Journal of Dispute Resolution

Volume 2005 | Issue 2 Article 3

2005

International Arbitration Is Not Your Father's Oldsmobile

Kenneth F. Dunham

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I. INTRODUCTION

American lawyers have represented citizens of the United States in three separate social cultures.[1] From the American Colonial days until the end of the 19th century, the United States culture was predominantly agricultural.[2] Americans transitioned from agriculture into a factory-based culture that lasted well into the 1980s.[3] In the 1980s, the American culture once again transitioned into a new culture based on advanced technology.[4] An average citizen of the colonial era would likely understand the culture extant before the American Civil War, but would probably be puzzled by the inventions of the post-Civil War industrial years. A man on the street in New York's Times Square during the 1920s would be astounded if he were suddenly propelled forward in time eighty-five years and deposited at Times Square in 2005. Technology would likely overwhelm the misplaced time traveler. Lawyers endeavor to transition with society, but at times they have as much difficulty moving from one culture to the next as any other citizen. Assumptions are drawn from life experiences, and if the majority of life experiences have been drawn from prior cultural norms, transition to a new cultural norm is often difficult.

Millions of Americans now living in the 21st Century learned about life in the culture of the post-World War II years. These were years that brought tremendous growth in the United States. During that era most products available on store shelves in the United States were made in the United States by United States citizens. The author had observed that during those Elysian times, most major items were purchased in local stores or chain stores like Sears or Montgomery Ward. Life in America's small towns resembled the microcosm depicted on 1950s American television in the fictional Mayberry, North Carolina, setting of *The Andy Griffith Show*.[5] American small town culture was very subdued and "user friendly" to the average citizen. Assumptions about life and how the world operated on a daily basis which were formed during those peaceful years may no longer be valid in the technological age.

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1. *See generally* ALVIN TOFFLER, THE THIRD WAVE 21-36 (Heidi Toffler ed., 1981).
2. *Id.* at 101-12.
3. *Id.* at 127-30.
4. *Id.* at 251-54.
5. *The Andy Griffith Show*, a CBS series that aired from the 1950s well into the 1960s, was reflective of life in small town America. The series is still in syndication and is shown by churches to demonstrate life in a town with good moral values. Andy Griffith, Don Knotts, Jim Nabors, George Lindsey and Ron Howard went on to distinguish themselves in other television series and movies, but it was their loveable Mayberry characters that gave their careers a firm footing.

Society has undergone radical changes since the 1980s, and changes continue to occur as this article is written. During the last decade, foreign goods have been imported into this country in record numbers, while many American jobs have been exported to foreign countries such as India.[6] The United States is an active trading partner with countries all over the globe. Nationalistic trade barriers which existed during the decades following World War II have been virtually removed.[7] American companies have facilities in foreign countries and foreign companies have facilities in the United States.[8]

The term "global economy" is bantered about these days in newspapers, magazine articles, and television programs. What do the words "global economy" really mean? In the 1950s, 1960s, 1970s and 1980s, the decades in which most of today's adult population grew up, the words "global economy" had little impact on most people. Today those words are used to indicate how international commerce is conducted. For example, in 1960, most automobiles sold in the United States were built in the United States using parts made in the United States.[9] In 2005, American automobiles may be built in the United States, Japan, Mexico, Canada, Germany, Sweden or some other country.[10] Many of the popular "foreign" cars of the 1980s, are now built in the United States, using parts from all over the world. BMW, for example, is a German company, but they build their Mini-Cooper in Oxford, England. The grille for the Mini-Cooper is manufactured in Germany, its engine is built in Brazil, its hood is made in the Netherlands and its wheels are made in Italy.[11]

American products lawyers reviewing the number of parts and their origin might ask "who can you sue if something goes wrong with these parts?" In this modern global economy, the answer may well be that no one gets sued, because many of the contracts between the final assembly company and the parts suppliers require binding arbitration instead of litigation.[12] Many of these contracts identify

6. Service providers have used independent contractors in India and other foreign countries to field complaints and technical questions in the past few years. The logic of American businesses that regularly engage in this practice has been questioned in numerous national publications. Harbaksh Singh Nanda, *India Says Outsourcing Jobs Good for U.S.*, WASH. TIMES, Jan. 3, 2005, *available at* http://washingtontimes.com/upi-breaking/20041213-095125-4941r.htm.

7. *Comments of Public Citizen, Inc., on Trade Matters Related to the Free Trade Areas of the Americas* (Sept. 30, 2000), http://www.citizen.org/trade/ftaa/articles.cfm?ID=1700 (relating how NAFTA and other trade agreements have opened the door to new markets).

8. Peter Gwin, *A World of Parts: It is a Big Job to Build a Mini*, NATIONAL GEOGRAPHIC, Feb. 2005. Gwin points out that manufacturers in the global economy buy parts from numerous countries to assemble one product. *Id.* Cost is often the driving factor of multi-national purchases. American corporations like GM, Ford and Chrysler build vehicles in Europe, Central and South America. *Id.* BMW, Honda, Isuzu, Mercedes, Nissan and Toyota build cars in the United States. *Id.* Chrysler and Mercedes have merged their companies into Daimler-Chrysler. *Id.* Some Chryslers are now built in Germany and imported into the U.S., while some Mercedes are built in America and exported to Germany. *Id.* The Hyundai Corp. recently opened its largest sedan manufacturing facility in Montgomery, Alabama, although their world headquarters is located in Korea. *Id. See also* Royal Ford, *Foreign Cars Rolling Out of U.S. Factories*, BOSTON GLOBE, Sept. 12, 2005, at D1.

9. *See* Ford, *supra* note 8.

10. *Id.*

11. *Id.*

12. *See* MARK HULEATT-JAMES & NICHOLAS GOULD, INTERNATIONAL COMMERCIAL ARBITRATION: A HANDBOOK 1, 2 (Phillip Capper ed., 2d ed. 2004). International trade is as old as organized society. *Id.* at 1. Trade was hampered by one or more trading partners worrying about the outcomes in the other trading partner's court system. *Id.* It was assumed that the home courts created

the arbitration provider in advance such as the American Arbitration Association (AAA) in New York, the London Courts of International Arbitration (LCIA) in London, or the International Chamber of Commerce (ICC) in Paris.[13] American lawyers are familiar with the AAA commercial rules, but they may not be familiar with the rules of foreign arbitral forums such as the LCIA or the ICC. United States Supreme Court decisions make it unlikely that arbitration with foreign corporations will take place in the United States unless the agreement clearly identifies a forum located in the United States.[14]

This article provides a short prospectus for the unwary lawyer who must venture into unfamiliar territory abroad. Although there are numerous arbitral forums available in countries all over the world, this article will focus primarily on the LCIA and the ICC. Following a brief history of international arbitration and the history of these two international arbitral forums, the article will discuss some of the major issues in international arbitration such as forum selection, issue preclusion and procedural matters. This article also includes sections on appealing awards and enforcement of awards under existing international treaties. The article is brought to a close with a discussion of potential problems for American lawyers representing clients in foreign arbitral forums. Included in this article are excerpts from research interviews with Mr. Adrian Winstanley, Registrar of LCIA, and with Ms. Erica Stein, Counsel, ICC International Court of Arbitration.[15]

II. HISTORY OF INTERNATIONAL ARBITRATION

All politics is local.
-Tip O'Neal[16]

Protectionism has been a part of international trade for centuries.[17] Protective tariffs are often imposed by countries to protect domestic business and industry

a significant advantage for the trading partner who was able to get disputes resolved in its own courts. *Id.* Arbitration has helped level the respective playing fields and is now frequently used in international contracts. *Id.* The New York convention of 1958 helped enforcement proceedings against partners who endeavored to rely on their own courts for protection. *Id.* at 3.

13. There are numerous arbitration organizations and forums worldwide. However, due to their experience in the field and user-friendly rules the AAA, LCIA and ICC are used frequently to resolve commercial disputes. John Sutton & Peter Close, *Choosing a Forum For International Commercial Arbitration*, 76 AM. SOC'Y INT'L L. PROC. 166, 173-82 (1982) [hereinafter Sutton, *Choosing a Forum*].

