Nortel Allocation Proceedings: Making the Case for Arbitration in Cross Border Insolvency

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Introduction

The former governor of the Bank of England, Sir Mervyn King, famously commented that "global banks are international in life but national in death."[1] The same can be said for multinational corporations. The expansion of international trade and globalization has contributed to the growth of large global corporations, operating through various subsidiaries in a multiplicity of jurisdictions. Unfortunately, these corporations have developed faster than the insolvency laws governing their eventual demise, leaving a patchwork of uniquely domestic laws to govern the dissolution of international entities. Given the rather limited success of international attempts to harmonize cross-border insolvency laws, alternative solutions for resolving cross-border insolvency disputes have emerged. Arbitration is one such alternative that naturally bridges the gap between domestic laws and international needs.

The recent Nortel allocation proceedings[2] ("Allocation Proceeding") offer unique insight into the untapped potential for arbitration in cross-border insolvency disputes. Nortel made headlines not only for the unprecedented nature of its concurrent proceedings between the United States ("US") and Canadian courts but also for the sheer magnitude of its litigation costs, which have surpassed $1 billion to date. In a recent dispute over the allocation of $7.3 billion in proceeds from the sale of assets jointly owned by the parties, the US and Canadian courts had to decide whether to resolve the issue themselves or whether to refer the parties to arbitration. The courts ultimately assumed jurisdiction and held the trial between May 12 and September 24, 2014. Their decisions are still pending.

The concurrent trials raise concerns about the enforceability and finality of the two independent court decisions and the financial implications of conducting separate proceedings. This paper examines the valuable role that arbitration could play in streamlining cross-border insolvency proceedings. It takes advantage of the unique opportunity afforded by the Nortel allocation dispute to illustrate how arbitration could have avoided some of the challenges arising out of the concurrent proceedings.

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[1] "Too Much of a Good Thing" *The Economist*, (13 October 2013), online: http://www.economist.com/news/special-report/21587378-2008-global-financial-integration-has-gone-reverse-too-much-good-thing.
[2] This decision has not yet been released and as such, it does not yet have a formal citation.

Challenges in Cross-Border Insolvency Proceedings

Cross-border insolvency occurs when a debtor has assets in more than one state, or where a debtor's creditors are not from the state where the insolvency proceeding is taking place.[3] This is invariably the case when large multinational companies apply for creditor protection, although these companies rarely operate under the same corporate entity internationally.[4] Instead, they rely on foreign incorporated subsidiaries that are created for tax, governance or limitation of liability purposes.[5] These complex corporate structures create difficulties for courts tasked with overseeing the insolvency proceedings, the main goals of which are to maximize the value of the debtor's worldwide assets, to protect debtor and creditor rights and to facilitate the just administration of the proceedings.[6] The fragmented corporate structure creates a tension between the need for uniformity in international insolvency law to achieve these goals and the reality that a court's jurisdiction is territorially defined.

The principle of national sovereignty limits a court's jurisdiction to individuals and property located within its territory.[7] As a result, insolvency proceedings often commence in each jurisdiction where the debtor has assets.[8] Separate proceedings are problematic as they lead to the appointment of multiple administrators and the application of different laws.[9] Disparities in domestic insolvency regimes may result in differential treatment of debtors and creditors leading to inconsistent, conflicting or unenforceable decisions.[10] Coupled with the administrative challenges of multiple proceedings, inconsistent legal regimes also hamper the rescue of

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[3] EU, Library of the European Parliament, *Cross-Border Insolvency Law in the EU* (Library Briefing) by Rafal Manko (21 Feb 2013) at 1, online: http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130476/LDM_BRI(2013)130476_REV1_EN.pdf

[4] Allan L Gropper, "The Arbitration of Cross-Border Insolvencies" (2012) 86 Am Bank LJ 201 at 203 [*Gropper*].

