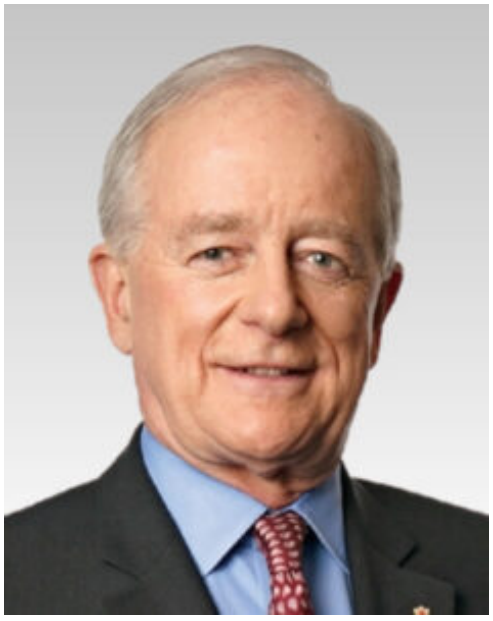
Kluwer Arbitration Blog

Interviews with Our Editors: In Conversation with the Honorable L. Yves Fortier

Dina Prokic (Senior Assistant Editor) (Woods LLP) · Wednesday, February 15th, 2023

Few people can pride themselves with a career as rich and impactful as that of the Honorable L. Yves Fortier, PC CC, OQ, KC, Ad. E., LLD and no summary will do it justice. Counsel, negotiator, arbitrator, diplomat, thought leader – these are just some of the hats Mr. Fortier has worn over the years. Starting out in Montreal's Ogilvy Renault (now Norton Rose Fulbright Canada), Mr. Fortier served as a member of the PCA from 1984 to 1989 and President of the LCIA Court from 1998 to 2001. In the last years of the Cold War and the beginning of the tumultuous 1990s, Mr. Fortier served as Canada's Ambassador and Permanent Representative to the United Nations in New York, acting as the President of the UN Security Council in 1989. Mr. Fortier was Chairman of the Sanctions Board of the World Bank and he served for 10 years on the Security and Intelligence Review Committee of Canada. He is presently Chairman of the Enforcement Committee of the European Bank for Reconstruction and Development. In 2012, he was sworn in as a member of the Privy Council of Canada.



With offices in Montreal, London (Twenty Essex) and Toronto (Arbitration Place), Mr. Fortier has served as the president or party-appointed arbitrator on more than 300 international and domestic tribunals. He has arbitrated some of the most salient and delicate disputes of our time which have captured the attention of the arbitration community and beyond, such as the PCA-administered Eurotunnel arbitration, the Yukos arbitrations and the MOX Plant dispute between

the Republic of Ireland and the United Kingdom concerning the movements of radioactive material through the Irish Sea (as a member of the International Tribunal for the Law of the Sea), as well as land and maritime boundary disputes between Bahrain and Qatar, and Colombia and Nicaragua as a Judge ad hoc of the International Court of Justice in the Hague.

Mr. Fortier, thank you for joining us on the Kluwer Arbitration Blog! We are thrilled to have this opportunity to share with our readers your story and perspectives.

1. ***The 2021 QMUL survey reconfirms arbitration as the preferred way of resolving cross-border disputes. While this may come as joyous news to those of us practicing in the field, others may recall the cautionary speech of Lord Chief Justice of England and Wales a few years ago about arbitration hampering the development of the common law. In your view, what, if anything, is the effect of arbitration on the development of the common law?***

For many years now, arbitration has been the preferred method of resolving disputes in domestic and international fora. On the international scene, disputes between corporations, disputes between states and investors, disputes between states with respect to land or maritime boundaries are being referred to arbitrators all over the world. The work of arbitrators is growing exponentially as the distinct advantages of arbitration over national courts are becoming more evident and more convincing. For those of us who are dabbling in this world, this is very good news.

I am aware of the warning of Lord Thomas, then Chief Justice of England and Wales, a few years ago about arbitration hampering the development of the common law. With the greatest of respect for his Lordship, I answer emphatically that his warning rests on very scant authorities.

I appreciate that his admonitory message may have been prompted by his genuine concern that arbitration is indeed reducing the workload and hence the judgments of his peers but I see no evidence that an increase of arbitral awards is impeding the development of the common law.

An increasing number of arbitral institutions are streaming hearings and parties are waiving the confidentiality of many important awards. I predict that this trend will continue and that even fewer awards of precedential value will be lost in arbitration.

