

---

January 1991

## Arbitrate or Litigate: A Canadian Corporate Perspective

Katharine F. Braid

Follow this and additional works at: <https://scholarlycommons.law.case.edu/cuslj>



Part of the [Transnational Law Commons](#)

---

### Recommended Citation

Katharine F. Braid, *Arbitrate or Litigate: A Canadian Corporate Perspective*, 17 Can.-U.S. L.J. 465 (1991)  
Available at: <https://scholarlycommons.law.case.edu/cuslj/vol17/iss2/33>

This Speech is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Canada-United States Law Journal by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

## Arbitrate or Litigate: A Canadian Corporate Perspective

*Katharine F. Braid\**

### INTRODUCTION

**T**his paper will address the major factors influencing decisions about whether to arbitrate or litigate a commercial dispute governed by domestic law in Canada. Arbitration is not the only form of alternate dispute resolution available in Canada. Resort to any of the forms is consensual rather than being statutorily based. However, even the statute-based forms are, in my view, variations of consensual arbitration. There are also Canadian statutes specifically dealing with international commercial disputes arbitration.

The issues to be discussed herein should be interpreted as applying only to commercial arbitration. There are substantially different considerations, statutes and procedures that apply to labor arbitrations, and the case law involving judicial review of the decisions of labor arbitrators shows a judicial reluctance to interfere with labor decisions that does not necessarily apply to commercial arbitrations.

All the factors that influence a decision to arbitrate or litigate a commercial dispute in Canada are essentially economic ones. Some factors relate to costs, some relate to time, some relate to confidentiality of information, a few relate to the relationship with the opposing party, and others relate to the effect of the arbitration on other business matters. Time is worth money, market sensitive information is worth money, and one's relationship with suppliers and customers is worth money. Even a disastrous decision which cannot be appealed and which affects other business costs money. All of these factors can be classified as economic.

The costs involved in arbitration and litigation include the cost of expert evidence, counsel fees, the cost of time of senior management, the fees of the arbitrator(s), the cost of the hearing room and the fees of a reporter. While in theory all the expert fees, the counsel fees, and the management time should be the same in arbitration and litigation, in practice, this is not true. The lawyers who prepare the case and the expert witnesses who will testify tend to use whatever pre-hearing or pre-trial time available. Thus, if there are many discovery procedures and a long time passes before the trial or hearing, counsel fees will be higher, as will the fees of the expert witness. Furthermore, the time required of senior management will also be greater.

---

\* Vice President, Canadian Pacific Legal Services, Toronto, Ontario. The author wishes to express her appreciation to Randy Marsh for his assistance in preparing this article.

The last two items, arbitrator fees, hearing room charges and reporter costs usually pertain only to arbitrations. In litigation, as a general rule, the judge's time and the cost of the courtroom is paid by the taxpayer. (In British Columbia, there is a daily use fee of \$100 per day for courtrooms). In addition, a court reporter's time is paid by the taxpayer with the parties only paying for the transcripts.

In arbitration, if there is a panel of three arbitrators, each party normally pays the salary of one arbitrator and the cost of the third arbitrator is shared between the parties. The arbitrator's fee should be discussed when the individual agrees to hear the case. Most Canadian statutes or "off the rack" rules for arbitrations have a provision about fees of arbitrators being "reasonable." A thousand dollars a day for the hearing and the pre-hearing meetings, plus an hourly rate comparable to that of other lawyers of comparable experience is not unreasonable. The cost of the hearing room varies greatly depending on the location. Usually it is a per diem rate. If a transcript is desired, the parties typically share the cost of the reporter's time and pay for their own transcripts.

In order to assess the anticipated counsel fees, expert evidence cost, and the time of senior management, the exact nature of the dispute must be considered and compared to the applicable arbitration statute and rules of civil procedure. The type of dispute also affects the likelihood of an appeal or judicial review being necessary or likely as does the issue of confidentiality of information.

