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## International Arbitration: A Practical Guide for the Effective Use of the System for Litigation of Transnational Commercial Disputes

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## **International Arbitration: A Practical Guide for the Effective Use of the System for Litigation of Transnational Commercial Disputes**

In recent years, there has been a dramatic increase in the number of transnational commercial arbitration cases filed in arbitration centers around the world. In the past, many of these arbitrations were simple, informal proceedings, handled primarily by a handful of commercial lawyers located in cities such as Paris or London who had little, if any, litigation experience. In striking contrast, today's international arbitrations are likely to be highly sophisticated commercial litigation cases, involving millions or even hundreds of millions of dollars, often handled by litigation sections of major U.S. or foreign law firms.

As one might imagine, the arbitration system has experienced a great number of growing pains because of its rapid emergence as a primary forum for the litigation of international commercial disputes. For although many advocates expressed their belief that international arbitration provided the best available means for resolving such disputes, they failed to warn potential users that the system was still in its infant stages. Accordingly, many litigators have been disappointed to find that the system did not operate efficiently enough to ensure their clients a fair hearing on the merits of a commercial dispute. As a result, reforms at the national and international level have been necessary to make the system a more efficient, workable device. This article will review these developments and show practitioners how they can make the system work better for their clients by designing and negotiating for more complete and creative arbitration agreements and procedures.

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### **Should You Advise Your Client to Use the Arbitration System?**

The decision to utilize the arbitration system is generally made at the time an international contract is being negotiated. The importance of this decision should be conveyed to the client, who, by inserting an arbitration clause into the contract, is agreeing in principle to relinquish his right to litigate related contractual disputes in court. Therefore, before discussing the relative merits of arbitration, it might be useful to discuss briefly the subject of litigation of international commercial disputes in national courts.

The nature of international contracts is such that the national court systems of the parties have not provided the businessman with a commercially desirable forum in which to settle related disputes. The problems that can arise in national courts can be seen in the following hypothetical case. A leading U.S. manufacturer (USA Corp.) agrees to deliver certain machinery to a corporation (Develco) of a developing nation. The contract contains no arbitration provisions. USA Corp., having delivered to Develco equipment valued at \$5 million, is informed by Develco that the equipment is defective and that Develco is blocking payment of guarantee funds from its national bank which were to be paid to USA Corp. after delivery. At the same time, Develco files a suit against USA Corp. in its national courts for breach of contract. Counsel for USA Corp., wholly unfamiliar with the law, language or legal procedures of the developing country and fearing that USA Corp. will not be given a fair trial there, files a suit against Develco in a U.S. federal district court for payment due it under the contract. Both actions proceed to judgment, but with opposite results. Various appeals are filed in both countries and it becomes apparent that neither party will be able to enforce its court judgment against the other. After several years of legal battles, USA Corp. is informed by officials from the developing country that three other contracts which USA Corp. has bid on in that country are to be awarded to foreign competitors unless this case is settled to Develco's satisfaction immediately. Faced with mounting legal costs and the potential loss of future contracts in the developing country, USA Corp. is forced to settle for a fraction of the contractual value. However, the public court proceedings have already damaged USA Corp.'s reputation in the developing country's business community and jeopardized USA Corp.'s chances for future contracts in that country.

Litigation in the courts of a "selected" neutral country has not been effective either. In theory, the parties can place a "forum selection clause" in their contract agreeing to litigate any disputes in the forum of their choice, applying that country's laws. In practice, however, the selected neutral national court, with its own large domestic case load, often will refuse to adjudicate purely international disputes where the parties are foreign nationals and where the con-

tract was neither negotiated, executed nor performed in that country. Moreover, the parties' national courts may refuse to enforce such forum selection agreements against their own nationals because the effect of the provision is to deny them access to their own national courts.<sup>1</sup> Thus, a "forum selection" provision often has no practical effect, and the parties to such an agreement often must rely on their own national courts to enforce their contract.

The fact that practitioners have in the past been frustrated in their attempts to resolve international commercial disputes at the judicial level is perhaps the single most important reason why international arbitration has enjoyed its recent popularity. When the system works ideally, many of the problems referred to above could be avoided. The parties can agree in advance to arbitrate all disputes arising from their contract in a neutral forum, under agreed upon rules and laws, even selecting their own judges (arbitrators). Arbitration proceedings can also be instituted quickly and more privately<sup>2</sup> than court proceedings. Since the arbitration proceedings are initiated in the spirit of the parties' prior agreement, such proceedings are often more amicable in nature than court proceedings; thus, there may be an opportunity to bring the parties together in friendly compromise, thereby preserving a business relationship and the corporation's integrity.

In addition, international arbitration has become an especially useful device in regulating the rapidly growing number of long-term business arrangements.<sup>3</sup> The primary advantage is that the parties to the contract can initiate arbitration proceedings to resolve disputes while the contract is being performed, without terminating the contract. Thus, in these large long-term contracts, a dispute on one phase of the project may be litigated without causing a destructive split which neither party would desire nor could afford. Distinguished commentator Holtzmann stated in a recent article, "In all of these transactions once the business collaboration begins the parties quickly

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<sup>1</sup>For many years forum-selection clauses were not enforceable in U.S. courts. However, the United States Supreme Court, in *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), ruled that such forum-selection clauses were binding on the parties. See also, Farquharson, *Choice of Forum Clause—A Brief Survey of Anglo-American Law*, INT'L LAW. (1974), vol. 8, p. 83; Reese, *The Supreme Court Supports Enforcement of Choice-of-Forum Clause*, INT'L LAW. (1973), vol. 7, p. 530.

<sup>2</sup>Unlike court proceedings with public hearings, arbitration proceedings are private in nature. For example, Article 15.4 of the International Chamber of Commerce Rules of Conciliation and Arbitration states that "persons not involved in the proceedings shall not be admitted." In addition, arbitration awards are private and not published.

<sup>3</sup>The major volume of U.S. exports today are large, long-term contracts often involving transfers of technology as well as the foreign services of U.S. professionals and technicians. The U.S. construction industry, whose foreign contracts are primarily long-term in nature, has increased the volume of its international contracts dramatically since 1972. In 1975, the leading U.S. contractors reported \$21.8 billion of new foreign contracts. This compares to \$11.7 billion in 1974, \$6.0 billion in 1973, and \$3.6 billion in 1972. *Foreign Contracts Account for One Third of 1975 Volume*, ENGINEERING NEWS REC. (April 1976, pp. 62-81).

become 'married.' 'Divorce' would be costly and destructive. To avoid major financial losses, parties must be able to continue their business together in a friendly way, even after disputes arise."<sup>4</sup>

The advantages of the arbitration system as outlined above are available to the client when the system works ideally. Unfortunately, in the past, this has not been the case, and often parties to an international commercial dispute have found that arbitration is as unsatisfactory as litigation in national courts. The problems which have plagued the system might be segregated into two separate categories: (1) those problems caused by the immature state of the system itself; and (2) those problems caused by the ineffective use of the system by attorneys.

