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## Rescuing the International Arbitral Model: Identifying the Problem in Natural Resources Trade and Development

Jacob R. Shaffer  
*West Virginia University College of Law*

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## RESCUING THE INTERNATIONAL ARBITRAL MODEL: IDENTIFYING THE PROBLEM IN NATURAL RESOURCES TRADE AND DEVELOPMENT

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## I. INTRODUCTION

Everyday businesses, private citizens, and even countries engage in international trade transactions. These transactions can raise a multitude of issues pertaining, for example, to price, quantity, security, or the problems of international cross-border litigation. Because of the many issues that can arise, and the difficulties of cross-border litigation, arbitration has become increasingly popular and common in international business transactions.<sup>1</sup> This form of dispute settlement has grown to particular consequence in today's society where growing efforts to find more efficient and effective means of adjudication are at the utmost premium.<sup>2</sup>

In fact, it is not hard to understand the attraction of arbitration in international business. The typical international transaction may be between parties of different language, culture, and most importantly legal or judicial systems. The potential barriers that are presented can cause many problems, for the most part, because international parties do not wish to submit to a foreign court's jurisdiction. These parties may wish to do business together, but because of the disparities or difficulties that will exist if any disputes arise, there may be a chilling effect on trade. Arbitration, however, creates a flexible option for dispute resolution that allows parties to agree, by contract, to the forum and the rules for the dispute resolution.<sup>3</sup> In this way, arbitration helps parties avoid

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<sup>1</sup> See generally CHRISTIAN BÜHRING-UHLE, *ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS* (Dr. Julian Lew ed., 1996); WILLIAM W. PARK, *ARBITRATION OF INTERNATIONAL BUSINESS DISPUTES: STUDIES IN LAW AND PRACTICE* (2006).

<sup>2</sup> See, e.g., Thomas D. Barton, *Common Law and its Substitutes: The Allocation of Social Problems to Alternative Decisional Institutions*, 63 N.C. L. REV. 519 (1985) (looking outside the current legal system to find other decision-making institutions that could render more efficient dispute settlement processes); Brian A. Liang, *Understanding and Applying Alternative Dispute Resolution Methods in Modern Medical Conflicts*, 19 J. LEGAL MED. 397 (1998) (discussing the need for the healthcare field to find more efficient means to adjudicate or resolve disputes); Frank Partnoy, *Synthetic Common Law*, 53 U. KAN. L. REV. 281 (2005) (suggesting the creation of a device, "synthetic common law," which would allow parties to stipulate which cases or rules should specifically apply to a dispute, therefore allowing for a more efficient and predictable result); Robert J. Rhee, *Toward Procedural Optionality: Private Ordering of Public Adjudication*, 84 N.Y.U. L. REV. 514 (2009) (arguing that parties should have the option to choose procedural devices to be used in public adjudication, as in private dispute settlement, as it would lead to more efficient results); Giesela Rühl, *Methods and Approaches in Choice of Law: An Economic Perspective*, 24 BERKELEY J. INT'L L. 801 (2006) (focusing on choice of law provisions as a means to make international litigation more efficient).

<sup>3</sup> International arbitration can come in many shapes and sizes. It is due to its flexible nature that, although the general principles are the same, there is often great latitude for creativity and other procedural mechanisms that allow parties to literally create their own dispute resolution process. For some articles that discuss these measures, see BÜHRING-UHLE, *supra* note 1, at 45; Winston Stromberg, *Avoiding the Full Court Press: International Commercial Arbitration and Other Global Alternative Dispute Resolution Processes*, 40 LOY. L.A. L. REV. 1337 (2007); Claude R. Thomson & Annie M.K. Finn, *Managing an International Arbitration*, 60 DISP. RESOL. J. 74 (2005).

many practical problems. Because of the explosive growth in popularity of international arbitration, the subject of international arbitration has been discussed and reviewed by numerous scholars.<sup>4</sup>

The current arbitral model does have flaws, some of which can prove fatal to any dispute that comes before it. The most commonly cited advantages of arbitration—efficiency, finality, arbiter expertise, enforceability, and honoring party intentions<sup>5</sup>—are supposed to meet and resolve any problems that arbitration may face. On the other hand, the disadvantages of arbitration—finality acting as a deterrent, accuracy being sacrificed for efficiency, arbitrator expertise hindering neutrality, and the problems posed by multi-party disputes<sup>6</sup>—can equally be seen as detriments to parties that use it. The pros and cons of international arbitration have been discussed at length in regards to general commercial trade.<sup>7</sup> These considerations are correct in their assertions and reviews of the process when dealing in general commercial trade. Arbitration is popular for a

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<sup>4</sup> See, e.g., Helen Tavares Erickson, *Litigation Versus Arbitration in the Americas: Advantages and Disadvantages From a New York Perspective*, 15 INT'L L. PRACTICUM 4 (2002) (discussing problems generally affecting international arbitration, in comparison to litigation, through the use of a hypothetical problem); Shekhar Kumar, *Virtual Venues: Improving Online Dispute Resolution as an Alternative to Cost Intensive Litigation*, 27 J. MARSHALL J. COMPUTER & INFO. L. 81 (2009) (analyzing certain upcoming trends in international arbitration with a focus on the potential benefits of using electronic arbitration); Philip J. McConaughay, *The Risks and Virtues of Lawlessness: A "Second Look" at International Commercial Arbitration*, 93 NW. U. L. REV. 453 (1999) (discussing the inherent "lawlessness" of international arbitration as it allows parties to agree to essentially anything and the importance that there be certain required procedural safeguards); William W. Park, *Determining an Arbitrator's Jurisdiction: Timing and Finality in American Law*, 8 NEV. L.J. 135 (2008) (analyzing the extent and power that an arbitrator has over a dispute, focusing on jurisdiction); William W. Park, *Duty and Discretion in International Arbitration*, 93 AM. J. INT'L L. 805 (1999) (examining the importance of when courts make decisions regarding arbitral final orders, they must weigh two policies: extending comity to foreign jurisdictions and enforcement of the arbitral award); Michael H. Strub, Jr., *Resisting Enforcement of Foreign Arbitral Awards under Article V(1)(e) and Article VI of the New York Convention: A Proposal for Effective Guidelines*, 68 TEX. L. REV. 1031 (1990) (discussing the New York Convention and the means by which a court will resist or enforce an arbitral award); Jessica L. Gelandner, Note, *Judicial Review of International Arbitral Awards: Preserving Independence in International Commercial Arbitrations*, 80 MARQ. L. REV. 625 (1997) (discussing the need for some form of judicial review of arbitral awards but also acknowledging the importance of independence for arbitration); Nana Japaridze, Note, *Fair Enough? Reconciling the Pursuit of Fairness and Justice with Preserving the Nature of International Commercial Arbitration*, 36 HOFSTRA L. REV. 1415 (2008) (focusing on the element of fairness that accompanies international arbitration and the justice that follows).

<sup>5</sup> See BÜHRING-UHLE, *supra* note 1, at 136–138; Benjamin J.C. Wolf, *On-line but Out of Touch: Analyzing International Dispute Resolution Through the Lens of the Internet*, 14 CARDOZO J. INT'L & COMP. L. 281, 301 (2006).

<sup>6</sup> See Wolf, *supra* note 5, at 307.

<sup>7</sup> See, e.g., BÜHRING-UHLE, *supra* note 1, at 136–138; Eric D. Green, *International Commercial Dispute Resolution: Courts, Arbitration, and Mediation—Introduction*, 15 B.U. INT'L L.J. 175 (1997); Steven C. Nelson, *Alternatives to Litigation of International Disputes*, 23 INT'L LAW. 187, 197 (1989); Wolf, *supra* note 5, at 301; *see infra* Part II and accompanying text.

reason; it has obvious advantages over traditional litigation. However, it remains to be seen if arbitration will be as advantageous in other areas of trade.

One such area is the trade and development of natural resources. Being that natural resources and energy trade are central to every nation's domestic market and consequentially to the international market, it is a topic that must be addressed. Natural resources trade and development is one of the fastest growing and most in-demand areas of international commercial activity, and subsequently arbitration.<sup>8</sup> This is due to the increased globalization of national markets and the continuous rise in demand for energy sources.<sup>9</sup> There are certain factors that are unique to natural resources trade that prohibit the traditional arbitral model from being effective; however, simply assuming these issues will correct themselves is not the answer. A far more critical examination of the problems arbitration is faced with when dealing in the energy sector is required in order for arbitration in the international market to continue to grow.

Of the problems that are presented in arbitration proceedings, enforcement of the final order award is one of the most detrimental to the process and model. The lack of enforcement, and confidence in it occurring, leads to the other problems that arise from arbitration. This seems to be particularly abundant in the trade and development of natural resources. This Note, therefore, will look at the inherent problems with natural resources arbitration and the importance that this be addressed in order to avoid future problems.

Difficulty in enforcement is not a problem unique to arbitration law, and an examination of other areas of the law reveals concepts that can be usefully applied in the arbitration context to address this challenging problem. Accordingly, this Note will suggest pulling certain concepts of contract and property law to deal with this and other problems as a means to address issues of enforceability. In order to better understand and examine these issues properly, this Note will begin with a foundation briefly describing the legal framework and then laying out the most commonly cited and discussed advantages and disadvantages of arbitration. Next, it will set out a case study dealing with natural resources trade and arbitration, which puts these propositions to the test. The case study will begin with a detailed illustration of the case background and will be followed with a section applying these pros and cons to the facts and procedural posture of the case. This Note then will show that arbitration failed in this case study and will demonstrate its failure through an analysis of the facts and how the advantages missed the target.

Following that section, this Note will point out the continual problems that natural resources arbitration cases involve, and discuss why the traditional arbitral model does not work as is currently used. Finally, some suggestions will be offered as a stepping stone to begin to address these problems and create

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<sup>8</sup> See generally JOHAN BILLET ET. AL., *ALTERNATIVE DISPUTE RESOLUTION IN THE ENERGY SECTOR* (Maklu & Association for International Arbitration ed., 2009).

<sup>9</sup> See U.S. Energy Information Administration, *International Energy Outlook 2010* (July 2010), [http://www.eia.gov/forecasts/archive/ieo10/pdf/0484\(2010\).pdf](http://www.eia.gov/forecasts/archive/ieo10/pdf/0484(2010).pdf) (last visited Oct. 15, 2011).

further awareness in order to engage in a more robust policy debate for change to arbitral law.<sup>10</sup>

## II. FOUNDATION OF INTERNATIONAL ARBITRATION

Today, arbitration is the most prominent form of international alternative dispute resolution.<sup>11</sup> The principle reason for its supremacy is its capability to bridge the gaps between different legal systems.<sup>12</sup> Arbitration grants parties the ability to dictate the terms, rules, and location of where any dispute will be heard. This is often times more appealing to international parties, who instead of relying on their own national courts, can opt for a private dispute resolution system that is contracted to in advance.<sup>13</sup> There are many attributes of arbitration that can make it valuable to those selecting to use it. However, to each advantage there are also certain disadvantages that many critics raise.

### A. *Legal Framework*

International arbitration is largely unrestricted and unregulated.<sup>14</sup> It is a creature that has grown out of contract law and other forms of alternative dispute resolution. There is, however, a certain overarching legal framework that provides guidance and rules to persons engaging in international arbitration. This framework is drawn primarily from the interplay of private party contractual relations, national legal systems, and international conventions.<sup>15</sup> This section will briefly discuss how international arbitral structure is affected by the consequences of contractual relations between parties, the direct impact of national court systems, and finally, the most important multinational arbitration agreement.

#### 1. Contractual Arrangements

There is a decision that parties will make before any arbitral proceedings or disputes arise; it will occur in the language of the initial arbitration

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<sup>10</sup> Ultimately, the author would like international institutions such as the International Chamber of Commerce or International Centre for Settlement of Investment Disputes to engage in the sort of debate described and to either draw upon this article for support or at the very least use it to identify the problems with the current system.

