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# Alternatives to Litigation of International Disputes

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# PERSPECTIVES

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The search for alternatives to litigation is now well-established, with growing recognition among scholars and attorneys of the inefficiencies of the traditional court system in dealing with commercial disputes, particularly those in an international context. Scores of books and articles on commercial arbitration have been written in recent years, conferences held, mediation centers established, and a variety of courses offered at law schools around the world. "Every week another article, every year another hopeful center, every five years another journal or yearbook" writes a law professor in the introduction to a journal symposium issue devoted to a discussion of international commercial arbitration.[1] The result of this success of arbitration and other alternative dispute resolution (ADR) mechanisms in drawing public attention and scholarly interest is a more extensive experience on which to base an assessment of the strengths and weaknesses of commercial arbitration.

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**This article draws on and updates some aspects of two previous papers by the author: Perlman & Nelson, *New Approaches to the Resolution of International Commercial Disputes*, 17 INT'L LAW. 215 (1983), and Nelson, *Planning for Resolution of Disputes in International Technology Transactions*, 7 B.C. INT'L & COMP. L. REV. 269 (1984).

1. Buxbaum, *Introduction*, 4 INT'L TAX & BUS. LAW. 205 (1986).

This article discusses the advantages and disadvantages of arbitration in an international commercial setting. Part I focuses on the context in which the decision to arbitrate is made, in particular on the problems unique to international commercial transactions. Part II evaluates the potential advantages and disadvantages of arbitration, and compares it to American-style litigation. Other ADR mechanisms are also briefly discussed. Finally, the article concludes that the success or failure of an arbitration is influenced by the aims of the people involved. It should be remembered that arbitration is a means of resolving disputes, and not of proving who is right or wrong. A too-aggressive approach to arbitration, or an adherence to rigid and complex procedural rules—"Americanizing" the process—changes the nature of arbitration and jeopardizes its chances of success. The ultimate question is not primarily one of structuring the process between the parties but rather, to a substantial extent, one of engaging the attention of the right decision-makers on each side.

## I. Problems Unique to International Commercial Transactions

Some of the factors that contribute to the difficulty and uncertainty of unplanned dispute resolution are common to all substantial commercial transactions. They include the high cost of litigation, the significant potential for damage to the underlying commercial relationship, and the unpredictability of result, which hampers settlement possibilities. Where the substantial commercial transaction is an international one, however, new levels of complexity are added.

### A. Opportunity for Forum-Shopping and Multiple Proceedings

Forum shopping, a concern in the U.S. domestic context, offers entirely new possibilities for manipulation of a dispute in the international context. The differences in substantive law, public policy, and procedures in effect in various countries naturally encourage the parties to a dispute to calculate the advantage to them in selecting one available forum over another, and often to attempt to bring the dispute before different fora. There are no universally accepted rules under conflict of laws governing the exercise of jurisdiction by national courts, and thus the courts of several countries may be competent to hear a dispute with multijurisdictional contacts.[2]

Compounding the initial problem of forum shopping for jurisdictionally competent courts is a further possible complication. Various jurisdictions follow different rules in selecting the applicable law to resolve disputes,

2. *See* V. Nanda & D. Pansius, Litigation of International Disputes in U.S. Courts § 7.01 (4 Int'l Bus. & Law Series, 1986).

and therefore inconsistent results are possible in different countries or even in different courts in the same country.[3]

The incentive to forum shop and the consequent possibility of several courts possessing concurrent jurisdiction over the same dispute may result in litigation proceeding simultaneously in the courts of two or more countries.[4] In American courts at least, the mere pendency of foreign litigation is generally not a basis for a stay.[5] That added costs and delays are likely as a result of multiple proceedings, and that the scope for abusive tactics on the part of counsel is widened, is readily apparent.

### B. Additional Procedural Complexities

Even litigation proceeding in a single jurisdiction is subject to a variety of procedural complexities that may divert attention and resources from the central issues of the dispute. This problem is particularly true when nationals of other jurisdictions are involved. Procedural differences among the various legal systems provide an added source of confusion and cause disputes unrelated to the main issues between the parties. The Westinghouse uranium litigation in the late 1970s provides a good example of the sort of confusion that is generated, and the diversion of attention from central issues that results, from an injection into the dispute of conflicting expectations regarding the procedural rules to be followed.[6]

Westinghouse sought to establish the existence of an international cartel among uranium producers that allegedly had brought about an extraordinary increase in the price of uranium. The American lawyers for Westinghouse, relying on the traditional tools of American pretrial discovery, sought the assistance of the courts of Australia, Canada, France, South Africa, and the United Kingdom to compel the production of documents by the defendants and their employees. Westinghouse was unsuccessful, largely because of the hostility of the foreign courts to the scope of American discovery procedures.[7] The failed effort cost Westinghouse months of time and hundreds of thousands of dollars.

The problems caused by varying procedural rules have been recognized, and efforts made at the intergovernmental level to simplify procedures

3. *Id.*

4. An excellent example is the parallel proceedings before the courts of both the United States and the United Kingdom in connection with the dispute between Nelson Bunker Hunt and British Petroleum arising out of the Libyan nationalization of certain oil concessions. *See* Hunt v. BP Exploration Co. (Libya), 492 F. Supp. 885 (N.D. Tex. 1980).