### **Recent Developments: Making the System Work**

For many years, the system was not an efficient mechanism for resolving international business disputes. For unlike a national judicial system, there was no institutionalized leadership to watchdog an arbitration proceeding or to provide the parties with a set formula of procedures. As a result, the arbitration proceedings were often unpredictable affairs—relying almost totally on the good faith of both parties in order to resolve the dispute. Since two parties to a dispute rarely work together "voluntarily"—absent some sort of mandate from a recognized legal authority, one party often refused to honor his agreement to arbitrate, choosing to file suit in his own national court. In such cases, national courts generally refused to recognize the validity of the arbitration clause since, as in the case of "forum selection clauses," such recognition would deny their citizens access to national courts. Finally, and most importantly, even if the parties did respect their obligations to arbitrate, the party who prevailed in the arbitration often could not enforce its arbitral award in a national court.<sup>5</sup>

Recognizing these problems, and at the same time believing that the system could be a valuable device for the settlement of international commercial

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<sup>4</sup>A second advantage is that arbitration may provide the parties with greater flexibility in their long-term contracts. Since the contract is to be performed over an extended period of time, the parties need the ability to deal with changing future circumstances. Thus, the parties can agree to allow a neutral arbitration to fill in "gaps" in such a contract. For example, in a situation where the parties cannot predict five years in advance the market value of a jointly produced product, they can agree that royalties from the sale of that product will be adjusted periodically by an independent arbitrator. Holtzman, H.M. and Bernini, G.V.E., *Arbitration in Long-Term Business Transactions*, INTERNATIONAL COMMERCIAL ARBITRATION (1974-75), pp. 12-13.

<sup>5</sup>Arbitral awards, unlike court judgments, are not automatically enforceable and the successful party must apply to a national court with jurisdiction over the other party for the enforcement of its award. Until recently, national courts, having little faith in the arbitration system, have been reluctant to enforce such awards. See text accompanying footnote 21, *infra*.

disputes, nations around the world embarked on a period of thoughtful reform and legislation in efforts to improve the system.<sup>6</sup>

### *Arbitration Centers*

Arbitration centers in many parts of the world now provide institutional leadership and procedural guidance for international arbitrations. Notable examples are the International Chamber of Commerce Court of Arbitration (ICC),<sup>7</sup> located in Paris, the Inter-American Commercial Arbitration Commission (IACAC) with its secretariat located in Rio de Janeiro, the International Court of Arbitration for Marine and Inland Navigation, with its secretariat in Gdynia, Poland,<sup>8</sup> and the International Center for the Settlement of Investment Disputes (ICSID),<sup>9</sup> with its offices in Washington D.C. In addition, many national organizations now handle international arbitrations. Perhaps the most sophisticated national centers are found in the Soviet-socialist bloc countries.<sup>10</sup> Most Western industrialized countries also have facilities for administering international arbitrations. For example, the national center in the United States is the American Arbitration Association (AAA), with its headquarters in Washington D.C.<sup>11</sup>

Although many arbitration centers have existed for a number of years, most centers, until recently, have not handled a large caseload of international arbitrations (with the exception of the Soviet-socialist bloc countries). The increased usage of these arbitration centers has stemmed primarily from educational efforts by the institutions themselves and from internal reform.<sup>12</sup> Such reform has resulted in a better understanding of international businessmen's needs, updated arbitration rules, and better administrative services.

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<sup>6</sup>In recognizing the value of international arbitration to encourage world trade, countries throughout the world have made a concerted effort to improve the system. Mr. Krishnamurthi, Secretary of the Indian Council of Arbitration, stated: "The ultimate aim of the arbitration movement is the world-wide adoption and practice of the arbitration idea." He further stated that to enable trade of every country to flow smoothly and swiftly, a system must be available so that disputes may be avoided or speedily settled when they arise. Krishnamurthi, N., *The International Arbitration Movement*, COMMERCIAL ARBITRATION—ESSAY IN MEMORIAM EUGENIO MINOLI (1974), p. 284.

<sup>7</sup>Thompson R., *The Procedure Under the Rules of the ICC*, INTERNATIONAL COMMERCIAL ARBITRATION (1974-75), pp. 180-87. ←

<sup>8</sup>Strobbach, Dr. Heinz, *Legal Aspects of Arbitration under the International Court of Arbitration for Marine and Inland Navigation*, COMMERCIAL ARBITRATION—ESSAYS IN MEMORIAM EUGENIO MINOLI (1974), pp. 499-515.

<sup>9</sup>Broches, A., *Arbitration Clauses and Institutional Arbitration—ICSID: A Special Case*, COMMERCIAL ARBITRATION—ESSAYS IN MEMORIAM EUGENIO MINOLI (1974), pp. 69-80.

<sup>10</sup>Jakubowski, J., *Arbitration in the CMEA*, INTERNATIONAL COMMERCIAL ARBITRATION (1974-75), pp. 238-49; Berman, H.J. and Bustin, G.L., *Soviet System of Foreign Trade*, LAW AND POL. INT'L BUS., vol. 7, pp. 987-1056 (fall 1975).

<sup>11</sup>Straus, Donald B., *International Arbitration under the Rules of the AAA*, INTERNATIONAL COMMERCIAL ARBITRATION (1974-75), pp. 188-98.

<sup>12</sup>An example of such reform can be seen in the IACAC. The institution was created in the 1930s (with its headquarters and administrative facilities in New York City) to handle arbitrations be-

An example of how institutional leadership and guidance can facilitate arbitration procedures can be demonstrated by an examination of the ICC in Paris, which has the largest caseload of any Western center. The ICC is an international organization with a membership of 47 separate countries. In 1922, the organization formed the Court of Arbitration, specifically responding to the need for a center to administer arbitration of international contractual disputes. Although for a number of years the center handled only a few small cases, more recently the number of new arbitration cases submitted each year varies between 150 and 200. The center now primarily handles large claims, ranging from \$10,000 to over \$100 million.

The "Court of Arbitration" is a misnomer. This court, composed of a chairman, vice-chairman, secretary-general, and one member nominated by each member's national committee, does not adjudicate individual cases, but administers them. After the parties have requested that their claims be arbitrated under the jurisdiction of the court, the court reviews the case and, based on the parties' recommendations, appoints the arbitrator(s) and designates the place of arbitration. The court sets the amount of deposit which the parties must make to cover fees and expenses of the arbitrators and ICC administrative expenses. The arbitration proceedings are guided by the ICC Rules of Conciliation and Arbitration (ICC Rules) which were substantially revised in 1975. The basic function of the court is to ensure that the arbitration is conducted in the manner prescribed by these rules.