[5] *Ibid.*

[6] World Bank, *Principles and Guidelines for Effective Insolvency and Creditor Rights Systems* (April 2001) at 53 online: http://www.worldbank.org/ifa/ipg_eng.pdf

[7] Paul H Zumbro, "Cross-border Insolvencies and International Protocols – An Imperfect but Effective Tool" 11 Business law International 157 at 160 [*Zumbro*]; Gropper, *Supra* note 4 at 204.

[8] Gropper, *supra* note 4 at 204.

[9] Gropper, *supra* note 4 at 204; Chandra S Mohan, "Cross-border Insolvency Problems: Is the UNCITRAL Model Law the Answer?" 21 International Insolvency Review 199 at 200 [*Mohan*]. Courts in the different jurisdictions are bound to apply their own domestic insolvency laws.

[10] Differences may relate to important aspects of insolvency proceedings such as due process requirements, the recognition and standing of foreign creditors and the ability of debtors to control their business. (See *Zumbro*, *supra* note 7 at 161).

financially troubled companies, impede protection of the debtor's assets against dissolution and impair the maximization of value for those assets.[11]

Recognizing the urgent need to unify international insolvency law, the United Nations Commission on International Trade Law ("UNCITRAL") formed a Working Group to draft the Model Law on Cross-Border Insolvency ("the Model Law").[12] This Model Law was adopted by several developed countries including Canada[13], the US[14] and the United Kingdom ("UK")[15] to form the basis of their respective international insolvency regimes.[16] The Model Law's purpose is to assist States in equipping their insolvency laws with a modern, harmonized and fair framework to more effectively address instances of cross-border proceedings concerning debtors experiencing severe financial distress or insolvency.[17] It assumes that each debtor can be localized in a single jurisdiction, its "center of main interest" ("COMI"), which is to have principal responsibility for managing the insolvency, though the Model Law also allows local courts to assume concurrent jurisdiction.[18]

In spite of the anticipation surrounding the Model Law, its success has been rather limited.[19] Some commentators claim this is due to its limited international adoption[20] and to the difficulties involved in identifying a specific COMI.[21] Others argue that the Model Law simply is

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[11] *Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency*, UNCITRAL (2013) at para 1 [*Guide*], online: http://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf

[12] *Model Law on Cross-Border Insolvency*, UNCITRAL (1997) [*Model Law*]. The UNCITRAL Working Group on cross-border insolvency consisted of representatives from 72 states, 7 intergovernmental organizations and 10 non-governmental organizations, therefore representing a wide range of interests. (See Mohan, *supra* note 9 at 202).

[13] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 Part XIII.

[14] *Companies' Creditors Arrangement Act*, RSC 1985 c C-36 Part IV.

[15] 11 USC § 1501-1532 (Chapter 15).

[16] Cross Border Insolvency Regulations 2006 (SI 2006/1030).

[17] *Guide*, *supra* note 11 at para 1.

[18] *Model Law, supra* note 12 at Article 28; Article 29(a)(i).

[19] Edna Sussman & Jennifer L Gorskie, "Capturing the Benefits of Arbitration for Cross Border Insolvency Disputes" in Arthur W Rovine ed, *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2012* (Boston: Martinus Nijhoff Publishers, 2013) 158 at 161 [*Sussman*].

[20] *Mohan, supra* note 9 at 206 (The Model Law has had limited success due to the low number of adoptees and the substantial changes made upon implementation). The Model Law has been adopted in 22 States (See: http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html).

[21] Wide variation in how the COMI principle has been interpreted has contributed to the difficulty in identifying the COMI in the course of a proceeding. See: *Gropper, supra* note 4 at 207; *Sussman, supra* note 19 at 161 ("[limited success]…principally because the COMI principle has proved difficult to apply, with litigants advocating for differed interpretations of the COMI standard and courts in various jurisdictions issuing conflicting, and often, irreconcilable decisions on what constitutes the debtor's true COMI. Because of the absence of agreement on how to apply the COMI principle there remain numerous examples of cross-border insolvencies in which more than one

not tailored to deal with the insolvency of international enterprises operating multiple subsidiaries in different jurisdictions.[22] The Model Law's inability to effectively bridge the gap between unique domestic insolvency laws has led to continued complexities in adjudicating cross-border insolvencies in multiple jurisdictions, which contributes to delays, inefficiencies and increased costs.[23] In response to these challenges, alternative strategies for streamlining cross-border insolvencies have emerged.[24] One of these alternatives, which has significant potential for resolving cross-border disputes, is arbitration.