<sup>11</sup> BÜHRING-UHLE, *supra* note 1, at 141.

<sup>12</sup> Wolf, *supra* note 5, at 282.

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

<sup>14</sup> See generally BÜHRING-UHLE, *supra* note 1, at 55; RALPH H. FOLSOM ET AL., PRINCIPLES OF INTERNATIONAL BUSINESS TRANSACTIONS 773 (2d ed. 2010).

<sup>15</sup> BÜHRING-UHLE, *supra* note 1, at 55 (“[T]hree levels of regimes are governing international commercial arbitration: the contractual arrangements of the parties, the various national legal systems that have an impact on the arbitration, and international agreements between states.”).

clause that is within the parties' trade agreement or contract. The parties will choose to either engage in either ad hoc or institutional arbitration.<sup>16</sup> Ad hoc arbitration is the traditional form of arbitration where the parties choose the rules and means by which they will proceed if a dispute arises.<sup>17</sup> Ad hoc arbitration procedures can be agreed upon in advance, or literally, the rules can be chosen ad hoc, when the dispute comes about.<sup>18</sup> On the other hand, parties may choose to pursue the route of institutional arbitration, where they would agree to employ the services of an arbitration institution.<sup>19</sup> Parties that agree to submit to institutional arbitration have less of a hand in the customization of the procedures by which their dispute will be resolved as the private service takes care of those details through their own model rules.<sup>20</sup>

## 2. National Legal Systems

National legal systems have a substantial impact on a host of issues that face international arbitration. These issues may range from determining jurisdiction of the arbitral panel to eventual enforcement of the award.<sup>21</sup> However, the most important impact that national legal systems have on international arbitration is for the latter issue. It is not until the sovereign power of a national legal system is sought out that an arbitral award can actually be collected. Without the confirmation power of courts, the award is simply voluntary. The importance of this power, which is held by a nation's courts, cannot be understated because it is through the sovereign that a winning party can attach assets that a losing party may not wish to so easily concede.<sup>22</sup>

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<sup>16</sup> See BÜHRING-UHLE, *supra* note 1, at 45; FOLSOM, *supra* note 14, at 776.

<sup>17</sup> See BÜHRING-UHLE, *supra* note 1, at 45.

<sup>18</sup> FOLSOM, *supra* note 14, at 776.

<sup>19</sup> BÜHRING-UHLE, *supra* note 1, at 46.

<sup>20</sup> *Id.* at 46–50 (discussing the advantages and disadvantages of choosing between ad hoc and institutional arbitration); FOLSOM, *supra* note 14, at 776 (“Institutional arbitration is in a sense pre-packaged, and the parties need only ‘plug in’ to the arbitration system of their choice. There are numerous competing centers of arbitration, each busy marketing its desirability to the world business community.”); see, e.g., W. LAURENCE CRAIG ET AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION (3d ed. 2000) (discussing rules of a particular institutional service and the means by which it provides arbitration services).

<sup>21</sup> BÜHRING-UHLE, *supra* note 1, at 61 (“As in transnational litigation, the impact of multiple national legal systems is manifested in several respects: the *jurisdiction* of the arbitral tribunal determines whether the process can validly be conducted at the exclusion of other processes (1); *procedural questions* control how the process is conducted (2); in most cases national laws are applied to the *substance* of the dispute (3); finally the treatment of the award determines what *effect* the results of the process will have (4).”). For a more in depth discussion of these issues and illustrations of their impacts, see *id.*

<sup>22</sup> *Id.* at 56 (“[A]s a practical matter, the private arbitration agreement as well as any international conventions will only have the effect that national legal systems confer upon them.”).

### 3. International Agreements

International agreements are the final pillar in the legal framework of international arbitration.<sup>23</sup> These can, to a degree, be considered to have had the most significant impact on harmonizing the international arbitral process. The most notable of these international conventions, and subsequent agreements, is the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”).<sup>24</sup> There are over 140 countries that are signatories to the convention and agreement that facilitates the enforcement of arbitral awards.<sup>25</sup> The overall goal and fundamental purpose of the New York Convention is to make arbitral awards easily enforceable from one country to the next.<sup>26</sup>

The New York Convention assigns the courts in each signatory country the task to recognize and enforce arbitration clauses and written agreements for the resolution of commercial disputes.<sup>27</sup> The New York Convention also requires courts to recognize and enforce, under local procedural rules, the awards rendered by arbitral tribunals.<sup>28</sup> Application of the New York Convention turns on where the award was made or will be made.<sup>29</sup> However, the Convention also covers the recognition and enforcement of arbitral awards made in non-

<sup>23</sup> *Id.* at 74.

<sup>24</sup> See United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 9 U.S.C. § 201, 330 U.N.T.S. 38. For some general background and analysis concerning the New York Convention, see, for example, BÜHRING-UHLE, *supra* note 1, at 75; JOHN COLLIER & VAUGHN LOWE, *THE SETTLEMENT OF DISPUTES IN INTERNATIONAL LAW: INSTITUTIONS AND PROCEDURES* 266 (1999) (stating the underlying purposes of the New York Convention are “(i) arbitration agreements are recognised as valid, and as precluding litigation of the dispute in the State’s courts; (ii) foreign arbitral awards are recognised and enforced, except in certain exceptional circumstances; and (iii) the grounds on which recognition or enforcement might be refused are strictly limited.”); FOLSOM, *supra* note 14, at 782; Thomas H. Oehmke, *International laws and treaties-New York Convention*, 2 *COM. ARB.* § 41:5 (2010). In addition to all the discussion about the New York Convention, there are also several other treaties that impact arbitration but tend to be more regional. See the above sources for descriptions of many of these as well. ALAN REDFERN & MARTIN HUNTER, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 322 (1986) (describing the New York Convention’s role in both resisting and enforcing arbitral awards).

<sup>25</sup> United Nations Commission on International Trade Law, *Status 1958-Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html) (last visited Oct. 12, 2011).

<sup>26</sup> WILLIAM F. FOX, JR., *INTERNATIONAL COMMERCIAL AGREEMENTS: A PRIMER ON DRAFTING, NEGOTIATING AND RESOLVING DISPUTES* 346 (3d ed. 1998) (“Fundamentally, the New York Convention is an attempt to make arbitral awards rendered in one country fully effective in any other signatory country.”).

<sup>27</sup> FOLSOM, *supra* note 14, at 783.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 784.

signatory countries where the arbitrating parties are from signatory countries.<sup>30</sup> Finally, the New York Convention sets forth the limited procedural grounds by which a national court may resist enforcement of an arbitral award.<sup>31</sup> In addition to procedural grounds, a court may refuse to recognize or enforce an award if it would be contrary to public policy or if the subject matter of the dispute cannot be settled by arbitration.<sup>32</sup> It is for these reasons that the New York Convention allows for a higher level of enforceability of arbitral awards and for a narrow window of defenses to be raised by losing parties or courts. These provide to promote the overall goals of arbitral enforcement while providing certain protections to parties who may have suffered arbitral abuse.

#### 4. Overview

Recall that there is a constant intermingling of the three forms of legal systems that make up the framework for international arbitration. These consist of both informal and formal measures that set the stage for the resolution of disputes through arbitration. These three forms should be analyzed together while keeping in mind the distinct nature of each one and how each form can change and the rate by which those changes can occur. This will help with the upcoming sections and, in particular, the case study later in this article.

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<sup>30</sup> FOX, *supra* note 26, at 347 (“For example, the New York Convention will govern an arbitral award between an Argentine seller and a Zairean buyer (both non-signatory nations) if the award was made in London because the United Kingdom, the place where the award was made, is a signatory. Similarly, the New York Convention will apply to an arbitral award made in Argentina between a British and a U.S. party.”). This is a good example of the New York Convention’s application, regardless to the fact that Argentina is now a signatory. *See supra* note 25 and accompanying text.

<sup>31</sup> *See* FOLSOM, *supra* note 14, at 783. According to the text of the New York Convention, a court has grounds to refuse enforcement, that include:

- (1) incapacity or invalidity of the agreement containing the arbitration clause “under the law applicable to” a party to the agreement,
- (2) lack of proper notice of the arbitration proceedings, the appointment of the arbitrator or other reasons denying an adequate opportunity to present a defense,
- (3) failure of the arbitral award to restrict itself to the terms of the submission to arbitration, or decision of matters not within the scope of that submission,
- (4) composition of the arbitral tribunal not according to the arbitration agreement or applicable law, and
- (5) non-finality of the arbitral award under applicable law.

*Id.*

<sup>32</sup> *Id.*

*B. Advantages*

Arbitration's most frequently-cited qualities include its efficient nature; the finality it carries with it; the option for parties to choose an arbitrator with subject-matter expertise; the relative ease with which international arbitral awards are enforced, compared to international litigation awards; and its institutional goal, as a contractual construct, to best honor the parties' intentions.<sup>33</sup> Each of these will be discussed in turn.

## 1. Efficiency

Arbitration has long been praised as being more efficient and effective than litigation. There are heavy financial and emotional costs of going to court that have been well documented.<sup>34</sup> However, through arbitration, parties are able to bypass many of the sluggish characteristics of traditional litigation. The time that parties may save, by avoiding the scheduling of hearings and the overcrowding of court dockets, often makes arbitration worthwhile.<sup>35</sup> Arbitrators also have a strong interest in adhering to a schedule established on the basis of convenience to the parties, counsel, and themselves.<sup>36</sup> This allows parties to be more apt to come together without a judicial mandate forcing them to meet.

This is possible through the relative flexibility of arbitration, which allows parties to schedule around their needs.<sup>37</sup> The informal nature of arbitration also produces several additional benefits.<sup>38</sup> Arbitration proceedings that are not burdened by the minutiae of rules of procedure and rigid structure serve a two-fold benefit. First, tensions are lessened between all parties which may help facilitate resolution.<sup>39</sup> Second, in many cultures, arbitration provides a "face-saving" approach to dispute resolution.<sup>40</sup> Many times in litigation, parties put so much emphasis on winning a dispute that it becomes impossible to move closer to resolution.<sup>41</sup> Arbitration provides an environment that allows those who may hope for settlement, but do not wish to appear to be the supplicant, a means to

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<sup>33</sup> Wolf, *supra* note 5, at 301.

<sup>34</sup> See, e.g., Peter Huang, *Emotional Adaptation and Lawsuit Settlements*, 108 COLUM. L. REV. SIDEBAR 50 (2008); Peter Huang & Ho-Mou Wu, *Emotional Responses in Litigation*, 12 INT'L REV. L. & ECON. 31 (1992); Eric A. Posner, *Law and the Emotions*, 89 GEO. L. J. 1977 (2001).

<sup>35</sup> See BÜHRING-UHLE, *supra* note 1, at 137; Wolf, *supra* note 5, at 301.

<sup>36</sup> See Osamu Inoue, *The Due Process Defense to Recognition and Enforcement of Foreign Arbitral Awards in United States Federal Courts: A Proposal for a Standard*, 11 AM. REV. INT'L ARB. 247, 251 (2000).

<sup>37</sup> BÜHRING-UHLE, *supra* note 1, at 138; Nelson, *supra* note 7, at 197.

<sup>38</sup> Nelson, *supra* note 7, at 199.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

do so without damage to reputation.<sup>42</sup> In other words, arbitration allows for a party that wishes to end a dispute to do so, but also, not to “lose face” by being recognized as the party at fault by a formal judge or jury declaration.

Additionally, arbitration does not generally involve the same breadth of discovery as traditional litigation, which many times is an advantage for parties that are concerned with disclosure of trade secrets or other important commercial documents.<sup>43</sup> Parties also save time by retaining broad discretion in structuring all proceedings, which can lead to an avoidance of costly pre-trial and post-trial work through reduced lawyer fees.<sup>44</sup> The time and money that can be saved by using an arbitral tribunal compared to a traditional court is one of the most appealing qualities of arbitration.