The prehearing proceedings and the arbitration hearing(s) are directed by the arbitrators. These proceedings may be short and simple, or long and quite complicated depending on the complexity of the case and the agreement of the parties. At the outset of each case, the ICC Rules allow the parties to agree on the prehearing and hearing procedures.<sup>13</sup> Under the ICC Rules, the parties can agree in advance to the law that will be applied by the arbitrators to decide the

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tween nationals of North American, Latin American and South American countries. By the early 1960s, the IACAC had no cases to administer and was virtually out of business. It became apparent that, due to emerging nationalism in Latin America and South America, parties from these countries did not wish to have their disputes administered or decided by Americans in New York City. It was thus decided that, if the system was to serve a useful purpose, the IACAC must become a truly international organization. In the late 1960s, the IACAC was reorganized as a network of individual national bodies, headed by an Argentinian as president, a Brazilian as secretary-general with offices in Rio de Janeiro, and with an American general counsel with offices in Washington D.C. Since this reorganization, the institution has met with increased acceptance and enthusiasm and many arbitration clauses now refer to the IACAC as its administrative institution. Straus, Donald B., *New Dimensions in International Commercial Arbitration*, Daniel Bloomfield Memorial Lecture (unpublished), given November 19, 1975 at Suffolk University. See also, Norberg, C.R., *Inter-American Commercial Arbitration Revisited*, LAW AM., vol. 7, pp. 275-90, (June 1975).

<sup>13</sup>Article 13 of the Rules for Conciliation and Arbitration of the ICC provides that a terms of reference be drawn up by the arbitrator(s) on the basis of documents submitted by parties or in their presence. See discussion on terms of reference, *infra*, in text accompanying footnote 31.

procedural and substantive issues. Once the hearings are completed, the arbitrators must make their award within a period agreed upon by the parties or mandated by the court. The award is submitted to the court for review to ensure that the final award is in an acceptable form.

The advantages of such an institution are several.<sup>14</sup> First, the institution provides a center which can be confidently designated as their administrator for the proceedings. The parties know in advance that the administrative guidance of such an institute will allow their dispute to be processed in an efficient and impartial manner. Often, the institution will help the parties draft their arbitration clause to ensure that it will be enforceable and that any arbitration will be held in accordance with the rules of that institution. In addition, the administrative support enables the tribunal to devote full time to judging the claims of the parties. Finally, the institutional guidance greatly minimizes the chance that the arbitrators will make procedural mistakes or that one party will not receive an equal opportunity to present his case. Thus, there is a far greater chance that such an arbitral award will be voluntarily complied with by the parties or will be enforced by the parties' national courts. ICC officials report 92 percent voluntary compliance to all arbitration awards made under its jurisdiction without necessity for subsequent enforcement proceedings in court.

### *Uniform Rules*

A second recent development that may greatly aid the businessman in the use of the arbitration system is the emergence of more uniform rules for conducting arbitration proceedings. Faced with the early problems of conducting arbitration proceedings without any rules, attorneys now face a new problem of the "proliferation of rules promulgated by institutions throughout the world."<sup>15</sup> In an address, Mr. Donald Strauss, former president of the American Arbitration Association and presently president of that association's Research Institute, stated that in order to establish a more effective international arbitration system "perhaps the most important building block is a set of rules that would be universally acceptable."<sup>16</sup> Mr. Straus was referring to the new rules that were recently drafted by the United Nations' Commission on International Trade Law (UNCITRAL). In 1976, the IACAC announced its intention to use these rules,<sup>17</sup> and in 1977, a U.S.A.-U.S.S.R. bilateral

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<sup>14</sup>One disadvantage is that fees for use of such administrative bodies are often high.

<sup>15</sup>Straus, D. B., *ICCA's Past Role in Developing the UNCITRAL Arbitration Rules and its Future Role in their Use*, (unpublished) paper presented to the International Council for Commercial Arbitration in Vienna, September 1976.

<sup>16</sup>See Straus, D.B., *New Dimensions in International Commercial Arbitration*, footnote 11, *supra*.

<sup>17</sup>*Ibid.*



agreement was announced which recommended that provisions for the use of UNCITRAL Rules be inserted into arbitration clauses of commercial contracts between parties from these two countries.<sup>18</sup> Mr. Straus in his speech predicted that by 1980 there would be only two sets of rules used to conduct arbitration proceedings—those of the ICC and those of UNCITRAL.<sup>19</sup> It is interesting to note that the UNCITRAL Rules are designed to be administered by any organization. It is possible that in the future, the parties can request that an institution apply the UNCITRAL Rules to administer their arbitration even though that institution may have its own separate rules.

### *Enforcement of Arbitration Agreements and Arbitral Awards*

Another significant development within the system is that counsel can more easily compel foreign nationals to respect their arbitration agreements in both U.S. courts and foreign jurisdictions, and better enforce arbitral awards based on those agreements. For although U.S. courts in past years have enforced foreign arbitration agreements and arbitral awards based on bilateral agreements<sup>20</sup> and principles of comity, they have not done so uniformly. Since the businessmen and their attorneys could not be sure that the courts would enforce the arbitration clause or arbitral awards, there was an understandable lack of confidence in the system. In 1958, a United Nations multilateral treaty, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, was created to make arbitration agreements and awards more uniformly enforceable. Under the convention an international arbitration agreement between parties of member nations is enforceable unless such agreement is "null and void, inoperable and incapable of being performed."<sup>21</sup> More importantly, an award based on such an agreement is directly enforceable in a court of any contracting state subject only to limited review by that court.<sup>22</sup>

<sup>18</sup>News Release from American Arbitration Association, dated January 12, 1977.

<sup>19</sup>See Straus, D.B., *New Dimensions in International Commercial Arbitration*, footnote 11, *supra*. Counsel should be warned that although these two sets of rules are extremely helpful in guiding the proceedings, the rules are still incomplete and should be supplemented by arbitration agreements as discussed, *infra*. Of the two sets of rules, the UNCITRAL Rules are far more complete and are highly recommended to counsel, especially to those who have had little arbitration experience.

<sup>20</sup>There are many bilateral agreements between the United States and other countries around the world which are also helpful in the enforcement of arbitration agreements and arbitral awards, for example, U.S.A.-U.S.S.R. Trade Agreements of October 18, 1972. See *United States-Soviet Commercial Arbitration under the 1972 Trade Agreement*, CASE W. RES. J. INT'L L., vol. 7, pp. 121-139 (winter 1974).

