

1979

## Arbitration and Developing Countries

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### Recommended Citation

Joseph T. McLaughlin, *Arbitration and Developing Countries*, 13 INT'L L. 211 (1979)  
<https://scholar.smu.edu/til/vol13/iss2/3>

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# Arbitration and Developing Countries

## I. Introduction

As a practical matter, the prudent investor seeks investments which will yield a fair return at a minimum risk. The other party in the commercial equation, the entrepreneur in the market for capital, attempts to encourage the investor by assuring him that the risks inherent in a particular business transaction will be acceptable. Because of the possibility of conflict between them, both the investor and the entrepreneur want specific assurances that potential disputes will be resolved promptly, efficiently, and inexpensively. Arbitration is the preferred dispute resolution mechanism for many such investors and entrepreneurs.

## II. The Growth in International Arbitration

The rapid expansion of commercial relations between the industrialized nations of Western Europe and the United States, on the one hand, and the developing countries, particularly the petroleum exporting countries, on the other, coupled with the growing role of state enterprises in commercial transactions, has underlined the necessity for the efficient resolution of disputes between parties contracting on an international basis. Recent evidence indicates that arbitration is becoming the preferred method of resolving the conflicts which often arise between these parties.<sup>1</sup>

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The author gratefully acknowledges the assistance of Ms. Enola G. Aird, Yale Law School, Class of 1979.

<sup>1</sup>Arbitration is administered by agencies in almost every trading center of the world and has received widespread endorsement from scholars and commentators. For example, an average of almost two hundred new disputes are submitted to the International Chamber of Commerce each year. See *ICC Arbitration: The International Solution to International Business Disputes*, ICC PUBLICATION 301 (Oct. 1977), p. 34. See also B. Cremades, *Arbitration and Business* (March, 1978) (Provisional Report presented at the Sixth International Arbitration Congress, Mexico City); Ehrenhaft, *Effective International Commercial Arbitration*, 9 LAW & POL'Y

Ideally, international disputes should be resolved promptly so that the flow of trade is not unduly disrupted. However, it has been suggested that the resolution of these disputes in national courts can substantially increase the risk, and therefore the price, of an international contract entered into on a fixed-price basis.<sup>2</sup> The increase in price has been estimated to be as high as 50 per cent.<sup>3</sup> This risk factor represents the contingent liability as perceived by one of the parties when any dispute must be resolved by a foreign court rather than by an arbitral tribunal in some internationally recognized forum.

Traditional litigation in a national court can be a costly, time-consuming, cumbersome and inefficient process, which obstructs, rather than facilitates, the resolution of business disputes. The formal adversarial structure and the possibility of national bias can destroy the business relationships which are conducive to the smooth flow of international trade. Access to the national courts may be restricted because of the overcrowded court dockets in many countries. The intricacies of the national procedures may be unknown to one or more of the parties. Moreover, foreign judgments may be difficult to enforce. For these reasons and others, businessmen seek alternatives to traditional litigation.<sup>4</sup> Arbitration is a potentially more efficient and attractive mechanism.

In the context of international trade, the discordant parties will be from different parts of the world, with correspondingly different world views, cultures and legal systems. Ideally, arbitration provides a flexible, mutually acceptable means of conflict resolution because the process is consensual: one party is not dragged unwillingly into court by another. The procedure is also understandable, flexible and informal, not overly burdened with the complex of legal rules and binding precedents. The arbitrators are often chosen by the parties and usually possess substantial commercial knowledge. Other positive features of arbitration include jurisdictional neutrality, confidentiality, reduced costs, and the possibility that the parties may strike a compromise which might not be available in a court of law. In general, the process is concerned with simple justice rather than the niceties of legal form and procedure.<sup>5</sup>

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INT'L BUS. 1191 (1977); HANDBOOK OF INSTITUTIONAL ARBITRATION IN INTERNATIONAL TRADE (E. Cohn, M. Domke, & F. Eisemann eds. 1977); Note, *The Growing Consensus on International Commercial Arbitration*, 68 AM. J. INT'L L. 709 (1974).

<sup>2</sup>K. Bocksteigel, *Arbitration and Courts — Recent Developments* (March 1978) (Paper Presented at the Sixth International Arbitration Congress, Mexico City).

<sup>3</sup>REPORT FROM EUROPE, No.2, at 2, (Chemical Bank, Feb.1977).

<sup>4</sup>For a discussion of the disadvantages of litigation in international business disputes, see Ehrenhaft, *Effective International Commercial Arbitration*, 9 LAW & POL'Y INT'L BUS. 1191 (1977). Cf. Holtzmann, *Arbitration and the Courts* (March, 1978) (Sixth International Arbitration Congress, Mexico City).

<sup>5</sup>See B. Cremades. *What is Arbitration? What Are Its Results*, THE TECHNIQUES OF INTERNATIONAL ARBITRATION, ICC Seminar (April 1977), at 2-10; Sanders, *International Commercial Arbitration*, 20 NETH. INT'L L. REV. 37 (1973).

### III. Views of Developing Countries

One of the most significant economic factors of the last two decades has been the change in the character of foreign investment in developing countries.<sup>6</sup> These countries have truly begun to assume an increasingly important role in the world economic and political order. Many of these countries were, at one time or another, colonized by some industrialized nation. Since gaining their independence, they have begun to assume an active role in the exploitation, development and marketing of their own natural resources.

Since they often lack the technical expertise and the capital to undertake such development alone, they are necessarily dependent upon external sources of investment in order to increase their share of world trade.<sup>7</sup> Although private investors have been primarily attracted to commercially sophisticated industrialized nations, they have shown increasing interest in developing countries. The shifting balance of economic power has made the developing countries highly desirable markets. They are leading contenders for investment capital. However, the perception by Western investors that these countries are economically naive or that they are risky markets has often inhibited investment. The developing countries themselves have their own predispositions against foreign investment. A long history of colonization, coupled with a heightened nationalism, has frequently made them unreceptive to any foreign presence. Both parties have approached each other with trepidation. Nevertheless, they have approached one another since the economic incentives are overwhelming.<sup>8</sup>

Developing countries and investors from the industrialized nations<sup>9</sup> have negotiated special types of agreements which take into account the changing nature of the world economic order. These are not necessarily short-term

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<sup>6</sup>The term "developing countries" is often used to describe countries in which the *per capita* real income is low in relation to the *per capita* real income of the United States, Canada, or Western Europe. See E. I. NWOGUGU, *THE LEGAL PROBLEMS OF FOREIGN INVESTMENT IN DEVELOPING COUNTRIES* 1 (1965). However, the collective term "developing countries" does not adequately reflect the fact that each of these countries is at a different stage in its political, economic and legal development. See W. FRIEDMAN & J. BEGUIN, *JOINT INTERNATIONAL BUSINESS VENTURES IN DEVELOPING COUNTRIES* (1971):

Within the general framework [developing countries] there are enormous differences between countries such as India or Brazil, which have a considerable background of managerial, scientific, and technological training, as well as considerable commercial experience and sophisticated indigenous enterprises, and some of the small, new independent states of Africa or the West Indies, which have made a sudden transition from tribal and static communities to the aspirations of modern states.

