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Résumé de l'article

Le présent article veut démontrer dans quelle mesure les parties privées à une transaction commerciale internationale dans le territoire de l'entente de libre échange, peuvent éviter les différends quant à la loi applicable à leur contrat et quant à la juridiction compétente pour trancher un différend découlant du contrat. Comme l'étude souligne des limites significatives au principe d'autonomie de la volonté à ces questions, l'auteur conclut que l'intervention gouvernementale est nécessaire pour assurer un climat favorable au commerce international dans le territoire de l'ALÉNA. L'auteur examine aussi l'utilisation croissante de méthodes alternatives pour régler les différends issus de contrats internationaux et fait un certain nombre de recommendations afin d'améliorer et d'augmenter leur utilisation.

Dispute Prevention and Dispute Resolution Post NAFTA : Choice of Law and Forum Selection Clauses*

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SUMMARY

The following article describes the extent to which private parties to an international transaction in the free trade area may avoid disputes as to the law applicable to the contract and as to the court that would have the jurisdictional competency to hear disputes arising therefrom. As the study demonstrates serious limitations to the effectiveness of party autonomy, the author concludes that Government intervention is necessary to ensure a more favourable framework for international commercial transactions within the free trade area. The author also examines the growing use of alternative methods to resolve international disputes and makes a certain number of recommendations to improve and increase their use.

RÉSUMÉ

Le présent article veut démontrer dans quelle mesure les parties privées à une transaction commerciale internationale dans le territoire de l'entente de libre échange, peuvent éviter les différends quant à la loi applicable à leur contrat et quant à la juridiction compétente pour trancher un différend découlant du contrat. Comme l'étude souligne des limites significatives au principe d'autonomie de la volonté à ces questions, l'auteur conclut que l'intervention gouvernementale est nécessaire pour assurer un climat favorable au commerce international dans le territoire de l'ALÉNA. L'auteur examine aussi l'utilisation croissante de méthodes alternatives pour régler les différends issus de contrats internationaux et fait un certain nombre de recommendations afin d'améliorer et d'augmenter leur utilisation.

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INTRODUCTION

While we have entered a new era with the North American Free Trade Agreement, a positive legal environment reflecting the globalization of the economy was already in place in the three signatory countries. For example, Mexico had already become a party to a number of important Inter-American[1] and other multilateral conventions on private international law and has recently modified its national rules of private international law providing a more favourable framework for international commercial transactions than had previously existed.[2] This is also the case in Canada as illustrated by the recent Supreme Court decisions in *Morguard*,[3] *Amchem*[4] and *Hunt*[5] (coming out of the common law provinces), and by the provisions of the new *Civil Code of Québec*, in force since January 1,

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1. Mexico has been a party to three Inter-American Conventions on Private International Law (namely : Panama, 1975; Montevideo, 1979, and La Paz, 1984) sponsored by the Organization of American States. As a result of those sessions, Mexico has adopted the following Inter-American Conventions : (a) On Letters Rogatory (Panama), (published in the *Official Gazette — O.G.*, April 25, 1978); (b) On the Taking of Evidence Abroad (Panama), (*O.G.* September 7, 1987); (c) On Protocol to the Taking of Evidence Abroad (La Paz), (*O.G.* September 7, 1987); (d) The Legal Regime of Powers of Attorney to be Used Abroad (Panama), (*O.G.* August 19, 1987); (e) On Proof of Foreign Law and Information (Montevideo), (*O.G.* April 29, 1986); (f) On the Extraterritorial Validity of Foreign Judgements and Arbitral Awards (Montevideo), (*O.G.* August 20, 1987); (g) On International Commercial Arbitration (Panama), (*O.G.* April 27, 1978); (h) On Letters of Exchange, Debit, Notes and Invoices (checks not included) (Panama), (*O.G.* April 25, 1978); (i) The Inter-American Convention on Jurisdiction for the Extraterritorial Effectiveness of Foreign Judgements (La Paz) of 1984.
There are other important international conventions to which Mexico is also a party, namely : New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards, (*O.G.* June 22, 1971); The Vienna Convention for the International Sale of Goods, of 1980 (from January 1, 1989); The Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters on March 18, 1970, in 1988; The Convention on the Limitation Period in the International Sale of Goods of April 14, 1980, collectively called the "Limitation Convention" in 1988, and in 1988 the Convention on Representation as regards the International Sale of Goods, Geneva, 1983.

2. In 1993, the Federal Code of Commerce's rules on commercial arbitration were repealed and replaced by a new Chapter on Internal Commercial Arbitration (Articles 1415 to 1437) and apply as well to international arbitration (*1993 Decree Amending the Mexican Code of Commerce* and the *Federal Code of Civil Procedure*, in force since July 23, 1993). The reform substantively incorporates the model law of Uncitral, the New York and Panama Conventions, with some variations.
Mexican rules of private international law were also recently modified but in various statutes and civil codes. Furthermore, each state has its own Civil Code, Commercial Code and Code of Procedure. They do not differ substantially from each other and from the codes in the Federal district. Reference in this paper shall be to those private international law rules in the *Federal Code of Commerce*, the *Federal Code of Civil Procedure* and the *Civil Code for the Federal District* (which is suppletive law for all matters not regulated by the *Commercial Code*).

3. *De Savoye* v. *Morguard Investments Ltd.*, [1990] 3 R.C.S. 1077.

4. *Amchem Products Inc.* v. *Workers Compensation Board*, 25 March, 1993, n° 22256, J.E. 93-674 (S.C.C.).

5. *Hunt* v. *Lac D'amiante du Québec et al.*, Nov. 18, 1993, file 22637.

1994.[6] However, the absence of uniform rules on choice of law in contracts, on jurisdiction, and on recognition and enforcement of foreign judgments leaves international commerce and trade within the NAFTA countries in a basically unsatisfactory situation at a time when their economies are becoming more and more interdependent each day. Legal uncertainty and multi-state proceedings are common place, resulting in delays and exhorbitant costs.

The object of my paper is to focus both on what parties doing business within the free trade area may do to prevent disputes as to the applicable law in international commercial transactions and on devices they may use to resolve any disputes that may arise. Some consideration shall be given as to how the governments of Mexico, Canada and the United States could improve the framework in these matters, keeping in mind the philosophy behind the NAFTA.

I. Preventing Disputes as to the Applicable Law

I wish to emphasize at the outset that the present discussion is only one aspect of dispute prevention, which includes a variety of measures, such as compliance programs, pre-contract negotiation, partnering and other initiatives that look well beyond legal institutions.

A. Applicable Law in the Absence of a Choice of Law Clause

In all of the jurisdictions of the parties to the NAFTA, where no choice of law clause has been included in the contract, the courts and arbitrators are given a free rein in ascertaining the law that will govern the contract.

In Québec, the new codal provisions direct the courts to apply the law of the country with respect to which the contract has its closest connection (Art. 3112 C.C.Q.). This will be determined by a full analysis of the objective and subjective connections to the contract, such as the place of conclusion, the place of performance, the place of negotiation, the location of the subject matter of the contract, the domicile, residence, nationality, the place of incorporation and the place of business of the parties. Nevertheless a presumption exists that the law having the closest connection is that of the residence of the party who is to effect the obligation which is characteristic of the contract (Art. 3113 C.C.Q.). For an enterprise, this is to be that of its establishment. Where there are a number of establishments, the applicable law should be that of the establishment directly linked to the contractual obligation. The rule does have the advantage of restricting judicial discretion and reducing uncertainty; but it will not always be easy to apply. The court will first have to determine the characteristic obligation, which is generally the obligation for which the payment is due. In the final analysis, it is really only a fictional pretension for prefering the law of the stronger party, *e.g.* supplier of goods,

6. Book X of the New *Civil Code of Québec* on Private International Law. See in particular the rules on party autonomy (Art. 3111 C.C.Q.), on forum selection (Art. 3165, 3148, 3168 C.C.Q.), and on the recognition of foreign decisions (Art. 3158-3168 C.C.Q.). Hereinafter, the *Civil Code of Québec* (1994) is referred to as the C.C.Q. or "The New Code".

over that of the weaker party, the payer. In any event, even if the characteristic obligation is easily established, it is a rebuttable presumption. For example where a Mexican firm contracts with a Québec enterprise to construct a property in Québec, a court might feel that given the links to Québec, it is Québec law which has the closest connection to the contract. In some complex contracts, such as counter trade, turn key, banking or licensing contracts, joint venture, consortia, barter (*e.g.* when Boeing exchanges jets for Saudi Arabian oil) or franchise agreements, the characteristic obligation will be difficult if not impossible to determine, and reference must then be to the principle of closest connection (Article 3112 C.C.Q.).

The New Code derogates from these general rules for particular contracts, such as the contract of sale (Article 3114 C.C.Q.), where failure to designate will result in the application either of the law of the establishment of the seller or that of the purchaser. Where a party has multiple establishments, the courts should logically adopt the solution adopted in The Hague Convention of 1985 on the *Law Applicable to the International Sale of Goods* from which this article was drawn, and apply the law of the establishment having the closest connection to the contract. However, the Code is silent on this matter and a court might decide to apply the law of the buyer or seller's *principal* establishment. However, even in the case of the nominate contracts there is the potential application of another law to govern the whole or part of the contract via the escape clause (Art. 3082 C.C.Q.). Additional insecurity also results from the application of certain laws, local or foreign, that the court considers to be of vital importance (Articles 3076, 3079 C.C.Q.).

Under Anglo-Canadian law, while special rules may apply for some contracts, the courts apply the proper law of the contract, which is generally considered to be the system of law with which the transaction has its closest and most real connection. Just as under the *Québec Civil Code*, the court will look at all the circumstances, without any presumptions, although the place of performance is likely to be regarded as the proper law if the contract is to be wholly performed in one territory.

In the United States, aside from special rules for particular kinds of contracts, the courts apply the formula of the Second Restatement which applies the law of the state which, with regard to the particular issue, has "the most significant relationship" with the parties and the dispute. In contracts, the factual situations to be taken into account include the places of contracting, negotiation and performance of the contract, the location of the subject matter and the domicile, residence, nationality or place of business of the parties. In some contracts, there is a proclamation that a certain law will *usually* apply[7] such as where the place of negotiating the contract and the place of performance are in the same state. In other instances a certain law will apply. However, this too is tempered with provisions that usually begin with the word "unless".[8]

In Mexico, although the court is directed to apply the law of the place where the contract is to be performed, no certainty is guaranteed in the interpretation of this rule. For example, leaving aside the possible application of the Vienna

7. S. SYMEONIDES, "Exception Clauses in American Conflict Law", (1994) *Am. J. of Comp. Law* 813, p. 826.

8. *Id.*, p. 828. This applies in contracts for the sale of an interest in movables (Section 191 of the Second Restatement).

Sales Convention to some of the issues,[9] in a sale from a Québec seller to a Mexican buyer, where the goods are to be delivered FOB Montréal and where the price is to be paid, performance of the agreement would appear to have taken place in Montréal and the law of Québec should be the governing law. However, a Mexican court could conclude that there is also a concrete performance (*cumplimento material*) to consider, which can only be ascertained when the goods are put to use in Mexico, resulting in application of Mexican law.[10]

Before an arbitral authority, to the extent that arbitrators are not deciding on a purely *ex aequo et bono* basis, all decisions are made pursuant to some law. In this regard, they enjoy considerable freedom in the determination of which law governs the agreement. In truth, arbitral tribunals are not really wedded to any particular national conflicts law. Nor is there any uniformity under the laws of the parties to the NAFTA as to how the arbitrator should choose the applicable law in the absence of choice by the parties. For example in Québec, according to Paragraph 6 of Article 940 of the *Code of Civil Procedure* of Québec (hereinafter called the C.C.P.), the arbitrator is to use the Uncitral model law, where choice of law is dictated under the terms of Article 28 by applying the conflict rule of a jurisdiction which the arbitrator deems appropriate (the indirect method). On the other hand, Article 944.10 C.C.P. provides for the direct method, pursuant to which the arbitrator is to apply the pertinent rules of a jurisdiction which is declared appropriate without the need to invoke any conflict rule. The British Columbia *International Commercial Arbitration Act* adopts the direct method (section 28(2)). As far as *Mexico* is concerned, the indirect method used is drawn in general from the *Uncitral Model Law on International Commercial Arbitration.*

> Failing any such designation by the parties, the arbitral tribunal shall determine the applicable law taking into account the characteristics and connection of the case.

To avoid any doubt, an arbitrator would be well advised to justify a decision by the methods in force in any jurisdiction where the award could be executed.

Although the rules governing international arbitration in Mexico are very similar to the rules of the *Uncitral Model Law on International Commercial*

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9. The United Nations Convention on Contracts for the International Sales of Goods, in force in the Unites States from January 1st, 1988, in Mexico from January 1st, 1989, and in Canada (all of the provinces) from May 1st, 1992. Most of Canada's trading partners are parties to the Convention, with the exception of Japan and the United Kingdom. Amongst the Latin American Countries, only Mexico, Argentina, Chile, Ecuador and Cuba are parties to the Convention. The implementing legislation in Québec is known as *La Loi concernant la Convention des Nations Unies sur les contrats de vente internationale de marchandises*, L.Q. 1991, c. 68. There is copious literature on the Convention. For a comprehensive analysis see J. HONNOLD, *Uniform Law for International Sales Under the 1980 United Nations Convention*, Deveter/ Boston, Kluwer, 2nd ed., 1991.

10. Article 13, Section V of the *Mexican Civil Code*; Professor Leonel PÉREZ NIETO CASTRO of the International Study Center of the National University of Mexico, "An International Transaction : Mexico-USA-Canada, the Mexican point of View", an unpublished text, pp. 4-5.

