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The volume and importance of international trade has expanded significantly in the past decade—a largely positive development. As might be expected, however, a parallel growth in the number and complexity of commercial disputes has arisen to challenge the existing dispute settlement mechanisms. Thus, to meet this challenge, new systems of dispute resolution have been designed.

In the views of many, arbitration has begun to supplant the court system as the favored means to resolve contract disputes among private parties. International commercial disputes can also arise between a private party and a foreign government regarding the private party's products. In such situations a relatively new mechanism may prove helpful to the private parties that believe their products are being treated unfairly or being wrongfully excluded by a foreign government. Section 901 of the Trade Agreements Act of 1979[1] provides such a mechanism whereby an American business can petition the U.S. Government to enforce rights to which the private entity may be entitled under the trade agreements to which the United States is a party.

I. Resolution of Contractual Disputes between Private Parties

In recent years increasing attention has been focused on the international commercial contract. Sophisticated contractual provisions and a variety of alternative legal options pertaining to most commercial possibilities have become the contractual tools of trade for the international commercial attorney. Although the variety of subject matter, parties, and national, legal and cultural differences which may be reflected in an international commercial contract make such contracts more difficult to standardize, the use of "boilerplate" language is not uncommon. It often appears that great thought, effort, and originality are applied to the basic commercial provisions of the contract while boilerplate is resorted to for the non-commercial "legalese". Frequently included is a boilerplate dis-

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[1] Pub. L. No. 96-39, 93 Stat. 295 (codified at 19 U.S.C. §§ 2411-2416 (Supp. III 1979)).

pute resolution clause. Yet the use of boilerplate for these important provisions without consideration of the available options and forms of resolution of a particular dispute entails significant risk and should be avoided. In fact, the dispute resolution clause should be as carefully planned as any of the basic commercial terms of the international contract. Carefully drafted provisions will enhance the prospects of successful dispute resolution. This article reviews the options available and considers the paramount issues involved in choosing an appropriate dispute resolution clause.

A. Resolution by a Court System

In the absence of an arbitration clause, the conflicting parties will find themselves in court. Invariably, each party prefers that its own court system resolve the dispute. This universal desire stems from the not unfounded belief that more favorable treatment, or at least no less favorable treatment, can be obtained in one's own system. A practical consideration is also involved; a party is most familiar with his own legal system and its procedural requirements. Thus, obtaining the "home court advantage" is generally considered an important objective.

The opportunity to choose a neutral forum provides certain attractions. The preselection of a neutral forum allows the parties to agree on a location that is mutually convenient. A neutral forum may also be requested to apply its own law or the law of a third country, allowing flexibility in the choice of substantive law. In order to aid in a more rational resolution of the dispute, the parties can select a forum that has expertise in the particular issues and type of contract involved.

Where a corporation of a major developed country has a dispute with a private party in a developing country, the conflict over forum could rise above mere preference. The developed country party might be unfamiliar with the language, law, and legal procedures of the developing country. Further, the state of law in the developing country might be such that the developed country party would believe a just resolution impossible. This has often led to insistence that disputes be settled outside the borders of the developing country.[2] On the other hand, the developing country party may lack the resources or expertise to become involved in a dispute in the court system of the developed country. Both the developed and developing country parties may distrust the other's system, further complicating the choice of forum for dispute resolution. This distrust on the part of the developing countries results from basic

[2] In some quarters there is a general mistrust between North/South evidenced by numerous differences concerning the New Economic Order. For a general discussion of the basic issues of this topic, *see* E. LASZLO, R. BAKER, E. EISENBERG & V. ROMAN, THE OBJECTIVES OF THE NEW INTERNATIONAL ECONOMIC ORDER (1978); K. SAUVANT & H. HASENPFLUG, THE NEW INTERNATIONAL ECONOMIC ORDER: CONFRONTATION OR COOPERATION BETWEEN NORTH AND SOUTH? (1977); J. SINGH, A NEW INTERNATIONAL ECONOMIC ORDER: TOWARD A FAIR REDISTRIBUTION OF THE WORLD'S RESOURCES (1977).

differences in the philosophical underpinnings of legal systems in the developed and developing nations. As one commentator has noted:

> Concepts such as ownership, contract, corporate personality which appear quite innocuous within the context of a municipal legal system may have grave implications when transplanted into the sphere of transnational transactions. Second, it is an established legal tradition in Europe and, to some extent, America, to refer to these legal concepts as the colourless tools of a legal system. Yet any perceptive observer will concede that these concepts connote discrete value systems of a distinct individualistic bias, which are often manifestly inimical to the aspirations and development goals of new nations. They should therefore not be accorded the status of immutable and universal postulates.[3]

The inevitability of preferences means that a neutral forum and the law of a third country will have to be agreed upon by the parties. Absent the selection of a neutral forum, it is probable that each party would commence an action in its own court system, proceed to judgment, and then be unable to execute the judgment due to non-enforcement in the other party's country.[4]

1. Enforceability of the Forum Selection Provision[5]

a. In the United States

Interestingly and somewhat surprisingly, it was not long ago that contract flexibility concerning forum selection was not possible when U.S. courts were involved. "It was the traditional view of American courts that agreements in advance of controversy whose object [was] to oust the jurisdiction of the courts [were] contrary to public policy and [would] not be enforced."[6] Specification of another forum would, therefore, be ineffective if one of the parties brought suit in a U.S. court which had otherwise proper jurisdiction over the matter. This judicial circumvention of the choice of the contracting parties was eliminated by the U.S. Supreme Court in *The Bremen v. Zapata Off-Shore Co.*[7]

In *Bremen* the Court noted that the "expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts."[8]

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[3] Asante, *International Transactions and National Development Goals*, 4 GHANA CIV. SERVICE J. 1, 6 (1977). Although Dr. Asante was speaking in reference to disputes between states and private corporations, the observation is equally applicable to the development mentality embodied in private corporations of the developing countries.

[4] On these issues, *see* Mehran & Patterson, *Recognition and Enforcement of Foreign-Country Judgments in the United States*, 6 LAW & POL'Y INT'L BUS. 37 (1974).

[5] *See generally*, Gilbert, *Choice of Forum Clauses in International and Interstate Contracts*, 65 KY. L. J. 1 (1976).

[6] Carbon Black Export, Inc. v. The Monrosa, 254 F.2d 297, 300-01 (5th Cir. 1958), *cert. denied*, 359 U.S. 180 (1959).

[7] 407 U.S. 1 (1972), *rev'g sub nom.* In re Unterweser Reederei, GMBH, 428 F.2d 888 (1970).

[8] 407 U.S. at 9.

The rule laid down in *Bremen* was that forum selection clauses will be enforced in U.S. courts unless enforcement is shown by the resisting party to be unreasonable under the circumstances.[9] This "reasonableness" rule accords with the Restatement (Second) of the Conflict of Laws.[10] The Court gave an indication of what might be compelling circumstances for non-enforcement, citing "fraud, undue influence, or overwhelming bargaining power."[11] In such situations it would be a violation of public policy to enforce the contractual agreement regarding forum selection.

b. In the European Economic Community (EEC)

In Europe there is general freedom of choice among the members of the EEC. Article 17 of the EEC Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters[12] recognizes choice of forum clauses if one of the parties is "domiciled" within the jurisdiction of a convention signatory.[13] There are two exceptions to this free choice provision. First, denial of choice may be based on the fact that a court of a Convention signatory should have exclusive jurisdiction due to the subject matter of the dispute.[14] Second, if undue bargaining

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[9] *Id.* at 10. For a discussion of the "reasonableness" test, *see* Lagerman, *Choice of Forum Clauses in International Contracts: What in Unjust and Unreasonable?*, 12 INT'L LAW. 779 (1978).

[10] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80 (1971). "The parties' agreement as to the place of the action cannot oust a state of judicial jurisdiction, but such an agreement will be given effect unless it is unfair or unreasonable." *Id.*

[11] 407 U.S. at 12. That the forum selected in the contract was seriously inconvenient to one of the parties might suggest that the agreement was adhesive, but the party making such a claim bears a "heavy burden of proof." *Id.* at 17.

"In such circumstances it should be incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court." *Id.* at 18.

[12] European Communities Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, *done* September 27, 1968, English translation printed in COMM. MKT. REP. (CCH), No. 96 (November 19, 1968), *reprinted in* 8 INT'L LEGAL MATERIALS 229 (1969).

[13] *Id.* at 235. Art. 52 provides that domicile is to be determined by the court chosen by reference to the law of the claimed domicile.

