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The Current Context: Where Do We Stand--Internationally and Domestically

Gerald Aksen

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OUR SUBJECT this morning is "Dispute Resolution, Where Do We Stand—Internationally and Domestically?" We stand, in my view, in a state of confusion. We are at a crossroads where we may have to look to history for some guidance.

The staggering nature of the problem was brought to my attention recently when I met with a friend who sits on the Supreme Court of the State of New York, which is the trial court in New York. The judge used to work with me years ago in the field of arbitration. She told me that during the past few years New York has switched to an individual assignment system of court filings whereby the judge who first gets the case stays with that case forever. The idea behind the system is that judges will have an incentive to complete that case in a relatively short time period.

My friend’s present case load, however, is two thousand cases. She said to me, “I read that the associates at law firms like yours work 2,000 hours a year. If I worked 2,000 hours a year, I would have one hour per case.” The lawyers may spend thousands of hours of time writing the briefs for one of those cases, but a citizen in New York will get an average of one hour of the judge’s time to have that dispute resolved.

If I were to ask anyone in this room what is alternative dispute resolution (ADR), I believe you would say it is an alternative to the courts because the courts are the standard, preferred governmental system of resolving disputes. The government provides it for us and pays for it through our tax dollars. The cost of governmental justice, however, has now reached the breaking point. In New York, the chief judge and the governor have been arguing over the size of the court budget. Are we going to get a little less justice from now on because that same judge who has two thousand cases a year will have a twenty percent increase in her case load for the same cost to the New York taxpayer.

Now, why do I say look to history? If we held this conference several hundred years ago and asked the participants what is alternative dispute resolution, I suspect they might have had a different response. Historically, when there were no courts, the standard method of resolving disputes was by war, intimidation, or arbitration.

Historically, arbitration was the method by which merchants settled
their disputes. They did not have a courthouse. If a trader delivered silk from China to India, there was no international courthouse (as there are none today) in which to dispute the quality of the cloth or the price. A local merchant, in what was called a “Pie Powder Marketplace,” was the arbitrator who resolved the dispute. But when sovereign kings and their counsellors (including, significantly for the United States, the English) looked at the problems of settling their local disputes, what evolved? A national governmental court system.

Look at dispute resolution in the United States today, what do we see? A court system that is obsolete, barely functioning, cost ineffective, and in total disarray. We see thirty thousand lawyers a year turned out by law schools that teach students how to get into the courthouse and what to do once there. We are perpetuating a system that is going to sink us completely into the abyss, if it has not already done so.

My historical picture of dispute resolution does not include arbitration, because in my view, arbitration in the United States is only seventy years old. It started in 1920 when New York passed the first law in the country that recognized voluntary agreements to arbitrate. As late as the 1950s and the 1960s, if a contract was drafted with an arbitration clause, that clause was revocable in half of the states at the will of either party. It was an unenforceable agreement because United States common law came from the common law of England, where arbitration agreements were unenforceable because they ousted the courts of jurisdiction and were against the public policy of the sovereign.

Arbitration, now so highly lauded, is therefore fairly new in the United States. We heard with praise that Canada ratified the New York Convention in 1988. But why did it take so long? It is noteworthy that both Canada and the United States have a federal/state jurisdictional process. It took the United States until 1970 to ratify the New York Convention, twelve years after it was promulgated, because many of our states did not recognize arbitration agreements. The federal government could not get ahead of the states, so the United States did not ratify the New York Convention until the states were convinced to pass their own modern arbitration laws.

Historically, we are looking at a process of government-sanctioned voluntary arbitration that still is relatively new. On the domestic scene, there is an explosion of what is called alternative dispute resolution techniques. By alternative dispute resolution techniques, I mean domestic alternatives to the courts. From 1920 to the 1980s, what was meant by alternative dispute resolution was primarily voluntary arbitration. That means two or more parties voluntarily, of their own free choosing negotiate a procedure and put it in their contract, and state and federal legislators make that arbitration promise enforceable.

One could make a case that the arbitration process never really caught on. The American Arbitration Association (AAA) has been in existence since 1926. From 1926 to 1970, its case load ran from zero to
maybe three, four, or five thousand cases a year. Now in its sixty-fifth year, it has sixty thousand cases. The AAA is probably the largest private tribunal in the United States, if not in the world, but it took sixty-five years to get there.