2. ***The same survey also ranks London and Singapore as the most preferred seats, followed by Hong Kong, Paris, Geneva, New York and Beijing. In your view, should parties consider seating their arbitrations in any Canadian city and, if so, why?***

In the heart of Canada’s financial district, in downtown Toronto, Canada has a fully integrated world class arbitration center, Arbitration Place (I am a member of Arbitration Place). It was founded 25 years ago by a dynamic and spirited lady, Kimberley Stewart, with the support and

encouragement of the city and the province.

Today it has a roster of eminent lawyers and retired judges, including the former Chief Justice of the Supreme Court of Canada. Its facilities can rival any arbitration center in the world; and I have arbitrated in all of them.

During the pandemic, it set up a range of virtual and hybrid solutions that enabled dispute resolution proceedings to be conducted efficiently. Today, Arbitration Place Virtual has become a secure eHearing service that includes everything litigants would expect from traditional on-site proceedings.

There is no reason why other cities in Canada, Montréal in particular, could not have participated in the eclosion of other arbitration centers. Canada, as is manifest from decisions of its Supreme Court and provincial superior courts, is very arbitration friendly. Québec, with its civil and common law systems and its two languages, is an obvious candidate to seat arbitrations.

Some of us Québec-based arbitrators have tried over the years to enlist the support of municipal and provincial authorities, but without any success. In my view, it is not too late. I know that there are younger lawyers in Québec today, members of ICC Canada, who have decided to put the wheels in motion in order to see more arbitrations seated in Montréal. I wish them success and will assist them in any way I can.

3. ***Investor-State Dispute Settlement (ISDS) has recently faced criticism from external stakeholders and has confronted an apparent legitimacy crisis. On the other hand, there is a debate about the legitimacy of the criticism itself (e.g., Gary Born's comparison of current criticism with opposition to arbitration that existed in Nazi Germany and Velimir Živkovi?'s reply to that assertion, both published recently in the Journal of International Arbitration). Do you think the criticism of ISDS has merit? If so, in your opinion, how effective would the recently-proposed reforms be in addressing the legitimacy-based concerns?***

My reaction to the criticism of ISDS in recent years can be summarized in one emphatic, rude word: "baloney"!

The criticism stems mainly from self-styled experts who know very little about ISDS or frustrated litigators who have had decisions issued against their clients.

It is well established that ISDS strengthens and promotes the rule of law by creating incentives for governments to follow basic due process and rights that are recognized around the world. ISDS is included in trade agreements to provide a neutral and impartial process to resolve conflicts between countries and foreign investors. It certainly is preferable to gunboat diplomacy.

I will not go so far as my friend Gary Born who has compared the current criticism with opposition to arbitration that existed in Nazi Germany but, as I wrote earlier, the critics should admit their lack of knowledge of the process or, at the very least, confess and bare their interest.

Do I say that ISDS is perfect? No, it can always be improved as some recently proposed reforms

demonstrate. However, while debating how it can be improved is legitimate, advocating its extinction is not.

4. ***The past couple of years have rightfully seen increased efforts aimed at improving diversity in international arbitration. What effect, if any, do you think these efforts might have on consistency and predictability of arbitral outcomes so desired by arbitration users?***

Whether in international arbitration, in the judicial system, in the corporate world, diversity needs to be encouraged. This aspiration does not suffer any exception.

But, as I have often said, in order to have diversity, you need to have suitable candidates. For example, 60 years ago when there were complaints that few women were appointed as judges, some of us were heard to say that this was because there were very few women in law school. In my class at McGill in 1958, there were two women and, after graduating, one never practiced!

Today, as a majority of students in law faculties are women, the "suitable candidate" argument is not valid. And indeed, in international arbitration, diversity of gender or race is a fact; I would add, a welcome fact.

However, to address your question, I fail to see how improved diversity in international arbitration has affected the consistency and predictability of arbitral outcomes. In my experience, and I have had the privilege of sitting with two women arbitrators on a few tribunals in recent years, the awards which were issued were not in the least bit impacted by diversity of these tribunals.

5. ***In addition to your achievements in international commercial and investment treaty arbitrations, you have also fulfilled the childhood dream of participating in the Olympic Games (though not as a professional skier but as an arbitrator of the Court of Arbitration for Sport (CAS)). While the system for resolving sports-related disputes currently in place is certainly beneficial to athletes seeking prompt resolution, are there any aspects that, in your view, require improvement or change?***

I have always enjoyed sports. I truly believe in the dictum "mens sana in corpore sano". I have played hockey, lacrosse; I have skied. In my much younger days, I played competitive tennis, even winning the boys' Québec doubles with Pierre Lambert as a partner who also went on to become a lawyer.