[14] *Id.* at 234. Art. 16 provides guidance regarding such subject matter. It states:

> The following courts shall have exclusive jurisdiction regardless of domicile:
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> (1) in matters involving rights in rem in real property or concerning the leasing of real property: the courts of the Contracting State in which the real property is located;
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> (2) in matters involving the validity, nullity or dissolution of a company or legal person having its seat in a Contracting State or of decisions of its organs: the courts of that State;
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> (3) in matters involving the validity of entries in public registers: the courts of the Contracting State in whose territory the registers are kept;
>
> (4) in matters involving the validity of patents, trademarks, designs and models, as well as of similar rights requiring a filing or registration: the courts of the Contracting State in whose territory the filing or registration was applied for or effected or is considered to have been applied for or effected under the terms of an international convention.

power or an adhesion contract is involved, the choice will not be enforced.[15]

2. Forum Selection in the Negotiation Process

A contractual advantage may be obtained by agreement on an appropriate forum, because the forum selected, absent express agreement to the contrary, will most often apply its own law. Familiarity with the substantive law of the neutral forum is of primary importance to the result of future dispute resolution.

Without careful selection, one may be subject to law which will not provide an adequate remedy. Remedies available upon breach of contract differ significantly from forum to forum. For example, specific performance is not available in France,[16] whereas it is the primary form of recovery in Japan.[17]

The *Bremen* case is an excellent example of the utility of a forum selection clause in protecting a client's interests. In *Bremen*, the ocean towage contract provided that "[a]ny dispute arising must be treated before the London Court of Justice."[18] The contract also contained two exculpatory clauses. They provided that: (1) the masters and crews were not responsible for defaults and/or errors in the navigation of the tow; (2) that damages suffered by the towed object are "in any case for account of its owner."[19] The plaintiff sued in Tampa, Florida, the port of refuge, alleging negligence and breach of contract. The probability that the plaintiff could expect no recovery in England was cited by the U.S. Court of Appeals as a reason for disallowing the forum selection clause.[20] The inability to recover was found to be contrary to U.S. public policy. The court of appeals based its conclusion on the opinion of an English maritime law expert that the exculpatory clauses in the contract would be held "prima facie valid and enforceable" against the plaintiff in any action maintained in England.[21] Additional evidence suggested that the selection of London as the contractual forum for dispute resolution was not a random choice. For example, under the applicable liability limits, even if the defendant was found liable, recovery was limited in the English forum to $80,000. By contrast, recovery in Tampa had a

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[15] Convention of Accession of October 9, 1978, 23 O.J. EUR. COMM. (No. 304) 77 (1978) adding section 4, "Jurisdiction over Consumer Contracts" to the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, *supra* note 12. A current English language version of the amended convention appears at [1978] 2 COMM. MKT. REP. (CCH) ¶ 5015 *et seq*.

[16] C. CIV. art. 1142 [France].

[17] Specific performance is available even where the loss may be compensated in money damages. Kitawgawa, *Damages in Contracts for the Sale of Goods*, 3 L. JAPAN: ANN. 43, 46 (1969). For other differences in the scope of contract damages between the United States and Japan, *see* Ricks, *A Comparison of the Scope of Contract Damages in the United States and Japan*, 12 INT'L LAW. 105 (1978).

[18] 407 U.S. 1, 2 (1972).

[19] *Id*. at 3 n.2.

[20] *See id*. at 8.

[21] 428 F.2d at 895.

$1,390,000 limitation.[22] When the U.S. Supreme Court ultimately upheld the enforceability of the forum selection clause, the plaintiff's agreement to the London forum seriously compromised its recovery. Thus, as *Bremen* illustrates, it is vital to carefully review the laws in the potential forum, both to prevent unpleasant surprise and to secure tactical advantages.

Given the pitfalls of a judicial resolution to the dispute, the question arises, why select any court forum when arbitration is an available alternative? This can best be answered after carefully considering arbitration as a dispute settlement mechanism.

B. Resolution by Arbitration

It has been contended that neutral forum selection clauses are not practical.[23] Underlying this view is the reluctance of neutral courts with heavy domestic case loads to adjudicate disputes where the parties are foreigners and have no contacts[24] with the neutral country. Further, as was the situation in the United States before *Bremen*, the national courts of the parties may not recognize a forum selection clause on public policy grounds.[25]

There are also reasons to prefer arbitration that do not relate to availability of a judicial forum. The resort to the courts implies an adversarial proceeding in which emotions are likely to run high. Such an atmosphere does not produce a climate conducive to further contracts between the parties. Further, if a long-term contract is involved, the parties may desire, and for practical reasons may be forced, to continue performance of the contract while the dispute is resolved. Arbitration would appear to be the more sensible vehicle in such circumstances.[26]

Arbitration exists in two basic forms, institutional arbitration and ad hoc arbitration.

1. Institutional Arbitration

Arbitration as a mode for dispute resolution has become increasingly popular in the international context. As more parties select the arbitration alternative, arbitration rules and institutions to administer them will grow in size and in number. Existing organizations include the American Arbitration Association (AAA), the London Court of Arbitra-

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[22] 407 U.S. at 8 n.8.

[23] *See* McClelland, *International Arbitration: A Practical Guide for the Effective Use of the System for Litigation of Transnational Commercial Disputes*, 12 INT'L LAW. 83 (1978).

[24] In *Bremen* the contract was neither negotiated, executed, nor performed in the neutral country. *See* 407 U.S. at 2-3.

[25] Public policy might be framed broadly in terms of undesirability of denying nationals access to their own courts—or may be framed narrowly as an unconscionable enforcement of the contract due to the laws of the neutral country.

[26] *See* Holtzman & Bernini, *Arbitration in Long-Term Business Transactions*, INTERNATIONAL COMMERCIAL ARBITRATION (1974-1975).

tion, the Japan Commercial Arbitration Association, and the Indian Council of Arbitration. Regional rules include the Uniform Rules of Procedure for 1974 for arbitration in the Arbitration Courts of the Council for Mutual Economic Assistance (CMEA)[27] countries and the rules of the United Nations Economic Commission for Europe, Asia, and the Far East.[28]

The most widely utilized international arbitration organization is the International Chamber of Commerce (ICC), headquartered in Paris, but with offices worldwide. The ICC has its own arbitration rules.[29] Perhaps the most influential set of rules, however, is the United Nations Commission on International Trade Law (UNCITRAL) Rules.[30] Because differing nationalistic and cultural attitudes have engendered a distrust of "someone else's" rules, the UNCITRAL rules were drafted to be suitable for worldwide use. In fact, the developing countries were significantly represented in the rule drafting process. As a result, the UNCITRAL rules have been substantially incorporated into the rules of the Inter-American Commercial Arbitration Commission (IACAC).[31] Further, the Asian-African Legal Consultative Committee has recommended use of the UNCITRAL rules in international commercial contracts. The intended universal suitability of the rules extends to diverse institutional systems as well. Acceptance by both capitalist and socialist countries as well as common and civil law countries was intended. The UNCITRAL rules may be applied by any institution if the parties have expressed a desire to be governed by them in the contract.[32]

The preliminary mechanics of arbitration can be demonstrated by an examination of the ICC procedures. The process begins when a party to an agreement that includes an ICC arbitration clause makes a demand upon the ICC for initiation of a proceeding.[33] The ICC Court of Arbitration confirms the existence of the agreement to arbitrate, oversees

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[27] The text of the Uniform Rules of Procedure in the Arbitration Courts at the Chambers of Commerce of the CMEA Countries may be found at 1 YEARBOOK COMMERCIAL ARBITRATION 147 (1976). The CMEA's principal member is the Soviet Union. The Convention on Settlement by Arbitration of Civil Law Disputes Emerging from Relations of Economic, Scientific and Technical Cooperation was signed in 1972 and has since been ratified by all CMEA members. Regarding the USSR's arbitration system, *see generally* Lebedev, *Union of Soviet Socialist Republics: The Foreign Trade Arbitration Commission at the USSR Chamber of Commerce and Industry*, HANDBOOK OF INSTITUTIONAL ARBITRATION IN INTERNATIONAL TRADE (1977).

[28] For a list of the various international regional and national institutions which offer arbitration services, and for copies of their rules of procedure, *see* 1 INTERNATIONAL COMMERCIAL ARBITRATION (Documents) (1976).

[29] The text of the Rules of Conciliation and Arbitration of the ICC may be found at 1 YEARBOOK COMMMERCIAL ARBITRATION 157 (1976) [hereinafter cited as ICC Rules].