5. *Id.*

6. Westinghouse Elec. Corp. Contract Litigation, 436 F. Supp. 990 (J.P.M.D.L. 1977).

7. Westinghouse Elec. Corp. Uranium Contracts Litigation, M.D.L. Docket No. 232, [1977] 3 W.L.R. 430, 434–36 (C.A.), *quoted* in Mehrige, *The Westinghouse Uranium Case: Problems Encountered in Seeking Foreign Discovery and Evidence*, 13 Int'l Law. 19, 22 (1979).

for service of process and taking evidence in foreign countries.[8] But procedural differences remain, adding complexity to international disputes.[9]

### C. The Difficulty of Enforcing International Judgments

An international dispute is not at an end simply because litigation before a national court has resulted in a judgment and the parties have exhausted all appeals. Judgments entered by foreign courts are not entitled to automatic enforcement by American Courts under the "full faith and credit"[10] clause of the United States Constitution, and foreign courts do not automatically accord such treatment to judgments rendered by American courts.[11] Recognition and enforcement of foreign judgments depend on notions of comity and fairness that are often vaguely and inconsistently articulated.[12]

In the United States the principal defenses to enforcement of a foreign judgment are lack of jurisdiction of the foreign tribunal, denial of procedural due process, and contravention of the public policy of the forum in which enforcement is sought.[13] In theory, American courts recognize the judgments of foreign courts on a basis of reciprocity, although this requirement has been much criticized and may no longer be the prevailing rule.[14]

Foreign courts tend to be even less willing than American courts to enforce foreign judgments. The foreign court often asks for assurance that a comparable judgment rendered by it would be enforced in the United States, and if this assurance of reciprocity cannot be given, the foreign court may be unwilling to recognize and give effect to the U.S. judgment.

Many of the same policy considerations that underlie U.S. law relating to enforcement of foreign judgments also affect Latin American practice

8. Of particular importance in this regard are the Convention on the Service Abroad of Judicial and Extrajudicial Documents, Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 163; and the Convention on the Taking of Evidence Abroad, Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, 847 U.N.T.S. 231.

9. *See, e.g.*, Société Nationale Industrielle Aerospatiale v. U.S. Dist. Court, 107 S. Ct. 2542 (1987).

10. U.S. Const. art. IV, § 1.

11. For the policy reasons underlying this difference in treatment, see von Mehren & Trautman, *Recognition of Foreign Adjudications: A Survey and a Suggested Approach*, 81 Harv. L. Rev. 1601, 1606–07 (1968).

12. von Mehren & Patterson, *Recognition and Enforcement of Foreign Country Judgments in the United States*, 6 L. & Pol'y Int'l Bus. 37, 45 (1974).

13. *See generally* von Mehren & Patterson, *supra* note 12; *see also* Restatement (Second) of Conflict of Laws § 98 (1969).

14. The classic statement of the reciprocity rule is contained in Hilton v. Guyot, 159 U.S. 113 (1895), which remains the leading American precedent on the subject. For analysis and criticism of the rule, see von Mehren & Patterson, *supra* note 12, at 46–48. Reciprocity is generally not a condition for enforcement under the Uniform Foreign Money-Judgments Recognition Act (1962), 13 U.L.A. 263 (Master ed. 1986).

in the area.[15] The law of enforcement of foreign judgments is relatively uniform throughout Latin America (although important differences exist among individual countries that must be taken into consideration by the attorney). Much of the uniformity is due to several important multilateral treaties,[16] which are quite broad in scope. In the absence of a treaty, the general Latin American rule is that foreign judgments are given effect only after formal recognition.[17] Failing formal recognition, a foreign judgment has limited use.

The bases for attack on a foreign judgment are very similar to those recognized in U.S. law. The Latin American court will consider whether the original court was jurisdictionally competent to decide the case, whether the defendant received adequate notice of the action and an opportunity to defend, and whether the judgment given conflicts with public policy in the state asked for enforcement. All but a few Latin American countries required reciprocity, as is in theory required in the United States as well, in the enforcement of foreign judgments. This reciprocity may be difficult to establish in the case of a judgment from the United States[18] because of the lack of clarity and uniformity in the law.

### D. Sovereign Immunity and Act of State Problems; Public Policy Considerations

Another set of problems that may be connected with an international dispute arises because of the involvement of governments in activities which, in the U.S. economy, are essentially private in nature. Most courts, because of considerations of comity and respect for sovereignty, do not wish to be asked to challenge the acts of a foreign government. The doctrines of sovereign immunity and act of state embody this judicial attitude, which goes back hundreds of years.

The doctrine of sovereign immunity in its modern form precludes national courts from asserting jurisdiction over foreign governments in respect of activities carried out by the foreign government in its sovereign capacity, but any commercial activities carried out by the foreign government are not entitled to immunity. Unfortunately the distinction between "commercial" and "sovereign" activities of a government is far

15. Comment, *The Reciprocity Rule and Enforcement of Foreign Judgments in Latin America: Trends and Individual Differences*, 17 Tex. Int'l L.J. 213, 213 (1982) (written by Jeff Larsen).

16. *Id.* These treaties include, inter alia, the Montevideo Treaty on International Procedural Law, Mar. 19, 1940, *reprinted in* 8 M. Hudson, International Legislation 472–532 (1949); the Bustamante Code, Feb. 20, 1928, 86 L.N.T.S. 111.

