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## ONCE AGAIN!

*by Steve Revay*

This is the third time that the lead article of The Revay Report is devoted to arbitration. In the first issue, winter 1981, I concluded by stating "...arbitration enjoys all the necessary prerequisites for speedy resolution of many contract disputes. However, the nature of the disputes, the procedures followed, and the people involved may singly or in combination make arbitration a sad experience in terms of results, time, and expense."

These words, without me knowing it, were mere echoes of a statement by Lord Justice Denning in **Bremer Vulkan Schiffbau und Maschinenfabrik** v. **South India Shipping Corpn Ltd.** (1981) AC 909.

The **Bremer Vulkan** dealt with the issue of stopping the arbitration because of 'inordinate and inexcusable delay' (i.e. 12 years) by the claimants. In his judgement Lord Denning said, in part:

> "When I was young, a sandwich-man wearing a top-hat used to parade outside these courts with his boards back and front, proclaiming 'Arbitrate, don't litigate'. It was very good advice so long as arbitrations were conducted speedily: as many still are in the City of London. But it is not so good when arbitrations drag on forever."

Although these warnings are still valid, during the past five years many people have realized that arbitration is a must in international trade and a significant help in resolving domestic commercial disputes. Accordingly, both Governments and trade and professional associations went out of their way to find ways and means to ensure that arbitrations are conducted expeditiously. These efforts appear to have culminated in 1986, as can be seen from the enclosed article.

1986 appears to be a turning point also for RAL. Our venture south of the border is bearing fruit and today we are engaged in the U.S.A. on five major claims in four states (with a combined face value of $82 million) plus we are providing scheduling services on a job in Texas.

## CANADA FINALLY ACCEPTS ARBITRATION

*P.M. Blaikie Q.C. and S.G. Revay*

The title may sound pretentious. After all, arbitration as a vehicle to resolve both commercial and labour disputes has been practiced in Canada throughout this century. What has happened in 1986 to justify it?

1. Canada finally acceded to the New York Convention (of 1958) providing for ready enforcement of foreign arbitration awards.
2. The Federal Government enacted the Commercial Arbitration Act, providing for arbitration of commercial disputes where at least one of the parties is a Federal department or a Federal Crown corporation, or in relation to maritime or admiralty matters both domestically and internationally.
3. All ten provinces enacted enabling legislation with respect to the New York Convention and at least four (British Columbia, Nova Scotia, New Brunswick and Ontario) have either passed or are in the process of enacting an International Commercial Arbitration Act.
4. British Columbia has passed, and Ontario and Quebec are working on major revisions of their respective domestic Commercial Arbitration Acts. The B.C. and Ontario Acts have remained largely unchanged since first enacted. Those Acts were modelled after the English law of 1889.
5. The Canadian Construction Association endorsed, at its last Annual Meeting in February this year the "Recommended Procedures For The Arbitration Of Construction Disputes".
6. On May 12, 1986, the British Columbia International Commercial Arbitration Centre was opened in Vancouver, and the Provinces of Ontario and Quebec are actively planning to open similar centres.
7. In 1986 the Arbitrators' Institute of Canada was reorganized in order to give more power and/or opportunity to the five regions to strengthen their ties with local construction and commercial associations in order to satisfy their needs better.

This long, but not exhaustive, list of events is to be substantial proof that Canadians are finally prepared to fully accept arbitration as a viable substitute for litigation.

There are many known definitions of "arbitrations", but one of the most descriptive comes from the book of Professor René David, **Arbitration in International Trade,** (Kluwer, 1985) which reads as follows:

> "Arbitration is a device whereby the settlement of a question, which is of interest for two or more persons, is entrusted to one or more persons — the arbitrator or arbitrators — who derive their powers from a private agreement, not from the authorities of a state, and who are to proceed and decide the case on the basis of such an agreement".

Reading Professor David's definition one may conclude, albeit erroneously, that arbitration is totally outside and free of judicial supervision. In reality, the degree of court intervention was one of the greatest hurdles in the way of commercial arbitration realizing its full potential in Canada.