[30] United Nations Commission on International Trade Law Arbitration Rules, 31 U.N. GAOR, Supp. (No. 17) 35-50, U.N. Doc. A/31/17 (1976), *reprinted in* 2 YEARBOOK COMMERCIAL ARBITRATION 161 (1977) [hereinafter cited as UNCITRAL Rules].

[31] The text of the Rules of Procedure of the IACAC may be found at 3 YEARBOOK COMMERCIAL ARBITRATION 231 (1978).

[32] The parties must specifically delineate the UNCITRAL Arbitration Rules in writing. UNCITRAL Rules, *supra* note 30, art. 1.1.

[33] ICC Rules, *supra* note 29, art. 3(1).

the selection of the arbitrator,[34] and will designate a situs if the parties have not done so.[35] Once situs and arbitrators have been selected, the arbitration itself can begin.

2. Ad Hoc Arbitration

In an ad hoc agreement the parties may agree on any mediating body they wish. Further, the parties themselves may develop the procedural rules for the arbitration. The agreement concerning the tribunal and the rules may be inserted into the ad hoc arbitration clause itself or may be deferred until a dispute arises.

There are serious drawbacks to the ad hoc approach, however. Designing the mechanics of an arbitration will be more time consuming than merely selecting the ICC or UNCITRAL rules. If deferred until some time after the dispute has arisen and the parties have become antagonistic, agreement on the mechanics will be even more trying. Thus, as between "institutional" and "ad hoc" arbitration, institutional arbitration appears generally preferable.

C. Comparison of Institutional Arbitration and Court Proceedings—An Analysis of the Advantages and Disadvantages

1. The Decision Maker

a. Capability

In a judicial system, the decision maker is usually a professional judge experienced in the resolution of disputes. An arbitrator, however, may have comparatively little experience. The type of experience that the arbitrator has had may also be different from that of a judge, a factor which may affect the resolution of a dispute. If a businessman is the arbitrator, the presentation of involved legal arguments may be inhibited. The absence of purely legal arguments is no loss if their use would lead to an unfair result. If, however, the arbitration is to be governed by a substantive body of law, as opposed to the amiable compositeur process,[36] and legal construction will be important, the parties would probably feel more comfortable with an experienced judge. If an inexperienced arbitrator deals unsuccessfully with a complicated legal issue, the award rendered may not only be unfair and incorrect, but it may also be of questionable enforceability.

An example of such an enforceability problem can be found in the old "stated-case" doctrine of the United Kingdom.[37] This doctrine permitted review of the arbitrator's legal reasoning on the theory that

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[34] *Id.* art. 2.

[35] *Id.* art. 12.

[36] *See* notes 73-77 and accompanying text, *infra*.

[37] *See generally*, Hacking, *The "Stated Case" Abolished: The United Kingdom Arbitration Act of 1979*, 14 INT'L LAW. 95 (1980).

"[w]hen there are persons untrained in law, and especially when . . . they allow persons trained in law to address them on legal points, there is every probability of their going wrong . . . ."[38] Therefore, exclusion of judicial review of the arbitral decision was previously considered to be "contrary to public policy."[39]

Under the United Kingdom Arbitration Act, 1979,[40] however, the parties to a nondomestic arbitration agreement[41] may provide at the time of contracting, with three specific exceptions, that an arbitration award will not be judicially reviewable.[42] As is the case in all instances of arbitration, the law of the forum should be followed precisely. Hence, the renunciation of judicial review should be tailored to the Arbitration Act, 1979, when the London forum is chosen.

A judicial system will provide a decision maker who is a legal expert, but a governing arbitral institution has the flexibility to appoint the most knowledgable decision maker to resolve the particular issues involved in the dispute. While a judge may be more familiar with a broad range of substantive law, it is less likely that the court systems will be able to provide competent legal decision makers who are also experts in the involved fields. Thus, the type of contract considered should influence the choice of the decision maker. For example, arbitration of issues involving technical or scientific problems may often be preferable to judicial resolution of disputes involving such matters.

b. Availability

Since dockets are crowded with domestic cases, delays can be expected. In some court systems trials may proceed in segments making appearance before the tribunal in an international case a source of continuing inconvenience.

Although arbitration is certain to proceed more rapidly than a segmented trial, its expedition should not be overemphasized. Arbitrators are rarely available on a full-time basis, and proceedings must be tailored to the arbitrator's schedule. When a panel of three arbitrators is utilized, as is often the case, the problem is exacerbated.

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[38] Czarnikow v. Roth, Schmidt & Co., [1922] 2 K.B. 478, 488.

[39] *Id.* at 487.

[40] For a discussion of the provisions of the statute, *see* Shenton & Toland, *London as a Venue for International Arbitration: The Arbitration Act, 1979*, 12 LAW & POL'Y INT'L BUS. 643 (1980).

[41] A nondomestic arbitration agreement contemplates that at least one of the parties is not a citizen of the United Kingdom.

[42] If the contract involves admiralty, insurance, or commodities and the contract does not provide that the dispute is to be governed by non-British law, judicial review may be excluded only if the agreement is made after arbitration has commenced. U.K. Arbitration Act, 1979, c. 42, § 4(1).

2. Evidence

a. Discovery

One of the often cited disadvantages of arbitration—particularly and perhaps uniquely from an American perspective—is the more limited availability of discovery. A judge generally has significantly more authority to compel production than does an arbitrator. The ICC rules make no mention of discovery rights.[43] The UNCITRAL rules, however, provide that "[a]t any time during the arbitral proceedings the tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the tribunal shall determine."[44] Therefore, the amount of discovery permitted, or compelled, will depend on the predilection of the arbitrator, a predilection that will often be determined by the arbitrator's more extensive familiarity with his own system. The discovery distinction is likely to be greatest when an American court proceeding is contrasted with an arbitration conducted by an arbitrator from a civil law jurisdiction.

b. Witnesses

Differences may also result in the form in which evidence is heard. The ICC rules provide that the arbitrator is to study the "written submissions of the parties and all documents relied upon . . . ."[45] He must also hear the parties together if so requested by one of the parties.[46] Testimony of witnesses, however, is provided only at the arbitrator's discretion.[47] Under the UNCITRAL rules, "[i]f either party so requests at any stage of the proceedings, the arbitral tribunal shall hold, hearings for the presentation of evidence by witnesses, including expert witnesses. . . ."[48] Under both sets of rules, however, the arbitral tribunal is free to determine the manner in which the witnesses are examined.[49] If civil law arbitrators are selected, it is probable that they will do the questioning rather than the parties, a factor that may reduce the utility and effectiveness of certain witnesses for American attorneys.

c. Rules of Evidence

Arbitral rules do not contain detailed rules of evidence. The arbitral tribunal, however, will normally consider the admissibility, relevance, materiality, and weight of evidence in the process of resolving the dispute.[50] Absent a choice of a procedural code of evidence to direct it,

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[43] *See* ICC Rules, *supra* note 29.
[44] UNCITRAL Rules, *supra* note 30, art. 24.3.
[45] ICC Rules, *supra* note 29, art. 14.1.
[46] *Id.* The arbitrator may also hear the parties on his own motion.
[47] *Id.*
[48] UNCITRAL Rules, *supra* note 30, art. 15.2.
[49] *See id.* art. 25.4; ICC RULES, *supra* note 29, art. 14.1.
[50] *See, e.g.*, UNCITRAL Rules, *supra* note 30, art. 25.6.

the arbitral panel will probably utilize the rules of evidence most familiar to it.

There are, of course, pronounced differences among judicial systems regarding treatment of witnesses and extent of discovery. If a common law neutral forum is selected, its procedure will differ markedly from a code system jurisdiction. The code countries have a marked preference for the development of the case by the judge rather than by the adversaries and for decisions based on documents rather than testimony of witnesses. Individual arbitrators are likely to draw heavily on their own experience and on methods taught them in their respective civil or common law systems in the arbitration process. Under the UNCITRAL rules, "the arbitral tribunal may conduct the arbitration in such a manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case."[51] The ICC provides similar authority in the absence of agreement to the contrary by the parties.[52]

The ICC also provides an opportunity, once arbitration has been invoked, to formulate procedural rules. Under the ICC Rules, at the initial stage of the proceedings the arbitrator is to draw up "Terms of Reference."[53] These "Terms" include identification of parties, places, issues, and also "particulars of the applicable procedural rules."[54] Hence, any attorney may attempt to rectify any perceived procedural inadequacy through his written proposal for the "Terms."