<sup>21</sup>See LAWYERS ARBITRATION LETTER, American Arbitration Association, vol. 1, n. 12 (December 5, 1975).

<sup>22</sup>For an excellent analysis of this treaty and its implications for U.S. attorneys, see Quigley, Leonard V., *Convention on Foreign Arbitral Awards*, A.B.A.J., vol. 58, p. 821-26 (August 1972). In his article, Quigley states that the primary utility of the treaty is in the enforcement of arbitral awards, and states that under the treaty only the following defenses may be raised to defeat the en-

Unfortunately, the United States did not sign the treaty until 1970, when institutions such as the AAA were able to convince the U.S. Congress to ratify the treaty.<sup>23</sup> Today, partially because of the U.S. ratification, there are now more than fifty signatory members to the convention, including most of the United States' important trading partners.

Since the United States signed the convention, U.S. courts have also supported the enforcement of arbitration agreements and arbitration awards. The landmark United States Supreme Court decision of *Scherk v. Alberto-Culver Co.*<sup>24</sup> is an excellent example. The case involved Alberto-Culver, an American corporation, and Fritz Scherk, a German citizen. Alberto-Culver had purchased three European businesses belonging to Mr. Scherk. A short period after the sale was concluded, a dispute arose concerning these transactions and Alberto-Culver brought suit in a federal district court against Mr. Scherk. Mr. Scherk responded that the federal court should not hear this case because there was a valid arbitration clause in the contract and that this dispute should be arbitrated before the ICC Court of Arbitration in Paris, France. The United States Supreme Court, recognizing the value of international arbitration between parties of countries with different laws and conflict of law rules, ordered the parties to arbitrate these disputes in Paris. The Court stated that an arbitration agreement which selects a forum where disputes can be litigated and the law to be applied is an "almost indispensable pre-condition to the achievement of the orderliness and productivity essential to any international business transaction."<sup>25</sup>

In another case, *McCreary Tire & Rubber Co. v. CEAT*,<sup>26</sup> the circuit court

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forcement of an award: (1) the absence of a valid arbitration agreement; (2) lack of fair opportunity to be heard; (3) the award (or a nonseverable part) exceeds the submission to arbitration; (4) improper composition of the arbitral tribunal; and (5) the award is not final and binding. In addition, the national court, on its initiative, may rule that the award is unenforceable if the subject matter submitted to arbitration is not arbitrable according to its own laws, or if the award is contrary to public policy considerations of that jurisdiction. For enforcement of an award in federal district court, based on 1958 U.N. Convention, see Title 9, U.S.C. §§ 201-08. For enforcement in state courts, see, *Foreign Nation Judgments—If State Law Provides for the Enforceability of Foreign Judgments, the Judgment is Enforceable Without Determination of Whether the Arbitration Award on Which It Is Based Is Independently Enforceable under the Convention on Recognition of Enforcement of Foreign Arbitral Awards*, GA. J. INT'L. & COMP. L., vol. 5, 264-76 (winter 1975).

<sup>23</sup>This treaty has been added to the United States Arbitration Act, at Title 9, U.S.C. §§ 201-8.

<sup>24</sup>417 U.S. 506 (1974). See also, *Contracts—International Arbitration—International Business Needs Justify Enforcement of Arbitration Clause in International Contract Pursuant to the Arbitration Act of 1925 Even Though a Violation of the Securities Exchange Act of 1934 and Rule 10(b)5 Thereunder is Alleged*, VA. J. INT'L. L., vol. 15, pp. 467-73 (winter 1975); *Arbitration Clauses in International Contracts and the Extraterritorial Reach of the Securities Exchange Act of 1934 in Light of Scherk v. Alberto-Culver Co.*, SYRACUSE L. REV., vol. 26, pp. 995-1015 (summer 1975).

<sup>25</sup>417 U.S. 506, at 516.

<sup>26</sup>501 F.2d 1032. See Note, AM. J. INT'L. L., vol. 69, pp. 184-86 (Jan. 1975).

of appeals refused to allow McCreary, a U.S. corporation, to escape its arbitration agreement with CEAT, an Italian corporation. McCreary attempted to attach property in Pennsylvania as part of a court action concerning a dispute over a distributorship contract. The circuit court viewed this Pennsylvania court action as a violation of the parties' agreement to arbitrate and inconsistent with the purpose of the 1958 United Nations Convention. The court stated, "the Convention forbids the courts of a contracting State from entertaining a suit which violates an agreement to arbitrate."<sup>27</sup> The court made it clear that U.S. courts have no discretionary power to refuse enforcement of valid international arbitration agreements and only those agreements which are void, inoperative or unperformable, would be denied enforcement.

### **The Practitioner: Making the System Work for the Client**

Although the reforms and developments referred to in the preceding section have greatly improved the mechanical efficiency of the system, counsel cannot benefit from these advances unless he uses the system properly. In the past, the arbitration system has often failed to provide clients with a commercially desirable result due to problems caused by attorneys who attempted to use the system without understanding how to use it effectively. These problems related primarily to two general areas: (1) the drafting and negotiation of an enforceable and effective arbitration clause, and (2) the establishment of workable arbitration procedures at the outset of the arbitration to enable the proceedings to flow fairly, swiftly and inexpensively.

#### *Drafting an Effective Arbitration Clause*

Most arbitration clauses are drafted by commercial lawyers—not by litigators. As a result, the emphasis is generally on enforceability—not effectiveness of the clause. A typical commercial lawyer may have a "boiler plate" he uses in every contract he drafts with some variations depending on the amount of negotiation on this clause. Although this clause is enforceable, often little thought is given by the practitioner as to the utility of the elements of the arbitration agreement.

A typical *ad hoc* arbitration clause (still widely in use today) may contain the parties' mutual agreement to arbitrate any disputes related to the contract, that each party should nominate one arbitrator, and that the two arbitrators will choose a third independent arbitrator to be the "president or chairman" of the arbitration tribunal. Such an arbitration clause may be of little use to counsel once a dispute arises. There is no guidance as to where the arbitration should take place, which rules should guide the proceedings, nor what law

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<sup>27</sup>501 F.2d 1032 at 1037.

shall apply to decide the issues. There is nothing to guide the arbitrators on how to select a third independent arbitrator, if the two arbitrators appointed by the parties fail to reach agreement on his selection. Lacking such guidance, it is no wonder that the system did not operate efficiently to solve the parties' disputes. It is conceivable that counsel for neither party could predict the outcome of such proceedings, and that one party might be denied a fair opportunity to present his case.