Arbitration from which they were drawn, they do differ in some significant aspects, such as the applicable law in the absence of a designation by the parties.[11]

B. PARTY AUTONOMY UNDER THE LAWS OF THE PARTIES TO THE NAFTA

The uncertainty as to the applicable law in the absence of a choice of law, suggests that the parties negotiate a choice of law clause at the outset, not only to direct the courts or arbitrators, but to guide the parties and define for them the legal system under which their rights will be determined. In this way the chosen legal system can provide gap-filling function for the agreements.

While all the NAFTA countries uphold the principle of party autonomy, a principle which makes the express or implied intention of the parties determinative of the legal system by which the contract should be governed, there is however no uniformity as to whether the contracting parties' choice is completely unfettered. In the *United States*, the courts will generally honor a selection of law if that State or Nation has a reasonable relationship to the parties or the transaction,[12] while in the Canadian common law provinces and territories, the selection must be *bona fide* and *legal*, and not chosen to evade the mandatory provisions of the objectively determined law. It remains unclear whether the selection of a system of law which had no connection with the transaction would be recognized.[13] In *Mexico*, the Code allows for a "validly designated" law to govern contracts. Finally in *Québec*, the New Civil Code allows for an unrestricted choice of law. It was felt that there is no reason why the parties should not be free to select the law which will govern their transaction, regardless of whether the law bears a relation to the transaction or not. After all, the parties are free to choose where their dispute will be resolved, the method of dispute resolution and, in arbitration, the rules of procedure. It was felt that the desire for certainty, predictability and the interests of international commerce freedom must prevail. In fact, the choice of the laws of a neutral country might be a compromise, or it might be because the chosen law has a well developed body of laws for the area of law involved (*e.g.* English law is often chosen to govern marine insurance agreements).

In all three countries, party autonomy is limited by the necessary or potential application of laws of immediate application, *i.e.* those considered to be of vital importance to the economic, political or social interests of a country, such as statutes dealing with currency regulations, or restrictive trade practices, antitrust legislation, and workmen's protective legislation. Of course, the public policy rules of the forum can also justify refusal to apply a designated law. As a result, a penalty and liquidated damages clause, valid under the chosen law, might not be honoured in another country.

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11. As article 1445, title four of the *Code of Commerce* and published in the *Diario Official de la federación* of July 22, 1993.

12. See *Uniform Commercial Code*, Sections 1-105; *Scherk* v. *Alberto-Culvers Co.*, (1974) 417 U.S. 506; *General Electric Co.* v. *G. Siempelkamp Gimbett & Co.*, (1993) W.L. 2906 (Ohio). Note that New York has adopted a statute providing for the recognition of a choice of law clause dictating that New York law governs in situations when the transaction involves at least $250,000.00 even in the absence of a reasonable connection of the agreement to New York.

13. J.-G. CASTEL, *Canadian Conflict of Laws*, 3rd ed., Toronto, Butterworths, 1993, pp. 554-555 and authorities cited.

C. DRAFTING CLAUSES TO AVOID DISPUTES AS TO APPLICABLE LAW IN THE NAFTA COUNTRIES[14]

1. In General

Given these restrictions on party autonomy, drafters of international agreements should at least : (1) be certain that there is a reasonable nexus between the chosen law and the contract; (2) that they have a good knowledge of the content of the chosen law and seek out competent foreign counsel. This will avoid choosing a law which could render the contract null; (3) that the contract is valid and enforceable under the laws of any country which has a genuine link with the transaction, for example, the law of the residence of the debtor of an obligation, or of the place of performance. This is also important even where arbitration is the dispute resolution method, as the arbitrator will likely take into consideration the mandatory rules of a jurisdiction where the arbitral award is likely to be enforced; (4) that the choice of law clause is precise. Governing law clauses take many forms and may be restricted to matters of interpretation, to the substantial validity of the agreement, or to all of the issues related to or arising from the contract.

2. Sample Clauses

— The simple clause

A simple concise and sufficient choice of law clause could read as follows :

> *All disputes arising out of the agreement shall in all events and for all purposes be governed by and construed in accordance with the laws in force in the Province of Québec.*[15]

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14. Some portions of this section of text were taken from a recently published article by the author. See J.A. TALPIS, "Choice of Law and Forum Selection Clauses Under the New Civil Code of Québec", (1993) 96 *R. du N.* 183, and in general, see I.F.G. BAXTER, "International Conflict of Laws and International Business", (1985) 34 *Int'l Comp. L.Q.* 538; G.A. ZAPHIRIOU, "Choice of Forum and Choice of Law Clauses in International Commercial Agreements", (1978) 3 *Int'l Trade L.J.* 311; R.J. WEINTRAUB, "How to Choose Law for Contracts, and How Not to : The EEC Convention", (1982) 17 *Tex. Int'l L.J.* 155; J.R. LOWE, "Choice of Law in International Contracts : a Practical Approach", (1971) 12 *Harv. Int'l L.J.* 1; G. KAUFMAN-KHOLER, *La clause d'élection de for dans les contrats internationaux*, Helbing a Lichtenhahn, Basel, 1980; A. LEHMHOFF, "The Parties Choice of Forum : Prorogation Clauses in Eurobonds", (1972) *Colum. Journal of Transnational L.*, pp. 240-266; E.L. KLING, "Greater Certainty in International Transactions through Choice of Forum", (1975) *Am J. Com L.*, pp. 366-374; MCCARTNEY, "The Use of Choice of Law Clauses in International Commercial Contracts", (1960) 6 *Wayne L. Rev.* 340; R.J. BAUERFIELD, "Effectiveness of Choice of Law Clauses in Contract Conflicts of Law : Party Autonomy on Objective Determination", (1982) 82 *Col. L. Rev.* 1656.

15. The justification for stipulating application of the laws in force in the province of Québec is to include the federal statues that do, in fact, apply in Québec and that the parties likely do not wish to exclude. See P. BIENVENU, *International Commercial Disputes : An Overview of Issues and Possible Solutions*, Paper published by the Canadian Institute, conference of March 1, 1994, Toronto, p. 19. See also the recent decision of the U.S. Supreme Court in *Volt Information Sciences Inc.* v. *Board of Trustees of Leland Stanford Junior University*, 89 U.S. 468 (1989).

— Jurisdiction-related Dual Governing Law Clauses

This type of clause provides that the agreement be governed by one law, for example that of the lender, except that in the event proceedings are brought by the lender in the courts of the borrower's jurisdiction these courts shall apply the latter's law :

> *This Agreement shall be governed by, and construed in accordance with, the law in force in the Province of Québec, Canada, provided, however, that in connection with any legal action or proceeding (other than an action to enforce a judgment obtained in another jurisdiction) brought by the Lender in respect of this Agreement in the courts of Mexico or any political subdivision thereof, this Agreement shall be deemed to be an instrument made under the laws of Mexico and for such purposes shall be governed by and construed in accordance with the laws in force in Mexico.* [16]

A special type of jurisdiction-related governing clause differentiates not only according to jurisdiction but also according to the cause of action rather than the issue.

> *This Loan Agreement (including, without limitation, the obligations of the borrower to repay the advances with interest hereunder and to pay all other amounts hereunder) shall in all events and for all purposes be governed by and construed in accordance with the laws in force in the Province of Québec, Canada. The Promissory Notes delivered hereunder are intended solely to provide additional remedies to the lender in connection with court proceedings in Mexico and they shall be governed by and construed in accordance with the laws in force in Mexico. However, any invalidity or unenforceability of or other effect on any such promissory note under the laws in force in Mexico shall not effect any of the obligations of the borrower, or impair any of the rights of the lender(s) hereunder.* [17]

Finally, there is nothing unusual in having different jurisdictions apply different laws to the same agreement.

> *Any question as to the construction or effect of this contract shall be decided according to the laws in force in Mexico if the reference to arbitration shall have been made by the purchaser and according to the laws in force in the Province of Québec if such reference shall have been made by the seller.* [18]

— The Handcuff Clause

In many contracts involving major international investments, one finds, in addition to a choice of law clause, a clause intending to reduce the effect of such a clause to a mere sham. It has been called a "handcuff clause" and is used where one party has insisted on the choice of its "home" state's law.

> *Claims for the fulfillment of or for any implementation of the contract, claims for damages resulting from any breach of a contractual obligation, and any other claims in connection with the contract can only be raised between the parties and against a third party if and insofar as this contract expressly authorizes the respective party to do so. Claims therefore cannot be put forward on the basis of a statu-*

16. M. GRUSON, "Contractual Choice of Law and Choice of Forum : Unresolved Issues", published in *Judicial Enforcement of International Debts and Obligations*, Washington International Law Institute, 1987, p. 15.

17. *Id.*, p. 15.

18. *Id.*, p. 18.

> *tory provision or of any other rule of law embodied in the law chosen by the parties as the proper law of the contract.*

Such a clause could raise questions of public policy, as it could deprive a party of a remedy which it would otherwise have under the chosen law.[19]

— Clauses Employing *Dépeçage*

By employing the principle of *dépeçage* the parties can agree to apply certain areas of the various systems of law to delineate potential issues or parts of the transaction. Contractual *dépeçage* allows the parties to tailor the rules to their greatest advantage. It may also allow for the resolution of some negotiation barriers and objectionable aspects of certain legal systems may be contractually excluded.

These clauses illustrate the technique of contractual *dépeçage* :

a) The parties may agree that different laws apply to different issues :

> *All matters relating to the payment of the balance of sale, including any penalties for late or prepayment of same shall be governed by the laws in force in the State of New York, but otherwise the laws in force in the Province of Québec shall govern this agreement and any construction to be placed thereupon or interpretation thereof.*

b) The parties may agree to a one-sided clause where the rights and duties of one party are governed by a law other than the law governing the whole agreement :

> *This Agreement shall be governed by, and construed in accordance with the laws in force in the Province of Québec, except in respect of the rights and obligations of the Buyer hereunder which shall be governed by, and construed in accordance with the laws in force in Mexico.*

While contractual *dépeçage* is formally embodied in the New *Civil Code of Québec* (Art. 3111 par. 3 C.C.Q.) and admitted under American[20] and Anglo-Canadian conflict of laws,[21] it is not formally admitted in Mexico, although it follows from the ratification of the *Vienna Sales Convention*, that Mexico should recognize it.

Unfortunately, two significant disadvantages burden the method of contractual *dépeçage*. A principal difficulty is the high negotiation costs associated with the process. To implement this choice of law option, the parties' legal counsel must possess rare comparative legal expertise. Counsel must be familiar with the wide range of potential applicable systems of law in order to determine the most effective selection. In addition, parties will have to devote much time and attention to determine the legal requirements of their transaction and which systems best meet those requirements. Although significant, the costs associated with these factors should decrease significantly as practitioners become accustomed to the process and gain experience with the more common contractual requirements. A word of caution : Results attained by contractual *dépeçage* must be coherent. If not, the

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19. O. SANDROCK, "Choice of Law and Choice of Forum in Civil Law Jurisdictions", in *Drafting and Enforcing Contracts in Civil and Common Law Jurisdictions*, the Netherlands, Kluwer, pp. 159-160.

20. E.F. SCOLES and P. HAY, *Conflict of Laws*, West Publishing Company, 1982, pp. 656 *et seq.*

21. J.-G. CASTEL, *op. cit.*, note 13, p. 568, and *Hamlyn & Co.* v. *Talisker Distillery*, [1984] A.C. 202 (H.L.).

courts may quite properly deny the severance from the law that governs the validity of the contract.

— Clauses Referring to "The General Principles of Commercial Law"

Such a clause might read as follows :

> *This contract, with regard to its conclusion, interpretation, execution, and enforcement, and all matters pertaining to it, shall not be governed by the laws of any State, but exclusively by international commercial customs, trade usages, and the general principles of law as developed in the conduct of international trade between merchants.*[22]

Where the parties make an express choice to submit their disputes to the general principles of law and / or the *lex mercatoria*, the arbitrator in an international arbitration is bound by such choice. Insofar as the courts are concerned, the question is more controversial, although I suggest such a choice should also be respected to the extent that the law applicable to the contract, objectively or subjectively determined, permits same.[23]

As the name implies, parties attempt to designate as applicable law a group of rules that are isolated from the influences of individual countries' laws. Due to their lack of attachment to specific national systems, anational substantive rules supposedly serve as a neutral source of governing law. However, although widely used in international commercial contracts, the general principles have escaped any definite formulation in international law or academic circles upon which parties can rely when choosing governing law. Aside from a few areas where merchants have developed some clear cut rules fo commercial law such as the INCOTERMS or Uniform Customs for Documentary Credits [where there still could be uncertainty as to their meaning (*infra*)], it is hardly possible to derive from international customs or general principles of law any clearly definitive guidelines on how to solve in a foreseeable and predictable manner, the intricate questions of law emerging from an international transaction.[24] As such, in the interest of certainty and predictability, the parties should avoid the simple reference to "The General Principles of Commercial Law" or to the *lex mercatoria*, the primary forms of anational substantive law. Nor should the parties attempt to combine a choice of a national law with the *lex mercatoria* where the former will not apply if it does not meet certain requirements established by international law.[25]

The construction contract for the Channel Tunnel provides an interesting combination of competing laws and the general principles. The contract was

> [...] in all respects to be governed by and interpreted in accordance with the principles common to both English and French law, and in the absence of such common

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22. O. SANDROCK, *loc. cit.*, note 19, p. 161. In general, see H.J. BERMAN and C. KAUFMAN, "The Law of International Commercial Transactions (Lex Mercatoria)", (1978) 19 *Harv. Int'l L.J.* 221; B.M. CREMADES and S. PLEHN, "The New Lex Mercatoria and the Harmonization of the Laws of International Commercial Transactions", (1984) 2 *Boston U. Int'l L.J.* 317.