3. Cost

The conventional wisdom is that arbitration is less costly than judicial resolution. Cost savings are generally attributed to faster resolution and earlier settlements. Drawn out proceedings, which are increasingly characteristic of American jurisprudence, are thought to be avoided. It must be noted, however, that extensive discovery is the prime cause of protracted litigation. If discovery is employed to the same extent in arbitration as it is in many judicial proceedings, the main cost savings associated with arbitration will be lost.

Absent a speedy settlement, an arbitration may become costly because it will entail certain costs that are not associated with litigation. In a judicial system, the judge and court functionaries are public servants. As such, their salaries and the costs associated with their work are borne by the government.[55] In institutional arbitration, the costs of the pro-

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[51] *Id.* art. 15.1.

[52] ICC Rules, *supra* note 29, art. 11.

[53] *Id.* art. 13.1.

[54] *Id.*

[55] Under some systems, costs may also be assessed where it is determined that the judicial system has been abused.

ceedings are passed on to the parties.[56] Further, this cost must be borne at the outset, as most institutions require a deposit of estimated fees before initiation of the proceedings. This requirement may be particularly burdensome where the respondent refuses, for one reason or another, to deposit his share of the costs. The ICC requires that the claimant deposit fees for both parties in such a situation.[57] There is a similar provision in the UNCITRAL rules.[58] Costs will also obviously increase when three arbitrators are used rather than one.

D. Enforcement of Agreement to Arbitrate

Today, the courts of most countries will permit parties to agree to arbitrate disputes. Historically, however, under English and American common law, arbitration agreements were considered unenforceable because they improperly ousted jurisdiction of the courts. This policy ended in the United States with the adoption of the Arbitration Act of 1925.[59]

United States courts, however, retain a bias in favor of judicial resolution of certain issues. Issues often considered non-arbitral include the validity of the arbitration clause itself and the question of fraud in the inducement to contract.[60] Some specialized matters such as patent validity and antitrust liability are also of particular concern to the courts. Even these areas of jurisdiction may not long remain sacrosanct, however. The U.S. Supreme Court, in *Scherk v. Alberto-Culver Co.*,[61] established that certain securities law issues previously within the sole domain of the courts need not necessarily be litigated in the U.S. courts. In *Scherk*, an American corporation that performed the majority of its business in the United States purchased three businesses, complete with trademarks, from a German citizen. The contract contained an arbitration clause providing that any controversy or claim arising under the contract would be arbitrated before the ICC in Paris. The American corporation later brought suit in the United States, alleging that the

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[56] *See, e.g.*, ICC Rules, *supra* note 29, app. II; UNCITRAL Rules, *supra* note 30, arts. 38-40.

[57] ICC Rules, *supra* note 29, art. 9.2, .4.

[58] The UNCITRAL Rules, *supra* note 30, art. 41.4, provides that:

> If the required deposits are not paid in full within 30 days after the receipt of the request, the arbitral tribunal shall so inform the parties in order that one or another of them may make the required payment. If such payment is not made, the arbitral tribunal may order the suspension or termination of the arbitral proceedings.

[59] Ch. 213, 43 Stat. 883 (codified as amended at 9 U.S.C. §§ 1-14 (1976)). Section 2 provides that arbitration agreements in international commercial contracts "shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." For a discussion of prior U.S. policy, *see* H.R. REP. NO. 96, 68th Cong., 1st Sess. 1, 2 (1924).

[60] Fraud of any type, under the English Arbitration Act, 1950, 14 Geo. 6, c.27, § 24(2), enabled either party to demand a court hearing of the case. The Arbitration Act of 1979, *supra*, note 42, abolished this right for international arbitration agreements.

[61] 417 U.S. 506 (1974).

seller made fraudulent representations concerning his trademark rights in violation of Securities and Exchange Act section 10(b) and Rule 10b-5. The plaintiff prevailed before the District Court and the Court of Appeals. The Supreme Court, however, reversed, holding that an agreement to arbitrate before a specified tribunal was "in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute."[62] The Court reiterated the language of *Bremen* stating: "We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts."[63]

The status of enforceability of arbitration agreements in other countries will vary. Generally, any signatory to the U.N. Convention on Recognition and Enforcement of Arbitration Awards[64] gives at least prima facie recognition of the enforceability of arbitration agreements. Article II of the Convention provides that:

> 1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
>
> . . .
>
> 3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration unless it finds that the said agreement is null and void, inoperative or incapable of being performed.[65]

In the United Kingdom, parties to international arbitration agreements may exclude judicial review at any time except as to agreements which could give rise to admiralty disputes, or are in insurance or commodity contracts.[66] When considering the dispute resolution clause, however, it is prudent to explore the domestic laws of the other party regarding enforcement of arbitration agreements. If the parties desire arbitration of all issues, a strongly worded exclusivity clause drafted to conform to the domestic laws of the arbitration forum should be included in the agreement. At the least, such a clause will enhance the potential that the parties will be able to successfully enter arbitration proceedings.

E. Formulation and Proper Management of the Arbitration Clause

When judicial proceedings are chosen, there is no need to specify the procedural rules. The court system will have its own procedure that cannot generally be modified or changed even if desired. If arbitration is the

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[62] *Id.* at 519.

[63] *Id.*

[64] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *done* June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3.

[65] *Id.*, art. II(1), (3).

[66] U.K. Arbitration Act of 1979, § 3, *see* note 42 and accompanying text, *supra*. *See also* Hacking, *supra* note 37 at 101.

choice, however, it is sensible for counsel to design an arbitration clause that will minimize the numerous non-substantive disputes which may arise.

The arbitration clause should cover as many procedural matters as possible since agreement is more likely while the parties are still on relatively good terms and negotiations can proceed apace. Once a dispute has arisen, settlement of the procedural aspects of the arbitration can be the most time consuming part of the arbitration process and can detract from resolution or settlement of the dispute itself.

1. Conduct of the Proceeding

Institutional arbitrators have their own rules. The ICC Rules provide a procedural framework. Under ICC arbitrations, the procedure is developed in part under the "Terms of Reference."[67] It is imperative that the attorney participate fully in the drafting of these "Terms".

If ad hoc arbitration is chosen, any set of rules previously mentioned might be selected. The American Arbitration Association rules are probably the most familiar to American corporations.[68] The UNCITRAL Rules, however, may gain the widest degree of acceptance in the future.

2. Forum

The selection of the situs is determined by consideration of a number of factors, such as the convenience of the parties, the law of the locale, and the terms of the arbitration agreement. The site should be convenient for obvious practical reasons. It is helpful if the witnesses, parties, experts, and their respective logistical support can easily reach the forum. If a factory or large quantity of goods is the subject of the dispute and inspection is likely to be necessary for resolution, easy access to the evidence should be considered. Convenience is also a matter of legal import. If the selected forum is unreasonably inconvenient, a recalcitrant party may bring an action in the courts to prevent either the arbitration from taking place or execution of the arbitral award.

If the parties wish to have all matters pertaining to their dispute resolved by arbitration, it is important that the local courts in the jurisdiction will respect this decision. The local law is also important for other less obvious reasons. For example, the award may be subject to taxation, as is the case in some cantons of Switzerland. If the other party insists on such a forum, an agreement to share the tax burden might be in order.

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[67] ICC Rules, *supra* note 29, art. 13.

[68] *See* Straus, *International Arbitration Under the Rules of the American Arbitration Association*, 1 INTERNATIONAL COMMERCIAL ARBITRATION (Collected Papers) 188 (1974). The text of the AAA Commercial Arbitration Rules may be found at 1 INTERNATIONAL COMMERCIAL ARBITRATION (Documents) 329 (1976).

