Looking Ahead: International Law in the 21st Century

Tournés vers l'avenir : Le droit international au 21ème siècle

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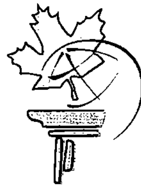

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International Dispute Resolution in the 21st Century: The Revitalization of National Courts

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I. Introduction

In the field of international dispute resolution, the last few decades of the twentieth century will probably be remembered as those in which the significance of national courts dwindled and international commercial arbitration and a proliferation of specialized international tribunals emerged and flourished. In this paper I will argue that the first few decades of the twenty-first century are likely to be recalled differently. They will be recalled as decades in which national courts re-established their primacy as fora for dispute resolution, including international dispute resolution, in three ways. First, in the first few decades of the twenty-first century national courts will be revitalized to regain their attractiveness to those engaged in international commerce who, in recent years, have been turning to arbitration to resolve their disputes. Second, the utility of national courts as fora for the resolution of disputes that are unsuitable for arbitration will increase in significance with the increase in the incidence of such disputes. And, third, national courts will facilitate the progressively internationalized trend toward judicial resolutions of mass concerns and public controversies. The balance of this paper describes each of these trends in turn and identifies key developments that illustrate them.

II. From Arbitration to Litigation

We tend to think of the challenges of international dispute resolution as modern challenges and the innovations that have been developed to meet those challenges as recent innovations. However, many of these innovations have arisen in the context of international commercial arbitration—and international commercial arbitration is

1. Osgoode Hall Law School.

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hardly a new phenomenon. It has its roots in the specialized tribunals established for international trade centuries ago in the era in which the *lex mercatoria* first emerged.[2] It is not surprising, then, that with the rapid expansion of international commerce there has been a concomitant expansion of the establishment and operation of international commercial arbitration. There is little doubt that commercial arbitration, and particularly international commercial arbitration, will continue to flourish. Nevertheless, by examining some of the key features that have made arbitration an attractive alternative to litigation, along with the inherent restrictions of arbitration and the recent innovations on some of the traditional features of national courts, it is possible to predict with some confidence that there will be a significant revival in the interest shown in international dispute resolution in national courts in the coming decades by those who, in recent times, might otherwise have chosen arbitration.

What are the features of arbitration that have persuaded parties to opt for arbitrated resolutions to their disputes instead of litigation? I suggest that there are, at least, four main features: flexibility, confidentiality, neutrality, and the enforceability of the award.[3]

a) Flexibility

First, arbitration provides flexibility in dispute resolution. It permits the parties to tailor the proceedings to suit them, thereby maximizing the efficiency of the process and the accuracy of the result. The parties may determine various procedural aspects of the arbitration, either in the arbitration clause in their commercial agreement, or in a subsequent agreement made for the purposes of resolving their dispute. These aspects include the location of the arbitral proceeding, the number of arbitrators and their qualifications, the language in which the arbitration is to be conducted, the applicable law, and the rules of procedure for the presentation of evidence and argument to the tribunal.[4] While it is true that the principle of party prosecution that is the cornerstone of the adversary system in common law courts allows a measure of freedom to the parties to conduct their case as they choose, many of the possible

2. See generally, Carbonneau ed, *Lex Mercatoria and Arbitration* (1998) Berger, *The Creeping Codification of the Lex Mercatoria* (1999); and De Ly, *International Business Law and Lex Mercatoria* (1992).

3. For a more full discussion of the advantages of arbitration see Redfern & Hunter, *Law and Practice of International Commercial Arbitration* (3 ed, 1999).

4. Holland, "Drafting a Dispute Resolution Provision in International Commercial Contracts" (2000) 7 Tulsa J Comp & Int L 451 contains a concise summary of the aspects of dispute resolution amenable to determination by the parties in their arbitration agreement.