There were, and perhaps still are, those who look at arbitration as an attempt to oust completely the jurisdiction of the courts. That conclusion is, of course, patently false, if taken literally, although the parties clearly do not wish to submit the merits of their dispute to the courts. Although the courts and the arbitrators perform similar functions relative to dispute resolution, arbitrators have no power to enforce their awards; that can be done only by "leave of the court, as if it were a judgement of the court". Additionally, the different Arbitration Acts grant varying degrees of supervisory power to the courts, such as the appointment and/or replacement of arbitrators, or granting interim measures of protection, or subpoenaing of witnesses and, perhaps, settling

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questions of law, that arise during the arbitration, through the procedure known as "stating a case". Of these, the right of either party and/or the arbitrator(s) to "state a case" for the opinion of the courts is, probably, the most objectionable on the international scene, as is witnessed by the fact that England was forced in 1979 to remove this provision from the law regulating arbitration, thereby facilitating international arbitrations taking place in England. In Canada, all current provincial Arbitration Acts contain stated case provisions, save for Quebec, where arbitration is governed by the Code of Civil Procedure (Art. 940 to 951 inclusive).

The new B.C. Act, which represents a significant departure from the old statute, retained a modified version of the stated case provision (Art. 33), which states in part:

> "(2) The Court shall not make a determination on the question submitted unless it is satisfied that substantial savings in costs of the Arbitration would result."

Whether Ontario follows B.C. in revising its Act remains to be seen. At the same time, however, both B.C. and a number of other provinces enacted special laws governing international commercial disputes. These Acts follow (with or without alterations) the Model Law, adopted by the United Nations Commission on International Trade Law (UNCITRAL) on June 21, 1985. These International Commercial Arbitration Acts are in addition to the Foreign Arbitral Awards Act enacted by all provinces. The latter Acts were required to allow the Federal Government to accede to the New York Convention. This Convention has two effects, provided it applies to the particular arbitration. First, if a party to an international agreement containing an arbitration clause starts a lawsuit (in spite of the arbitration clause), the court is required to stay that proceeding and send the parties off to arbitrate. Second, it makes the enforcement of foreign arbitral awards more expeditious.

The influence of these two provisions on international trade is far-reaching. It has always been puzzling that Canada, a major trading nation, could remain aloof and unfriendly to international arbitration. Canada was, by the way, the only major western trading nation remaining outside the New York Convention for so long.

As opposed to the Foreign Arbitral Awards Act and, by inference, the New York Convention, the International Commercial Arbitration Acts (already passed or in the process of being enacted by at least four provinces) provide for the basic substantive and procedural rules for the conduct of international commercial arbitrations in the respective provinces. This is important since the procedural law, although not necessarily the substantive law, of the place where the arbitration is being held, governs the proceedings. For example, an international arbitration held in Vancouver is governed by the B.C. Arbitration Act. This Act contains, among other things, the stated case provisions and the power of the courts to set an award aside, all of which are generally unacceptable in international dispute resolution procedures. By passing the International Act, B.C. and the provinces following it circumvented these problems, thereby facilitating international arbitrations.

Quebec and the Federal Government chose a different route and, following the UNCITRAL Model Law, provided for domestic and international arbitrations in a single statute.

The third reading of Quebec Bill 91 has been held over for the fall session of the National Assembly, whereas the Federal Act was proclaimed on August 10, 1986. Federal Act, as already stated, applies to matters where at least one of the parties to the arbitration is a department or a Crown corporation or in relation to maritime or admiralty matters. It further states that:

> "The Governor in Council, on the recommendation of the Minister of Justice, may make regulations prescribing the terms of and conditions on which a department or a Crown corporation may enter into an arbitration agreement".

This is a major departure from the past attitude of the Federal Government, which until now refused to consider the resolution of a dispute, particularly a construction claim, through arbitration.

Since the enactment of this law the officials of the Department of Justice confirmed that the Government is now prepared to arbitrate certain contractual disputes.

The impact of this change in attitude can be very significant, particularly if the construction industry takes full advantage of it. It is, perhaps, not generally known that the distribution of jurisdiction between Federal and Provincial courts can, at times, create a major hurdle in resolving a construction dispute. Sub-constractors, if so inclined, must sue the general contractor in a provincial court, while the general contractor must take his dispute with the Crown to the Federal Court, even though it is the same dispute arising out of the same project. Similarly, the Crown, if considered advisable, must sue an architect or an engineer in a third action, again in a pro-

## SHORT PIECES

### SEMINARS

With the start of the seminar season, RAL personnel is again put into harness. This fall, RAL people will deliver twelve papers in seven different seminars and will conduct four mock arbitrations. Additionally, Regula Brunies is busy organizing the technical program at the 1986 Annual Seminar/Symposium of the Project Management Institute, to be held in Montreal between September 20 - 24, 1986.

### RAL COMMENCES WORK ON CONSTRUCTION DATASOURCE SPECIFICATION

Revay and Associates Limited commenced work in August on a nation-wide project to develop a specification for the needs of the construction industry in the area of handling information available from various electronic means. Principal funding will be from the National Research Council.

