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A BRIEF HISTORY OF ARBITRATION

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ARBITRATION AS AN ALTERNATIVE TO LITIGATION

One of the great limitations on our understanding of arbitration, and our ability to get the most out of it, is the fact that we habitually think of it as an alternative to litigation. This means we start out with the concept that litigation is the perfect way of resolving commercial disputes and then we just add and subtract particular elements to turn it into arbitration. Quite often the only element we add is confidentiality. The idea seems to be: *Now we have the perfect system because we have confidentiality; let's do everything else exactly the same way*. The result is that arbitration becomes no real alternative to litigation. Often arbitration proves to be a poor alternative to litigation, given all of the complexities that can arise in drafting arbitration agreements, enforcing those agreements and/or the resulting awards, and dealing with a sometimes inhospitable court system in that process. However, this all-too-familiar and pervasive reality is based on a false premise because arbitration is a stand-alone concept, the full potential of which is only realized when it is implemented as such.

Understanding something about the history of arbitration has several benefits. By recognizing the roots of arbitration outside the court system, we can think more freely about the procedures that are necessary to resolve a particular dispute. By learning that arbitration historically belongs primarily in the category of dispute settlement rather than dispute adjudication, many concerns regarding the "arbitrability" of various types of disputes and supposed incursions upon court jurisdiction are put to rest. Questions as to applicable standards of judicial review are also placed in a clearer light. An understanding of the persistence of business people in turning to arbitration in all ages and in the face of, at times, considerable opposition from the courts brings home the enduring value of this type of dispute resolution in commercial disputes.

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THE BEGINNINGS OF ARBITRATION

When considering arbitration in its earliest historical manifestations, definitional issues are sometimes encountered as to whether a particular dispute resolution process really was arbitration as it is understood currently. Today, the emphasis is upon arbitration as a form of adjudication by a tribunal chosen by the parties. Historically, as we will see, the roots of arbitration were more closely related to notions of conciliation, often carried out by individuals chosen by the social or business community in which the dispute arose rather than by the immediate parties to the dispute. Nevertheless, the essential ideas of arbitration pre-date the notion of litigation before national courts, and, indeed, pre-date the existence of national courts themselves.[1]

In the fifth century B.C., Demosthenes described Athenian arbitration law in these terms:

> If any parties are in dispute concerning private contracts and wish to choose any arbitrator, it shall be lawful for them to choose whomsoever they wish. But when they have chosen by mutual agreement, they shall abide by his decisions and shall not transfer the same charges from him to another court, but the judgements of the arbitrator shall be final.[2]

Thus 2,500 years ago, in the original democracy of western civilization, the essential elements of arbitration had already emerged. It is a consensual method of resolving contractual disputes. The parties choose the arbitrator by mutual agreement. Once selected, the arbitrator's decision is final and binding. The dispute is not to be re-litigated in another forum. It may be said that we still experience some difficulties implementing these foundational concepts. But the concepts themselves have remained the same.

Roman law on arbitration has been summarized as follows:

> [F]rom the beginning of the empire, Roman law allowed citizens to opt out of the legal process by what they called *compromissum*. This was an agreement to refer a matter to an arbiter, as he was called, and at the same time the parties bound themselves to pay a penalty if the arbitrator's award was disobeyed. Payment of the penalty could be enforced by legal action.[3]

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1. Earl S. Wolaver, "The Commercial Background of Commercial Arbitration" (1934), U. Penn. Law Rev. 132.
2. Demosthenes cites this Athenian law in his speech "Against Meidias", para. 21.94, at http://perseus.uchicago.edu/perseus-cgi/citequery3.pl?dbname=-GreekFeb2011&getid=1&query=Dem.%2021.
3. P. Stein, "Arbitration Under Roman Law" (1974), 41 *Journal of the Institute of Arbitrators* 203, 203-204.

The same underlying concepts as those described by Demosthenes are evident in this description. However, there are some additional ideas worth noting.