Unfortunately, five years ago, I fell while skiing and severed my right quadricep. The ensuing surgery was not a complete success and I have not been able to ski or play tennis since then but, my love for sports has not diminished. I remain an unconditional fan of the Montreal Canadians.

When I started arbitrating, I asked myself how I could combine arbitration and sport. Shortly after I returned from 4 years in New York as Canada's Ambassador to the United Nations, I found myself

in 1993 in Geneva as Chairman of a panel of the United Nations Compensation Commission (Iraq / Kuwait) where I met Mathieu Reeb who was then Secretary General of the Court of Arbitration for Sport in Lausanne and a keen skier. We skied together one weekend in Verbier and, while enjoying a fondue and a glass of wine, he told me about CAS and encouraged me to apply for inclusion on its roster of arbitrators which I did and, as the saying goes, the rest is history.

I arbitrated a number of CAS cases in Lausanne, including the doping charges against the cyclist, Lance Armstrong.

When, in 2002, Mathieu asked me if I was interested in being appointed to a CAS chamber which would travel to Salt Lake City and be available to hear cases promptly during the winter Olympics, you can imagine what my enthusiastic response was. And off to Salt Lake City, I went with my Code of Arbitration for Sport and my ski boots!

The chamber in place in Salt Lake City and every Olympic Games since 2002 is very efficient. It provides athletes and national sport federations with prompt, immediate, hearings and decisions which are of course required during the Games. I recall chairing a Panel which examined witnesses and issued a decision during the night in Salt Lake City in order to allow a skater to compete the following day.

Similar ad hoc Chambers have been set up since 2002 during every Olympic Games. I was privileged to be appointed as a member of the 2010 chamber for the Vancouver Winter Olympics. I see no improvement or change to the system in place now which is needed.

As an aside, while your travel and hotel expenses are assumed by CAS, arbitrators receive no stipend. But, and it is a very important “but”, you are provided with the best tickets to attend any sporting event during the Games and, when you are not sitting on a panel, you can ski as I did at Whistler in 2010 and Park City in 2002.

6. ***As someone who has had lawyers from all corners of the world appear before you, what traits or presentation techniques have you found to be most impressive? Have you come to identify any features that are particular only to common-law trained practitioners, as opposed to civil-law-trained, and vice-versa?***

Yes, as an international arbitrator for more than 30 years now, I have been privileged to sit on tribunals with some of the best jurists in the world. I have also been enriched intellectually by having some of the best advocates on the planet appear before me.

This leads me to the following reflection. Since Prime Minister Mulroney wrote in his Memoirs that he had offered to appoint me to the Supreme Court of Canada and that I had refused, I can confirm that he did. Needless to say, I was very humbled by the PM’s offer. But I turned it down after some reflection because I came to the conclusion that it was simply not in my DNA to spend decades living professionally with 8 other persons I had not chosen, in a city called Ottawa! Having said this, I hasten to add that I respect and admire all the outstanding men and women who have said yes and now dispense justice on Canadian courts.

But I loved adjudicating and serving as an international arbitrator has allowed me to enjoy all the advantages of my friends who sit as judges in Canada and none of the disadvantages! I meet men and women jurists of different nationalities. I sit in cities all over the world such as Paris, London, Geneva, Singapore, Hong-Kong, Washington, Miami and many others. I apply civil and common law as well as the national law of many countries. I consider myself very fortunate.

You have asked me specifically whether there are certain “traits or presentation techniques” that I have found to be particularly impressive, my answer is NO. A lawyer is a lawyer: an advocate mandated to present to the tribunal the best evidence which he/she believes will vindicate his/her client whether Swiss or Nigerian, whether British or French.

There is one facet of my experience as an international arbitrator which I would like to address before I close this chapter. You refer to it in your question: The civil versus the common law arbitrator.

We know that civil law trained arbitrators prefer written evidence rather than examination and, particularly, cross-examination of witnesses. Well, I cannot recall the number of times I have seen and heard colleagues, fellow arbitrators, experienced civilists, admit, after listening to the cross-examination of a witness, especially by a British QC, that the examination helped them reach a decision!

Thank you, Mr. Fortier, for your time and perspectives! We wish you all the best!

This interview is part of Kluwer Arbitration Blog’s “Interviews with Our Editors” series. Past interviews are available here.

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