14. *See* Mitsubishi v. Soler Chrysler-Plymouth, 473 U.S. 614, 614 (1985). A Puerto Rican car dealer signed a contract containing an arbitration clause that designated Japan as the site of the arbitration. *Id.* at 617. The court held the arbitration should take place in Japan, pursuant to the contract. *Id.* at 610. The court found no merit in the contention of the dealer that U.S. statutes preclude international arbitration. *Id.* at 615. The court held the dealer's antitrust claims could be arbitrated. *Id.* at 638-28. The court found that the appearance of an antitrust dispute did not merit an assumption that a forum selection clause was invalid as to arbitration. *Id.* at 635-37. It was apparent in *Mitsubishi* that the courts were not willing to revoke a valid arbitration agreement on protectionism grounds.

15. The author also acknowledges with gratitude the suggestions and advice of Mr. Winstanley, Mr. Sillett, Ms. Stein and Ms. Marie Llinas of the Documentation and Research Center of the ICC.

16. Tip O'Neal served in the United States House of Representatives.

17. HULEATT-JAMES & GOULD, *supra* note 12.

from foreign competition.[18] International arbitration agreements once contained clauses selecting forums domiciled in one party's country to the exclusion of the other party's country until a more modern approach was adopted.[19] The concept of arbitrating the dispute in a party's domestic forum had numerous cost advantages, but it also allowed review of any award by the local courts.[20] If the award was adverse to the citizen or company where the court held jurisdiction, there was some likelihood that the domestic court would invalidate it.[21] Therefore, collection of such awards became difficult, if not impossible, under most circumstances. The courts of the United States were not immune to the "parochial concept that all disputes must be resolved under our laws and in our courts."[22]

The United States Supreme Court moved away from protectionism in *Scherk v. Alberto-Culver Co.*[23] The Supreme Court reasoned that when substantial business contracts affect citizens in two or more sovereign nations there will likely be conflicts of law.[24] Therefore, arbitration clauses are used to resolve the conflict of laws in advance so as to promote the orderliness of business and predictability of result.[25] The Supreme Court further held that the parties pre-selected their forum in the contract and that pre-selection choice of forum must be honored.[26] The enlightened approach taken by the Supreme Court in *Scherk* is the approach now taken by most western countries, with the possible exception of France, a nation that reserves the right to interpret contractual terms and arbitration results under its own laws.[27]

The New York Convention—an international United Nations sponsored treaty designed to allow enforcement of the arbitration award outside the country in which the award was rendered—has resulted in increased global use of the international arbitration process.[28] Well in advance of the passage of the New

18. The United States and other countries have often been criticized for the imposition of protective tariffs.

19. For many years the United States courts refused to consider foreign awards but would agree to review awards returned in the United States. *See* Indusea Corp. v. S.S. Ranborg, 377 F.2d 200, 203 (2d Cir. 1967) (describing how the Carriage of Goods by Sea Act invalidated forum selection clauses).

20. *Id.*

21. *Id.*

22. M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9 (1972) (describing concern over the conflict between foreign forum selection clauses and statutes, and the invalidation of those negotiated clauses by U.S. courts).

23. 417 U.S. 506 (1974). In *Scherk*, an American company and a German company entered into a sales contract which contained an arbitration clause designating the ICC in Paris as the forum for any arbitration hearing. *Id.* at 508. The agreement also designated Illinois law as the law governing the agreement. *Id.* The American company filed suit in federal district court claiming fraud and sought to rescind the contract. *Id.* at 509. The federal court refused to rescind the contract but also refused to enforce the arbitration clause. *Id.* at 509-10. The U.S. Court of Appeals affirmed the trial court, but the U.S. Supreme Court reversed, holding that the arbitration clauses should be enforced. *Id.* at 510, 519-20.

24. *Id.* at 516.

25. *Id.*

26. *Id.* 516-19

27. Stephen K. Huber & Wendy Trachte-Huber, *International ADR in the 1990s: The Top Ten Developments*, 1 HOUS. BUS. & TAX L. J. 184, 208 (2001). Even if an arbitration award has been set aside in another country, such a result is not considered binding in France. *Id.* The French reserve the right to decide whether an arbitration award rendered in a country other than France is enforceable in France. *Id.*

28. *Id.* at 185. *See* discussion *infra* Section XI.

York Convention, the United States had an enforcement mechanism in the Federal Arbitration Act (FAA).[29] Similar laws in England and France were in place prior to the New York Convention, but many countries lacked the requisite laws to enforce international arbitration awards.

One of the key selling points of international arbitration is the avoidance of the "politics is local" problem. The arbitration process, especially when conducted in one of the recognized international arbitration forums, eliminates the pitfalls of local politics and to some extent levels the playing field.[30] There are probably few situations more frightening to a business lawyer than being forced to appear in an unfamiliar court in a foreign country arguing against that country's laws. Although international arbitration may be more complicated and more time consuming than domestic arbitration, it provides a sense of security in the enforcement of international contracts.[31]

III. THE BASIS OF INTERNATIONAL ARBITRATION IS THE CONTRACT'S FORUM SELECTION CLAUSE

The 1972 United States Supreme Court case *M/S Bremen v. Zapata Offshore Co.* involved an American company and a German company whose contract contained a forum selection clause naming the courts of England as the forum for resolution of contractual disputes.[32] The Supreme Court held that the British courts were suitably neutral for the resolution of this dispute.[33] In 1991, the Supreme Court once again upheld the validity of a forum selection clause in the case of *Carnival Cruise Lines v. Shute*.[34] Federal courts are required to enforce forum selection clauses domestically, and the federal courts also enforce forum selection clauses in international contracts.[35] Due to a forum selection clause, a car dealership in a United States protectorate (Puerto Rico) was forced to arbitrate its contract dispute with a Japanese car manufacturer in Japan.[36]

A forum selection clause is vital to the enforceability of international contracts. These contracts do not enforce themselves and failure to include a forum selection clause could result in simultaneous litigation in two or more countries over the same set of contract terms and conditions.[37] This piecemeal litigation approach could result in foreign and domestic judgments requiring the parties to

29. Huber & Trachte-Huber, *supra* note 27, at 186-87.

30. William W. Park, *The Relative Reliability of Arbitration Agreements and Court Selection Clauses, in* INTERNATIONAL DISPUTE RESOLUTION: THE REGULATION OF FORUM SELECTION 3, 3-6 (J. Goldsmith ed., 1997). Arbitration minimizes the risk of litigation in foreign countries. *Id.* It reduces the likelihood of being "home cooked" by a foreign judge interpreting local laws. *Id.* Arbitration agreements do not enforce themselves, and a forum selection clause is the key to enforcement of an international contract. *Id.*

31. *Id.*

32. *M/S Bremen*, 407 U.S. at 1.

33. *Id.* at 17-19.

34. Carnival Cruise Lines v. Shute, 499 U.S. 585 (1991). The forum nonconveniens argument was laid to rest by this case. *Id.* A group of ticket holders on a cruise ship were forced to travel to the arbitration forum selected in their contract with the cruise ship company, rather than arbitrating in the place where the contract was signed. *See id.* at 590-97.

35. *See Mitsubishi*, 473 U.S. at 658.

36. *Id.*

37. *Scherk*, 417 U.S. at 517.

comply with court orders that may not remotely resemble each other.[38] A forum selection clause which sends the dispute to a neutral tribunal for arbitration eliminates the competing judgment problem. In the words of Justice Stewart in *Scherk v. Alberto-Culver Co.*, "a contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction."[39]

IV. ISSUE PRECLUSION AND CLAIM PRECLUSION

The concept of issue preclusion in arbitration is often misunderstood and is sometimes confused with claim preclusion.[40] The goal in international arbitration is to achieve claim preclusion, or a complete bar to having the case heard elsewhere. It is often difficult to prove collateral estoppel to the satisfaction of a court that did not hear the original case, especially if a case was heard by an arbitrator.[41] Some courts have opposed preclusion of any issue in subsequent litigation that was decided in arbitration.[42] Other courts will limit the effects of preclusion to matters covered by the contractual language, because the arbitrator's authority to decide issues is limited by the contract's terms.[43] There is also the danger that foreign courts will use the opportunity to enforce its country's domestic laws by voiding an arbitration award.[44] However, the United States Supreme Court defers to the decisions of arbitrators in international commercial arbitration, because it is impossible to restrict global trade to contracts governed by United States laws.[45] Thus, if the claims presented or the issues resolved in a foreign arbitration are identical to the ones which are the subject matter of a subsequent federal court action, the federal courts will preclude those claims and issues.[46]

