

## INTERNATIONAL BUSINESS DISPUTES

IAN F. G. BAXTER\*

## I. INTRODUCTION

THIS is the third and final article on rules of law for the adjudication of international business disputes.<sup>1</sup> The three articles propose a method which, it is believed, would be more pragmatic and suitable for international business than the various choice of legal-system approaches that have become popular, and which are the intellectual progeny of some rather mystical ideas borrowed from Germany in the last century.<sup>2</sup> The suggested method was sketched in the concluding paragraphs of the first article,<sup>3</sup> and developed further in the second article.<sup>4</sup> This article will return to a discussion of the method, and it will also examine its application to litigation and arbitration—with or without a choice of law clause.

As in the previous articles, this one is concerned only with international business disputes, and this excludes, for example, non-commercial disputes, as well as interstate, inter-provincial or other disputes that are internal to a country. The articles do not deal specifically with less formal ways of settling disputes, although recognising that some of these can be important and desirable.<sup>5</sup> For example, mediation and conciliation can be useful alternatives to litigation or arbitration.<sup>6</sup>

The two previous articles have argued that choice of legal-system thinking is not a suitable approach for international business disputes. Indeed the business community and their advisers have indicated their negative feelings by the very frequent inclusion in international agreements of choice of jurisdiction clauses, arbitration clauses, and, in the case of both litigation and arbitration, clauses designating a governing

\* Professor Emeritus, University of Toronto.

1. The previous articles are "International Conflict of Laws and International Business" (1985) 34 I.C.L.Q. 538 and "International Business and Choice of Law" (1987) 36 I.C.L.Q. 92.

2. As to the intellectual roots of the choice-of-legal-system approach, see e.g. *idem* (1987), pp.100-104.

3. *Op. cit. supra* n.1 (1985), at pp.559-562.

4. *Op. cit. supra* n.1 (1987), at pp.112-115.

5. In certain parts of the world, which have rising commercial importance, such as the countries of the Far Eastern region, there is less enthusiasm than in North America for the intervention of lawyers in international business. The number of lawyers per 100,000 of population in these countries is considerably less than in North America.

6. A mediator will assist the parties to arrive themselves at an agreed solution of their differences. A conciliator is likely to propose to the parties what seems to be a good solution to their differences.

law.<sup>7</sup> A different set of objectives is proposed. International business is entitled to special treatment, due to its great importance, huge volume and complexity, and the involvement of foreign parties.

## II. THE "INTERNATIONAL BUSINESS LAW APPROACH"

It is suggested that a country should create within its own *lex fori* a body of legal rules and principles for international business issues. This would be instead of choice of legal-system rules (by which either the issues are dealt with by *lex fori* rules, usually designed for cases without foreign elements, or the issues are "shunted" into a foreign legal system). If the proposed suggestion were adopted, English law, for example, would have a sub-area of principles and rules for disputes about business transactions involving foreign parties. In a case before an English court, the rule-of-decision could then be obtained from this sub-area. For brevity, this change will be referred to as the "international business law approach". The sub-area would be created and developed from statutes, case decisions, international treaties, and international business practices as recognised by English law. It would, therefore, be a part of the national law of the country. It would not be some non-existent *lex mercatoria* with imaginary worldwide acceptance. This was the position taken in the two previous articles and it is maintained here.<sup>8</sup> These proposals for change would affect basic thinking, but need not make dramatic differences immediately in the outcome of litigation or arbitration. For example, as suggested in the second article: the principle of party autonomy should be retained and respected; and titles validly acquired under the *lex situs* should be recognised.<sup>9</sup>

If Ruritania is a country that adopts the proposals for change made in these articles, it will develop within its legal system a body of Ruritanian international business law—principles, rules, statutes and cases—which will be applied by Ruritanian courts to international business cases that come before them. If various countries adopt the proposals, each

7. *Op. cit. supra* n.1 (1985), at pp.541-544 (on party autonomy and arbitration). Becker, "Choice-of-Law and Choice-of-Forum Clauses in New York" (1989) 38 I.C.L.Q. 167-175.