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variations in procedure are dictated by the choice of forum. For example, the parties can stipulate the applicable law (subject to proof) in litigation,[5] but once they have selected the forum, the language for the proceeding and the basic rules of procedure will generally follow that choice and will not be open to further variation, even on the strength of both parties' consent. It should also be noted that frequently, along with the flexibility brought by the decision to arbitrate a dispute, also comes the benefits of efficiency. The parties and the arbitrator(s) move forward at their own pace unimpeded by the typically crowded dockets of many modern national courts.

b) Confidentiality

Second, historically, international commercial arbitration has afforded the opportunity not generally available in litigation for the parties to ensure that their proceeding is conducted in confidence. In this way, they have been assured that the nature of the dispute, the case made on each side and the result, would not automatically become a matter of public record.[6] Confidentiality has been a decisive factor weighing in favour of arbitration for many business disputes. Arbitration is not merely a means of ensuring that business records and other proprietary information remain confidential, but it is also a means of ensuring that the existence of a dispute and its resolution remain confidential where this is appropriate and beneficial to ongoing business relations between the parties and the reputation of each party. This has also been a particularly important factor in investment disputes in which, typically, one of the parties is a government.

c) Neutrality

Third, by opting for arbitration, rather than litigation, the parties to a dispute have often been able to overcome any lurking anxieties regarding the tendency of national courts to favour one side or the other. This is so because the parties to an arbitration are permitted to select a neutral location for the conduct of the arbitration (and one or more arbitrators who are nationals of countries other than the parties' countries). In

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5. For a relatively recent illustration of the significance of proof to the effectiveness of a choice of law clause see *Old North State Brewing Co v Newlands Services Inc* [1999] 4 WWR 573 (BC CA).

6. Gibbons, "Private Law, Public 'Justice': Another Look at Privacy, Arbitration, and Global E-Commerce" (2000) 15 Ohio State J Disp Res 769 (confidentiality issues arising in online dispute resolution).

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international commercial disputes, the neutrality of arbitration has been a highly-prized feature contributing significantly to confidence in the process and the result.[7]

d) Enforceability of the Award

Fourth, arbitration permits the parties to overcome one of the ongoing complications of cross-border litigation, that of securing an enforceable decision in a desirable forum. Even under the traditional common law rules, which are more generous than those still operating in many countries, a defendant served abroad, who has not previously agreed to litigation in the forum selected by the plaintiff, can generally prevent a judgment issued in that forum from becoming enforceable elsewhere, simply by ignoring the notice of proceeding and refraining from participating in the proceeding.[8] Under the regimes established by the New York Convention[9] and the UNCITRAL Model Law,[10] arbitral awards have gained widespread acceptance. They are generally protected from appellate scrutiny and they are readily enforced in many countries.[11]

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7. For an interesting discussion of neutrality and the comparative roles of private international law and the harmonization of national standards, see Juenger, "The *Lex Mercatoria* and Private International Law" (2000) 60 Louisiana L R 1133.

8. See Castel, *Canadian Conflict of Laws* (4 ed, 1997) Ch 15, "Recognition and Enforcement of Foreign Judgments", and North & Fawcett, *Cheshire and North's Private International Law* (13 ed, 1999), Ch 15, "Recognition and Enforcement of Foreign Judgments: The Traditional Rules". These rules have been superseded within Europe by the Brussels Convention, now Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16/01/2001 at 1 and among those countries that are members of the European Free Trade Association by the Lugano Convention, and in Canada by the Supreme Court of Canada decision in *Morguard Investments Ltd v De Savoye* [1990] 3 SCR 1077 and the jurisprudence that has developed from it.

9. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958; 330 UNTS 38, No 4739 (1959). The New York Convention has been ratified or acceded to by more than 120 countries.

10. United Nations Commission on International Trade Law: Model Law on International Commercial Arbitration, 40 UN GAOR Supp (No 17), Annex 1 at 81, UN Doc A/40/17 (1985). The model law is in force in Canada pursuant to provincial legislation such as the International Commercial Arbitration Act, RSO 1990, c I.9.

11. See United Nations Commission on International Trade Law, *Enforcing arbitration awards under the New York Convention: Experience and Prospects* (1999).

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Having identified four of the principal features that have attracted persons with international commercial disputes to arbitration, it is important to note two key restrictions on the availability of arbitration: the need for consent and the expense.