There is little question that American lawyers would prefer to operate under American laws, rather than having those laws ignored the foreign arbitral tribunals. Such an argument was made by the lawyers for a New York fruit distributor in an effort to avoid arbitration in Japan over damaged fruit.[47] The bill of lading by the Japanese company delivering the fruit contained an arbitration clause which required the arbitration over damaged goods to take place in Tokyo, Japan.[48] The Supreme Court held the Carriage of Goods by Sea Act (COGSA)[49] did

38. *Id.*
39. *Id.*
40. Sabrina M. Sudo, *The U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards and Issue Preclusion: A Traditional Collateral Estoppel Determination*, 65 U. PITT. L. REV. 931, 933 (2004). Issue preclusion and claim preclusion are similar, but different doctrines. *Id.* Issue preclusion is connected to collateral estoppel, whereas claim preclusion is connected to res judicata. *Id.*
41. *Id.* at 934.
42. *Id.*
43. *Id.* at 935.
44. *Id.* at 937.
45. *Id.*
46. *Id.* at 942-43.
47. Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 530-32 (1995) [hereinafter, *Sky Reefer*].
48. *Id.* at 530-31.
49. 46 U.S.C.A. App. §§ 1300-1315 (2000).

not nullify the foreign arbitration.[50] The Supreme Court also rejected the fruit company's contention that the Japanese arbitrators would not apply correct law during the arbitration.[51]

The Supreme Court has demonstrated in its opinions over the past two decades that it favors international arbitration as the primary vehicle for the resolution of international disputes.[52]

V. THIRD PARTIES

In a lawsuit, third parties who wish to become involved can file a motion to intervene, motion for joinder, motion for consolidation or a declaratory judgment action requesting a court to rule on their right to become involved in a pending action. If an arbitration matter is pending before a court who has ordered it to arbitration, a party who wishes to be included in the arbitration can file for joinder, intervention or consolidation of arbitral proceedings.[53] Sometimes, non-signatories may be uniquely positioned to be a part of the arbitration, and arbitrators may add these parties even though they chose not to be involved.[54] However, non-parties cannot be added to an arbitration by an arbitrator, if the non-parties object to being involved.[55] The situation involving non-parties who wish to be added to the arbitration, or non-parties who are asked to become involved, usually arises when one member of a group of companies is forced to arbitrate.[56] The other associated companies may have some stake in the outcome, or their business transactions are so intertwined with the company in arbitration they become a necessary party.[57]

Dealing with a third party who was not in privity to the original contract has been a thorny issue in international arbitration for years.[58] Most of the interna-

50. *Sky Reefer*, 528 U.S. at 541.

51. *Id.* at 531-32

52. *See id.* at 533-40.

53. *See generally* Carolyn B. Lamm & Jocelyn A. Aqua, *Defining the Party—Who is a Proper Party in an International Arbitration Before the American Arbitration Association and Other International Institutions*, 34 GEO. WASH. INT'L L. REV. 711 (2003). International arbitration case numbers are on the rise. *Id.* at 711-12. Many of these disputes involve multiple parties, some of whom are not signatories to the arbitration agreement. *Id.* at 718-21. If the non-signatory is affected by the outcome of the arbitration, they may be added by the court or organization administering the arbitration. *Id.* at 713.

54. *Id.* at 722-28.

55. *Id.* at 716.

56. *Id.* 713-14.

57. *Id.* at 728-30.

58. *See generally* James M. Hosking, *The Third Party Non-Signatory's Ability to Compel International Commercial Arbitration: Doing Justice Without Destroying Consent*, 4 PEPP. DISP. RESOL. L. J. 469 (2004). Third parties occupy a unique position in international arbitration, because they can bring an action against one of the arbitrating parties, intervene in an existing action or be compelled to join litigation; but in arbitration, they cannot be added without consent. *Id.* Unless the third party is seeking to become a beneficiary of the contract, it will be difficult to include them in an arbitration in which they chose not to be involved. *Id.*

Hosking suggests ten possible ways to resolve the non-signatory third-party dilemma in arbitration:

1. Incorporation by reference in a subsequent contract.
2. Assumption of obligation to arbitrate.
3. Agency.
4. Veil-piercing demonstrating the third party is an alter-ego of a party.

tional arbitration rules say little about adding third parties, and most of the time consent is necessary to add non-signatories to an arbitration.[59] There are legal grounds to add parties to litigation that show promise in the addition of parties to international arbitration.[60] At least theoretically, any ground for adding a party to litigation should work for arbitration.

VI. THE RULES OF ENGAGEMENT

The arbitration rules discussed in this article are, conveniently, available via the World Wide Web. The specific addresses where these rules may be found are listed below.

A. American Arbitration Association's International Rules of Arbitration (AAA Rules) are available at http://www.adr.org/sp.asp?id=22090.

B. The London Court of International Arbitration Rules (LCIA Rules) are available at http://www.lcia.org/ARB_folder/arb_english_main.htm.

C. International Chamber of Commerce Rules of Arbitration (ICC Rules) are available at http://www.iccwbo.org/court/english/arbitration/pdf_documents/rules/rules_arb_english.pdf.

D. United Nations Commission on International Trade Law Arbitration Rules (UNCITRAL Arbitration Rules) are available at http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf.

VII. DISTINCTIONS AND DIFFERENCES

The following is a side-by-side comparison of the key elements of the four major international arbitration rules.

5. Estoppel due to intertwined interests.
6. Assignment of contract rights.
7. Substituted for former party.
8. Succession to party by operation of law.
9. Subrogation.
10. Third party beneficiary of contract.

See id.

59. *See id.*

60. *See id.*

	AAA	LCIA	ICC	UNCITRAL
1. Commencing the Arbitration (the procedure is similar in all four sets of rules, except some require more detail than others).	Claimant gives written notice to AAA administrator and to the respondent, including a statement of the claim.	Claimant sends Registrar of the LCIA court a written request for arbitration and serves a copy on all other parties. The request contains a statement of the claim.	Party seeking arbitration serves notice upon the Secretariat. The Secretariat sends copies to respondent. The request includes a statement of claim.	Claimant sends respondent a notice of arbitration and the name of the appointing authority or no such authority is named, to the Secretary General of the Permanent Court of Arbitration at the Hague. The notice shall include a statement of claims.
2. Response (the details required by the respondent vary according to the rules. The AAA and ICC place great importance on a response within 30 days of the claim).	Respondent is given 30 days to respond in writing and file a counterclaim to the notice and claim. The response and counterclaim must be served upon the claimant and upon the AAA administrator.	Respondent is given 30 days to respond in writing to the Registrar with copies for the arbitrators and the claimant. Failure to respond does not preclude denial of allegations at a later date.	Respondent has 30 days to file an Answer with the Secretariat and the Secretariat sends a copy to the claimant. Counterclaims shall be filed with the Answer. The claimant has 30 days to reply to a counterclaim in writing to the Secretariat.	The arbitral tribunal determines the period of time in which a respondent may submit a statement of defense to the claims.
3. Arbitrator selection (procedure varies widely if parties cannot agree).	Parties mutually agree on appointment procedures. If the parties do not agree within 45 days, the AAA administrator appoints them.	Parties may nominate arbitrators, if their agreement allows nomination. Absent agreement the LCIA Court may appoint an Arbitrator. The LCIA court alone is empowered to appoint arbitrators.	Arbitrators must be neutral and disclose conflicts of interest. Parties may agree on arbitrator(s), but if they cannot agree, the ICC court appoints a sole arbitrator.	Unless the parties agree to appoint a sole arbitrator, there shall be a panel of three arbitrators. If parties cannot agree on arbitrators within 30 days, the Secretary-General of the Permanent Court of Arbitration at the Hague shall designate an appointing authority.
4. Challenge of arbitrators (varies by rules).	Parties can challenge arbitrator in writing within 15 days after appointment.	Party who challenges an arbitrator must do so within 15 days of leaving problem with arbitrator in writing to LCIA and all other parties.	Parties may challenge arbitrator within 30 days of the discovery of anything that would make the arbitrator not suitable to serve.	Party who challenges arbitrator generally must do so within 15 days of appointment or becoming aware of circumstances which make the arbitrator unsuitable.