*Id.* at 5.

<sup>7</sup>*Id.*

<sup>8</sup>*Id.*

<sup>9</sup>These private investors are generally multinational corporations. See generally Ryans & Baker, *ICSID as a Little-known Solution to Investments in High Risk Countries*, 1975 AKRON BUS. & ECON. REV. 8; Domke, *Arbitration, NATIONALISM AND THE MULTINATIONAL ENTERPRISE: LEGAL, ECONOMIC AND MANAGERIAL ASPECTS* 233-243 (1973).

contracts; they tend to be developmental agreements<sup>10</sup> by which a foreign investor agrees to provide the mechanisms for a long-term project. Such agreements are often executed between a foreign investor and the sovereign itself and have replaced the concession agreements of the seventeenth, eighteenth and nineteenth centuries. They may be an intrinsic part of a nation's economic development program and are often collaborative efforts in which the government offers the investor a fair return on its investment in return for a positive contribution to the national economic development plan.

A developing country's goals and its perceptions of how these goals can best be achieved may differ from those of the investor. Thus, after an agreement is reached, differences may erupt while work on a project is in progress or after the project has been completed. Accordingly, an essential element of any economic development agreement, from the standpoint of both parties, is some assurance that the project, be it long-term or short-term, will come to fruition, that it will be managed efficiently, that the profits and the risks will be allocated fairly, and that, if disputes arise, some mechanism will exist for their resolution.

In negotiating an economic development agreement with a foreign investor, the government of a developing country will often prefer to submit disputes to the developing country's courts. The outcome of this stage of the negotiations will probably be determined, in large part, by the relative bargaining power of the government and the foreign investor. The foreign investor may normally be expected to resist such an arrangement. The investor may fear, with or without a basis in fact, that the national judiciary will be unable to effect an impartial resolution of the dispute, or he may be reluctant to submit a dispute to what he considers to be an unsophisticated judicial system. Assuming that recourse to national courts is unacceptable to the foreign investor and that the foreign government is convinced, either

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<sup>10</sup>The agreements are typically of three varieties: (1) purchase/sale of goods; (2) investment and (3) transfer of technology. Purchases and sales include real estate, securities, services, and are characterized by the actual transmission of economic goods; investments may be effected by participation, collaborative efforts or by the delivery of material goods; transfers include designs, specifications, procedures, patents, trademarks, engineering and technical assistance and the continuous activity implied in the license or authorization from one party to the other with respect to specialized knowledge. See Statement of H. Sierra, Sixth International Arbitration Congress, Mexico City (March 1978). See also Farer, *Economic Development Agreements: A Functional Analysis*, 10 COLUM. J. TRANSNAT'L LAW 200 (1971). Professor Farer has observed that "[these] agreements . . . embody the terms under which private capital is invited into a developing country for a long term investment. Unlike some cosmetic adjustments, the change in name reflects important substantive changes. The changed power relationship between capital-exporting and importing states; the changed values among governing elites in the latter group of states; changed investor expectations, and to some degree, changed functions for these agreements. . . . Today [these agreements] are recognized as important channels for the transfer of technology, as stimulating agents for domestic entrepreneurship, and most comprehensively, as inputs for a consciously directed program of economic growth." *Id.* at 200.

by the investor's reasoning or economic power, of the relative benefits of arbitration and agrees to it, many problems remain to be resolved.

Despite the many positive attributes of arbitration and its widespread use throughout the world, arbitration does not provide the definitive answer to all international disputes. Many countries are reluctant to resort to international arbitration. Even if the parties resort to arbitration, Professor Sanders has pointed out a problem they might encounter:

The different concepts of arbitration, looking at arbitration on a world-wide basis, is another problem of international commercial arbitration. The concept of arbitration is not the same everywhere in the world. The Anglo-Saxon concept of arbitration differs from that of the civil law countries and those two concepts both differ from the arbitration concept in the socialist countries. For the unification of arbitration these different concepts constitute a great draw-back.<sup>11</sup>

Often the very benefits which arbitration should ideally provide may be lost in an international arbitration, unless the arbitration procedure is carefully chosen and tailored by the draftsmen. They must (1) anticipate the practical and legal consequences of the inclusion of an arbitration clause by taking into account the views of the developing country; (2) select, where appropriate, the recognized arbitration rules most suited to the agreement, and (3) draft specific language governing arbitration under the agreement.

Arbitration's effectiveness will always depend upon how well it satisfies the needs of the parties. A draftsman contemplating the insertion of an arbitration clause in an agreement between a developing country and a foreign investor should first acquire a basic understanding of the attitudes of the developing country toward arbitration. He should know, for example, that almost all countries in sub-Saharan Africa have adopted modern arbitration statutes<sup>12</sup> and are parties to the Treaties of Friendship, Commerce and Navigation.<sup>13</sup> If he is dealing with one of the countries of the Middle East, he ought to know that they have long recognized arbitration as a form of dispute settlement. However, despite this recognition, many of these same countries hesitate to enforce awards of foreign arbitral tribunals or to accept the application of foreign law to the resolution of conflicts involving a state entity. Under such circumstances, such countries prefer to resort to their national courts.

Latin American countries have long viewed arbitration with misgivings. Their antipathy to international arbitration poses a continuing problem for businessmen. Many of these countries continue to adhere to the Calvo doctrine which severely restrains the creation of third-party adjudicative devices for resolving disputes. Originally formulated as a defense against

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<sup>11</sup>Sanders, *supra* note 5, at 44.

<sup>12</sup>Tiewul & Tsegah, *Arbitration and the Settlement of Commercial Disputes: A Selective Survey of African Practice*, 24 INT'L & COMP. L.Q. 393, 398 (1975).