It is often said that arbitration is based on the "autonomy of the will of the parties," but it is generally legal counsel who must express that "will" clearly in the arbitration clause of a contract.<sup>28</sup> In order to insure that the arbitration system will work efficiently for your client, the following decisions should be made at the time the arbitration clause is drafted and negotiated:

- The selection of an appropriate institution to administer any arbitration proceedings. Most institutions will send counsel a brochure on request, explaining how arbitration proceedings can be handled under its guidance. Often, such an institution will provide parties with a "boiler plate" arbitration clause. By following this form, the parties can generally be assured that their arbitration clause will be enforceable, and that any proceedings will be administered by the named institution. However, most such "boiler plates" are incomplete and should be supplemented along the guidelines presented below.

- The designation of rules that shall apply to the proceedings. Although many institutions have their own rules, the new UNCITRAL Rules may be administered by any institution, and counsel may prefer to use them once he becomes familiar with them. A copy of these rules can be obtained through the AAA.

- The selection of a convenient, neutral place (forum) for the arbitration hearing. The location of the administering institution should not dictate to the parties where the arbitration hearing will take place. For example, the ICC Court of Arbitration in Paris can, and does, administer proceedings in many cities around the world. The decision should be based on several considerations. The first is that the place of arbitration be in a country that has ratified the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. This may insure that the arbitration clause and the award can be enforced. Secondly, the forum should be in a state or country whose laws favor arbitration, since in the absence of the

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<sup>28</sup>A well-drafted arbitration clause, setting forth specific instructions to arbitrators, is especially important when one party refuses to respect its prior agreement to arbitrate once a dispute arises. In such "involuntary" proceedings, the arbitrators must look solely to that Agreement for its authority to act. If the arbitration clause has detailed provisions which would ensure the defendant a fair hearing, had he participated in the proceedings, most courts will enforce a subsequent "default" award.

parties' agreement on procedural matters, often the law of the place of arbitration will be used. A final consideration should be based on the convenience to the parties since an inconvenient forum will discourage parties from arbitrating small disputes because of the cost of transportation and foreign legal counsel.

- The choice of law to be applied by the arbitrators to judge the parties' claims. It is important to designate which law will be applied in procedural and substantive questions. A failure to specifically distinguish between these two categories will usually mean that the selected law will be applied only to substantive questions, and the law of the situs of the hearing (assuming it is different) will be applied to procedural matters. The selected law should be of a state or a country which has traditionally favored arbitration, since the laws of these jurisdictions will generally facilitate the arbitration of any dispute.<sup>29</sup>

- The parties should designate the language to be used at the hearing, especially if multiple originals of the contract are made in two or more languages.

- A sixth decision should be made by an attorney who is negotiating a long-term contract. He should make sure that the parties can initiate arbitration proceedings easily during the performance of the contract—without interrupting the smooth execution thereof. He may also wish to provide that an arbitrator can fill in certain “gaps” in the contract. Since in some jurisdictions these types of provisions are not enforceable, the legality of such provisions under the applicable contractual law should be ascertained in advance.

- A final decision relates to the prospective arbitrators. The parties generally do not nominate specific arbitrators at the time the contract is signed, but should at least indicate how many arbitrators will judge their claims (one or three), what their qualifications should be, and that the president of the tribunal be from a neutral country. Often, in contracts involving a complex technical subject matter, it may be advisable that the arbitrators have specialized technical knowledge. If the arbitration is to be conducted in two languages, it is essential that each arbitrator be extremely competent in both languages.

Once an arbitration agreement has been reached along the above-stated guidelines, the arbitration system should provide your client with a more workable device to enforce and resolve related business disputes. In addition, such an agreement may provide him with a better means of avoiding arbitra-

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<sup>29</sup>Of course, counsel should have knowledge of the selected laws and as a tactical matter should attempt to negotiate a choice of law of which he has more working knowledge than counsel for the other party.

tion or litigation altogether, since the threat of a well-designed enforcement procedure often encourages the other party to respect his contractual obligations.

### *Drafting a "Terms of Reference" after Dispute Arises*

A second type of arbitration agreement is often negotiated by counsel after a dispute arises and after attempts to settle the dispute amicably have failed. In these cases, counsel can agree to formulate a second arbitration agreement to supplement or even replace the original arbitration clause.<sup>30</sup> Such an agreement is called simply an "arbitration agreement" or the "terms of reference," and its purpose is to give the arbitrators specific instructions as to how the parties wish the arbitration to be conducted.<sup>31</sup> At this time, counsel may be in a better position to design the arbitration proceedings since they will know the specific issues in dispute, and, because a dispute is pending between the parties, counsel should be more interested in working out the procedural details.

The terms of reference should confirm the parties' agreement on the following elements: (1) a brief statement of the facts which give rise to the parties' claims; (2) a brief statement of each party's claims; (3) a list of issues to be decided by the arbitrators; (4) the designation of arbitrators and a procedure for the selection of the neutral arbitrator; (5) provisions for the replacement of arbitrators, if necessary; (6) the designation of the site for arbitration hearings; (7) the designation of applicable law for both arbitration proceedings and substantive law to be applied by arbitrators; (8) the designation of language of arbitration; (9) detailed instructions relating to procedure for arbitration; and (10) the designation of forums where the award may be enforced. The original arbitration clause, if well drafted, should give counsel a basis for agreement on many of these elements. When counsel cannot agree on all of the listed elements, they may agree to submit the disputed elements to the arbitrators—once the tribunal has been appointed—with instructions to the arbitrators to resolve the parties' differences at a preliminary hearing.

The key sections of the terms of reference are those relating to the exact procedures to be used for the arbitration. While most arbitration centers' rules do contain certain procedural provisions, these generally deal with the selection of arbitrators, preliminary pleadings, form and substance of final awards, and

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<sup>30</sup>An agreement to arbitrate "existing" disputes is enforceable under the provisions of the 1958 U.N. Convention, whether or not the original contract had an arbitration clause.

<sup>31</sup>The ICC Rules provide that the arbitrator(s) shall draw up the terms of reference at the beginning of the arbitration. In ICC arbitrations, it is advisable that the parties attempt to meet and agree on a mutually acceptable draft of the terms of reference, and submit this to the arbitrator(s). This will generally save costs and time, since the arbitrators will not have to meet and formulate the document themselves. More importantly, the parties, not the arbitrators, will design the procedures to be used in the arbitration.

costs of the arbitration. However, the rules are generally silent or vague on the procedure by which the arbitrators and attorneys shall conduct the case. The parties are given the opportunity to set forth their preferences in the terms of reference. Absent such guidance, the tribunal often embraces the law of the place of hearing to determine procedural questions, which in some cases may be unfortunate since neither the arbitrators nor counsel for either party may be familiar with the law of the neutral forum.

