
January 1991

Discussion after the Speeches of James H. Carter and Professor Jean-Gabriel Caste

Discussion

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

 Part of the [Transnational Law Commons](#)

Recommended Citation

Discussion, *Discussion after the Speeches of James H. Carter and Professor Jean-Gabriel Caste*, 17 Can.-U.S. L.J. 511 (1991)

Available at: <https://scholarlycommons.law.case.edu/cuslj/vol17/iss2/37>

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.

Discussion after the Speeches of James H. Carter and Professor Jean-Gabriel Castel

QUESTION, *Mr. Coombe*: Jim Carter raised some reasonable concerns pertaining to the potential for intrusion of courts in United States arbitration matters. My question, however, is can most of those problems be resolved by drafting? The problem facing arbitration is that people have not been trained in drafting arbitration clauses adequate to deal with the competency of arbitrators to pass on arbitrability. Moreover, these provisions must expressly be included in the clause, as should the problems of provisional remedies and the problems of discovery. Would these not be recognized on the four corners of the act?

ANSWER, *Mr. Carter*: There is a basic philosophical difference in the arbitration community as to how an arbitration clause should be drafted. One of the advantages of arbitration is relative simplicity, which means relative standardization. We have gone a long way in legislative drafting so that a fairly simple clause, like a Triple "A" clause, can be taken out of a pamphlet and put in a contract, and it will bring in a whole lot of things that will solve a host of problems. That is a wonderful thing. I am a strong believer in such simplicity. But if you start saying that, "In addition, we want a little bit of discovery, but not too much; and in addition, we want to be sure there are not any punitive damages; and in addition, concerning the governing law clause where we said the law of California applies, we did not mean our international arbitration statute," every lawyer is going to have his own version of what this clause ought to look like. The reality is, when drafting such an agreement, when "clause twenty-nine," (the arbitration clause), is reached, nobody really wants to have two lawyers with their own versions of all these details battling it out.

Simple inclusion of clauses can be accomplished with varying degrees of success. If the arbitrators are to be the sole judges of arbitrability, most courts would hold that such provisions would override the language in Chapter One of the Federal Arbitrations Act. But the price of uniformity may be a very high one.

QUESTION, *Mr. Gerhart*: Given the concept of *lex mercatoria*, which is popular in Europe, would you comment on how a U.S. court might react if asked to confirm or enforce an award based on that principle?

ANSWER, *Mr. Carter*: I do not think it presents much of a problem in the United States. There is a fairly recent article on *lex mercatoria* by Professor Lowenfeld, in which he states the thesis that *lex mercatoria*, as properly understood, is not a concept which is rooted in anybody's law.

Instead, it is international parts of different concepts on which people instinctively draw when deciding commercial transactions. The courts will likely hold that the parties bargained for it, and, therefore, they will apply it.

QUESTION, *Mr. Miller*: Is arbitration broad enough to include mediation for legal purposes? That is, could an agreement to mediate be considered an agreement to submit to arbitration for legal purposes, and thus provide a legislative framework for mediation as well?

ANSWER, *Professor Castel*: If you are thinking of a clause that would only deal with mediation, but that states no more than that, I would say no. If the parties agree only to mediate, that is not arbitration. The two are separate and distinct institutions. Our courts would take literal interpretation and go no further. You could not interpret an agreement to mediate as an agreement to arbitrate unless you have a clause that was quite clear on that point.

QUESTION, *Professor King*: The ICSID, the International Convention for the Settlement of Investment Disputes, is a convention that many countries are involved in where disputes between a country and an investor are subject to the enforcement provisions of the convention. The question is, what has been the U.S. courts' approach towards the enforcement of those awards?

ANSWER, *Mr. Carter*: We have not received a whole lot of law concerning this, unfortunately. The ICSID, which is a branch of the World Bank, has had short of thirty cases filed in its long life. There have not been many awards, and fortunately, most of those have been complied with. Therefore, there is a gap of case law here. The cases that have come before a U.S. court have been treated much like any other award. They all have been straightforward even though they were awards against a sovereign. As long as they had clearly gone through the arbitration process, that was sufficient. The one case where they did not go through the process caused some problems.