The ICC was created in 1923 and until recently required arbitrations to take place in its Paris, France, facilities. However, the ICC has now branched out into other parts of the world including the United States, Asia and the Middle East.[61] The LCIA conducts most of its arbitrations in London, England, but is also willing to be flexible for the convenience of the parties.[62]

VIII. INTERVIEWS WITH LCIA AND ICC OFFICIALS

Interview with Adrian Winstanley
Registrar
London Court of International Arbitration
February 28, 2005

Q: Do lawyers and parties from the United States get confused by terminology or wording in the LCIA rules?

A: Not in my experience. We do, however, come across United States attorneys who tend to lapse into litigation vernacular, such as referring to the parties as Plaintiff and Defendant, rather than Claimant and Respondent and to written submissions as "pleadings," and so forth. This might be symptomatic of a tendency among some United States parties and their lawyers to import litigation culture into arbitration; a tendency strongly resisted in many other jurisdictions.

Q: Do lawyers and parties from the United States sometimes question adequate notice or raise adequate notice issues in LCIA arbitrations?

A: Lawyers and parties of all nationalities raise such questions and I am not aware of any greater propensity on the part of United States lawyers than any others. The LCIA rules are particularly clear about the interpretation of notices and periods of time. See, in particular, Article 4.

Q: When lawyers and parties from the United States come to London for an LCIA administrated arbitration do issues arise regarding who can represent a party during the arbitration?

A: No. There is no restriction on who may represent a party in an LCIA arbitration conducted in London, subject, of course, to soundness of mind and proper authority. See Article 18.

Q: Does the LCIA require parties from the United States to associate attorneys authorized to practice before the LCIA to represent the parties in an LCIA administered arbitration?

61. *See* Sutton, *Choosing a Forum*, *supra* note 13, at 173-74.

62. *See* Adrian W. Winstanley, *Overview and Comparison of International Arbitration Rules – LCIA*, *in* INTERNATIONAL BUSINESS LITIGATION & ARBITRATION 2001, at 819, 822 (PLI LITIGATION AND ADMINISTRATIVE PRACTICE COURSE HANDBOOK SERIES NO. 648, 2001).

A: There is no such restriction.

Q: Please describe the arbitrator selection process or processes used in LCIA arbitrations.

A: The first point to make is that the LCIA court alone may *appoint* arbitrators under the LCIA rules, though the parties are always free to *nominate* arbitrators. Having said that, the process depends, initially, on whether there is a sole arbitrator, or three, and whether there is party-nomination. The LCIA is also flexible in assisting parties who wish to select their own tribunal, for example by providing lists of candidates that the LCIA court would be willing to appoint, from whom the parties may make their selection.

Here is the essence of the procedure:

1. The LCIA Secretariat reviews the request for arbitration and the accompanying contractual documents.
2. A résumé of the case is prepared for the LCIA court.
3. Key criteria for the qualifications of the arbitrator(s) are established and recorded.
4. The criteria are entered into the LCIA database, from which an initial list is drawn.
5. If necessary, other institutions are consulted for further recommendations.
6. The résumé, the relevant documentations, and the names and CVs of the potential arbitrators are forwarded to the LCIA court.
7. The LCIA court advises which arbitrator(s) the Secretariat should contact to ascertain their availability and willingness to accept appointment.
8. The Registrar sends those candidate(s) an outline of the dispute.
9. When the candidate(s) indicate their availability, confirm their independence and impartiality, and agree to fee rates within the LCIA's bands, the form of appointment is drafted.
10. The LCIA court formally appoints the tribunal and the parties are notified.

Q: Does the LCIA permit parties to specify the level of the arbitrator's expertise or the arbitrator's credentials in the selection process?

A: Contracting parties may certainly specify, in their agreement, that the arbitrator(s) should have x or y quality. The parties may, similarly, ask the LCIA to appoint arbitrators with such qualities once the dispute has arisen. However, it is not sensible to establish excessively narrow criteria for the qualifications of an arbitrator, lest no such arbitrator should be available once a dispute arises. Furthermore, it is very much part of the role of the institution to ensure that the arbitrators it appoints are suitably qualified for any given dispute.

Q: Does the LCIA require a disclosure of conflicting financial interest or personal interest by the arbitrators selected to preside over a hearing?

A: Strict rules of independence and impartiality govern the appointment of *all* arbitrators, not only the presiding arbitrator. It is a universal requirement in international arbitration (also acknowledged by the AAA/ABA code of ethics) that

all arbitrators be, and remain, impartial and independent of the parties. See, in particular, Articles 5.2 and 10.3.

Q: Does the LCIA have written standards that it uses to disqualify arbitrators?

A: The LCIA does not have "written standards," but the challenging party must lodge its challenge within 15 days of becoming aware of the circumstances giving rise to it. If, within a further 15 days, the challenged arbitrator steps down or the other party or parties to the arbitration accept(s) the challenge, the arbitrator will automatically be removed, with no inferences being drawn as to the validity or otherwise of the challenge. More usually, however, the challenge will be referred to the LCIA court for determination.

Under LCIA procedures, challenges referred to the court for determination are most commonly dealt with by a division of three court members, the chairman of the division being the president or a vice-president.

By Article 29.1 of the LCIA rules, all decisions of the court are administrative and no reasons need be given. However, the LCIA court has adopted the practice of giving reasons in the case of challenges, so as to afford both tribunal and parties the opportunity to understand the standards that the court is applying.

Q: Does the LCIA permit parties to request provisional remedies?

A: Yes. See, in particular, Article 25.1(c).

Q: Does the LCIA permit consolidation of multiple claims into a single arbitration?

A: The LCIA will permit consolidation of related arbitrations, but cannot require consolidation, which is entirely a matter for the parties to agree. However, by Article 22.1(h), a willing third party may, on the application of one of the parties to the arbitration, be joined to the proceedings, even if other parties to the arbitration object, provided that all parties will have an opportunity to express their views.

Q: Does the LCIA permit arbitrators to allow the parties to engage in discovery prior to a hearing? If the answer is "yes" to that question, is the amount of discovery allowed limited?

A: Documentary discovery is commonplace in international commercial arbitration. However, wholesale discovery of the kind familiar to parties in litigation before the United States courts is sometimes considered excessive and inappropriate in arbitration. Under the LCIA rules, the tribunal has wide powers to direct disclosure/discovery on such terms as it considers appropriate. See, in particular, Article 22.1(e) and (f). The IBA guidelines on the taking of evidence in arbitrations are also frequently used as a reference-point for the appropriate level of discovery.

Q: Does the LCIA require parties to agree to an obligation of confidence in the arbitration proceedings?

A: By subscribing to the LCIA rules, the parties are bound by the confidentiality agreement at Article 30.1

Q: How often do LCIA arbitrators hold pre-hearing conferences with the parties to clarify issues?

A: I can't give you statistics, but short procedural hearings are commonplace.

Q: Does the LCIA require parties to submit a detailed statement of claim or terms of reference document in advance of a pre-hearing or a hearing?

A: A statement of claim and terms of reference are, of course, entirely different animals. As to the statement of claim, which the LCIA calls the statement of the case, the answer is that this is the first of the substantive written submissions, without which neither the tribunal nor the respondent will have a full grasp of the case. As such, it must clearly have been filed before any hearing on the merits. Very rarely, a tribunal may call an early preliminary meeting even before the statement of the case has been filed. "Terms of reference" are a creature of the ICC. However, it is commonplace for tribunals in LCIA arbitrations and, indeed, in ad hoc arbitrations to seek to narrow issues at an early stage of the proceedings.

Q: Does the LCIA have a procedure for the summary disposition of partial claims or issues prior to the arbitration hearing?

A: There is no equivalent under LCIA rules to the summary dismissal of a claim or any part of a claim. However, if this question relates to the issue of partial awards prior to the final award, the answer is, again, that this is commonplace, particularly regarding issues of jurisdiction and in the bifurcation of liability and quantum.

Q: Do the LCIA rules permit the substitution of written witness statements in lieu of live witness testimony at an arbitration hearing?

A: Article 20.3 provides that, subject to any order otherwise by the tribunal, the testimony of a witness may be presented by a party in written form. More commonly, however, the parties first exchange witness statements, which stand as evidence-in-chief for the purposes of an oral hearing, at which the witnesses may be cross-examined.

Q: Does the LCIA require their arbitrators to return the award within a specified time period after the hearing is closed?