RAL's proposal evolved from its 1983 national survey on Construction Research, Development and Demonstration activities, a project sponsored by the Canadian Government. This study confirmed the serious gap between developers and users of technology and resulting delays in "technology transfer". The rapidly advancing technology for the speedy electronic transmission of texts and graphics holds out the promise of solving much of the problem — providing that it is economical and specifically geared to meet practitioners' needs. The chances of success would be greatly increased if other pieces of information used by contractors, designers, suppliers etc. were incorporated in an easily-accessed integrated system.

A feature of the project will be detailed sessions with industry practitioners to establish their real "user needs" (A focus largely neglected on other systems). A portable demonstration system is being assembled to illustrate sample services that are now available or soon will be. All of the four RAL offices in Canada will be involved in the project, which is a joint venture with IRAD Corp. of Kanata. (Ron Tolmie was associated with RAL's Construction R.D. & D. study and set up IRAD in 1984). The datasource specification material will provide inputs to a proposed information service for the construction industry.

vincial court. The three actions may produce contradictory results.

These inefficiencies and inequities can be resolved through arbitration. Until now, the only short-cut available to contractors when in dispute with a department of the Federal Government was 'mediation'. This procedure is entirely toothless. According to the applicable regulation of the Treasury Board, mediation can deal with the quantum of the dispute only, and then only after the Crown acknowledges liability for the claim. Moreover, the recommendation of a mediator is not binding on the parties. Simply stated, mediation is a waste of time and money. Arbitration is an infinitely better solution.

Perhaps the most important advantage of being able to arbitrate disputes with the Federal Government is that through arbitration, or with the threat of arbitration, contractors may now be able to force contract administrators (e.g. the Engineer) to make timely decisions. At the same time, this new possibility of expeditious dispute resolution should act as an incentive to prepare and issue better drawings and clearer specifications. In general, it should help to improve the cost effectiveness of the construction industry.

This possibility, of course, is not sufficient by itself. As has been stated already, contractors success in benefitting from this opportunity will depend on the perseverance of the industry in general and the appropriate construction associations in particular. This is enabling not mandatory legislation, and it will be up to the industry to ensure that its potential benefits are realized.

The Federal Act is a close replica of the Model Law, and represents a significant departure from the Arbitration Acts currently in force in the common law provinces as well as the existing rules set out by the Code of Civil procedure in Quebec.

The fundamental principle of both the Model Law and the Federal Act (Art. 19) is to recognize the parties' freedom to agree on how an arbitration should be carried out: that is, to tailor the procedural rules to their specific needs, whether by referring to a proven set of standard arbitration rules (such as the C.C.A. endorsed "Recommended Procedures For The Arbitration Of Construction Disputes") or by negotiating an individual agreement. The advantage of negotiating an agreement on those rules at the association level is undeniable and should be pursued, otherwise the whole process may die a natural (or rather unnatural) death.

The most important departure from existing Canadian practice is the drastic limitation of possible court intervention. Article 5 states as follows:

> "In matters governed by this Code, no court shall intervene except where so provided in this Code."
> (N.B.: Code, here, means the Schedule attached to the Act).
>
> These possible areas of intervention are as follows:
>
> **Article 9:** Granting of interim measures of protection, if requested by a party.
>
> **Article 11:** Appointment of arbitrators, should the parties fail to do so within thirty days.
>
> **Article 13:** Challenging the appointment of an arbitrator for conflict of interest (i.e. lack of impartiality or independence).
>
> **Article 14:** Termination of the mandate of an arbitrator for failure to act.
>
> **Article 16:** Arbitrators' jurisdiction, if disputed.
>
> **Article 27:** Assistance in taking evidence.
>
> **Article 34:** Setting aside an arbitral award for one or more of the following reasons:
> (a) Arbitration agreement is found to be invalid, or
> (b) Insufficient notice given to a party re appointment of the arbitrator or re the arbitral proceedings, or
> (c) The award deals with matters not properly before the arbitrator(s), or
> (d) The arbitral procedures were contrary to the agreement of the parties, or
> (e) The subject-matter of dispute is not capable of settlement by arbitration in Canada, or
> (f) The award is in conflict with public policy of Canada.

At this time, one can only speculate as to the actual scope of these "setting aside" provisions. No doubt, the future will bring more clarity and some frustrations. It is unfortunate that the construction industry was given no opportunity to discuss the proposed bill prior to its enactment. It is doubtful, however, whether major changes would have been recommended and/or achieved. One should also note the provisions of Article 4 — Waiver of Right to Object. This article could conceivably reduce the opportunities to seek remedies under Article 34.

