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Preface

John E.C. Brierley*

The contributions to this special number of the *McGill Law Journal* demonstrate, once again, — although the point now hardly needs re-iterating — the vigorously polyvalent character of arbitration as a technique directed to dispute resolution. The tradition of resorting to arbitration is, of course, ancient and its modern applications are numerous. But the phenomenon, even today, is nevertheless remarkable. There is probably no other extra-judicial mechanism that is, from all appearances, so infinitely adaptable, whether in western or other legal traditions and whatever (or almost whatever) the context of the dispute or the opposition of interests it seeks to resolve. Other dispute resolution devices, to be sure, have been imagined, but arbitration remains the paradigmatic institution from which most of them have sprung.

The reasons for this are almost self-evident. While they have been stated many times, their re-iteration here is nonetheless appropriate in preliminary remarks intended to frame the setting for the detailed studies to follow. The primary point about arbitration is that it is a technique allowing disputing parties to select the forum in which the dispute will be heard, to select those who will be the deciders of the matter, and, sometimes also, the criteria that will be brought to bear in the decisional process. Even the issue submitted need not always be one fully justiciable in the usual sense as understood in state courts. Witness to this last idea are the technique of a contractually agreed upon expertise which is sometimes difficult to distinguish from arbitration properly

* Sir William Macdonald Professor of Law, Faculty of Law & Institute of Comparative Law, McGill University.

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so-called, the adaptation of the arbitral technique in labour relations where "interests" as much as "rights" are in question, and, in the view of some, the possibilities of arbitration as a mode for the adaptation of contracts into a future time. Whether all these processes amount to arbitration in the usual sense may be a topic of discussion, but it nevertheless remains true that they draw upon the general model that arbitration represents. This remains so even when a state legislative authority resorts to them with a view to keeping specified matters out of the state-driven judicial or quasi-judicial processes that it constitutes.

The place of arbitration therefore seems secure and it re-affirms, as it were, the wisdom of the ancients who deployed it, just as we do today, in the absence of, or in the face of the unsuitability characterizing, other forums. It appears, however, that arbitration has acquired an even greater legitimacy than it once may have had and this, in turn, encourages its adaptation to an ever widening spectrum of disputes, examples of which are studied in this number. Canada, in fact, illustrates the truth of this proposition. It is a country that, historically, has not shown much of a creative approach to the matter when its experience is contrasted to that of others. Two recent developments, emphasized in this collection, point to a new departure in Canada's case: first, the recent adoption or adaptation of the UNCITRAL Model Law at the Canadian federal, provincial and territorial levels, which has injected new ideas into the traditional ways of thinking about arbitration and may lead to the emergence of a dialogical jurisprudence between Canadian common and civil law that has not yet characterized much of our private law; and, second, the dispute resolution procedures of the *Canada-U.S. Free Trade Agreement*, which have been appropriately signalled as a model of "cross-enrichment" in the use of arbitration as between the public and private sectors of trade relations.[1] It is, of course, no accident that these important developments have occurred within the context of international commercial relations in which Canada, necessarily, increasingly participates in the face of the new globalization of trading patterns. But the studies published here also demonstrate a further paradox (if the word is accepted as appropriate) implicit in the arbitration phenomenon, namely its use as a means for the "privatization" of dispute settlement for private persons and also as a mechanism adaptable to the resolution of disputes involving actors that are properly characterized as "public" entities or, at the least, as implicating mixed public and private concerns.

Students of both private and public law will therefore find, in this special number, reflections of interest on a range of subjects related to arbitration. These are all the more interesting because they come from jurists with different backgrounds and professional concerns and from various countries. The diversity of matters addressed emphasizes both the wide appeal of arbitration as a legal institution and, despite the basic simplicity of arbitration as an idea, the legal complexities to which it gives rise in practice.

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[1] J. Paulsson, "Cross-Enrichment of Public and Private Law Dispute Resolution Mechanisms in the International Arena" (1992) 9:1 J. Int'l Arb. 59 at 61.