A: No, but the Tribunal must act diligently to produce its award, in compliance with its general duties under Article 14.

Q: Does the LCIA suggest or require arbitrators in LCIA administered hearings to adhere to the concept of amiable compositeur when crafting their awards?

A: To the contrary, Article 22.4 precludes any such equitable approach, other than with the parties' express agreement in writing.

Q: Under the LCIA rules, does an interested non-party have the right to challenge arbitral jurisdiction of an issue prior to the arbitration hearing?

A: A "non-party" has no rights to intervene in an arbitration in which it does not, by definition, have locus standi, whether under the LCIA rules or any other rules. However, a non-party who is willing to be joined to an LCIA arbitration may, under Article 22.1(h) be so joined on the application of one of the parties.

Q: With regard to the "commercial reservation" of the New York Convention, does the LCIA consider employment disputes as a commercial transaction?

A: The LCIA does not interpret statutes or treaties. That is a matter for the parties and for the arbitral tribunal.

Q: Does the LCIA publish a list of issues it deems non-arbitral?

A: No.

Q: In its dealings with lawyers and parties from the United States, has the LCIA found any issue or issues particularly troubling?

A: No.

Q: Is there any admonition or advice you would like to offer to lawyers and parties from the United States when engaging the LCIA to resolve a conflict?

A: Parties do not "engage" the LCIA. The LCIA is a neutral administrator at the disposal of all parties to the dispute. Having said that, I would not presume to offer advice or admonition in general terms to United States lawyers or parties.[63]

Interview with Ms. Erica Stein
Counsel
ICC International Court of
Arbitration
Paris, France
March 30, 2005

Q: Do you find that American lawyers confuse terminology and use litigation terms instead of the proper terms in your court?

63. Interview with Adrian Winstanley, Registrar, London Court of International Arbitration (Feb. 28, 2005).

A: There may be some confusion for the novice lawyer, but the Secretariat helps parties to understand terms and clear up any confusion. There is a team effort to help lawyers understand the culture.

Q: How does the ICC deal with notice issues?

A: Copies of all filings are sent to parties through the ICC. Notice issues do not arise due to this procedure.

Q: Does the ICC encounter representation issues?

A: There is no requirement that parties be represented by lawyers. The arbitrators are not required to be lawyers.

Q: Does the ICC have admission to practice issues before its court?

A: There are none.

Q: What is the basis for the arbitrator selection process in ICC administered arbitrations?

A: The selection process is a classic tripartite format, but the party selected arbitrators must be neutral. There are no rosters per se, but the ICC can appoint arbitrators from national committees. The arbitrators should be appropriate for the case and the parties, and they should be individuals the ICC finds acceptable.

Q: Does the ICC require arbitrators to possess expertise in the subject area of the arbitration?

A: No.

Q: Does the ICC have a default process for the selection of arbitrators?

A: Rule 12 requires the ICC to ask the parties how to replace the arbitrator(s). If that procedure fails, the ICC appoints an arbitrator.

Q: Does the ICC require a conflicts of interest disclosure?

A: Rule 7 requires arbitrators to be neutral. Following their nomination, arbitrators fill out paperwork. If they lie about their neutrality a party can challenge them as an arbitrator or they can resign. The written standards to disqualify arbitrators are contained in Article 7.

Q: Does the ICC allow arbitrators to grant provisional remedies?

A: The ICC does not suggest consolidation, but the parties can consolidate. Article 46 allows the ICC to order consolidation if one party requests it. The ICC cannot forcibly bring in allegedly necessary third parties.

Q: Does the ICC allow discovery?

A: The parties have the power to select rules which allow discovery.

Q: Does the ICC have an obligation of confidentiality?

A: The ICC does not have a confidentiality provision for parties. However, the ICC does not publish awards or respond to inquiries.

Q: Do ICC arbitrators hold pre-hearing conferences?

A: There are not a lot of in-person pre-hearing conferences. If these are conducted, they are casually done over the telephone or through email.

Q: Does the ICC require a statement of claim or terms of reference prior to a hearing?

A: Terms of reference provide a road map for the progress of the arbitration. For example on the issues of discovery and evidence the International Bar Association Guidelines on Taking of Evidence may be used or the United States Federal Rules of Procedure may be selected.

Q: Does the ICC court use summary disposition of partial claims or issues?

A: There is no summary disposition procedure at the ICC. Such a procedure could make the award unenforceable under the New York Convention.

Q: Does the ICC allow witness statements?

A: There are lots of witness statements.

Q: Does the ICC impose a time period for returning the award?

A: The ICC scrutinizes the award. This may take two weeks to one and one half months. The ICC reviews the award's form and substance and may require it be reworked before being issued.

Q: Do ICC arbitrators use amiable compositor when drafting awards?

A: Only if the parties agree to apply it.

Q: Does the ICC have a procedure for the intervention of non-parties?

A: Third parties may become a part of the arbitration only if everyone agrees. The ICC can determine if a third party will be allowed to intervene if the parties agree to it. The parties may file an amended request prior to selection of arbitration to add a party. Following the selection process, parties can only intervene by agreement.

Q: Does the ICC treat employment disputes as a commercial transaction under the commercial reservation of the New York convention?

A: The ICC does not resolve employment disputes unless requested.

Q: Does the ICC deem any issues non-arbitrable?

A: No. If parties bring an issue to the ICC for resolution, the ICC will take it. See Article 6-2.

Q: Do ICC arbitrators who were not a part of the majority award issue dissenting opinions?

A: Dissenting opinions are occasionally allowed by the chair. However, dissenting opinions are an informational document and do not become a part of the award.

Q: Does the ICC publish opinions?

A: Collections are made of awards. Some arbitration associations publish awards such as the United States–Iran claims tribunal. ICC will only publish awards it is authorized to publish by the parties involved.

Q: Does the ICC allow a record of the arbitration to be taken down and preserved?

A: That is up to the parties. Unilateral appearances before the tribunal are recorded.[64]

IX. A FEW SUGGESTIONS ON PROCEDURE

The rules of each arbitration forum are different.[65] Assumptions should not be made as to what is or is not allowed by the arbitrators in that forum. Researching arbitration rules in a particular forum is essential preparation for an appearance in an international arbitration forum. The forum's rules are not hidden from view or contained in a difficult to obtain document. Most foreign arbitral forums have attractive websites which provide valuable information.[66] Almost all of

64. Interview with Erica Stein, Counsel, International Court of Arbitration, in Paris, France (Mar. 30, 2005)

65. *See supra* Section VI.

66. AAA, LCIA, ICC, UN, WTO and WIPO each have websites. American Arbitration Association, http://www.adr.org (last visited Dec. 20, 2005); The London Court of International Arbitration, http://www.lcia-arbitration.com (last visited Dec. 20, 2005); International Chamber of Commerce, http://www.iccwbo.org (last visited Dec. 20, 2005); United Nations, http://www.un.org/english (last visited Dec. 20, 2005); The World Trade Organization, http://www.wto.org/ (last visited Dec. 20, 2005); The World Intellectual Property Organization, http://www.wipo.int/portal/index.html.en (last visited Dec. 20, 2005).

these websites contain a downloadable copy of their arbitration procedural rules.[67] If the rules are not contained on the website, all of these websites have contact information where a copy of the rules may be requested. If possible, these rules should be obtained and reviewed prior to the demand for arbitration, so as to avoid potential costly procedural blunders. Although forum rules tend to be similar, they are not uniform.[68]

The logistics of the arbitration must also be taken into account when scheduling the arbitration. Although most of the forums will allow arbitration hearings to be held in locations other than the forum headquarters, the forums prefer to hold the arbitration hearing in the city where the forum is headquartered. Therefore, if the arbitration is conducted by the LCIA, the location of the hearing will likely be London, England, and if the ICC is the selected forum, the hearing will most likely take place in Paris, France.[69]

American lawyers will likely find London easier to navigate than Paris, due to the commonality of the English language. Although street signs and services in Paris are printed in French, most Parisians speak English. Logistics in Geneva are more difficult because most of its citizens also speak French, except in the downtown tourist areas. The author has personally experienced the difficulty of getting around Geneva in taxicabs, because many of the taxi drivers cannot speak English. It is strongly suggested that addresses of meetings be written in French and given to the taxi drivers in both these French speaking cities. The alternative is to become acquainted with the language used at the forum location. American lawyers should never assume the language barrier is non-existent.