Arbitration

Arbitration is a process by which parties consensually submit a dispute to a non-government decision maker, selected by or for the parties, to render a binding decision resolving the dispute in accordance with neutral, adjudicatory procedures affording each party an opportunity to present its case.[25] It is a private and versatile process that can be tailored to suit the parties' needs. The outcome of arbitration is a final and binding award that is *prima facie* enforceable[26] in 154 states[27] and cannot be reviewed on its merits.[28] Arbitration is widely used to

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jurisdiction presides over what must be viewed as a main proceeding, even where the insolvent entities have assets in common or are managed from a single home base"); Some commentators are optimistic that the Model Law will be increasing used given that the recent global recession "resulted in an upswing of cross-border insolvency cases," see Look Chan Ho, *Cross-Border Insolvency: A Commentary on the UNCITRAL Model Law*, 3d ed (London: Globe Business Publishing UK, 2013) at 5. It should be noted that the *Guide, supra* note 11 at para 141-149, has clarified how COMI should be identified by setting out factors that should be considered in analysis.

[22] *Gropper, supra* note 4 at 209. The Model Law recognizes that a debtor can have assets in different jurisdictions, but it assumes that these are all held by the same entity. Conversely, most large corporations today operate internationally through multiple, discrete subsidiaries that are separate legal entities from the parent corporation; ("No provisions in ML (or EU regulation) effectively deal with enterprises comprised of multiple entities or business groups. The ancillary case model on which both rely is designated for the benefit of a single legal unit that seeks limited relief in another jurisdiction").

[23] *Sussman, supra* note 19 at 166.

[24] Although this paper focuses only on arbitration, it is worth mentioning that Protocols are widely used to address the challenges of inconsistent insolvency regimes and uncertainty as to which courts should properly assume jurisdiction in a cross-border insolvency proceeding. (See *Zumbro, supra* note 7).

[25] Gary Born, *International Arbitration: Law and Practice* (Netherlands: Kluwer Law International, 2012) at 4 [*Born*].

[26] *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 7 June 1959, online: http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf [*New York Convention*]; *Born, supra* note 25 at 377; Article III of the *New York Convention* establishes presumptive enforceability of foreign arbitral awards subject to the exhaustive Article V grounds for resisting enforcement.

[27] The *New York Convention* has been adopted by 154 United Nations parties, but not all of these parties are sovereign nations; for instance, the State of Palestine. (For full list of convention states, see http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html)

[28] *Born, supra* note 25 at 382: "It is an almost sacrosanct principle of international arbitration that courts will not review the substance of arbitrators' decisions contained in foreign awards…The [New York] Convention does not contain any exception permitting non-enforcement of an award simply because the arbitrators got their decision

resolve international commercial disputes because it provides a speedy, neutral and expert dispute resolution process, largely subject to the parties' control, in a single centralized forum with internationally enforceable decisions.[29]

Though the use of arbitration in cross-border insolvency has recently gained popularity,[30] it is by no means a new idea. In 2007, the International Insolvency Institute recommended that UNCITRAL take its largest success, the *New York Convention*, and clarify how it applies to international insolvency disputes.[31] The International Insolvency Institute was referring to the widespread enforceability of arbitration awards which, pursuant to the *New York Convention*, can only be refused on very narrow procedural grounds. It proposed several uses for arbitration in cross-border proceedings and suggested that a combination of court orders and arbitration would streamline proceedings and enhance the international enforceability of court bankruptcy orders.