"COMPROMISSUM"

First note that opting out of the legal process is linked to the notion of "compromissum", from which we get the word "compromise". Arbitration is placed in the category of the settlement of a dispute, not in the context of the adjudication of a dispute. It is a way of compromising, *i.e.* resolving or settling a dispute without recourse to the courts.

The concept of "compromissum" marks a very important dividing line or watershed, if you will, in arbitration as a whole. On the one side of the watershed, we have post-dispute agreements to arbitrate. A dispute has arisen. Now we are going to settle that dispute through a process of arbitration, *i.e.*, choosing someone to resolve that matter for us on the basis of our representations. On the other side of that watershed, we have pre-dispute clauses whereby we say: "If we ever have a dispute, we will submit to arbitration."

The *Ontario Arbitration Act* makes no distinction between arbitration agreements that submit an existing dispute to arbitration and one that submits a dispute or disputes that, at the time the agreement was entered into, had not yet arisen and may never arise. However there is a significant difference. There is a difference not just in terms of when the agreement is entered into, but also in terms of the policy implications for the administration of justice and the way that arbitration is viewed by the court system and by society as a whole. It is easier to see post-dispute clauses within the context of a "compromise". After all, there is no law that says that parties cannot settle a private dispute between them in any way they wish: by making a new bargain, tossing a coin, or asking someone else to decide. The parties are bound by no particular notions of law – or even fairness – when they settle their disputes. On the other hand, pre-dispute clauses look much more like a systematic opting out of the court system itself. This could be viewed, and has been viewed historically, by the courts as a potential undermining of the state and its institutions.

To put the issue of state control of dispute resolution in a positive light, it should also be observed that pre-dispute arbitration agreements are much more subject to power imbalance between the contracting parties. A more powerful contracting party can impose arbitration as a term on the less powerful contracting party in a pre-dispute clause and specify terms favourable to it for the

conduct of the arbitration; whereas in the post-dispute context, the party with less contracting power has a more equal opportunity to choose between arbitration and the courts by simply refusing to arbitrate.

Historically, the Napoleonic Code and French law did not permit pre-dispute agreements to arbitrate. Only existing disputes could be submitted to arbitration and the submission was known as a "compromis d'arbitrage" based on the Roman notion of "compromissum".[4] Although modern French law no longer retains this limitation, a vestige of "compromis" as the basis for arbitral jurisdiction is still evident in the rules of the International Chamber of Commerce's International Court of Arbitration (commonly referred to as the "ICC"). The ICC is based in Paris, France and has strong roots in French legal culture. In an ICC arbitration, when the arbitration gets started, the parties are required to agree to Terms of Reference, which formulates and resubmits the particular dispute to the tribunal. The ICC is the only significant international arbitration institution to require this step. Although in many cases the writing of the Terms of Reference is treated as *pro forma* – and a party cannot obstruct an ICC arbitration from proceeding by refusing to sign the Terms of Reference – the fact that the parties are required to go through the formal step of signing Terms of Reference for the specific dispute maintains a lingering reference to the notion that an arbitration is more legitimate in some sense if it is assented to after the dispute has arisen.

In recent times, the idea that a post-dispute clause is more justifiable as a basis for excluding court jurisdiction has come to the fore in another context. In Canada and in the United States, consumers are allowed to seek remedies through class actions because court proceedings are too expensive in relation to individual claims. Legislation which enforced arbitration agreements had the effect of allowing corporations to use their greater power at the contracting stage, especially in standard form consumer contracts, to contractually foreclose access to class actions. Arbitration agreements trump court action. Class actions are a form of court action. So arbitration agreements trump class actions. Courts in Canada upheld that view of the law[5] – and in the United States still do, giving rise to vociferous criticism of arbitration in the American media.[6] Legislatures in

4. Jean de la Hosseraye et al., *Arbitration in France*, CMS Guide to Arbitration, Cameron McKenna LLP, available at https://eguides.cmslegal.com/pdf/arbitration_volume_I/CMS%20GtA_Vol%20I_FRANCE.pdf.
5. *Union des consommateurs c. Dell Computer Corp.*, 2007 SCC 34, [2007] 2 S.C.R. 801, 34 B.L.R. (4th) 155 (S.C.C.).