## 2. Finality

Many disputes that occur in the international arena are between large multinational corporations or business trading partners. The globalization of the world economy has led to a dramatic increase in the number of international contractual obligations every year.<sup>45</sup> Due to this increase and the long lasting relationships that develop between these companies, there has been a greater emphasis for finality in disputes. Proponents of arbitration insist that because there is no appeal mechanism, on the merits of the dispute, it is a benefit to parties that have continuing relationships.<sup>46</sup> These corporations require urgency that will allow parties to resolve a dispute without destroying the business relationship and goodwill necessary with it.<sup>47</sup> In these situations a final decision allows the parties to resolve the dispute, preferably in an amicable fashion, and move on to continue in a profitable manner.

Another aspect of finality that is sometimes less emphasized is the privacy attribute of arbitration. Traditional litigation is almost always of public record, depending on the country, which can be accessed by anyone. The greater

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<sup>42</sup> *Id.*

<sup>43</sup> BÜHRING-UHLE, *supra* note 1, at 136; Nelson, *supra* note 7, at 197.

<sup>44</sup> Wolf, *supra* note 5, at 302.

<sup>45</sup> William H. Knull, III & Noah D. Rubins, *Betting the Farm on International Arbitration: Is it Time to Offer an Appeal Option?*, 11 AM. REV. INT’L ARB. 531, 537 (2000) (“[W]ith major infrastructure, energy, manufacturing and other contracts now attracting financing and participation with the increasing globalization of the world economy, there are more and more very large international transactions in which the stakes can be tens, hundreds, or even thousands of millions of dollars. Projects may involve investments lasting decades, increasing the likelihood of a major dispute at some point in the project’s life.”).

<sup>46</sup> BÜHRING-UHLE, *supra* note 1, at 136–38; Wolf, *supra* note 5, at 302.

<sup>47</sup> Nelson, *supra* note 7, at 198 (“If business people withdraw from the dispute resolution process and leave their lawyers to engage in a ‘win-lose’ contest, damage to the commercial relationship is likely.”).

level of confidentiality<sup>48</sup> afforded by arbitration over litigation may in itself be the goal of the parties involved.<sup>49</sup> As stated, many times the companies seeking arbitration are large corporations that when a dispute arises do not wish, for a variety of reasons, for the public or competitors to learn about it.<sup>50</sup> This is accomplished through arbitration, which offers private proceedings, and because they are also efficient, the matter can wrap up quickly and quietly. In addition, privacy plays into protecting the underlying commercial relationship by shielding it from any possible harm as a result of publicized dispute.<sup>51</sup> Due to the nature of long-term contractual relationships and the fact that they may lead to conflicts,<sup>52</sup> parties often require a dispute resolution system that enables quick and agreeable resolutions.<sup>53</sup>

### 3. Expertise

Arbitration typically allows the parties to choose an arbitrator with a technical background in the subject matter of the underlying dispute.<sup>54</sup> Arbitrators do not need to be lawyers, and the common use of panels of arbitrators allows for the inclusion of both technical and legal experts.<sup>55</sup> The arbitrator's expertise is especially relevant to resolution where the dispute involves interpretations, customs, and technical standards to a party's trade or industry.<sup>56</sup> An arbitrator, unlike a judge, is not only free to draw upon his background, but is encouraged to do so in order to help resolve a dispute.<sup>57</sup>

An arbitration panel that has a breadth of expertise in a dispute will help bolster the accuracy of a decision, by being well-educated in the field, but also will save time as the parties will not have to educate a judge or jury in order for them to understand the material. A prime example of this benefit is as follows:

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<sup>48</sup> The words "confidentiality" and "privacy" will be used interchangeably in this article; however, in arbitration there is a slight distinction that will not be discussed here. For a good discussion of this difference and its impact on commercial arbitration see Amy J. Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 U. KAN. L. REV. 1211 (2006).

<sup>49</sup> BÜHRING-UHLE, *supra* note 1, at 136; Nelson, *supra* note 7, at 198.

<sup>50</sup> Nelson, *supra* note 7, at 197–198.

<sup>51</sup> *Id.* at 199.

<sup>52</sup> Green, *supra* note 7, at 175 ("The investments required to compete effectively expose businesses to all of the uncertainties inherent in any long-term interdependent relationship plus those associated with cross-cultural, transnational matters, including possible expropriation by one's partner, submission to the jurisdiction of foreign courts, and reliance on an alien legal system.").

<sup>53</sup> Wolf, *supra* note 5, at 304.

<sup>54</sup> BÜHRING-UHLE, *supra* note 1, at 136–138; Wolf, *supra* note 5, at 304.

<sup>55</sup> Nelson, *supra* note 7, at 197.

<sup>56</sup> Wolf, *supra* note 5, at 304.

<sup>57</sup> *Id.*

In one commercial dispute . . . the arbitrators awarded the buyer money damages for non-delivery even though no evidence as to the market price of the goods had been introduced. Judge Learned Hand dismissed the seller's arguments that this constituted arbitral "misconduct," remarking that if the arbitrators "were of the trade, they were justified in resorting to their personal acquaintance with its prices."<sup>58</sup>

The use of panels has become almost automatic when arbitration is employed and its use allows for great benefits.

#### 4. Enforcement

Enforcement of a judgment in international litigation is sometimes more difficult than winning the actual case.<sup>59</sup> Whenever parties enter into litigation and choose a forum for that suit, they must always consider enforcement as a reason for choosing a particular judicial forum. This issue of enforcement is usually not as troublesome when parties deal with arbitration. Arbitration enforcement treaties are more prolific throughout the international community than are agreements based solely on traditional litigation. The New York Convention<sup>60</sup> and the Panama Convention<sup>61</sup> are two of these agreements to which the United States and many other nations are signatories.<sup>62</sup> Treaties like these carry provisions that have empowered parties to utilize the courts of signatory nations to enforce arbitral awards.

The rise in reciprocity and comity in the international community regarding arbitral award enforcement has become one of the chief benefits for parties to avoid litigation.<sup>63</sup> Because countries are more willing to enforce arbitral awards based on merit, procedural law has begun to become more centrally important to arbitration enforcement in signatory countries.<sup>64</sup> Although countries that sign these arbitration agreements are willing to enforce foreign awards,

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<sup>58</sup> *Id.* at 305 (citing ALAN SCOTT RAU ET AL., PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS, 861 (3d ed. 2002)).

<sup>59</sup> Knull & Rubins, *supra* note 45, at 533 ("[B]ecause it can be problematic to enforce a court judgment across national borders, arbitration is frequently the only way a prevailing party to an international proceeding can actually compel payment after the resolution process is complete.").

<sup>60</sup> See *supra* note 24 and accompanying text.

<sup>61</sup> See Inter-American Convention on International Commercial Arbitration, 9 U.S.C. § 301 *et. seq.* (2006).

<sup>62</sup> See *supra* note 24 and accompanying text; Thomas H. Oehmke, *International Laws and Treaties-Inter-American Convention*, 2 COM. ARB. §41:6 (2010). Both sources provide a very strong analysis of how these two conventions affect the recognition of arbitral awards and how they can and cannot be enforced in foreign jurisdictions. These sources also describe how the two conventions work together and all the nations that are signatories.

<sup>63</sup> BÜHRING-UHLE, *supra* note 1, at 136.

<sup>64</sup> Wolf, *supra* note 5, at 305.

most still wish to retain some means to protect against abuses. Procedural law has grown not simply for governing the validity of these awards, but more importantly the grounds for setting aside these awards if abuse does occur.<sup>65</sup>

### 5. Honor Parties' Intentions

Typically, parties in arbitration have bargained for and agreed upon it as the means to resolve their dispute. It would seem counterintuitive to not defer to arbitration then, based on its notion as a contractual construct to honor the parties' intentions.<sup>66</sup> There are two aspects of this advantage of arbitration that can be identified as either a direct result of arbitration or indirectly stemming from its use. First, arbitration is based on freedom of contract. When parties agree to arbitrate, it is no different than another term agreed to in a contract.<sup>67</sup> Even in industries that require arbitration for any disputes, it is a free choice to enter into that industry.<sup>68</sup>

Secondly, courts will point to public policy supporting resolution of disputes that do not require public judicial aid. In many countries the public court dockets and trial schedules are backlogged and litigation can take many years from beginning to end. Therefore, if a judge has an opportunity to send some cases elsewhere, when the disputing parties have made declarations of an intention to use arbitration but had never formally agreed, then that judge will almost always honor those parties' intentions. This encouragement of arbitration, in situations such as these, "reflects an international preference that the intention of the parties, as evidenced by their contractual obligations, should be preeminent."<sup>69</sup>

### C. Disadvantages

Arbitration is not a perfect system. Even those proponents of arbitration find problems and cannot be totally uncritical. International arbitration has risen to its current state of prominence because of many parties' reluctance to submit

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<sup>65</sup> *Id.*; see also Pippa Read, *Delocalization of International Commercial Arbitration: Its Relevance in the New Millennium*, 10 AM. REV. INT'L ARB. 177 (1999) (discussing the delocalization of international arbitration, specifically the effect of procedural law on parties to arbitration and possible theories for avoiding the procedural law of the forum state).

<sup>66</sup> Wolf, *supra* note 5, at 305 (quoting ALAN SCOTT RAU ET AL., PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS, 757 (3d ed. 2002) ("[O]ne common rationale for deference to arbitration is that the parties have bargained for the judgment of an arbitrator, rather than a court, to resolve their disputes and that this bargain, once made, should be respected.")).

<sup>67</sup> *Id.* at 306.

<sup>68</sup> See Jeffrey W. Stempel, *Bootstrapping and Slouching Toward Gomorrah: Arbitral Infatuation and the Decline of Consent*, 62 BROOK. L. REV. 1381 (1996) (discussing even where, as in the securities industry, all disputes are sent to arbitration—the customer has willingly agreed to arbitrate his disputes as part of the cost of gaining access to the securities industry).

<sup>69</sup> Wolf, *supra* note 5, at 306.

their dispute to a foreign jurisdiction's court system.<sup>70</sup> However, even with its popularity, in many cases arbitration's problems arise from the same attributes that are cited as beneficial qualities.<sup>71</sup> This section will discuss how finality can act as a deterrent, accuracy is sometimes lost for efficiency, arbitral expertise may sacrifice neutrality, and the problems that multi-party disputes pose towards international arbitration.

### 1. Finality as a Deterrent

Finality is usually cited as one of the strongest advantages of arbitration, but it also can act as a deterrent to selecting arbitration. There are instances where a party whose amount in dispute may be so large or significant that they become less interested in finality and more reluctant to chance a decision without exercising every possible legal mechanism.<sup>72</sup> If parties enter into arbitration, the decision is typically binding, and there is no appellate review, unless agreed upon in advance. Some courts have procedures in place that will set aside arbitral awards for blatant or inconceivable decisions,<sup>73</sup> but a majority of national courts, through agreement to arbitration treaties, will take the decisions as valid and enforce the judgments.

As growth continues throughout the international community and the value of transactions are on the rise, international businesses engage in a high stakes gamble every time they use arbitration.<sup>74</sup> Evidence shows that international arbitration is losing ground to traditional litigation of disputes over very large sums of money.<sup>75</sup> This could be due to the lack of a "back-up" mechanism following the arbitral award.

Another aspect of finality that is emphasized as an advantage of international arbitration is to protect the underlying commercial relationship. However, with the rise of technology, more and more small companies have the opportunity to engage in international business with another foreign party and they may only enter into a single transaction. These parties have no interest in protecting a future business relationship and are more concerned with making certain this

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<sup>70</sup> *Id.*

<sup>71</sup> Nelson, *supra* note 7, at 200.

<sup>72</sup> Wolf, *supra* note 5, at 307.