8. In a section about the idea of a general *lex mercatoria* with worldwide acceptance which would not be the creation of a national law, Redfern and Hunter, *Law and Practice of International Commercial Arbitration* (1986), p.89, include a quotation from Baxter, *idem*, p.560. The apparent implication is that the proposals in the writer's article were intended to promote such an unanchored *lex mercatoria*. This is not the case. The quotation (given at p.560 of Redfern and Hunter) advocates a departure from choice of legal system techniques and proposes the development of rules "within the forum legal system that are specially designed for situations of modern transnational business and for the practice and expectations of the parties involved".

9. *Op. cit. supra* n.1 (1987), at pp.113-114.

country will have, as part of its *lex fori*, its own sub-area of international business law which the courts of that country will apply. At first sight this may seem like each country creating its own individual sub-area of international law applicable to commerce, with, of course, the possibility of differences between the sub-areas. But there are important considerations about this result.

First, it is very common practice, in both international business litigation and international commercial arbitration, for the parties to make an agreed selection with regard to the law or jurisdiction (or both) to govern the substance of their dispute, and for effect to be given to such choice. But the world contains many different national legal systems, and their substantive rules-of-decision are intended primarily for the resolution of domestic issues, and, at present, are rarely constructed with a special view to international business issues. But if the parties, for example, by a clause in their contract, have designated the law or jurisdiction of a country which has adopted the proposals in these articles, the international business sub-area of the legal system of that country could apply, and this would result from the parties' own choice of law.

Second, there would be a reasonable likelihood of some harmonisation regarding various (national) sub-areas of international business law. This might be, for example, by conventions, treaties, recognised rules of practice: such as the Uniform Customs and Practice for Documentary Credits, Inco Terms, the New York Convention, UNCITRAL Model Law on International Arbitration, various shipping agreements, the business rules and practice of financial markets, and so on.

The general theory behind the construction of choice of legal-system rules or guidelines appears to be to create a mechanism for allocating the issue to one and only one of the world's legal systems. To achieve this purpose the mechanism has the function of deciding whether to retain the rule-of-decision within the legal system of the forum, or else to "shunt" it into one and only one foreign legal system. So, clearly, choice of law rules or guidelines of this kind are intermediation rules and not rules of decision. It seems to be assumed that this process will make the adjudication of commercial cases with foreign elements more just. But surely a better and more direct way is for the legal system to generate as part of its *lex fori* a body of law that is made with a special view to international business.

The "international business law approach" is not a new idea. The Romans had many non-Romans within their Empire, and for this reason they created within their legal system a body of principles and rules designed for issues involving non-Romans. These principles and rules could include elements from foreign laws and customs, for example in regard to Mediterranean commercial usages. They were intended to govern the relations between persons in an equitable way and without

reference to their nationality.<sup>10</sup> But the principles and rules were part of the whole Roman law and were administered by Roman magistrates.<sup>11</sup> They were not regarded as principles and rules of some non-existing international "world law".

An important effect of a country adopting the proposals in these articles would be that the courts of that country would be required to consider actively the formulation of substantive principles and rules-of-decision intended specially for international business disputes. Traditional choice of legal-system theory does not require this. Instead, what it requires is usually either the application of the ordinary (internal) commercial law of the legal system selected by the parties (through application of the autonomy principle), or the use of a selection formula (usually through "choice of law" rules or guidelines), and thereafter the application of the ordinary (internal) commercial law of that legal system. Once the applicable legal system has been determined, by whichever method, the rule-of-decision is obtained from the commercial law of that country—rules commonly applied to non-international issues. Indeed, in reading the relevant case reports and academic literature, one tends to feel that traditional choice of legal-system theory can encourage a game of precedents and semantics. But if a country adopted an "international business law approach", the courts, legislators and legal scholars of that country would be encouraged to apply their minds in a direct way to the design of principles and rules specially for international commerce. It is surely desirable that the development of rules-of-decision in international business disputes should be approached in a direct fashion, instead of assuming that just results will arise somehow indirectly by the roundabout application of rules-of-decision, based on some current choice of legal-system theory. An "international business law approach" is intended to be essentially the adoption of a point of view. It should not be a sudden upsetting of existing principles and decisions—but a gradual infusion into international business adjudications of new theoretical and policy bases.<sup>12</sup>

There is a distinction between the application of a legal principle or rule of a national legal system, and the use of such a principle or rule as "data" in connection with the determination of a dispute issue. A simple example of a "data" use would be consideration of the rules of the road of the country where an automobile accident took place, in deciding an issue on negligence. Other examples of data might be: navigation and traffic rules for shipping or aircraft; recognised trade or business practices; recognised market usages and customs, for example, in inter-

10. Jolowicz, *Historical Introduction to Roman Law*, pp.101-102.

11. *Op. cit. supra* n.1 (1985), at p.545.