Canada, however, took the view almost universally that imbalance of contractual power in consumer contracts is being used inappropriately to preclude people from having an effective remedy, rather than being used to give both parties a more efficient and effective remedy. The legislative answer has been to enforce only post-dispute submissions to arbitration in consumer cases and to invalidate pre-dispute arbitration agreements.[7] Thus the idea of arbitration as "compromissum" continues to have validity and practical application today.

ENFORCING AGREEMENTS TO ARBITRATE

A second issue that is raised in the brief description of Roman law on arbitration quoted above is: How do you enforce an agreement to arbitrate, or a resulting award? Here we confront the fact that, since arbitration is not part of the state system, a party needs to be able to enlist the coercive powers of the state through the court system to enforce arbitration agreements or awards. The solution in Roman law was for the arbitration agreement to provide a penalty if one failed to comply with the arbitration award, with the penalty being typically greater than the amount that was likely to be in dispute. The penalty was enforceable by court action. This remedy continued to be the main recourse, even in English jurisprudence and arbitration practice, until arbitral jurisdiction was fully recognized and supported by modern arbitration statutes and case law with exceptions in relation to certain subject matters.[8]

In the post-Classical period, national court systems began to emerge and along with them their perpetually familiar deficiencies:

> In the post-Classical period, arbitration became increasingly popular because of deficiencies in state court systems, which were characterized as unreliable, cumbersome, and costly, and which faced particular difficulties in [international and other cross-border matters]. During this era, the enforceability of arbitration agreements was progressively recognized, even without a penalty mechanism. This result was generally based on the principle of *pacta sunt servanda* [contracts must be

6. "Arbitration Everywhere, Stacking the Deck of Justice", *The New York Times* (October 31, 2015) (part of a major series on this issue).
7. For example, in Ontario see: *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sch. A, s. 7(2) and (3). Similar concerns regarding balance of power in relation to agreements to arbitrate have resulted in legislative restrictions on the arbitrations of family disputes: See in Ontario: *Arbitration Act*, S.O. 1991, ss. 2.1, 3(2), 4(2).
8. Earl S. Wolaver, "The Historical Background of Commercial Arbitration" (1934), Univ. Penn. Law Rev. 138.

> honoured], which was developed and applied by canonical jurists in the context of agreements to arbitrate.[9]

However, these developments did not occur without resistance from the courts.

DEVELOPMENT OF COMMERCIAL ARBITRATION IN ENGLAND

In early England, arbitration was a standard form of dispute resolution within Guilds. Professional Guilds (trade associations) operated under a warrant from the sovereign. The warrant typically included the authority to resolve disputes among members. In order to become a member of a particular professional guild or trade, one had to accept a form of dispute resolution which prevented members of that trade from going to the courts.[10]

Country fairs or international merchant fairs also became a very important area for disputes relating to trade. Foreign merchants would bring and sell or trade their goods and would want to collect their money before they left. Extended battles in court proceedings were unrealistic and a barrier to trade.

An ordinance of Edward I, in 1419, decreed:

> And whereas the King doth will that no foreign merchant shall be delayed by a long series of pleadings, the King doth command that the Wardens and Sheriffs shall hear daily the pleas of such foreigners as shall wish to make the plaint against the foreigners . . . and that speedy redress shall be given unto them.[11]

One can debate whether or not Guild-based arbitration or the arbitration by Sheriffs and Wardens pursuant to King Edward's decree was truly arbitration. These were not entirely consensual fora and can be viewed merely as alternative venues within the overall state court system. But developments proceeded from there, and by the mid-17th century merchants were setting up their own tribunals to resolve their disputes.