In practice, the decision whether to arbitrate or litigate should be made when the contract governing the commercial relationship is drafted. If an arbitration clause is not included in the contract, the parties will not be able to decide unilaterally that any subsequent dispute should be arbitrated. The parties to the contract should agree on what specific kinds of disputes should be referred to arbitration, or whether all disputes about the interpretation of the contract or arising under the contract should be referred to arbitration. They will need to agree on some basic procedures for arbitration such as single arbitrator or three-person board, time limits for appointments, and other similar practical concerns. They should agree to either incorporate by reference a statute or a set of rules for arbitration, or include specific provisions covering the procedure. They need to agree on whether they want the full statutory rights of appeal or some limitation on appeals. The chances of agreeing on such matters are much better at the stage when the parties are interested in a deal and no dispute has yet arisen. If the contract is with a supplier or customer with whom the client has an ongoing relationship, the client should be advised that a properly worded arbitration clause can help preserve the relationship even if a serious dispute arises under the contract.

In deciding which issues should be listed in the arbitration clause, one should consider all of the different disputes that might arise under the contract for which a lawyer would not be one's first choice as arbitrator. All those disputes would probably be better arbitrated than litigated.

As a general rule, it is preferable to use arbitration clauses for all technical matters such as what are market value rents for future rent increases, what costs are to be included in cost plus price adjustments, and what are extras in construction contracts. In technical disputes, one should agree to very tight time limits, no discovery of parties, production of all relevant documents, expert reports, witness statements ten days before the hearing, and no right of appeal. One may want to reserve a right of appeal when the likelihood of the matter ending up before a court is high. In Canada it is less advisable to arbitrate matters involving the interpretation of contracts since this is one of the things Canadian courts do best.

If the contract does not contain an arbitration clause and the client needs to decide whether to propose to the other party that the dispute be arbitrated or agree to such a proposal by the other party, or if it is questionable whether the exact dispute that has arisen is required to be arbitrated, counsel must analyze the economic factors previously discussed. This analysis should also involve the statutes and procedural rules that apply to arbitration and litigation in the jurisdiction in question.

The arbitration statutes of the other common law Canadian provinces, and in most respects Quebec (which is a civil law jurisdiction), are similar to that of Ontario. British Columbia is the only province that has recently revised its commercial arbitration statute.

In Ontario, the applicable Ontario statute remains the Arbitrations Act, *ONT. REV. STAT.* ch. 25 (1980). Until recently, this Act was essentially identical to its British Columbia counterpart, the Arbitrations Act, *B.C. REV. STAT.* ch. 18 (1979). After much study, including a Report on Arbitration by the Law Reform Commission of British Columbia in 1982, a new British Columbia Act was passed called the Commercial Arbitration Act, *B.C. STAT.* ch. 3 (1986). This Act is believed to have rectified many of the perceived inefficiencies of the former British Columbia Act and has helped foster a more conducive climate for commercial arbitration within British Columbia.

There are uniform rules of procedure under the British Columbia Act, the Domestic Commercial Arbitrations Rules of British Columbia, which the parties can use either in whole or in part or they can agree to specific procedures of their own. The "off the rack" procedural rules most commonly used in other provinces in Canada for domestic arbitrations are the Rules of Arbitrators Institute of Canada (AIC).

At a recent meeting of the Uniform Law Conference of Canada, a proposal was put forward to work toward implementing a new national Uniform Arbitration Act. Recently the Ontario government has put forward a document based upon the UNCITRAL model law which also resembled the Uniform Arbitration Act. This document, Bill 42, an Act to revise the Arbitrations Act, 1st Sess. 35th Seq., Ont., 1991, received first reading on March 27, 1991 and presently awaits second reading.

There have been a number of pro-arbitration papers written assum-

ing that the legal framework of the new Arbitration Act would be like the Uniform Arbitration Act or the UNCITRAL Law or the International Commercial Arbitration Act, ONT. REV. STAT. ch. 25 (1980), and my comparisons are between an arbitration under it and litigation.

### DISCOVERY

There are no detailed rules with respect to pre-hearing discovery under the Ontario Arbitrations Act. The Act specifies that the parties shall submit all books, deeds, papers, accounts, writings and documents as may be required or called for during the proceedings. The AIC Rules establish that a preliminary meeting should take place between the parties and the arbitrator(s) during which the arbitrator(s) should determine several matters including "what documents, correspondence, books, or records shall be produced, when they should be produced and by whom." My experience with arbitrations under this Act is that usually no examination for discovery of parties is held, but a full list of all relevant documents must be produced at a set time before the hearing. I am, however, aware of an arbitration involving real property evaluation where the parties agreed to oral discovery of expert appraisers after exchanging the reports.