In addition to knowing the procedural rules regarding filings and evidentiary procedures, attorneys representing clients in a foreign arbitration forum should pay close attention to the process of selection of arbitrators and replacement of arbitrators who cannot serve. The foreign arbitral forums vary in the selection process and default positions regarding replacement of arbitrators.[70] The role of the forum's case administrator in the selection and replacement of arbitrators varies from organization to organization.[71] Some of the forums maintain more control in this area than other forums.[72] The parties may require their arbitrators to possess knowledge or skill in certain areas, or the parties can actually name the arbitrator or arbitrators in advance in their agreement to arbitrate.[73]

X. APPEALING THE AWARD

Arbitration's main selling points are cost and efficiency with regard to process and speed of disposition. Obviously, if successful challenges to arbitral awards were common, arbitration would lose its appeal. It would, in some meas-

67. The websites of international arbitration forums such as LCIA and ICC generally contain a downloadable copy of the arbitration rules for that forum.

68. Some forums allow limited discovery, some vest the arbitrators with the power to control discovery, and some prohibit discovery. *See* Sutton, *Choosing a Forum*, *supra* note 13, at 171.

69. *Id.* at 172-75.

70. CHRISTOPHER DRAHOZAL, COMMERCIAL ARBITRATION: CASES AND PROBLEMS, 357-59 (2002).

71. *Id.* at 358.

72. *Id.*

73. *Id.*

ure, become non-binding. Therefore, challenging any arbitration award is a daunting process, but it is especially difficult in international arbitration. UNCITRAL rules permit the parties to request an interpretation of the award or request a supplemental award.[74] Some foreign arbitral forums do not allow awards to be reconsidered once rendered.[75] A final award in some foreign arbitral forums is "final" in every sense of the word.[76] Perhaps the impetus behind the finality of awards is the functus officio doctrine.[77] The general idea behind this doctrine is that the ability to change the award expires when the award is written. The New York Convention does not provide much hope for the recession of arbitral awards.[78] Federal courts also enforce foreign arbitral awards in compliance with the New York Convention and the FAA.[79]

XI. THE NEW YORK CONVENTION

The New York Convention is an international treaty regarding the enforcement of foreign arbitral awards. The official title of the New York Convention is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and it became effective on June 10, 1958. The New York Convention contains sixteen articles summarized as follows:

Article I - Countries are referred to as "states" in the New York Convention. Article One requires countries that have ratified or acceded to the New York Convention to honor non-domestic arbitral awards rendered in other countries that have ratified or acceded to the Convention. Countries may also declare the so-called commercial reservation when ratifying the convention. The commercial reservation requires the subject of arbitral awards be commercial in nature, as that term has been defined by the national laws of the member country.

Article II - Countries that have ratified or acceded to the convention agree to enforce written agreements to arbitrate.

Article III - Countries that have ratified or acceded to the convention agree to enforce foreign arbitral awards in a manner consistent with the enforcement of domestic arbitral awards within that country. No additional conditions or higher fees shall be charged to enforce a foreign arbitral award.

Article IV - Parties wishing to enforce a foreign arbitral award must supply an original or certified copy of the agreement to arbitrate and an original or certified copy of the award. If the award is to be enforced in a country where the primary language is different from the language of the agreement and award, the agreement and award shall be translated into the language of the country in which enforcement is sought.

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74. *Id.* at 471.

75. Iran-United States Claims Tribunal, art. IV, para. 1.

76. *Id.*

77. "Functus officio" is defined as "having performed his or her office." BLACK'S LAW DICTIONARY 682 (7th ed. 1999). In relevant part, the doctrine relates that once the duties of the appointed office are performed, the officials have no further authority to do anything else with regard to their appointment.

78. New York Convention, art. III, June 10, 1958, 330 U.N.T.S. 38 (requiring member states treat arbitration awards issued in other member states as binding and enforceable).

79. 9 U.S.C.A. §§ 201-208 (2000).

Article V - Recognition and enforcement of foreign arbitral awards may be refused on the following grounds:

1. A party was under some incapacity when the agreement to arbitrate was signed.
2. The agreement to arbitrate was illegal in the country where it was made.
3. Proper notice of the appointment of the arbitrator was not given.
4. Proper notice was not given regarding the arbitration proceedings.
5. The award exceeds the authority of the arbitrators and decided issues not contemplated by the arbitration agreement. However, if the issues contemplated by the agreement to arbitrate can be separated from those not contemplated, the award regarding the contemplated issues is enforceable.
6. The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement to arbitrate or the laws of the country in which the arbitration took place.
7. The award has not yet become binding on the parties.
8. The award has been suspended by competent authority in the country in which it was made, or the award has been set aside by the laws of the country in which it was made.
9. The country in which the arbitration award was rendered is found by competent authority not capable of settlement (resolution) by arbitration.
10. The award is contrary to the public policy of the country in which it was rendered.

Article VI - When a party files an application to set aside or suspend an award, the authority upon which the award was sought to be enforced may adjourn the decision on the award, and upon application by the party seeking to enforce the award, require the other party to give suitable security.

Article VII - Other arbitration treaties may be used to enforce the award if available and the Geneva Protocol of 1923, on arbitration clauses and the Geneva Convention on Execution of Foreign Arbitral Awards of 1927, shall cease to have an effect on countries bound by the New York Convention.

Article VIII - Countries could ratify the New York Convention by December 31, 1958, if they were members of the United Nations or any specialized agency of the United Nations or becomes a party to the Statute of the International Court of Justice *or* any country to which an invitation was extended by the General Assembly of the United Nations. Once ratified the paperwork evidencing the ratification was to be deposited with the Secretary-General of the United Nations.

Article IX - Countries which qualify under Article VIII shall be allowed to accede to the New York Convention, and the paperwork evidencing accession shall be deposited with the Secretary-General of the United Nations.

Article X - Countries which have territories may extend the application of the New York Convention to those territories. The extension shall be noticed to the Secretary-General of the United Nations and becomes effective in 90 days. Countries who do not extend the application of the New York Convention to their territories shall consider doing so with the consent of the territories.

Article XI - This article contains three subsections requiring member countries to recommend ratification of the New York Convention to its constituent countries or provinces not required to ratify the Convention. Upon request by another member country of the Convention, a country shall transmit to the Secre-

tary-General of the United Nations a statement of the law and practices of constituent countries and the effect of the convention in those countries.

Article XII - The Convention becomes effective in member countries on the 90th day after the ratification documents are filed with the United Nations.

Article XIII - Member countries can denounce their ratification of the Convention in writing to the Secretary-General of the United Nations, but the denunciation is not effective until one year after receipt of the notification by the United Nations. If the country's territories are also included in the denouncement, the Convention ceases to become effective in the territories one year after receipt of the notice by the United Nations. Any award rendered during the one-year period after notification is considered enforceable.

Article XIV - A country cannot enforce the convention against other countries unless it agrees to be bound by the convention.

Article XV - Official notifications to the countries as to new ratifications, accessions, declarations, notification, effective dates and denunciations will be completed through the Secretary-General of the United Nations.

Article XVI - The Convention was translated into: Chinese, English, French, Russian and Spanish before it was deposited in the archives of the United Nations.

The first countries to ratify the New York Convention were Egypt, France, Israel, Morocco, Syria and Thailand. Russia ratified the New York Convention in 1960, the United States ratified it in 1970 and the United Kingdom ratified it in 1975. The most recent ratification of the New York Convention came from Pakistan in 2005.[80]

Forty years after its ratification, the United Nations held a colloquium on its experience and prospects with the convention.[81] The New York Convention is much more progressive than its predecessors, the 1923 Geneva Protocol and the 1927 Geneva Convention, but some nations have apparently treated it as too progressive.[82] Procedures are left to national arbitration laws, and this problem could be remedied by uniform procedural rules of enforcement.[83] There is also a need for consistency among nations in the application and interpretation of the convention.[84] Some countries like Egypt have integrated the convention into their commercial laws, while others like Thailand have used their own laws of enforcement using the convention as guidance.[85] Some nations such as Canada do not consider the convention as controlling over its own laws.[86]

80. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517. The New York Convention of 1958 was the United Nations attempt to develop an international treaty for the enforcement of international arbitration awards that would check the rescission of such awards by domestic courts. *Id.* at art. 1.