The following is a quote taken from a book published in 1685 called *The Ancient Law Merchant*, by Gerald Malynes:

> The second meane or rather ordinarie course to end the questions and controversies arising between Merchants is by way of Arbitrement, when both parties do make choice of honest men to end their causes, which is

9. Gary Born, *International Commercial Arbitration*, 2nd ed. (Leiden, The Netherlands: Wolters Kluwer, 2014), Vol. 1, p. 29.
10. Wolaver, *supra*, footnote 8, pp. 312 *et seq.*
11. Wolaver, *supra*, footnote 8, p. 136.

> voluntarie and in their own power, and therefore is called Arbitrium or free will, whence the name Arbitrator is derived: and these men (by some called Good Men) give their judgments by Awards, according to Equitie and Conscience, observing the Custome of Merchants, and ought to be void of all partialitie or affection more nor less to the one than to the other: having onlie care that right may take place according to the truth, and that the difference may be ended with brevitie and expedition.[12]

In this quotation of a little over 100 words from the mid-1700s, every important concept of arbitration finds expression.

COMPETITION WITH THE COURTS

As arbitration gained popularity, the notion developed that the jurisdiction of the courts was being "ousted" by arbitration.[13] Some of this was also driven in England by the fact that, in those days, judges were paid by the case, so when their workload went down, their pay went down. Nevertheless, the idea that arbitration agreements are not enforceable because they "oust" the jurisdiction of the courts came to be regularly expressed in case law.

The principle emerged that a party may revoke an agreement to arbitrate at any time before the arbitration takes place.[14] This was a highly effective way for the courts to neutralize arbitration as a practical alternative to court litigation, particularly with reference to pre-dispute arbitration agreements. However, as with all jurisprudence that fails to meet a commercial need, the case law merely inspired ever more creative drafting solutions in commercial contracts.

The case of *Scott v. Avery*[15] in 1856 is a landmark in the history of arbitration. Its continuing prominence is reflected in the fact that it is the only case mentioned by name in the *Arbitration Act*, S.O. 1991.[16] In *Scott v. Avery*, the balance shifted between contract and court – between arbitration jurisdiction based on the consent of the parties and court jurisdiction based on the power of the sovereign. Ultimately, the advance was based on the ingenuity of draftsmanship. In that case the parties drafted a clause that said, in effect, "The only cause of action that will arise under this agreement is the enforcement of an award arrived at through arbitration." During the

12. Quoted by Born, *supra*, footnote 9, p. 32.
13. *Mitchell v. Harris* (1793), 30 E.R. 557, 2 Vesey Junior 129 (Ct. of Chan.).
14. Wolaver, *supra*, footnote 8, p. 138.
15. (1856), 5 H.L. Cas. 811, 10 E.R. 1121.
16. Section 5(4). This section provides that a *Scott v. Avery* clause will treated like any other arbitration clause and therefore subject to the same rights and remedies under the *Arbitration Act*.

argument of *Scott v. Avery*, Lord Campbell explicitly referenced the possibility that judicial animosity to arbitral jurisdiction was motivated by the unseemly desire of various courts in England to protect their jurisdiction, and their remuneration, from incursions both by other courts in England and by arbitral tribunals.[17]

Since *Scott v. Avery* in 1856, a lot of water has flowed under the jurisprudential bridges in England and other Commonwealth countries. Not all of it immediately fell into line with the new pro-arbitration, pro-business perspective espoused by Lord Campbell. But the unquestioned pre-eminence and pre-emptiveness of court jurisdiction ceased to be unquestioned thereafter.