Prior to the 1986 amended Act, the former British Columbia Arbitrations Act was identical to the present Ontario Act. However, the new Commercial Arbitration Act of British Columbia now contains explicit rights to pre-hearing documentary discovery<sup>1</sup> which empower the arbi-

---

<sup>1</sup> The relevant sections of the British Columbia Commercial Arbitration Act are sections 5, 6 and 7. They state:

5. (1) Before an arbitration hearing commences, the arbitrator may, on the application of a party, order another party to produce any documents that the arbitrator considers are relevant to the arbitration.
- (2) A party who has been ordered to produce documents under subsection (1) shall permit the party in whose favor the order was made to inspect the documents covered by the order and take copies of them.
6. (1) All parties to an arbitration and any person claiming through them shall, when ordered by the arbitrator, submit to being examined by the arbitrator under oath and shall produce all records that the arbitrator may require.
- (2) In an arbitration, the arbitrator shall admit all evidence that would be admissible in a court, and in addition may admit other evidence that he considers relevant to the issues in dispute, and, subject to the rules of natural justice, may determine the manner in which evidence shall be admitted.
7. A party to an arbitration or to a reference from the court may issue a subpoena to a witness but not for a document which the witness could not be compelled to produce in an action, and the court may order that a subpoena shall issue to compel the attendance before an arbitration of a witness.

Enhanced rights to discovery are also echoed in the BCICAC rules. Section 24 of the BCICAC Rules states:

24. The arbitrator may, on application or on his own motion, order a party to produce any documents the arbitrator considers relevant to the arbitration within a time the arbitrator specifies, and where such an order is made the other party may inspect those documents and take copies of them.

trator(s) to order discovery of all relevant documents.

In litigation, both the Ontario and British Columbia Rules of Civil Procedure provide for full discovery of documents and discovery of one person on behalf of each party unless a judge orders otherwise. The parties can always agree, just as they can in arbitration, to limit or eliminate production and discovery. My experience with commercial disputes has been that while discovery of parties can sometimes be limited by agreement to specific issues, or even sometimes replaced by an Agreed Statement of Facts, production of documents is invariably required.

It is also necessary to decide whether the client wants or needs examination for discovery of the other party. If the client does not want discovery, and the other party agrees to forego discovery of parties, using arbitration which does not automatically provide for it may save time and money.

It may not, however, save all that much time. The contract may specify the time during which arbitrators may be appointed. The AIC Rules do specify certain time limits. The AIC rules also specify time limits for having the procedural meeting and a time limit between the procedural meeting and the hearing. However, many of the people likely to be considered suitable choices for the third member of the panel are very busy. Most, when requested to act as arbitrators, will state that they cannot meet those time limits. In fact, if the hearing will take more than one week, you may have to wait six months or more for a mutually

---

Each party shall make available to the other party for inspection and taking copies, any documents upon which the former party intends to rely.

In addition section 26 states:

26. Each party shall prove the facts relied upon to support his claim or defence.

If a party is presenting evidence through a witness, the party shall, no later than 7 days before the commencement of the oral hearing, advise the arbitrator and the other party of the name and address of the witness and shall provide a brief summary of his evidence.

The parties agree that, notwithstanding the application of the *Evidence Act*, R.S.B.C. 1979, c. 116, s. 10, the written statement of an expert need only be supplied at least 7 days before the commencement of the oral hearing.

The arbitrator shall be the judge of the relevance and materiality of the evidence offered and he is not required to apply the legal rules of evidence.

All oral evidence shall be taken in the presence of the arbitrator and all the parties except where any of the parties is absent in default or has waived the right to be present.

The parties shall prepare assemblies of all documents to be introduced at the oral hearing and shall submit those assemblies to the other party and to the arbitrator no later than 7 days before the commencement of the oral hearing. The parties agree that these document assemblies shall be deemed to have been entered into evidence at the oral hearing without further proof and without being read out at the hearing but either party may challenge at the hearing the admissibility of any document so introduced. The arbitrator may allow a party to introduce into evidence at the oral hearing a document which was not disclosed under section 22 or submitted 7 days before the commencement of the hearing under this section but the arbitrator may take that failure into account at the time he fixes any costs under section 39.

agreeable hearing date. Under the AIC Rules, it should take only 160 days from the application for arbitration to a decision. I have never seen that happen. My experience has been that in Ontario if the arbitrators are senior people in their professions, you will be lucky to start the arbitration six months after the center person has been retained. In some provinces in Canada (Ontario is not one of them), you can get a trial within six months of filing a Certificate of Readiness, which can be soon after pleadings are complete, if you forego discovery and have an Agreed Statement of Facts and books of documents.