12. *Op. cit. supra* n.1 (1987), at pp.114-115.

national markets (such as the Euro-markets). An area in which this distinction can be very important is the interpretation of international agreements or related documents. As was argued in a previous article, the correct task of a court in the interpretation of an international business document should be to ascertain the meaning of the document and the intention of the parties, and to employ all reasonable aids in so doing.<sup>13</sup> These aids ought to be used as data, and might include: the language of the document; any special legal or other technical terms; the understanding and effect of contracts in a relevant country, in its legal system or prevailing among its business community; the views of foreign legal or business experts as to the meaning of the document and the intentions of one or more of the parties. These different kinds of data are essentially information about the circumstances and environment of the dispute issue. This is quite different from using choice of legal-system rules to consign an issue to either the forum or another legal system in order to apply the rule-of-decision provided by that selected legal system. In regard to international business disputes, the argument of these articles is in favour of the use of "data" in reasonable circumstances.

### III. ARBITRATION AND LITIGATION

ARBITRATION has been in existence for centuries as a method for settling disputes between merchants. But in recent years, accompanying a great expansion of international trade—both in volume and geographically—international commercial arbitration is used extensively as an alternative to litigation, and arbitration clauses are common in international business agreements. There are, however, situations in which arbitration is not usually preferred; for example, some sovereign States are unwilling to arbitrate, and there seems to be an inclination by bank creditors, and their lawyers, to prefer litigation for disputes arising out of international loan agreements.<sup>14</sup>

There are a number of differences between the determination of an international business dispute by litigation or by arbitration, of which the following are examples.

#### A. Agreement by the Parties

Arbitration requires the agreement of the parties, and cannot exist without it. This agreement is frequently incorporated in a basic international contract covering the transaction, and this means that a choice of the

13. *Idem.* p.114.

14. Wood, *Law and Practice of International Finance* (1984) Clark Boardman Comp. ¶3.04[2]; Penn, Shea and Arora, *The Law and Practice of International Banking* (1987) p.35.

mode of dispute settlement may be agreed upon at the time when a deal is made and before there has been any dispute. Litigation, of course, does not require the agreement of the parties before it can exist. However, the doctrine of "autonomy" is commonly used in international business contracts, by insertion of either a choice of law clause or a choice of jurisdiction clause, or both.<sup>15</sup> The insertion of such clauses requires the consent of the parties, and their usual insertion by agreement lessens the consensual-non-consensual distinction between litigation and arbitration in relation to the general practice of international business.

#### B. Choice of Adjudicator

In arbitration the parties can choose their own person or persons to adjudicate the dispute between them.<sup>16</sup> There may also be a judicial arbitration.<sup>17</sup>

#### C. Specialised Knowledge and Experience

An international business dispute may turn substantially (or perhaps entirely) on the facts, and also it may very well be concerned with the interpretation and effect of specialised documents and the customs and practices of particular kinds of business. Arbitration allows the parties to choose an arbitrator who has had experience of international commercial arbitrations and has specialised knowledge of relevant areas of commercial law, or experience in the kind of business involved in the dispute. Examples might include marine insurance, engineering, construction and advanced technology. In disputes of this type a person experienced in the business may have the specialised knowledge of that type of business which would not be expected from a judge in litigation. However, such differences in knowledge can be modified, because expert witnesses can inform the court on the technicalities and specialities related to the dispute; of course, this can happen also in an arbitration.

15. The autonomy doctrine in contracts has existed since the Middle Ages, and is freely used in international business contracts, largely to avoid the complications and uncertainties of the choice of legal system rules that would otherwise be involved. See *op. cit. supra* (1985), at pp.541-542.

16. This has the consequence that the parties have to pay the arbitrators' fees and the administration costs of the arbitration.