There are, however, certain challenges with using arbitration. First, arbitrability remains an issue since cross-border insolvency triggers both third party rights and public policy concerns. Not all issues in a cross-border insolvency can be arbitrated, and those improperly submitted can later be refused enforcement.[32] Another concern is the difficulty in obtaining the consent required for arbitration once a dispute arises.[33] However, these concerns are not prohibitive in a dispute between affiliate debtors over the allocation of proceeds, and it is generally accepted that these disputes are more effectively resolved by arbitration.[34] Allocation disputes between affiliates rarely raise arbitrability concerns as they are purely economic in nature and seldom

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wrong, or even badly wrong."; *Judgment of 24 November 1993*, XXI Y.B Comm Arb. 617,623 (Lux Superior Court of Justice) (1996): "The New York Convention does not provide for any control on the manner in which the arbitrators decide on the merits…Even if blatant, a mistake of fact or law, if made by the arbitral tribunal is not a ground for refusal of enforcement of the tribunal's award;" *Karaha Bodas Co,* 364 F.3d at 288: "The [New York Convention] provides that a court…must enforce an arbitration award unless it finds one of the grounds for refusal or deferral of recognition specified in the Convention. The court may not refuse to enforce an arbitral award solely on the ground that the arbitrator may have made a mistake of fact or law."

[29] *Born, supra* note 25 at 9.

[30] *Sussman, supra* note 19 at 166.

[31] Zack A Clement, on behalf of the International Insolvency Institute, "Greater Use of International Arbitration in Cross-Border Insolvency Cases" (Address to UNCITRAL Congress in Vienna, Austria, 12 July 2007), online: http://iiiglobal.org/component/jdownloads/finish/391/4288.html [*International Insolvency Institute*].

[32] *New York Convention, supra* note 26 at Article V(1)(a);Article V(2)(a).

[33] In some instances, pre-existing arbitration agreements will not be enforced once one of the parties files for creditor protection or bankruptcy. As a result, the parties would have to consent to the arbitration once the dispute has already arisen. This is a concern as it becomes far more difficult to obtain consent at this point. However, Justice Gropper, a former judge of the Delaware Bankruptcy Court, suggests that consent to arbitration would be granted because of "its potential to save significant going concern value and avoid the costs and uncertainties of duplicative parallel proceedings and extended litigation in multiple courts." (See *Gropper, supra* note 4 at 222).

[34] *Gropper, supra* note 4 at 227; *Sussman, supra* note 19 at 169; *International Insolvency Institute*, *supra* note 31 at 3

impair third party rights.[35] Arbitrating allocation disputes avoids duplicate judicial proceedings, reduces the risk of double recovery and inconsistent decisions, and results in an award that is internationally enforceable.[36]

It is surprising that, given these advantages, arbitration is rarely used in cross-border insolvencies. In the Nortel Allocation Proceeding, the US and Canadian courts had a unique opportunity to refer to arbitration the allocation dispute over $7.3 billion in proceeds jointly owned by Nortel affiliates in the US, Canada and the UK. Although the courts correctly refused to refer the parties to arbitration without a valid arbitration agreement, the litigation that followed helps to justify the use of arbitration to resolve allocation disputes in the context of cross-border insolvency.

Nortel and the Allocation Proceeding

Nortel Networks Corporation ("Nortel") was a large communications company headquartered in Toronto that operated over 130 affiliates in more than 100 jurisdictions around the world.[37] On January 14, 2009, Nortel initiated creditor protection proceedings in multiple jurisdictions including Canada, the US and the UK in an attempt to restructure the company.[38] Nortel subsidiaries in Canada and the US submitted a protocol (the "Protocol") to streamline proceedings between Canadian and US courts.[39] The Protocol affirmed that Ontario and Delaware courts would have respective jurisdiction over Canadian and US subsidiaries but that motions could be filed and heard in either court or simultaneously by both courts.[40]

On June 19, 2009, Nortel announced that it would abandon restructuring efforts and instead focus on liquidating its assets. Nortel recognized that selling its subsidiaries as a going concern and its patents as a bundle would generate more revenue, but that this would require cooperation among its affiliates. To achieve this goal, Nortel affiliates from Canada ("Canadian