<sup>13</sup>*Id.*

European intervention, the doctrine has long been regarded as a major hindrance to the flow of trade in Latin America.<sup>14</sup>

Only four countries in Latin America (Chile, Cuba, Ecuador and Mexico) have ratified the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Although in 1975 the Inter-American Convention On International Commercial Arbitration of the OAS was signed by twelve Latin American countries<sup>15</sup> and was heralded as an event of "tremendous and vital significance,"<sup>16</sup> only six countries Chile, Panama, Costa Rica, Mexico, Uruguay and Paraguay have ratified it.<sup>17</sup>

Some Latin American countries remain suspicious of the arbitration process. They fear that arbitration is designed to evade the local laws<sup>18</sup> and they are concerned that the arbitration process may be used solely for the investor's benefit. This suspicion of arbitration results in certain governmental policies against any third-party dispute resolution whatsoever. Thus, foreign investors in many Latin American countries have generally been required to agree to resort to national courts in the event of any dispute.

It is also argued that present arbitration systems are alien to Latin American countries:

When an arbitration is suggested its principal office is more than likely located in a foreign country and the individuals who staff the institution are both foreign and unknown to one or both parties. This is often the case for the Latin American businessman and lawyers. Or if the suggestion is made for ad hoc arbitration, additional uncertainties present themselves. There are no familiar rules or proce-

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<sup>14</sup>The Calvo doctrine manifests itself in clauses in concession agreements which prohibit diplomatic intervention by the concessionaire's native country in the event of some commercial dispute. The clause generally requires that the parties submit to local jurisdiction, and submit to the application of local law. See generally, Wesley, *The Procedural Malaise of Foreign Investment Disputes in Latin America: From Local Tribunals to Fact Finding*, 7 LAW & POL'Y INT'L BUS. 813 (1975); Abbott, *Latin America and International Arbitration Conventions: The Quandary of Non-Ratification*, 17 HARV. INT'L L.J. 131 (1976).

Recent developments indicate that the Latin American countries may be more inclined to engage in international arbitration. The Inter-American Convention on International Commercial Arbitration, O.A.S.T.S. A/20 (SEPF), 14 INT'L LEGAL MATS. 336 was signed by several countries in Latin America. The Convention acknowledged the utility and validity of agreements to submit disputes between parties to international contracts to arbitration.

<sup>15</sup>Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Uruguay and Venezuela. See Report on the Inter-American Convention On International Commercial Arbitration, 14 INT'L LEGAL MATS. 336 (1975).

<sup>16</sup>C. Norberg, [1978] 3 Y.B. COM. ARB 13 (International Council for Commercial Arbitration).

<sup>17</sup>Updates Abbott, *supra* note 14, at 131.

<sup>18</sup>See, e.g., Wesley, *supra* note 14, examining Mexico and Venezuela's policies particularly. This Latin American suspicion is not necessarily unreasonable. Indeed, Professor Tiewul has said that "Arbitration is not always the objective exercise it appears to be . . . Its usage is often tainted by some of the defects and problems which make people flee from the courtroom unto its umbrella. And it is often the seat of palpable injustice." He adds, however, ". . . these are defects which are collateral to its misuse and whose eradication is to be striven for in the process of developing the institution with a keener taste than ever." Tiewul & Tsegah, *supra* note 12 at 398.

dures, there is no effective way to resolve procedural disputes, to determine where the arbitration hearings should be held or to appoint the arbitrators if the parties cannot choose them by agreement. In addition, at least two of the arbitrators will probably be total strangers to one or both parties. In Europe, North America, and a few other parts of the world where arbitration is more common, there is familiarity with and confidence in the institutions and the arbitrators. But, in Latin America these uncertainties can and often do lead to suspicion and rejection of the procedure. Under these suspicions and resulting prejudice (sometimes enacted into law), the growth of arbitration is severely impeded.<sup>19</sup>

Many Latin American countries simply do not believe that their interests will be safeguarded by the internationally recognized institutional arbitration centers. These centers are at least perceived by some as favoring the Western industrialized nations.

Accordingly, commentators<sup>20</sup> have urged that arbitration structures be refashioned to take into account the interests of the Spanish-speaking countries and to increase their participation and activism in these arbitral institutions. Until progress in this regard is made, the potential for more complete use of arbitration in Latin America will probably remain unrealized.

#### IV. Special Problems in Negotiating Arbitration Clauses with Parties in Developing Countries

An investor contemplating arbitration as a dispute resolution mechanism in a contract governing an international transaction with a party located in a developing country (even one receptive to arbitration) must recognize that there may be impediments to its use.

##### 1. *Choice of Forum*

The choice of an arbitral forum raises highly significant issues. As Professor Domke has noted, "[d]eveloping countries no longer wish to see their disputed commercial relations determined by Western-oriented arbitral bodies outside their countries."<sup>21</sup> At the same time, the investor will probably want to avoid resolution of any dispute in the courts of a developing country where nationalistic sentiments may be perceived as militating against a just and impartial decision. The classic solution would be to agree to arbitration in a third country under internationally recognized rules. However, when the contracting party in the developing country is the gov-

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<sup>19</sup>D. Straus, *So Perfect in Theory—So Neglected in Practice*, (March 1978) (Paper presented at Sixth International Arbitration Congress, Mexico City). Professor Cremades has frankly stated that "They (the institutional centres) are held to administer arbitration with a mentality which to a certain degree and sometimes unconsciously tends to favor firms exporting capital or importing raw materials." B. Cremades, *Arbitration and Business* 35, (March 1978) (Provisional Report presented at the Sixth International Arbitration Congress, Mexico City).

<sup>20</sup>Straus & Cremades, *supra* note 19.

<sup>21</sup>M. Domke & O. Glossner, *The Present State of the Law Regarding International Commercial Arbitration*, in *THE PRESENT STATE OF INTERNATIONAL LAW* 3-15, 307-330 (M. Bos ed. 1973).



ernment itself or one of its agencies, as is common, it may be adverse to such an arbitration on the grounds that submission to arbitration in a third country would constitute an affront to its dignity as a sovereign. Accordingly, the government may insist on some dispute resolution procedure within its own borders. For example, in its agreement with the Pan Am International Company, Argentina insisted upon, and ultimately obtained, a clause providing for arbitration within its own borders.<sup>22</sup> Even where a government agrees to arbitration in a third country, it may later accuse the arbitral tribunal of bias and refuse to submit future disputes to arbitration if the award is adverse to its position.<sup>23</sup>

A survey<sup>24</sup> of arbitration procedures in the countries of the Middle East reveals a preference for internal arbitration systems.<sup>25</sup> Saudi Arabia and Iran forbid arbitration in foreign countries under most circumstances and require that the resolution of disputes be referred to their national tribunals. Saudi Arabian Decree No. 58 of 1963 specifically limited the authority of governmental organizations to subject themselves to foreign arbitration. Companies entering into contracts with governmental entities in Saudi Arabia cannot avail themselves of the facilities of international arbitration in the event of a dispute. The investor's alternative in Saudi Arabia is the Board of Settlement of Commercial Disputes (limited to disputes arising from private contracts) or the Grievance Board which has jurisdiction over government contracts. The Saudi Arabian Permanent Board of Concession Appeals is also an available forum under certain circumstances.