17. In England, under the Administration of Justice Act 1970, s.4, the parties may appoint a judge of the Commercial Court as sole arbitrator or as umpire. There is an appeal from a judicial arbitrator so appointed to the Court of Appeal. Schmitthoff, *The Law and Practice of International Trade* (8th edn, 1986), p.576.

#### D. Time and Cost Considerations

Various advantages are sometimes claimed for international commercial arbitration, in comparison with national litigation, as a mechanism for settling disputes, such as privacy, flexibility, lower costs and speed. But these may not always be justified. There may be circumstances where litigation may be more expeditious and less expensive.<sup>18</sup> This advantage for litigation is probably more likely in a country where there are special commercial courts, and with judges who are experienced in dealing with commercial cases. If, in addition to having commercial courts, the approach suggested in these articles were adopted, and the country created (within its own *lex fori*) a body of legal principles and rules designed specially for international business issues, one could predict an increase in effectiveness by its courts in the handling of international commercial cases.

#### E. Enforcement

A major advantage of international commercial arbitration as compared with national litigation is in regard to enforcement. International conventions, and in particular the New York Convention,<sup>19</sup> together with legislation based on the Convention, have provided facilities for the enforcement of foreign awards, having greater range and flexibility than exist so far in regard to court judgments. This is, of course, an important consideration where the assets of parties may be situated in different countries and transnational enforcement is desired.

There are long-standing problems and limitations in the transnational enforcement of court judgments, possibly related mainly to feelings about national sovereignty. There have been some moves to improve the situation among the member countries of the EC, and perhaps this will continue and the example be followed elsewhere. It has been commented that:<sup>20</sup>

18. Schmitthoff, *ibid.*, refers to *British Imex Industries Ltd v. Midland Bank Ltd* [1958] 1 Q.B. 542, where the Commercial Court gave judgment 11 days after the issue of the writ, and *P. K. C. Sethi (1944) Ltd v. Parabmull Rameshwar* [1950] 1 All E.R. 51, 58, [1951] 2 All E.R. 352, a case in which a contract contained an arbitration clause of the London Joint Association. The dispute went to arbitration and thereafter by special case to the courts. and Singleton LJ stated that "this procedure adds greatly to the cost and trouble which the parties have to encounter in a case of this kind. It would, I think, be better that a dispute such as this should go direct to the Commercial Court, and there be dealt with, as it would be a saving of costs for the parties."

19. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958.

20. "Resolving International Commercial Disputes" (Lord Wilberforce), in Paterson and Thompson, *UNCITRAL Arbitration Model In Canada* (1987), p. 10.

Apart from inter-European judgments, governed by the 1968 Convention,<sup>21</sup> it can probably be said that arbitration awards are more easily enforced than Court judgments. The New York Convention gives a much more convenient and effective method of enforcing arbitration awards than anything you can find as regards Court judgments except, as I have said, the European judgments.

#### IV. ARBITRATION AND THE APPLICABLE LAW

THERE are two distinguishable situations in which it may be necessary to determine an applicable law in an international commercial arbitration: the law governing the validity of the arbitral process, i.e. the so-called *lex arbitri*; and the law governing substantive issues.

As regards the former, the usual view is that the *lex arbitri* is the law of the place of arbitration, and that that law applies to the validity of the process and the arbitral tribunal is subject at least to its mandatory rules. A rough analogy is sometimes made between the place of arbitration and the place of the forum in litigation. National legal systems may relate to the arbitral process in different ways.

An arbitration may turn largely, or perhaps even entirely, on the facts concerning the dispute, in which case there may not be a problem about what law governs the substantive issues. Most international business transactions involve an agreement between the parties. This may be quite an elaborate document, prepared by lawyers. In that event the interpretation and application of the agreement will be likely to be a fundamental part of the work of the arbitral tribunal. In addition, in practice, the great majority of arbitration clauses in such agreements will contain a designation of the legal system to govern substantive issues. In international business transactions and documentation it is normal practice, whether litigation or arbitration is contemplated, to take advantage of the principle of the autonomy of the parties, and to have an agreement between the parties, of one sort or another, for the designation of a legal system for any dispute which may arise in the future in connection with the transaction. International bodies have recognised the principle of the autonomy of the parties as regards international commercial arbitration. The UNCITRAL Model Law provides:<sup>22</sup>

The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the

21. European Communities Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Brussels, 27 Sept. 1968 (given effect to by the Civil Jurisdiction and Judgments Act 1982).