3. *Choice/Avoidance of Substantive Law*

a. *Choice of Substantive Law*

In arbitration the law which is to apply to the merits must be selected. If no law is designated, the arbitrator may deem the parties to have impliedly chosen the law of the arbitration situs.[69] Alternatively, the absence of a designated body of substantive law could lead to use of the law that the arbitrator believes to be most relevant or the law with which he is most familiar.[70]

Selection of the substantive law in arbitration can be used creatively and for the benefit of the client. There should be careful consideration of this point by counsel prior to the agreement. If non-U.S. substantive law is applied, resort to U.S. courts for enforcement of concepts not found in the chosen law will not be possible.[71]

b. *Avoidance of Substantive Law—The Amiable Compositeur Process*

A study of the vagaries of conflicting legal systems may be avoided if the parties opt to designate the arbitrator an "amiable compositeur". An amiable compositeur need not refer to any particular body of law. Rather he attempts to bring the parties to an equitable resolution of the dispute through common sense application of justice. Such an option would likely work best in the Far East where friendly negotiation is the preferred mode of dispute resolution. However, the term and the practice is most often found in Western Europe. Both the ICC and UNCITRAL rules provide for selection of the amiable compositeur process.[72]

Freedom from strict legal constraints has been suggested as the essence of the arbitration process. One commentator, Peter Ehrenhaft, has forcefully maintained that the amiable compositeur should always be

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[69] The Supreme Court has noted that "[u]nder some circumstances, the designation of arbitration in a certain place might also be viewed as implicitly selecting the law of that place to apply to that transaction." Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 n.13 (1974).

[70] UNCITRAL Rules, *supra* note 30, art. 33(1) provides: "The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable."

Similarly, ICC Rules, *supra* note 29, art. 13(3) provides: "The parties shall be free to determine the law to be applied by the arbitrator to the merits of the dispute. In the absence of any indication by the parties as to the applicable law, the arbitrator shall apply the law designated as the proper law by the rule of conflict which he deems appropriate."

Both UNCITRAL and the ICC Rules provide for reference to terms of the contract and usages in the trade, the UNCITRAL placing more emphasis on these matters. Under UNCITRAL, the arbitrator is to decide *in accordance* with the terms and usages, UNCITRAL Rules, *supra* note 30, art. 33(3); whereas under the ICC Rules the arbitrator merely has to *take account* of them. ICC Rules, *supra* note 29, art. 13(5).

[71] *See* Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974).

[72] ICC Rules, *supra* note 29, art. 13.1(g); UNCITRAL Rules, *supra* note 30, art. 33.

utilized in arbitration, citing three reasons in support of this position.[73] First, a provision requiring the arbitrator to apply substantive law introduces an element of uncertainty into the agreement.[74] Complete knowledge of the chosen law is unlikely in the international context. Further, without a firm grounding in the conflict of law rules of the chosen law, one may later find that the specific substantive concepts desired will not be applied. Also, there is always the possibility that the chosen law will change between the time the choice of law is made and the time the dispute arises. Hence, there is the chance that overlooked or unanticipated arbitrary rules will be applied that will inequitably benefit one of the parties. Regarding this point, Ehrenhaft concludes:

> If a contract is intended to record the parties' mutual understandings of their expectations, the bases for settling disputes thereunder should similarly adhere as much as possible to that privately created law. The arbitrary rules of a remote and, as far as these parties are concerned, uninformed legislature or court are almost by definition inappropriate.[75]

Second, by choosing a body of substantive law any speed, efficiency, or cost advantages which might apply to the arbitration may be negated.[76] Before the work of actually resolving the dispute can begin, the relevant law and its proper application must be determined. The focus may be shifted from finding an equitable resolution of the specific dispute to determining or resolving legal issues or procedures.

Third, if the parties desire a legal interpretation under a body of substantive law, it may be more sensible to choose a court proceeding before a judge who is certain to be familiar with the law.[77] Furthermore, if arbitration is chosen, there is the danger that the award will not be enforced if the arbitrator grossly misinterprets or improperly applies the chosen law.[78]

For fairness and efficiency, Ehrenhaft would have his arbitrator resolve the dispute by considering the contract language first and then trade custom. Throughout the proceedings, an analysis of the equities involved in the particular dispute would pervade the arbitrator's application of language and custom.[79]

For a number of reasons, use of an amiable compositeur is not uni-

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

[74] *Id.* at 1210.

[75] *Id.*

[76] *Id.* at 1210-11.

[77] *Id.* at 1211.

[78] An arbitration award must be upheld unless it can be shown that there was partiality on the part of the arbitrator, that the arbitrator exceeded his authority, or that the award was rendered in "manifest disregard of the law." Aerojet-General Corp. v. American Arbitration Ass'n, 478 F.2d 248, 252 (9th Cir. 1973) (citations omitted).

[79] Ehrenhaft, *supra* note 73, at 1211.

versally highly regarded.[80] An amiable compositeur may have great difficulty bringing the parties to a resolution they will all consider just and equitable. Moreover, an amiable compositeur may be a hindrance in a case involving a complicated or close question because the parties would have no body of law on which to accurately assess the relative merits of their positions, which is typically the starting point for reaching a mutually acceptable compromise.[81] The absence of a body of law in the decision making process may also affect the enforceability of the award. A court reviewing an award of an amiable compositeur may look unfavorably on a decision which is totally void of any familiar substantive legal considerations, especially if it is a court in the home country of the losing party.

4. The Clause

The ICC model arbitration clause reads: "All disputes arising in connection with the present contract shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with said Rules."[82] It is obvious that this clause does not begin to cover the issues raised in this article. In effect, it says simply "let's arbitrate."

The UNCITRAL model clause is little better, but it adds a reminder that the parties may want to cover other issues. It reads:

> Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force.
>
> Note—Parties may wish to consider adding:
>
> (a) The appointing authority shall be . . . (name of institution or person);
> (b) The number of arbitrators shall be . . . (one or three);
> (c) The place of arbitration shall be . . . (town or country);
> (d) The language(s) to be used in the arbitral proceedings shall be . . .[83]

This clause does not preclude judicial review and does not make a choice of substantive law to govern the merits of the dispute. Serious consideration should be given to covering these matters in any arbitration clause selected.

The ICC Court Rules Booklet also notes the overriding importance of checking applicable national laws when drafting the clause. It notes that "the laws of certain countries require that parties to contracts expressly accept arbitration clauses, sometimes in a precise and peculiar

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[80] *See* Higgens, Brown & Roach, *Pitfalls in International Commercial Arbitration*, 35 BUS. LAW. 1035, 1041 (1980).

[81] *Id.*

[82] INTERNATIONAL CHAMBER OF COMMERCE, RULES FOR THE ICC COURT OF ARBITRATION 6 (1975) [hereinafter referred to as the ICC Court Rules Booklet].

[83] UNCITRAL Rules, *supra* note 30, art. 1.1.

manner."[84] Compliance with such peculiarities is advisable.

F. Enforcement of the Award

Winning the case in court or before an arbitral panel does not in all cases conclude the dispute. The judgment or award rendered must be enforced, usually in the national courts of the losing party. When a court system is involved, this problem falls under the rubric of comity.

1. Court Judgments

a. In the United States[85]

i. Comity

Comity permits a foreign judgment to be enforced unless to do so would violate public policy. This public policy exception will generally be involved when the proceedings, cause of action, or judgment are seriously offensive to the policy of the enforcing nation. In general, when a court's conscience is shocked, enforcement may be denied. Because laws and procedures will vary, a determination of the offensiveness to public policy will not necessarily turn on procedure. There are, however, three major issues that are likely to involve the public policy exception in cases before U.S. courts: lack of jurisdiction, inadequate notice and opportunity to be heard, and fraud.[86]

In most states, the foreign court's jurisdiction is assumed and the burden of proof is on the party asserting lack of jurisdiction.[87] Jurisdiction will be found to be lacking if it was obtained in a manner seriously violative of American notions of due process. If a forum selection clause has been made part of the contract, however, the jurisdictional argument is significantly diminished in light of the enforcement policy of the *Sherk* and *Bremen* cases.[88]

A violation of public policy will also be found if the losing party has not received adequate notice of the foreign proceeding. Notice must have been sufficient as to the nature, time, and the place of proceeding.[89]

If the foreign judgment is obtained by fraud, enforcement may be denied. Some American courts recognize a distinction between intrinsic and extrinsic fraud.[90] Thus, in some jurisdictions fraud intrinsic to the proceedings, such as falsified evidence, would not bring relief from execution. Where the fraud was extrinsic to the proceedings, recognition

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[84] ICC Court Rules Booklet, *supra* note 82, at 6.

[85] *See generally* Mehren & Patterson, *supra* note 4.

[86] *Id.* at 61-63.

[87] *See, e.g., In re* Malaszenko, 204 F. Supp. 744, 744-45 (D.N.J. 1962).

[88] *See* text accompanying notes 3-11 and 49-51 *supra*.

[89] The UNIFORM FOREIGN MONEY JUDGMENTS RECOGNITION ACT, § 4(b)(1), provides that a foreign judgment need not be recognized if the defendant "did not receive notice of the proceedings in sufficient time to enable him to defend." This Act was intended to codify the existing common law regarding recognition and enforcement of foreign judgments.