17. Comment, *supra* note 15, at 214.

18. *Id; see also* von Mehren, *Enforcement of Foreign Judgments in the United States*, 17 Va. J. Int'l L. 401, 405–06 (1977).

from clear, as a consideration of the activities of state-owned business enterprises in the nonmarket economies would indicate. Specific sovereign immunities legislation in force in the United States[19] and the United Kingdom[20] provides some guidance in characterizing a particular activity, but such legislation is exceptional and there is a need for greater international uniformity in this area.[21]

Under the act of state doctrine, a U.S. court will refuse to adjudicate a dispute, even one between American litigants, when such an adjudication would require the court to look behind the sovereign acts of a foreign government.[22] Although, as under the sovereign immunity doctrine, acts of a commercial character by the foreign government are not protected from judicial scrutiny, the distinction between "sovereign" and "commercial" activities is not clear. Enactment of the so-called "Sabbatino Amendment"[23] has narrowed the field of application of the act of state doctrine in the United States. The Amendment prevents judicial abstention based on the doctrine in certain types of cases unless the President determines that abstention would serve the foreign policy interests of the United States. But the Sabbatino Amendment has been construed rather restrictively,[24] and the act of state doctrine is still a complicating factor in the resolution of commercial disputes involving acts of foreign governments.

Another complicating factor in international commercial transactions, whether or not a foreign government is involved, is the difference in public policy from one country to another. Such differences can be substantial, and may result in, for example, nonenforcement of contract provisions for reasons completely unrelated to the intent of the parties or even to the actual fairness of the transaction. These public policies, often established through the legislative process, may be obstacles to the recognition and enforcement of a foreign judgment or arbitral award. As will be discussed in Part II of this article, public policy considerations are not to be taken lightly in handling an international commercial dispute.

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19. Foreign Sovereign Immunities Act of 1976, Pub. L. 94-583, 90 Stat. 289, (codified at 28 U.S.C. § § 1332(a)(2), (3), (4), 1391(f), 1441(d), 1602-1611 (1982 & Supp. I).

20. State Immunity Act 1978, ch. 33 17 I.L.M. 1123 (1978).

21. *See* Brower, Bistline & Loomis, *The Foreign Sovereign Immunities Act of 1976 in Practice*, 73 AM. J. INT'L L. 200, 213 (1979); *see also* Lacroix, *The Theory and Practice of the Foreign Sovereign Immunities Act: Untying the Gordian Knot*, 5 INT'L TAX & BUS. LAW 144 (1987) (discusses the complexities of application of the Act).

22. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

23. Pub. L. No. 88-633, § 301(d)(4), 78 Stat. 1013 (1964), (codified 22 U.S.C. § 2730(e)(2) (1982)) (also known as the Hickenlooper Amendment). For a discussion of the application of the amendment, see V. NANDA & D. PANSIUS, *supra* note 2, § 10.06.

24. V. NANDA & D. PANSIUS, *supra* note 2, § 10.06.

### E. Increased Costs Resulting from the International Context

The final complicating factor to be mentioned here is perhaps the most obvious: international litigation is made more costly by the need for counsel in more than one country, and by the additional time and travel necessitated by the distances involved. Multiple proceedings, enforcement expenses, and additional procedural complexities also create significant extra costs.

## II. Thinking through the Alternatives in a Specific Context

The major sources of difficulty in the resolution of international commercial disputes have been identified above. The discussion of them has been abstract, divorced from a specific context. But in discussing alternative methods of dispute resolution, context must always be considered. "A method alternative to what?" is the question that supplies the framework for evaluating the advantages or disadvantages of arbitration. The evaluation of a dispute resolution procedure must also be done in terms of an objective against which the success of the procedure may be measured. The objective is to find a means of resolving disputes that is both fair and reasonably efficient, and that produces a prospect of agreement in the future.

### A. Arbitration Versus Litigation

The term "international commercial arbitration" has no single, unvarying content. This article uses the term to describe all private adjudication of commercial disputes with international aspects.[25] It should be noted that the term "arbitration" encompasses both "institutional" arbitration, administered by organizations such as the International Chamber of Commerce (ICC) or the American Arbitration Association (AAA) and usually conducted under the rules of that organization, and "ad hoc" arbitration, administered and conducted in a manner specifically designed by the parties. In either case, the arbitration agreement may be a provision in the original commercial contract or may be drafted and agreed to by the parties after the dispute has arisen.

#### 1. *The Potential Advantages of Arbitration Versus Litigation*

##### a. Prevention of Multiple Proceedings

To minimize the risk of multiple proceedings with potentially inconsistent results, the parties to a transaction should select in advance a single,

25. This is the definition supplied by Smit, *The Future of International Commercial Arbitration: A Single Transnational Institution?*, 25 Colum. J. Transnat'l L. 9 n.1 (1986).

mutually agreeable forum for dispute resolution. The choice should be made with careful attention paid to whether the chosen forum will in fact exercise jurisdiction, and whether the forum selection will be recognized and enforced by other possible alternative fora, without a need for further proceedings.

The prevention of multiple proceedings has been helped by the substantial progress in the development of an institutional and legal framework for arbitration that is in many respects more highly developed than the international judicial process. The United Nations Committee on International Trade Law (UNCITRAL) has developed a set of rules of arbitration,[26] which, together with the Rules of Conciliation and Arbitration of the ICC,[27] are widely accepted internationally for use in all but the most specialized kinds of commercial disputes. The International Centre for Settlement of Investment Disputes (ICSID) administers its own set of rules, as does the AAA and the Council for Mutual Economic Assistance (CMEA).[28]

The enforcement of arbitral awards has been the subject of intergovernmental effort as well, with a large number of countries becoming parties to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards,[29] commonly known as the "New York Convention." Under the convention it has become much easier both to compel[30] arbitration to the exclusion of parallel judicial proceedings—reducing if not eliminating the possibility of forum shopping—and to enforce an award once it has been obtained.[31]

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26. Report of the United Nations Committee on International Trade Law, 31 U.N. GAOR, Supp. No. 17, Doc. A/31/17, at 33 (1976), *reprinted in* 15 I.L.M. 701 (1976).