Since then, with the help of modern arbitration statutes which increasingly emphasised party autonomy as the basis of arbitral jurisdiction, the separate but equal status of arbitration jurisdiction and court jurisdiction has come to be recognized. In words that closely echo Demosthenes' description of arbitration in ancient Greece which was quoted at the beginning of these remarks, Lord Mustill said in 1995:

> Arbitration is a contractual method of resolving disputes. By their contract the parties agree to entrust the differences between them to the decision of an arbitrator or panel of arbitrators, to the exclusion of the Courts, and they bind themselves to accept that decision, once made, whether or not they think it right.[18]

A similar sentiment was expressed by Justice LeBel in the Supreme Court of Canada when he said in 2003:

> However, an arbitrator's powers normally derive from the arbitration agreement. In general, arbitration is not part of the state's judicial system, although the state sometimes assigns powers or functions directly to arbitrators. Nonetheless, arbitration is still, in a broader sense, a part of the dispute resolution system the legitimacy of which is fully recognized by the legislative authorities.[19]

Of course, since *Scott v. Avery*, manifold qualifications have been added in modern arbitration statutes and by case law both to the enforcement of arbitration agreements and awards by the courts and to the circumstances in which a court may interfere with, or help, the arbitration process. These qualifications make up most of the modern law of arbitration.

17. (1856), 25 L.J. (N.S.) 313 (Ex.).
18. *Pupuke Service Station Ltd. v. Caltex Oil (NZ) Ltd.* PC 63/94, 16 November 1995 at 1.
19. *Desputeaux c. Éditions Chouette (1987) inc.*, 2003 SCC 17, [2003] 1 S.C.R. 178, 23 C.P.R. (4th) 417 (S.C.C.), para. 41.

TWENTIETH CENTURY DEVELOMENTS

In the 20th century, modern forms of arbitration began to develop. In particular, one of the phenomena in the early 20th century was the rise of arbitral institutions.

Although historically arbitration had been largely *ad hoc*, *i.e.* tribunals were set up on a case-by-case basis by the consent of the parties, arbitral institutions had existed in earlier times. For example, in 1705 a dispute relating to a freighter known as the *Ouzel Galley* (which unexpectedly sailed into port, bearing pirate treasure, years after it was thought to have been lost at sea) was settled by an *ad hoc* panel of merchants chosen by the contending parties to serve as arbitrators. The arbitrators went on to establish the Ouzel Galley Society which provided arbitrations services for disputes among merchants.[20]

In 1919, in the aftermath of World War One, a group of industrialists, financiers and business leaders decided to form the International Chamber of Commerce to promote international business and trade. They referred to themselves as "the merchants of peace". In 1923 they founded the International Court of Arbitration, which remains the world's largest arbitration institution. The ICC has promoted the important concept of international arbitration as a solution to interstate hostility, commercial instability and risk in international transactions.

Another early arbitration institution was the American Arbitration Association (the "AAA"), founded in 1926. Although it has grown to rival the ICC in volume of cases and international reach, its initial objectives were somewhat more modest. A wonderful article from *The New Yorker* magazine, issued on April 24, 1937, provides an example. The article, by an unnamed author, describes a case resulting from an elderly landlady doing her marketing in a row of shops along Broadway. She slipped on an iron sidewalk hatch outside a fruit and vegetable market and a lawsuit in the municipal court of New York ensued. As the article explains:

> It may sound like a simple matter for prudent men to determine after hearing testimony whether a cherry or a strawberry rolled out of a tray, fell three feet and came to rest at a certain place on a certain date. Actually, in the courts such a thing is an absurdly slow and ponderous undertaking.

20. Professor Nael Bunni, "What History has taught us in ADR", *CIArb The Resolver*, February 2015.

Eventually, the landlady and the fruit stall vendor were referred to the AAA to see if that body could provide a more reasonable solution. The arbitrator assigned to the case was a very senior member of an established law firm who was donating his time. The hearing was held in a modest boardroom on the premises of AAA. There was no formality. Everyone told their side of the story. People could talk as long as they wanted and say whatever they wanted. At the end of the meeting the arbitrator rendered his decision. It didn't cost anybody anything.

Things are more complicated today.[21] There is more money to be made in arbitration today than perhaps there was at that time.