### *Designing Effective Arbitration Procedures*

A primary consideration when designing procedures is to ensure the parties that the arbitration proceedings will be conducted fairly, and that each party will have an opportunity to present its evidence and to argue its case.<sup>32</sup> A second important consideration is that costs must be minimized whenever possible. Perhaps the most common criticism of the system today is that international arbitration is excessively expensive. Finally, the proceedings must be designed for a minimum of delay once they commence, since if a commercial arbitration does not resolve the dispute swiftly, the result, no matter how favourable, may not produce a commercially desirable solution. Thus, when negotiating the procedures section of the terms of reference, a practitioner may wish to consider the following procedures:

- **PROCEDURE FOR SELECTION AND REPLACEMENT OF ARBITRATORS.** If the parties have designated an arbitration center to administer its arbitration, or have specified that the UNCITRAL Rules will be applied, selection and replacement of arbitrators will be adequately covered by the applicable rules. However, in *ad hoc* arbitration, great care must be taken that provisions are made so that the arbitrators can be selected without delay, that the president will be neutral and that the arbitrators appointed will have agreed upon qualifications.<sup>33</sup> It is equally important to provide for procedures to select a replacement efficiently, in the event that one arbitrator is unable to fulfill his duties.<sup>34</sup>

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<sup>32</sup>This is important because unlike a court judgment, appeals cannot be readily made from an arbitration award. *See generally*, Sanders, Dr. Pieter, *Appeals Procedure in Arbitration*, INT'L. COM. ARB., pp. 112-29 (1974-75). It is also important to the successful party that the proceedings were conducted fairly, since the losing party can defend against the enforcement of any award by showing that the arbitration procedures did not afford him a fair opportunity to present his case. *See supra*, footnote 21.

<sup>33</sup>If counsel wishes to draft comprehensive procedures for the appointment of arbitrators, he should refer to Article 2.1.-2.6. of the ICC Rules or articles 6-8 of the UNCITRAL Rules. Although arbitrators are rarely "challenged," counsel may wish to insert provisions for challenging an arbitrator for cause by referring to Article 2.6. of the ICC Rules or articles 9-12 of the UNCITRAL Rules.

<sup>34</sup>For excellent models, see Article 2.8. of the ICC Rules or article 13-14 of the UNCITRAL Rules.

• **PROCEDURE FOR SUBMISSION OF PRELIMINARY PLEADINGS.** This procedure is also handled by most arbitration rules. The purpose of these pleadings is to give the arbitrators a preliminary view of each party's claims and defenses. Although there is no standard procedure for these submissions, they should be limited in number since parties often wish to respond continuously to points made by the other party. Accordingly, it may be best to provide for an opening memorandum by the claimant to be followed by the defendant's response and counterclaims. Generally, the claimant should be given an opportunity to respond to the counterclaims. As discussed *infra*, in many arbitrations, the parties supplement the pleadings with a detailed presentation of claims and counterclaims prior to the hearing together with supporting documentation.

• **PROCEDURE FOR PREHEARING PROCEEDINGS.** This section may be the most difficult and controversial to negotiate, but may be the most important. In the past, prehearing procedures have been used extensively in American courts to ensure that lawsuits proceed fairly and speedily. In addition, these procedures are often designed to cut costs of litigation. In spite of these advantages, counsel often refuse to utilize prehearing procedures in international arbitration. This may be due to the fact that as commercial lawyers they are not familiar with the usage of these procedures or because foreign businessmen have adamantly refused to agree to such provisions since they are considered to be typically American. These procedures include: (i) requests for admissions,<sup>35</sup> (ii) interrogatories,<sup>36</sup> (iii) requests for production and inspection of

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<sup>35</sup>This is one of the most standard prehearing devices used in U.S. judicial proceedings. Such a device is a request to the other party to admit under oath certain facts are true and its purpose is to limit the issues to be decided—thus saving the parties' time and costs to prove undisputed issues. A provision such as the following might be used:

*Requests for Admissions.* Within thirty (30) days after the signing of this agreement, each party may serve a written request for admissions on the other. Within five (5) days after receiving said requests for admissions, the parties may object in writing to all or part of any such request for admissions on the grounds that a request is irrelevant, unduly burdensome or that it requests privileged information. Within forty-five (45) days after the signing of this agreement, the President shall rule on the validity of any such objection, and the parties shall respond under oath to such requests for admission or parts thereof that the President rules are not objectionable within sixty (60) days after the signing of this agreement. Such admissions will be admissible as evidence at the hearing.

<sup>36</sup>Written interrogations are also common prehearing discovery devices used by the U.S. courts which allow parties to submit written questions to each other relating to the other parties' respective claims, defenses and evidence which they propose to submit at the hearing. Interrogatories are perhaps the cheapest form of discovery, and highly preferable to traveling long distances in order to collect preliminary evidence. Since this device allows the parties to obtain information which is in the possession of the other party prior to hearing, it could help eliminate the "surprise" element that often denies the parties a fair hearing in arbitration proceedings. Like requests for admissions, this form of discovery often allows the parties (and arbitrators) to limit the issues and thereby save costs and time. A typical provision would read as follows:

*Written Interrogatories.* Within thirty (30) days after the signing of this agreement, each party may serve written interrogatories on the other requesting relevant information known to the



documents,<sup>37</sup> (iv) written statements and depositions.<sup>38</sup> Unfortunately, many attorneys who handle arbitrations believe that these procedures will only complicate the proceedings. On the contrary, provisions for some or all of these prehearing procedures could greatly simplify the tasks of counsel, and as more professional litigators become involved, the usage of these procedures will undoubtedly become predominant. When prehearing procedures are used, the parties should agree that disputes relating to said procedures will be decided solely by the president of the tribunal.<sup>39</sup> Thus the parties can submit their disputes on prehearing matters to the president quickly, and a decision can be made without the necessity of costly pretrial hearings before the entire panel or

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other party. Within five (5) days after receiving said interrogatories each party may object to all or part of any such interrogatory on the grounds that the question posed is irrelevant, unduly burdensome or that it requests privileged information. Within forty-five (45) days after the signing of this agreement, the President shall rule on the validity of any such objection and the parties shall respond to such interrogatories or parts thereof, that the President rules are not objectionable within sixty (60) days of the signing of this agreement. The answers to such interrogations will be made under oath and admissible as evidence at the hearing.