<sup>73</sup> See, e.g., William W. Park et al., *International Commercial Dispute Resolution*, 37 INT'L L. 445 (2003). In U.S. federal court, there exists a two-prong test to set aside arbitral awards for "manifest disregard of the law." First, an objective element requires inquiry into whether the relevant law was "well-defined, explicit and clearly applicable." Second, a subjective component of the test involves examination of whether the arbitrator intentionally ignored the law. *Id.* at 445, 446. Tests such as these tend to be in addition to the procedural defenses granted under the New York Convention.

<sup>74</sup> Wolf, *supra* note 5, at 307.

<sup>75</sup> Knull & Rubins, *supra* note 45, at 532 ("In a recent survey of 606 corporate lawyers from America's largest corporations, 54.3% of those who chose not to opt for arbitration said that choice was made largely because arbitration awards are so difficult to appeal.").

decision is correct. Therefore, these parties may avoid arbitration in order to avoid an “end-game” scenario. Without a more common form of appellate review, a chilling effect will take place on the use of international arbitration.<sup>76</sup>

## 2. Accuracy Sacrificed for Efficiency

The arbitral process can trade the interests of accuracy and justice for that of efficiency.<sup>77</sup> Accuracy is a time consuming process and when someone seeks a more efficient process, accuracy can sometimes be lost. For example, the narrower discovery permitted in arbitration may prevent arbitrators from being able to compel the production of documents or presentation of witnesses.<sup>78</sup> This restriction many times can hinder fact development and lead to unjustified results from the arbitrator.<sup>79</sup> Although this efficient process ends disputes, it can harm the other aspects of dispute resolution. The settlement of conflict achieves peace between the parties, but this peace is obtained at the expense of another significant purpose of adjudication,<sup>80</sup> that being the explanation of a community’s rules and laws.<sup>81</sup>

A traditional court system provides essentially two types of service.<sup>82</sup> One is dispute resolution through determining whether a rule has been violated, and the other is rule formulation through creating rules of law as a byproduct to the dispute resolution process.<sup>83</sup> The inherent tradeoff to alternative dispute resolution is that what parties gain in efficiency may be outweighed by societal loss.<sup>84</sup> Arbitration can be argued as good for society because it is an attempt to honor the intentions of disputing parties by allowing them to resolve their dispute in whichever manner they choose. The parties after all have agreed to live by the decision of the arbitrator and this decision can then easily be coined a “just” result.<sup>85</sup> Also, it helps to conserve judicial resources as arbitration takes many disputes that may not require formal judicial process to reach a result. Nonetheless, the parties’ chosen process may not necessarily achieve justice.<sup>86</sup>

On the other hand, society also has an interest in seeing accurate results to a dispute based on the merits of a case. The broad discovery tools and proce-

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<sup>76</sup> Wolf, *supra* note 5, at 307.

<sup>77</sup> *Id.* at 308.

<sup>78</sup> Nelson, *supra* note 7, at 203.

<sup>79</sup> *Id.*

<sup>80</sup> Wolf, *supra* note 5, at 308–09.

<sup>81</sup> *Id.* at 309 (“Courts not only aim to achieve peace between warring parties, but also to explicate and give force to the community’s values, as they are embodied in their laws.”).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 308.

<sup>85</sup> *Id.* at 309.

<sup>86</sup> *Id.*

dures that are employed by traditional litigation, although costly and time consuming, tend to lead to the development of all the relevant facts and issues.<sup>87</sup> By the use of thorough discovery tools, justice is served by a case being decided based upon merit and not simply being disposed of quickly in order to move forward with business. The second societal interest that is lost by the use of arbitration procedures is the lack of precedent that follows arbitral decisions.<sup>88</sup> Many systems of law depend on court opinions and outcomes to not only guide the courts in future disputes, but also to form rules in order to “impose order where uncertainty would otherwise chill people’s behavior.”<sup>89</sup> Therefore, arbitration can deprive courts of the opportunity to interpret a community’s values and laws.<sup>90</sup>

The final product of an attempt at a more efficient process is the problem of parallel proceedings. Parallel proceedings are sometimes considered inevitable when dealing with international dispute settlement.<sup>91</sup> There are various problems that accompany the parallel proceedings<sup>92</sup> that necessarily follow any disputes in the international arena. Besides the obviously higher legal costs and time requirements of these proceedings, if a party attempts to enforce a judgment in one jurisdiction while proceedings are pending in another, the party may be handicapped from enforcing its legal right.<sup>93</sup> The costs and time that go along with these parallel proceedings drastically counteract the efficiency of ending a dispute through arbitration.

### 3. Expertise Hinders Neutrality

Arbiter expertise is neither a requirement nor an attribute that is universally embraced in the arbitration process. There are many benefits from an arbitrator that has a strong background and knowledge of the subject matter of the dispute. However, this knowledge can be accompanied by predisposition and preconceptions which may lead to arbiter bias.<sup>94</sup> Even very educated individuals, who swear to remain neutral, will bring their opinions and prejudices into dispute resolution. In addition, many times arbitrators with subject matter exper-

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<sup>87</sup> *Id.* at 308.

<sup>88</sup> *Id.* at 309.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* This would apply mostly in countries that use a common law system that gives tremendous weight to precedent. It would seem that this would be less of a disadvantage in a civil law system that puts less value on court precedent.

<sup>91</sup> See Nadine Balkanyi-Nordmann, *The Perils of Parallel Proceedings: Is an Arbitration Award Enforceable if the Same Case is Pending Elsewhere?*, 56 DISP. RESOL. J. 20, 21 (2002).

<sup>92</sup> A “parallel proceeding,” for the purposes of this article, is either litigation or arbitration involving the same parties and causes of action but pending in the states of different jurisdictions. *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> Wolf, *supra* note 5, at 310–11.

tise will be reused within an industry.<sup>95</sup> Due to this practice, some arbitrators may have an incentive to favor their industry in order to obtain future employment.<sup>96</sup>

#### 4. Multi-Party Disputes

Generally, the current system of international arbitration lacks the appropriate mechanism to deal with more than a two-party dispute.<sup>97</sup> The growth of international business and global interdependence has led to a higher level of transactions between multiple parties. For example, construction contracts present many difficulties, as they typically involve many parties.<sup>98</sup> Most instances, there are many subcontractors, employees, banks, insurers, and so on.<sup>99</sup> Any disputes that are to arise from these transactions will likely involve several of the parties, as the disputants attempt to pass responsibility to the others.<sup>100</sup> Certain problems come about where several parties sign a single contract, which provides for selection of arbitrators by the parties. This leads to problems because many of the model sets of arbitration rules<sup>101</sup> provide for the means of selection by two disputants, but not three or more.<sup>102</sup> The problems that would arise from six parties that all want to appoint their own arbitrator are readily apparent. Not only would these parties not be able to agree upon an arbitral panel, but then once the proceedings began the thought of six arbitrators agreeing on how to rule on a dispute between six different parties, from which each arbitrator was appointed, tends to boggle the mind.

#### D. Summary of Attributes for Arbitration

For better or worse, arbitration is the most used form of international alternative dispute resolution. As with most tools of dispute resolution, parties have to use a process of weighing pros and cons when deciding whether to en-

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<sup>95</sup> *Id.* at 312.

<sup>96</sup> *Id.*

<sup>97</sup> Nelson, *supra* note 7, at 200.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> For example, the International Chamber of Commerce's rules provide that the disputees will nominate arbitrators but may not have more than three arbitrators on a panel. INTERNATIONAL CHAMBER OF COMMERCE, RULES OF ARBITRATION art. 8 (2010), available at [http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules\\_arb\\_english.pdf](http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf). Also, the London Court of International Arbitration's rules of arbitration provide that when there are three or more parties to a dispute, if the parties cannot divide between claimant and respondent, then the Court will disregard nominations for arbitrators and appoint them by itself. LCIA, ARBITRATION RULES, art. 8.1 (1998), available at [http://www.lcia.org/Dispute\\_Resolution\\_Services/LCIA\\_Arbitration\\_Rules.aspx](http://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration_Rules.aspx).

<sup>102</sup> Nelson, *supra* note 7, at 200.

gage in arbitration. Arbitration could be the best possible means to end a dispute for some parties, while others may prefer traditional litigation for a host of reasons. Regardless, any party that chooses to pursue arbitration will, without a doubt, be employing the most common and easy to use form of alternative dispute resolution.

### III. CASE STUDY: *KARAH BODAS CO., L.L.C. v. PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA*

International arbitration is generally accepted as being the primary alternative to traditional litigation because it offers many advantages when applied to commercial trade. However, the purpose of this case study will be to determine if general arbitration practices and procedures, as applied to the trade and development of natural resources, will be equally advantageous. The analysis will be focused on arbitration generally, but the importance and utility of an analysis of this case is premised on it as being for the development and trade of natural resources. The result of this case study will show the difficulties that generalized arbitration has with a dispute involving natural resources trade and development. Following this case study, there will be a discussion identifying the specific problems that this area of trade poses and means to alter arbitration in order to be more effective.

There are multiple reasons for choosing this particular case. One reason is the nature of the product being developed and traded. Geothermal energy has a great likelihood for tremendous value based upon its potential for energy production as well as its renewable nature.<sup>103</sup> Additionally, there will likely be more cases that follow a similar fact pattern as this over the next several years. As energy use continues to grow and demand for a more efficient and sustainable means to produce energy grow along with it, more disputes similar to this will arise. In order to better resolve these disputes a harder focus must be taken on finding a solution to the unique problems that natural resource trade and development create. This should be kept in mind while reading the next section.

#### A. *Background Facts and Procedural Posture*

To begin, it is important to meet the parties. Karaha Bodas Company, L.L.C. (“KBC”) is a privately owned power development company that is based out of the Cayman Islands. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (“Pertamina”) is a power company that is wholly owned by the Indone-

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<sup>103</sup> Professor Nafi Toksoz, a professor of geophysics at Massachusetts Institute of Technology, says that “[g]eothermal energy could play an important role in our national energy picture as a non-carbon-based energy source.” Further, he comments that “[i]t’s a very large resource and has the potential to be a significant contributor to the energy needs of this county.” Ken Silverstein, *Geothermal Energy’s Potential*, ENERGYBIZ INSIDER, (Aug. 22, 2008), [http://www.energycentral.com/functional/articles/energybizinsider/ebi\\_detail.cfm?id=554](http://www.energycentral.com/functional/articles/energybizinsider/ebi_detail.cfm?id=554).

sian government. KBC explores and develops geothermal energy sources and builds electric generating stations using geothermal sources. Pertamina is an oil, gas, and geothermal energy company. In November 1994, KBC signed two contracts to produce electricity from geothermal sources in Indonesia.<sup>104</sup> Under the Joint Operation Contract (“JOC”) and the Energy Sales Contract (“ESC”), KBC was to develop the geothermal energy sources, and Pertamina was to manage the project and sell the produced electricity to PLN.<sup>105</sup> Both contracts contained almost identical arbitration clauses, which required the parties to arbitrate any disputes in Switzerland under the Arbitration Rules of the United Nations Commission on International Trade Law (“UNCITRAL”).<sup>106</sup> Work had begun on the project, and then on September 20, 1997, the government of Indonesia temporarily suspended the project because of the country’s financial crisis.<sup>107</sup> Work on the project was temporarily restored on November 1, 1997.<sup>108</sup> However, the Indonesian government indefinitely suspended the project on January 10, 1998.<sup>109</sup>

On February 10, 1998, KBC notified Pertamina that the government’s indefinite suspension constituted an event of “force majeure” under the ESC and

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<sup>104</sup> Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274, 282 (5th Cir. 2004) [hereinafter *Fifth Circuit Confirmation Opinion*].

<sup>105</sup> *Id.* PLN is an electric utility owned by the Indonesian government but was dismissed from the action. *Id.* at 282 n.6.