[90] *See id.* § 4(b)(2).

would be denied, however.[91] Courts normally look to American fraud concepts rather than those of the particular foreign jurisdiction involved.

ii. Reciprocity

Although the Supreme Court in the 1895 case of *Hilton v. Guyot*,[92] authorized American courts to consider the existence of reciprocity in the enforcement of foreign judgments, the concept has since fallen from favor.[93] The Supreme Court has not overruled *Hilton* but has stated that it is to apply "only in limited circumstances."[94] Furthermore, state courts are not bound by the *Hilton* decision.[95]

b. In the EEC

Among the EEC nations, foreign judgments are governed by the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters.[96] Although not effective, the Hague Draft Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters[97] of April 26, 1966 may also be referred to as it reflects expert opinion on this topic.[98]

c. The Developing Nations—The Indonesia Example[99]

The distrust of developed countries by the developing nations is often reflected in the attitude adopted concerning foreign judgments. In-

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[91] Extrinsic fraud would include: misrepresentations that the foreign proceeding would be terminated which induced a party not to participate, Tamimi v. Tamimi, 38 A.D.2d 197, 328 N.Y.S.2d 477 (1972); misstatements regarding location of the parties which affected jurisdiction, *In re* Topcuoglu's Will, 11 Misc.2d 859, 174 N.Y.S.2d 260 (1958); and misrepresentations which affected service of process, Parker v. Parker, 155 Fla. 635, 21 So.2d 141 (1945).

[92] 159 U.S. 113 (1895).

[93] *See, e.g.*, R. LEFLAR, AMERICAN CONFLICTS LAW 169-71 (3d ed. 1977); Bleimaier, *The Doctrine of Comity in Private International Law*, 24 CATH. LAW. 327 (1979); Golumb, *Recognition of Foreign Money Judgments*, 43 ST. JOHN'S L. REV. 604 (1969); Lenhoff, *Reciprocity and the Law of Foreign Judgments*, 16 LA. L. REV. 465 (1956).

[94] Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 411 (1964). The *Hilton* holding involved an attempt by a foreign national to enforce an in personam judgment of his country's courts against a U.S. citizen.

[95] Erie R. Co. v. Tompkins, 304 U.S. 64 (1938). *See, e.g.*, Johnston v. Compagnie Generale Transatlantique, 242 N.Y. 381, 384, 152 N.E. 121, 123 (1926). *See also* Bata v. Bata, 39 Del. Ch. 258, 163 A.2d 493 (1960), *cert. denied* 366 U.S. 964 (1961); Coulborn v. Joseph, 195 Ga. 723, 25 S.E.2d 576 (1943).

Some states, however, have required reciprocity. *See, e.g.*, Hager v. Hager, 1 Ill. App.3d 1047, 274 N.E.2d 157 (1971); Northern Aluminum Co., Ltd. v. Law, 157 Md. 641, 147 A. 715 (1929).

[96] Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, *supra*, note 12.

[97] The Hague Draft Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, Apr. 26, 1966, *reprinted in* 5 INT'L LEGAL MATERIALS 636 (1966); 15 AM. J. COMP. L. 362 (1967).

[98] *See generally* Zaphiriou, *Transnational Recognition and Enforcement of Civil Judgments*, 53 NOTRE DAME LAW. 734 (1978).

[99] *See generally* Hornick, *The Recognition and Enforcement of Foreign Judgments in Indonesia*, 18 HARV. INT'L L. J. 97 (1977).

donesian law, for example, provides that, except as to maritime matters, judgments rendered by foreign courts may not be executed in Indonesia. Such cases must be commenced, retried, and decided in an Indonesian Court.[100]

The situation may be slightly altered if there is an agreement consenting to foreign jurisdiction. If the foreign judgment does not require execution on Indonesian property, it can be recognized.[101] Even if a judgment is recognized, execution is nevertheless prohibited. One possible remedy to this problem would be to obtain a waiver of invocation of the prohibition against execution. One commentator has argued, however, that such a waiver would be ineffective as the law "is a public rather than private law provision."[102] The commentator goes on to recommend that a consent to foreign jurisdiction be obtained, as the foreign judgment may be given evidentiary weight by the Indonesian court.[103]

The Indonesian provisions are not unique. They illustrate the need for careful review of the national law and policies which may apply in particular fact situations.

2. Arbitral Awards

The U.S. position and policy regarding arbitral awards was clarified in 1970 when the United States ratified the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[104] The U.S. Senate approved the Convention with several reservations. These reservations were: (1) that the award be made in the territory of a Convention party; (2) that the dispute be "commercial" under U.S. law; and (3) that there be reciprocity.[105] Most major commercial nations are now parties to the Convention, although the flags of convenience countries, Liberia and Panama, are not.[106]

Under Article V of the Convention, recognition and enforcement of the award may be denied either at the request of one of the parties or upon the court's own motion under certain specified circumstances. In order for the party seeking denial to enlist the court's protection, the party must offer proof that: (1) the parties were under some incapacity or that the agreement was not valid under the law of the country where the award was made or the law to which the parties are subject; (2) there

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[100] Regulation of Nov. 8, 1947, Stb. 52/1847 and Stb. 63/1849, Engelbrecht 1135 (1960 ed.). Sections 436(1) and 436(2) of Reglement op de Burgelikje Rechtsvordering [BRu.].

[101] There are no Indonesian cases permitting such enforcement, but when Indonesian law is silent, reference to Dutch cases is permissible. In the *Bontmantel* case, Kühne & An. v. Platt, [1925] N.J. 91 (H.R. 14-11-1924), a Dutch plaintiff who was unsuccessful in England was barred from bringing the same action in a Dutch court.

[102] *See* Hornick, *supra* note 99 at 101.

[103] *Id.* at 102.

[104] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Pub. L. No. 91-368, § 1, 84 Stat. 692 (1970) (codified at 9 U.S.C. §§ 201-208 (1976)).

[105] S. Res. 313, 90th Cong., 2d Sess., 114 CONG. REC. 29,605 (1968).

[106] *See* the notes following 9 U.S.C.A. § 201 (West Supp. 1981) for a list of signatories.

was inadequate notice and opportunity to be heard; (3) the award involved matters outside the terms of the submission to arbitration; (4) there were defects in the procedures used; or (5) the award has not become binding or has been set aside.[107] A court may also deny recognition and enforcement of the award if it finds that the subject matter of the dispute is inappropriate for arbitration or is contrary to public policy under that country's law.[108]

The Geneva Convention on the Execution of Foreign Arbitral Awards of 1927,[109] which remains valid as to signatories that have not acceded to the U.N. Convention,[110] may also be relevant to judicial review. The significance of such a review can be demonstrated by reference to Indonesia. Holland acceded to the Geneva Convention on behalf of the Netherland Indies, now Indonesia. The Indonesian Constitution provides that pre-independence legislation is valid unless specifically revoked. Hence, under the terms of the Geneva Convention, Indonesian courts would have to enforce foreign arbitral awards.[111] This illustration also suggests the necessity of consulting with foreign counsel at the time the agreement is drafted.

Most civil law countries require that the arbitrator give a statement of reasons with the award.[112] In fact, there is a trend toward requiring a statement of reasons which has been encouraged by English passage of the Arbitration Act of 1979 which abolished the "stated case doctrine."[113]

II. Disputes between a Private Party and a Foreign Government: Section 301 and the Trade Agreements Act of 1979

Acts of God, market forces, personalities and other factors can cause problems in a contractual relationship. One especially important potential source of problems is the application of another country's tax, trade, or other domestic laws. Imposition of an anti-dumping or countervailing duty can severely affect the profitability of a contract. Regulatory or taxing actions can foreclose future contracts by eliminating the potential

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[107] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *supra* note 64, art. V(1)(a)-(e).

[108] *Id.* art. V(2)(a)-(b).

[109] Convention for the Execution of Foreign Arbitral Awards, Sept. 26, 1927, 92 L.N.T.S. 301.

[110] *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *supra* note 64, art. VII.

[111] This conclusion is not free from doubt. When Indonesia became independent, an Agreement on Transitional measures provided that it would remain bound by international agreements acceded to by Holland on its behalf, unless such were expressly revoked. The agreement itself was revoked in 1956. *See generally* Hornick, *supra* note 99 at 102.

[112] The failure to state reasons may provide grounds for invalidation of the award in the German Federal Republic. Zivilprozessordnung [ZPO] § 1041(5) (W. Ger.).