Under the BCICAC Rules, the maximum time provided from start to finish is 156 days. My colleagues in the British Columbia Bar tell me this is rarely the situation in practice.

In deciding to arbitrate or litigate, the nature of the dispute must be taken into consideration. It must be decided what kind of arbitrator is most desirable and whether discovery of parties would be needed. Finally, the costs must be compared. Both the experts and the lawyers charge by the hour either way - it is just a question of how many hours they can fill. If no discovery of parties is required, it eliminates some time required by senior management for both preparation and attendance at discovery.

#### CONFIDENTIALITY

In arbitration, often both the arbitrator and the counsel for the opposing party are likely to be reasonable when it is requested that certain documents be produced or that the documents used to prove the case be treated confidentially. This is particularly important when the arbitration is about one party's costs in a dispute about a "cost plus" price adjustment.

Section 147 of the Ontario Courts of Justice Act (1984) provides a means whereby a document may be sealed from public scrutiny. Subsection 2 to section 147 states: "A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the record." There are comparable provisions in the rules of the other common law provinces in Canada. The burden of proving a need for sealing a document under Section 147 is substantial. In one of the few reported successful applications to seal documents, the court ordered documents revealing a secret manufacturing process sealed. However, it has been held that a party's general unease or fear that public knowledge of its financial affairs might possibly affect its business interests was insufficient to warrant sealing the documents.<sup>2</sup> In addition, courts have ruled that a vague reference to potential financial embarrassment is also insufficient to warrant sealing the documents.<sup>3</sup> And, finally, it was noted that in order for a document to be sealed it must be "filed"

---

<sup>2</sup> *Re Sorbara and Sorbara*, 59 O.R.2d 153 (Master 1987).

<sup>3</sup> *424317 Ontario Ltd. v. Silber*, 70 O.R.2d 59 (H.C.J. 1989).

pursuant to section 147(2).<sup>4</sup> This would mean that “confidential” material of a party that was used, but not filed by the adverse party, could not be sealed.

This procedure is rarely used in Ontario, and the kind of document about internal costs that senior executives at Canadian Pacific Legal Services think is “highly confidential” is unlikely to be ordered sealed under it.

When weighing the pros and cons of arbitration, one should therefore look at the kind of documentary evidence needed to prove one’s case and what financial harm it could do one’s client if its competitors obtain it. However, if it is likely the case is going to end up in the Court of Appeal, the issue of confidentiality may not matter. The documents will probably be available to the public anyway. I am not aware of any Ontario Court of Appeal decision sealing documents which either formed the basis of the record or reasons of an arbitration award during the hearing of an appeal from an arbitration award.

#### REVIEW OF DECISION

Several Canadian commentators<sup>5</sup> have noted that the major impediment to increased reliance on arbitration as a means to deal with commercial disputes is the wide scope of potential judicial intervention in arbitrators’ decisions. The chief means available through most Canadian provincial arbitration statutes remains the “special case” procedure, but there are also judicial supervision, review and enforcement of awards.

The Ontario Arbitrations Act provides in sections 11 and 12 for a statutory right to review an arbitration award and sets out the grounds upon which an award may be set aside or remitted. Those sections provide as follows.

11. (1) The court may remit the matters referred, or any of them, to the reconsideration of the arbitrators or umpire.
- (2) The arbitrators or umpire shall, unless the order otherwise directs, make the award within three months after the date of the order.
- (3) Where an arbitrator or umpire has misconducted himself or an arbitration award has been improperly procured, the court may set the award aside.

The case law would seem to suggest that these provisions supply a complete code for the appeal of arbitration decisions, and, therefore, the common law right of appeal for an error of law on the face of the award has been replaced. In reality, it does not seem to matter, as the courts have used the same test in determining whether or not the arbitrator has engaged in misconduct. If the court finds that there has been misconduct,

---

<sup>4</sup> *National Gypsum Co. v. Dorrell*, 68 O.R.2d 689 (H.C.J. 1989).

