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COMMENT

OUT WITH THE OLD, IN WITH THE NEW: THE MINI-TRIAL IS THE NEW WAVE IN RESOLVING INTERNATIONAL DISPUTES

I. INTRODUCTION

Historically, merchants used arbitration to settle commercial disputes among themselves.¹ However, the early American courts viewed arbitration unfavorably, often refusing to acknowledge its validity.² During the 1970's, however, the courts' attitude toward arbitration shifted. The United States Supreme Court decision, *The Breman v. Zapata Off-Shore Co.*,³ ushered in an era of growing acceptance toward arbitration agreements. The change in the Court's attitude has allowed businesses to provide for arbitration agreements in their contracts without fearing that their desire to avoid litigation would be thwarted.

With the rise in international trade has come a growing number of disputes between international parties. An evolving global economy necessitates the need for dispute settlement techniques which transcend cross-cultural and national barriers. However, businesses engaged in international commerce have had to overcome yet another obstacle in American courts. When faced with arbitration agreements in international settings, American courts traditionally displayed an attitude of parochialism: a narrow interpretation of which country's law should control.

Fortunately, the courts have begun moving away from this parochial attitude, thereby giving more deference to the parties' intentions in international arbitration agreements.⁴ However, businesses and corporations have begun experimenting with an alternative which is less time-consuming and less costly than arbitration. This alternative is the mini-trial.

This Comment will first focus on arbitration, the most widely used alternative dispute resolution (ADR) technique in the international business setting. The

1. Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 855 (1961).

2. *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978 (2d Cir. 1942).

3. 407 U.S. 1 (1972).

history of commercial arbitration in the international setting will be briefly discussed, as will judicial recognition of the importance of arbitration in the international setting. The advantages and disadvantages of commercial arbitration will also be discussed. Second, this Comment will discuss the mini-trial, an alternative procedure which allows international disputants the opportunity to resolve disputes without being faced with parochialism and other problems. The Comment will explore the use of mini-trials to eliminate parochialism and other problems inherent in arbitration and to bridge the cultural gap between international disputants.

II. ARBITRATION OF INTERNATIONAL COMMERCIAL DISPUTES

A. History of Commercial Arbitration

The history of commercial arbitration dates back to at least the thirteenth century in England, when disputes between merchants were settled in courts staffed by other merchants.⁵ The concept of commercial arbitration was carried over to the American colonies and was used by the colonists from the outset.⁶ Trade associations and the courts used arbitration in the early twentieth century to resolve domestic business disputes in the United States.⁷

Three major institutional settings can be defined in which arbitration developed as a mechanism for settling commercial disputes.⁸ The first arose when two persons agreed in a contract to settle disputes arising under the contract by submitting the dispute to arbitration.⁹ In this setting, "the making of all arrangements including the procedures for arbitration, rests entirely with the parties concerned."¹⁰

The second setting in which arbitration developed was in the trade associations.¹¹ "The group establishes its own arbitration machinery for the settlement of disputes among its members, either on a voluntary or compulsory basis, and sometimes makes it available to non-members doing business in the particular trade."¹²

5. Mentschikoff, *supra* note 1, at 854.

6. *Id.* at 855. The New York Chamber of Commerce was founded in 1768 to arbitrate disputes among its members, among other things. *Id.*

7. *Id.*

8. *Id.* at 848.

9. *Id.* at 849.

10. *Id.* Mentschikoff identifies some of the advantages, real and perceived, that motivate the individuals in this situation. These include "(1) a desire for privacy . . . [,] (2) the availability of expert deciders [,] (3) the avoidance of possible legal difficulties . . . [,] and (4) the idea that arbitration is faster and less expensive than [litigation]". *Id.*

11. *Id.*

12. *Id.*

Administrative groups, including the American Arbitration Association and chamber of commerce groups, form the third setting for commercial arbitration.¹³ These groups are also used by trade associations which do not handle a large enough volume of cases to have their own arbitration machinery.¹⁴

The use of arbitration in resolving local disputes between merchants and trade associations carried over into the international arena.¹⁵ Arbitration soon emerged as the "premier remedy for disputes arising from international contracts."¹⁶

In modern times the use of arbitration has expanded rapidly in resolving commercial disputes in international commerce.¹⁷ Business people realize that arbitration holds a very attractive advantage over litigation.¹⁸ This advantage is the ability to circumvent the problems inherent in litigation. Problems in the litigation setting include: (1) diversion of energies to non-central issues; (2) lack of management involvement; (3) combative and formalistic environment; (4) delays due to court congestion; and (5) costs of litigation.¹⁹ These problems, inherent in domestic business litigation, are also evident in international disputes.