Iran forbids arbitration outside its borders in the case of disputes involving governmental contracts. It has an internal arbitration tribunal for the settlement of disputes involving a governmental body or agency. Here, again, foreign investors must submit to the tribunal of the host country in the event of a dispute arising out of a governmental contract, except under unusual circumstances.

Disputes between the government of Oman and foreign firms are typically resolved through conciliation within Oman by the Committee for the Settlement of Commercial Disputes. Its decisions are binding and nonappealable. Egypt, on the other hand, appears to accept international arbitration without provisos and is a signatory to both the 1972 Convention of the International Center for Settlement of Investment Disputes and the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention").

In Israel, government agencies will not, as a rule, submit to international arbitration. Accordingly, foreign contractors must agree to submit disputes

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<sup>22</sup>6 Int. Legal Mats. 696, 722 (1967).

<sup>23</sup>3 Int. Legal Mats. 45 (1963).

<sup>24</sup>See Setrakian, *Arbitration under the Legal Systems of the Middle Eastern Countries*, ALI-ABA COURSE OF STUDY: CONSTRUCTION CONTRACTING IN THE MIDDLE EAST (1978); Planagan, Albert, American Arbitration Association Library document (1977).

<sup>25</sup>Reference to the arbitration procedures of the various Middle Eastern countries are based on the Setrakian paper, *supra* note 24.

to local arbitration tribunals. Israel does enforce foreign arbitral awards, if not contrary to public policy, and is a signatory to the New York Convention.

Although some foreign parties contracting in Morocco have been able to negotiate agreements providing for arbitration under the auspices of the International Chamber of Commerce, resort to international arbitration is avoided as much as possible. Most contract disputes are submitted to the national courts or to Moroccan government organizations.

For several years, the government of Abu Dhabi provided in its contracts for arbitration under the auspices of the International Chamber of Commerce with the law of the United Kingdom as the substantive law governing the contract. However, recently it has begun to insist upon arbitration in Abu Dhabi under Abu Dhabi law.

## 2. Choice of Law

The choice of the governing substantive law in international agreements with arbitration clauses may also present some difficulty. Although countries such as Egypt and Algeria recognize the validity of agreements providing for arbitration under the *procedural* rules of, say, the International Chamber of Commerce, these countries and others often insist upon the application of their own *substantive* law.

Such an approach to the question of the governing substantive law of the contract arises, in part, from the view expressed in many countries located in Africa and Asia, that traditional principles of private international law are somewhat biased in favor of Western industrialized interests. These traditional principles are perceived to have been established at a time when the needs and concerns of developing countries were not fully considered and when an attitude of Western chauvinism characterized most dealings with developing countries.<sup>26</sup>

With respect to contracts for the transfer of technology, for example, Dr. Humberto Briseno Sierra has recently observed:

There is an opposing trend from developing countries which emerges as the project for the Code of Conduct prepared by the UNCTAD by the group called of the 77. [sic] One ruling establishes that contracts on technology transfer must be governed by the receiving country's law. This implies distrust of arbitration and, mainly, of the foreign arbitration courts.<sup>27</sup>

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<sup>26</sup>For example, in the arbitration between Petroleum Development (Trucial Coast) Ltd. and the Sheik of Abu Dhabi, Lord Asquith of Bishopstone found that the law of Abu Dhabi was nonexistent and unsuited for modern commercial transactions. He then chose to apply what he called "principles rooted in good sense and common practice of the generality of civilized nations." 18 I.L.R. 144, 149 (1951). See generally B. Cremades, *Arbitration and Business*, 35 (March 1978) (Paper Presented at the Sixth International Arbitration Congress, Mexico City); See also Ramazani, *Choice of Law Problems and International Oil Contracts: A Case Study*, 11 INT'L & COMP. L.Q. 503 (1962).

<sup>27</sup>H. B. Sierra, General Statement Presented at the Sixth International Arbitration Congress, Mexico City (March 1978) at 1.

### 3. *Arbitrable Issues*

In some instances, countries have repudiated their arbitration commitments and insisted upon national procedures for the resolution of disputes between contracting parties.<sup>28</sup> The Organization of Petroleum Exporting Countries (OPEC), for example, adopted a Resolution in 1967, providing *inter alia*, that:

Except as otherwise provided for in the legal system of a Member country, disputes arising between the Government and operators (i.e., the oil companies) shall fall exclusively within the jurisdiction of the competent national courts as and when established.

This resolution formed a basis for the contention that, in cases of expropriation, a country should have the right to rescind arbitration agreements and substitute its own national tribunals as the method for redressing the claims of the concessionaire.

Libya's actions, following the issuance of its Decree of September 1, 1973, provide a graphic example of this attitude. The Libyan government decreed that fifty-one percent of the interests of the foreign oil companies operating in that country under concession agreements would be nationalized. In the concession contracts, Libya had agreed to resolve any disputes with the oil companies through arbitration. Thus, after the expropriation Decree, the oil companies requested arbitration and the appointment of an arbitrator. Libya, however, refused to abide by the terms of the agreement and did not appoint an arbitrator. The companies requested that the President of the International Court of Justice appoint an arbitrator to hear and resolve the dispute. The Libyan government, opposing the request, argued that the nationalization decree was an act of sovereignty and, therefore, not subject to arbitration.

Subsequent events, however, demonstrated that this argument will not be readily accepted in an international forum. In the ensuing Texaco-Libya arbitration,<sup>29</sup> the arbitral tribunal forcefully rejected Libya's position in this regard. The government's agreement to submit to arbitration was held to be binding despite the nature of this dispute. Notwithstanding Libya's refusal to submit to arbitration, René-Jean Dupruy, the sole arbitrator in the proceeding, went forward with the arbitration. He concluded that neither the OPEC Resolution of 1967 nor the United Nations General Assembly resolu-

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<sup>28</sup>See also the Anglo-Iranian Oil Case, I.C.J. Pleadings 11, 40, 258, 267-68 (1952); *Sapphire International Petroleum Ltd. v. Nat'l Iranian Oil Co. Private Arbitration Award* (1963 Rep. 35 I.L.R. 136 (1967)). This position has caused foreign investors to question the binding character of arbitration clauses in certain circumstances. In a survey of attitudes of businessmen toward arbitration in general and the International Convention for the Settlement of Investment Disputes (ICSID) in particular, one respondent stated, in a somewhat exaggerated fashion, that "recent actions in South America and the Middle East show that they pay no attention to arbitration or contracts." Ryans & Baker, *The International Centre for Settlement of Investment Disputes, (ICSID)*, 10 J. WORLD TRADE L. 65, 78 (1976).