e) The need for consent

Arbitral proceedings are available only upon the consent of both of the parties to the dispute. This consent may be given either at the time the parties enter into a commercial relationship with one another or at the time they wish to resolve a dispute. Thus, arbitration is generally available only in situations in which the parties have contemplated dispute resolution in the course of forming or maintaining their business relationship or when they have agreed to arbitration as the means of dispute resolution when a dispute has arisen. Arbitral proceedings are not available to aggrieved persons who have not persuaded or cannot persuade the person who has caused them harm to pursue dispute resolution through arbitration. While this is not a drawback to the utility or effectiveness of international commercial arbitration when it is available, it is a factor limiting access to it. To the extent that international dispute resolution increasingly involves the kinds of disputes that cannot be resolved through arbitration because they do not arise in the context of commercial relationships in which the parties have contemplated dispute resolution and are willing to pursue arbitrated resolutions of their disputes, the need for consent represents an important limitation in arbitration as a means of international dispute resolution.[12] As will be discussed below, such disputes are arising with increasing frequency as businesses provide goods and services to markets of consumers that span intra-federal and international borders. In these situations, arbitration might be unavailable either because the claimants have not planned for dispute resolution and thereby made arrangements for it or because the disputes involve multiple parties and not all of them have established the same arrangements for dispute resolution.

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12. The suggestion that this confines international commercial arbitration to dispute resolution between parties who have consented to it specifically in respect of the other party involved should be qualified. It is increasingly the case that, for example, investment disputes such as those conducted under the auspices of ICSID (International Centre for Settlement of Investment Disputes), are participated in by states for whom the jurisdiction of ICSID is compulsory by reason of their ratification of The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965. In this regard, although the states have consented to the arbitration of investment disputes under the auspices of ICSID, they have not specifically consented to the resolution of any particular dispute with an investor.

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f) The expense

International commercial arbitration can be relatively costly for the parties.[13] Operating, as it does, as private dispute resolution without state sponsorship, the costs of arbitration are borne directly by the parties. This puts arbitration out of reach financially for many who might otherwise find attractive the benefits it brings. Again, while this does not impair the effectiveness of international commercial arbitration for those for whom it is cost effective, it does limit its availability as a means of international dispute resolution.

In sum, some of the main advantages of international commercial arbitration in comparison with litigation that became apparent in the last few decades of the twentieth century are: flexibility, confidentiality, neutrality, and the enforceability of the award. The main restrictions on the availability of international commercial arbitration are the need for the consent of the parties and the expense to the parties. So much for the twentieth century. Litigation in national courts is changing dramatically—so much so that it can be said that each of the advantages that were once afforded to parties only in arbitral proceedings is now either an emerging feature of litigation in national courts or one that is clearly on the horizon.

g) The evolution of national courts

Flexibility - The common law has always permitted a certain degree of flexibility in proceedings through the operation of the principle of party prosecution. However, owing to the proud tradition of ordinary courts of general jurisdiction, there were once fairly few specialized commercial courts that could provide the parties with procedures tailored to the particular needs of their kinds of disputes. Beyond the major commercial centres of the world, such as London with its Commercial Court,

13. As Charles Routh explains, "Arbitration can be very expensive. Each person on a board of arbitrators may require payment and possibly air transportation to the hearing site as well. The translation of documents can also be very expensive. This can vary greatly from different appointing authorities. As an example, if you assume a claim of $1,000,000, the AAA would charge $5,000 for its services as the appointing authority and administrator. The I.C.C. would charge $16,800. The I.C.C. generally has a more thorough review process, however, which probably improves the quality of the awards. The London Court of Arbitration charges $2250 plus time and expenses for administration plus approximately the amount the arbitrator would normally earn in his or her profession. The Japanese Commercial Arbitration Association would charge approximately $12,350, while the British Columbia Arbitration Centre would charge approximately $3,360 plus additional fees per quarter ($350 per party) as administrative fees.": Routh, "Dispute Resolution - Representing The Foreign Client In Arbitration And Litigation" (2000) SF24 ALI-ABA 1 at 8.

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and New York, it was unlikely that the parties to international commercial disputes would find themselves in courts that had any specialized expertise or that were organized so as to facilitate the special needs of commercial litigation. In recent years, this has been changing in a number of centres. For example, in Toronto, the Superior Court of Justice has a "Commercial List"[14] staffed by judges with expertise not only in the substantive law likely to be in issue in most commercial disputes but also in the particular procedural needs of commercial disputes. Accordingly, in matters ranging from technological facilities to scheduling, efforts are being made to support the particular needs of commercial dispute resolution—efforts that will also support the needs of international commercial dispute resolution.

Confidentiality - The heightened and increasing concern with confidentiality in international commercial dispute resolution has not been lost on those who have made efforts to bring about civil justice reform. The now fairly routine use of proprietary and protective orders in the United States and the "Deemed Undertaking" rule in Ontario[15] provide examples of the ways in which the courts are recognizing that the importance of ensuring that they are open to the public is tempered with the need to facilitate dispute resolution relating to sensitive business information and business dealings. This is another way in which changing court practices are preventing the choice between litigation and arbitration from remaining a decision based on an all or nothing approach to the relative benefits of "public" and "private" litigation.