A lot of people do not like to negotiate arbitration clauses in contracts and therefore do not do so. As I told you, lawyers are not taught how to negotiate arbitration clauses in law schools. It is assumed that one only gets justice in one place in U.S. law schools - in the courthouse. That is perfect justice because if you lose the first time, you can appeal it again, and again, and again, up to the United States Supreme Court, until you get the "right" decision. Such an appeals procedure is never permitted in arbitration. Why? Because you only get one trial and that decision is final and binding. Such a result is "un-American."

So, voluntary arbitration has really not caught on. There are two hundred thousand cases a year filed in the federal courts in the United States, without counting the state courts. That number alone may be more than all of the arbitrations in the United States. My judge friend told me that her pending caseload may be more than all of the international arbitrations pending in the world.

Those people who will tell you that voluntary arbitration is booming, in my view, may be wrong. Arbitration cases constitute an insignificant percentage of the lawsuits filed in the United States. In an effort to overcome this relative lack of use, those who believe that the only thing that is wrong with voluntary arbitration is that it is too final, have evolved a new method of dispute resolution called Non-Binding Dispute Resolution. If we were to ask where the United States is right now in the development of dispute resolution, the answer is it is going through a phase of Non-Binding Dispute Resolution. This form of ADR has been hailed as the "solution" - just uncouple the finality and everybody is sure to use it.

Indeed, the federal government is jumping on the band wagon and passing law after law providing for mandatory compulsory dispute resolution; but it is compulsory arbitration with a non-binding result. That is where the United States stands domestically in dispute resolution. That form of ADR is still floundering and will continue to do so.

The international scene fascinates me. I am a practitioner who spends half my time outside of the United States doing what is known as old-fashioned, voluntary international arbitration, a process that has been around, among merchants, for centuries. This process now has the benefit of a modern treaty, which even the United States and Canada have ratified, and a United Nations endorsed UNCITRAL Model Law which our Canadian friends have enacted. I do not think there is any significant, meaningful differences between the United States Arbitration Act and the Model Law. I am just glad to see that the Canadians have ratified a modern international arbitration statute that augurs well for the future of Canadian-United States relations.
What I find especially interesting is that, in the United States, the law that is evolving domestically in the field of arbitration is coming in the back door, from the law of international arbitration. Because the world today is becoming so small, almost every client I have does business outside of the United States. The products they make may be manufactured elsewhere, and they are certainly sold elsewhere. There is no such thing as a fairly large-sized American company today that is not participating in the international business arena.

By an historical accident, the law of international arbitration is so favorable in the United States that it has made a distinction between domestic dispute resolution and international arbitral resolution. The United States Supreme Court in the 1970s and 1980s fashioned decisions in the 1970s and 1980s which asserted that when a truly international contract is drafted, it will be looked at a little differently than a domestic United States contract. The enforcement of international arbitration agreements and the enforcement of foreign arbitral awards are liberally favored.

The United States court decisions have done precisely that. Canada may well follow the same path because the New York Convention, that both Canada and the United States have ratified, urges the courts in international cases to construe problems liberally in order to follow that treaty. As an international treaty, the New York Convention is more important than any domestic state statute. The courts, at least in the United States, are indeed following that approach.

But if you enforce an international arbitration agreement with liberality, how can you justify not doing the same for your domestic contracts? Why should a Canadian be able to enforce an arbitration agreement in New York with ease and a New Yorker not be able do so? The United States courts are saying the answer is that you cannot make any distinction.

The result is that United States domestic law is now being helped by our international law treaty obligations that the United States follows to the letter. The United States is the easiest place in the world for the enforcement of a foreign arbitral award. Foreigners get a very good deal when they arbitrate here. For anyone who arbitrates in Canada and brings the award here, it is abundantly clear that the United States courts will enforce it.

Unfortunately, our Canadian Ambassador has expressed a sentiment shared around the world - foreigners do not like to arbitrate in the United States. Why? Because we have developed this perfect legal system of justice that has discovery, disclosure, and all kinds of things that frighten the hearts of people around the world. Some lawyers can no longer go to Japan unless they sign an affidavit stating that they are not there to take discovery. They keep a watch out for American lawyers right at the border.
We have struck such fear in the hearts of foreign businesses around the world because of discovery, international scholars will be dealing with this subject for the next twenty years. We are a minority on this subject. Discovery may be right philosophically, but I am not sure the rest of the world agrees with the American view.

