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The Future of International Commercial Arbitration

*Robert Coulson**

During the last few years dramatic changes have taken place in the world many totally unexpected: the rapid break-up of the Soviet bloc and a rejection of centralized economic planning; the willingness of the United States and its allies to enforce national boundaries, backed by overwhelming and sophisticated military power; and, an ever-increasing economic connectedness brought about by rapid communications, travel and currency transfers. The world of business has become small, interconnected, and driven by a desire for growth and profits. In all parts of the world, human desires and consumer appetites are demanding that the economy produce, distribute and sell. The net result has been a rapid increase in commercial transactions: more negotiations, more contracts, more business obligations and, consequently, more disputes to be resolved.

Most business disagreements, domestic or transnational, are resolved over the phone. Sometimes, a face-to-face meeting may be required; but negotiations are the main method of dispute resolution. Some intractable controversies survive. For those, the new science of Alternative Dispute Resolution (“ADR”) has achieved some popularity, at least in the United States. Whatever such methods may be called—conciliation, mediation, med/arb, mini-trial, etc.—they have created a new terminology for advocates and neutrals. This is a healthy development because governments, corporations and other such cumbersome institutions need all the help they can obtain to avoid litigation. Like other hierarchies, they stumble badly when embarking upon the difficult task of determining how to carry out dispute resolution negotiations.

Decision making is difficult for large organizations. The same ADR techniques used to resolve controversies between business entities can be used internally to resolve disagreements that arise within an organization. The difference between intra-organizational controversies and inter-organizational disputes is that internal impasses can be decided by higher levels of authority such as the CEO, the designated government official or by the general in charge rather than the court. Otherwise, the disagreements can be just as bitter.

When impasses occur between legal entities, they can be resolved in court, or in arbitration, or by terminating relationships. In 1964, in *HOW TO STAY OUT OF COURT*, I encouraged parties to create private,

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nonjudicial methods for resolving disputes. The intervening years have increased the general support for that point of view. As the courts have fallen further behind in their efforts to provide prompt, rational decisions, arbitration clauses have become increasingly popular in business contracts. Over 90% of the civil cases filed in court are withdrawn or settled by lawyers, but only after months or years of expensive legal jousting. The business community is being ill served.

The United States is not alone in failing to provide an efficient business litigation system. Germany, Japan and most other developed countries are encountering longer and longer delays in providing court determinations. The transnational business community is well aware that national courts, particularly the national courts of a "foreign" party, are not attractive tribunals for promptly and impartially deciding international commercial disputes.

In the absence of an acceptable international court, the primary available alternative is international commercial arbitration. The optimum international arbitration would contain the following ingredients.

- (1) Impartial, professional administrative agencies available in all of the major business centers. These agencies would have cooperative relationships, sharing information about qualified, impartial arbitrators and about national arbitration laws. They would also provide secretariat facilities in particular cases.
- (2) Relatively uniform modern rules of procedure would be issued and publicized so that parties could make an informed choice of forum in drafting arbitral clauses and selecting the place and the administrative auspices for their arbitration.
- (3) Competent and impartial arbitrators would be identified and available in all parts of the world, trained in arbitral procedure and in the applicable law, with a variety of technical experience so that arbitrators could be selected for their relevant expertise. Party autonomy in the selection of arbitrators would be a primary consideration.
- (4) With few exceptions, arbitrators would be impartial and disinterested, and would serve subject to strict ethical guidelines.
- (5) Arbitral agencies and professional societies would train arbitrators and advocates on the process so that they could serve in a responsible way.
- (6) The New York Convention and modern national laws applicable to international commercial arbitration would be in place in the major business centers. Information on these laws and any divergent practices would be available through the various arbitral institutions. This kind of legislation requires national courts to defer to the parties' agreement to resolve their disputes through arbitration.
- (7) Arbitration agencies would receive adequate financial support from their local business community or from their national

government, to carry out the non-revenue producing educational activities described above.

The above is an ideal system of international arbitration. How far towards this Nirvana has arbitration progressed? That depends on who is speaking. Recent articles by Arthur L. Marriott of Wilmer, Cutler & Pickering in Vol. 2, No. 2 of the *World Arbitration & Mediation Report* (1991); by Dr. Gillis Wetter in *1 American Review of International Arbitration* 91 (1990); and by Professor Bernardo Cremades in a recent speech to the International Bar Association criticize the current practice, emphasizing an "increasing concern as to the complexity, the cost and the delay of international arbitration." The 1990 Congress of the International Council on Commercial Arbitration in Stockholm concentrated on those same concerns.

Among the flaws in the present system are the following.

- (1) Many arbitration clauses are not self-enforcing. A party who wants to arbitrate must go to a local court for appointment of arbitrators, for determinations of arbitrability, for arbitrator challenges, and for other decisions that could be decided by an administrative agency under institutional procedures. An administrative agency, willing to take such steps, is not available in every commercial center. Some agencies have obsolete procedural rules. Others are inadequately funded. Still others are captives of regimes that are hostile to modernization.
- (2) The party appointed arbitrator system, largely perpetuated by the 1978 UNCITRAL rules, creates a wide range of procedural problems, including many opportunities to stall or delay the arbitration, compounded by ambiguity as to whether either party's designated arbitrator will serve as an advocate or as an impartial.
- (3) Some agencies do not provide training and exchange information concerning qualified arbitrators. When an institution is dominated by arbitrators, training sometimes becomes an end in itself, providing a source of income but operating to exclude otherwise qualified arbitrators from the field. The AAA believes in full party autonomy, with arbitrators available on a non-exclusive basis, wherever feasible. Some industries prefer to create and utilize closed panels of industry experts.
- (4) Some countries, Japan and Singapore, for example, limit the participation of foreign counsel, needlessly restricting a foreign party's right to obtain a prompt, fair arbitration in that country's jurisdiction. Other countries have restrictions as to who can serve as an arbitrator or on the free entry of witnesses and evidence. These kinds of restrictions should be identified and eliminated.
- (5) Not every country has adopted the New York Convention or passed modern international commercial arbitration laws.

For some such countries, the UNCITRAL model law provides a useful resource.

- (6) Most necessary is the continuing need for educating lawyers and business executives on the arbitral process, so that international commercial arbitration can fulfil its function of deciding business disagreements with dispatch and in accordance with the expectations of the parties. To the extent that such procedures become more uniform, this task will be facilitated. Rather than focus upon the differences between procedures and national laws, training should concentrate on advocacy and arbitrating within a relatively common format.

The global business community would be foolish not to invest in strengthening such a system. At present, the United States is leagues ahead of other countries in using institutional arbitration. In 1990, the American Arbitration Association handled over sixty-thousand arbitration cases. The relatively few cases arbitrated in other countries would suggest that they have far to go. Radical changes are needed, with agencies adopting more service-oriented, developmental policies.

The International Arbitration Rules of the AAA have been made available to arbitral agencies in other countries. These procedures represent state-of-the-art technology for international commercial arbitration and could serve as a model in other parts of the world.

Court reform moves at the pace of a glacier for obvious reasons. International commercial arbitration, being a private, contract-driven system, should be more flexible and able to reform itself more swiftly, particularly if parties are innovative and willing to kick free from the vested interests of arbitrators and international lawyers. The parties who draft arbitration clauses control the nature of the arbitral process. It is up to them to modernize the system.