<sup>106</sup> *Id.* at 282. Article 13.2(a) of the JOC and Section 8.2(a) of the ESC’s arbitration provision both provide for any disputes between the parties to be resolved through the use of an arbitral tribunal and allow for appointment of arbitrators by the parties. *Id.* at 282–83 n.7. Further, both contracts contained the following language:

The award rendered in any arbitration commenced hereunder shall be final and binding upon the Parties and judgment thereon may be entered in any court having jurisdiction for its enforcement. The Parties hereby renounce their right to appeal from the decision of the arbitral panel and agree that in accordance with Section 641 of the Indonesian Code of Civil Procedure [neither] Party shall appeal to any court from the arbitral panel and accordingly the Parties hereby waive the applicability of [certain Indonesian laws]. In addition, the Parties agree that [neither] Party shall have any right to commence or maintain any suit or legal proceeding concerning a [dispute hereunder until the] dispute has been determined in accordance with the arbitration procedure provided for herein and then only to enforce or facilitate the execution of the award rendered in such arbitration.

*Id.* (emphasis added).

<sup>107</sup> *Fifth Circuit Confirmation Opinion, supra* note 104, at 283.

<sup>108</sup> Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 190 F. Supp. 2d 936, 940 (S.D. Tex. 2001) [hereinafter *Texas Confirmation Opinion*].

<sup>109</sup> *Fifth Circuit Confirmation Opinion, supra* note 104, at 283. The reasons behind the Indonesian government’s suspension of the project and eventual termination coincided with a change of leadership in Indonesia. The country during this time was experiencing intense political challenges and economic hardship. For a good discussion and excellent analysis of these problems, see Judith Bird, *Indonesia in 1998: The Pot Boils Over*, 39 ASIAN SURVEY 27 (1999), available at <http://www.jstor.org/stable/2645591?seq=1>.

JOC contracts.<sup>110</sup> KBC initiated arbitration proceedings shortly thereafter on April 30, 1998.<sup>111</sup> As stated in the contracts, KBC went ahead and appointed an arbitrator and awaited Pertamina's response and appointment of an arbitrator of its own. After thirty days had past, following commencement of arbitration proceedings, by a letter dated June 2, 1998, KBC notified the International Centre for Settlement of Investment Disputes ("ICSID") of Pertamina's inaction and requested the appointment of a second arbitrator pursuant to the appointment provision of the contracts.<sup>112</sup> The ICSID questioned KBC's unilateral appointment of an arbitrator but ultimately expressed its intent to grant KBC's request for appointment in a letter dated June 29, 1998, that was addressed to all parties.<sup>113</sup> It was at this point that ICSID appointed an arbitrator because of Pertamina's lack of response.<sup>114</sup> From there, as specified in the JOC and ESC, the two appointed arbitrators then selected a third arbitrator to be the chairman of the panel.<sup>115</sup>

This newly formed tribunal heard some preliminary issues on November 19, 1998.<sup>116</sup> Following this hearing, Pertamina submitted a memorial contending KBC had improperly consolidated claims, and the tribunal was improperly constituted because it was a multi-party dispute and that KBC failed to honor the arbiter nomination procedures.<sup>117</sup> A hearing was held on this matter on May 31, 1999.<sup>118</sup> On October 4, 1999, the tribunal issued a preliminary award, which held the tribunal was properly constituted, the claims were properly consolidated, and the Indonesian government was not a party.<sup>119</sup> KBC then filed its revised Statement of Claim on November 24, 1999.<sup>120</sup> Pertamina then received a number of time extensions before filing its response on April 7, 2000.<sup>121</sup> In turn, KBC filed a rebuttal to that response in May 2000.<sup>122</sup> Pertamina made a request for further continuance and discovery, which was denied later in the same month.<sup>123</sup>

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<sup>110</sup> *Fifth Circuit Confirmation Opinion, supra* note 104, at 283.

<sup>111</sup> *Id.*

<sup>112</sup> *Texas Confirmation Opinion, supra* note 108, at 940–41.

<sup>113</sup> *Id.* at 941.

<sup>114</sup> *Fifth Circuit Confirmation Opinion, supra* note 104, at 283.

<sup>115</sup> *Id.*

<sup>116</sup> *Texas Confirmation Opinion, supra* note 108, at 941.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 941–42.

<sup>122</sup> *Fifth Circuit Confirmation Opinion, supra* note 104, at 284.

<sup>123</sup> *Id.*

It was at this point that a hearing on the merits of the case was scheduled to begin at some point in June.<sup>124</sup> The hearing commenced on June 19th and ended on June 23rd.<sup>125</sup> The transcript that resulted from the hearing ended up being over 800 pages, and it included extensive argument and live testimony from several witnesses.<sup>126</sup> After considering the evidence presented, the tribunal issued its final award on December 18, 2000.<sup>127</sup> The tribunal held that Pertamina had violated both the JOC and ESC, and awarded KBC damages for money spent on the project and lost profits.<sup>128</sup> Pertamina appealed the award to the Supreme Court of Switzerland in February 2001, and while that appeal was pending, KBC began to initiate enforcement proceedings across the globe.<sup>129</sup>

After KBC was given judgment from the arbitral award, its attorneys began to enforce the judgment in any state that had assets that could be attached. It is at this point where multiple parallel proceedings were engaged, both domestic to the United States and in other foreign jurisdictions. The initial suit in the United States was in the Southern District of Texas. The Texas District Court slowed its proceedings in deference to Pertamina's request that the Swiss Supreme Court would first be allowed to decide whether to annul the award on appeal.<sup>130</sup> In April 2001, the Swiss Supreme Court denied Pertamina's claim because of certain untimely payment of costs.<sup>131</sup> Pertamina moved for reconsideration, which was again dismissed in August 2001.<sup>132</sup> The Texas District Court, in December 2001, following notice of the Swiss Court's decision, decided to enforce the arbitral award and rejected all of Pertamina's challenges.<sup>133</sup> Pertamina appealed and the decision was affirmed by the Fifth Circuit Court of Appeals.<sup>134</sup>

At the same time as this litigation, there were several other proceedings being pursued. After the Swiss Supreme Court denied Pertamina's request to annul the award, Pertamina filed suit in Indonesia seeking annulment by its courts.<sup>135</sup> In August 2002, the Indonesian court ordered annulment of the arbitral

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<sup>124</sup> *Id.*

<sup>125</sup> *Texas Confirmation Opinion, supra* note 108, at 942.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Fifth Circuit Confirmation Opinion, supra* note 104, at 285. The tribunal awarded KBC \$111.1 million, the amount KBC had expended on the project, and \$150 million for lost profits. *Id.* The tribunal explicitly rejected KBC's calculation as to lost profits and made its own conclusion. *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 310.

<sup>135</sup> *Id.* at 285.

award.<sup>136</sup> Meanwhile, at the same time as Pertamina's annulment suit was pending in the Indonesian court, KBC filed another suit in the Texas District Court to enjoin Pertamina from pursuing action to annul the award in Indonesia.<sup>137</sup> KBC was seeking an anti-suit injunction that would protect the arbitral award from annulment by the Indonesian court as well as protection from annulment by other foreign courts.<sup>138</sup> The Texas District Court granted the injunction in April 2002.<sup>139</sup> However, Pertamina appealed and the Fifth Circuit held that the District Court could not issue the injunction because it was outside the duties of a court underneath the New York Convention.<sup>140</sup> Therefore, it reversed the District Court's decision in June 2003.<sup>141</sup>

In addition to the Texas and Fifth Circuit litigation taking place, there were multiple attempts to enforce the award in other areas. KBC attempted to register its judgment, as confirmed by the Texas District Court, in New York, Delaware,<sup>142</sup> and California.<sup>143</sup> In February 2002, KBC presented the judgment to the Southern District of New York for enforcement, to which the court issued a writ of execution "author[izing KBC] to execute upon any property of Pertamina within this jurisdiction in satisfaction of the outstanding final judgment, amounting, to date, in total to the sum of \$261,166,654.92 plus interest."<sup>144</sup> However, a dispute arose as to which bank accounts could be executed upon by KBC. That dispute went to the Second Circuit which affirmed the District Court, ordering that KBC could attach to a portion of the disputed funds, but not the entire amount in the accounts.<sup>145</sup> More litigation followed, primarily revolving around the disputed funds and bank accounts.<sup>146</sup>

As this issue was being resolved, Pertamina suspected fraud by KBC in its arbitral award, and brought an independent action in the Cayman Islands.<sup>147</sup> In response, KBC brought an anti-suit injunction, similar to the one brought in

<sup>136</sup> *Id.* at 285–86.

<sup>137</sup> *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 264 F. Supp. 2d 470 (S.D. Tex. 2002) [hereinafter *Texas Injunction Opinion*].

<sup>138</sup> *Id.* at 474–75.

<sup>139</sup> *Id.* at 483.

<sup>140</sup> *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 374 (5th Cir. 2003) [hereinafter *Fifth Circuit Injunction Opinion*].

<sup>141</sup> *Id.*

<sup>142</sup> *See Karaha Bodas Co. v. Virginia Indonesia Co., BP Muriah Ltd.*, 57 F. App'x. 535 (3rd Cir. 2003).

<sup>143</sup> *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 77 (2nd Cir. 2002) [hereinafter *Second Circuit Confirmation Opinion*].

<sup>144</sup> *Id.* at 77–78.

<sup>145</sup> *Id.* at 92–93.

<sup>146</sup> *See, e.g., Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 305 F. Supp. 2d 304 (S.D.N.Y. 2004).

<sup>147</sup> *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 500 F.3d 111, 117 (2nd Cir. 2007) [hereinafter *Second Circuit Injunction Opinion*].

Texas earlier, to enjoin Pertamina from suing KBC over the award execution and enforcement.<sup>148</sup> The New York District Court stated that KBC was entitled to an injunction prohibiting Pertamina from applying to the Cayman Islands court or other foreign courts restricting the use of arbitral award.<sup>149</sup> The Second Circuit affirmed the District Court's opinion and injunction, modifying it only slightly.<sup>150</sup> Finally, as of now, it appears that the litigation may have ceased in the United States as the Supreme Court denied Pertamina's petition for certiorari in June 2008.<sup>151</sup>

Throughout the above timeline of award enforcement litigation taking place in the domestic United States, there were other venues that KBC attempted to enforce its arbitral award. KBC filed suit to enforce in Hong Kong, Canada, and Singapore. In March 2003, the Hong Kong High Court granted KBC's application to register the award and denied Pertamina's attempt to have it set aside.<sup>152</sup> An appeal was partially heard in December 2003, but adjourned to be reheard in February 2006.<sup>153</sup> However, the award was for a little under \$900,000.<sup>154</sup> As for Singapore, in March 2002, the High Court of Singapore granted KBC's application to register the award as well.<sup>155</sup> However, in late January 2006, Pertamina informed the Singapore court of its fraud allegations of KBC.<sup>156</sup> KBC made various applications to the court in an attempt to defer litigation until the termination of proceedings in the United States, but the court denied KBC's applications.<sup>157</sup> Eventually, KBC voluntarily dismissed its action in Singapore.<sup>158</sup> Lastly, in December 2004, a Canadian court gave judgment to KBC and confirmed the award.<sup>159</sup>

Collection following enforcement of judgments was an entirely different story. Even though KBC was able to have enforcement of judgments in these different states or nations, actually attaching to assets and collecting upon those judgments was difficult. As discussed above, in New York there was an

<sup>148</sup> *Id.* at 117–18.

<sup>149</sup> *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 465 F. Supp. 2d 283, 300–01 (S.D.N.Y. 2006) [hereinafter *New York Injunction Opinion*].

<sup>150</sup> *Second Circuit Injunction Opinion*, *supra* note 147, at 130. The modification was only to clarify that this injunction does not bar any other enforcement proceedings in other nations or any actions that would be inconsistent with the New York Convention.