<sup>37</sup>After the parties have received answers to interrogatories, each party can then request production of documents in the possession of the other party which would be relevant to their claims or counterclaims. Although such discovery should be standard practice in any litigation situation to enable the parties to prove their respective cases, it is rarely provided for in international arbitration. The provision in the terms of reference could read as follows:

*Production and Inspection of Documents.* Each party shall have the right to request in writing the production of all documents in possession of the other party relevant to any claims or counterclaims in this arbitration. Said request shall be made no later than ninety (90) days after this agreement is signed. Within ten (10) days of receipt of said requests, a party may object in writing to all or part of any individual request, on the grounds that it is unduly burdensome, that the documents requested are irrelevant or privileged or that such documents are equally available to the requesting party. Within one hundred and twenty (120) days after the signing of this agreement, the President shall rule on the validity of any such objection, and the parties shall produce the documents pursuant to the requests or parts thereof that the President rules are not objectionable within one hundred and fifty (150) days after the signing of this agreement. The production shall be made at a mutually agreed time at the Headquarters of the parties and/or at the construction site, if it would be unduly burdensome to transport documents from the site to the parties' Headquarters.

<sup>38</sup>The use of witness statements and depositions may be one of the best ways to cut arbitration costs. The parties may agree that in lieu of transporting witnesses to the place of arbitration, and presenting lengthy live testimony at trial, witnesses' testimony can be presented by written statements. The parties can then exchange statements and, in many cases, the opposing party will not object to evidence nor wish to cross-examine a witness on minor issues which he concedes. In other cases, cross-examination of more important witnesses can take place at each party's headquarters. In this latter case, the written statement and the transcript of the deposition can be submitted to the tribunal, along with other documentary evidence. The parties may also wish to indicate that key witnesses may testify at the hearing "live." If so, witness statements and/or depositions of key witnesses should be provided for to allow each party the opportunity to effectively cross-examine adverse witnesses.

<sup>39</sup>Counsel may preface its prehearing procedures section with the following provision:

*Pre-Hearing Discovery.* The following prehearing procedures may be utilized by the parties to obtain documentary and testimonial evidence for the hearing. Although the President may consult with the other arbitrators concerning pre-hearing discovery, the President shall have the sole power to rule on the validity of objections by parties to discovery and to make other orders which will implement the provisions of this section.

lengthy delays while the president attempts to obtain a consensus from the other arbitrators on minor procedural points.

- **PROCEDURE FOR SUBMISSION OF DOCUMENTS TO TRIBUNAL.** Submission of documents in an orderly manner, so that counsel can easily refer to them at the hearing, and so that the arbitrators will read them, is extremely important. In most arbitrations, strict rules of evidence are not in force, and therefore arbitrators accept and consider documentary evidence even though such evidence might not be admissible in a national court of law. The most efficient method of submitting documents appears to be in numbered bound volumes at a time close enough to the hearing so that documentation of each party's case is complete and so that arbitrators can review them just before the hearing. Premature submission of the documents may result in multiple submissions to tribunal which are difficult to refer to at the hearing. In addition, premature review of documents by arbitrators may cause them to forget the substance of documents long before the arbitration hearing on merits.<sup>40</sup>

- **PROCEDURE FOR DETAILED PRESENTATIONS.** In major or complex arbitrations it may be helpful if each party submits a detailed presentation of claims (counterclaims) and responses, just prior to hearing. Such a submission could allow each party to present its case in detail, referring to specific documentary evidence. Such presentations often simplify the hearing itself by sharpening the issues and by giving the arbitrators a preview of the evidence which will be presented. The detailed presentation should be submitted along with the volumes of documentation, referred to *supra* and each party's documents may be organized accordingly. It is generally preferable that the parties file their detailed presentations simultaneously—with the opportunity to respond within a predetermined period.

- **PROCEDURE FOR SUBMISSION OF MEMORANDA OF LAW.** During the course of the arbitration, parties may wish to submit detailed legal memoranda, supporting their positions. This is usually done prior to the hearing and each party should be given the opportunity to reply to these memoranda. In addition, the arbitrators may request that supplementary memoranda of law be submitted to them at any time during the proceedings. Often the arbitrators request additional legal memoranda following the hearing relating to disputed points of law which arise during the hearing.

- **HEARING PROCEDURES.** Such procedures are often designed by the tribunal itself. However, it may be desirable to provide for detailed hearing procedures in the terms of reference in order to avoid the possibility that the tribunal may devise procedures which are not acceptable to your client. In ad-

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<sup>40</sup>Multiple review of documents by arbitrators, if not on a selected, educated basis may substantially raise cost of arbitration due to increase of arbitration fees.

dition, if the parties design the procedures themselves, it will be difficult for the losing party to later argue that the award should not be enforced due to the fact that the hearing was conducted unfairly. The procedures should be designed so as to divide the time set aside for the hearing between the parties. By so agreeing, the parties will know in advance how much time is available to prove its case. Thus, at the time the terms of reference are signed, each party can predict this element of costs and can also begin to tailor its case to fit within the time limits prescribed. In addition to division of time between the parties, there should be an agreement on the forms of evidence to be accepted at the hearing. For example, the parties may agree that live testimony will be limited to that of experts, and that factual witnesses will submit evidence by sworn witness statements or depositions. It may also be wise to specify the law to be used to supplement the agreed-upon procedures and to state whether strict rules of evidence will apply to the proceeding.

- **PROCEDURES FOR EXPERT WITNESSES.** There are generally two types of expert witnesses used in international arbitration. The most common type of expert is the one who is retained by each party to testify on its behalf on a technical issue. Another type of expert witness is appointed by the tribunal when it feels that insufficient evidence has been presented by the parties' experts to explain the technical issues sufficiently. This type of expert is also appointed when the tribunal believes that the subject matter is such that only an expert could properly evaluate the evidence. The use of this second type of expert should be limited by careful wording in the terms of reference.<sup>41</sup> Such limitations are necessary because expensive independent experts may greatly add to the cost of arbitration, and secondly, because the arbitrators often substitute the expert's judgment for their own on the merits of the case.

- **PROCEDURES FOR DECISIONS OF THE TRIBUNAL.** It is advisable that the terms of reference include procedures which will guide the tribunal's decisions on procedural or prehearing issues. The primary concern is that these decisions be made quickly. Thus, the parties should be given short periods in which to submit written memoranda on issues and, as discussed above, it may be useful to allow the president of the tribunal to make prehearing decisions himself. The president should be given a specific period of time in which to make his decision so that the proceedings will not be delayed unnecessarily. Secondly, the president should be given power to enforce his decisions by the use of sanc-

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<sup>41</sup>The provision could read as follows:

Each party may submit testimony by technical experts before the Tribunal. After hearing this testimony, the Tribunal may appoint an independent technical expert *only if* the Tribunal deems it necessary to clarify certain technical points which such testimony might leave unanswered. The findings of said expert(s) shall not be binding on the Tribunal. If deemed necessary by the Tribunal, said expert(s) may be chosen from a list submitted by common accord of the parties.

tions. These sanctions can be designed by parties, and depending on the severity of the infraction, they might include an order that one party pay the other's costs, or part thereof, or the ultimate threat of default judgment against a party who refuses to respect an order of the tribunal.