23. See J.A. TALPIS and J.-G. CASTEL, "Le Code civil du Québec — Interprétation des règles de droit international privé", *La réforme du Code civil*, t. 3, Laval, Les Presses de l'Université Laval, n° 276.

24. O. SANDROCK, *loc. cit.*, note 19, p. 164.

25. *Id.*, p. 165, and see G. VAN HECKE, "Contracts Subject to International Transnational Law" in H. SMIT, N.M. GALSTON and S.L. LEVITSKY, *International Contracts*, New York, 1981, pp. 25 *et seq.* for a survey of different clauses used in this respect.

> principles by such general principles of international trade law as have been applied by national and international tribunals.[26]

While one may readily acknowledge the reasons for such a compromise in the case of that contract, it obviously has shortcomings from the point of view of certainty and predictability. Another version of this clause permits the parties to declare an arbitrator as an amiable compositeur permitting the arbitrator to apply the fundamental principles of equity, fairness and common sense. While there appears to be no reason why such a choice would not be honoured, the weakness from the point of view of predictability is obvious.[27]

— Clauses Permitting Change of Applicable Law

Allowing the parties to substitute the applicable law would seem consistent with the theory of party autonomy. After all, they could always cancel their contract and start again. In view of the uncertainty in allowing the parties to change the applicable law,[28] such a clause may be considered :

> *Furthermore, the parties may agree at any time to have this Agreement governed in whole or in part by a law other than that hereinabove set forth. Any modification as to determination of the law applicable subsequent to the date of these presents shall not effect either the formal validity of this Agreement nor the rights of third parties.*

— Clauses Avoiding *Renvoi*

The doctrine of *Renvoi* has never found any place in the law of contract under Anglo-Canadian,[29] American,[30] and Québec law[31]. In fact it has been excluded formally and generally under the New *Civil Code of Québec* (Article 3080 C.C.Q.). However, in the interest of security, and to avoid the admission of *Renvoi* by a foreign court, parties could include the following clause :

> *The parties expressly designate the internal laws in force in Mexico to govern this contract, so that Mexico's choice of law rules shall not apply in any instance so as to require the application of the law of any other State.*

— Clauses Freezing the Law at the Time of Contract

As we are all fully aware, laws change and sometimes new laws are given retrospective effect. The question as to whether the courts would apply the law in existence at the time of the contract or at the time of the litigation is not settled either in Québec nor in Anglo-Canadian law, although the courts have a tendency to apply the law as it exists at the time of the proceedings.[32] However, I am of the opinion that party autonomy should allow the parties to avoid uncertainty by

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26. In A. REDFERN and M. HUNTER, *Law and Practice of International Commercial Arbitration*, 2nd ed., London, Sweet & Maxwell, 1991, p. 117.

27. W.F. FOX, *International Commercial Agreements*, the Netherlands, Kluwer, 1992, p. 132.

28. See G. GOLDSTEIN, "Les règles générales du statut des obligations contractuelles dans le droit international privé du nouveau code civil du Québec", (1993) 53 *R. du B.* 199.

29. See J.-G. CASTEL, *op. cit.*, note 13, p. 569. *Rosencrantz* v. *Union Contractors Ltd. and Thornton*, (1960) 31 W.W.R. 597; 23 O.L.R. (2d) 973 (B.C.S.C.).

30. E.F. SCOLES and P. HAY, *op. cit.*, note 20, p. 68, footnote 2.

31. See J. TALPIS, "Notions élémentaires de droit international privé québécois", (1977) *C.P. du N.* 127, p. 143.

32. See J.-G. CASTEL, *op. cit.*, note 13, p. 570 and authorities cited.

freezing the law to effectively avoid future material changes in the law which may have a significant impact on the terms and conditions of the agreement. Obviously it may result in the application of a law that has been repealed.

For example :

> *The parties expressly designate the internal laws in force in Mexico to govern this contract, as they exist as on the date of these presents. They agree not to be affected by any future changes in the said law which may affect the terms and conditions of this contract.*

The parties could also freeze the applicable law by incorporating the provisions of foreign law into their contract (Incorporation by Reference). As they then constitute terms of the contract as at the date of incorporation, they are unaffected by subsequent changes in the law (even its repeal).

The following section will take a closer look at the applicable law or laws in the most common international trade contracts post NAFTA.

D. A CLOSER LOOK AT WHY CHOICE OF LAW CLAUSES ARE IMPORTANT IN CERTAIN INTERNATIONAL AGREEMENTS

It is well beyond the scope of this paper to review in detail all of the techniques to prevent disputes in sales, distribution, franchise, licensing agreements or in joint ventures and international loans. My intent is rather to limit my discussion to the choice of the law or laws to govern these specific contracts, in whole or in part.

1. The United Nations Convention on Contracts for the International Sales of Goods (The 1980 Vienna Sales Convention)

a) Background and Purpose

The Sales Convention is a body of law that grew out of efforts spanning 50 years by several organizations (The Hague Conference on Private International Law, The United Nations Commission on International Trade Law (Uncitral), and the International Institute for the Unification of Private Law (Unidroit), all of which are still involved in the process of unification and harmonization of international commercial law. The Convention's main purpose is to avoid conflict of law problems concerning the formation of international contracts of sales of goods and the rights and obligations of the buyer and seller arising therefrom. This is achieved by adopting uniform rules.

b) The Convention's Scope

The Sales Convention applies to contracts of sale between parties whose places of business are in different contracting states,[33] irrespective of their nationality or whether or not the goods sold move from one country to another. In other words, it is the location of the parties that determines whether the contract is

33. Article 1(1)(a).

an international contract under the Convention.[34] So for example, a sale of widgets between a Québec corporation and a Mexican corporation will be governed by the Convention. Note also that Article 1(2) requires that both parties be on notice that their places of business are in different countries. Where a party has more than one place of business, the place of business for the purpose of the Convention is that which has the closest relationship to the contract and its performance.[35] It is therefore important to specify in the preamble or as a separate clause in the body of the contract, the place of business of each party. Where a party has more than one place of business, the parties should specify the branch that has the closest relationship to the contract and to its performance, so as to avoid any doubt. For example :

> *The parties agree that the seller will perform the contract through its branch in Mexico, and that consequently this branch shall be deemed to have the closest relationship to this contract.*

This is distinct from the *head office* or *elected domicile* of the contracting parties which should also be indicated, as well as the law under which it is organized if it is a legal person.

The Convention also applies if one party, or if neither party has its place of business in a contractual state when the rules of private international law of the forum lead to the application of the law of a contracting state,[36] *e.g.* Québec seller sells to U.K. buyer and Québec law is applicable under Article 3114 C.C.Q., the Sales Convention applies even though the United Kingdom has not ratified the Convention.

As a result, there is the increasing likelihood that the Sales Convention will end up applying to sales contracts involving enterprises carrying on business with each other in Mexico, Canada and the United States even though the parties neither chose it nor intended it to apply. This will happen, for example, where the contract is oral or where a law is mentioned in negotiations,[37] and therefore no governing law was chosen, or where the parties have used standard forms which either do not specify the law governing the contract or simply state for example that the law of Québec or Mexico governs the contract. If it has not been specifically excluded, the law of Québec that will govern the contract is the Sales Convention.

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34. P. WINSHIP, "Working in Canada with the U.N. Convention for the International Sale of Goods", published by the CANADIAN INSTITUTE, at a Conference entitled : *Negotiating and Structuring International Business Transactions*, Toronto, March 1 and 2, 1994, p. 4.

35. Article 10.

36. Article 1(1)(b). Article 95 allowed for a reservation by a state that it would not be bound by article 1(1)(b). The United States and China have made this reservation. The fact is the United States delegation felt that the *Uniform Commercial Code's* rules were better than those of the Convention. Initially, British-Columbia had indicated that it would make the same reservation, but on July 31, 1993, the Government of Canada withdrew this reservation.

37. See, for example, the case of *Oberlandesgericht Frankfurt a.m.*; 5 4 261 / 90, of June 13, 1991, reproduced in German with a brief summary in English and French in (1991) *Uniform Law Rev.* I., p. 372. A sales contract between a French seller and a German buyer, concluded after the Convention's entry into force in France, was held to be governed by the Convention since the parties had not chosen another law. It did not constitute an implied consent that the seller at first instance, in response to the buyer's statement that German law was applicable, had merely raised the question of whether German or French law applied. Nor could the lack of an unequivocal response be treated as an admission since the applicable law is not a fact.

While the Sales Convention does contain a comprehensive regulation of some of the important questions arising in contracts for the international sale of goods, it has a number of drawbacks in light of its limited scope of application. It does not apply to sales of consumer goods,[38] electricity, ships, vessels, securities or other negotiable instruments, or goods sold by auction (Article 2(a)). The Sales Convention does not define "contract of sale", so that its application to some types of transactions is problematic. Known problems include "consignments", in which the "buyer" may return any goods which cannot be sold, barter transactions or "countertrade", in which goods are exchanged for other goods and not for money,[39] and "conditional sale", in which the seller retains title to secure payment. While the Convention covers certain aspects of the conditional sale, it does not address the security interest that may result from the reservation of title. Presumably, a lease of goods is not a sale because the lender retains title to goods, nor is a license to use goods. Furthermore, the Sale Convention does not apply a mixed contract for both goods and services if the "preponderant" part of the obligations of the party who furnishes the goods consists of the supply of labour or other services.[40] Nor are there *any* guidelines provided to determine whether the goods or services are preponderant.

The Sales Convention also excludes the liability of the seller for personal injury caused by the goods to any person (Article 3). It also does not apply to issues of the contractual validity of the contract, including grounds for annulling it (fraud, error, duress, unconscionability) and the effect of the contract or property interest in the goods sold.

The foregoing illustrates that the lack of knowledge as to when the Convention rules apply may cause serious prejudice to a party. To avoid uncertainty as to whether the Sales Convention applies or not, the parties should either expressly exclude or submit to the Convention.

c) Drafting to Exclude or to Submit to the Sales Convention

Article 6 allows the parties to derogate from or vary the effect of any of the provisions of the Convention. Thus the parties may prefer to exclude the application of the Sales Convention totally or partially. Although the parties may thereby "opt out", care must be used in drafting a statement of exclusion, as a clause that simply states that *the contract is to be governed by the rules in force in the Province of Québec* will result in application of the Sales Convention.

The following is a sample choice of law clause which should achieve the effect of opting out :

> *The parties intend to exclude the application of the United Nations Convention on Contracts for the International Sale of Goods to this contract. Accordingly, this contract shall not be subject to the United Nations Convention on Contracts for the International Sale of Goods, but rather the contract shall be governed by the internal rules in force in the Province of Québec.*

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38. Unless the seller at any time before or at the conclusion of the contract neither knew or ought to have known that the goods were bought for personal or household use.

39. Separate Uncitral reports on countertrade indicate that it is not regarded as a sale under the Convention.

40. Article 3(1), 3(2).

If the Convention is to be excluded totally, the parties should designate another law. However, they might prefer to employ contractual *dépeçage* and expressly exclude only certain provisions of the Sales Convention while submitting the rest of the contract to the Convention's rules. If they attain a certain level of expertise in this exercise, drafters would state expressly that certain rules of the Convention shall not apply, incorporate the substituted rules into their agreement and designate a governing law for the substituted rules to avoid overlapping.

A brief examination of the use of Intercoms and letters of credit illustrates the point.

Intercoms are standardized provisions developed by the International Chamber of Commerce that cover the terms and conditions of transportation of goods across boundaries, such as FOB (Free on Board), CIF (free Cost Insurance and Freight), FCA (Free Carrier), EXW (Ex Works), CFR (Cost and Freight), and DDP (Delivery Duty Paid). The parties might prefer to use them in lieu of Articles 66 to 72 to govern issues of delivery, manner and costs of shipment, risk and responsability for arranging and paying for insurance storage costs.[41] However, they do not have a universal meaning, so that where there is no reference to a law or body of rules to define them, this can lead to misunderstandings, disputes and litigation as a court might either seek out some international uniform definition on the basis of the implied intent of the parties, or simply use national criteria. In order to remedy these problems, the International Chamber of Commerce first published in 1936 a set of international rules for the interpretation of the most commonly used terms in foreign trade, which have been periodically amended. As a result, it is suggested that reference be made to these Intercoms of 1990 (which may be found in a manual produced by the International Chamber of Commerce), to interpret these delivery terms.

As well, in a sale of goods from a Québec exporter-seller to a Mexican importer-buyer for example, each party may know nothing about the other's legal system. To address the uncertainty of payment, international businesses and banks have established a secure form of payment that is commonly used for international agreements, the irrevocable letter of credit. The seller will then usually insist on derogating from the terms of Article 53 of the Sales Convention, and require the buyer to establish a confirmed irrevocable letter of credit and "to pay against the document" rather than after delivery and inspection of the goods. In fact, the letter of credit treats the seller's delivery of the documents as tantamount to delivery of the goods.[42]

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41. For a detailed analysis of trade terms, see J.-G. CASTEL, A.L.C. DE MESTRAL, C. GRAHAM, *International Business Transactions*, Montgomery, 1986, pp. 523-561. These trade terms are, of course, used in most international sales, not only those governed by the Convention.

42. See R. FOLSOM, M. WALLACE GORDON, J. SPANOGLE jr., *International Business Transactions*, West Publishing, 1992, pp. 61-62 and see J.-G. CASTEL, A.L.C. DE MESTRAL and C. GRAHAM, *id.*, pp. 642-718. The letter of credit is also normally used in sales contracts even those not governed by the Convention. Other documents are also usually used such as the negotiable bill of lading, the commercial invoice (which sets out the terms of the purchase such as grade and number of goods, price, etc.), the policy of marine insurance (if the goods go by sea), the certificate of inspection (issued by a commercial inspecting firm and confirming that the required number and type of goods are being shipped), the export license and/or health inspection certificate (showing that the goods are cleared for export), and the certificate of origin.