Neutrality - The concern for neutrality arises from the lingering anxiety, not necessarily borne of experience, that one might not be treated fairly in a foreign court. Often, it goes beyond any rational concern related to an expectation (justified or otherwise) about a potential for bias against foreign businesses because it is rooted in a general anxiety about unfamiliar foreign court procedures. To be sure, the parties are free to select the law that will be applied to resolve their dispute so that even if the matter is decided in a foreign court they will be free to plead and prove the law they have chosen and insist that it be applied to determine their rights or their obligations. However, this freedom does not extend to the procedures that are to be followed in the adjudication. All national courts apply local procedure regardless of any agreement by the parties to the contrary,[16] and it is possible, then, that the

14. See Practice Direction – Commercial List (1992) 6 OR (3d) 385; Practice Direction – Commercial List (1993) 13 OR (3d) 453; Practice Direction – Commercial List (1995) 24 OR (3d) 455.

15. Rule 30.1 of the *Ontario Rules of Civil Procedure*, RRO 1990, Reg 194, provides that "All parties and their counsel are deemed to undertake not to use evidence or information to which this Rule applies [generally, evidence obtained in discoveries] for any purposes other than those of the proceeding in which the evidence was obtained."

16. See Castel, *Canadian Conflict of Laws* (4 ed, 1997), Chapter 6.

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adjudication could entail procedures that are unfamiliar to at least one of the parties. However, this "final frontier" of the conflict of laws is now being challenged in an ambitious project of the American Law Institute—one that seeks to develop Transnational Rules of Civil Procedure.[17] In time, if adopted, the Transnational Rules would ensure that international commercial disputes were subject to a single set of rules concerning the composition of the court, the rules of evidence, nature of pleadings and other matters that could give rise to uncertainty and misgivings about having one's commercial dispute resolved in a foreign tribunal.

Enforceability- The final basis for hesitating to use national courts to resolve international commercial disputes identified above is that regarding the enforceability of the judgment. In the uncertain patchwork of judgments regimes that currently prevails in the international community, there is considerable and justified concern that defendants can shield themselves from unfavourable judgments far too easily. By locating their assets in jurisdictions that have restrictive rules for the enforcement of judgments and by engaging in various forum-selection tactics, they can avoid responsibility for satisfying even a duly-obtained judgment. To be sure, this concern applies in large measure to the kinds of cases that involve non-consensual dispute resolution—the kinds that would not have been amenable to arbitration in any event. However, improvements in the enforceability of judgments could well ease the need for an arbitration agreement in the commercial contract and, in that way, prospectively divert matters for arbitral tribunals to national courts.

The improvement on the judgments front that I am referring to, of course, is that to be hoped for from the negotiations at The Hague of a multilateral judgments convention.[18] At present, the negotiations continue in a state of flux that makes it difficult to predict with confidence the progress at the time this conference's proceedings are published.[19] Still, there is hope that, in time, some agreement can be

17. American Law Institute, "Principles and Rules of Transnational Civil Procedure Preliminary Draft No 2" (March 17, 2000) available at <www.ali.org>. The project is led by Geoffrey Hazard Jr and Michele Taruffo.

18. The Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, adopted by the Special Commission, 30 October 1999, is available online at <www.hcch.net/e/conventions/draft36e.html>.

19. Following the sending of a letter from Jeffrey D. Kovar, Assistant Legal Advisor for Private International Law, United States Department of State to Mr. J.H.A. van Loon, Secretary General, Hague Conference on Private International Law, February 22, 2000 expressing concern about the prospects for the negotiations, the delegations reviewed the schedule for a diplomatic conference and decided to engage in further consultations before moving on to a diplomatic conference. See Walker "Canada's Position on a Multilateral Judgments Convention" in *Trilateral Perspectives on International Law* (3 ed, 2001).

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reached on some portion of the proposed provisions so that a basic framework for reliably enforceable judgments can be established even if there remains much to be done to improve it in the future.