• **PROCEDURES FOR AWARD(S) OF THE TRIBUNAL.** Procedures to guide the tribunal in making its award are important because the enforcement of the final award may be denied by a national court if the award is made improperly or if the form of the award is incorrect. The most elaborate sections of institutional arbitration rules are generally devoted to the procedures for the making of the awards.<sup>42</sup> The main elements of such a section usually provide that the award be made by a majority of arbitrators based on applicable law and that the award be final and binding on the parties. The award should contain the tribunal's written explanation of the basis for its award, and state the date and place where award was made. While it is preferable that all three arbitrators sign the award, one arbitrator may disagree with the majority and refuse to sign the award. Accordingly, the procedures should provide that signature by the majority will suffice, if the award states the reason for the absence of the signature of the dissenting arbitrator. The parties may wish to make provisions for the correction of minor errors or omissions in the form or substance of the award.<sup>43</sup> Finally, in order to ensure that the tribunal would give its award promptly, it is desirable to provide the tribunal a limited period of time to announce its final award. This period will, of course, vary depending on the complexity of the case.

• **PROCEDURE FOR AWARD OF COSTS.** A separate section should contain complete instructions to the tribunal on the allocation of costs of the arbitration proceeding between the parties. This is an important provision since, if properly drafted, it will allow counsel to predict costs of the proceedings which may be extremely helpful during the settlement negotiations. This section can be drafted by referring to institutional arbitration rules,<sup>44</sup> and should include provisions which cover: (i) tribunal fees and expenses;<sup>45</sup> (ii) fees of independent experts appointed by tribunal;<sup>46</sup> (iii) expenses of hearing, including

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<sup>42</sup>See, articles 17-25 of the ICC Rules and Articles 31-37 of the UNCITRAL Rules.

<sup>43</sup>See, Article 36 of the UNCITRAL Rules. This provision may facilitate process of correcting an award which a national court has rejected due to errors in the form of the award.

<sup>44</sup>See, Article 20 of the ICC Rules or articles 38-40 of the UNCITRAL Rules.

<sup>45</sup>Unlike judges in national courts whose services are paid by the government, arbitrators' fees are absorbed by the parties as costs of the arbitration. Such fees are usually charged on an hourly or daily basis. The ICC Rules contain a chart which sets forth the arbitrators' fees, the amount of which depends on the sum of dollars in dispute. See Appendix II, Article 4(b) of the ICC Rules. If such a chart or scale is not used by parties, it is recommended that arbitrators' fees be agreed upon by arbitrators at the time they are appointed, so that the parties can reasonably control and predict these costs.

<sup>46</sup>Such fees can often be excessive, and since their work often duplicates that of the parties' own experts and the tribunal itself, the use of these experts should be limited, as discussed, *supra*, footnote 41.

transcripts of proceedings; (iv) travel expenses of witnesses to hearing; (v) fees and expenses for institution administering proceedings or appointing authority; (vi) fees and expenses of counsel for the parties.<sup>47</sup> It may be advisable for the parties to deposit a bond or advance in equal amounts at the outset of proceedings for the payment of these arbitration expenses. When the proceedings are complex and are designed to last more than six months, provisions should be made to pay arbitrators' fees and expenses periodically from the advances.

• **PROCEDURE FOR THE ENFORCEMENT OF THE TRIBUNAL'S DECISIONS AND THE AWARD.** One of the most important provisions in the terms of reference is the undertaking by the parties to implement the tribunal's decisions and awards without delay and to renounce all right to judicial recourse with respect to preliminary tribunal decisions. The parties should agree that judicial review of the final award will be limited to that provided for in the 1958 United Nations Convention.<sup>48</sup> In addition, the parties should respectively designate a national court where any award can be enforced against it in appropriate judicial proceedings.<sup>49</sup> Such provision will enhance the ability of the parties to enforce the award to such a degree that the losing party will often respect the award voluntarily, eliminating the need to apply to national courts for its enforcement.

One final comment should be made with respect to the procedures section of the terms of reference. To ensure that the proceedings flow smoothly, it is especially important that each procedural section contain specific deadlines and that the tribunal has the means to enforce them. Accordingly, extensions of time should be granted only in exceptional circumstances, thus ensuring the parties that their dispute will be resolved swiftly, in accordance with the terms of their arbitration agreement.

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<sup>47</sup>Parties usually must often absorb most of their own expenses related to retained counsel, especially where the award represents a compromise between the parties' respective claims. In addition, in some countries, counsel fees and expenses may be recovered only if incurred by counsel certified to practice in that country. For example, the Solicitors Act of 1957, S. 23 in the United Kingdom, provides that the party employing counsel (solicitors) uncertified in the United Kingdom cannot recover arbitration costs related to counsel's disbursements, even though the parties would be entitled to such costs by the terms of the award.

<sup>48</sup>An example of such a provision is the following:

All decisions and awards rendered by the Tribunal will be binding upon the parties and will be final for all the questions submitted to the Tribunal.

By submitting their dispute to arbitration, the parties agree to execute without delay all decisions and awards, renouncing the right to all judicial recourse with respect to interim decisions, but reserving the right to judicial review of the final award as accorded by the 1958 United Nations Conventions on the Recognition and Enforcement of Arbitral Awards.

<sup>49</sup>This provision can be drafted as follows:

*Enforcement of the Award.* The parties agree that in the case that an award is rendered in favour of \_\_\_\_\_, that said award can be enforced against \_\_\_\_\_ in appropriate proceedings in \_\_\_\_\_ court located in \_\_\_\_\_. If an award is rendered in favour of \_\_\_\_\_, said award can be enforced by appropriate proceedings in the \_\_\_\_\_ Federal District Court of \_\_\_\_\_, located in \_\_\_\_\_.

**Conclusion**

One price of participating in lucrative transnational business transactions is that the U.S. court system does not realistically protect the interests of U.S. businessmen. The international arbitration system, although not perfected, can provide a reasonable alternative, if used correctly by attorneys. For the time has now come when attorneys can no longer blame the system itself for failing to provide their clients with an acceptable means of resolving their disputes. On the contrary, it may be counsel, by failing to use professional tools available to him, who will deprive the client of an effective forum for litigation of its transnational disputes.