<sup>29</sup>See discussion and text of the Texaco-Libya Award in 104 JOURNAL DU DROIT INTERNATIONAL 350 (1977).

tions regarding sovereignty over natural resources could be used by Libya to evade its contractual obligations.

The significance of this Award should not be overlooked. There is now well-reasoned support for the proposition that contractual commitments between a sovereign state and a foreign investor will be enforced against the state by an international arbitral tribunal. The announcement of the Award in this instance resulted in Libya's settling the dispute on terms favorable to the claimant. The explicit message of the Texaco-Libya Award is that when a sovereign is a party to an international commercial agreement with a comprehensive arbitration clause, it may not assert sovereign immunity in order to avoid its contractual agreement to arbitrate. It would appear, then, that if a state wishes to exclude expropriation disputes from the arbitrable issues under an agreement, it should do so explicitly.

## V. Major Systems of Arbitration

If a party in a developing country does not insist (or have the bargaining power to insist) on arbitration or traditional litigation within its borders, it can choose from a variety of recognized international arbitration systems.<sup>30</sup> These systems differ in many respects, including the amount of administrative costs and arbitrators' fees, the method of selecting arbitrators, the procedural and evidentiary rules, and the form and content of the arbitral award. Recognizing the multiplicity of available arbitration systems throughout the world, it is still possible to identify some of the more prominent systems of international arbitration as follows:

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<sup>30</sup>These institutional centers are an outgrowth of the activity of the 19th century trade associations. The specialized trade associations were the self-governing associations of various industries and trades which developed rules applicable to their respective activities. A concomitant of the growth of the trade associations was the development of mechanisms for dispute resolution and the settlement by adjudicators skilled in the trade. There was a gradual recognition of the utility of this type of organization. Sometime prior to World War I, Chambers of Commerce in countries active in international trade attempted to create similar mechanisms for providing such dispute settlement services on a large scale and on a non-specialized basis. The trend began in Paris in 1923 with the creation of the International Chamber of Commerce. It was followed in the 1930s by the American Arbitration Association in the United States and, in the Soviet Union, by the All-Union Chamber of Commerce in Moscow. Since then, fueled by numerous international and multilateral conventions, centers have sprung up throughout the world. Their major advantage is that they have a highly developed set of rules which permit them to guarantee the validity of arbitral agreements and to insure their enforcement. See *supra* note 1, HANDBOOK OF INSTITUTIONAL ARBITRATION IN INTERNATIONAL TRADE (1977). An alternative to the institutional centers is *ad hoc* arbitration. This choice often has many advantages. The parties may structure the form to suit their needs and they pay no administrative charges. But precautions must still be taken to insure that the death or unavailability of an appointed arbitrator or the refusal of one party to comply with the agreement does not render the arbitration clause meaningless. One method of dealing with this is to provide for some recognized national legislative code of arbitration to prevail, subject to contrary provisions of the contract. See A. Martin, "Points to Note in Drafting Arbitration Clauses and Choosing Arbitrators," London, England (November 1976).

1. The Rules of the International Centre for the Settlement of Investment Disputes ("ICSID" or "Centre");
2. The Rules of Conciliation and Arbitration of the International Chamber of Commerce ("ICC") (1975);
3. Commercial Arbitration Rules of the American Arbitration Association ("AAA") (1977);
4. United Nations Commission on International Trade Law Arbitration Rules ("UNCITRAL") (1976) and
5. Rules of the Arbitration Institute of the Stockholm Chamber of Commerce ("SCC") (1976).

(The London Court of Arbitration Rules have been recently revised and are not discussed in this article.)

These five systems vary significantly with respect to numerous issues and, before selecting a particular system, they should be compared in detail. Even after the selection of an institutional system is made, however, the draftsman should be aware that the arbitration rules selected will not answer every question which may arise. Thus, careful thought should be given to restructuring or adding rules, where appropriate, to conform to the needs of the parties. Of course, each system has positive and negative aspects which must be weighed in order to determine what is best suited to the needs of particular parties. What follows is a brief outline and comparison of the five systems listed above.

### 1. *ICSID Arbitration*

The ICSID<sup>31</sup> is an intergovernmental agency created in 1966 by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. The Centre's authority is limited to investment disputes in which one of the parties is a state ("host state"). As of March 1978 there were 76 signatories to the Convention. These included the industrialized Western nations and many of the developing countries of Africa, Asia, the Middle East and the Caribbean. The ICSID was designed to facilitate investments in developing countries by providing a specialized mechanism for investment dispute settlement. It offers facilities for arbitration and/or conciliation of disputes. The Centre's decisions are not subject to review by the courts of the contracting state. The signatory states designate experts in the areas of arbitration and conciliation. These names are maintained by the Centre. When a dispute arises, the Centre designates an Arbitration or Conciliation Panel to settle it. The arbitration or conciliation may take place at any location designated by the parties. The decision of the

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<sup>31</sup>See Amerasinghe, *How to Use the International Centre for Settlement of Investment Disputes by Reference to its Model Clauses*, 13 INDIAN J. INT'L L. 530 (1973); Farer, *Economic Development Agreements: A Functional Analysis*, 10 COLUM. J. TRANSNAT'L L. 200, 234 (1971).

panel is binding on the parties and is enforceable under the rules of international law. The Centre acts as supervisor of the proceedings and provides certain procedural rules.

The ICSID is particularly appealing to developing countries. A state is not obliged to use its facilities even after it has signed the Convention. The state consents to the Centre's jurisdiction when the dispute arises. Once consent is given, it may not be withdrawn. The state is assured that the investor's national state will not intervene to protect the investor or assert an international claim on his behalf. The state may also require that the investor resort to its local courts as a prerequisite to invoking the jurisdiction of the ICSID. Moreover, unless the parties agree to the contrary, the law to be applied in the arbitration of the dispute is that of the host state. In sum, "ICSID arbitration is very closely administered and supervised arbitration which contains many safeguards, having particularly in mind the position of States which are parties to proceedings."<sup>32</sup> Accordingly, it may provide a desirable alternative to institutional arbitration centers which are sometimes perceived as having a Western bias.