<sup>151</sup> *PT Pertamina v. Karaha Bodas Co.*, 554 U.S. 929 (2008).

<sup>152</sup> *New York Injunction Opinion*, *supra* note 149, at 286.

<sup>153</sup> *Id.* The court notes in this opinion that at the time of this litigation it was unsure of the status of the appeal.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 286.

<sup>159</sup> *Id.* But, at the time of the New York Injunction Opinion's publication, Pertamina's appeal of that judgment was still pending.

entire series of litigation solely to determine the portion of money in certain bank accounts that could be attached.<sup>160</sup> Finally, the New York District Court asked Pertamina if their petition for certiorari was denied to the Supreme Court, would they consent to pay the judgment against it.<sup>161</sup> Pertamina stated that if certiorari was denied, it would “not object before this Court to the payment of the judgment.”<sup>162</sup> In October 2006, almost all of the \$319 million payment was turned over to KBC for distribution to its shareholders.<sup>163</sup> However, this money did not make it to KBC at this time. The District Court stayed the assets pending the appeal to the Second Circuit by Pertamina.<sup>164</sup> The Second Circuit then granted KBC’s motion to lift the stay on February 13, 2007.<sup>165</sup> The Supreme Court, on February 15, denied Pertamina’s motion for an emergency stay to override the grant by the Second Circuit.<sup>166</sup> It was not until this point when KBC was finally able to satisfy the majority of its judgment against Pertamina.

### B. *Analysis*

Arbitration did not work in the dispute between KBC and Pertamina. The advantages that arbitration is supposed to provide were inadequate or problematic in this contract dispute. Again, as discussed in detail above, the advantages of arbitration are supposed to be as follows: its efficiency; its finality; the option for parties to choose an arbitrator with subject matter expertise; the relative ease with which international arbitral awards are enforced, compared to international litigation awards; and its institutional goal, as a contractual construct, to best honor the parties’ intentions.<sup>167</sup> Each of these cited advantages failed in its application in the dispute. Although there is no way to predict how this case would have gone if the parties would have, from the beginning, used traditional litigation, it does not seem it could have been any worse.

#### 1. An Inefficient Result

Efficiency is often given credit as being the primary advantage of arbitration. This dispute was anything but efficient. The actual arbitration from initial proceedings to final award was not by itself overly inefficient. The entire process from KBC’s initial notice of arbitration to the final award by the panel

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<sup>160</sup> See *supra* note 146 and accompanying text.

<sup>161</sup> *New York Injunction Opinion*, *supra* note 149, at 288.

<sup>162</sup> *Id.*

<sup>163</sup> *Second Circuit Injunction Opinion*, *supra* note 147, at 117. A smaller portion of the funds was not turned over until November. *Id.* at 117 n.6.

<sup>164</sup> *Id.* at 118.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> See *supra* Part II.B. and accompanying text.

was only a little more than two years. This process would appear to be much quicker than if the parties had taken their dispute to a national court system. However, receiving judgment is only half the battle. The events that took place during and after judgment are the source of the problems and inefficiencies that accompany arbitration as a form of dispute resolution.

The problems here began before the arbitration hearing had started. Although two years does not appear to be a long period of time, this time period could have been much shorter had it not been for the constant extensions that the parties were being given for the filing of their documents. The flexibility of arbitration actually harmed the efficiency of the process. Both KBC and Pertamina were given a series of time extensions, prior to the hearing, for filing of the Revised Statement of Claim and the response to it. The allowable flexibility, which may not have been granted in traditional litigation, extended the date of the hearing much later than it could have been, which led to an inefficient result.

Next, the arbitration hearing itself caused problems. There was a huge amount of evidence produced at the hearing that amounted to over 800 pages for its transcript. Both parties had significant live and written testimony submitted, which helped account for the hearing taking four days. The fact that the Second Circuit and the District Court made note of the record being very large should serve as an indicator that the arbitration produced a significant amount of evidence. Usually, because of the limited discovery and brevity by which the arbitrators allow for evidence production, the hearing focuses on key issues and stresses the importance of a narrow scope for the case to be heard. The goal is for increased efficiency in the hearing process. The hearing that took place here further fed into the overall inefficiency because of the breadth by which evidence was taken and heard by the arbitral panel.

Further, the arbitration was not cost efficient. The costs that the parties in this dispute must have incurred must have been staggering. One can only imagine the costs that two adverse parties must expend in the course of a dispute, of this magnitude, that spanned over a decade. The initial arbitration proceedings began in April 1998 and the Supreme Court denied certiorari in June 2008. Even though collection efforts had begun and been enforced in certain jurisdictions, it was not until the denial by the Supreme Court that the litigation may have ended in the United States.<sup>168</sup> The legal fees that the parties must have sustained would have been tremendous based solely on the domestic litigation.

In addition to attorney fees and court costs, the travel expenses by these parties must have also been enormous. It would be necessary that certain witnesses and attorneys would need to travel to the different courts that the parties were engaged in, in order to testify or advocate effectively. These locations ranged from New York to Singapore and everywhere in between. The argument

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<sup>168</sup> This does not mean that there may not be continuing litigation in foreign jurisdictions across the globe. It can only be said at this point, that at the time of publication of this article, there is no current ongoing litigation in the United States.

that arbitration is more cost efficient would appear to be a very weak one as shown in this dispute.

A further point to mention that shows a lack of efficiency by the use of arbitration here was the amount of parallel proceedings that took place while KBC was trying to enforce the judgment. There are multiple instances of further court proceedings that hampered the progress of other courts in making decisions about enforcement of the arbitral award. One example is the initial Texas District Court slowing all proceedings pending the outcome of Swiss Supreme Court's review of the arbitral award. Another is the same Texas District Court issuing an anti-suit injunction based upon an annulment proceeding in Indonesia by Pertamina. This proceeding is almost identical, but slightly different, to the one by the New York District Court that issued an anti-suit injunction a few years later for a lawsuit in the Cayman Islands. All of these either slowed proceedings or added additional litigation based exclusively upon the initiation of parallel litigation elsewhere. These were only a few of the many instances that occurred during this dispute that led to a higher level of inefficiency in the overall arbitral process. Arbitration in this dispute lacked the efficiency that is required for it to be a viable alternative to traditional litigation.

## 2. The Never-Ending Story

Finality is regarded as another attribute of arbitration that allows it be viewed as advantageous to litigation. In this dispute, there was no degree of finality to be found. Pertamina was constantly appealing all judgments and fighting each court order. It seemed as though many times there was almost no chance of having the court's decision overturned, but Pertamina fought it regardless of its chances. Any opportunity for these parties to get past this problem and attempt to reestablish a profitable business was impossible. This is due primarily to one reason: the size of the award. It was so great that the loser of the judgment would be too far harmed to proceed with further business with the other collecting party. Also, the nature of the claim was based completely on a one time construction job for the development of the geothermal energy plant. This would not have been an ongoing contract between the parties, but was limited to the building of the power plant to harness the resource that would be managed by Pertamina. For this reason, the parties had less interest in moving past this problem and were more focused on making sure this decision was correctly made.

The privacy aspect of finality was also lost by the use of arbitration in the dispute. Because of the numerous motions, briefs, and appeals, more and more facts were developed in the case.<sup>169</sup> No secrets of the trade were disclosed or other similar documentation, but through this continuing litigation it would be quite obvious to competitors and any members of the interested public that

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<sup>169</sup> See *supra* Part III.A. and accompanying text. As these facts, for the most part, would not have been found without the litigation that followed the arbitral award.

there was a dispute between the parties. This may not have had any real relevant impact on the parties, but this advantage of arbitration was yet another that was not found in this dispute.

### 3. Arbitrator Panel Weakness

Arbitral expertise is recognized as a staple to any arbitration panel. It is very common for legal and technical experts to compose the panel that hears the disputes by the parties. It is unclear whether the arbitrators in this dispute had any technical background in the area of geothermal energy development. It appears that they must have had some experience in international arbitration prior to their appointment.<sup>170</sup> But, the hearing must have included some very technical elements that would have needed explanation, if not translation. The facts indicate that there were at least seven live witnesses and many written submissions by witnesses as well.<sup>171</sup> The facts do not state if these were experts or lay witnesses, but it seems evident from the Texas District Court's extensive use of experts, that there must have been some technical expertise required to understand the problems of this dispute. There were a significant number of opinions rendered to the arbitration panel to help it understand the problem and reach an educated conclusion.<sup>172</sup> Of these experts, there were many non-legal experts, which included a public accountant,<sup>173</sup> a geologist,<sup>174</sup> and a couple engineers.<sup>175</sup> The use of these experts creates an inference that the panel needed assistance in rendering an opinion in a field of certain complexity. Therefore, it would appear that there was a lack of arbitral expertise by the panel in regards to the technical area involved here. The lack of a panel with expertise eliminates one of the ad-

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<sup>170</sup> This assertion is based solely upon the positions listed with the names of the arbitrators. KBC appointed Professor Piero Bernardini, who was at the time Vice-Chairman of the International Chamber of Commerce's International Court of Arbitration and Member of the London Court of International Arbitration. *Texas Confirmation Opinion*, *supra* note 108, at 940 n.2. The ICSID appointed Dr. Ahmed El-Kosheri, another Vice-Chairman of the International Chamber of Commerce's International Court of Arbitration. *Id.* at 941 n.3. These two arbitrators, as required by the contract, then appointed Mr. Yves Derains, who was the former Secretary General of the International Chamber of Commerce, as Chairman of the panel. *Fifth Circuit Confirmation Opinion*, *supra* note 104, at 283.

<sup>171</sup> *Texas Confirmation Opinion*, *supra* note 108, at 942.

<sup>172</sup> *Id.* at 936. This conclusion is reached because of the list of expert opinions listed following the court's opinion. These opinions would most likely have been filed along with other documents that went before the court by the two parties to the suit.

<sup>173</sup> See Expert Report and Affidavit, *Texas Confirmation Opinion*, 190 F. Supp. 2d 936 (S.D. Tex. 2001) (No. 01-CV-0634), 2000 WL 35300414.

<sup>174</sup> See Rebuttal Witness Statement, *Texas Confirmation Opinion*, 190 F. Supp. 2d 936 (S.D. Tex. 2001) (No. 01-CV-0634), 2001 WL 35199777.

<sup>175</sup> See Expert Report and Affidavit, *Texas Confirmation Opinion*, 190 F. Supp. 2d 936 (S.D. Tex. 2001) (No. 01-CV-0634), 2000 WL 35057559; Expert Report and Affidavit, *Texas Confirmation Opinion*, 190 F. Supp. 2d 936 (S.D. Tex. 2001) (No. 01-CV-0634), 2000 WL 35152905. This list is not extensive; there were further opinions.

vantages that arbitration is supposed to possess. Without this expertise, these arbitrators are not much better off than a traditional judge and a further drag on efficiency is created.

#### 4. Inadequate Enforcement

Enforcement is considered a strong advantage in international arbitration over that of traditional litigation. There is a major distinction between receiving a judgment and being able to enforce that judgment in a jurisdiction where assets can be attached. This distinction is brought to the forefront in international cases when enforceability is always an issue. This dispute highlights this distinction as KBC received judgment relatively early in the process, but was not able to enforce the judgment and attach assets until many years later. The judgment by the arbitral panel was awarded in December 2000. Over the next seven years, KBC attempted and was successful in enforcing the award in various jurisdictions in the United States and abroad. However, it was not until 2007 when KBC was finally able to collect upon its judgment.

The disconnect between judgment and enforcement is a problem that arbitration was supposed to minimize. Arbitration enforcement treaties<sup>176</sup> were an attempt to close the time and legal gaps between receiving a judgment and enforcing it in a jurisdiction of a signatory country. Here, the United States is a signatory to the New York Convention, under which KBC was attempting to enforce the award.<sup>177</sup> However, the problem that was supposed to be limited by the treaty still occurred. Seven years is hardly a quick turn around from judgment to enforcement and collection. Although seven years may not seem extreme for many settings, it is for a method of dispute resolution that claims to be a quicker process that allows for simpler enforcement. The multiple proceedings and constant appeals that took place during this dispute did not meet the goals of speedy enforcement, which is argued as an advantage of arbitration.