That fear has invaded the arbitration field, even though United States arbitration law is the most liberal in the world. The trouble is that we have come about it backwards. In most other countries, if you have an arbitration clause in a contract, that arbitration clause is followed and you never go to court. In the United States the law developed the opposite way. Under American law, the question of arbitrability is a matter for the courts to decide. In every other civil law jurisdiction, the arbitrator's jurisdiction is decided by the arbitrator himself. As a result, unfortunately, when a contract provides for United States law, some view the law as if it is very easy to go to court to interfere with the arbitration. This is the view of many in the world.

The trouble is that the world will not hear what happens when arbitration cases wind up in court. United States law has now evolved to the point where the court puts such a presumption of validity behind the arbitration clause that the judge will almost immediately throw the case out, back to the arbitrator. You may lose several months on a motion, but you will get right back to arbitration. Indeed, some believe it appropriate to bring a Rule 11 (frivolous motion) proceeding against the party who tries to delay the arbitration.

Further, a review of United States case law in the 1980s shows no major commercial issue left that is not capable of settlement by arbitration. Whether it is antitrust, securities, RICO, or patent claim, the United States can arbitrate it. The United States is ahead of the rest of the world. Many of those cases cannot be arbitrated in civil law countries. They can in the United States. I tell my foreign friends, "Trust me. Bring your arbitrations to the United States because here you can arbitrate anything."

Our courts have gone one step further. They have so liberally interpreted the concept of a foreign arbitral award that the title is not even accurate. The treaty is called, "The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards." It is really a convention on the recognition and enforcement of international arbitral awards. Why do I say that? Because one can now enforce under that treaty any arbitration award rendered in the United States, so long as it involves international commerce. For example, if there is a dispute between a Canadian party and a Mexican party and they arbitrate in New York, that is an international arbitration which United States courts have construed to fit within the definition of a foreign arbitration award.

The parties get the benefit of a liberal enforcement of the agreement in the United States, and a very quick enforcement of the award. The United States has become a world leader in international arbitration. My
hope for the future of the domestic dispute resolution concept is that it keeps coming in that same back door from the international field. So far it is coming in well.

The pertinent questions that need to be discussed are: Who is paying for all of this? What is the cost? What is the effect on the governmental systems? Who has access to these mechanisms? Often people talk in terms of the individuals who do not need help. Most people think in terms of big business disputes. That is who I represent. Big business can usually take care of itself. It does very well on these international agreements. If we force the American public to settle their disputes privately, out of court, who pays for that? When business goes to private arbitration, it foots the bill. It does not take that money from the taxpayer's pocket.

The United States government is now mandating the use of alternative dispute resolution, but think about its motives. It is looking for ways to save money. If we can push these cases out of the public courts, are the citizens getting the same form of justice? I can file a summons and complaint for a middle-class individual in New York for one hundred and seventy dollars. I cannot file an arbitration for a hundred and seventy dollars. This cost factor is going to have an effect on the economy because the cost of settling disputes in the United States has an impact on the Gross National Product.

With seven hundred thousand lawyers in the United States, we could pass a law that each lawyer must try two cases each year and immediately resolve the court's caseload situation, except for one problem. Who would the judges be? We do not have enough courthouses or judges to do that. There are solutions to the delays, but who will pay for them? Who has the ability?

Further, the court system has the advantage of precedent. A lawyer can advise a client based on reading court decisions as to what the future might bring. We have purposefully kept arbitration and other dispute resolution systems confidential so that there is no way to gain predictability. Is that what we are now mandating, a “free for all” in which every case will be confidential? From my own past experience, labor mediators never had to disclose what they decided because the success of mediation was to get the matter resolved. They do not look at the cost. In New York City, the public is now paying for the cost of mediation of twenty-year-old labor contracts despite the fact that the City does not have the money. Did the mediator do a bad job twenty years ago? No. He did his job. The mediator resolved the pending dispute, and the police did not go on strike. However, nobody looked to the long-term impact.