One author, however, argues that arbitration is not less expensive than litigation in the international business arena.²⁰ In fact, he argues that cost is not the main motivating factor in the choice to arbitrate.²¹ He states that a main motivation behind arbitration of international business disputes is fear of submitting the dispute to a court in a foreign land.²² Examining decisions of American courts strengthens his theory.²³ Until recently, United States court decisions reflected a parochial attitude that U.S. law should govern if one of the disputants was an American citizen or business.²⁴

13. *Id.*

14. *Id.*

15. Carbonneau, *Arbitral Adjudication: A Comparative Assessment of its Remedial and Substantive Status in Transnational Commerce*, 19 TEX. INT'L L.J. 33 (1984).

16. *Id.* at 61.

17. Allison, *Arbitration of Private Antitrust Claims in International Trade: A Study in the Subordination of National Interests to the Demands of a World Market*, 18 N.Y.U. J. INT'L L. & POL'Y 361, 378 n.78 (1985/86).

18. Perlman & Nelson, *New Approaches to the Resolution of International Commercial Disputes*, 17 INT'L LAW. 215, 216-18 (1983).

19. *Id.*

20. Allison, *supra* note 17, at 378.

21. *Id.* at 379.

22. *Id.* Given the past history of United States court decisions reflecting a parochial attitude toward international disputes, it is not surprising to think that U.S. business persons would feel uncomfortable having their dispute decided by a foreign court. *Id.*

23. See, e.g., *Bremen*, 407 U.S. 1 (discussing prior decisions in United States Courts holding arbitration clauses invalid.); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) *reh'g denied*, 419 U.S. 885 (1974) (discussing the Wilko non-ouster of jurisdiction rule).

24. See *infra* note 68 and accompanying text.

B. Judicial Recognition of Parochialism in American Courts

Historically, American courts did not look favorably on agreements to arbitrate future disputes.²⁵ The main rationale in the courts' decisions was that "disputing parties could not be permitted to 'oust' the courts of their jurisdiction" by having an agreement to arbitrate a future dispute in another jurisdiction.²⁶ The courts distinguished between enforcing agreements to arbitrate future disputes and enforcing arbitration awards; the latter of which they were more likely to uphold.²⁷ The courts' hostility toward enforcing arbitration agreements applied not only to domestic situations, but to international commercial agreements as well.²⁸

As the number of cases on court dockets increased, however, businesses began to look to arbitration to resolve their commercial disputes.²⁹ "The initial impetus for modifying the negative American judicial position on arbitration came from state statutes, primarily, the New York Arbitration Act of 1920."³⁰

In 1925, the Federal Arbitration Act was passed.³¹ This Act was designed to change the courts' attitude toward arbitration.³² "The Act's promulgation established a statutory scheme that implements the federal policy of encouraging arbitration as an alternative that is less costly and less complicated than litigation."³³ The Act allows parties to enforce agreements to arbitrate in a United States district court, and "requires courts to stay litigation that is commenced in disregard of arbitration agreements."³⁴

Prior to the enactment of these statutes the courts were unwilling to enforce agreements to arbitrate future disputes, or to stay suits brought in breach of the agreement.³⁵ Even after the passage of these statutes, the courts' attitude continued to be marked by problems when dealing with arbitration in the international area.³⁶

25. Kanowitz, *Alternative Dispute Resolution and the Public Interest: The Arbitration Experience*, 38 HASTINGS L.J. 239, 251-52 (1986/87). For a complete examination of this hostility, see *Kulukundis*, 126 F.2d 978.

26. Kanowitz, *supra* note 25, at 252. See also Allison, *supra* note 17, at 404 n.239.

27. Kanowitz, *supra* note 25, at 253.

28. An example of this is the First Circuit's decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 723 F.2d 155 (1st Cir. 1983).

29. Comment, *Enforcing International Commercial Arbitration Agreements—Post-Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 36 AM. U.L. REV. 57, 62 (1986/87).