In sum, the combined effect of improvements in national court procedures in the aspects of dispute resolution traditionally most valued in arbitration—flexibility, confidentiality, neutrality, and enforceability of the award—and the continuation of the historic strengths of litigation, will be to foster a growing trend toward dispute resolution in national courts instead of arbitral tribunals. This trend should not be overstated. There will always be a role for international commercial arbitration for those who choose it and who are willing to finance it—both in international disputes and in domestic disputes. And with the rapid increase in international commerce, the increased use of national courts predicted here might well leave the use of arbitral tribunals undiminished. Still, the trend toward the increased use of national courts will be an important one.

III. The Vertical Expansion of International Dispute Resolution

If the last few decades of the twentieth century were marked by a massive expansion of international trade and commerce—a "horizontal" integration of the global economy, then the first few decades of the twentieth century will be marked by a different kind of expansion—a "vertical" integration. This vertical integration of the global economy will come about through the entry of consumers and small businesses into regular and direct participation in international commerce. Along with this vertical integration, there will necessarily develop a corresponding need to ensure adequate dispute resolution facilities.

Clearly, this expansive trend in dispute resolution in national courts will not come about through cases being diverted from arbitral or international tribunals. These cases would not otherwise have found their way into other fora. Nevertheless, to the extent that the growth in this kind of international dispute resolution challenges national courts to adapt their procedures and refine their approach to legal rules in order to produce reliably fair results, it will strengthen the overall capacity of national courts to do so in the full range of international disputes.

This trend is probably best considered by revisiting the features already referred to as permitting a more expanded scope of operation than arbitral tribunals—those of compulsory jurisdiction and expense—and to consider ways in which these features might be further refined to suit the needs of international cases.

As discussed in the first section of this paper, one key advantage of national courts over arbitral tribunals in making them available for a wide range of cases is their compulsory jurisdiction. There is no need for aggrieved persons to obtain consent of the opposing parties to secure effective dispute resolution, provided that the aggrieved persons meet the jurisdictional requirements of the national court and

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provided that the defendants' assets are accessible to enforcement proceedings pursuant to the applicable judgments regime. This is critical for the resolution of the kinds of dispute that tend to arise for this newly emerging sector of participants in international commerce. Disputes involving employees, consumers and small businesses often do not occur within the context of the kinds of ongoing commercial relations that would create an incentive to cooperate in dispute resolution, that is, to cooperate at least to the extent of agreeing that dispute resolution should be anticipated and provided for in agreements setting out the terms of the parties' business relationship. Compulsory jurisdiction is also critical because the commercial and other contexts in which disputes involving these groups occur tend also to be those in which there has been little or no opportunity to plan for dispute resolution (regardless of whether it is desirable to do so).

Is the compulsory jurisdiction of national courts effective for those who would benefit from it? Could it be improved or refined to suit the needs of these groups in international disputes? The answer to both of these questions is "yes". Yes, the compulsory jurisdiction of national courts is an invaluable means to securing access individuals and small businesses to international dispute resolution; and, yes, there are at least three ways in which it is evolving or will need to evolve to meet the needs of these groups. These three areas of evolution relate to the enforcement of foreign judgments, the means for determining the appropriate forum, and the interpretation of forum selection agreements.

Access to dispute resolution is only access to justice if it has the potential to yield an enforceable judgment. Accordingly, an adequate judgments enforcement regime can be critical to providing meaningful access to justice for an aggrieved person who cannot afford to travel to the defendant's home jurisdiction (provided that is where the defendant's assets are located) to avoid the added concern of having to seek enforcement of the judgment in a court other than the court that issues it. As mentioned above, the adequacy of the judgments regimes in national courts is currently being addressed in the negotiation of a multilateral judgments conventions under the auspices of the Hague Conference. It is not necessary to commit to particular predictions about the about the likely directions those negotiations will take or the ultimate success of the negotiations to recognize the benefit they have already had in increasing the awareness and understanding of the existing law in various countries concerning the recognition of foreign judgments. Even without further progress in the negotiations, the improved understanding would facilitate the provision of advice on how to obtain an enforceable judgment or, at least, the means to minimize the cost of uninformed choices in seeking to obtain one.