22. UNCITRAL Model Law on International Commercial Arbitration, adopted by the UN Commission on International Trade Law on 21 June 1985, Art. 28(1).

dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.

Similarly, the UNCITRAL Arbitration Rules provide: "The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute."<sup>23</sup> The Model Law also contains an important general qualification in regard to selection of the governing law for the substance of the dispute, namely: "In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."<sup>24</sup> The Model Law does not allow the tribunal to decide *ex aequo et bono* or as *amiable compositeur* unless the parties have expressly authorised it to do so.<sup>25</sup>

#### A. *The Position Where No Applicable Law Is Selected*

What is the position if the parties do not select an applicable law by agreement? If the parties do not make a selection of an applicable law, the Model Law provides: "Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable."<sup>26</sup> This provision and the policy that appears to be embodied in it have been criticised. For example, the summary of the Chairman in the Lausanne Interim Meeting of the International Council for Commercial Arbitration, in 1984,<sup>27</sup> stated that this provision was heavily criticised, first by the Rapporteur in his written and oral reports and then by most of the speakers, and added that:

The formula retained by the Draft Model Law appeared objectionable in many different ways: firstly in its exclusive reference to the "conflictual" method, in contradistinction to the *pluralisme des méthodes* generally accepted by the modern science of private international law; secondly, by its rigid character, in sharp contrast to the variety of approaches and the flexibility displayed for many years by modern arbitration practice.

The Task Force on the adoption of the UNCITRAL Model Law in British Columbia recommended changing the words "the law determined by the conflict of laws rules which it considers applicable" to "the rules of law it considers appropriate given all the circumstances sur-

23. Art.33(1).

24. Art.28(4).

25. Art.28(3).

26. Art.28(2). Also in Art.33(1) of the UNCITRAL Arbitration Rules.

27. International Council for Commercial Arbitration, Congress Series # 2, *UNCITRAL's Project for a Model Law on International Commercial Arbitration* (1984), pp.197-198.

rounding the dispute", and a member of the Task Force commented that the Task Force:<sup>28</sup>

was sceptical about the predictability and controllability that would be gained by requiring the arbitral tribunal to justify its selection of the applicable law by conflict of laws rules. The steps the tribunal would have had to follow would have been: (i) to decide which country's conflict rules should be applied (not by any means obvious, in many cases); (ii) to determine what those conflict rules were (which, particularly in the areas of contracts and tort, is often fraught with uncertainty); and (iii) to apply those rules to select the relevant laws (which, because the rules tend to be open-ended, like the "closest and most real connection", etc., often adds yet more uncertainty).

In litigation it is normal to apply the conflict rules of the *lex fori*, but in international commercial arbitration there is the question—whether an international arbitration tribunal has a *lex fori*, and if so where is it located? One possibility is the legal system of the place where the arbitration is held. But apparently there is a strong body of opinion that an international arbitration tribunal is not bound to apply the conflict rules of the seat of arbitration.<sup>29</sup> This raises the next question—how should the tribunal select the conflict rules? It was stated in the *Sapphire* arbitration<sup>30</sup> that a tribunal "must look for the common intention of the parties, and use the connecting factors generally used in doctrine and in case law and must disregard national peculiarities (Batiffol, *Revue de l'Arbitrage*, 1957, p.111; Caribiber, *l'Arbitrage International de droit privé*, Paris, 1960, pp.52, 92)".<sup>31</sup>

It would seem, therefore, that an arbitrator may have substantial freedom of choice as to which set of choice of law rules to use, in the somewhat rare situations where the parties have not provided an agreed choice of an applicable law. One would assume that in these situations a tribunal will be likely to resort to a set of choice of law rules of a jurisdiction with which it is familiar, and not necessarily to the choice of law rules of the seat of the arbitration. For example, an English arbitrator may turn to the choice of law rules of English law, even if the arbitration

28. Joost Blom, in Paterson and Thompson, *op. cit. supra* n.20, at pp.130-131.

29. Redfern and Hunter, *op. cit. supra* n.8, at p.95 (footnotes omitted), mention a "doctrine which has found support both in the rules of arbitral institutions and in the practice of international arbitration. The doctrine provides that, unlike the judge of a national court, an international arbitral tribunal is *not* bound to follow the conflict of law rules of the country in which it has its seat. This doctrine has many powerful advocates, particularly amongst German, French and Swiss lawyers. A leading commentator has spoken of 'The almost total abandonment of the application of the rules of conflict of the so-called arbitral forum'."