30. Carbonneau, *supra* note 15, at 45. "Unlike prior state statutes, which only recognized submissions as enforceable, the New York Act provided that the agreement to arbitrate future disputes was binding and enforceable according to the usual rules of contracts." *Id.* at 45 n.46.

31. Comment, *supra* note 29, at 62. The current version of the act is reported at 9 U.S.C. §§ 1-14 (1982).

32. Comment, *supra* note 29, at 62.

33. *Id.*

34. *Id.* at 63.

35. Kanowitz, *supra* note 25, at 252.

36. See *supra* notes 20-24 and accompanying text.

The judiciary was not the only branch of the government hostile to agreements to arbitrate international commercial disputes. The executive and legislative branches did not seek arbitration of international disputes either.³⁷ "Prior to 1970, the United States was not a party to any international agreement on arbitration."³⁸ This was probably the result of the parochial attitude that the United States did not need to deal with other countries on their terms, but every country should adhere to the laws of the United States when dealing with businesses in the United States.³⁹ A parochial attitude toward arbitration cost the United States revenues that would have been generated by advancing international arbitration.⁴⁰ The refusal of the United States government to recognize the importance of arbitration agreements in furthering international trade also hindered American business interests, "which wanted to participate in and perhaps guide international trade."⁴¹

The United States Supreme Court recognized this problem in its 1972 decision, *The Bremen v. Zapata Off-Shore Co.*⁴² This case involved an arbitration agreement contained in a contract between German and American corporations.⁴³ The agreement provided that any dispute would be litigated in the London Court of Justice.⁴⁴ Zapata filed a lawsuit in a U.S. federal district court and The Bremen sought to dismiss the case or stay the case until it could be submitted to the London Court of Justice under the forum selection clause contained in the agreement.⁴⁵ The district court and court of appeals denied The Bremen's motions.⁴⁶ The courts followed authority from earlier cases which reasoned that such forum selection clauses should not be enforced because their effect is to "oust the jurisdiction of the courts."⁴⁷ The *Bremen* Court shifted the burden of proof from the proponent of the forum selection clause to the opponent of the forum selection clause "to show that enforcement of the clause is invalid for such reasons as fraud or overreaching."⁴⁸ The Court recognized that the United States could not insist on a "parochial concept" if American business interests were to be furthered in international trade.⁴⁹ The Court further stated that, "we cannot have trade and commerce in world markets and international

37. Carbonneau, *supra* note 15, at 62.

38. *Id.* at 65.

39. *See, e.g., Bremen*, 407 U.S. at 9.

40. Carbonneau, *supra* note 15, at 62.

41. *Id.* at 66 n.134.

42. 407 U.S. 1.

43. *Id.* at 2.

44. *Id.*

45. *Id.* at 3-4.

46. *Id.* at 6-7.

47. *Id.* at 6.

48. *Id.* at 15.

49. *Id.* at 9.

waters exclusively on our terms, governed by our laws, and resolved in our courts."⁵⁰

In 1974, the Supreme Court handed down the most important decision concerning international arbitration to date: *Scherk v. Alberto-Culver Co.*⁵¹ This case involved a sales contract between a U.S. corporation and a German citizen.⁵² Alberto-Culver filed suit in a U.S. federal district court and Scherk sought to invoke the arbitration clause contained in the contract.⁵³ The district court and court of appeals refused to enforce the arbitration clause under the "non-ouster of jurisdiction rule" the Supreme Court had announced over twenty years earlier in *Wilko v. Swan*.⁵⁴

When *Scherk* reached the Supreme Court, however, the Court followed its reasoning in *Bremen* and expanded that reasoning further. The *Scherk* Court recognized that the contract in question was a truly international one and should not be subjected to parochialism by American courts.⁵⁵ Consequently, "a contractual provision specifying in advance the forum to be employed and the law to be applied is an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction."⁵⁶ The Court thus recognized the importance of arbitration agreements in international business transactions as providing predictability and orderliness.

The *Scherk* Court failed to recognize that the presence and ultimate enforcement of arbitral clauses does not necessarily insure predictability and orderliness, especially if the parties to the agreement belong to different cultural backgrounds.⁵⁷ This is especially true in U.S.-Japanese disputes.⁵⁸ The Japanese legal mentality differs from that expressed in the American legal system in that the Japanese prefer dispute resolution over litigation.⁵⁹ The preference for dispute resolution stems from the Japanese culture, in that the Japanese stress

50. *Id.*

51. 417 U.S. 506.