As the letter of credit modifies the Sales Convention's terms of payment, and is a contract separate and apart from the contract of sale, in the interest of avoiding disputes as to whose law should govern its interpretation, including the obligations and the roles of the different banks, the standards, and time for examining documents, the parties should designate as the governing law, that of the state where the banking institution which issued the letter of credit has its place of business. In any event, the letter of credit should include a reference to the new version of the rules set forth in "The International Chamber of Commerce's Uniform Customs and Practices for Documentary Credits" (the UCP) which took effect on January 1, 1994 and which incorporate a number of important changes which will affect the way banks administer letters of credit.

More troublesome are the implied exclusions. As there is nothing in the text requiring that the exclusions be express, the Convention's rules can be excluded by implication. In fact, established trade practice between the parties and trade usages, such as references to an Intercom have the same exclusionary effect. A more general but uncertain implicit exclusion results from the use of model laws containing clauses dealing with and derogating from matters covered by the articles of the Convention. There are a number of excellent model laws prepared under the auspices of organizations such as The International Chamber of Commerce or those associated with the United Nations such as CNUCED or CNUDCI. However, the uncertainty which results from not knowing whether the Sales Convention has been totally or partially excluded by the use of a model law, suggests that the parties not leave this to the courts.

Accordingly, when reference is made to a model law, unless counsel has the time and expertise to draft a coherent contract by employing the contractual *dépeçage* technique, they would be well advised to totally exclude the application of its Convention, as well as *The Hague Convention on the Law Applicable to Sales of Corporal Moveables* of June 15, 1955, and the rules of any other potentially applicable Convention.

If the parties can opt out, can they opt in in circumstances where the Sales Convention does not apply, for example where the contract is not "international" within the scope of Article 1 or where the type of contract is expressly excluded (Articles 2 and 3)? The problem is that the text of Article 6 only recognizes the right of the parties to opt out. In the spirit of the Convention, most authorities believe that the parties should be able to opt in, at least where the Convention is not applicable under Article 1. However, I doubt that the parties should be able to submit to the Convention contracts excluded under Article 2, where party autonomy is excluded totally or potentially under specific conflict or mandatory rules of the forum, such as in the case of consumer contracts under certain laws (Art. 3117 C.C.Q. in Québec).

The following clause could be used :

> *The rights and obligations of the parties under this agreement shall be governed by the United Nations Convention on the International Sale of Goods, notwithstanding that the private international law rules of any forum might otherwise lead to the application of some other law.*

Finally, where the parties do intend the Sales Convention to apply, given its limited scope, it is important to designate a governing law for the remaining questions that fall within the scope of party autonomy, such as the interpretation or the validity of the contract, and extra-contractual issues that could be

governed by the law applicable to the contract in accordance with the forum's rules (*e.g.* in Québec, see Article 3127 C.C.Q.).

Where the parties intend the Sales Convention to apply, the following clause governing residual matters could be used :

> *Notwithstanding that the United Nations Convention on Contracts for the International Sale of Goods governs the rights and obligations of the parties in this contract, all items and matters not covered by the Convention shall be governed by the internal laws in force in the Province of Québec.*

I would like to make a few general observations as to the decision to opt out or to opt in.

Firstly, it would be inaccurate to say that the Conventions' rules are pro-buyer as has been suggested.[43] It really depends on what clause is being considered. Some rules seem to favour the buyer, *e.g.* Article 50 allows for a reduction of price in case of non-conforming goods, but the buyer cannot in this case (Article 49(1)) and in most cases void the contract. In fact, the Convention is founded on the idea that it is better to save the contract than to let it die. This aspect is pro-seller. The resolution of the contract is secondary. Only in the case of a "fundamental breach", as defined in Article 25, may the contract fail. If a breach is not fundamental, a party may only obtain damages or reduce its obligations (price or delivery). This idea of saving the contract is manifested by a number of rules in particular in the delays to perfect execution of an obligation. For example, Article 63 permits the seller and Article 47 permits the buyer to give a delay to the other party; Article 71 has a similar result in the case of anticipatory breach, as do Articles 39, 41 and 42. By virtue of Articles 37 and 48, a seller who makes a non-conforming tender has the right to cure the tender, even after the time for performance has past. Finally, the *force majeure* Article (79) is not too expansive.

Secondly, lawyers tend to exclude the application of the Sales Convention for a number of very valid reasons, such as the uncertainty of a uniform interpretation which is linked to a lack of binding precedents, and unfamiliarity. As well, rules on the battles of the forms are unclear. It seems that he who fires the last shot wins. Of course, even under the rules of law of all the parties to the NAFTA, it is difficult to determine what came first and what came last, especially where there is extensive ongoing exchange of documents including, quotas, sales orders, purchase orders, etc.

An additional dissuasive factor for Québec and Mexican lawyers and notaries might be the excessive number of common law concepts. In fact, while the Convention is civil law in form, a statement of general principles in simple clear language, it is basically common law in substance. There are a number of concepts taken from the common law, and in particular from the Uniform Commercial Code, which are unfamiliar to the civil law of Québec and of Mexico such as : the doctrine of reliance in the formation of the contract (Art. 16(2)), the doctrine of fundamental or essential breach (Art. 25), the concept of merchantability taken from the UCC, the doctrine of anticipatory breach (Article 72(1)), the duty to mitigate damages and the common law concept of implied duty (Article 80). Navigating through

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43. Interestingly, others have suggested that the sales Convention is "pro-buyer". R.M. LAVERS, in his article "CISG : To Use or Not to Use", *International Business Lawyer*, January, 1993, p. 10. Perhaps it is, after all, a good balance of the rights of the seller and the buyer.

these unfamiliar waters might cause some resistance in submitting to the Sales Convention.[44]

In time, however, lawyers, notaries and business people will become more comfortable applying the Sales Convention which will also serve as a suitable compromise as it is the domestic law of neither party. The fact that it is a creation of the United Nations should lend comfort to those who might feel it is an unbalanced body of laws created by major trading nations. Finally, it is consistent with traditional principles of sales, and in that sense may be regarded as a codification of the *lex mercatoria*.[45]

d) Some Matters Ancillary to Sales Contracts

(i) Title to the Goods

Title to the goods sold is outside of the scope of the law applicable to the contract and the Convention. This includes the time when ownership is to pass to the buyer, as well as the conditions for the transfer of same, other than the formalities of the contract, and the validity of a title retention clause (*vis-à-vis* a third parties). Under the Private International Law rules of all parties to the NAFTA, these questions are governed by the law of the location of the goods at the time of the contract and not by the law of the contract. Given that delineation of the contractual and property aspects of sales are problematic in all jurisdictions, the parties should usually try to ensure that the same law applies to both.[46]

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44. See G. JONES, "Impact of the Vienna Convention in Drafting International Sales Contracts", (1992) *International Business Lawyer* 421, p. 426. To minimize the risk of disputes: (1) The parties should specify in writing what will constitute a binding contract early in the negotiations so as to avoid any doubts, as the Convention's rules on formation speak to the intent of the parties. (2) The parties should include a provision describing the scope of work and services to be undertaken. (3) They should specify the right to reject and substitute. The right to reject non-conforming goods regardless of the degree of non-conformity should be specified if that is the intent since the Convention generally provides for acceptance of goods with a reduction in price unless the goods are so non-conforming as to constitute a fundamental breach. (4) They should consider methods to ensure acceptable quality of goods. (5) The parties should make disclaimers suitable for any law. With respect to clauses disclaiming the warranties set forth in the Convention, the disclaimer should follow both the language of the Convention and that of the governing law. (6) The parties might wish to specify and limit events which could be considered an anticipatory breach under Article 71. This rule enables the non-defaulting party to be released from its obligations and even to avoid the contract. (7) The parties should address their respective responsibilities with regard to taxes and duties. (8) Article 79 provides that a party is not liable for failure to perform its contractual obligations if it proves that the failure was due to an impediment beyonds its control and that it could not reasonably be expected to have foreseen this impediment or to have avoided or overcome its consequences. The Convention does not define "impediment". Accordingly, I strongly suggest that the parties agree upon their own *Force Majeure* clause which would supersede any inconsistent provisions in Article 79. For example, they could stipulate precise consequences of particular events, *e.g.* acts of God, regulatory intervention etc. They should then choose a separate law to govern the validity of this substituted clause if not admitted under the law governing the contract. (9) It is important to be precise as to where notices must be given, where and when delivery is deemed to have taken place and in what country and where service of process would be considered sufficient.

45. W. FOX, *International Agreements*, *op. cit.*, note 27, p. 45.

46. See J.A. TALPIS, "The Law Governing the Domain of the Statut Réel in Contracts for the Transfer of Moveables in Private International Law", (1973) *C. de D.* 302.

(ii) Currency and Foreign Exchange Risks

The parties will want to lessen the exchange risk given the volatile exchange market. The Canadian seller will prefer payment in Canadian or American dollars. Where it does not have the leverage to impose payment in its own currency, there will be uncertainty as to the conversion date, at least from the point of view of Québec law where there is authority for reference to the date when the debt was payable under the contract,[47] the date of the judgment ordering payment or the date of payment.[48]

In Mexico, the Mexican Monetary Law of 1931 (Article 8) requires that obligations contracted within or outside Mexico must be paid in pesos. Where the court is dealing with a claim based on Canadian dollars, it will have to convert the dollars, seemingly as of the date of payment.

To avoid exchange risks arising as a result of uncertainty of the applicable date for the conversion, the contract could stipulate alternative conversion dates. The following clause is particularly interesting from the point of view of the seller :

> *RATE OF EXCHANGE CONVERSION : All sums owing hereunder shall be paid in Canadian Dollars unless otherwise approved by the seller, in its sole discretion. Unless payment in foreign currency is so approved, the conversion in Canadian dollars shall be calculated either at the rate of exchange existing on the date payment was due, on the date when a foreign court of competent jurisdiction or a Québec court rendered final judgment on the claim, or on the date payment is made, the choice being exclusive to the seller.*[49]

To avoid the risk arising as a result of devaluation, the contract could include provisions protecting the value of the contract from currency devaluation. Firstly, the exporter could ensure a guaranteed price measured in United States or Canadian dollars by invoicing the importer in the foreign currency at a U.S. dollar equivalent established in the invoice. While payment would be made in the buyer's currency, if a devaluation of the foreign currency occurred, the price in foreign currency would be raised correspondingly. Alternatively, currency clauses could link the price to an exchange rate with the comparative rate being calculated at the date of actual payment. Secondly, the exporter could factor the foreign exchange risk into the price for the goods. Thirdly, the exporter could shield part of the purchase price from devaluation by requiring pre-payment of a percentage of the purchase price.[50]

A second risk which the Canadian seller may face is the imposition of exchange controls by the foreign governments. At the present there are no such controls in Mexico. Such controls may be in the form of restrictions on conversion or restrictions on repatriation. The simplest solution is to provide in the contract that payment shall be made in Canada or the United States.

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47. *Omnivalor — Rhoninter S.A.* v. *Leroy*, [1987] R.J.Q. 1544 (C.S.).

48. See J.-G. CASTEL, *Droit international privé québécois*, Toronto, Butterworths, 1980, p. 512 and authorities cited.

49. This clause covers the case where the issue of conversion arises either on a direct action or in a suit to enforce a foreign judgement.

50. See S. BATHRAM, *Penetration of the International Marketplace Through Intermediaries and Structured Alternatives*, published by the CANADIAN INSTITUTE, paper given at Toronto, Ontario, October, 1994, pp. 39-40.

(iii) Government Approval

Some aspects of international sales transactions within the NAFTA may require approval of Canadian, American or Mexican governments. Even in this emerging era of freer trade created by the NAFTA, there will still be some restrictive trade devices which could impede, disrupt or restrict trade and which the parties must address. Common devices include tariff barriers import and export duties, import licensing, safety, environmental and other minimum manufacturing standards, etc. The contract should provide that it is not fully effective until the necessary approvals have been obtained.

(iv) Personal and Real Guarantees Securing Payment

Where a third party intervenes to guarantee the buyer's obligations, there should be specific designation of the law applicable to this guarantee. In the absence of designation, the guarantee could be governed by the law applicable to the principal contract or by some other law. In Québec it would likely result in application of the law of the guarantor's place of establishment as it is he who furnishes the characteristic obligation of the contract (Art. 3113 C.C.Q.).

Where the seller-creditor insists upon real security over the goods sold, the parties should address the conflicts of law issues as to the validity and effect of security interests. While current Mexican law recognizes several types of secured financing transactions normally used in the other NAFTA jurisdictions, including conditional sales contracts,[51] pledges without delivery of possession[52] and chattel mortgages,[53] the security interest created under the foreign law may not always be enforceable in Mexico.

2. International Distribution Contracts

a) Distinguishing Distribution Contracts

Distribution contracts are not explicitly regulated either in Mexican, American, Anglo-Canadian or Québec law, although they are widely used in practice. There are various types of distribution agreements. In most cases, the distributor is an independent contractor acting in its own name and purchasing goods from a supplier for resale for its own account. He bears the economic risk of resales, carries customer's credit and usually warehouses and physically distributes the goods. In this relationship the distributor is an independent entity which has no authority to act on behalf of the supplier.