30. *Sapphire International Petroleum Ltd v. The International Iranian Oil Company* (1964) 13 I.C.L.Q. 1011. The sole arbitrator was a judge of the Swiss Federal Tribunal.

31. The comment is quoted from Redfern and Hunter, *op. cit. supra* n.8, at pp.95-96 (footnote omitted).

is conducted in some other country, whereas, in a litigation, the judge will be required to apply the conflict rules of the *lex fori*. Apart from this distinction, however, it would appear that, in an international business dispute where the parties have not provided an agreed choice of an applicable law, both judges and arbitrators usually employ traditional choice of law rules or principles to select a legal system which will supply the rule-of-decision.

In summary it can be said that, in general, in international arbitration the norm is that the parties provide an agreed choice of the applicable law, by exercise of the principle of autonomy, either by a clause in an international agreement or other valid means, and the rule-of-decision is obtained from the chosen legal system, or else, if there is no agreed choice by the parties, the choice of law rules of a system familiar to the arbitration tribunal will be used. How would this affect the application of the "international business law approach", namely, the creation of a sub-area of principles and rules dealing with disputes arising from international transactions, so that the rule-of-decision is obtainable from this sub-area of law? If the parties made a choice of the law of a country which included an international business law approach, the tribunal would give effect to that choice, and would apply the rules of the sub-area. If the parties made no choice of law, it would still be open to an arbitration tribunal to apply the law of a country which included an international business law approach.

#### B. *International Enforcement*

Neither the common law nor the civil law systems appear yet to have produced a really satisfactory method for the international enforcement of judgments.<sup>32</sup> Transnational distribution of assets is common in international business, and a party to litigation against whom a judgment has been obtained may have assets in countries other than the forum country. But the successful party may find it difficult or impossible to reach the foreign assets.

Could we not have transnational recognition and enforcement of a court judgment where both parties have consented to the jurisdiction of the court, and the court has applied the law chosen by the parties in their agreement? If the parties had instead agreed to international arbitration, and the tribunal had applied the law chosen by the parties in

32. There have been regional improvements, e.g. the enforcement of judgments within contracting States in the EC. But such developments are limited in scope and do not provide a general international system for the recognition and enforcement of foreign judgments comparable, for example, to the New York Convention in the case of international commercial arbitration.

their agreement, the New York Convention would have facilitated transnational enforcement. Arbitration is consensual and, if similar consensual elements are present in an international business litigation, could this not make possible a UN-based convention for that class of judgment?

#### V. CONCLUSION

At present we have two streams of process for third party resolution of international business disputes—litigation and arbitration. In recent years there has been an increase in the activity and promotion of international arbitration. There are institutional arbitration facilities related to the UN, governmental arbitration agencies in some countries, centres for international arbitration located in a growing number of countries, as well as a proliferation of commerce-related bodies and associations involved with international arbitration. The existence of separate streams means that decisions have to be made as to which one to follow. In practice this decision usually comes at the time when an international agreement is being put together, and therefore before there has been any dispute arising from the business transaction which is the subject of the agreement. In a substantial transaction, for example between two multinationals, the form of the agreement will be prepared or revised by legal counsel, either in-house or outside lawyers, and their preferences and usual practice are likely to be reflected in the choice of stream. Whichever stream is selected it is usual to insert a choice of law clause or a choice of jurisdiction clause or both. Having made a commitment to one stream in the agreement, it can be difficult and expensive to change streams, and may well mean renegotiation of that part of the agreement. Both litigation and arbitration have their advantages and disadvantages. Having made a commitment to one stream in the agreement, one party or both may later become disappointed with that mode of dispute settlement and wish that the other mode had been selected.

More thought should be given to the possibilities of bringing the two streams closer together, perhaps by trying to introduce into international business litigation some of the perceived advantages of international commercial arbitration. This is the kind of thinking and dialogue that should take place, particularly in the leading business and financial centres of the world.