52. *Id.*

53. *Id.* at 509.

54. 346 U.S. 427 (1953). *Wilko* demonstrated the Court's early tendency to back away from enforcing arbitration agreements. *Id.*

55. *Scherk*, 417 U.S. at 516. "A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages." *Id.*

56. *Id.*

57. Even though the court in *Scherk* states that "such a provision obviates the danger that a dispute under the agreement might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved," *id.* at 416, it fails to consider the differences and problems inherent in the international setting caused by differing cultural attitudes. The court seems to be more concerned with obviating problems for the tribunal, rather than the disputants.

58. *Id.*

59. Kanowitz, *Using the Mini-Trial in U.S.-Japan Business Disputes*, 39 MERCER L. REV 641, 643 (1988), citing D.F. HENDERSON, *CONCILIATION AND JAPANESE LAW: TOKUGAWA AND MODERN* 191 (1966).

preserving on-going business relationships and settling disputes in a mutually beneficial way where there is no winner and no loser.⁶⁰

*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*⁶¹ is the Court's most recent attempt to eliminate the United States' prior attitude toward international arbitration. *Mitsubishi* involved a distribution agreement between Soler, a Puerto Rican Corporation, Mitsubishi, a Japanese corporation, and the U.S. corporation Chrysler, which were involved in a joint business venture.⁶² The distribution agreement contained an arbitration clause stating that all disputes arising from the agreement were to be resolved by arbitration in Japan.⁶³ Due to financial trouble, Soler attempted to get Mitsubishi to divert some of the cars it had ordered to other dealers, but Mitsubishi refused.⁶⁴ Negotiation efforts failed and Mitsubishi brought suit in a federal district court.⁶⁵ The district court determined "that the international character of the Mitsubishi-Soler undertaking required enforcement of the agreement."⁶⁶

The Court of Appeals for the First Circuit, however, reversed the district court's decision.⁶⁷ One of the court's reasons for its decision was that regardless of whether other nations agree with U.S. attitudes toward competition, those attitudes are sufficiently well known and thus could scarcely be characterized "as 'parochial' in the sense of being petty provincialisms."⁶⁸ The attitude reflected by this court of appeals exemplifies the type of provincial attitude that American courts have had toward arbitration of international commercial disputes. The Supreme Court recognized this and reversed the First Circuit, following the same line of reasoning it used in *Bremen* and *Scherk* in holding the arbitration clause valid.⁶⁹ The Court stated that "concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement."⁷⁰

III. ADVANTAGES AND DISADVANTAGES OF COMMERCIAL ARBITRATION

Most commentators see arbitration as the most effective alternative to litigation in resolving commercial disputes.⁷¹ The most often-cited advantages

60. Kanowitz, *supra* note 59, at 643.

61. 473 U.S. 614.

62. *Id.*

63. *Id.* at 617.

64. *Id.*

65. *Id.* at 618.

66. *Id.* at 621.

67. *Id.* at 614-15.

68. *Mitsubishi*, 723 F.2d at 163.

69. *Mitsubishi*, 473 U.S. at 629.

70. *Id.*

71. See Perlman & Nelson, *supra* note 18.

are expedition, expertise, and economy.⁷² Arbitration generally takes less time than litigation to resolve a dispute.⁷³ Further, the arbitration also usually involves someone who is an expert in the field involved in the particular dispute.⁷⁴ The arbitrator will be able to make "practical and expert judgments"⁷⁵ without the parties' having to resort to costly expert witnesses to provide testimony.⁷⁶ Most lawyers also believe that arbitration is generally less expensive than litigation.⁷⁷ Two other issues that tend to make arbitration more attractive than litigation are the limits placed on discovery in arbitration, and the arbitration award itself.⁷⁸ In placing limits on discovery, arbitration seeks to reduce the time it takes to resolve the issue and therefore reduce costs.⁷⁹ Additionally, in arbitration, the arbitrator is not limited to a finding of damages, but may also determine the most appropriate form of relief.⁸⁰