[35] *Desputeaux v. Éditions Chouette (1987) Inc*., [2003] 1 SCR 178 at 57, 58, 60.
[36] *Sussman, supra* note 19 at 169.
[37] *Re Nortel Networks Corporation et al,* 2014 ONSC 6973 at 1 [*Re Nortel 2014*].
[38] *Ibid,* at 4. While the most substantial proceedings were commenced in Canada, the US and the UK, there were secondary liquidation proceedings in other jurisdictions.
[39] *Re Nortel Networks Inc, et al,* Case No. 09-10138 (KG), Order on January 14, 2009 by US Bankruptcy Court for District of Delaware, online: http://www.casselsbrock.com/cb/pdf/Nortel.pdf [US Protocol]; *Re Nortel Networks Corporation et al,* 2009 CanLII 726 (ON SC) at 42.
[40] *US Protocol, supra* note 39 at 12.

Debtors”), the US (“US Debtors”) and the UK (“EMEA Debtors[41]), (collectively, “the Parties”), entered into an Interim Funding and Settlement Agreement (“IFSA”) in which the Parties agreed to cooperate in the sale of substantial assets, the proceeds of which would be held in escrow.[42] The IFSA also provided that escrow accounts would not be distributed until the Parties could agree on an allocation, or in absence of agreement until the dispute resolvers could allocate the funds.[43] The sale of Nortel subsidiaries generated US $2.8 billion while the residual intellectual property was sold for US $4.5 billion,[44] for total proceeds of $ 7.3 billion held in escrow.[45]

Despite the successful sales, the Parties could not agree on how to allocate the proceeds. After two years of failed negotiation and mediation,[46] the US and Canadian Debtors brought a motion before the US and Canadian courts seeking approval for an Allocation Protocol that would give these courts jurisdiction to allocate the funds between the Parties. The US and Canadian Debtors relied on the IFSA and subsequent escrow agreements to argue that the Parties consented to the exclusive jurisdiction of the US and Canadian courts. Conversely, the EMEA Debtors argued that the courts lacked jurisdiction because the Parties validly agreed to arbitrate allocation related disputes in the IFSA.[47] Ultimately, both the US and Canadian courts assumed jurisdiction, finding that the Parties failed to conclude a valid arbitration agreement in the IFSA.[48]

The Allocation Proceeding was unique because it was the first time that a full trial was conducted simultaneously in two international courts.[49] The trial was governed by the legal

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[41] EMEA debtors consist of Nortel subsidiaries in the UK, Europe, Middle East and Africa, for whom the main proceedings took place in the UK.
[42] *Re Nortel Networks Corporation*, 2013 ONSC 1757 at 7 [*Ontario Trial Order*].
[43] *Interim Funding and Settlement Agreement* at s.12(c), online: http://bankrupt.com/misc/NortelInterimFundingAgreement.pdf [*IFSA*].
[44] The total proceeds from the patent sales significantly surpassed the initial estimate of $900 million, *Re Nortel 2013*, *supra* note 42 at 5.
[45] *Re Nortel 2014*, *supra* note 37 at 5.
[46] *Ontario Trial Order*, *supra* note 42 at 12.
[47] *Ontario Trial Order*, *supra* note 42 at 22
[48] *Ontario Trial Order*, *supra* note 42 at 35. The court concluded that the Parties conferred exclusive jurisdiction jointly to the US and Canadian court through multiple escrow agreements; *Re Nortel Netowrks Inc, et al* Case No. 09-10138(KG), Docket No 5307 and 5531, US Bankruptcy Court for District of Delaware, online: http://www.deb.uscourts.gov/sites/default/files/opinions/judge-kevin-gross/nortel-allocation-opinion-and-order.pdf [*US Trial Order*].
[49] David Ullmann, “Nortel Allocation Trial a Cross Border First, But Will it be Worth it?,” (2014) 26 Commercial Insolvency Reporter 53 at 55 [*Ullmann*].

practices and civil procedure rules applicable in each country respectively.[50] Special technology allowed the judges to conduct a live trial simultaneously in each jurisdiction.[51] Counsel in the two jurisdictions would take turns making submissions to their courts and would otherwise observe the ongoing proceeding in the other jurisdiction.[52] They also questioned witnesses over live closed circuit feeds.[53] Both judges took note of evidence produced in each courtroom.[54] They are allowed, under the Protocol, to discuss the case but they must render independent decisions on how the proceeds will be allocated.[55] To date, the decision regarding final allocation has not been released.