[113] *See generally* Hacking, note 37 *supra*. Previously, if an arbitrator stated his reasons for an award, he would be subject to a writ of certiorari reviewing his legal reasoning. The court then had the power to set aside, but not amend, the award.

for profitability. Since these are government controlled events, they have generally been beyond the influence of business entities. It is, therefore, sometimes useful for an American business to enlist the support of the U.S. Government. Under section 301 of the Trade Act of 1974[114] businesses can petition to have the U.S. Government attempt to remove obstacles to commercial activity set in place by foreign governments.

A. Outline of Section 301

1. Purpose

The legislative history of the 1979 Trade Agreements Act made clear the Congressional intent that the United States receive the benefits that had been agreed upon at the Tokyo Round of the Multilateral Trade Negotiations (MTN). The Senate report stated that the:

> benefits to the United States from the various non-tariff agreements negotiated in the MTN depend very heavily on the vigorous insistence by the United States that its rights be secured and that other countries carry out their obligations under the agreements. Absent such insistence, including use of dispute settlement procedures . . . [the agreements] . . . will become largely one-way streets whereby the United States assumes obligations without reciprocity, and whereby the benefits for international trade are substantially reduced, especially as the United States responds to the non-implementation of others.[115]

2. Procedure

a. Initiation of a Section 301 Proceeding

The President may take action on his own initiative to protect American interests[116] or he may act in response to a petition filed by an injured party.[117] The procedure to be followed in a section 301 action is administered by the Office of the Trade Representative[118] (still popularly known as the STR). The 301 petition is filed with the STR's section 301 Committee.[119] The petition must indicate the identity of the parties, the rights being denied, the laws and regulations affected, the volume of product or service affected, and the general economic impact of the inhibiting foreign practice.[120] The STR, with the advice of the section 301 Committee, has 45 days after the receipt of the petition to decide whether or not to initiate an investigation.[121]

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[114] 19 U.S.C. § 2411 (1976), *as amended by* Trade Agreements Act of 1979, Pub. L. No. 96-39 § 901, 93 Stat. 295 (codified at 19 U.S.C. §§ 2411-2416 (Supp. III 1979)).

[115] S. REP. NO. 249, 96th Cong., 1st Sess. 236, *reprinted in* [1979] U.S. CODE CONG. & AD. NEWS 381, 622.

[116] 19 U.S.C. § 2411(c)(1) (Supp. III 1979).

[117] *Id.* § 2411(c)(2).

[118] Procedures for complaints filed under 301 can be found at 15 C.F.R. § 2006 (1980).

[119] *Id.* § 2006.0(c).

[120] *Id.* § 2006.1(a)-(f).

[121] *Id.* § 2006.3.

b. Consultations

If the STR decides to initiate an investigation, he must request consultations with the foreign country involved.[122] During the consultation and dispute settlement process, the STR "shall seek information and advice from the petitioner and from the appropriate private sector representatives."[123] If the petitioner so requests in his petition, the information may be conveyed through public hearings. The hearings must be held within 30 days after the STR's affirmative determination regarding initiation of the investigation.[124]

c. Presidential Action

The President may take action only if he determines that the situation justifies action and a mutually acceptable agreement cannot be reached between the United States and the foreign government during the consultation period. If a trade agreement is involved, the dispute settlement process contained within the agreement is to be invoked only if the consultations fail. If no trade agreement is involved, the President may take whatever action he deems proper after consideration of the advice derived during the consultation period.

Depending on the type of petition, the STR must make a recommendation of action to the President within seven, eight or twelve months after initiation of the investigation.[125] Presidential action may be taken on a nondiscriminatory basis or solely against the products or services of the foreign country or instrumentality involved. Prior to such action there must normally be an opportunity for comment, and upon request, public hearings.[126] The President must request advice from the appropriate private sector prior to taking any action,[127] and may request a probable economic impact report from the ITC.[128] Section 301 allows the President to take expeditious action if he believes it is required.[129] In such a case hearings are still held, albeit after action has been taken.[130]

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[122] *Id.* § 2006.5.

[123] *Id.* § 2006.5(b).

[124] 19 U.S.C. § 2412(b)(2)(A) (Supp. III 1979). The hearings may be held at a later date if so agreed to by the petitioner. *Id.* Hearings may also be held at other times following a timely request therefor made by the petitioner. *Id.* § 2412(b)(2)(B).

[125] *Id.* § 2414(a)(1). A seven month recommendation period applies to export subsidy matters, *id.* § 2414(a)(1)(A); eight months for subsidies other than *only* an export subsidy, *id.* § 2414(a)(1)(B); twelve months for all other matters other than agreements approved under § 2(a) of the Trade Agreements Act of 1979, *id.* § 2414(a)(1)(D). If an agreement approved under § 2(a) of the Trade Agreements Act of 1979, 19 U.S.C. § 2503(a) (Supp. III 1979), is involved, the USTR recommendation is to come 30 days after the dispute resolution procedure is concluded, *id.* § 2414(a)(1)(C).

[126] 19 U.S.C. § 2414(b)(1) (Supp. III 1979).

[127] *Id.* § 2414(b)(2).

[128] *Id.* § 2414(b)(3).

[129] *Id.* § 2411(c)(1).

[130] *Id.* § 2414(b).

d. Consultations and Dispute Settlement in the GATT[131] *Context*

If a GATT agreement is involved, reference must be made to GATT dispute resolution procedures. The principal consultation and dispute settlement clauses of the GATT are Articles XXII and XXIII.[132] Since the GATT was not originally intended to become an administrative organization, Articles XXII and XXIII provide merely an outline of a dispute settlement procedure. After the death of the International Trade Organization, a more refined dispute settlement mechanism was never implemented.

Article XII expresses the pervasive GATT concept of consultation. It provides that:

> 1. Each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by another contracting party with respect to any matter affecting the operation of this Agreement.
> 2. The CONTRACTING PARTIES may, at the request of a contracting party, consult with any contracting party or parties in respect of any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1.[133]

Article XXIII(1), like Article XXII, provides a consultation procedure. The Article XXIII procedure can be utilized by a contracting party when "any benefit accruing to it directly or indirectly under [the GATT] is being nullified or impaired or the attainment of any objective of the [GATT] is being impeded . . . ."[134] Article XXIII(2) provides additional procedures which are available if consultations do not result in the resolution of the dispute. It should be noted that the paragraph 1 consultations are a prerequisite to the procedures of paragraph 2. Although not intended at the time of drafting, the Article XXII consultations, though they differ in certain technicalities, have been deemed to satisfy the conditions paragraph of Article XXIII.[135]

If consultations fail, the matter "may be referred to the CONTRACTING PARTIES."[136] At that point the Parties must (1) promptly investigate the matter and (2) make recommendations or rul-

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[131] GENERAL AGREEMENT ON TARIFFS AND TRADE, *done* Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 194 [hereinafter cited as GATT]. Complete text in force as of March 1, 1969, is *reprinted in* 4 GENERAL AGREEMENT ON TARIFFS AND TRADE, BASIC INSTRUMENTS AND SELECTED DOCUMENTS 1-76 (1969).

[132] For a discussion of all the dispute settlement clauses in the GATT, *see generally* Jackson, *GATT as an Instrument for the Settlement of Trade Disputes*, 61 AM. SOC'Y INT'L L. PROC. 144 (1967).

[133] GATT, *supra* note 131, art XXII (1), (2).

[134] *Id.* art. XXIII (1).

[135] *See* J. JACKSON, WORLD TRADE AND THE LAW OF GATT 178 (1969). GATT provides in part that the contracting party may:

> [W]ith a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.

GATT, *supra* note 131, art. XXIII (1).

[136] GATT, *supra* note 131, art. XXIII (2).

ings as appropriate.[137] In practice, a panel of experts would be set up to perform these functions.