While these advantages may be present in domestic commercial arbitration, at least one author states that they are reversed in the international setting.⁸¹ "Delays increase because of distance and difficulties of communication and language; expense is greater because of administration and arbitrator's fees; costs to the parties are higher because of the need for added counsel, translators, interpreters, and transportation."⁸² Differences in foreign procedural systems also add to the complexity of the procedure.⁸³ Much of the added expense in international commercial arbitration involves the arbitrators themselves.⁸⁴

72. Loevinger, *Antitrust Issues as Subjects of Arbitration*, 44 N.Y.U. L. REV. 1085, 1089 (1969).

73. *Id.* According to one proponent of arbitration, the average AAA arbitration takes four to five months, while another states that most arbitrations take less than six months, which is much less than time than litigation takes. Meyerowitz, *The Arbitration Alternative*, 71 A.B.A. J. 78, 80 (Feb. 1985). See also Hoellering, *The Mini-Trial*, ARB. J., Dec. 1982, 48, 50.

74. Loevinger, *supra* note 72, at 1089.

75. *Id.*

76. Meyerowitz, *supra* note 73, at 79.

77. *Id.* "The relative informality and flexibility of the arbitral process, together with the advantages of expedition and expertise, usually provide a much more economical method of reaching a final disposition of differences than conventional litigation." *Id.*

78. *Id.* "AAA Rules do not provide for pre-trial discovery, for example." *Id.*

79. *Id.* at 80.

80. *Id.*

81. De Vries, *International Commercial Arbitration: A Contractual Substitute for National Courts*, 57 TUL. L. REV. 42, 61 and n.82 (1982/83).

Lawyers, on the other hand, are often rightly skeptical about the apparent advantages of arbitration. They know that their clients will often be disillusioned in the event. Arbitral tribunals have to be paid, whereas court fees are often negligible. In important cases, three arbitrators, or two and an umpire, are usually preferred to a single arbitrator, and this greatly adds to the costs and complexities. If the arbitrators are busy men, as they usually are, arbitration can be much more protracted than litigation, certainly in comparison with our court system of an oral hearing which is generally continuous.

Kerr, *International Arbitration v. Litigation*, 1980 J. BUS. L. 164-65.

82. De Vries, *supra* note 81, at 61.

83. *Id.*

84. Kerr, *supra* note 81, at 164.

Usually, those persons chosen to be arbitrators are experts in their fields and hence can command substantial fees.⁸⁵ Because the arbitrators are experts, they are usually very busy, which gives rise to another problem, scheduling.⁸⁶ Considerable costs can also be incurred in just trying to get the arbitrators to the meeting.⁸⁷

The decisions in *Bremen*, *Scherk*, and *Mitsubishi* have helped to eliminate some of the problems with arbitration in the international setting by addressing the problem of parochialism. The Court in *Mitsubishi* recognized the growing need for a procedure to deal with the problem areas in international commercial arbitration. The *Mitsubishi* Court stated, "As international trade has expanded in recent decades, so too has the use of international arbitration to resolve disputes arising in the course of that trade. The controversies that international arbitral institutions are called upon to resolve have increased in diversity as well as complexity."⁸⁸

IV. THE USE OF THE MINI-TRIAL TO BRIDGE THE CULTURAL GAP AND ELIMINATE PROBLEMS INHERENT IN COMMERCIAL ARBITRATION

The problem of differing legal systems and differing attitudes toward resolution of disputes remains in international arbitration settings. One ADR technique that fits the needs of international disputants better than arbitration is the mini-trial. It provides the disputants a mechanism for resolving the complex cases that are increasingly arising in international commercial disputes.⁸⁹ This ADR technique also allows disputants from different countries and cultures to resolve their disputes without feeling that they have been subjected to a foreign legal system. The mini-trial does this by allowing the disputants to focus on the merits of the dispute instead of dealing with procedural issues which differ from one legal system to another.⁹⁰ Arbitration lacks this feature because in arbitration the decision is "announced by a third party after formal and complete presentation by trial lawyers for each side, with little or no participation by the clients."⁹¹ Use of the mini-trial can also eliminate some of the problems inherent in

85. *Id.* at 176.

86. *Id.* The scheduling problem can obviously lead to delays in getting the arbitration hearing held.

87. *Id.* "This may involve the parties in considerable air fares and hotel expenses on numerous occasions." *Id.*

88. *Mitsubishi*, 473 U.S. at 638.