81. *Enforcing Arbitration Awards Under the New York Convention.* Professional papers presented at United Nations 1958 colloquium.

82. Pieter Sanders, *The Making of the Convention*, UN Publication No. E.99 V.2 (June 10, 1998).

83. *Id.*

84. *Id.*

85. *Id.* at 26-29. (comments from the Egyptian officials at the colloquium).

86. *Id.* at 28. (comment from Canadian judge Michael Goldie at the colloquium).

XII. PITFALLS AND POTENTIAL PROBLEMS

One of the complaints against arbitration in general has been that it can be a trapdoor for the less sophisticated party.[87] The party who is at an educational disadvantage in forming the agreement is often the party who stands the least to gain and the most to lose from an arbitration agreement.[88] The idea of self-determination so present in mediation, is giving way to the economics of business in arbitration.[89] Unlike courts, where judgments are often challenged on appeal, arbitration awards are rarely appealable.[90] The Geneva Convention of 1927 required foreign arbitral awards to be confirmed in their country of origin before they were considered enforceable elsewhere in the world, but the New York Convention eliminated that requirement.[91] If the chances for a rescission or adjustment of the arbitration award are virtually eliminated, the parties are in a position to enforce the award internationally with very little effort required. Therefore, if it is next to impossible to prevent international contractual arbitration or prevent the enforcement of international arbitration awards, it follows that parties must be careful agreeing to terms when making the contract.

One of the major differences between the comfort zone created by the United States arbitration paradigm and the arbitration climate in Europe is that the Europeans have a much more restrictive view of the role of courts in the arbitration process.[92] The federal court decisions in the United States have created the presumption in domestic arbitration that courts can be called upon to decide issues of party intent, the validity of the agreement to arbitrate and the arbitrability of the dispute.[93] European courts, on the other hand, have stayed out of such controversies by allowing the arbitrators to decide these issues.[94] In France, for example, the courts decline to get involved in cases where arbitral panels have been

87. Christopher Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. ILL. L. REV. 695, 706 (2001).

88. Colin P. Johnson, *Has Arbitration Become a Wolf in Sheep's Clothing? A Comment Exploring the Incompatibility Between Pre-Dispute Mandatory Binding Arbitration Agreements in Employment Contracts and Statutorily Created Rights*, 23 HAMLINE L. REV. 511, 530-31 (2000).

89. *Id.*

90. *Id.* at 531.

91. Yusuf Ahmed Alghanin & Sons v. Toys "R" Us, Inc., 126 F.3d 15, 18 (2d Cir. 1997), *cert. denied*, 522 U.S. 1111 (1998).

92. John J. Barcelo III, *International Commercial Arbitration: Who Decides the Arbitrators Jurisdiction? Separability and Competence-Competence in Transnational Perspective*, 36 VAND. J. TRANSNAT'L L. 1115 (2003). The question of who decides jurisdiction can be found in three separate stages of transnational arbitration cases. *Id.* at 1118. First, the litigation itself may revolve around whether a court or an arbitrator should hear the dispute. *Id.* Second, some cases require arbitrators to decide whether they will hear the case or decline to hear it, and thereby allowing the matter to proceed in litigation. *Id.* Finally, courts are often requested by the losing party to review the award itself. *Id.* In stage one, a decision must be made on whether the parties agreement requires them to arbitrate. *Id.* at 1118-19. Separability, legality and other contractual issues must be considered at this stage. *Id.* At stage two the competence-competence application determines whether the courts or the arbitrators should decline to hear the matter. *Id.* at 1118. The French courts decline jurisdiction once an arbitral forum has agreed to hear a matter. *Id.* at 1124-25. In the United States courts may or may not hear the arbitrability issue, even if arbitrators have accepted a case. *Id.* at 1132. The parties may request the courts to review whether an arbitration agreement is valid before proceeding. *Id.* European countries generally allow the arbitrators to decide this issue. *Id.* at 1125-31. In order for U.S. to change, there needs to be legislation overhauling the FAA. *Id.* at 1136.

93. *Id.* at 1121.

94. *Id.* at 1125-31.

formed.[95] The FAA is silent on whether courts or arbitrators should decide these issues.[96] Therefore, until the FAA is amended to cover these matters, the American courts will likely continue deciding these issues.[97]

One of the major criticisms of American lawyers in European arbitral forums is their view of litigation.[98] This view probably arose due to two cases, *Prima Paint v. Flood and Conklin*[99]and *First Options v. Kaplan.*[100] *Prima Paint* created a separability standard to enable courts to examine the validity of the arbitration clause in the contract.[101] *First Options* held that courts determine the arbitrability of a dispute.[102] These two cases have created a gap between European law and American law on these issues.[103] The European courts decline involvement once a panel of arbitrators has been formed, but the American courts reserve the right to decide whether arbitrators should become involved.[104] Neither the FAA nor the New York Convention deal with these issues, creating a potential trap for American attorneys arbitrating in Europe under European law.[105] The assumptions made by American lawyers that "unfair" agreements to arbitrate should be submitted to the courts for a legal determination of their validity has little merit in international arbitration.[106]

Although arbitration in the United States has been sold to the legal community as a time saving and cost saving process, the same cannot generally be said for international arbitration.[107] International arbitration typically lasts over four

95. *Id.* at 1125.
96. *Id.* at 1134-35.
97. *Id.* at 1135.
98. *See* Erica Stein Interview, *supra* Section VII.
99. Prima Paint Corp. v. Flood and Conklin Mfg. Co., 388 U.S. 395 (1967).
100. First Options of Chicago v. Kaplan, 514 U.S. 938 (1995).
101. *Prima Paint*, 388 U.S. at 395.
102. *First Options*, 514 U.S. at 938.
103. Adriana Dulic, *First Options of Chicago, Inc. v. Kaplan and the Kompeteny-Kompeteny Principle*, 2 PEPP. DISP. RESOL. L. J. 77 (2002). Under the FAA the Kompeteny-Kompeteny principle authorizes the decision on jurisdiction of the arbitrators to hear the case to be made by the courts, instead of requesting arbitrators to sort things out on jurisdiction according to *First Options*. *Id.* at 79-80. The contract must be clear that the parties intended to submit disputes to arbitration. *Id.* at 80. If it is unclear, then the courts decide arbitrability. *Id.* The FAA does not cover the specifics of arbitrability, and cases like *First Options* interpret the principles of arbitrability. *Id.* at 79-80. Perhaps a new FAA, similar to European arbitration laws, should be considered so as to avoid the confusion of parties over who decides jurisdiction. *Id.* at 96.
104. *Id.* at 79-80.
105. Robert H. Smit, *Separability and Competence-Competence in International Arbitration: Ex Nihilo Nihil Fit? Or can Something Indeed Come From Nothing?*, 13 AM. REV. INT'L ARB. 19, 23-27 (2002). The separability doctrine from *Prima Paint* demonstrates the necessity of sustaining the intent of the parties to arbitrate all disputes between them. *Id.* at 22-24. Therefore, arbitration clauses should be separable from the container contract in order to sustain that intent. *Id.* at 24. The related principle of competence-competence allows arbitrators to decide challenges to their authority, rather than removing the matter to court. *Id.* at 25. Neither the FAA nor the New York Convention deal with separability or competence-competence. *Id.* at 23-27. International arbitration's use of separability and competence-competence are usually sustained in foreign courts when a determination is made that there are arbitrable issues. *Id.* at 30.
106. *Id.*
107. G. Hans Sperling, *New London Arbitration Rules: Paradise Regained?*, 21 MAR. LAW 557, 558-60 (1997). Arbitration's original selling points were speed and cost savings. *Id.* at 557-58. The legalistic approach to arbitration has made the process slow and expensive. *Id.* 558-60. International arbitration usually lasts from one to six years, with a typical arbitration lasting a little over four years, which negates the time savings concept. *Id.* Significant cost increases have made international arbitra-

years and costs a substantial amount of money.[108] Although there has been some movement toward streamlining the international arbitration process in England, the other European arbitral forums have not followed suit.[109] This trapdoor for American lawyers in international arbitration may lead to underestimating fees and expenses, and giving clients an incorrect estimate of the time this process will require. Underestimating fees, costs, and time involvement can lead to significant relational problems between the lawyer and the client.