There are other types of distribution agreements, such as those where the distributor is really a sales representative acting for and on behalf of the supplier. In this situation he does not bear the economic risk of failure, and he takes orders for shipments directly to the customer from the supplier. Such a distributor might be called an "agent", a "representative", or a "broker". This type of agree-

51. *Civil Code* (federal district), Article 2312.
52. *General Law of Credit Investments and Operations*, Articles 321-333.
53. *Civil Code* (Federal district), Articles 2893-2899.

ment would also include the case where the distributor names a sub-distributor. Depending on the nature of the contract, he might even be an employee of the supplier.

b) The Distributor as an Independant Contractor

Failure to designate the law or laws to be applied to this type of distributorship contract leads to much uncertainty. A court could conclude that there is one law applicable to the whole contract, or it could submit the different contractual elements of this complex contract to separate laws. Under Québec law, should the court conclude that one law applies to the whole contract, this would likely result in the application of the law of the place of the establishment of the distributor, as it is he and not the exporter who has the obligations which are characteristic to the contract. Undoubtedly, the exporter is selling the goods to the other party who will resell them. However, this is not the essence of the contract which is really characterized by the fact that the distributor is obliged to promote the sale of the exporter's products in the designated territory by a variety of means : advertising, marketing, etc. While the sales contract can be summed up in the delivery of the goods and the payment of the price, the distribution contract is one of an extended term, with permanent obligations imposed upon the distributor which requires work, services and costs. It is therefore the distributor who furnishes the characteristic obligation of the contract. This would also appear to be the law applicable in American and Canadian common law, as being the place having "the most significant relationship or the closest connection to the contract". To avoid such a result, the parties should choose another law or laws to apply to the contract.

c) The Subordinate Distributor

Where the distributor is an intermediary, the contractual relations between the supplier and the intermediary are governed by the general rules of contractual obligations, which, in the absence of choice, would, from the Québec perspective, result in application of the law of the country of the establishment of the intermediary (Art. 3113 C.C.Q.).

The law applicable to this type of distributorship agreement becomes particularly important when a court has to determine whether or not to give effect to laws of a jurisdiction whose law does not govern the contract which protects these distributors,[54] who are in a position of dependency, from unilateral cancellation by the exporter of the concession. Such a law might provide that the distribution agreement cannot be terminated without the payment of a special compensation or indemnity to the distributor. The amounts can be very substantial. The motivation for such legislation which exists in about 35 countries is not difficult to understand. In past years, the supplier would employ the dealer to develop local goodwill and clientele and then, when the local foothold was strong enough and the return on investment of the dealer was in sight, terminate the relationship substituting a local affiliate or its own subsidiary for the former dealer. Although the tendency is to treat

54. The laws sometimes affect the independent distributor as well.

such rules as mandatory domestic rules[55] applicable only to the extent that the rules are part of the law governing the contract, a court could qualify these rules as foreign laws of immediate application, on the basis that such legislation is vital to the economy, the public interest and the general welfare of the state. As a result, even though the parties attempt to avoid application of these rules by choosing a law that allows for cancellation without indemnity, there is no guarantee that this will be effective. To reduce the possible application of such laws, the distribution agreement should be short, renewals should be avoided, and the supplier should retain the right to appoint additional dealers in the territory, and to make sales directly to customers.

The parties in this type of distribution agreement should also ensure that they are not creating en employer-employee relationship. If the intermediary is deemed an employee, party autonomy is restricted. In accordance with Québec, American and Mexican rules, the mandatory protection laws will apply, including those dealing with job security, minimum pay, work condition standards and severance pay.

Finally, a continued source of uncertainty is the law that will apply to determine whether or not the distributor (intermediary) binds his principal when he acts without authority or exceeds his contractual authority. Domestic laws of Mexico, Québec and the United States differ on this question as do the conflict rules. Under Québec law, failing designation by the parties, the applicable law will be the law of the place where the intermediary acted, if this be either the domicile of the principal or of the third party (Art. 3116 C.C.Q.), whereas a Mexican court would apply the law of the place where the intermediary acted. I suggest that the parties specifically choose the law applicable to this external relationship in the interest of security,[56] although it is not certain that this would override the otherwise applicable law under Mexican, American and Anglo-Canadian conflict rules.

3. More Permanent Ventures

The Canadian or American exporter might want to get involved in a more sophisticated arrangement to tap the Mexican market, such as manufacturing its products in Mexico through a licensee or by a branch or a subsidiary owned by it. A joint venture might also be used. Although it is beyond the scope of this paper to deal with the dispute prevention surrounding these ventures, I do wish to make a few suggestions on the subject of how to avoid disputes as to the applicable law.

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55. See P. LAGARDE, "La loi applicable au contrat de distribution commerciale", Colloque Université d'Ottawa sur "Les risques", 18 octobre 1989, *Comment maîtriser les risques dans les contrats internationaux*, published in la Collection Bleue. See *e.g.* J. SPERLING, "Termination Under Dutch Law of Agency Agreements", (1990) 18 *Int'l Bus. Law.* 462; R.T. JONES, "Practical Aspects of Commercial Agency and Distribution Agreements in the European Community", (1972) 6 *Int'l Law* 107.

56. See J.A. TALPIS, "Loi applicable à la représentation volontaire organique en droit international privé québécois", (1989) *R.D.U.S.* p. 89.

a) International Licensing Agreements

Where a license agreement is envisaged, the drafters of international agreements must take special care to ensure that the licensor's proprietary rights are protected under the licensee's law. In any event, the contract should be precise as to a number of aspects such as the subject of the license, the scope of the license, the services by the licensor, currency in which payments are to be remitted, liability of the parties for taxes and duties, and the term and termination of the license. Failure to designate, will likely result in application of the licensee's law to govern the agreement, whatever the forum, unless the Sales Convention applies. From the perspective of Anglo-Canadian law[57] and American law,[58] it seems that the Convention will apply to any transaction for the licensing of computer software, as long as the software is provided with computer equipment as part of a larger system. Accordingly parties proposing to enter into international agreements involving intellectual property should carefully consider whether the transaction may be subject to the Sales Convention and decide to opt in or out.

b) Franchise

The seller may prefer to enter into a franchising agreement with the Mexican franchisee. The agreement will, of course, be drafted in accordance with the laws favourable to the franchisor, normally that of his own country. There are generally no specific domestic nor conflict rules for franchise agreements. Accordingly, the parties are free to choose the law applicable to their agreement and most of its substantive provisions. This will avoid the uncertainty resulting from the probable application of the franchisee's law and objectionable rules thereunder from the franchisor's perspective. The international franchising agreement will also include trademark licensing clauses, investment by the franchisee, operations indemnity, insurance, handling of the merchandise, a territorial clause defining the territorial limits, *e.g.* all of Mexico or an area, and the franchisor's undertakings, *e.g.* not to grant any other franchise within the area of the franchise already granted.

c) Branch or Subsidiary

The Canadian firm might decide to open a branch or establish a subsidiary in Mexico to manufacture its goods. Where a branch is chosen, from the point of view of American, Anglo-Canadian and Québec conflict of laws, the laws in force in the place of incorporation will continue to govern the status, capacity, representation and responsability of officers for the debts of the company, even though it operates through a Mexican branch. From the point of view of Mexican law, the law governing many of these questions is that of the jurisdiction where the corpora-

57. See *Burroughs Business Makers* v. *Feed-Rib Mills*, (1973) 42 D.L.R. 3d. 303 Man. C.A., affirmed (1976) 64 D.L.R. 3d. 767 (S.C.C.).

58. See *Triangle Underwriters Inc.* v. *Honeywell Inc.*, 604 F. 2d 737 (2nd Cir. 1979) and *PRX Industries Inc.* v. *Lab. Con, Inc.*, 772 F. 2d 543 (9th Cir. 1985).

tion is managed, which should result in the application of Mexican law. Where a Mexican subsidiary is envisaged, these questions will be governed by Mexican law.

d) Joint Ventures

In general, there is no recognition of the joint venture as a separate judicial entity either in the domestic or private international law rules of any of the parties to the NAFTA. In strict legal terms any discussion of joint venture refers to any one of a number of forms of structured cooperation where two or more parties may choose to combine and invest expertise, capital, or other efforts for a common project. Joint ventures within the NAFTA for example, could comprise (1) two or more Canadian firms engaging in a joint venture in Mexico; (2) a Québec company engaging in a joint venture with a Mexican company in Mexico or in the United States, (3) a Canadian company and the Mexican government in Mexico, etc.

Joint ventures are particularly vulnerable to controversy and have a high mortality rate! There are enough strains when parties come from the same country and the same background. When cultures and goods clash, the issues that divide the parties might not be suitable for neat litigation or arbitration. As such, dispute prevention is very important.

Where the joint venture takes the form of either a limited or general partnership, party autonomy will apply. As such, Mexican and Québec parties to a joint venture should select the applicable law since failure to choose the applicable law, at least from the perspective of Québec law, as no intelligent predetermination of the party who is to furnish the characteristic obligation can be made under Article 3113 C.C.Q. The parties unite to create a new institution with or without legal personality and accept certain obligations. As a result, by virtue of Article 3112 C.C.Q., the law having the closest connection should apply, which at first blush would seemingly be that of the jurisdiction where the partnership is to operate. There is also authority in American law for the application of the law of the place where the venture was to operate.[59] This law (chosen or not) will govern, in particular, relations between the partners themselves, between them and the partnership, or with third parties, the responsability of the partners for the debts of the partnership and the question of legal personality.

The preferred structure is the incorporated joint venture as it usually provides tax advantages and limited liability. The law under which the corporation is constituted will govern most of the issues involving the activities of the company, status, capacity, representation, liability of shareholders or directors for debts of the company and capital organization. There will necessarily be a shareholders' agreement especially in a closely held corporate joint venture where success or failure is largely dependant on the relationship of the shareholders. The shareholders' agreement thus plays a role similar to the partnership agreement discussed above and should also include a choice of law clause as well as provisions normally found therein.

There could also be a joint venture in certain joint venture assets being used in the business. The laws applicable to determine the rights and obligations of

59. *Teas* v. *Kimball*, 257 F. 2d 817, pp. 823-824 (5th Cir., 1958). *Flammia* v. *Mite Corp.*, 401 F. Supp. 1121, p. 1126 (DE.D.N.Y.), 1975.

co-owners would be governed by the law of the *situs* of the assets both under the conflict rules of all the parties to the NAFTA.

Finally, the commercial trust could be a vehicle for a joint venture. Joining the common law tradition, a trust can now be validly established under the new *Civil Code of Québec* in conformity with Article 1269 C.C.Q. However, the parties should be certain that effect to it will be given abroad before designating Québec law to govern the trust. The effect in Mexico is uncertain.

4. International Loan Agreements

In all types of international loan agreements, designation of the applicable law is very important, given the variety of contractual devices enabling lenders to terminate their contractual obligations if circumstances make it more difficult for them to perform their lending obligations,[60] such as "Euromarket disaster clauses",[61] or "illegality clauses".[62] Of course, a court might still refuse to enforce the terms of the loan which, even though valid under the chosen law, violate the public policy and mandatory rules, not only of the forum but a foreign law, in particular, the laws and public policies of the borrower's country. Thus where the loan transactions make use of illegal currency or gold clauses, contravene exchange control regulations or where the purpose of the loan is to finance a war or trade with an enemy, it is probably unenforceable in all the juridictions of the parties to the NAFTA.

It is even possible that defenses based on *force majeure* and "change of circumstances" not admitted under the chosen law may be available to the debtor, either on the basis of the public policy or of the forum where there is a sufficient link to it, or even on the idea of recognizing these defenses as part of the international *lex mercatoria*.

In any event, in international loan agreements, choice of law may depend on whether finance is being raised in specific capital markets or through bilateral negotiations between the lender and the borrower. Loans raised in specific capital markets will be governed by loan agreements and other debt instruments governed by the system of law that customarily governs the transactions in the relevant market. For example, Eurocurrency lending is usually governed by English law or the laws of one of the American States. In other cases, including project financing, the lender will usually insist upon application of the law of his domicile. The main exception to this rule are loans made by multilateral institutions such as

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60. T. WÄLDE, "The Sanctity of Debt and Insolvent Countries, Defenses of Debtors in International Agreements", in *Judicial Enforcement of International Debt and Insolvent Obligations, op. cit.*, note 16, p. 119.

61. "Euromarket disaster clauses" authorize lenders to give the borrower the option of either paying increased interest or preparing a loan before contractual maturity if, because of unexpected developments in the Eurocurrency market, the interest rate no longer reflects the cost to the lenders of funding their commitments, *id.*, p. 121.

62. "Illegality clauses" allow a lender to withdraw from his commitment and require prepayment of the loan if making or continuing to maintain the loan is made illegal by supervising legislation. Such illegality clauses often are formulated as "impracticality clauses", which basically entitle the lender — or even a member of a lending syndicate — to refuse to make the loan or, should the loan already have been disbursed, to require repayment, if maintaining the loan should prove illegal or even "impractical", *id.*, p. 122.

the International Bank for Reconstruction and Development which frequently contain the questionable "handcuff clause",... *that the rights and obligations under the loan agreement shall be valid and enforceable in accordance with the terms, notwithstanding the laws of any jurisdiction to the contrary.*

E. ADDITIONAL DISPUTE PREVENTIVE TECHNIQUES AS TO APPLICABLE LAW

There is nothing illegal or immoral in using the conflict rules to avoid conflict of laws. Legal persons, as parties to the contract, could be constituted in accordance with the laws of a favourable jurisdiction. Parties could also avoid complex problems of characterization of issues as form or substance, contract or property, by ensuring that the goods are situated at the time of the contract in the jurisdiction whose law has been chosen to govern the contract, and concluding the contract in that jurisdiction.

Where a foreign law is chosen, the parties to the contract could integrate or annex written proof by an expert as to its content, they could then renounce to any contestation thereof, in any proceedings.

In fact, parties could even choose a law to govern their contract which allows for private seizure and for private realization and a forum would recognize such rules in case of contestation. In this context, it is useful to remember that in most of the civil law countries in Europe (Germany, Belgium, Spain, Italy, Greece, Holland and Portugal), notarial deeds are self-executing. They have what is called *la force exécutoire* and, subject to a certain number of minor formalities, they are immediately enforceable and have the force of *chose jugée*, just as a judicial decision.