If the contracting parties consider that the circumstances are serious enough, they may authorize a contracting party to suspend the application to any other contracting party of such GATT obligations or concessions that are deemed appropriate.[138]

As previously mentioned, the GATT articles provide a broad framework for dispute resolution. A major U.S. objective in the MTN was to devise rules and procedures to insure timely and fair enforcement of U.S. rights under the GATT and under the new agreements that were being negotiated.[139] Dissatisfaction with Articles XII and XXIII of the GATT was due to "inordinate delays" and the "perception that political and power relationships influence the results more than the merits of the dispute."[140] At the MTN major steps were taken to rectify these problems. The negotiators' resolutions to these and other problems were embodied in the Texts Concerning a Framework for the Conduct of World Trade (Framework Agreement).[141]

For disputes which will be considered under the central dispute settlement mechanism, the Framework Agreement provides for the establishment, upon approval of the GATT Council, of panels to review disputes. The size and composition of the panels, the powers of the panels, the general timing requirements for panel review, and the general procedure for resolution of disputes in the context of the consultation and dispute settlement provisions of GATT Articles XXII and XXIII are also detailed in the Framework Agreement. The panels are to be composed of three to five impartial members from countries which are not involved in the dispute. Each panel generally has the authority to review the case at hand using its own working procedures while consulting regularly with the parties to the dispute and any technical experts who may provide assistance. To insure more rapid resolution of the dispute, a three month time limit for panel determinations is set as a general guideline. Panel recommendations of fact and law are submitted to the Council, which reviews the panel decision and either provides guidance to the parties to the dispute or makes a ruling on the dispute. The Council may also authorize retaliation.

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[137] *Id.* The "ruling" language seems to imply a power to interpret the agreements.

[138] *Id.* Art. XXIII (2) reads in relevant part:

> If the application to any contracting party of any concession or other obligation is in fact suspended, that contracting party shall then be free, not later than sixty days after such action is taken, to give written notice to the Executive Secretary of the Contracting Parties of its intention to withdraw from [the GATT] and such withdrawal shall take effect upon the sixtieth day following the day on which such notice is received by him.

[139] S. REP. NO. 249, *supra* note 115, at 233, [1979] U.S. CODE CONG. & AD. NEWS, at 618.

[140] *Id.*

[141] *Id.* H. DOC. NO. 96-153, Part I, 96th Cong. 1st Sess. 1, 621-661 (1979). The Framework Agreement was approved in § 2(a) of the Trade Agreements Act of 1979, 19 U.S.C. § 2503(a) (Supp. III 1979).

Not all disputes are considered under the Framework Agreement. Some disputes will be considered under the specific dispute settlement procedures contained in the other MTN agreements. The following characteristics, however, are common to all the agreements:

(1) Timing guidelines are given for the dispute settlement process to prevent parties to a dispute from delaying decisions by a panel or a committee of signatories.
(2) Consultation provisions are included which outline principles for bilateral and multilateral consultation prior to establishment of an impartial dispute panel.
(3) The right to a panel is provided in each of the agreements. Panels are to be composed of experts who act in their individual capacities.
(4) Panels are to review the dispute and make findings of fact and law.
(5) Panel findings are sent to the committee of signatories for final decision which may include authorization to retaliate if a party refuses to change the practice found to be in violation of the agreement or the agreement otherwise permits it.

Dispute settlement mechanisms and time limits vary under each agreement. The agreement relating to subsidies and countervailing measures contains the most stringent time limits, providing for completion of the dispute process within approximately 120 days after the consultation and conciliation period. Other agreements, however, provide for completion of the process within three to six months after the consultation and conciliation period. Each agreement may also vary slightly with respect to the composition and powers of the panel, the process for panel review, use of additional technical experts to advise panels on details outside their areas of expertise, and the relationship of the panel to the respective committees of signatories.

There is no provision in the GATT for direct participation by private parties. Through the section 301 procedure, however, private parties can spur the U.S. Government to exercise its rights under the GATT.

Of course, many disputes will occur outside the GATT framework. If a bilateral trade treaty is involved, it will be necessary to rely on the treaty's specific dispute resolution procedures. If there is no trade agreement in place, an ad hoc proceeding will be instituted that may or may not extend beyond consultations.

3. Example of Application

The recent Canadian broadcasters case provides a good example of the operation of section 301 where a trade agreement is not involved.[142] In that case, the longstanding business relationships between U.S. border broadcasters and their Canadian advertisers were disrupted by enactment in Canada of legislation designed to strengthen the Canadian broadcast industry as an aspect of Canadian culture. The law denied U.S. broadcasters access to a substantial portion of the advertising mar-

[142] 43 Fed. Reg. 39,617 (1978).

ket in Canada, amounting to between twenty and twenty-five million dollars annually.[143] Fifteen U.S. television licensees filed a section 301 petition, and the STR subsequently initiated an investigation.[144] The petitioner requested public hearings which were held twelve weeks later. Consultations were held between American and Canadian broadcasters and between the U.S. Government and the Canadian Government, in order to seek a solution which would address the Canadian cultural development objective without adversely affecting the U.S. broadcasting stations. These consultations, however, were unsuccessful.[145]

In June, 1980, the STR requested comments concerning the actions proposed by the petitioner to the President.[146] The proposed actions were:

> Imposition of special duties on all Canadian feature films and records exported to the United States;
>
> Imposition of quantitative restrictions on Canadian feature films and records exported to the United States;
>
> Support by the Administration of tax legislation which would disallow, for purposes of U.S. income taxes, deductions of the costs of advertising on Canadian television or radio;
>
> Support by the Administration for the continuation of section 602 of the Tax Reform Act of 1976 which limits, for the purposes of U.S. income taxes, deductions for expenses incurred attending conventions abroad;
>
> Adoption of a policy which would require consideration of the unreasonable nature of the Canadian tax restriction imposed by § 19.1 of the Canadian Income Tax Act, when dealing with Canada on matters of mutual concern.[147]

These hearings were held July 9, 1980. The President made his decision on August 1, 1980.[148] He determined that the most appropriate response was to

> propose legislation to Congress which, when enacted, would mirror in U.S. law the Canadian practice. The legislation would amend the U.S. Internal Revenue Code to deny income tax deductions for the costs of advertising primarily aimed at U.S. audiences and placed on broadcast stations located in a foreign country if a similar deduction under the income tax law of that country is denied for advertising principally aimed at its audience and placed on U.S. broadcast stations. This response was considered the most appropriate, as it was directed at those interests in Canada which benefitted from the denial resulting from enactment of [the Canadian law] on Canadian advertising revenues to U.S. border broadcasters.[149]

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[143] Presidential Memorandum of July 31, 1980, for the United States Trade Representative, *reprinted in* 45 Fed. Reg. 51,173 (1980).

[144] *Id.*

[145] Presidential Memorandum, *supra* note 143.

[146] 45 Fed. Reg. 42,107 (1980).

[147] *Id.*

[148] *See* Presidential Memorandum, *supra* note 143.

[149] *Id.* at 51,173-74.

B. The Breadth of Section 301—Application to Enforcement of Arbitral Awards

The President, under section 301(a)(2), "may respond to *any* act, policy, or practice of a foreign country or *instrumentality* that . . . is unjustifiable, unreasonable, or discriminatory and burdens or restricts United States commerce."[150] It is not a strained interpretation to find a court of a foreign country to be an "instrumentality" of that country. Further, given the expansive definition "commerce" has received in U.S. courts, non-enforcement of an award, judgment, or ordered performance could easily be found to affect U.S. commerce.

The legislative history defines "unjustifiable" and "unreasonable" in terms of U.S. trade agreements.[151] The U.N. Convention on the Recognition and Enforcement of Arbitral Awards is arguably a trade agreement as its implementation affects commerce. Hence, any signatory which does not enforce a properly rendered arbitral award conceivably would be subject to action under section 301.

If the non-enforcing party is not a signatory of the Convention or if enforcement of a judgment is sought, all hope is not lost. Section 301 also speaks of any "discriminatory" act which burdens or restricts U.S. commerce. If the foreign court has enforced some foreign judgments or awards that were rendered in the same manner as the judgment at issue, a good case for discrimination could be made.

Conclusion

Dispute settlement mechanisms have been devised for application to most forms of international trade, including the most common types of disputes. Hence, it is unwise to fail to consider the efficacy and propriety of these systems to resolve specific problems.

The private international trader must intelligently weigh the utility of dispute resolution in the courts against that of arbitration. The trend towards arbitration was first marked by the growing use of the ICC Rules and Court of Arbitration by Western nations. Today the trend toward a worldwide system of dispute resolution recently has been accelerated by development of the UNCITRAL Arbitration rules. Dispute resolution involving non-Western nationals is likely to increasingly involve this model.

Section 301 will also prove useful to American international traders. In contradistinction to private dispute resolution, section 301 does not supplant traditional dispute resolution systems; instead, it creates an entirely new opportunity for American businessmen to protect their interests.

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[150] 19 U.S.C. § 2411(a)(2) (Supp. III 1979) [emphasis added].

[151] S. REP. NO. 249, *supra* note 115, at 234-35, [1979] U.S. CODE CONG. & AD. NEWS, at 620.