89. See, e.g., Davis & Omlie, *Mini-Trials: The Courtroom in the Boardroom*, 21 WILLAMETTE L. REV. 531 (1985).

90. Green, *Growth of the Mini-Trials*, LITIGATION, Fall 1982, 12.

91. *Id.*

arbitration in resolving international commercial disputes.⁹² This is especially true with respect to speed and costs.⁹³

A. The Mini-Trial Process

The mini-trial was created in 1977 as a way of settling a complex patent infringement case.⁹⁴ "The mini-trial is a formal presentation of evidence and arguments to representatives of both parties."⁹⁵ It combines "selected characteristics of the adjudicative process with arbitration, mediation, and negotiation."⁹⁶ The lawyers from each side present their best case to the parties in an attempt to let the parties decide if there is a need to litigate the case or if it would be more beneficial to settle out of court.⁹⁷ One feature of the mini-trial which gives it an advantage over arbitration is that the mini-trial promotes settlement, whereas arbitration is more like litigation, where one party always loses.⁹⁸ "To conduct a successful mini-trial it is imperative that each side fully understand its own legal and evidentiary situation in the dispute."⁹⁹ Once the attorneys determine that a mini-trial is the best way to proceed, the next step is to draft a mini-trial agreement.¹⁰⁰ Since the mini-trial is a flexible procedure, this agreement is needed to set the ground rules for the process.¹⁰¹ The mini-trial agreement can differ from dispute to dispute, but certain issues should always be addressed.¹⁰² These include pending litigation, the issues to be discussed, discovery, the neutral advisor, management representatives, exchange of briefs and other documents, and the format to be used to exchange the information.¹⁰³ Once the agreement is drawn up and accepted by both sides, the attorneys must

92. *Id.*

93. See Green, *supra* note 90, at 61.

94. *Id.*

95. Patterson, *Dispute Resolution in a World of Alternatives*, 37 CATH. U.L. REV. 591, 595 (1987/88).

96. Green, *supra* note 90, at 12.

97. Patterson, *supra* note 95, at 595.

98. Green, *supra* note 90, at 13.

Whether or not the mini-trial results in prompt settlement, it is not a waste of time.

The mini-trial will have helped the lawyers prepare for any further litigation. In addition, the mini-trial educates the litigants about the possible consequences of future actions.

Finally, mini-trials do not add significantly to the costs of litigation. Most of the preparatory work has to be done anyway.

Davis & Omlie, *supra* note 89, at 532.

99. W. BRAZIL, *EFFECTIVE APPROACHES TO SETTLEMENT: A HANDBOOK FOR LAWYERS AND JUDGES* 54 (1988).

100. CENTER FOR PUBLIC RESOURCES LEGAL PROGRAM *MINI-TRIAL WORKBOOK* 1, 23 (E. Fine ed. 1985).

101. *Id.*

102. *Id.* at 24.

103. *Id.* at 24-25.

focus their attention on "the core of the dispute and assess the case realistically."¹⁰⁴ If the agreement so provides, the parties can have discovery or exchange pre-hearing briefs prior to the mini-trial.¹⁰⁵ Finally, the attorneys and the business representatives sit down and discuss the important aspects of their case and the mini-trial.¹⁰⁶

Mini-trials are generally conducted by a neutral adviser.¹⁰⁷ The adviser can serve as a mediator during settlement negotiations or can be asked to give a non-binding decision on the case.¹⁰⁸ The most distinctive feature of the mini-trial, and the reason it is such a useful technique when dealing with parties from foreign countries, is that the presentation of the evidence is not made to a person with the authority to issue a binding judgment, but to the parties themselves.¹⁰⁹ The mini-trial "can make use of the skills and knowledge of trained lawyers, while facilitating direct communication between the disputants themselves."¹¹⁰ "Critical to the success of the mini-trial is the presence of corporate officers who possess settlement authority."¹¹¹ The mini-trial "can make use of the skills and knowledge of trained lawyers, while facilitating direct communication between the disputants themselves."¹¹² This was clearly seen in a dispute involving Amoco Oil Company in the early 1980's.¹¹³ The mini-trial procedure devised by Amoco's attorney permitted only the businessmen-disputants to ask questions.¹¹⁴ The lawyers were permitted to suggest questions to the businessmen, but were not permitted to ask questions themselves.¹¹⁵ After the presentation of each side's case, the lawyers left the room and the parties worked out a settlement between themselves.¹¹⁶

Mini-trials are most helpful in cases involving complex factual disputes.¹¹⁷ "Mini-trials succeed by narrowing the dispute, promoting a dialogue on the merits of the case rather than just dollar values, and converting what had grown into a typical lawyers' dispute back into a businessman's problem by removing many of the collateral legal issues in the case."¹¹⁸ By removing the "legal" components of the case, the disputants can focus on the problem itself instead of whatever

104. *Id.* at 26.