While Québec legislature has not yet agreed to attribute *la force exécutoire* to notarial acts, the new Code, in my opinion, suggests that notarial acts before foreign notaries having the *force exécutoire* under the *lex causae* should be treated in the same way as transactions (Art. 3163 C.C.Q.) or foreign judgments, and as with them, not be subject to any judicial revision (Art. 3158 C.C.Q.) although some defenses under Article 3155 C.C.Q. could be adapted.

Finally, the most important tool to ensure the application of the desired law is to select an authority (judicial, arbitral or other) which will respect the choice of law that the parties have made. The next Section will examine dispute resolution techniques in the contract.

II. PRIVATE DISPUTE RESOLUTION

While the parties will have tried to prevent disputes as to the applicable law or laws that will govern their contract (as well as other matters), they will have to address dispute resolution if the contract is to have a sound foundation. The fact is, many dispute resolution clauses are drafted haphazardly and are put in as an afterthought and without the consideration that they really deserve. Sometimes, there is simple incorporation of a boilerplate form without any inquiry into how the clause might work if a dispute occurs. Regrettably, the clauses often incorporate the more formal techniques of dispute resolution as litigation or arbitration without obligating the parties to try to work things out in a milder and less threatening arena such as renegotiation or mediation.[63]

63. W.F. FOX, *op. cit.*, note 27, p. 82.

A. LITIGATION OF INTERNATIONAL DISPUTES AND THE IMPORTANCE OF FORUM SELECTION CLAUSES

Where the parties decide not to resort to arbitration or to other milder dispute resolution devices, and prefer the traditional court system they will want to be certain to include a forum selection clause. A forum selection clause is necessary since there are no universally accepted rules governing the exercice of jurisdiction by national courts, and thus, the courts of several countries may be competent to hear a dispute. Furthermore, the countries of the NAFTA have expansive bases for personal jurisdiction, sometimes bordering or being exhorbitant, such as the "tag jurisdiction" in the common law provinces and United States (*i.e.* service of writ upon a defendant during his temporary presence),[64] or performance of a single obligation in the territory (Article 3148 al. 3 C.C.Q.). Additional uncertainty results from the use of discretionary doctrines of *forum non conveniens*[65], *forum conveniens*, *lis pendence* and anti-suit injunctions in most of the North American jurisdictions, often resulting in parallel proceedings in different courts. In fact, it is not rare for parties to spend years in litigation only to find out that they are in the wrong court.

As a result, selection of a forum, especially an exclusive forum is a necessary tool to avoid forum shopping, litigation in multiple fora and the uncertainties resulting from forum shopping, *forum conveniens*, *forum non conveniens*. Another important reason for including such a clause is that even if the various fora accept the choice of law clause, it will not be interpreted in the same way. Generally, the most sensible solution is to choose the same law and court to hear a dispute. This avoids the proof of foreign law, with all the complexities that this entails and mistakes on its content that courts may make. Finally, selecting a forum could avoid litigation ending up in a court which has little experience in complex international agreements.

B. EXCLUSIVE OR NON-EXCLUSIVE CLAUSES

Where the forum selection clause specifies the jurisdiction where a dispute may be heard, it is a non-exclusive clause. Where the parties designate *only*

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64. G.B. BORN, "Reflections on Judicial Jurisdiction in International Cases", (1987) 17 *Ga. J. Int'l Comp. L.* 1. As to the confused state of American jurisdictional laws, see F. JUNGER, "American Jurisdiction, A Story of Comparative Neglect", (1993) 65 *Col. L. Rev.* 3.

65. While North American jurisdictions have their own particular versions of *forum non conveniens*, there are similarities : Availability of alternative forums, availability of witnesses, law applicable to the merits, advantage to the parties. Public interest factors include administrative difficulties from court congestion. It will also be applied more extensively in the United States than in Québec, where it is only possible on application by a party (Art. 3135). The dicta of the United States Supreme Court in *Piper Aircraft Co.* v. *Reyno*, (1981) 102 S.Ct. 252, constitutes almost a codification of the American law of *forum non conveniens*. While the Québec courts had shown judicial restraint in the use of these discretionary measures, especially where there was no other proceeding pending outside Québec, (see : *Lamborghini (Canada) Inc.* v. *Automobile Lamborghini (S.P.A.)*, C.S. Montréal, n° 500-05-013105-942, February 2, 1995, *Malden Mills Industries* v. *Huntington Mills (Canada) Ltd.*, [1994] R.J.Q. 2227), this is no longer the case, see : *H.L. Boulton & Co. S.A.* v. *Banque Royale du Canada*, [1995] R.J.Q. 213.

one court in which a dispute may be heard to the exclusion of any other court, it is known as an exclusive clause. Where the parties intend their selection to be "exclusive", the clause should be drafted carefully as there is a tendency for courts to be protective of their jurisdiction. Unless there are clear indications of exclusivity, they might conclude for the soft clause (non-exclusivity).

The following are examples of non-exclusive forum selection clauses and are more in line with the idea of a submission to jurisdiction by a party where the forum would not otherwise be competent :

> *In the case of a dispute, the parties agree to submit to the jurisdiction of the Québec courts.*
>
> *The parties consent to the jurisdiction of the courts of Mexico in an action arising out of or concerned in any way with the agreement.*

The following would seem to me to be exclusive clauses :

> *The parties agree that only the courts of Québec shall have jurisdiction over the contract and any controversies arising out of the contract.*
>
> *Any disputes shall be tried before the courts of Mexico.*
>
> *Any dispute "must" be tried before the courts of Mexico.*

Just as in choice of law, the parties can choose one forum to adjudicate one aspect of an obligation, and choose another forum for the remaining issues. For example :

> *Any disputes relating to the seller's obligation of warranty shall be tried in the courts of the province of Québec; all other disputes shall be tried in the courts of Mexico.*

A forum selection clause may be *exclusive* insofar as one party to the agreement is concerned but non exclusive insofar as the other is concerned.

> *If a party "A" is plaintiff, any dispute arising out of the contract must be tried before the courts of Québec. Party "B" consents to the jurisdiction of the Québec courts.*

As the foregoing illustrates, forum selection clauses may take different forms depending on the interests of the parties. However, the stronger party will usually prefer to have the weaker party submit to the stronger party's jurisdiction in a non-exclusive manner. The allows him to sue the weaker party elsewhere.

For example a clause common in banking agreements provides :

> *The borrower hereby submits to the jurisdiction of the courts of New York, but the bank reserves the right to proceed under this agreement in the courts of any other country having jurisdiction in respect thereof.*

C. EFFECTIVENESS OF FORUM SELECTION CLAUSES

In spite of the obvious advantages to the parties, forum selection clauses have not always fared well, whether it has been on the occasion of a direct lawsuit before the selected court or in violation of a foreign selected court, or to enforce a foreign decision pursuant to or in violation of a forum selection clause.

1. In Québec

Subject to its validity pursuant to the applicable law, the New Code directs the courts to give effect to the forum selection clause in whatever context it may arise.[66] Furthermore, subject to there being an international dispute, as in the case of choice of law, unrestricted choice also applies to forum selection clauses. As a result, no argument of fraud upon the local or foreign jurisdiction should be accepted to set aside the choice of a forum having no connection to the parties or to the contract. Nor should effect be denied where the law of the state designated would not permit an agreement on the choice of court because of the subject matter.[67]

While it would appear that the forum selection clause should be ineffective if the contract in which it is incorporated is annulled, the courts should treat the forum selection clause separately, as a separate contract, as in arbitration (Art. 3121, 2662 C.C.Q.). In any event, the parties could address this contingency in their contract. Should there be conflict as to the determination of the clause as being exclusive or non-exclusive, this should be governed by the law applicable to this agreement.

As far as matters which could be the object of forum selection clauses, they are clearly recognized in personal actions of a patrimonial nature, and would therefore cover not only contractual disputes, but should also be effective for disputes arising from civil responsibility or quasi-contracts.

Notwithstanding the foregoing, it appears from the new codal provisions that the forum selection clause is not as binding as it might appear. Even where the clause is clearly "exclusive" a court could, in exceptional cases, using its discretionary powers, allow the local proceedings to continue despite the parties agreement on trial abroad (*for de nécessité*, Article 3136 C.C.Q.), or by declining jurisdiction even though the parties have agreed to submit to the competency of the Québec courts (*forum non conveniens* (Art. 3135 C.C.Q.)). For example, notwithstanding an exclusive selection of the Mexican courts, Québec plaintiff commences an action in Québec, arguing the inconvenience of the chosen court and the necessity for the Québec court to hear the case to avoid a denial of justice (Art. 3136 C.C.Q.). The plaintiff would of course have a difficult burden to convince the court to deny giving effect to the clause as illustrated by the *Lamborghini (Canada) Inc.* v. *Automobile Lamborghini (S.P.A.)* case where the Superior Court refused to take jurisdiction on the basis of article 3136 C.C.Q. because the parties had validly designated the Italian courts as exclusively competent to hear any controversy arising from their contract.[68] Similarly, in a proceeding to recognize a foreign decision pursuant to a forum selection clause, defendant could argue that a Québec court would have, under the same circumstances, declined jurisdiction by *forum non conveniens*. Or on a proceeding to enforce a foreign judgment, in spite of a clause selecting the Québec court, plaintiff could argue that in similar circumstances, a

66. Article 3148, par. 1(4), par. 2 C.C.Q.; Article 3165, par. 1 and 2 C.C.Q. and Article 3168, par. 5 C.C.Q.

67. As in Article 10(5) of the 1971 *Hague Convention on the Recognition of Foreign Judgements*.

68. *Supra*, note 65, February 2, 1995, R. TREMBLAY. See J. TALPIS and J.-G. CASTEL, *Le Code civil du Québec — Interprétation des règles de droit international privé, op. cit.*, note 23, pp. 911 *et seq.*

Québec court would have taken jurisdiction (Article 3164, 3136 C.C.Q.). In both situations the convenience of the court is raised. While it is too early to predict, one would hope that the Québec courts will continue to exercise judicial restraint and in the interest of the parties, and in the spirit of the NAFTA, give binding effect to forum selection clauses.

2. In Mexico[69]

While forum selection clauses are recognized in Mexican law, they too are subject to certain limitations. In particular, the jurisdiction should not have been established in an abusive manner, and should have a reasonable connection to the subject matter of the action, which is interpreted as being the court of the domicile of the parties to the transaction, the place where any of the contractual obligations are to be performed, or the court of the jurisdiction where the goods are situated. Subject to these limitations, judgments rendered by foreign courts in breach of forum selection clause would not be enforced. However, a one-sided submission clause is invalid under Mexican law,[70] *e.g.* if the Mexican party be the plaintiff, he must proceed before the Québec courts and if he is the defendant he submits to the Québec courts.

In many contracts with Mexican enterprises, the foreigner will be obliged not only to submit all disputes to Mexican courts and to Mexican law, but to renounce its rights to call upon his government for protection in all matters arising out of the contract. This renunciation to diplomatic protection is known as the "Calvo Clause",[71] and is required by the Constitution of Mexico in the case of Government Contracts, usually concession agreements, and in cases where property is purchased by an alien. Even though the "Calvo Clause" has failed to achieve international recognition, the concept remains an important consideration for Canadians and Americans doing business in Mexico. In fact, the clause has in the past been frequently inserted in conventional commercial agreements between private parties. However, it would seem obvious that in the post-NAFTA era, given, *inter alia*, Mexico's acceptance of the arbitration provisions in the Investment Chapter, the necessity for use of the clause should gradually disappear.

3. In the United States

Since the 1972 Supreme Court decisions in *Bremen* v. *Zapata Off-Shore Oil Co.*,[72] and *Scherk* v. *Alberto Culver Co.*,[73] the American courts have usually enforced forum selection clauses. For example, in *Crown Beverage Co.* v. *Cerveceria*

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69. The rules found in the *Inter-American Convention on Jurisdiction* to which neither Canada or the United States is a party are applied generally.

70. Article 567 of the *Federal Code of Civil Procedure* (as amended in 1988).

71. The renunciation concept originated out of a doctrine advanced in 1868 by the Argentinean Jurist, Carlos Calvo. The Calvo doctrine holds that nationals of one State must rely exclusively on the national judicial system in resolving commercial dispute. See D. GRAHAM, "The Calvo Clause : Its Current Status as a Contractual Renunciation of Diplomatic Protection", Vol. 6 (1971) *Tex. Int'l Forum* 289.

72. 407 U.S.I. 92 S. cd, 1907 (1972).

73. *Op. cit.*, note 13.

Motcezama S.A.,[74] the plaintiff, a U.S. distributor sued a Mexican manufacturer for breach of their distributorship contract. The contract contained a forum selection clause providing that Mexico was the exclusive forum with respect to any dispute relating to interpretation of the agreement. The plaintiff asserted that the clause was unreasonable and unjust because it would be inconvenient to litigate in Mexico and because the Mexican courts might favor a local company over a U.S. company. The United States Court upheld the enforcement of the forum selection clause holding that "the inconvenience of litigating a dispute over a freely negotiated international contract in the country where one of the parties is located and is to perform is not sufficient to override the clause".[75]

The Court also rejected the plaintiff's "provincial" argument regarding the potential unfairness of the Mexican court stating, "[i]f the unfairness of foreign tribunals can ever be a basis for refusing to enforce such a clause, a much stronger showing than [the plaintiff] has made is required".[76] However, based on the statement in *Bremen*, that "plaintiff could clearly show that enforcement would be unreasonable and unjust or that the clause was invalid for such reasons as fraud or overreaching".[77] American courts have developed a whole catalogue of defences such as statutory restrictions, abusive clauses[78] and inconvenience to the plaintiff against exclusive and non-exclusive forum selection clauses.[79]

With respect to the convenience limitations, one could say that the American courts are actually imposing a *forum non conveniens* limitation on the effectiveness of the agreement of the parties. Accordingly forum selection clauses are binding on the parties, unless the plaintiff who brings suit in another forum, or the defendant when the case is brought in the selected forum, can still show that its enforcement would be unreasonable, unfair or unjust. Further uncertainty results from the possibility that the United States courts may dismiss the proceeding due to the public factors abovementioned such as court congestion, lack of local interest in the controversy, even where the defendant has not raised the doctrine of *forum non conveniens*.