The Allocation Proceeding is a modern technological feat, but one that raises concerns about the finality, enforceability and financial costs of the proceeding. Considering the ability of arbitration to produce a final and widely enforceable award, the US and Canadian Parties' decision to proceed with concurrent litigation may attract criticism. A closer inspection of the circumstances reveals that some of these concerns could have been avoided by choosing to arbitrate instead.

Concerns about Finality and Enforceability

One of the main concerns of the Allocation Proceeding is the enforceability of judgments rendered by the US and Canadian courts since both courts must render independent judgments on how the escrow amount will be allocated. Though the judges agreed to cooperate in conducting the proceedings,[56] and could discuss the reasoning prior to making a decision,[57] there is no guarantee that they will render consistent, and therefore enforceable, decisions. There are also concerns about the finality of any decision. Decisions rendered by both courts are subject to the routes of appeal normally available in each jurisdiction. Some experts claim that appeals are inevitable given the large sum of money involved.[58] The potential for appeal in each jurisdiction only heightens the concern that the allocation issue will remain unresolved for some time.

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[50] *Ibid.*
[51] *Ibid.*
[52] *Ibid.*
[53] *Ibid.*
[54] *Ibid.*
[55] *Ibid*; *US Protocol, supra* note 39 at 12.
[56] *Ontario Trial Order, supra* note 42 at 37; *US Trial Order, supra* note 48 at 8.
[57] *US Protocol, supra* note 39 at 12.
[58] *Ullmann, supra* note 49 at 55.

In contrast, arbitrating the allocation dispute would have guaranteed a final and enforceable award. Arbitration awards are presumptively and widely enforceable.[59] They are not subject to an appeal on the merits and instead can only be set aside on very narrow procedural grounds or for a violation of public policy.[60] As such, an arbitral award resolving the allocation issue would not be subject to the substantive appeals available to judgments from the US and Canadian courts. Instead, a court tasked with assessing the enforceability of an arbitral award can only engage in a preliminary inquiry into whether enforcement can be refused on narrow procedural or public policy grounds; a process that is far less onerous than an appeal of the substantive law. Arbitration also resolves the issue of inconsistent decisions, as a single tribunal can only render one decision regarding the allocation of proceeds. The risk of inconsistencies is further reduced by the fact that the tribunal will be applying the same law to the dispute. Therefore, unlike the judicial decisions, which are subject to two separate laws and independent routes of appeal, a decision rendered by an arbitral tribunal would be final and binding on the parties.

Concerns about Financial Costs

The growing financial cost of dismantling the Nortel enterprise has always been a concern, particularly since these costs will be paid out of the Nortel estate, thereby minimizing assets available to creditors. Prior to the commencement of the joint proceedings, professional fees totalled $1.3 billion, an amount that the Ontario judge called "completely shocking."[61] While fees incurred during the joint Allocation Proceeding have not yet been released, it is likely that they will be substantial.

Considering that professional fees were quite high, it is questionable whether continuing with a joint proceeding was an economically prudent decision as it forced Nortel to incur avoidable costs. First, Nortel incurred $1.3 million in technology costs to facilitate the live streaming required to conduct the joint proceedings.[62] Second, joint proceedings significantly

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[59] *Supra* notes 26, 27 and 28.

[60] *New York Convention, supra* note 26 at Article V; In Ontario, *International Commercial Arbitration Act*, RSO 1990, c I-9, Article 36, and Article 34 for setting aside an arbitral award prior to resisting enforcement.