African countries, for example, exhibit a strong tendency to submit disputes to the ICSID.<sup>33</sup> Many of these states played significant roles in the conception and implementation of the Centre. Consequently they place a good deal of confidence in its ability to provide a fair settlement of disputes. It is this confidence in the system, born out of participation in its creation, which may be indispensable to the success of arbitration in developing countries. In 1972 for example, when the Ghanaian government dishonored a number of its contracts with foreign investors, the government voluntarily submitted to arbitration under the ICSID.

It is significant to note that even the ICSID, which seems to provide sufficient safeguards to allay fears of an institutionalized Western bias,<sup>34</sup> has been unable to attract Latin American countries to accede to the Convention. This may in part be explained by Article 42(1) of the ICSID Convention which suggests that, although the parties are free to choose whatever law they wish to govern the arbitration, the law chosen may be overridden by the Centre's application of the standards of international law.<sup>35</sup>

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<sup>32</sup>Remarks of A. Broches, Sixth Annual International Arbitration Congress, Mexico City (March 1978). See Baker & Ryans, *ICSID as a Little-known Solution to Investment Disputes in High Risk Countries*, AKRON BUS. & ECON. REV. 8 (1975).

<sup>33</sup>Many African governments are generally inclined to use arbitration as a dispute resolution mechanism. Special provisions are often made in investment enactments or decrees for arbitration to resolve disputes arising from nationalization or withdrawals of concession rights. Tiewul & Tsegah, *Arbitration and the Settlement of Commercial Disputes: A Selective Survey of African Practice*, 24 INT'L & COMP. L. Q. 393, 397-98 (1975).

<sup>34</sup>Many Western investors have accused the Centre of having a "developing country" bias. Ryans & Baker, *The International Centre for Settlement of Investment Disputes* (ICSID), 10 J. WORLD TRADE LAW 65, 72 (1976).

<sup>35</sup>Abbott, *Latin America and International Arbitration Conventions: The Quandary of Non-Ratification*, 17 HARV. INT'L L.J. 131, 138-39 (1976).

Some Latin American countries believe this Article raises the possibility of Western bias in the ICSID.

Because of the jurisdictional scope of the Centre, two major definitional problems may arise. First, is the transaction in question an "investment" so that the Centre may properly take cognizance of it? There may be cases in which this question admits of no easy answer. Thus it would seem to be advisable for the parties to characterize it as such in their agreement in order to create a presumption in favor of the "investment" label in borderline cases.<sup>36</sup>

Second, is one party to the agreement a "state" so that the other jurisdictional prerequisite of the ICSID may be met? This problem is particularly acute if an agency or subdivision of a state is a party to the agreement. Thus, when it is intended that a subdivision or agency of the host state be a party to an agreement subject to ICSID arbitration, the host state must designate that entity as a party to the agreement. Thereafter, papers submitting disputes to the Centre must contain the consent of the subdivision or agency and the consent of the subdivision or agency must be approved by the host state.

#### A. SUBMISSION TO THE CENTRE

If the host state which is a party to an agreement is a member of the Centre, the parties to the agreement may submit their dispute to the Centre by including a clear statement in the agreement that disputes will be submitted to the Centre. The parties should specify their choice of procedure since the Centre offers both arbitration and conciliation services. The parties may also choose a combination of the two.

#### B. COSTS

The appointed tribunal is empowered to determine its fees and expenses within the limits set by the Administrative Council. If the parties object to the fee limits set by the Administrative Council, they may suggest different limits in their consent to submission. The arbitral tribunal has authority to allocate the expenses between or among the parties, but the parties may agree in advance on the manner of allocation.

#### C. PROCEDURE

The Centre provides arbitration rules which may be amended to suit the particular needs of the parties. The procedural arrangements fashioned by the parties are given great weight by the tribunal. If the parties do not designate their own rules, they become subject to the Centre's rules as in force on the date of the consent agreement.

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<sup>36</sup>See Amerasinghe, *supra* note 31.

#### D. CHOICE OF ARBITRATORS

There must be an uneven number of arbitrators. A majority of the arbitrators must be from countries other than those of the parties. If the parties are unable to agree on the selection of arbitrators within 60 days of the initiation of the request for submission of the dispute, either party may resort to the rules of the Centre on the appointment of arbitrators. These rules provide for three arbitrators. Each party is to approve one of the arbitrators and the third arbitrator is to be appointed by agreement of the parties.

#### E. FINALITY

The tribunal's arbitral award is not subject to any appeal and this rule cannot be changed by agreement. The host state must recognize the award as binding and enforce it as if the award were a final judgment. Awards are not published without the consent of the parties.

### 2. *The ICC Court of Arbitration*

In contrast to the ICSID, the ICC provides a non-specialized mechanism for dispute settlement. Any type of international commercial dispute may be submitted. The ICC Court of Arbitration provides the rules of conciliation or arbitration and supervises the application of these rules by the arbitrators.<sup>37</sup>

#### A. COSTS

In ICC arbitration the arbitrator's fees and the administrative charges are based not on the amount of work performed, but rather on the amount in dispute. If the amount in dispute is large, the costs of arbitration will be correspondingly high. In a \$5 million dispute, for example, a single arbitrator's fee could be as much as \$62,000.

#### B. PROCEDURE

The rules of procedure in ICC arbitration are somewhat vague. The parties often embark on an ICC arbitration totally unaware of matters such as the permissible scope of discovery, if any, the right to a complete transcript of the oral proceedings, the right to present witnesses, both lay and expert, and the right to both direct and cross-examination of such witnesses.

#### C. CHOICE OF ARBITRATORS

If the parties to an ICC arbitration fail to agree on the choice of the sole arbitrator, the parties lose all control over the choice. The responsibility is

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<sup>37</sup>RULES OF THE COURT OF ARBITRATION OF THE INTERNATIONAL CHAMBER OF COMMERCE (1975).



given by the Court of Arbitration to a national committee of a country other than those of which the parties are nationals. After the committee's choice is made, it is extremely difficult for the parties to challenge it.<sup>38</sup>

#### D. TERMS OF REFERENCE

The drafting and execution of the terms of reference are required by the ICC Rules. This document is designed to aid the arbitrators in their assessment of the questions presented for resolution, but the preparation of the terms of reference is an expensive and time-consuming procedure which may become, in effect, a "mini-arbitration."

### 3. *The American Arbitration Association*

The facilities of the AAA offer yet another alternative to parties engaged in international commerce.

#### A. COSTS

A significant difference between arbitration under the AAA and arbitration under ICC is cost. The AAA rules, unlike those of the ICC, place a limit on administrative charges.<sup>39</sup> Moreover, the AAA scale of administrative charges is substantially lower than that of the ICC since the AAA administrative fee schedule stops at disputes involving claims amounting to \$5 million. Administrative charges for claims in excess of that amount are negotiated with the AAA by the parties to the arbitration. Theoretically, the AAA arbitrators serve without a fee. But if the arbitration is prolonged, the parties normally agree to pay each arbitrator a fee. The arbitrator's fees in AAA arbitration reportedly range from \$250 to \$1,000 a day per arbitrator.