#### 5. Neglecting Party Intentions

Finally, arbitration in this dispute did not best honor the parties' intentions. At first glance, it would seem that this advantage of arbitration was found in this dispute. The parties had contracted for an arbitration clause, and when a problem arose, the parties both voluntarily submitted to that arbitration. However, a closer reading of the contract language will actually show otherwise. Not only did the parties agree to arbitrate any disputes, but they also agreed to not appeal the final order of the arbitral decision. The contract language stated that the award would be final and binding on the parties. This language was not followed as Pertamina appealed and filed annulment proceedings in order to avoid

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<sup>176</sup> See *supra* note 24 and accompanying text.

<sup>177</sup> See *supra* note 25 and accompanying text.

the arbitral judgment. The same reasoning that argues that the parties' intentions were met for having arbitration also is used to show that their intentions were not met because the contract stated that the arbitral award would be final and clearly it was not.

Honoring the parties' intentions is an aspect of arbitration that gives it a certain level of quality over traditional litigation. Most courts and people believe that if something is voluntarily entered into and agreed upon, then there is a higher level of justice achieved by its result rather than forcing parties to engage in something. Without honoring the intentions of the parties through enforcing the contract how it was written, and agreed upon, then arbitration loses a primary principle of its wide acceptance. The partial reading of the contract that was done here does not show that Pertamina violated the arbitration clause by ignoring its final binding provision. However, if the contract is read as intended, as a whole, then it states that Pertamina did in fact violate the contract, and the entire arbitration procedure and subsequent litigation did not honor the parties' intention of creating a binding process.

### C. *Case Study Final Thoughts*<sup>178</sup>

KBC and Pertamina entered into a contract with an arbitration clause with the expectation of certain goals to be achieved through its use. A problem came up that caused a breach of the contract by Pertamina. As required by the contract, the parties began arbitration proceedings. Unfortunately, the arbitration did not work as planned. This is partially the fault of the parties, but also is due to the inherent problems that natural resource arbitration poses to the traditional arbitral model. The generalized arbitration procedures that are very effective in many types of commercial trade disputes do not carry over to instances involving natural resources trade and development. With this in mind, consider the following suggestions for improvement to the process.

## IV. ARBITRATION PROBLEM AND SUGGESTIONS FOR IMPROVEMENT

Before beginning to discuss suggestions to alter the traditional arbitral model, a discussion must be had as to the essence of the problem and then the actual difficulties that this problem raises.

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<sup>178</sup> The KBC/Pertamina dispute is not the only example where parties, engaged in international energy and natural resources trade, have submitted to arbitration and had poor results. *See, e.g.*, *Steel Corp. of Philippines v. Int'l Steel Servs., Inc.*, 354 F. App'x 689 (3d Cir. 2009) (parties trading in iron ore and steel products that submitted to arbitration ended in multiple appeals); *Termo-Rio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928 (D.C. Cir. 2007) (parties agreed to the construction and purchase of a power plant, which fell through and was submitted to arbitration; however, following the arbitral award the parties instituted numerous law suits); *Halliburton Energy Servs., Inc. v. NL Indus.*, 618 F. Supp. 2d 614 (S.D. Tex. 2009) (parties engaged in the production and sale of petroleum byproducts submitted to arbitration and lawsuits followed concerning various issues of the arbitration).

A. *Government Involvement as a Barrier to Success*<sup>179</sup>

The problems that natural resources trade and development pose stem from the almost certain government involvement by each country that has a stake in the process. The reasons for the government constantly having a hand in this form of commercial trade are many, but it would seem to mostly circulate around the value and scarcity of these resources. The interest by the government to deal in natural resources would likely come from the rise in demand for energy. Although this is not a recent phenomenon, that is, that there continues to be a larger demand of energy each year, it still needs to be noted because it is the underlying reason for government activity in this field.<sup>180</sup>

Natural resources, either renewable or non-renewable, have tremendous value for the ability to produce energy in a variety of forms. Further, their value comes from either their scarcity in amount, or location. Meaning, that non-renewable resources will eventually no longer be available for use, and because of their finite state, their value is high. This is an example of scarcity in amount. Whereas renewable resources will, if sustainably used, last forever, but their value comes from the location in which they are found. A renewable resource may be very clean and have a high capacity factor,<sup>181</sup> but if it is too costly to distribute to an area of demand, then its value decreases. Therefore, this is an example of scarcity by location.

Because of the inherent value that natural resources possess, and also because of the uniqueness that they typically have in geographic location, a country possessing these valuable stocks would be foolish not to be interested in their control. It is due to these considerations that governments wish to pursue involvement in the trade and development of natural resources.

The government involves itself in natural resources trade and development to a much higher degree than in any other commercial trade.<sup>182</sup> This is not to say that the United States government or the government of another nation does not regulate or attempt to control other forms of commercial trade. Nonetheless, it is not a reach to conclude that government is more likely to be either a party or have a direct stake in the outcome of natural resources trade and development disputes. It does not take long after either watching or reading the news

<sup>179</sup> Government, or state, involvement in international trade and specifically arbitration is an issue that not only this author views as important or prevalent. Currently, the International Chamber of Commerce has organized a task force and is conducting an investigation into arbitrations involving states or state entities to determine whether any additional procedural mechanisms should apply to these disputes. See International Chamber of Commerce, *Task Force on Arbitration Involving States or State Entities*, <http://www.iccwbo.org/policy/arbitration/id32956/index.html> (last visited Sept. 16, 2011).

<sup>180</sup> See *supra* note 9 and accompanying text.

<sup>181</sup> See David B. Spence, *Can Law Manage Competitive Energy Markets?*, 93 CORNELL L. REV. 765, 796 n.150 (2008).

<sup>182</sup> See *id.* at 792–94.

that this fact is realized.<sup>183</sup> In the United States, federal, state, and local governments all attempt to have some form of control or direct input on the final use of natural resources.<sup>184</sup> This could range from federal legislation to local county ordinances. Either way, these are all means by which the government will assert some form of control over natural resource trade and development.

In the United States, there is less involvement by the government over natural resources than in other countries. However, it does not change the fact that the United States will find a way to be involved. It may go by the name of environmental protection, national security, export controls and short supply restrictions, maintenance of national reserves, or the promotion of sustainable use but in the end these are all ways that the government wishes to assert control over a valuable commodity. As stated, this is more prevalent overseas where private property rights are not protected as strongly as in the United States. Foreign governments may assert, and usually do, more ownership over natural resources based upon a variety of arguments.<sup>185</sup>

No matter the nation or its government, there are a few common means by which the government may involve itself in the natural resource commercial scene. The two most typical would be either by establishing a “state-owned entity” to do the business of developing the state owned resources or by leasing and selling off the resources to private companies for their own development. A few state-owned entities would be Saudia Aramco,<sup>186</sup> Rosneft,<sup>187</sup> Statoil,<sup>188</sup> and Per-

<sup>183</sup> The following articles are either situations where the national government is restricting development or when it engages in commercial trade and development itself. *See, e.g.*, Keith Bradsher, *China Seizes Rare Earth Mine Areas*, N.Y. TIMES, Jan. 21, 2011, at B1, available at <http://www.nytimes.com/2011/01/21/business/global/21rare.html?src=mv>; Bruce Finley, *Colorado part of “new gold rush” for rare-earth metals*, DENVER POST (Jan. 16, 2011), [http://www.denverpost.com/news/ci\\_17109238](http://www.denverpost.com/news/ci_17109238); Walter T. Molano, *Venezuela: Hell on Earth*, LATIN BUS. CHRON. (Jan. 21, 2011), <http://www.latinbusinesschronicle.com/app/article.aspx?id=4732>; Hiroko Nakata, *Debate starts on restricting foreign purchases of land*, JAPAN TIMES (Jan. 21, 2011), <http://search.japantimes.co.jp/cgi-bin/nn20110121a2.html>; United Press International, *Diamonds, timber still trouble for Liberia*, UPI.COM (Jan. 7, 2011, 8:52 AM), [http://www.upi.com/Science\\_News/Resource-Wars/2011/01/07/Diamonds-timber-still-trouble-for-Liberia/UPI-25701294408373/](http://www.upi.com/Science_News/Resource-Wars/2011/01/07/Diamonds-timber-still-trouble-for-Liberia/UPI-25701294408373/).

<sup>184</sup> *See generally* Spence, *supra* note 181, at 765.

<sup>185</sup> For an example of nations forcefully getting involved see Bloomberg News, *Big Oil shares hurt as state companies seize reserves*, L.A. TIMES (June 30, 2008), <http://articles.latimes.com/2008/jun/30/business/fi-oil30>.

<sup>186</sup> *See At a Glance*, SAUDI ARAMCO, <http://www.saudiaramco.com/content/www/en/home.html#our-company%257C%252Fen%252Fhome%252Ffour-company%252Ffat-a-glance.baseajax.html> (last visited Sept. 16, 2011).

<sup>187</sup> *See Rosneft at a Glance*, ROSNEFT, <http://www.rosneft.com/about/> (last visited Sept. 16, 2011).

<sup>188</sup> *See Our History*, STATOIL, <http://www.statoil.com/en/about/history/Pages/default3.aspx> (last visited Sept. 16, 2011).

tamina from the case study. The purpose of listing and identifying these state-owned entities is to illustrate the range of countries that engage in this practice of establishing state owned energy companies. These are not limited to lesser developed countries, but include some of the most wealthy and powerful nations in the world. Moreover, this list is far from extensive, but is a small sample of the wide range of state-owned energy development companies. On the other hand, if a country decides to allow for private development of resources it may establish a set of leasing or purchasing procedures that will still guarantee some profit for the government.<sup>189</sup> Typically, in these systems the government would receive an upfront payment and also some form of royalty as resources are produced.<sup>190</sup> Either way, through direct ownership or leasing and sales, the government will maintain a strong level of control.

### B. *Problems that Occur*

The reasons for government involvement have been set out and the means by which the government pursues these goals have been touched on. Now, it is time to discuss the problems posed by governmental involvement to the traditional arbitration model. The two problems that are posed by governmental involvement are issues presented by sovereign immunity and the unwilling nature of most governments to concede.

#### 1. Sovereign Immunity

Sovereign immunity can raise multiple problems ranging from jurisdiction to collection. Sovereign immunity is the right of a foreign state to be immune from the jurisdiction of a certain nation's court system.<sup>191</sup> However, this immunity is not absolute as it is subject to waiver. This waiver can take effect in a host of ways.<sup>192</sup> Without waiver of sovereign immunity, a court cannot allow suit against a nation or enforce an order or agreement that would bind it. This is raised in many cases as a defense to arbitral enforcement; it is usually unsuccessful because the state-owned entity is engaged in commercial activity and its agreement to arbitrate will also normally waive the right to immunity.<sup>193</sup> Even

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<sup>189</sup> See, e.g., The Mineral Leasing Act of 1920, 30 U.S.C. § 181 *et seq.* (2006) (the means by which the United States government leased property to private parties).

<sup>190</sup> 30 U.S.C. § 192 (2006) (discussing royalties).

<sup>191</sup> See 28 U.S.C. § 1604 (2006). This definition is from the Foreign Sovereign Immunity Act, it is a fairly common restatement of the concept.

<sup>192</sup> See, e.g., A.R. Int'l Anti-Fraud Sys., Inc. v. Pretoria Nat. Cent. Bureau of Interpol, 634 F. Supp. 2d 1108 (E.D. Cal. 2009) (holding implicit waivers of immunity under Foreign Sovereign Immunities Act ("FSIA") are found where the foreign state has agreed to arbitration in another country, has agreed that the law of a particular country should govern the contract, or has filed a responsive pleading without raising the defense of sovereign immunity).

