SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Canada-United States Law Journal

Volume 17 | Issue 2 Article 6

January 1991

Discussion after the Speeches of Yves Fortier and Gerald Aksen

Discussion

Discussion after the Speeches of Yves Fortier and Gerald Aksen

QUESTION, *Professor King*: Ambassador Fortier, there are provisions in the laws of both Canada and the United States for the enforcement of foreign commercial awards. We also both have the ICSID Convention covering the enforcement of awards in investment disputes. Do you see any possibility for a similar convention dealing with the enforcement of political awards and political disputes? We settle commercial disputes and then enforce the award. Likewise, we settle investment disputes and then enforce the award. Is there any possibility of following that pattern in the political area?

ANSWER, *Ambassador Fortier*: I cannot imagine that States with disputes would accept an enforceability mechanism written into their legislation. Enforcement of political disputes between States becomes a matter of sovereignty. And, if having accepted the binding nature of the arbitration process, the government, Congress or Parliament, refused to implement the award, it would be a blot on that country's record in international relations. That country would no longer be respected and would no longer be trusted in its relations with other countries. Therefore, I cannot see any enforcement award procedure which would be agreed to by political entities.

QUESTION, *Mr. Miller*: What does "binding" and "non-binding" actually mean, and what is involved in producing something we call binding? Does it mean that a party's property will be seized if they do not comply, or they will somehow be embarrassed or penalized? Or is it the market forces that make something binding or non-binding?

ANSWER, *Mr. Aksen*: I think that is an excellent question for a host of reasons. First, the word itself is a difficult one. The word "binding" appears in the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. It is found in one of the paragraphs that courts tend not to understand. The Convention says that an enforcing national court in a country does not have to enforce a foreign arbitral award if it has not yet become binding. It is an unfortunate choice of words because it means one thing to civil lawyers and another to common law lawyers. Speaking as an American common law lawyer, I use the word binding to mean when an award becomes final and cannot be appealed anymore.

The example I would like to give is that the international diamond market voluntarily accepts arbitration awards as final and binding and totally nonappealable. And the system works. The diamond market actually has a building in New York called the Diamond Dealers Club where disputes are brought. Under their rules, which are published and

have been around for years, the arbitrators resolve all disputes between members of the Diamond Dealers Club. These can involve hundreds of millions of dollars for purchases of diamonds from South Africa, Israel, Australia or wherever it may be. If there is any dispute, it must be taken to this tribunal. When the award is rendered, the losing party must pay it within two weeks. It is final, it is binding. If the losing party does not pay, his name and his picture are posted worldwide, and no diamond dealer may sell to this individual again. Now that works.

Americans think of the word binding as synonymous with final. If you look to the legislative history of the Convention, there was a lot of discussion about the word. The word was a compromise word. So unfortunately, it has international meaning. I think the important thing is that unless the mechanism is somehow made final so that the winning party can collect and the losing party knows he must pay, the process of delay will continue.

Most international businesses do not want to reach the level of a binding decision. Our Asian friends, who come from a different culture, will tell you it is a mistake to get into any binding process. In Asia, business people do business with friends. Friends should be able to resolve their disputes without any third-party adjudicatory mechanism. Therefore, they spend as much time as is necessary to discuss, mediate, and work out the problem. Both parties know going in that they may have to give up a little in order to save face. I think the Asian attitude should be studied because it is a process that works. No one says that theirs is the perfect system any more than ours is the perfect system. But if ever there was an opportunity to try and work out a system, the United States and Canada have it, because there are certainly enough similarities between the two countries that the differences should not separate us.

Having recently read a report on a dozen or so cases involving Chapter 18 and Chapter 19 of the U.S.-Canada Free Trade Agreement, from red raspberries to pork to equipment, it is hard to take all of that seriously. Maybe it is important to focus on what those disputes are, what the products are, and what is really going on. Somebody should look for a non-binding way in which to settle such disputes because I suspect that the binding feature of those U.S./Canadian panels is what is scaring the farmers or the producers on both sides of the country.

Your question is a good one. I do not know the answer to it, but it has a lot of implications because the word "binding" is in the treaty.

QUESTION, *Professor King*: Ambassador Fortier, what do you see as the maximum expectation regarding the use of conciliation to settle international disputes, both in the private and public sector?

ANSWER, *Ambassador Fortier*: Conciliation is an alternative method of resolving disputes and it can work. I have seen it work in my practice. I think a lawyer should be a conciliator and should call the case the way he sees it. We have an awesome responsibility as attorneys not to tell our

clients that their case is a sure win. I know that this may sound anathema to some of you. It sounded anathema to me when I first heard it from one of my senior partners many years ago. I was told that my first responsibility as a attorney was to examine the facts given to me by the clients and then give an honest, objective opinion of whether or not he, she or the company had a chance of being successful.

We, the lawyers, are partly responsible for that terrifying picture which was painted by my colleague earlier about the court system in New York. I think all of us from Canada know that this more or less applies in our major litigation centers. We have helped make it happen. So I think we should disguise ourselves more as conciliators.

In the international field conciliation is a form of alternative dispute resolution. First of all, it is identified as such in the United Nations Charter, in which States are encouraged to resort to it in order to solve their disputes. But every now and then we get someone like Saddam Hussein who rears his ugly head and decides that he is going to settle disputes by having recourse not to conciliation, but to the law of the jungle. Lawyers would not be in business if our clients did that.