<sup>5</sup> See e.g., Henri C. Alvarez, *The Role of Arbitration in Canada: New Perspectives*, 21 U.B.C.L. REV. 247 (1987).

the court may remit the matter to the arbitrators for their decision based on the court's determination. The question of whether the award should be partly or wholly set aside or remitted is in the discretion of the court taking into account all the relevant circumstances.

The courts have given the word "misconduct" a broad meaning and have included, as well as errors of law on the face of the award, such matters as ambiguity and uncertainty in the award,<sup>6</sup> corruption, fraud and the arbitrator's admission of a mistake.<sup>7</sup>

The parties may expressly include a right of appeal in their submission to arbitration. In Ontario, the appeal is to the Divisional Court and the procedure is set out in section 16 of the Act. In the absence of a specific right of appeal, section 11 of the Schedule to the Act provides that the award is final and binding.

Notwithstanding the absence of a specific right of appeal provision in the submission to arbitration, and even in the face of an explicit privative clause, Canadian courts are adamant in not acting so as to fetter their inherent judicial supervisory duties to review decisions of lower level judicial tribunals for jurisdictional errors. Jurisdictional errors may be found in a variety of actions by arbitrators. The decision in *Douglas Aircraft v. McConnell*, 99 D.L.R.3d 385 (1979), found jurisdictional error occurred when an arbitration tribunal:

- (1) misinterpreted their parent or constituting statute;
- (2) adopted procedures contrary to natural justice;
- (3) engaged in arbitrary conduct;
- (4) refused to discharge their function;
- (5) was engaged in a fraud;
- (6) was biased; or
- (7) acted on no evidence.

The distinction between jurisdictional error and error of law is often a difficult one to make.

It has been observed by John Keefe, in his article *Judicial Review of Arbitration Awards (Arbitrate or Litigate?: is Arbitration a Realistic Alternative to Litigation?)*,<sup>8</sup> that if a party wishes to preserve his right to review an arbitrator's decision and knows that a particular legal issue may arise, he should simply ensure that this issue is not put to the arbitrator. However, if the party wishes to make submission on the issue, avoidance is problematic. The way around this problem is to request that the arbitrator state a case for the opinion of the court pursuant to section 9 and 26 of the Act. Otherwise, it is likely that it will be later inferred that the parties intended that the arbitrator should decide that legal issue.

Section 26 of the Ontario Arbitrations Act also gives the court broad supervisory powers over arbitration tribunals by giving an arbitra-

---

<sup>6</sup> *Scotia Constr. v. City of Halifax*, 1 D.L.R. 316 (S.C.C. 1935).

<sup>7</sup> *McRae v. Lemay*, 18 S.C.R. 280 (1889).

<sup>8</sup> See Toronto: Canadian Bar Association, 1985.

tor authority to refer a special case to the Divisional Court and the Court the authority to order an arbitrator to refer the case to it.

Under the new British Columbia Commercial Arbitration Act, the "stated case" procedure has been replaced with a more limited right to an application for a determination on a question of law.<sup>9</sup> The court retains jurisdiction to grant a stay pending such an application.<sup>10</sup> The court's power to set aside for errors of law on the face of the record has been replaced by a limited right of appeal on a question of law.<sup>11</sup> However, Section 36 of the new British Columbia Act imports the case law on error of law as a grounds for attack of arbitration awards by its use of the word "misconduct" in its definition of "arbitral error."

The appeal provision (Section 31) of the British Columbia Commercial Arbitration Act was considered in the case of *Domtar Inc. and Belkin Inc.*<sup>12</sup> That decision seems to import a test somewhat reminiscent of the "patently unreasonable" test applied to appeal from labor arbitrations. While the scope of review in British Columbia may be more limited, there are still extensive remedies on an error in law.

Some of the Canadian commentators on arbitrations have cited the current law on the enforcement of arbitration awards as one of the reasons parties stay away from arbitrations. I doubt this applies to arbitrations between large companies. Senior officers of large public companies may not like an arbitration award but they either obey it or appeal it - flaunting it would carry sufficient penalties in terms of the company's business reputation; therefore, not paying the award is unlikely to be an attractive option even knowing that doing so could put the other party to great time and expense to enforce the award. Difficulty in enforcing awards rarely enters the decision-making process in determining whether to arbitrate or litigate a commercial dispute.