The charge that international arbitration has to some extent been "Americanized" to make it more friendly to American lawyers seems to be a stretch.[110] There has always been and there continues to be a problem when lawyers from common law countries engage in arbitration with lawyers from civil code countries.[111] American lawyers attempts to "legalize" international arbitration have failed.[112] The argument advanced by some that AAA's increasing involvement in international arbitration translates into a more favorable view of the American approach to arbitration has been countered by at least two developments.[113] While it is true that international arbitration volume has picked up at AAA in recent years, it is also true that the LCIA and the ICC have also witnessed an increase in their caseloads.[114] Even though AAA has the largest number of cases, the more

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tion very expensive. *Id.* The London Maritime Arbitrators' Association (LMAA) has streamlined its rules to lower costs and lessen the time involved in international arbitration cases, especially in smaller disputes. *Id.* at 561-63. These rules provide a fast and low cost process for the resolution of disputes in arbitration. *Id.* at 562-63.

108. *Id.* at 558-60.

109. *Id.*

110. Elena V. Helmer, *International Commercial Arbitration: "Americanized," "Civilized" or "Harmonized."* 19 OHIO ST. J. ON DISP. RESOL. 35, 35-36 (2003). The impact of American lawyers involved in international arbitration has at times been positive, but has also highlighted the differences between common law and civil law. *Id.* Americans have been accused of trying to make international arbitration more like civil court litigation. *Id.* at 36. The attempt to "legalize" international arbitration has been mitigated to some extent by the presence of European and other cultures' influence on the process. *Id.* at 39-40. Although AAA has a large caseload, other international arbitration forums such as LCIA and ICC have also reported a dramatic increase in caseloads. *Id.* at 38. The most significant international arbitrations still take place outside the United States. *Id.* at 42. The reason given for this is the complicated United States law system, which seems illogical to lawyers from civil code countries. *Id.* The fear of interference by U.S. Courts has led to an image of non-neutrality. *Id.* at 44. The major developments in international arbitration over the past century have occurred in Europe. *Id.* at 45. The American lawyers became seriously involved in international arbitration in the 1970s. *Id.* These American lawyers endeavored to turn the international arbitration process into off-shore litigation. *Id.* at 45-46. Thus, the charge of American lawyers trying to Americanize the international process may have merit. Evidence and discovery in arbitration reveals the major gap between American lawyers and everyone else. *Id.* at 50. Interviewing and cross-examination of witnesses has always been a part of American litigation, but has not become accepted practice in international arbitration where discovery is usually limited to evidentiary document production. *Id.* at 50-51. International arbitration is much more document oriented than American arbitration. *Id.* at 50. International arbitrators rarely allow cross-examination of witnesses in depositions or in hearings. *Id.* at 52. Witness statements and expert reports are admitted as written. *Id.* at 53. Pre-hearing conferences are common in American arbitration but were rare in international arbitration until recently. *Id.* at 60. Pre-hearing conferences in international arbitration are now common. *Id.* at 61. The Americanization of international arbitration has not occurred yet, and if it does it will decrease the use of the process based on claims of U.S. nationalism. *Id.* at 67.

111. *Id.* at 37.

112. *Id.*

113. *Id.* at 40.

114. *Id.* at 38.

significant cases are decided in Europe, primarily due to the lack of trust by the international community in American courts interference with the arbitration process.[115] The argument has been advanced that the reason Europeans have not come around to the American way of thinking is that Americans are latecomers to the international process.[116] However, the United States has been involved in international arbitration since the Jay Treaty of 1794, which included an arbitration process to settle claims between American citizens and British citizens following the American Revolutionary War.[117] The Jay Treaty served as a foundation for international arbitration.[118] Thus, the United States has been involved in international arbitration since its inception.[119]

The basic differences between European law and United States law has caused problems for American lawyers in European arbitral forums, but so have procedural differences in the way arbitrations are conducted.[120] American lawyers are accustomed to the AAA selection process and are less familiar with the often-used tripartite selection process used in Europe. The general rule of the European process requires that all three arbitrators be neutral, whereas the American tripartite selection process presumes each side will name an arbitrator favorable to their side and only the third arbitrators will be neutral.[121] The ABA revised its code of ethics for arbitrators in 2004, to require all three arbitrators to be neutral. AAA also changed its commercial rules to require all three arbitrators to be neutral.[122]

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115. *Id.* at 42.

116. Roger P. Alford, *The American Influence on International Arbitration*, 19 OHIO ST. J. ON DISP. RESOL. 69, 70 (2003). The United States has exerted some influence on international arbitration since the late 1800s in the formation of the Permanent Court of Arbitration at The Hague. *Id.* at 75. International arbitration as a concept began with the Jay Treaty of 1794, which arbitrated claims between British and American citizens following the American Revolutionary War. *Id.* at 72. The Jay Treaty pointed out the weaknesses of the court system in addressing issues arising between citizens of different countries. *Id.* at 72-73. It is a mistaken assumption to believe that the United States has only recently become involved in international arbitration. *Id.* at 70-71. The United States has been involved in nearly every level of international arbitration for years. *Id.* at 77.

117. *Id.* at 72.

118. *Id.* at 72-73.

119. *Id.* at 77.

120. John M. Townsend, *Clash and Convergence on Ethical Issues in International Arbitration*, 36 U. MIAMI INTER-AM. L. REV. 1, 1-2, 15 (2004). American lawyers practice in a culture where the classic selection process for tripartite arbitration is to allow each party to select an arbitrator who is more inclined to decide the case in favor of the party who selected them. *Id.* at 1. Those arbitrators select a third arbitrator who is neutral to complete the panel. *Id.* International arbitration forums assume that even party selected arbitrators are neutrals. *Id.* Other procedural differences that stem from the basic differences between English-based common law procedural devices and civil code process considerations also create problems for American lawyers who presume the English-based procedures will apply. *Id.* at 2. In order to resolve some of these problems between English speaking lawyers and non-English speaking lawyers the International Bar Association developed a set of rules that to some extent bridges the gap between common law and civil law presumptions. *Id.* at 3. Several of these rules address the differences between civil law and common law regarding witnesses. *Id.* at 4-5. In 2004, the ABA revised its Code of Ethics for Arbitrators from presuming the party appointed arbitrators would be non-neutral to a presumption that all the arbitrators would be neutral. *Id.* at 7-8. AAA has also changed its commercial rules to reflect the international presumption that all arbitrators should be neutral. *Id.* at 9. Neither the new ABA code nor the new AAA commercial rules allow ex parte contact with the arbitrators by either party. *Id.* at 10-11. Both the AAA rules and the new code of ethics by the ABA require an arbitrator to disclose any potential conflicts of interest and prior dealings with either party. *Id.* at 12-13.

121. *Id.* at 1.

122. *Id.* at 7-8.

American lawyers are accustomed to discovery in arbitration and the cross-examination of witnesses, but in international arbitration discovery is usually limited to exchange of evidentiary documents.[123] Witness statements are used in international arbitration rather than cross-examination of live witnesses.[124]

American lawyers must realize they are dealing with laws and procedures in international arbitration that are substantially different from the Americanized version of this process. Failure to do homework in international arbitration can lead to disastrous consequences to American lawyers who assume the Americanized version is the correct version to follow.

XIII. CONCLUSION

International arbitrations held in Europe employ the arbitral forum's set of rules or the UNCITRAL rules, depending upon the forum selected. These rules are not "your father's comfortable old four door sedan" court rules. The international arbitration rules do not track the civil procedure rules American lawyers learn in law school. American lawyers have always been proficient in litigation using the federal rules of civil procedure applied through an adversarial system. Such an approach does not work in the arbitral forums of Europe, where the rules are much less adversarial and non-combative. Most United States corporate lawyers do quite well handling arbitrations for their clients in Europe, because they study the rules of the forum before they appear in it. However, there are some American attorneys who are so steeped in litigation practice that they endeavor to understand international arbitration by comparing it to the civil litigation process. In today's global economy and in this age of information technology, the old assumption by some that the rest of the world should do things the American way is pure fantasy. International arbitration has not been Americanized. There is adequate information available on the World Wide Web to educate even the most obstinate lawyer in the rules, procedures and terminology of foreign arbitral forums. If an American lawyer desires to represent the client zealously and within the bounds of the law, it is incumbent upon that lawyer to do the preparation necessary to handle the case in the forum selected.

123. *See* Helmer, *supra* note 110, at 50-51.
124. *Id.* at 4-5.