#### B. RULES OF PROCEDURE

The AAA rules of procedure, in sharp contrast to those of the ICC, are quite specific. A description of claims and defenses, proofs and witnesses must be provided by both parties. Power to decide what evidence may be introduced is shared by the parties and the arbitrators. Such choices are not within the sole discretion of the arbitrators.

Section 28 of the AAA rules provides that "the complaining party shall . . . present his claim and proofs and his witnesses, who shall submit to questions and other examination. The defending party shall then present his defense and proofs and his witnesses, who shall submit to questions or other

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<sup>38</sup>A recent ICC Preliminary Award in Case No. 2321 (1974) illustrates this problem. The defendants contested the propriety of the nomination of the arbitrator by the Court of Arbitration of the ICC which, they argued, had ignored their contractual provisions. The arbitrator upheld his own appointment, stating, rather summarily, that since the parties' method of appointment had proven ineffective, the arbitrator was properly appointed by the Court. (1976) 1 Y.B. COM. ARB. 133 (International Council for Commercial Arbitration).

<sup>39</sup>COMMERCIAL ARBITRATION RULES OF THE AMERICAN ARBITRATION ASSOCIATION (1977).

examination.” Thus the parties may offer evidence which they deem essential to an understanding of the issues and any party may request that the arbitrator issue a subpoena to compel the production of documents or witnesses at hearings before the arbitrators if the arbitrator is authorized to do so by the law of the forum.

#### C. CHOICE OF ARBITRATORS

Before appointing an arbitrator, the AAA consults the parties by sending each party a copy of a specially prepared list of proposed arbitrators. In international matters the AAA list usually contains ten names of persons technically qualified to resolve the particular dispute involved. The list also includes a description of each individual's business or professional affiliations. If the parties wish to obtain additional information concerning a proposed arbitrator, the AAA, unlike the ICC, will provide supplementary biographic data.

The parties have seven days from the date of the mailing of the list to return it with any names to which they object crossed off, and with the remaining names marked in the order of preference. This procedure eliminates all persons crossed-off by either party, and, from those who remain, determines the person with the highest degree of mutual preference. That person is then invited to be the arbitrator.

The AAA also has the power to appoint an arbitrator from its National Panel, without the submission of any additional lists, if no arbitrator previously proposed is mutually acceptable, or the arbitrator chosen is unavailable. However, selection procedures are flexible and, if both parties agree, the AAA will send the parties another list of proposed arbitrators. The same procedure will then be repeated and the seven day limit is not rigidly enforced.

#### D. TERMS OF REFERENCE

Unlike the ICC, the AAA Rules do not provide for the preparation of terms of reference. The parties may submit, however, statements clarifying the issues involved. The parties also help frame the issues by filing documents similar to the traditional complaint and answer used in American courts of law.

#### 4. Arbitration under the UNCITRAL Rules

The United Nations Commission on International Trade Law (UNCITRAL) promulgated comprehensive arbitration rules which were adopted by the General Assembly of the United Nations on December 15, 1976.<sup>40</sup>

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<sup>40</sup>Sanders, *Commentary On UNCITRAL Arbitration Rules*, (1976) 2 Y.B. COM. ARB. 172-73 (International Council for Commercial Arbitration).

These rules may be used to give structure to ad hoc arbitrations. However, they also envisage resort to an "appointing authority," such as an existing arbitral institution or the Secretary-General of the Permanent Court of Arbitration at The Hague, to resolve problems which cannot be settled by the parties. Such problems may include the selection or replacement of an arbitrator.

#### A. COSTS

Article 39 provides that "[t]he fees of the arbitral tribunal shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject matter, the time spent by the arbitrators and any other relevant circumstances of the case."

There is no administrative fee as such, but the parties may be required to bear additional fees and expenses if they resort to a third party to appoint an arbitrator or if the Secretary-General of the Permanent Court of Arbitration at The Hague incurs expenses arising out of the arbitration.

Additional costs, including travel and other expenses of the arbitrators, witnesses and experts, as well as the legal costs of the successful party, may be included within the arbitral award.

#### B. RULES OF PROCEDURE

The UNCITRAL Rules are similar to those of the AAA in that they give either party the right to require, at any stage of the proceeding, "hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument" (Article 15.2). The tribunal, however, retains the power to determine the manner in which witnesses are examined.

The tribunal is also empowered to appoint experts to report to it on specific issues, but the parties are entitled to examine any document upon which the expert has relied in his report and to interrogate the expert at a hearing. The parties may also present their own expert witnesses. The UNCITRAL Rules permit the parties to frame the issues by submitting written statements of claim and defense. In these statements the parties set forth the facts supporting their positions and may attach thereto any relevant documents. Submission of further written statements is within the discretion of the arbitral tribunal. The tribunal also has the authority, at any time during the arbitral proceedings, to require the parties to produce documents or other evidence.

#### C. CHOICE OF ARBITRATORS

The UNCITRAL Rules permit the parties to participate in the selection of the sole or third arbitrator. If the parties are unable to agree on a sole or third arbitrator and cannot agree to name an appointing authority, either party may ask the Secretary-General of the Permanent Court of Arbitration at The Hague to designate an appointing authority. The appointing authority must use a list procedure whereby the authority sends both parties an

identical list containing three names. Within 15 days after receipt of the list, each party must return the list, having deleted the name or names he objects to and having ranked the remaining names in the order of preference. The appointing authority will appoint the sole or third arbitrator from among the names approved on the list. If the appointment cannot be made in this manner, the appointing authority may exercise its discretion in appointing the arbitrator.

#### D. TERMS OF REFERENCE

The UNCITRAL Rules do not provide for the preparation of any terms of reference.

#### 5. *Rules of the Arbitration Institute of the Stockholm Chamber of Commerce*

##### A. COSTS

The final costs of SCC arbitration are somewhat unpredictable. There is no administrative or arbitrators' fee schedule and the rules themselves do not state the basis for determining such costs. Should a settlement be made before an award is rendered, the arbitral tribunal has power to decide that the parties must pay a reasonable amount as compensation to the SCC and the arbitrators. If the settlement is made before the arbitral tribunal has been appointed, the Institute will determine its own compensation. The tribunal can also apportion costs in its final award. Little guidance is provided as to the method of fixing the costs.