But not all of the members of this expanded sector of participants in international disputes are aggrieved persons seeking relief. Some are also potential defendants, i.e., persons whose conduct in the course of international commerce is the subject of complaint. For them, the compulsory jurisdiction of national courts

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coupled with an effective judgments regime could become a trap for the unwary, one that would have the further potential of creating a disincentive to increased involvement in international commerce. Accordingly, the accommodation of individuals and small businesses in international dispute resolution will depend not only on the flexibility in forum selection that comes with a generous judgments regime, but also on the sensitivity of the law of jurisdiction to logistical impediments to crossborder litigation for persons of limited resources. As the International Law Association's Committee on International Civil and Commercial Litigation observed in its 2000 Report, it is a fallacy that the forum shopping debate is relevant in only the largest of cases.[20] Indeed, the stakes are easily as high for those who cannot afford to engage in skirmishes over the appropriate forum for the resolution of their dispute as they are for those whose disputes are large enough to warrant such tactical maneuvers.[21]

Finally, in accommodating the needs of this new sector of parties to international disputes, it will be important for national courts to become more sophisticated in their appreciation and handling of jurisdiction agreements. In its 2000 Report, the Committee on International Civil and Commercial Litigation recommended that courts respect jurisdiction agreements and assume or decline jurisdiction pursuant to them.[22] According to the Committee, this would represent a

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20. International Law Association, Committee on International Civil and Commercial Litigation, *Report of the Sixty-Ninth Conference* (London: International Law Association, 2000) at 140. The International Law Association is an international non-governmental organization established for the "study, elucidation and advancement of international law, public and private, the study of comparative law, the making of proposals for the solution of conflicts of law and for the unification of law, and the furthering of international understanding and goodwill."

21. *Westec Aerospace Inc v Raytheon Aircraft Company* (1999) 173 DLR (4th) 498 (BC CA), leave to appeal granted April 20, 2000 SCC Bulletin, 2000 at 733, adjourned January 25, 2001, SCC Bulletin, 2001 at 152, provides a recent illustration of the challenges faced by small businesses in fighting jurisdictional skirmishes.

22. Articles 3.1 and 3.2 of the Leuven/London Principles, which set out the recommendations of the Committee provide:

    3.1 If the parties have chosen the originating court as the exclusive forum for resolution of the matter, then that court shall exercise jurisdiction and shall not decline it ... [as provided for in a subsequent Principle].

    3.2 If the parties have chosen an alternative court as the exclusive forum for the resolution of the matter, then the originating court shall either terminate its proceedings on the ground that it has no jurisdiction over the matter or as the case may be decline jurisdiction.

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further advance on the hostile approach once taken by common law courts to jurisdiction agreements as impermissibly usurping a core adjudicative function that has, in recent times, given way to a view that courts should exercise discretion to refuse to give effect to an exclusive jurisdiction clause nominating another court only where there is a "strong cause". While giving effect to jurisdiction agreements might be a welcome advance for sophisticated parties of equal bargaining power, it is not necessarily so for new members of this expanded group of parties who find themselves embroiled in international disputes. Fairness to them might occasionally require a court to refuse to give effect to a jurisdiction clause. However, I suggest that in determining whether there is a "strong cause" to disregard a jurisdiction agreement, a court should do so not in terms of whether the agreement merely anticipates the analysis a court would undertake in determining appropriate forum if there was no agreement, but on the basis of whether the agreement is a sound one in terms of contract principles (i.e., whether it represents the genuine consent of the parties and does not produce any overriding unfairness).[23]

In sum, in time with advances in the areas of the enforcement of foreign judgments, the means for determining the appropriate forum, and the interpretation of forum selection agreements, the compulsory jurisdiction of national courts will make them more accessible and suitable as fora for international dispute resolution to the expanded range of litigants and cases that are not well suited to arbitration. As the volume of these cases increases through the vertical integration of the global economy, so too will the role of national courts in resolving international disputes.

With regard to the question of expense, the means for reducing the expense of international litigation and thereby increasing access to it for members of the expanded sector of those doing crossborder business are obvious and ongoing. These means relate primarily to technological enhancements in communication. Digital communication and document transfer, electronic filing of court documents and video conferencing all hold the promise of reducing or eliminating the added expense of litigating over long distances. As these technological advances become more readily available, so too will there be an increase in accessibility to international dispute resolution in national courts.

IV. The Internationalization of Public Interest Litigation

The third, and final, trend that I will discuss is one that, in part, represents a growth area in litigation and also, in part, represents a diversion of disputes from international tribunals to national courts. Increasingly, national courts and dispute

23. For a more detailed discussion of this point, see Walker, "Beyond Big Business: Contests between Jurisdictions in a Vertically Integrated Global Economy" in *Civil Litigation Forum* (Toronto: Law Society of Upper Canada, 2000).