On the one hand arbitration is fuelled by the idea there is a better way than going to court to resolve all kinds of disagreements. Keep things simple and have a third party or parties trusted by both sides decide the dispute. In many ways, that is the essential idea of arbitration – and *ad hoc* arbitration in particular. On the other hand there is a countervailing impulse that this can also be quite a lucrative practice area, dealing with important issues that require every possible measure of due process to be followed and which can bear the freight of high value services.

Institutions provide greater certainty that pre-dispute arbitration agreements will be enforced (for example by assisting in the formation of an arbitral tribunal when one party is uncooperative, or by deciding challenges to arbitrators based on conflicts of interest expeditiously) and ensuring that the arbitrations will be conducted in a predictable manner (for example by setting default rules for the arbitration). At the same time, by supporting institutions, arbitration practitioners have a greater ability to access the professional opportunities that arbitration can provide – as the members of the Ouzel Galley Society likely hoped in 1705. And so, based on both supply side and demand side motivations, arbitral institutions have proliferated to a spectacular degree. In recent years, arbitration institutions have been founded in vast numbers based on national, regional and metropolitan initiatives around the world – not to mention industry-based and subject matter based institutions, and micro-institutions based on nothing more than the fact that the arbitrators on the roster share office space.

21. Although they do not necessarily have to be more complicated procedurally. The author has used a similar procedure to that used in the case of the landlady who slipped, in significant commercial matters where the matter in dispute literally had to be settled within a matter of days or hours.

THE NEW YORK CONVENTION OF 1958

Finally, it is important to review significant developments in the 20th century relating specifically to international arbitration.

In the international sphere, arbitration always had the same kind of attraction that it did in the medieval fairs because the disputes relate to trade. Trade is something that happens quickly. The expeditious resolution of disputes is important. Furthermore, when litigating before the courts, parties to an international agreement often wish to avoid litigating in the courts of the country in which the other party carries on business. Court judgments were (and to some extent remain) difficult to enforce in other jurisdictions.[22] Arbitration provides a neutral forum, but it was a cumbersome process to take awards from one jurisdiction and enforce them in another jurisdiction, which is an essential requirement in terms of international trade.

There was, in most countries, a concept called *double exequatur*. The principle was enshrined in the 1927 Geneva Convention on the Execution of Arbitral Awards. *Double exequatur* was a requirement that wherever the arbitration took place, the court of that jurisdiction had to agree to enforce that award before it could be enforced anywhere else. In effect, it was necessary to convert an arbitration award into a judgment in the place where it was obtained. That judgment would have to be taken to the jurisdiction where a party wanted to enforce it and convert it into a judgment there – hence the *double exequatur*.

This meant that there were two occasions for mischief because courts, both at the place of arbitration and at the place of enforcement, would impose various, often unpredictable conditions. Either court may try to interfere with the merits of the award and so on and so forth.

In 1958 the New York Convention on the Enforcement of Arbitration Agreements and Arbitration Awards was formulated by the United Nations. It got rid of *double exequatur*.[23] It created an immediate international obligation on all Contracting States to enforce all foreign arbitration awards, whether international or

22. The Hague *Choice of Court Convention*, which is about to be adopted in Ontario, will make foreign court judgments more readily enforceable in Ontario where the parties have chosen the courts of the judgment state as the forum for the litigation of their disputes. It should also be observed that the enforcement of foreign court judgments in Canada has not, in general, been as difficult as has been the case in most other countries in the world.
23. Markie Paulsson, *The 1958 New York Convention in Action* (Leiden, The Netherlands: Wolters Kluwer 2016), pp. 9-13.

domestic in the country of origin, to enforce arbitration agreements and not allow parties to go to court to litigate a dispute if they have entered into an arbitration agreement. It strictly limited the grounds on which an arbitration award could either be set aside or not enforced. The general premise is that a foreign arbitration award can only be set aside by a court on very limited grounds. Otherwise, it has to be enforced. These changes immediately made arbitration awards infinitely more enforceable internationally than court judgments which were, and have continued to be, plagued by all kinds of issues relating to subject matter and personal jurisdiction, attornment and other forum related issues.