27. INTERNATIONAL CHAMBER OF COMMERCE, PUB. L. NO. 291, ICC 9-21 RULES FOR THE ICC COURT OF ARBITRATION (1980).

28. CMEA countries include Bulgaria, Cuba, Czechoslovakia, German Democratic Republic, Hungary, Mongolia, Poland, Romania, Union of Soviet Socialist Republics, and Vietnam. *Uniform Rules of Procedure in the Arbitration Courts at the Chambers of Commerce of the CEMA Countries dated Feb. 28, 1974, reprinted in,* 4 INT'L TAX & BUS. LAW 433 (1986). Professor Smit argues that "the needs of international intercourse cannot effectively be served by the rapidly increasing number of international arbitration institutions with different rules and processes" and he proposes the creation of a single international institution. Smit, *supra* note 25, at 29.

29. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *done* June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3. With the accession of the Peoples' Republic of China on Jan. 22, 1987, the Convention now has seventy-two signatories.

30. The Convention requires the courts of a state party to it to refer the parties to arbitration except where the agreement to arbitrate is "null and void, inoperative or incapable of being performed." *See* Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards,* 70 YALE L.J. 1049, 1063-64 (1961).

31. *See generally* Harnik, *Recognition and Enforcement of Foreign Arbitral Awards,* 31 AM. J. COMP. L. 703 (1983).

Another international convention regarding the enforcement of arbitral awards is of importance in Latin American countries. The Inter-American Convention on International Commercial Arbitration[32] combines elements of an earlier draft convention[33] and the New York Convention. While it differs from the New York Convention in some respects, it seeks the same objectives in similar ways.[34] Both conventions deal with the issue of enforcing an arbitral award. The Inter-American Convention follows the New York Convention in limiting the grounds on which a party can object to the enforcement of a foreign arbitral award by putting the burden of proof on the party opposing enforcement to prove the defectiveness of the award.[35] Thus far ten countries have ratified the Inter-American Convention, and seventeen have signed it.[36] The United States Senate gave its consent to ratification of the Inter-American Convention on October 9, 1986. Congress must now adopt implementing legislation. It is being urged to do so by many interested groups, among them the American Bar Association and the AAA.[37]

b. Insulation from the Application of National Public Policies Extrinsic to the Intentions of the Parties

Prior to agreeing on a forum for dispute resolution, the law of any forum under consideration should be reviewed to ensure that public policies of the forum will not interfere with enforcement of the agreement as intended by the parties. If unintended application of national public policies cannot be avoided through choice of forum (as when the government of one party imposes sanctions on that party for violation of national laws), thought should then be given to an agreement on remedies enforceable in the chosen forum that would permit equitable adjustments to the relationship.

An aspect of commercial arbitration that may be an advantage or a disadvantage, depending on the context in which it arises, is that arbitrators are generally much less likely than national courts to entertain claims or defenses alleging violation of regulatory laws grounded on considerations of public policy rather than of equity between private parties. Arbitrators have no public policies extrinsic to the agreement of the parties that they must enforce.[38] Arbitrators are thus more likely than courts to

32. Jan. 30, 1975, O.A.S.T.S. No. 42, O.A.S. Doc. OEA/Ser. A/20 (SEPF), *reprinted in* 14 I.L.M. 336 (1975).

33. Draft Convention on International Commercial Arbitration, Oct. 5, 1967, O.A.S. Doc. OEA/Ser. I/VI.1, at 48.

34. Nattier, *International Commercial Arbitration in Latin America: Enforcement of Arbitral Agreements and Awards*, 21 TEX. INT'L L.J. 397, 402 (1986).

35. *Id.* at 403.

36. INT'L ARB. REP., Aug. 1986, at 589.

37. Nattier, *supra* note 34 at 405; *see also* INT'L ARB. REP. Apr. 1987, at 239.

38. Higgins, Brown & Roach, *Pitfalls in International Commercial Arbitration*, 35 BUS. LAW. 1035–40 (1980).

apply the law selected by the parties regardless of any choice-of-law principles that might prevent such application under the laws of the place of arbitration.[39]

In part for this reason, many national legal systems treat as nonarbitrable certain kinds of disputes having a high public-policy content. Nevertheless, in the landmark case of *Scherk v. Alberto-Culver*[40] the United States Supreme Court held that a claim involving alleged violation of the antifraud provisions of the securities laws could not be brought before the courts where the underlying agreement was "truly international in character" and included an arbitration clause.[41] The decision in *Scherk* stands for the proposition that, in light of the strong policy favoring international arbitration embodied in the New York Convention, issues that would be nonarbitrable domestically may be arbitrable when the underlying transaction is "truly international" in character.

The recent United States Supreme Court case of *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*[42] held that claims arising under the Sherman Antitrust Act are arbitrable in the context of an international distributorship agreement. The Supreme Court rejected the public policy concerns raised by a lower court to justify precluding arbitration of antitrust claims in international business disputes. The Court warned, however, that "in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy."[43] The Court thus was careful to preserve the role of American courts in protecting parties' rights to assert antitrust and perhaps other statutory claims.[44] An American court could at the enforcement stage vacate an award for failure of the arbitral tribunal to address and resolve antitrust claims.