4. In the Common Law Provinces and Territories of Canada

The uncertain effect of forum selection clauses before the Canadian Common law court is similar to the American position. In principle, the forum selection clause will be enforced, unless the balance of convenience strongly

74. 663 F. 2d. 886 (9th Cir. 1981).
75. *Id.*, p. 888.
76. *Id.*, p. 889.
77. *Supra*, note 72.
78. See *Carnival Cruise Line* v. *Shute*, (1991) 499 U.S. 585 (applying to a consumer tort victim where there was a printed forum selection clause on the back of the cruise ticket).
79. M. GRUSON, "Contractual Choice of Law and Choice of Forum : Unresolved Issues" in *Judicial Enforcement, International Debt Obligations*, International Law Institute, *op. cit.*, note 16, pp. 26 *et seq.*; M. GRUSON, "Forum Selection Clauses in International and Intestate Commercial Agreements", (1982) *U. Int'l L. Rev.* 133; Z. COWEN and D.M. DA COSTA, "The Contractual Forum : A Comparative Study", (1965) 43 *Can. B. Rev.* 453.

favours the opposite conclusion.[80] Justice Doherty in *Fairfield* v. *Law*[81] states the generally accepted approach :

> Where the parties have agreed upon jurisdiction in a contract which is the subject matter of the dispute, and where there is no suggestion that the agreement as it related to jurisdiction offends public policy or was the product of grossly uneven bargaining positions, the Court should give effect to the term of the agreement unless the party seeking to have the case heard in another jurisdiction can show that the interests of the parties and the interests of justice favour trial in that other jurisdiction.

To ensure certainty and predictability the parties could, in their contract, expressly renounce raising forum conveniens *in any excluded forum or* forum non conveniens *in the selected forum. They could even go further, and renounce the right to raise any jurisdictional defense, or constitutional arguments, and to be irrevocably bound by any judgment rendered by the selected court.*

While the Québec and Anglo-Canadian courts would likely give effect to such a renunciation, there is no such guarantee of this in the United States, given that American courts on their own initiative may dismiss a case under *forum non conveniens*.

III. ALTERNATIVES TO LITIGATION OF INTERNATIONAL DISPUTES

Given the reasons for the increased popularity of alternative dispute resolution in domestic commercial disputes, there can hardly be any doubt that they are even more appropriate for business disputes of an international character. In fact, the search for alternatives to litigation is now well established with the growing recognition of the inefficiencies of the traditional court system in dealing with commercial disputes in an international context.[82] Scores of books and articles have been written in recent years, conferences held, mediation centres established, and law offices have modified their practice to become a part of this movement away from the courts.

A. ARBITRATION : NAFTA'S PREFERRED METHOD OF ALTERNATIVE DISPUTE RESOLUTION

Article 2022, par. 1 of the NAFTA includes an important statement of principle :

> Each party shall to the maximum extent possible, encourage and facilitate the use of arbitration and other means of alternative dispute resolution for the settlement of international commercial disputes between private parties in the free trade area.

The NAFTA's encouragement of arbitration comes as no surprise, particularly in light of the issues discussed. It is becoming the norm in the resolution of international commercial disputes. Arbitration is usually less costly and time

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80. See J.-G. CASTEL, *op. cit.*, note 13, p. 250 and authorities cited and see *New Hampshire Insurance* v. *Stabas Bau*, (1992) 1 Lloyd's Rep. 361, p. 371.

81. (1990) 71 O.R. (2d) 599. As well the choice must be express.

82. S.C. NELSON, "Alternatives to Litigation of International Disputes", (1989) 23 *Int'l Law* 187.

consuming than litigation, which requires counsel in different countries and extra costs resulting from multiple proceedings and enforcement expense. It prevents multiple proceedings with potentially inconsistent results. Arbitration is flexible, and allows the parties to select arbitrators who are well equipped to deal with the issues specific to their dispute, the type of arbitration and the arbitration process, thereby assuring them a certain degree of control over the process.

As well, arbitration avoids some limitations on party autonomy, for example the "substantial connection" test within the United States or the "validly designated" limitation in Mexican law, or the failure to give effect to contractual *dépeçage* if it breaks the harmony or unity of the contract.

We have seen the weakness of forum selection clauses, and the uncertainty to recognition and enforcement of foreign decisions.

The fact is Mexico, Canada and the United States are all parties to the *United Nations Convention on the Recognition of Foreign Arbitral Awards*, commonly known as the "New York Convention" and Mexico and the United States are also parties to the *Inter-American Convention on International Commercial Arbitration* (the Panama Convention).[83] As well, in all three countries, legislation facilitating and promoting commercial arbitration has been adopted. It has thus become much easier to compel arbitration to the exclusion of parallel judicial proceedings.[84] As well, intra-NAFTA arbitral awards will normally be enforced by all the parties to the NAFTA, reducing if not eliminating the possibility of forum shopping and to enforce an award once it has been obtained.[85]

The statement of principle in paragraph 1 of Article 2022 of the NAFTA is complemented by paragraphs 2 and 3 of the same Article which state :

> (2) To this end, each party shall provide appropriate procedures to ensure observance of agreements to arbitrate and for the recognition and enforcement of arbitral awards in such disputes.
>
> (3) A party shall be deemed to be in compliance with paragraph 2 if it is a party to and is in compliance with the 1958 United Nations Convention on the Recognition of Foreign Arbitral Awards or the 1975 Inter-American Convention on International Commercial Arbitration.

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83. January 30, 1975, O.A.S.T.S., n° 42 O.A.S. doc. OEA/Aer A/20 (SEPF).

84. See however the unfortunate decision of the Québec Court of Appeal in *Guns N' Roses Missouri Inc.* v. *Productions Musicales Donald K. Donald Inc.*, C.A. Montréal, n° 500-09-0023150935, May 18, 1994, where the court refused to recognize the effect of an arbitration clause between *Guns N' Roses Missouri Inc.*, defendant in warranty, and *Productions Musicales Donald K. Donald Inc.*, principle defendant and plaintiff in warranty. On February 2, 1995, leave to appeal to the Supreme Court was refused. Similarly, Anglo-Canadian common law courts have, in the past, not always given full effect to the arbitration clause, retaining a discretionary power in this regard, which is not compatible with Article II of the *New York Convention*, nor with Article 8 of the Model Law. See comments of judge Deschamps in *B.C. Navigation Co.* v. *Campotex Shipping Services*, published in (1988) 16 F.T.R. 79; *Ocean Star Container Line* v. *Ilberfreight*, Federal Court of Appeal, June 2, 1989, n° A-784-88.

85. S.C. NELSON, *loc. cit.*, note 82, p. 194. See generally, H. HARNIK, "Recognition and Enforcement of Foreign Arbitral Awards", (1983) 31 *Am. J. Comp. L.* 703; and S. GRAVEL, "Arbitration Within the NAFTA Area : Current Difficulties and Future Trends", published in the *I.C.C. International Court of Arbitration bulletin*, vol. 4 / n° 2, October 1993, pp. 36-48. International arbitration will be relentlessly enforced by all the parties to the NAFTA. In the United States, see *Mitsubishi Motors* v. *Chrysler-Plymouth Corp.*, (1985) 473 U.S. 614. See M. TENNENBAUM, "International Arbitration of Trade Disputes in Mexico : The arrival of NAFTA and New Reforms to the Commercial Code", (1995) 12 *J. Int'l Arb.* 52.

The fact that decision by a few lawyers and/or a law professor may be more enforceable than a judgment is a fact repute with ironies but it reflects the legal impact of the concept of "consent" in legal cultures everywhere.[86]

While it is beyond the scope of this paper to discuss arbitration clauses that could or should be used, I would like to make a few suggestions on the drafting of an arbitration clause :[87]

The parties should include such a clause in their contract (*clause compromissoire*), even though they could adopt a submission (*compromis*) once a controversy has arisen. In addition, the parties could designate the law applicable to their arbitration agreement as the laws of all parties to the NAFTA recognize the autonomy of the clause from the contract to which it relates.

There is no miracle clause. It need not be lengthy or complicated but to be effective it must be clear to avoid any ambiguity. While the parties could provide for *ad hoc* arbitration, most parties prefer the assistance of a recognized arbitral institution and choose among the major arbitration institutions.

UNCITRAL recommends the following model submission clause :

> *Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as are presently in force.*

The court of Arbitration of the ICC in Paris recommends the use of the following model clause :

> *All disputes arising in connection with the present contract shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules [...]*

The American Arbitration Association recommends the following clause :

> *Any controversy or claim arising out of or relating to this contract, or any breach thereof, shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association, and judgment upon the award rendered by the Arbitrator(s) may be entered in any Court having jurisdiction thereof.*

The Québec National and International Arbitration Centre recommends the following :

> *Any dispute which arises in the course of or following the performance of the present contract will be definitely settled under the auspices of the Québec National and International Commercial Arbitration Centre by means of arbitration and to the exclusion of courts of law, in accordance with its General Commercial Arbitration Rules in force at the time this contract is signed and to which the parties declared they have adhered.*

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86. J. WESTBROOKE, ABA, Fall-Winter Meeting, Mexico, Nov. 1994, "An Overview of International Enforcement of Commercial Monetary Obligations".

87. On submission clauses, see J. RHODES and L. SLOAN, "The Pitfalls of International Commercial Arbitration", (1984) 17 *Journal of Frans. Law* 19, pp. 25 *et seq.*

The British Columbia International Commercial Arbitration Centre recommends the following :

> *All disputes arising out of or in connection with the contract or in respect of any defined legal relationship associated therewith or derived therefrom shall be referred to and finally resolved by arbitration under the rules of the British Columbia International Commercial Arbitration Centre.*

Even when the parties have agreed to the use of a supervising institution and its rules, the contract should set out more of the details of dispute resolution including the rules system, the language of the arbitration proceeding and the arbitral award, the site of the arbitration and the number of arbitrators.[88]

B. ALTERNATIVES OTHER THAN ARBITRATION — INFORMAL METHODS OF DISPUTE RESOLUTION

Rightly or not, parties to an international agreement sometimes have reservations about arbitration as costs are nonetheless high, confidentiality is not guaranteed, and there is no appeal of the sentence. While it is probably an unusual international contract that provides for dispute resolution other than by litigation or arbitration, it will come as no surprise that parties to international agreements might in the future begin to turn to informal alternatives to settle disputes, at least as a first step.

The most common types of informal ADR that would lend itself to international commercial disputes, organized in ascending order of third party intervention include : *Negotiation*, which is the most common forum of dispute resolution. In fact, some parties place an express obligation of renegotiation in the contract with the expectation that the parties will not resort to a formal method of dispute resolution without firstly talking to each other, *Mediation*, which is the facilitation of negotiations among parties by a neutral third party.[89] At present, mediation is underutilized in international trade even though more and more dispute resolution agencies, such as the International Chamber of Commerce, the United Nations Commission on International Trade Law (UNCITRAL), and the American Arbitration Association have promulgated rules for mediation and conciliation which are characterized by brevity and simplicity. However it is inevitable that mediation will catch on in the international scene; *Mini-trial*, which is a non-binding settlement process typically used in large bilateral commercial disputes between corporate entities and which lends itself to the settlement of international disputes. Its growth is also likely as some of the major institutions now have Mini-trial rules; *Early neutral evaluation (ENE)*, which involves a neutral evaluator who is experienced or has specialized training in the substantive area in issue. It may include actual settlement discussion. There are also Semi-Binding Procedures, which have more "teeth" to them such as *Mini-trial with advisor's opinion admissible in proceedings*. There are some Binding Procedures where the parties agree to give conclusive effect to the outcome of the alternative proceeding. One type of binding procedure would involve the conduct of a *Mini-trial before a referee or*

88. W.F. FOX, *International Commercial Agreements*, *op. cit.*, note 27, pp. 130-131.

89. See L. PEARLMAN and S.C. NELSON, "New Approaches to the Resolution of International Commercial Disputes", (1983) 17 *Int'l Law* 215. See W.F. FOX, *id.*, pp. 194-196, as to how the different stages of mediation might work in an international commercial contract.

special master appointed by a court having juridiction over the dispute. There is Mediation / Arbitration or *Med. / Arb.* which commences as the mediation of the dispute by a neutral third party. If the mediation does not successfully resolve the dispute, the third party assumes the role of Arbitrator and imposes a decision on the parties.

While it is rare, the parties could provide for guarantees that they will submit to binding mediation or some other informal dispute resolution method by putting a sum in escrow to be forfeited to the party who refuses to respect the obligation. The sum could be the equivalent of estimated costs, or much more, as liquidated damages. The validity of a such a clause should be governed by the law applicable to the contract, even there are procedural and jurisdictional overtones which suggests reference to the *lex fori*. In any event, it would surely not within the spirit of the NAFTA, and particularly Article 2022, for a court in any of the contracting countries to refuse to recognize its validity.

There are other techniques which imaginative drafters can contemplate. They include the device of adaptation by which the contract itself is drafted in a sufficiently flexible fashion to accommodate unanticipated occurrences as supply shortages or sharp price increases or decreases.[90]

One creative solution devised by a Japanese attorney in a joint venture involving an American and a Japanese company was to specify that any claim brought by the Japanese company had to be brought in Chicago and any claim by the American company had to be brought in Tokyo. This had the beneficial effect of discouraging either side from resorting to arbitration and, in actual practice, forced them to resolve all of their differences amicably.