105. *Id.* at 27.

106. *Id.*

107. See Green, *supra* note 90, at 12; Patterson, *supra* note 95, at 596.

108. Patterson, *supra* note 95, at 596.

109. *Id.* See also Green, *supra* note 90, at 12.

110. See Kanowitz, *supra* note 59, at 646.

111. *Id.* at 647.

112. *Id.*

113. *Amoco Mini-Trial Settles Six-Way Fracas*, 1 ALTERNATIVES TO THE HIGH COST OF LITIGATION 1 (January 1983).

114. *Id.* at 3.

115. *Id.*

116. *Id.* at 4.

117. *Id.*

118. Green, *supra* note 90, at 12.

adversarial system to which they might be subjected. This is especially important in American-Japanese business disputes because of the Japanese aversion to the American adversarial system.¹¹⁹

B. The Mini-Trial: Solution to the Cultural Gap in Resolving International Business Disputes

Corporations in the United States have begun using the mini-trial to settle complex factual disputes.¹²⁰ The procedures used in mini-trials allow the disputants to resolve the conflict without resorting to time- and money-consuming litigation.¹²¹ The mini-trial could be the vehicle of the future in resolving international business disputes. One context in which the mini-trial could be very helpful in bridging the cultural gap involved in international business disputes is in Japanese-American corporate disputes.¹²²

The Japanese have an aversion to litigation and settle most business disputes informally.¹²³ This is probably because the Japanese place more emphasis on preserving business relationships than on contractual rights between the parties.¹²⁴ Conversely, most American business persons prefer more formal devices to resolve disputes.¹²⁵ The mini-trial allows both sides the opportunity to settle after they have a better idea of the strength of their case, or if the dispute cannot be resolved, to resort to more formal dispute resolving devices.¹²⁶ This feature of the mini-trial "permit[s] the accommodation . . . of both the Japanese preference for non-judicial dispute resolution and the American preference for arbitration or for face to face negotiations within the context of judicial dispute resolution."¹²⁷

There are several problems that arise in the use of mini-trials to resolve Japanese-American business disputes. The first problem is the location of the disputants.¹²⁸ With one side being in Japan and the other in America, the problem of getting both sides in the same place is not a small one. Added to this can be the problems associated with finding a neutral site acceptable to both sides and then getting the neutral adviser there.¹²⁹ The second problem in Japanese-American disputes is the difference in rules for discovery in both countries.¹³⁰ The Japanese system of discovery is much more limited than the American

119. See Kanowitz, *supra* note 59.

120. *Id.* at 645 and n.20.

121. Green, *supra* note 90, at 14.

122. See Kanowitz, *supra* note 59.

123. *Id.* at 643.

124. *Id.*

125. *Id.* at 641.

126. See W. BRAZIL, *supra* note 99, at 57.

127. Kanowitz, *supra* note 59, at 642.

128. *Id.* at 648.

129. *Id.*

130. *Id.* at 648-49.

system, so that mini-trials involving coerced discovery are less attractive to the Japanese than mini-trials occurring voluntarily before the filing of a suit.¹³¹ One way to overcome this problem is for the parties to agree to an informal discovery schedule in a pre-mini-trial contract.¹³²

The same problems present in using mini-trials in resolving Japanese-American business disputes are present in other international business disputes as well. Labeling the dispute an international one almost always involves logistical problems. Unless the countries are in close proximity to one another, getting the disputants together will be a problem. Also, the different legal systems employed in each country will create problems in using mini-trials after suit has been filed, especially in procedural areas. These two problems are not insurmountable, however, and when weighed against the potential benefits a mini-trial can provide, lose much of their significance.