The greater latitude afforded arbitrators in avoiding application of national public policies is illustrated by a pair of cases decided in France.[45] In both cases the Paris Court of Appeals held that, because of the non-French character of the awards, it lacked jurisdiction to hear challenges

39. *See generally* Croff, *The Applicable Law in an International Commercial Arbitration: Is It Still a Conflict of Laws Problem?*, 16 INT'L LAW. 613 (1982).

40. 417 U.S. 506 (1975).

41. *Id.* at 515.

42. 473 U.S. 614 (1985).

43. *Id.* at 637 n.19; *see also* O'Neill, *Recent Developments in International Commercial Arbitration: An American Perspective*, 4 J. INT'L ARB. 7, 9 (1987) (discussion of *Mitsubishi*).

44. O'Neill, *supra* note 43, at 11.

45. *See generally* Craig, Park & Paulsson, *French Codification of a Legal Framework for International Commercial Arbitration: The Decree of May 12, 1981*, 7 Y.B. COM. ARB. 407, 409–10 (1982).

to two arbitration awards rendered in Paris under ICC rules. *Libyan General National Maritime Transport Co. v. Gotaverken Arendal AB*[46] and *AKSA v. Norsolor*[47] led to amendments to the sections of the French Code of Civil Procedure dealing with arbitration designed to ensure, among other things, that awards rendered in international commercial arbitrations would not be invalidated on grounds of conflict with French internal (as opposed to international) public policy.[48]

As the number of disputes declared nonarbitrable by national legal systems decreases, arbitration clauses become more attractive as a way of avoiding the application of national public policies extrinsic to the intentions of the parties. This may reduce the likelihood of one of the parties using spurious claims under laws such as the United States securities and antitrust statutes to avoid arbitration or to apply pressure for a favorable settlement.

c. Procedural and Other Flexibility

One of the cardinal features of arbitration is its flexibility. American lawyers, accustomed to detailed rules of procedure and evidence, may be uncomfortable with that flexibility, but to the extent parties to a transaction are willing to devote the time and effort required, they may develop a structure that meets their needs more closely than the traditional litigation system is able to do.[49] The lack of elaborate pre-hearing discovery and the general informality and nontechnical nature of evidence introduction minimizes the opportunities for procedural maneuvers that have little to do with the central issues of the case but that have the potential to cause a great deal of delay, confusion, and expense. Foreign companies in particular, wary of dealing with American lawyers, discovery, depositions, and pretrial examinations, may greatly prefer the relative procedural simplicity of arbitration.[50]

The ability of the parties to select arbitrators who are well-equipped to deal with the issues specific to their dispute is a principal element of flexibility in arbitration. Arbitrators need not be lawyers, and the common use of panels of arbitrators permits the inclusion of technical as well as

46. The decision is published in 1980 REVUE DE L'ARBITRAGE 524. An English translation is attached to Paulsson, *Arbitration Unbound: Award Detached from the Law of its Country of Origin*, 30 INT'L & COMP. L.Q. 358 (1981).

47. Published in 1981 REVUE DE L'ARBITRAGE 306. An English translation was published in 20 I.L.M. 887 (1981).

48. Decree No. 81–500, dated May 12, 1981, inserts two new titles (V and VI), comprising arts. 1492–1507, into Book IV of the New Code of Civil Procedures.

49. Fox, *Dispute Resolution Techniques in International Contracts Involving the Sale of Goods*, 15 INT'L BUS. LAW 259, 260 (1987).

50. Aksen, *The Need to Utilize International Arbitration*, 17 VAND. J. TRANSNAT'L L. 11, 13 (1984).

legal experts.[51] Company management may be involved as arbitrators, offering them the chance to participate in resolving the dispute to an extent not possible with traditional litigation, where management typically defers to legal counsel. Arbitrators may be chosen in advance of a dispute, allowing both parties to avoid the anxiety accompanying the appointment of a decision-maker unfamiliar to them and of unknown ability and impartiality.

d. Confidentiality

Arbitration does not generally involve discovery as extensive as that afforded in U.S. judicial proceedings. This may be an advantage to a party concerned about, for example, the disclosure of trade secrets. Moreover, arbitral awards are themselves confidential and not matters of public record, which lessens the risk of public disclosure as a result of the proceedings.[52] The greater confidentiality afforded by arbitration may in itself be a goal of the parties involved, who may prefer to shield their business dealings from competitors and the public. It may also be valued as a means of protecting an ongoing commercial relationship from possible harm due to a publicized dispute.

Of particular concern to the corporate planner should be preservation of the underlying commercial relationship. Long-term contractual and other legal relationships in international commerce are increasingly prevalent, lending urgency to the need for procedures that will allow parties to resolve a dispute without destroying their business relationship and the goodwill necessary to it. If business people withdraw from the dispute resolution process and leave their lawyers to engage in a "win-lose" contest, damage to the commercial relationship is likely. A prime objective of the planner should be to involve in the dispute-settlement process those business people aware of and committed to the importance of settling differences while maintaining as much as possible an affirmative atmosphere for continuing the business relationship. This atmosphere may require for its preservation the confidentiality afforded by arbitration.