IV. IMPROVING THE EFFECTIVENESS OF COMMERCIAL DISPUTE RESOLUTION PROCEDURES

The common desire of the three NAFTA countries to continue working toward increasing the effectiveness of commercial dispute resolution procedures is expressed in Paragraph 4 of Article 2022 :

> 4. The Commission shall establish an Advisory Committee on Private Commercial Disputes comprising persons with expertise or experience in the resolution of private international commercial disputes. The Committee shall report and provide recommendations to the Commission on general issues referred to it by the Commission respecting the availability, use and effectiveness of arbitration and other procedures for the resolution of such disputes in the free trade area.

In the context of issues addressed in this paper, the following possibilities could be considered to improve the present situation, the whole well within the spirit of the NAFTA.

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90. W.F. FOX, *id.*, pp. 83 *et seq.* and pp. 184 *et seq.*, and N. HORN, "Standard Clauses on Contract Adaptation" in *International Commerce in Adaptation and Renegotiation of Contracts in International Trade and Financing*, edited by N. HORN, Kluwer, 1983, p. 112. For a review of a variety of alternative dispute mechanisms in international agreements, see S.C. NELSON, "Alternatives to Litigation of International Disputes", (1989) 23 *Int'l Law* 187.

A. WITH RESPECT TO ARBITRATION AND OTHER ALTERNATIVE DISPUTE RESOLUTION METHODS

Canada could accede to the 1975 *Inter-American Convention on International Commercial Arbitration* (Panama Convention), so as to extend the guarantees included in it to Canada's relations with Latin American countries who are not party to the New York Convention (*e.g.* Brazil, Venezuela, El Salvador and Paraguay). The Convention guarantees judicial recognition of foreign arbitral awards by signatory states.

Canada and the United States could accede to the 1979 *Inter-American Convention on Extra-Territoriality of Foreign Judgments and Arbitral Awards* (Montevideo Convention), which in 1987 was ratified by Mexico, further extending their trade guarantees with Latin America.

Canada and Mexico could become parties to the 1966 *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*,[91] to which 107 nations, including the United States, are party. The ICSID Convention provides for the establishment of an International Centre for the Settlement of Investments Disputes, as a non-financial organ of the World Bank. ICSID is designed to serve as a forum for conciliation and for arbitration of disputes between private investors and host governments.

Even though Mexico, the United States and Canada are all parties to the New York Convention, Article 2022 paragraph 4 could lead to an additional agreement between the parties, for example to further limit (within these nations) the invoking of the two main defenses to enforcement, non-arbitrability[92] and public policy even though they are in general narrowly construed. The agreement could also bind the nations to improve the rules in their respective jurisdictions directing courts to further honour arbitration clauses by compelling arbitration, or staying litigation pending the outcoming of arbitration. The fact is, the abovementioned unfortunate decision of Québec Highest Court in *Guns N' Roses* is particularly troublesome, not only from the point of view of the judicial security of international commercial transactions but from the respect of Canada's international obligations under Article II of the New York Convention. In fact, as the decision could adversly affect Canada's international reputation, one regrets that the Supreme Court did not accept to hear the case.[93]

A more ambitious project would be to create a single international authority[94] under the auspices of the United Nations to guarantee uniform applica-

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91. Published in 14 *International Legal Materials* 336.

92. In the United States following *Mitsubishi* v. *Solor*, (1985) 473 U.S. 614, very few issues in international contracts are not arbitrable. See W.F. FOX, "Mitsubishi v. *Solor* and its Impact on International Commercial Arbitration", (1985) 19 *J. World Trade L.* 579.

93. See *United States Federal Arbitration Act*, 9 U.S.C. 1-14, pp. 201-208. For a critical appreciation of the failure of the Canadian common law courts to give a binding effect to the arbitration clause, see A. PRUJINER, "La force obligatoire des clauses d'arbitrage (article 8 de la Loi type NUDCI)", (1994) 3 *Rev. de l'Arb.* 569.

94. The creation of such an institution was proposed by Hans Smit. See "The Future of International Commercial Arbitration : A Single Transnational Institution", (1986) *Colum J. Transnat'l L.* 9 and V. PECHOTA, "The Future of the Law Governing the International Arbitral Process : Unification and Regard", (1992) 2 *Am. Rev. of Int'l Arb.* 17, p. 28.

tion of the standards established by the New York Convention without the possibility of refusal of enforcement by any national court save the ground of public policy. In fact, the parties of the NAFTA could agree to create such a supranational authority within the free trade area.

Finally, Mexico, the United States and Canada could agree to introduce legislation in their countries imposing mandatory mediation at least as a first step, in international commercial disputes requiring the court to stay any litigation in the presence of a pre-existing agreement to mediate. After all, we are very close to mandatory arbitration and there is mandatory litigation! Where a party is sued, he has no choice but to go to court or default in court. In any event, the countries could agree to further the less formal forms of alternative dispute resolution. An expression of this policy is found in Paragraph (1) of Section 30 of the *British Columbia International Commercial Arbitration Act*:

> It is not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute and, with the agreement of the parties the arbitral tribunal may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement.[95]

B. WITH RESPECT TO JURISDICTION AND FOREIGN JUDGMENTS

Even though litigation is slow, cumbersome and costly, the characteristics of finality and enforceability (at least in the state in which a decision is rendered), often warrant the litigation of many commercial disputes even when alternatives are available. In any event, the alternative forms frequently require parties to go into court even after they have mediated or arbitrated the dispute because the party losing the mediation or arbitration does not voluntarily concede. In many cases going directly to court may be the best solution.[96] As such, more is needed than simply directing dispute settlement away from the courts.[97] As litigation remains predominant, there needs to be a multilateral (or trilateral) Convention on jurisdiction and foreign decisions (something along the lines of the Brussels Convention),[98] ensuring *inter alia*, the recognition of forum selection clauses without *forum non conveniens*, or other discretionary rules to set them aside. The fact is, a special commission organized by the Hague Conference on Private International Law including the parties to the NAFTA was held in June, 1994 to study the possibility of a future convention dealing with such a future convention A consensus emerged to recognize in principle, the jurisdiction of a court which was chosen by the parties, and for that court to have exclusive jurisdiction, although no conclusions emerged on whether the selection may be disregarded if the selected court is *forum non conveniens*. The timing is particularly right for such a Convention as there is a

95. S.B.C., chap. 14, s. 30(1).

96. W.F. FOX, *International Commercial Agreements*, *op. cit.*, note 27, p. 204.

97. M.W. GORDON, (1953) *Modern Law Rev.* 157, p. 169.

98. *Convention on Jurisdiction and Enforcement of Judgements and Civil and Commercial Matters*, Brussels, September 27, 1968. This Convention has since served as a model for the Lugano Convention which extends European full faith and credit and long arm jurisdiction to Austria, Finland, Iceland, Norway, Sweden and Switzerland.

clear trend in both the United States[99] and Canada[100] to extend the liberal rules on the recognition of judgments within the federation to those rendered outside.[101]

Although it is obvious that the Calvo Clause would be incompatible with such a Convention, in the interim and even if no convention takes place, the Mexican authorities must pass legislation prohibiting the use of the Calvo Clause in international private transactions, at least between private parties.

A treaty amongst the NAFTA countries on the recognition of transnational bankruptcy is needed. The previous attempt at a bilateral U.S. Canada treaty in 1979 failed. It provides for "universal" recognition of international bankruptcy. It is now the time to revive the negotiations and to include Mexico.

Canada should accede to the March 18, 1970 Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, as Mexico and the United States[102] are parties to it.

Finally, Mexico should adhere to The Hague Convention of 1965 on the Service Abroad of Judicial and Extra-Judicial documents in Civil or Commercial Matters, as Canada[103] and the United States are parties to it. The lack of uniformity of service of process procedures is a major problem.

C. INCREASED UNIFORMITY IN CHOICE OF LAW OR DOMESTIC LAW

As has been demonstrated, there still remains a certain amount of insecurity as to whether or not an expressly designated foreign law will always be respected by the courts of the countries to the NAFTA.

The parties of the NAFTA could pursue uniformity on choice of law in contracts. In fact, Canada, the United States and Mexico participated in the preparation of a draft Inter-American Convention on the law applicable to international contracts prepared under the auspices of the Organization of American States at the Fifth Inter-American Specialized Conference on Private International Law on March 19, 1994 in Mexico. The rules adopted are very favourable to international

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99. Although a few States still follow the Supreme Court decision in *Hilton* v. *Guyot*, (159 U.S. 113, 16 S. Ct. 139), many states have enacted the *Uniform Foreign Money Judgements Recognition Act* (13 Uniform Laws Anno. 417) providing *inter alia*, that foreign money judgments are recognized and enforced on the same terms as a sister-state.

100. In the *common law Provinces and Territories of Canada*, the *Morguard* decision (*supra*, note 4) advocating full faith and credit within Canada, was applied to judgements rendered outside Canada. See *McMickle* v. *Van Straaker*, (1992) 93 D.L.R. 4th 74 (B.C.S.C.) and see *The Foreign Judgements Act*, R.S.S. 1978 C.F.-18; *The Foreign Judgements Act*, R.S.S. 1973 C.F.F. In Québec, no longer is a distinction made for the recognition and enforcement of judgments from Canadian Provinces or judgments rendered outside Canada.

101. See *Uniform Enforcement of Canadian Judgments Act* (ULCJA) of 1991 which embodies the notion of full faith and credit to enforcement of judgments between the Provinces and Territories of Canada, and the 1994 *Court and Jurisdiction and Transfer Act*.

102. See the unfortunate decision in *Société Nationale Aérospatiale* v. *United States District Court*, (1987) 107 S. Ct. 2542, where the Supreme Court refused to adopt a rule that would have required the litigants to resort to the Convention, rather than retaining the option of using discovery rules in the Federal Rules of Civil Procedure. See also J.P. GRIFFIN and M.N. BRAVIN, "Beyond Aerospatiale : A Commentary on Foreign Discovery Provisions of the Restatement (Third) and the Proposed Amendments to the Federal Rules of Civil Procedure", (1991) *Int'l Law* 331.

103. Canada acceded to this Convention on September 26, 1988, which has been in force since May 1. 1989.

commercial transactions. For example, the party autonomy principle is adopted without restriction. Derogating from Mexico's present rules and contrary to the restrictive features of the Rome Convention on the Law Applicable to Contractual Obligations,[104] the Convention allows the parties to stipulate to the "general principles of international law".[105]

As well, the Advisory Committee could create and publish, even as a directive, trade usages applicable in the NAFTA jurisdictions in order to define a regional *lex mercatoria*.[106]

To facilitate the development of international commerce within the free trade area, Canada should ratify the "Limitation Convention"[107] which compliments the Sales Convention and which displaces the disparate time periods, concepts and internal conflict rules on the prescription or limitation as concerns international sales. Some are too short, some are too long, while some refer to the *lex fori*, others to the law governing the contract. The Convention which provides uniform predictable material rules has been ratified by Mexico in 1988 and has been in force in the United States since December 1, 1994. Finally, party autonomy is preserved as the parties may opt to exclude its application.[108]

Finally, Canada and the United States could accede to the 1983 Geneva Convention on Agency in the International Sale of Goods, as Mexico has ratified it in 1988. The Convention is another important step towards unification of international trade law. It was intended to complete the Vienna Convention and provide uniform rules on agency.[109]

CONCLUSION

In this paper I have focussed on the prevention of disputes within the NAFTA as to applicable law in international transactions and as to the authority which could be called upon to resolve any dispute that could arise. Unquestionably, the practice of alternative dispute resolution is on a roll and will continue to grow.

However, in the parties', as well as in the public interest, governments, organizations, lawyers, notaries and law school programs must work towards avoiding disputes for all matters in the agreement. In fact, the National and International Arbitration and Mediation Centre within the countries should promote dispute prevention by organizing seminars, and in other ways. This would have a most beneficial effect and ensure the business and legal community that the bottom line is avoiding as much dispute as possible, reducing time and costs and maintaining good relations between commercial partners. Such endeavours include, but go well beyond, drafting to cover every potential area of dispute. In this context, insofar as Québec-Mexican relationships are concerned, one should not overlook an element

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104. (1980) O.J. L/266.

105. See Article 9(2) of the Convention, and in general, see F. JUENGER, "The Inter-American Convention on the Law Applicable to International Contracts : Some Highlights and Comparisons", (1994) vol XLII, *Am. J. of Comp. Law* 381.

106. S. GRAVEL, *loc. cit.*, note 85, pp. 47-48.

107. *Supra*, note 1.

108. See P. WINSHIP, "The Convention on the Limitation Period in the International Sale of Goods : The United States Adopts UNCITRAL's Firstborn", (1994) 28 *Int'l lawyer* 1071.

109. For a good analysis, see J. BONNEL, "The 1983 Geneva Convention on Agency in the International Sale of Goods", (1983) 32 *Am. J. of Int'l Law* 717.

so essential that in the final analysis it may operate to significantly reduce potential disputes. From a fundamental perspective, the fact that both Québec and Mexico are able to trace their sociocultural as well as their sociolinguistic origins from the Latin culture cannot be emphasized enough. Integral, particularly in the context of their NAFTA participation, is the fact that in both countries the transaction of business is characterized by, and indeed premised upon, friendship, honor, good faith and trust. In addition, both societies share the parameters inherent in civil law jurisdictions and both are oriented toward a "civilian" method of reasoning. The aspects and advantages of this concept of common culture and legal heritage will surely facilitate negotiation and promote cooperation between entrepreneurs, lawyers and notaries alike throughout Québec and Mexico. The significance of these fundamental similarities and traditions should not be underestimated, and the potential long range beneficial value should not be overlooked.

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