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resolution are coming to be used to vindicate the collective rights of persons. Where dispute resolution was once confined to the rights and obligations of persons to one another and collective rights depended upon political action for their advancement, groups are now turning to the courts as arbiters of their rights where these rights have been infringed upon or impaired by governments or businesses.

One example of such group actions is consumer actions that occur within the confines of a single state or province. However, it is increasingly the case that the multi-state, multi-province or multinational nature of consumer markets gives rise to similarly constituted class actions. Under such circumstances, the proceeding is only viable if the laws of jurisdiction and *res judicata* are adapted to ensure that all persons identified as falling within the plaintiff class are regarded as bound by the outcome of the proceeding in the courts in which they might sue separately. This, of course, is well established among the American states in multi-state actions[24] and is coming to be established in multi-province actions in Canada.[25] There is, however, also a recent development to this effect on the international front. In *Paraschos v YBM Magnex International Inc,*[26] the United States Court for the Eastern District of Pennsylvania is considering whether it is appropriate for it to determine a securities fraud action against a defendant headquartered in that state involving a class of plaintiffs located both in Canada and the United States. One important issue in the determination relates to the different requirements of proof for liability and whether it is appropriate to permit deemed reliance provisions of US securities law to apply to trades otherwise regulated by Ontario securities law because the stock was traded on the Toronto Stock Exchange. The application of these deemed reliance provisions to the action would be significant factors in the viability of any class action for this kind of claim and, therefore, could affect the availability of relief to individual claimants.

Further, to the extent that multi-jurisdictional classes come to be a viable option for the vindication of collective or group rights, national courts will increasingly become the forum for the debate and resolution of issues that would once have been addressed in political or diplomatic *fora*. Where the vindication of collective rights entails not only declaratory relief but also individual remedies such as damages, national courts are uniquely suited to the task because only they can bind parties (in

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24. See *Phillips Petroleum Company, v Shutts* 472 US 797, 807, 105 S Ct 2965, 86 L Ed 2d 628 (1985).

25. See *Nantais v Telectronics Proprietary (Canada) Ltd* (1995) 25 OR (3d) 331(Gen Div); leave to appeal dismissed (Div Ct) at 347; *Harrington v Dow Corning Corp* (2000) 193 DLR (4th) 67 (BC CA); *Carom v Bre-X Minerals Ltd* (1999) 43 OR (3d) 441; and *Wilson v Servier Canada Inc,* (2000) 50 OR (4th) 219 (SC), and Manitoba Law Reform Commission, *Class Proceedings* (1999).

26. *Paraschos v YBM Magnex International Inc,* No. 98 Cv 6444 (East Dist Penn).

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this case, plaintiffs) not before them. For this reason, in mass torts, which are increasingly multi-jurisdictional in nature, defendants find court resolutions desirable. One has only to think of the claims being resolved in Canada for injuries caused through infections received from the blood system to realize how invaluable the national court system can be for resolving multijurisdictional disputes. In *Parsons v Canadian Red Cross Society,*[27] a national class action, commenced in cooperation with provincial class actions in British Columbia and Québec, secured compensation in an Ontario court for persons across the country who had been infected by tainted blood products. Most significantly, it secured this relief not only from a single defendant but also from the Canadian provincial governments. At one time, this might have occurred only in the course of some special *ad hoc* administrative regime established for the purpose. Now it is something that is available through the ordinary courts.

There is a further international dimension to this development of class actions. That is, that the courts able to provide collective or group remedies through class actions are increasingly likely to see themselves as appropriate *fora* for the resolution of such disputes (i.e., as opposed to courts that cannot do so). This is certainly so in the United Kingdom where, in the *Lubbe* case,[28] some 3000 persons exposed to asbestos in the mines of South Africa sued the U.K. parent corporation in the English courts and defeated a motion for a stay in favour of the South African courts on the basis that they would not be able to pursue their claims in South Africa without the benefit of the legal aid and multi-party procedures which they enjoyed in the English proceedings. The House of Lords acknowledged that the granting of a stay in that case would be a denial of justice. A similar result was reached in the Ontario courts in the recent decision in a multi-province class action for injury caused by diet pills manufactured in Canada by a French group of companies. The availability of class actions in Ontario played a role in persuading the court that France, a country that does not have group proceedings, would not be a more appropriate forum for the resolution of the dispute.[29] In turn the availability of class actions in more than one forum can invite courts to consider whether the substantive law is adequate to the task of providing group relief. For example, as mentioned above, in a securities fraud case a US court could decide that it was a more suitable forum for a class action if the plaintiff class was able under US law to avoid having to prove individual reliance on the defendants' misrepresentations.[30] All of this is only to suggest that class