The confidentiality of arbitral proceedings may be an added advantage when a government agency is a party to the dispute. Government accountability to the public and the consequent concern with public opinion

51. Smit, *supra* note 25 at 11 & n.10.

52. Arbitration awards are not invariably confidential. On Sept. 16, 1987, the AAA, under whose auspices the recent IBM-Fujitsu arbitration was concluded, placed advertisements in the *New York Times* and the *Wall Street Journal* announcing the decision of the arbitrators and summarizing its terms, and offering a packet of materials relating to the decision. IBM and Fujitsu obligated themselves not to discuss the award, but gave their permission to the AAA to disclose its terms.

may prevent the agency from settling a case or taking a position in litigation that, while otherwise reasonable, would attract unfavorable press and public attention. A government agency may have to analyze the case from a public relations standpoint, a possible hindrance to rational settlement of the dispute. The confidentiality of arbitration would allow negotiations to be conducted in private, and should greatly reduce the possibility of public scrutiny influencing the process.

e. Value of Informal Proceedings

The final advantages of arbitration to be discussed in this article are perhaps less easily recognized and measured than those mentioned above. The relatively informal nature of arbitration produces several important benefits. Informal proceedings not burdened by detailed and inflexible rules of procedure may lessen the tension surrounding a dispute and in that way alone facilitate a solution. And in certain cultures in particular, arbitration may provide a "face-saving" approach to dispute resolution.[53] So much prestige may have been invested in advocating one's own position in a dispute that it becomes impossible to move closer to the other party's position in negotiations save in an environment mediated by a third person. This environment allows those who may hope for a settlement (but who do not wish to appear to be the supplicant) a graceful retreat from an intransigent position. Even aside from concerns over the impartiality of the forum, cultural differences may make one party feel out of its element in the courts of another party. And in some cultures the courts are not where business is done anyway.

Finally, the informal nature of arbitral proceedings allows room for the participation of corporate management. Often only onlookers to litigation battles dominated by their lawyers, in arbitral proceedings management may have an active role in defining the issues and structuring a solution. Involvement of senior management in attempts to resolve disputes has several beneficial results. First, the managers are exposed to the arguments and perspective of the other side to the dispute, allowing them to assess more realistically the merits of their own position, and the possibilities of settlement. Second, management participation helps ensure that the dispute will be viewed from a commercial perspective with the ultimate goal being a mutually satisfactory solution rather than the complete vindication of one position or another. And finally, the involvement of senior management seems likely to increase the chances for reestablishment of a good commercial relationship between the parties.

53. Fox, *supra* note 49, at 260.

2. *Potential Disadvantages of Arbitration Versus Litigation*

Arbitration is far from universally praised. Even those who ultimately find much to value are not uncritical.[54] The disadvantages of arbitration in many cases result from the same attributes that give rise to its advantages.

a. Problem of Multiple Proceeding

It should be noted that the attempt to use arbitration to avoid multiple proceedings may backfire. The traditional litigation system is better-equipped to deal effectively with disputes involving more than two parties. In products liability cases, for example, impleader is available to join those who should be party to the litigation.

An international commercial transaction often involves more than two parties. Construction contracts, for example, are particularly likely to present difficulties, involving as they do many parties—a contractor and many subcontractors, employees, banks, insurers, and so on.[55] Even a relatively simple sales contract may involve, in addition to the buyer and seller, brokers, insurers, transport agents, and bankers. Any dispute that arises is likely to involve several of the parties, as the original disputants attempt to pass responsibility to others. The multiparty business dispute is in many ways a new phenomenon to which little attention has been paid in the past, and for which little provision has been made in existing arbitration rules.[56] Problems may arise where several parties have signed the same contract. Existing arbitration rules provide a method of appointing arbitrators where there are two disputants, but not where there are three or more. Or a dispute may arise under one contract and lead to further disputes under other contracts. The parties to each contract will be prepared to arbitrate with each other, but not with "outside" parties.[57]

The traditional court system is able to accommodate multiparty disputes with relative ease, being equipped with well-developed rules on joinder of parties. Existing arbitration rules have no such mechanism, necessitating a careful working out in advance of methods of dealing with multiparty disputes. A party could protect itself against the multiparty problem by negotiating in each related contract arbitration clauses authorizing consolidation; by application for arbitral consolidation to a national court;

54. *See generally* Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668 (1986); Rhodes & Sloan, *The Pitfalls of International Commercial Arbitration*, 17 VAND. J. TRANSNAT'L L. 19 (1984).

55. Devitt, *Multiparty Controversies in International Construction Arbitrations*, 17 INT'L LAW. 669 (1983).

56. This is the opinion of the Institute of International Business Law and Practice, founded by the ICC, as expressed in the report of its first annual meeting, PUB. NO. 359, MULTIPARTY BUSINESS DISPUTES, ICC 12 (1980).

57. *Id.*

by entering into a submission agreement with the concerned parties providing for consolidation; or by operation of the rules of an international arbitration institution (however, the rules of most of the major international arbitration associations do not provide for consolidation).[58]

United States law seems clearly to permit consolidation of arbitration proceedings in the absence of specific party agreement,[59] but the law of leading European arbitration centers is either adverse or unsettled.[60] The Institute of International Business Law and Practice of the ICC urges recognition of the multiparty problem in international arbitration. The Institute suggests that it is preferable to have a multiparty business dispute decided by a single arbitral tribunal, and that this should be achieved by agreement of the parties or by suitable provision in the rules of arbitral institutions.[61] With respect to those countries that have become parties to the New York Convention, problems of enforcement of arbitral awards have now been largely eliminated as far as international commercial arbitration is concerned. However, there still remain a number of commercially important countries not yet party to the Convention, with resulting doubts as to the enforceability in the courts of those countries of arbitral awards rendered elsewhere, and vice versa. Courts tend to be hostile to any effort by private parties to oust them of jurisdiction. Some legal systems, while recognizing the validity of arbitration agreements and awards, have discriminated in various ways against foreign as opposed to domestic awards.[62] Enforceability problems may result in multiple proceedings that would have been unnecessary in a traditional litigation setting.

b. Impact on Substantive Rights

Resort to arbitration may affect the substantive rights and duties of the parties in a manner not originally contemplated. For example, in forcing defendant Soler Chrysler-Plymouth to arbitrate even its allegation of an antitrust violation on the part of Mitsubishi Motors, the Supreme Court may have effectively changed the balance struck in the distributorship agreement between the parties. The antitrust protections of American law may have been relied upon, then effectively withdrawn with the command to arbitrate.