[61] Geff Gray, "Billion-dollar Nortel tab boosts pressure over runaway legal costs," *The Globe and Mail* (14 May 2014) online: http://www.theglobeandmail.com/report-on-business/industry-news/the-law-page/billion-dollar-nortel-tab-boosts-pressure-over-runaway-legal-costs/article18669475/.

[62] Janet McFarland & Jeff Gray, "Nortel Bankruptcy Case: A Cross Border Spectacle," *The Globe and Mail* (8 May 2014) (QL).

increased Nortel's legal costs, as they required twice as many lawyers and lasted longer than a single proceeding would. Lawyers in each jurisdiction were required to attend court everyday but spent a substantial amount of time observing the proceedings in the other jurisdiction. Finally, the availability of separate appeal routes in both the US and Canada further increases the likelihood that professional fees will continue to accumulate. Should any of the parties appeal the decision, they will require additional legal representation, as will the responding parties. In the event that decisions are appealed in both jurisdictions, the legal fees will double and will continue to be paid out of the Nortel estate.

Even without exact cost estimates, it is reasonable to anticipate that arbitration would have reduced these avoidable costs by streamlining the duplicate proceedings into a single proceeding. First, a single proceeding would avoid duplication of legal costs for representation in two jurisdictions over a longer trial. Accounts from the Allocation Proceedings suggest that it was common for counsel attending the trial in one jurisdiction to observe submissions made in the other jurisdiction even though these submissions may not bear on the judgment of the observing court. These unnecessary costs could have been avoided by a single arbitral proceeding, which only requires one set of counsel.

Second, unlike court proceedings that are subject to rigid procedural rules, arbitral proceedings can be tailored to the needs of the parties. The flexibility arbitration offers would have been particularly useful in this case as it involved parties from multiple jurisdictions. The parties could have chosen a convenient location for the proceedings, appointed arbitrators who are experts in intellectual property and patent law, and selected the procedural rules to govern the arbitration. Instead, the concurrent proceedings forced the parties to attend trial at fixed times and observe while submissions were made. A single arbitral proceeding, tailored to the needs of the parties, would have reduced the duration and cost of the concurrent proceedings.

Third, arbitration would have avoided the $1.3 million in costs incurred to equip the courtrooms with the technology required to facilitate the joint proceedings. While arbitration may contribute to other incidental costs, such as travel expenses, it would not require the parties to incur these specific costs by allowing them to tailor the proceedings in a more cost-efficient manner.

Finally, arbitration allows the parties to escape significant future costs by avoiding the two routes of appeal from the judicial decisions. It is true that the appellate courts may refuse to grant leave to appeal, but this is unlikely in light of the substantial impact that the allocation will have on vested parties.[63] Since arbitration removes the availability of appeal, any future resistance to enforcement will not result in a review of the award's substance.

In closing, it should be noted that arbitration's ability to reduce costs should not be understood to mean that arbitration is an inexpensive process. Indeed, it is not, and it often requires up-front payment for the full cost of the arbitration. Though not inexpensive, arbitration is likely less expensive than concurrent litigation proceedings that are subject to the possibility of separate appeals. Even without the benefit of comparable estimates, it is reasonable to anticipate significant savings from streamlining duplicate proceedings into a single arbitration.

Conclusion

The Nortel Allocation Proceedings offered unique insight into how arbitration could be used to overcome the challenges that arise in a cross-border insolvency proceeding, particularly in a dispute over the allocation of proceeds between affiliate debtors. While arbitration cannot replace the function of a court in an insolvency proceeding, it has a valuable role to play in streamlining the process by resolving disputes in an efficient and enforceable manner.

[63] Pensioners are the largest creditors of the Canadian subsidiary, and their protests in the course of the Nortel proceedings have been well documented. (See: http://www.theglobeandmail.com/report-on-business/industry-news/the-law-page/nortels-canadian-workers-face-meagre-payout-under-bondholder-deal/article20727444/).