And finally, reference ought to be made to paragraph (a) of Article 2, which reads as follows:

> "(a) 'Arbitration' means any arbitration whether or not administered by a permanent institution;"

For all practical considerations, there is only one "permanent" arbitral institution in Canada, the Arbitrators' Institute of Canada Inc. The British Columbia International Commercial Arbitration Centre is not an arbitral institution in the meaning of this sub-paragraph, because it does not formally administer arbitrations, and moreover it has no capacity to appoint arbitrators in the manner envisaged in sub-paragraph 4(c) of Article 11.

There are those who question the wisdom of introducing an administrative body in the arbitral process and argue that the guaranteed freedom of the parties and/or the discretion of the arbitrators must remain sacrosanct, and believe that administering institutions may interfere with that freedom. The authors hold a different view and believe that arbitration of construction disputes arising out of Federal contract will never achieve its potential without an independent administrative body, if for no other reason but to avoid frequent applications to the courts for example, each time a party fails to appoint an arbitrator in a timely manner could jeopardize the very purpose of this Act. It ought also to be recognized that arbitration will never take its rightful place as an appropriate dispute resolution vehicle unless more and better qualified arbitrators are trained. The Arbitrators' Institute of Canada is, today, the only organization which trains arbitrators and is equipped to start a credible certification programme.

Yes! Canada has finally accepted arbitration, but it will be some time before arbitration fulfills its promise.

## IMPORTANCE OF TECHNOLOGY CITED IN INDUSTRY SURVEY

In a survey conducted by RAL's Ottawa Bureau this summer, spokesmen for 13 leading national associations representing the various sectors of the construction industry were asked to identify major issues facing the industry now and during the next decade. Participants were asked to cite those that came first to mind.

The most prevalent "major issue" was survival in the face of decreased markets and increased competition. The 46 issues identified were subsequently rated as to their technological implications. Of these, 15 were "vital" and 15 were "significant" in this regard. On an unweighted basis as to relative importance, two-thirds of the major issues therefore have important technological implications.

## MSR INTERNATIONAL INC.

In our last issue we announced the creation of MSR International Ltd. Allow us now to introduce to you Manning Seltzer who is Secretary-Treasurer of the new firm.

## E. MANNING SELTZER

E. Manning Seltzer received his B.S. degree from Villanova University and his Juris Doctorate degree from Harvard Law School.

From 1956 to 1977, he served as Chief Counsel for the U.S. Corps of Engineers, Department of the Army. As Chief Counsel to the Chief of Engineers and all elements of the Corps of Engineers, he was responsible for the legal system of the Corps of Engineers carried out worldwide with approximately 450 attorneys.

His professional experience has been directed entirely to construction-engineering matters, with particular emphasis on problems arising in connection with the performance of a wide variety of heavy construction projects as well as many kinds and types of vertical structures. Mr. Seltzer has been involved in furnishing legal support for numerous construction projects, domestically as well as many located in foreign countries, including France, Italy, Germany, Greece, Iran, Pakistan, Iceland, Greenland, Canada, Morocco, Somali, Saudi Arabia, Panama, Korea, Japan, Taiwan and other countries. His exposure to foreign laws and interface with local governmental authorities whose operations, directly or indirectly, have affected performance of construction in the host countries has proven invaluable in his representation of clients presently performing construction outside the United States.

Mr. Seltzer has chaired numerous boards and committees concerned with developing and modernizing construction contracting methods and types of contracts. He was actively involved as the Department of Defense representative on the U.S. Government Interdepartmental Committee for the Revision of the Construction Contract prescribed for use by all Federal Government agencies concerned with construction. He has been instrumental in developing the cost-plus-fixed-fee (CPFF) construction and architect-engineer contracts used by the Department of Defense. He had a major role in writing the manuals for negotiation methods and fee determinations for CPFF contracts.

From 1956-1965, he also served as Chairman of the Corps of Engineers Board of Contract Appeals. In this capacity he presided over many construction disputes involving adversary proceedings. He has considered numerous cases where changes, differing site conditions, design error and delay impacts were the reason for the claims, including in scope and out of scope changes. Frequently involved in the trial process was the evidentiary presentation of the planned schedule of performance versus the actual schedule and the establishment of responsibility in connection with performance of the construction contracts.

Through the years as a private practitioner, Mr. Seltzer has continued his specialization in engineering and construction. In his office in Washington, D.C., he represents numerous clients in this field.

Mr. Seltzer has authored various articles on construction claims and has lectured on numerous occasions at universities and other forums on construction contracts and their administration.

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