Arbitration may also affect the substantive rights of the parties in the area of preliminary relief. American courts have split on the question whether the New York Convention precludes the granting of pre-award

58. Devitt, *supra* note 55, at 671, 674.

59. *Id.* at 673, citing the applicability of FED. R. CIV. P. 42(a) (authorizing consolidation) to proceedings under the Federal Arbitration Act.

60. *Id.*

61. Institute of International Business Law and Practice, *supra* note 56, at 21.

62. Quigley, *supra* note 30, at 1051.

attachments or other preliminary relief,[63] although it does seem clear that such relief is available to the extent that it is demonstrably consistent with the intent of the arbitration agreement. Commentators are split on this issue as well. Some see the necessary involvement of national courts as undermining the purpose and effect of the Convention, while others believe that preliminary relief is an effective means of enforcing an arbitral award.[64]

The principal international rules of arbitration specifically permit either party to apply to a court for interim relief.[65] In the absence of such a provision the parties may well be required to seek interim relief from arbitrators rather than the courts. These awards may under the New York Convention be enforceable in the courts; however, the delays involved in appointing the arbitrators and then obtaining the interim award may make the issue moot. There may also be doubts whether an arbitral award will adequately deal with, for example, the problem of trade secrets violations, where injunctive relief would seem the best remedy. The ability of arbitrators to order nonmonetary awards and ensure their enforceability is needed to enhance the utility of arbitration in a variety of disputes.

c. The Risk of Creating a Defective Structure

Unlike a judicial proceeding, commercial arbitration does not take place within a framework of well-defined rules on such matters as pre-hearing proceedings, submission of documents to the tribunal, presentation of issues prior to the hearing, use of expert witnesses, and so on.[66] In addition, except where well-developed rules such as those of the ICC or UNCITRAL are used, the parties must make detailed arrangements regarding procedures for appointment of arbitrators, replacement of arbitrators where necessary, submission of pleadings, entry of awards, allocation of costs, and enforcement of awards.

The foregoing matters are regulated by agreement of the parties, and that agreement is generally entered into as part of a commercial agreement

63. *Compare* I.T.A.D. Assoc. v. Podar Bro., 636 F.2d 75 (4th Cir. 1981) *with Atlas Chartering Serv. v. World Trade Group, 453 F. Supp. 861 (S.D.N.Y. 1978); see also* Note, *Pre-Award Attachment Under the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 21 VA. J. INT'L L. 785 (1981).

64. Rhodes & Sloan, *supra* note 54, at 34.

65. Article 26(3) of the UNCITRAL Rules provides as follows: "A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement." [1976] VII UNCITRAL Y.B. (part 1) 22, U.N. DOC. A/31/17 (1976). *See also* article 8(5) of the ICC Rules.

66. For an outline of the procedural issues which should be addressed in drafting an arbitration agreement or terms of reference, see McClelland, *International Arbitration: A Practical Guide for the Effective Use of the System for Litigation of Transnational Commercial Disputes*, 12 INT'L LAW. 83 (1978).

to which the arbitration clause is only a very small and ancillary part. It often happens then that most of those issues must ultimately be decided in the absence of contractual provisions, which increases the likelihood that the time and resources of the parties will be diverted from the central issues in the dispute. There is also then a greater risk of drafting a "pathological" clause, which will fail of its purpose if ever tested in a dispute.

The greater procedural and other flexibility offered by arbitration was discussed above as an advantage. The risk attaching to this flexibility, however, is that the parties may attempt to draft an arbitration clause that mirrors in its detail and complexity the rules governing a United States District Court. Flexibility is only helpful if advantage is taken of its availability.

The flexibility offered by arbitration has a price. Judicial fora have the advantage, at least in most countries, of being provided and paid for by government rather than by private litigants utilizing their services. In contrast, the forum costs of an arbitration must be defrayed by the parties to the arbitration. The expenses involved include the fees and expenses of the arbitrator or arbitrators. Since arbitrators tend to be experienced commercial lawyers or technical people, their expenses obviously are not small. Where the parties use institutional as opposed to ad hoc arbitration, the expenses include administration fees charged by the institution in question.[67]

d. Discovery Narrower in Scope

The narrower discovery permitted in arbitration may prevent arbitrators from being able to compel the production of documents or the presentation of witnesses for deposition. While this restriction may be an advantage in some cases, it may also hinder fact development and lead to unjustified results.[68]

Lack of discovery may be a disadvantage to the extent that one is comparing arbitration to the U.S. litigation system, with its well-developed discovery rules. But in arbitration, precisely because the parties do not have the tools to compel discovery, an arbitrator may draw inferences from a failure to produce certain evidence. An arbitrator will be free to

67. The high cost of institutional arbitration has been much criticized. Fox, *supra* note 49, at 260 (citing Lyons, *Arbitration: The Slower, More Expensive Alternative?* AM. LAW. 107 (Jan./Feb. 1985)). Arbitral institutions have responded to concern over costs. The ICC, for example, in 1986 announced changes in its fees schedule capping a formerly open-ended scale for administrative charges, and staggering the payment of advances on costs (formerly payable in total in advance). Memorandum from Stephen Bond, Sec. General of the ICC Court of Arbitration (July 1, 1986).