<sup>193</sup> *Id.*

though most times this complication is merely that, a small stumbling point, it is still important to address because of the ramifications that this immunity can cause. If the immunity is not waived then the private party will be out of luck, and because in most natural resources disputes one party is a proxy of the government, this issue of immunity must be addressed. After this initial issue is disposed, the primary problem that natural resources trade in arbitration faces is made readily apparent.

## 2. Government Pride

Regardless as to the form of government, whether it is based upon democracy, communism, or divine right, there is one characteristic that most governments share: They do not like to lose. Governments like to lose even less when they are a party to litigation or arbitration, and a judgment is ordered against them. If a government or its agent loses a case at an arbitral panel, it would seem they would be more likely to appeal or institute parallel proceedings.<sup>194</sup> The reason may be one of many, such as, the government does not want to appear weak to its nation's people, or more importantly to other countries, by being brought to its knees by a private entity. The image of a nation losing millions or even billions of dollars to a private party raises huge political risks that a country engages in when it enters into commercial trade. These risks can range from leadership change<sup>195</sup> to social unrest. The political face-saving that leadership regimes participate in would be greatly undermined by the loss of an arbitral award.

These could be some of the many reasons, but it would appear most likely to come back to the end-all-be-all, money. The government by controlling or being involved in the control of natural resources commands the most reliable and, arguably, most powerful form of revenue, that being energy. The demand for energy continues to rise, and the institution that controls that supply will have both incredible wealth and power. These are two things that most governments, and people, view as significant.

Due to the unwillingness to admit defeat, the most noticeable disadvantages of arbitration are forced to the top by governmental involvement in the disputes. It is the government's involvement that has spurred a call for change in the traditional arbitral model to account for these problems. Now, a final point needs to be clear. This article is not indicating that the government being involved in natural resources trade and development is good or bad, but only that it causes the complications to the traditional arbitration model that has led to the problems discussed.

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<sup>194</sup> For a perfect example, see *supra* Part III and accompanying text.

<sup>195</sup> See *supra* note 109 and accompanying text.

*C. Suggestions*

The following section contains some proposed suggestions that may counteract these issues raised by government involvement in arbitration. While the first two are suggestions specifically aimed at natural resources trade and development, the third could be a helpful change to international arbitration generally. The first suggestion would be the incorporation of punitive damages in arbitration, either through a punitive damage clause in arbitration agreements or in the form of sanctions administered by a nation's government. The second suggestion would be a requirement of party bonding to be established before and held throughout the life of any project or transaction. Finally, the third suggestion would be a disclosure requirement between parties on certain matters.

*1. Punitive Damages*

There are two means of implementing punitive damages into international arbitration that should be given serious consideration. The first being the entry of a punitive damage clause into an international commercial trade agreement between transacting parties. The second would be through the involvement of a party's national government where the government could issue sanctions against either party, depending on certain circumstances.

A punitive damage clause being required or recommended into any international commercial agreement, which submits to arbitration, could have tremendous utility. At first glance, the idea of having punitive damages arise out of a contractual agreement would tend to conflict directly with traditional contract theory. However, this could be reconciled by indicating that this clause would only take effect if problems came about during or following the arbitration process. Therefore, a simple breach of the contract would not trigger the punitive damages clause, but it would require a specific set of circumstances dealing with the arbitration.

The problems that the clause would address would be two-fold. It would help limit parallel proceedings and also would add a further element of seriousness to arbitration. The threat of a high punitive damage award would act as a deterrent from parties instituting proceedings outside of the agreed upon arbitration. This would functionally work by having the parties agree that if either of them brings an action beyond those specified in the contract, then the arbitration tribunal could tack-on additional punitive damages. This would obviously not apply to actions to enforce an award in a certain jurisdiction to attach assets. However, most other actions, unless specifically agreed upon, would trigger the clause and the party that brought the suit in another jurisdiction would be hit with a major punitive award.

By including this clause, arbitration would gain more teeth and further emphasize the seriousness of its nature. At this point, it seems that many times, parties that engage in arbitration believe they have an easy fall-back and can bring forth subsequent litigation if they are unhappy with the result. The use of this clause would still allow for parties to bring alternative litigation, but it

would make them think twice if their pocketbook was on the line. For example, in our case study, KBC and Pertamina had a clause in their contract prohibiting the commencement of any suit or legal proceedings concerning the underlying dispute of the arbitration.<sup>196</sup> However, there was nothing stopping either party from pursuing other litigation besides breaching the contract, which had already been breached. This would not be the case with a punitive damage clause as the parties would be held to follow the arbitration procedures and the agreed upon, and more importantly, contracted to provisions concerning disputes or face a hefty penalty.

The actual mechanics by which the amount would be set could take a few different forms. It could be a set percentage of the overall compensatory award or it could be an amount set by the arbitral panel, following its award, in case parallel proceedings were instituted. The latter option would have some chance of abuse and might not be the best route. However, the first option could almost take the form of a liquidated damages clause, except it is meant to punish. The means chosen could also add to the flexibility of arbitration as well. Now, in all fairness, most parties may not wish to agree to such a term without some form of appeal. This could be resolved by simply having the parties stipulate which court or courts a party may appeal an award to in the case of abuse. Hopefully, by the addition of this last element, parties may consider the use of a punitive clause in their arbitration agreements.

Moreover, this clause could be particularly effective against government parties involved in natural resources trade and development because of the constant appeals and proceedings brought by government entities that do not wish to lose. Additionally, a government would have a difficult time explaining to its citizens why it suffered a huge punitive claim based upon its inability to follow contracted to processes for its disputes. It is for these reasons that a punitive damage clause could help avoid some of the problems presented by arbitration in natural resources disputes.

As an alternative to an agreed upon punitive damage clause, the use of government sanctions by a nation's governing authority could also be used in a punitive nature. Government sanctions currently exist and are used frequently; most often one government will place some form of economic sanction on another in order to pressure that country or others to make some political or social change.<sup>197</sup> This effective tool could also be carried over and used more regularly in trade agreements that select arbitration as its means of dispute resolution.

It may seem odd that a possible solution to a problem caused by government involvement is more government involvement; hence, an examination of the benefits that could be had demonstrates its value. As discussed above, the

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<sup>196</sup> See *supra* note 106 and accompanying text.

<sup>197</sup> For a collection of United States trade sanctions, see United States Department of the Treasury, *Sanctions Programs and Country Information*, <http://www.treasury.gov/resource-center/sanctions/Programs/Pages/Programs.aspx> (last visited Sept. 16, 2011).

problem of government involvement in natural resources arbitration comes from the government acting as a party to the dispute, not acting as the enforcement mechanism. A national government can act as an enforcement mechanism through the same way most governments accomplish goals: deterrence.

Government sanctions by their very nature are meant to punish and deter certain behavior. Thus, using these sanctions more in international arbitration would only further reinforce some of the same goals as a punitive damage clause would, but would not require party agreement on exact terms. However, in order to have a higher degree of legitimacy and reliability, there would need to be a multinational treaty similar to the New York Convention. This treaty would need to set forth the allowable sanction values as well as grounds for enforcement and defense. These sanction values, or their calculation, and defenses would need to be specifically illustrated in order to limit abuse by national governments. The benefits of this specificity would be to minimize government discretion outside of prescribed procedures in the treaty. This treaty would in essence act as a counterpart to the New York Convention that would allow for signatories to apply sanctions to parties that violate arbitral awards through either instituting unauthorized parallel proceedings or refusing to comply with a final arbitral order.

There are various benefits of incorporating government sanctions into commercial trade agreements. Many of these benefits would counteract the problems created during natural resources arbitration, and thus should be considered a viable solution.

## 2. Party Bonding

Another tool that could be employed to help deal with the problems posed by natural resources arbitration would be the use of financial bonding by the parties. This would help address the problem of enforcement that goes along with arbitral disputes. Specifically, this would be helpful for natural resources disputes because of the huge payouts and awards that accompany them. It would seem almost certain that most parties to a contract already have insurance or perform checks on the other party to ensure financial integrity. However having the parties come together during contract negotiations and decide on an amount of money that must be set aside in case of arbitration proceedings would drastically help avoid enforcement problems. This way the parties would know that a certain amount of money, which could be held by a neutral third-party,<sup>198</sup> is available for damages to be set-off against following the final order by an arbitral panel.

As though it seems this would greatly help limit the issues of enforcement and collection, many parties would likely be hesitant to turn over huge sums of money to a third party with limited control. Due to this, some limited

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<sup>198</sup> This would be an appropriate role for a bank or other financial institution.

appeal option would need to be given to the parties that participate in this bonding process in order to ensure fairness. This may make arbitration somewhat less efficient, but would also allow for greater enforcement, a tradeoff that many parties may wish to take. This route of requiring bonds may also be very effective against government parties because, if a government party loses, it will not be able to try to freeze or hide assets it may have available for attachment. These attributes of party bonding could help successfully empower victorious parties in enforcing their claims in a timely manner.

### 3. Disclosure Requirements

A final suggestion that would increase the efficiency and enforcement capabilities of arbitration would be a requirement in all agreements to disclose the location and form of assets of each party. There would be strict limitations and guidelines that this disclosure would have to follow. For example, only the jurisdiction and the state or country would need to be expressly given as for the location of the assets. It would not need to be the precise address, if it were real estate, or bank account information, if it were cash. It would be left in very general terms, but sufficient enough to locate them upon inquiry. As for the form of the assets, it would also be in general terms, such as classifying the assets as real or intellectual property.

Even if some of the above described process is done through the limited discovery that goes on in arbitration, it should be done prior to arbitration and required to be stated in the contracts and updated as assets change. This would give a level of transparency to the proceedings and avoid the guessing game to find where a party may actually have assets following the final order. These disclosure requirements would help the arbitral process, while also still protecting the privacy of the parties.

These suggestions, are at this point, purely theoretical, and the purpose of this article was to identify the reasons for the failure of arbitration when used in natural resources cases, while suggesting some alternatives that would need to be implemented in order to see if any positive results followed. These suggestions are meant to provide a stepping stone towards further thought and solutions that need to be formulated to address this continual problem.

## V. CONCLUSION

International arbitration faces a real problem. Natural resources trade and development will continue to be prevalent throughout the international market and unless some changes are made to the traditional arbitral model, it will be left in the dust. Cases like the Pertamina/KBC dispute are not a unique set of circumstances that will not be repeated. In fact, it will be quite the opposite. There will be more situations where a government and a private entity have a dispute arising from some energy sector development and will seek arbitration to resolve those disputes. However, these quarrels will not benefit from the advantages of arbitration as it currently sits. A change is needed for arbitration to

meet its potential in the field of international trade and development of natural resources. This change does not need to be the exact kind advocated in this article, but it must be prompted and followed through by some organization that has a staked interest in a better process.

It will be interesting to see if any change does occur over the next few years. This could take the form of a specific set of model arbitral rules for natural resource cases promulgated by one of the many private international arbitration services or possibly through a multinational treaty. Regardless of the means, change is needed. It is easy to envision that if these problems are not curbed soon, arbitration as a form of dispute settlement in these types of cases will no longer be used.

*Jacob R. Shaffer\**

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\* Senior Editor, Volume 114 of the *West Virginia Law Review*; J.D. Candidate, West Virginia University College of Law, 2012; B.A. in Political Science, *cum laude*, Westminster College, 2009. The author would like to thank his family, particularly his parents, Robert and Diana Shaffer, for their patience and encouragement during the drafting of this Note. Also, the author would like to thank his colleagues of the *West Virginia Law Review* that have provided substantial comment during this note process. Finally, the author would like to thank Professors Gregory Bowman and Alison Peck for their continual advice and guidance as their remarks have provided an invaluable resource.