##### B. RULES OF PROCEDURE

The SCC Rules, like those of the ICC, give the arbitrator great discretion to choose among various procedural approaches. The rules do state that the Swedish law of arbitration<sup>41</sup> shall apply and that oral procedure is to be the norm. The rules also require that the issues in dispute, as well as the evidence to be offered by each party, be described in writing before any hearing by the tribunal.

Although the matter is not specifically addressed by the SCC Rules, Swedish law gives arbitrators the power to appoint experts on their own initiative. However, the arbitrators have no power to summon witnesses to appear before the tribunal or to sanction a party if that party refuses to produce evidence called for by the arbitrators. As a practical matter, the arbitrators may assign evidentiary weight to a refusal to produce such evidence. If a party wishes to compel testimony or production of a document or an object, he must apply to the appropriate District Court.

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<sup>41</sup>The Arbitration Act of 1929, as amended, July 1, 1976. See Holmback & Mangård, Sweden, [1978] 3 Y.B. COM. ARB. 161 (International Council for Commercial Arbitration).

**C. CHOICE OF ARBITRATORS**

The chairman of the arbitral tribunal or a sole arbitrator is always appointed by the SCC under the rules. The SCC Rules make no provision for the parties to participate in this selection process.

**D. TERMS OF REFERENCE**

There is no provision in the rules for the preparation of any terms of reference. The claimant must submit a written request for arbitration containing a brief account of the dispute and a statement of claim which should include a statement of the claimant's principal evidence. The respondent must submit a reply to the request for arbitration containing a brief comment on the request and a defense which should include a statement of respondent's principal evidence and any counterclaims.

**VI. Drafting the Arbitration Clause:  
Practical Considerations**

Once counsel is familiar with the social, cultural, religious and political history and attitudes of the developing country and the rules of the various international arbitration systems, he should be equipped to draft an effective arbitration clause. Some of the central issues to be considered in this regard are:

1. the definition of the disputes which will be arbitrable;
2. the method for selection or appointment of arbitrators; and
3. the substantive and procedural law/rules which will govern the arbitration.<sup>42</sup>

If the parties mean to provide for arbitration as the sole remedy for any dispute arising out of the agreement in issue, this intent must be made explicit in the agreement.<sup>43</sup> A general statement that the parties agree to submit any and all disputes to arbitration is not sufficient for this purpose.<sup>44</sup> Similarly, if the parties wish to arbitrate only limited questions, the arbitration clause should explicitly so provide.

The parties may utilize their own method of selecting arbitrators or they may rely on the rules promulgated by some institutional arbitration center. This choice is particularly important since it will indirectly affect the result of the arbitration process. Under the ICC Rules, for example, the parties may agree to select a sole arbitrator, or to nominate, respectively, one

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<sup>42</sup>See Aksén, *A Practical Guide to International Arbitration*, in *PRIVATE INVESTORS ABROAD* 51 (1976). There are several collateral matters to be considered: (1) the form of the award; (2) the language of the written submissions and the oral proceedings; (3) the qualifications required of arbitrators not selected by the parties; (4) the consent to the entry of judgment upon the award; (5) the possible limitation of the fees and expenses otherwise applicable, and (6) the forum of the arbitration.

<sup>43</sup>Ehrenhaft, *Effective International Commercial Arbitration*, 9 *LAW & POL'Y INT'L. BUS.* 1191, 1195 (1977).

<sup>44</sup>*Id.*

arbitrator each. A third arbitrator, the Chairman of the tribunal, is then selected by the Court of Arbitration or by the national committee designated by the Court. The parties are free to vary these rules by providing that the third arbitrator will be nominated by the two other arbitrators within a fixed period of time.<sup>43</sup>

The Chairman of the tribunal normally plays a critical role in the proceedings. If no majority decision is reached, he alone will render the arbitral award. It has been argued that where the parties are represented by counsel, the appointment of three arbitrators is unnecessary, uneconomical and inefficient.<sup>44</sup> On the other hand, if each party feels that it is directly represented in the decision-making process, both parties may be more willing to comply with the arbitral award. In selecting the arbitrators, the parties should carefully consider the impact of other factors such as the governing substantive law, the language of the agreement at issue, the principal underlying documents, the forum of the arbitration, the nature of the dispute and the type of expertise which may be required to understand the major issues.

The parties may determine the governing substantive law to be applied in the arbitration. If no such provision is made in the agreement, the arbitrators may apply the substantive law indicated by the appropriate conflict of law rules. This may result in the application of general rules of law considered common to civilized nations. In addition, since the procedural law applied in the arbitration is often influenced by the choice of the forum for the arbitration, that choice is extremely important. The applicable procedural rules, often combined with certain mandatory provisions of the forum's procedural law, may affect critical questions such as the right to present witnesses, the use of direct and cross-examination, pre-hearing disclosure of relevant evidence, the scope of expert testimony and the right to a verbatim transcript of all oral proceedings.

## VII. Conclusion

Arbitration involving parties from developing countries will only work effectively if it is tailored to satisfy the needs and legitimate expectations of all parties. Many developing countries view existing forms of international arbitration as mechanisms which primarily serve the interests of Western entities. Unless the developing countries are reasonably persuaded that arbitration will fairly protect their interests, its potential will remain unrealized in the developing world.

Existing international arbitration institutions, already attempting to broaden their focus, are in an excellent position to see that the potential for increased resort to arbitration is more fully realized.

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<sup>43</sup>McLaughlin, *International Arbitration*, in ALI-ABA COURSE OF STUDY: CONSTRUCTION CONTRACTING IN THE MIDDLE EAST (1978).

<sup>44</sup>Ehrenhaft, *supra* note 43, at 1201.

The regionalization of traditional arbitration centers, now located principally in Western Europe, would be an important step in enhancing the image of arbitration in developing countries. Such centers would attract more arbitrators from developing countries and, in this manner, the arbitration panels ultimately selected should be better balanced. Moreover, given the significance of the choice of the forum for the arbitration, such regional centers would offer developing countries the opportunity to participate in arbitrations in which the procedural rules would be more familiar to them. This regionalization should be accompanied by full-scale attempts to create a genuine partnership between the national judiciary and the arbitration centers.

Arbitration's enormous potential for efficient dispute resolution on a truly consensual basis rests, in large part, upon the initial freedom of the parties to choose the substantive and procedural law governing the ultimate proceedings. This unique feature of arbitration can be lost by poor planning and careless drafting. Careful planning and drafting, however, make it possible for the parties, including those who identify with the concerns of the developing nations, to avoid many of the pitfalls otherwise associated with international arbitration and to ensure that the consensual nature of arbitration is preserved while its reputation for impartiality is enhanced.