Two examples of these benefits of the mini-trial in the international setting involve German corporations. The first involved a German manufacturer that terminated its U.S. distributor.¹³³ The distributor filed a one million dollar lawsuit under an applicable long arm statute.¹³⁴ However, the lawyer for the distributor decided to try the mini-trial procedure to save time.¹³⁵ After presentations from both sides, and time to discuss their positions, the parties reached a mutually beneficial settlement in fifteen minutes.¹³⁶ The second example also involved termination of a distributor agreement, this time between a Swiss and a German company.¹³⁷ These two corporations settled their dispute by using the Zurich Mini-Trial,¹³⁸ a mini-trial developed and adopted by the Zurich Chamber of Commerce.¹³⁹

C. Advantages of the Mini-Trial Over Arbitration

The most important advantage of the mini-trial over arbitration is probably that mini-trials are always non-binding.¹⁴⁰ This is important because it allows the parties the option to accept the advisor's decision or to litigate. Arbitrations, however, are usually binding and often end with a third party making the final

131. *Id.* at 649.

132. *Id.* See also Green, *Corporate Dispute Management* in THE CPR LEGAL PROGRAM MINI-TRIAL HANDBOOK (1982).

133. *U.S.-German Mini-Trial Settles Distributor's Million Dollar Claim in One Day*, 2 ALTERNATIVES TO THE HIGH COST OF LITIGATION 1 (March 1984).

134. *Id.*

135. *Id.*

136. *Id.* at 7.

137. *Zurich Mini-Trial*, 4 *Alternatives to the High Cost of Litigation* 6 (July 1986).

138. *Id.*

139. See *The Zurich Mini-Trial: A New Option for International Dispute Resolution*, 3 ALTERNATIVES TO THE HIGH COST OF LITIGATION 1 (January 1985).

140. Davis & Omlie, *supra* note 89, at 533.

decision, sometimes with no participation by the businessmen-disputants.¹⁴¹ While arbitration can drag on as long as conventional litigation, mini-trials are usually concluded in one or two days.¹⁴² Furthermore, use of the mini-trial procedure reduces the need to strategically choose the neutral advisor.¹⁴³ Mini-trials are also confidential and informal.¹⁴⁴ "No transcript of the hearing is produced and the rules of evidence and procedure are not enforced."¹⁴⁵ Also, unless the parties agree otherwise, any evidence produced at the mini-trial will not be used in any subsequent litigation if there is no settlement.¹⁴⁶ Finally, since the mini-trial procedure is informal and voluntary, any party may withdraw at any time without damaging its case.¹⁴⁷

V. CONCLUSION

The judicial recognition of the importance of removing parochialism from international business disputes¹⁴⁸ is one factor that has opened the door for ADR. Not only has arbitration been improved by removing parochial arbitral decisions, but corporations are using other ADR techniques as well in an effort to cut the high cost of litigation and to meet the needs of international business disputants in resolving conflicts.¹⁴⁹ The mini-trial is an important ADR technique in the international setting. It provides the disputants the chance to resolve the dispute without spending huge sums of money in the process.¹⁵⁰ It also allows disputants from different cultures the opportunity to resolve the dispute

141. *Id.*

142. *Id.*

143. When [the parties] select an arbitrator, they think they must find one who will be predisposed to their point of view For a mini-trial to work, however, both parties must respect the neutral adviser. The parties should select the best and most respected neutral they can find. There is no point in maneuvering for advantage.

Green, *supra* note 90, at 17.

144. Davis & Omlie, *supra* note 89, at 532.

145. Edelman & Carr, *The Mini-Trial: An Alternative Dispute Resolution Procedure*, 42 ARB. J. 7, 12 (1987).

146. *Id.* at 14.

147. *Id.* at 13.

148. See *Breman*, 407 U.S. 1.

149. See *U.S.-German Mini-Trial Settles Distributor's Million Dollar Claim in One Day*, *supra* note 133; *Zurich Mini-Trial*, *supra* note 137; *The Zurich Mini-Trial: A New Option for International Dispute Resolution*, *supra* note 139.

150. See *The Zurich Mini-Trial: A New Option for International Dispute Resolution*, *supra* note 139.

based on the merits of each side's case without the advantage or disadvantage of one party's legal system. By presenting the case to both sides of the dispute in an informal setting in which legal complexities are not present, the mini-trial bridges the cultural gap between countries and legal systems and allows a more efficient resolution of the dispute.

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