#### AWARDS OF COST

The Ontario Arbitrations Act does not have a specific provision for the award of costs except if a party requests and receives a postponement, he shall pay the costs thrown away. The British Columbia Act gives the arbitrator full discretion in making an order of costs under section 11. Canadian courts in all provinces normally award costs to the successful party in commercial disputes. Therefore, if a win is guaranteed, it is cheaper to litigate than arbitrate in Ontario.

What are those costs likely to be? I reviewed the file of a lengthy and complicated commercial arbitration I did in 1988. The hearing lasted about ten days and the decision was appealed to the Divisional Court and then to the Court of Appeal. Leave to Appeal to the Supreme

---

<sup>9</sup> Commercial Arbitration Act, B.C. STAT. ch. 3, § 33 (1986).

<sup>10</sup> *Id.* § 15.

<sup>11</sup> *Id.* § 31.

<sup>12</sup> 62 D.L.R.4th 530 (C.A. 1989).

Court of Canada was refused. Our own expert's bill was about \$90,000 in Canadian dollars. The costs for our own arbitrator and half of the third arbitrator was about \$10,000. Our internal legal costs of the arbitration were about \$80,000.

I have also reviewed a file for a trial of a commercial dispute in the Supreme Court of Ontario in 1988 that lasted about the same amount of time. The taxed party and party costs including expert fees were less than the costs of the arbitration mentioned above. The actual legal costs were about one third higher than the taxed legal costs.

#### SUPERFICIAL COMPARISON TO THE U.S. SITUATION

Everything I have said relates only to Canada. I have, however, spent most of the last two years buying a U.S. railway which should not have, but did involve court proceedings in the Bankruptcy Court, the District Court, the 3rd Circuit Court of Appeals, and the "Special Court" under the 3R Act. It also involved an arbitration commenced under the rules of the American Association of Arbitration Rules, which was eventually dropped.

There are some real differences between U.S. and Canadian procedures for both arbitration and litigation that affect a decision to arbitrate or litigate. First, generally U.S. discovery and interlocutory proceedings seem to go on forever, are not limited by relevance and are unbelievably costly. Canadian discovery procedures have been expanded in recent years by amendments to rules of procedures and cases but they are still considerably more limited. Second, there are differences in the law relating to the sealing of evidence in Canada and protective orders in the United States. U.S. courts and administrative tribunals give protective orders fairly readily which limit evidence to the eyes of the judge and counsel and prohibit its further disclosure or use. These orders follow the case through levels of appeal. Similar orders are available in U.S. arbitrations. Third, there are differences in arbitration rules and the grounds for judicial review. It appears that fraud is generally the only sure grounds on which to appeal an arbitration award in the United States. However, there are no time limits in the American Association of Arbitration Rules for setting a date for hearing or for rendering an award. Fourth, when U.S. courts award costs, they mean the filing fees, not the party and party legal costs. It can cost a lot to win.

#### CONCLUSION

As the Canadian law now stands, there is little reason to assume that the time required to finally settle a dispute involving an issue of law will be substantially less if the dispute is arbitrated rather than litigated. If the issues are essentially factual issues, the chances of the matter being concluded without court intervention are reasonably good, and an arbitration, particularly an arbitration under the new British Columbia Com-

mercial Arbitration Act, is likely to be quicker and less costly than a trial would be. This is particularly true if the factual issues are technical, deal with engineering issues, or involve cost accounting or evaluation issues.

If the resolution of the dispute requires introduction of market-sensitive information, this information is less likely to become available to your client's competitors under a Canadian arbitration as opposed to at trial. However, neither Canadian procedure has adequate procedural protection for such information.

There are international commercial arbitration statutes in most Canadian provinces that are based on or adopt the UNCITRAL model law on arbitration, and I think most general counsel of large Canadian companies favor arbitration of most international commercial disputes. If the contract specifically provides that the law of a Canadian province applies to the contract, there is less risk in litigation but it is really impossible to control the costs of litigation in foreign courts no matter which law is being applied.

However, for domestic disputes the Canadian legal system has not yet provided a consistent statutory framework supported by judicial interpretation that makes arbitrations more attractive. The majority of commercial disputes that cannot be settled by negotiation between the parties involve more than technical issues, they involve a basic disagreement on the interpretation of a business agreement or arrangement. The relatively small savings in time and money that can be achieved by arbitrating rather than litigating such disputes is more than offset by the lack of predictability and lack of finality of arbitration decisions.