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27. *Parsons v Canadian Red Cross Society* (1999) 40 CPC (4th) 151 (SC), appeal quashed [2001] OJ 214 (CA).
28. *Lubbe v Cape Plc* [2000] 2 Lloyd's Rep 383 (HL).
29. *Wilson v Servier supra.*
30. See *Paraschos v YBM Magnex, supra.*

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actions relating to international disputes in national courts can generate pressure to change procedural and substantive national law in ways that once might have been left to legislators or members of the executive.

In addition to the collective actions commenced directly by aggrieved groups, governments themselves are increasingly turning to the courts to obtain redress on behalf of groups of persons who have been harmed by the conduct of market participants. This is not particularly new. It has long been undertaken pursuant to the subrogated rights available under various government sponsored administrative relief programs, such as workers' compensation schemes. Only recently, however, has this process developed an international dimension. The key reason for this is that there has existed a longstanding rule against it that has only recently come to be reconsidered. This rule is known as the "foreign public law exception"[31] and in the United States as the "Revenue Rule". The rule provides that courts will not apply foreign law or give effect to foreign judgments where to do so would give effect to the will of a foreign sovereign.

The first serious incursion into this rule occurred in the 1995 decision of the Ontario courts in *USA v Ivey.*[32] In that case, the American government had, pursuant to environmental legislation, conducted an environmental clean-up operation, and sought compensation for the expense of doing so from the persons responsible for the damage. Since these persons were not in the United States, but in Canada, it was necessary for the US government to seek enforcement of the judgment in Ontario. The Ontario court agreed that the judgment should be enforced. The court said it was not a foreign public law judgment because it was for an amount that would only compensate the US government for money it had spent in the clean-up operation and it did not include amounts that were intended to punish the defendants or to raise revenues for the general use of the government. However, the court went on to observe that in an issue of such transborder significance as environmental protection, it would be inappropriate to expand the situations in which the foreign public law exception might interfere with appropriate cooperation. Therefore, Canadian courts will no longer assume that suits brought by a foreign government and involving an award that will be received by a foreign government are automatically the kind that should not be entertained in Canada or the kind that generate awards that should not be enforced in Canada because they are not the sort of controversy that should be resolved in the courts.[33]

31. See Castel, *Canadian Conflict of Laws* (4 ed, 1997) Ch 9 – Refusal to Apply Foreign Law or Enforce Foreign Judgment.

32. *United States of America v Ivey* (1996) 26 OR (3d) 533 (Gen Div), *aff'd* (1996) 30 OR (3d) 370 (CA).

33. And see *United States of America v Levy* (1999) 45 OR (3d) 129 (Gen Div); *United States (Securities and Exchange Commission) v Shull,* unreported (British Columbia

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Recently, the Canadian government has had the opportunity to test the extent to which this rule would prevent it from resolving a dispute in the American courts. In *Attorney General of Canada v RJ Reynolds*[33] Canada brought a claim under the US RICO (Racketeering Influenced Corrupt Organizations) statute for losses suffered in connection with a smuggling operation during a period in which a sales tax on cigarettes was imposed to discourage young persons from beginning to smoke. Canada's action was dismissed at first instance on the basis that it was barred by the Revenue Rule but this decision is being appealed.

V. Conclusion

Where will all this lead? In terms of dispute resolution generally, this seems difficult to predict as the courts are increasingly viewed as dispute resolution *fora* of choice for an broadening range of controversies that include a broadening range of persons. However, in terms of international dispute resolution, it can be said with increasing confidence that the role of national courts is no longer diminishing and that both for persons whose international disputes were once thought best resolved by arbitration and for those whose international disputes could not be resolved by arbitration, national courts will provide suitable fora in the twenty-first century.

Supreme Court, 5 August 1999) available on Quicklaw at [1999] BCJ No 1823;*United States (Securities and Exchange Commission) v Cosby,* unreported (British Columbia Supreme Court, 29 March 2000) available on Quicklaw at [2000] BCJ No 626.

34. *Attorney General of Canada v RJ Reynolds* N Dist NY (19 June 2000) 99-CV2194.

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