The big difficulty with ICSID is that it has gotten itself tangled up because it has an internal review procedure. Because ICSID is a body where investment claims are resolved against sovereigns, the draftsmen came to the conclusion that some way was needed to review the decisions because they were not supposed to be reviewed by municipal courts on the merits. An internal review before the award becomes final was created. Having discovered that about twenty cases into the process, ICSID has now been doing it to every decision. It has caused a lot of anxiety for people with ICSID clauses in their agreement. They wonder whether they will ever see the day when they will be able to have an award to take to a court to enforce. If they get there, I think the courts will love it.

QUESTION, *Mr. Coombe*: How do you stand on replacing the Federal Act with the Model Act?

ANSWER, *Mr. Carter*: Let's do it.

QUESTION, *Mr. Coombe*: Is it politically opportune to do so?

ANSWER, *Mr. Carter*: For most people, it is not politically opportune right now. Most people who have reviewed the UNCITRAL Model Law, since it came along in the mid 1980s as a possibility for the United States, have argued that we do not need it. The pro-status-quo side of the argument is that we have a lot of developed case law interpreting a statute that is uniform across domestic and international law. To some extent it is uniform across commercial laws since the Federal Arbitrations Act applies to other areas as well. These people do not want to throw out all this case law. They believe that we can find the answers under U.S. arbitration. However, it is very hard to do that. You really have to read the cases. You cannot just pick up the statute and find an answer. One would think that a "user-friendly" system of law ought to be somewhat more transparent. Additionally, as we begin to have states thinking that it is a good idea for various reasons to enact a state version of the UNCITRAL Model Law, we are creating a number of conflict issues and we are unsettling the law somewhat anyway.

Finally, on the non-status-quo side, I would say that we are seeing a number of other places around the world implementing something based on the UNCITRAL Model Law. It is the trend in Canada. It is the law in Australia, Scotland, Hong Kong and more. We are going to live in a world where UNCITRAL Model Law concepts, which are not very different from our current law, are going to be the law. We ought to be moving toward standardization and transparency for users.

QUESTION, *Professor King*: Would you comment about the state laws and how you regard them as development in terms of the growth of the arbitration industry?

ANSWER, *Mr. Carter*: Somewhere between pernicious and inconvenient. They were enacted in a number of cases in states which had very antiquated domestic arbitration laws generally, and were not put in the Uniform Model Law or had some lacuna accumulate in domestic arbitration law by bad decisions. An argument was that federal law will preempt it. Well, this is a pretty bad argument, muddying the waters still further. But the *Volt* case tells us that the federal law does not preempt many things. It has left it unclear what federal law does and does not preempt. It does not preempt anything that is not directly in conflict with the Federal Arbitrations Act, but there are very few things in the Federal Arbitrations Act to such a degree of specificity that you can say that the standard has been met. It is supposed to preempt laws that are unfriendly to the general idea of pro-arbitration. For instance, a state statute says that you cannot arbitrate real estate disputes. Short of that, what would a state do that would be so directly contrary to arbitration that it would be inconsistent?

That leaves a lot of room for litigation. I guess in twenty years we will have litigated most of the possibilities. It seems to me they have created problems for us with no great plus.

QUESTION, *Professor King*: Mr. Castel, Canadians do not have a problem with this because the entire country has adopted the same law. The provinces have adopted the Model Law, correct?

ANSWER, *Professor Castel*: In the international commercial field, we have the same law across the country including the territories, and at the federal level, too. But the federal law is restricted to federal matters and the rest applies to provincial matters. So we have a uniform law. On the provincial level, as it was pointed out earlier, we have the Arbitration Acts which deal with domestic arbitration. Ontario is trying to adopt a new version of that legislation. I do not know if the new government is going to present a new bill again. Basically there are two statutes which more or less implement the UNCITRAL Model Law.