In other words, under the New York convention, the award of a sole arbitrator appointed directly by the parties, or by a mechanism specified by them, is more readily enforceable abroad that a judgment of the highest court in any G20 country. Futhermore, the New York Convention makes no distinction between *ad hoc* and institutional arbitration awards.

Over 156 nations have become Contracting States under the New York Convention on the enforcement of foreign arbitral awards, making it easily the most successful international convention of any kind. States are allowed to have reservations in a couple of respects. They may restrict enforcement of the convention to commercial cases and they may limit their obligation to enforcing only arbitration awards from other countries that have signed the Convention. But, at that moment in time when international arbitration awards no longer needed to be validated by a court in the jurisdiction of the seat of the arbitration, and courts everywhere were limited in terms of their ability to not enforce that award, the explosion in international arbitration that we now see today began. It was the "Big Bang" of international commercial arbitration.

Today, in the international sphere, no one talks about arbitration being an alternative to court litigation. Arbitration is *The* method of resolving international commercial disputes – to the point where it has been suggested that it would be negligent of a lawyer drafting an international contract not to include an arbitration provision.

The New York Convention was followed by the formation of the United Nations Commission on International Trade and Arbitration Law (UNCITRAL) which is the custodian of the Convention and has played a dominant role in promoting the Convention as the foundation of modern international arbitration.[24] In particular,

24. Renaud Soriel, "The Influence of the New York Convention on the UNCITRAL Model Law on Commercial Arbitration", *Dispute Resolution International*, Vol. 2 No. 1, pp. 27 *et seq.*

UNCITRAL has overseen the promulgation and updating of the Model Law on International Commercial Arbitration and the creation of the UNCITRAL Arbitration Rules, which provides a non-institutional framework for parties to adopt and use in their commercial arbitrations. Where the services of an institution are required to assist parties, *e.g.* in forming an arbitration tribunal, the UNCITRAL Arbitration Rules provide for the parties to apply to the Permanent Court of Arbitration at the Hague to name an "appointing authority" to assist with such matters.

Canada is a signatory to the New York Convention and all provinces, including Ontario, have adopted (in one form or another) the Model Law for international disputes. Ontario has recently enacted a bill to update its *International Commercial Arbitration Act* so as to adopt the most recent changes to the Model Law.[25]

THE CHALLENGE FOR TODAY

At the present time in Ontario, we are seeing a dramatic increase in the use of arbitration for the resolution of commercial disputes. The reasons are not much different from those which have driven the growth of arbitration through the years.

The demands on our court system for the resolution of all types of disputes, in a manner that meets the high standards we have set for our society in regard to the administration of justice, cannot all be met with the resources that are made available. Indeed, there is a question as to whether adequate resources could ever be made available. It is not surprising that those who can afford private dispute resolution will turn to it. Indeed, the case can be made that those who can afford to settle their cases (particularly where the disputes relate to the allocation of business profits and losses) should do so and free the limited resources available to the courts for the resolution of other issues crucial to the well being of society which cannot finance their own resolution.

Although improvements are always possible, in Ontario we are favoured by modern arbitration legislation and court decisions, particularly at the appellate level, which support arbitration as a method by which parties can settle their own commercial disputes.

The challenge is to continue to build on the progress that has been made. Unlike most other jurisdictions in the world, lawyers in Ontario and across Canada have been able to implement arbitrations with minimal support from arbitration institutions or

25. *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Sch. 5 (enacted March 22, 2017).

the courts. What is now needed is to focus on arbitration as an independent form of dispute resolution that does not need to imitate litigation norms. In particular, we need to learn from, and replicate, the success of international arbitration in non-international disputes. In that regard, there is much to be learned from the persistence, creativity and independent thought that has gone before in the history of arbitration.