68. Ehrenhaft, *Effective International Commercial Arbitration*, 9 LAW & POL'Y INT'L BUS. 1191, 1207 (1977).

draw adverse inferences from nonproduction of evidence, where a trial court judge would rely on the rules of discovery to reveal pertinent evidence. This observation has a counterpart in the court system too. A French court, for example, would be more willing to draw inferences from a lack of evidence than a U.S. court would be, again because of the different availability of discovery mechanisms.

### B. Alternatives Other than Arbitration

Alternative procedures can be structured in many ways. The particular structure chosen will depend on the nature of the dispute, whether for example it involves technical issues or questions of fact, and on the legal framework within which the structure will be established. This section will summarize briefly the principal variations that have been suggested.[69]

#### 1. *Nonbinding Procedures*

Nonbinding procedures are designed to be purely advisory. They are independent of any formal proceedings either pending or subsequent, and no statements or conclusions made at or arising from the procedures may be used as evidence in formal proceedings. Nonbinding procedures may take several forms:

##### a. "Mini-trial" with Neutral Advisor

Used in the TRW/Telecredit dispute and in the multimillion dollar contract case between the Wisconsin Electric Power Company of Milwaukee and the American Can Company of Greenwich, Connecticut, this procedure involves a structured presentation to business executives of the disputing parties and a neutral advisor. The executives, aided by the advisor, then consider possible resolutions of the dispute.[70] If the dispute is not settled at this stage, the next step is for the neutral advisor to render an opinion as to the probable outcome of the dispute if it were to proceed to trial. Prior agreement of the parties would usually prevent this opinion from being put into evidence at any subsequent trial.

##### b. Confidential Mediation or Conciliation

In this procedure, the neutral advisor acts as confidential go-between for the parties and conducts a kind of shuttle diplomacy. The idea is that the parties will communicate negotiating positions and concerns to the

69. The list of possibilities set forth is based in substantial part on the variations suggested by Eric Green. *See* Green, *The Mini-Trial Approach to Complex Litigation*, in Center for Public Resources, Dispute Management I-A.1 (looseleaf 1981).

70. For an account of the Wisconsin Electric mini-trial, see Lempert, *Two Companies Find Big Promise in Little Trial*, Legal Times, Oct. 24, 1983, at 48.

intermediary who will attempt to structure a solution acceptable to both sides. Again, it appears necessary that the parties agree to preserve the confidentiality of this process and agree not to introduce any portion of the discussions in evidence in any subsequent formal proceedings.

c. Contingent Settlement Agreement

Really a negotiating structure, this variation involves attempts by the parties to reach agreement as to the monetary amounts that would be owed assuming several possible outcomes at trial. The theory is that by quantifying their potential exposures and recoveries the parties will narrow the range of possible outcomes and thus enhance the probability of arriving at a compromise.

2. *Semi-Binding Procedures*

Semi-binding procedures, while not a part of formal proceedings, are related to them in a way that gives them more "teeth" than the nonbinding procedures discussed above.

a. "Mini-trial" with Penalties

One option would be the use of a "mini-trial" like that used in the Wisconsin Electric Power Company case, with the added element of a stipulated penalty to be paid by the party whose position is rejected by the neutral advisor if that party refuses to accept the neutral advisor's opinion and then loses in the ensuing formal proceedings. Apart from this penalty, however, the neutral advisor's opinion is strictly advisory.

b. "Mini-trial" with Proceedings Admissible

This variation, similar to the procedure used in the Wisconsin Electric Power Company case, contemplates a "mini-trial" before a neutral advisor with the advisor's opinion admissible by either party in subsequent formal proceedings. The advisor's opinion would not be conclusive but would carry probative weight.

3. *Binding Procedures*

Under a binding procedure the parties would agree to give conclusive effect to the outcome of the alternative proceeding, to the extent implicit in the procedure selected.

a. "Mini-trial" before Special Master

One type of binding procedure would involve the conduct of a "mini-trial" before a referee or special master appointed by a court having jurisdiction over the dispute. The parties would presumably have to limit discovery and narrow the issues in advance, with the approval of the overseeing court. Conclusions of law by the special master would be

subject to review by the court under the applicable rules of procedure, while findings of fact would be conclusive on the parties.

The proceedings before the special master would provide for participation by senior management of both parties and for periods of consultation and would thus attempt to achieve the objectives of alternative procedures within a court-supervised context.

b. Modified Arbitration

Where the parties conclude the arbitration agreement after the dispute has arisen, it is usual to draw up "terms of reference" defining issues to be resolved and procedures to be used. The parties may draft the terms of reference in whatever way they consider appropriate. Under this variation the parties would be foreclosed from challenging the arbitral award, either as to findings of fact or conclusions of law, except through one of the defenses permitted under applicable domestic law, and where also applicable, the New York Convention.

## III. Conclusion

The alternatives to litigation discussed above are in the end simply different mechanisms for achieving the same result: directing the attention and engaging the energies of business people toward resolving the dispute. The value of the alternative procedure selected may be measured in terms of its success in structuring management participation in dispute resolution. Such participation offers the best chance for a realistic assessment of the parties' respective positions, and thus ultimately the best chance for a timely, equitable, and beneficial settlement of the dispute.