

Northwestern Journal of International Law & Business

Volume 12

Issue 1 *Spring*

Spring 1991

Non-Lawyers in International Commercial Arbitration: Gathering Splinters on the Bench

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Recommended Citation

James E. Meason, Alison G. Smith, Non-Lawyers in International Commercial Arbitration: Gathering Splinters on the Bench, 12 Nw. J. Int'l L. & Bus. 24 (1991-1992)

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Non-Lawyers in International Commercial Arbitration: Gathering Splinters on the Bench

*James E. Meason and Alison G. Smith**

I.	INTRODUCTION	25
II.	OVERVIEW	26
	A. Growth of International Trade and its Ramifications for the Legal Profession	26
	B. Alternative Dispute Resolution and the Ascendance of Arbitration	27
	C. Western Domination of the Institutional Arbitral Setting	28
III.	COMPARISON OF INSTITUTIONAL PRACTICES IN THE SELECTION OF ARBITRATORS	30
	A. American Arbitration Association	31
	1. <i>Description of Entity</i>	31
	2. <i>Rules Relating to the Selection of Arbitrators</i>	31
	3. <i>Actual Selection Process</i>	32
	B. International Chamber of Commerce	33
	1. <i>Description of Entity</i>	33
	2. <i>Rules Relating to the Selection of Arbitrators</i>	34
	3. <i>Actual Selection Process</i>	35

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C.	International Centre for the Settlement of Investment Disputes and its Additional Facility	36
	1. <i>Description of Entity</i>	36
	2. <i>Convention Rules Relating to the Selection of Arbitrators</i>	37
	3. <i>Actual Convention Selection Process</i>	38
	4. <i>Facility Rules Relating to the Selection of Arbitrators</i>	38
D.	United Nations Commission on International Trade Law	39
	1. <i>Description of Entity</i>	39
	2. <i>Rules Relating to the Selection of Arbitrators</i>	40
IV.	ATTRIBUTES OF SELECTED PROFESSIONS	41
	A. Several Intangible Qualities	41
	B. Attorneys	42
	C. Foreign Affairs Professionals	43
	D. Business/Technical Professionals	44
V.	CONCLUSION	46

I. INTRODUCTION

In light of the frequent appearance of arbitration clauses in international contracts, and the volume of litigation handled in this manner, international commercial arbitration¹ has become a favorite subject of commentators who have primarily focused on the relative benefits of arbitration versus litigation and cross-institutional rules comparisons. One area that has received scant attention is the factors concerning the actual selection of particular individuals to serve as arbitrators. This article looks at how arbitrators are chosen today within the institutional context. Following this are general discussions of selected professions for indications of their members' inherent suitability for and adaptability to arbitration.

It must always be kept foremost in one's mind that the most successful arbitration is that which sets a smooth course for future commercial operations, and is not simply attained through the speedy and low cost resolution of the disagreement. In the international context, differing cul-

¹ While the term "international commercial arbitration" has no single, uniform meaning, it encompasses both "institutional" (administered by organizations such as the American Arbitration Association (AAA) and International Chamber of Commerce (ICC)) and "ad hoc" (administered and conducted in a manner specifically designed by the parties, based on their concepts of equity and fairness with an eye to the particular circumstances of each case) arbitrations. Nelson, *Alternatives to Litigation of International Disputes*, 23 *Int'l Law* 187 (1989).

tural perspectives, attitudes, and legal systems complicate the arbitral process. Owing to several factors, not the least of which is the extremely adversarial nature of our legal profession, one can question the ultimate utility and wisdom of using American attorneys to serve as arbitrators in international disputes. It is our premise that, while much of the available American literature implicitly touts the legal profession and its practitioners as inherently superior to other professionals and subsequently well suited to arbitration, those outside the legal community may better serve the long-term goals of the parties, which are the successful resolution of the dispute and the maintenance of an amicable business relationship.

The Parker School of Foreign and Comparative Law has compiled a roster of some 459 potential international commercial arbitrators.² The arbitrators are listed by name, along with biographical information such as present occupation and education. Of the 459 potential arbitrators listed, 382 of them are engaged in the practice or teaching of law.³ Only 56 are engaged strictly in business endeavors. Additionally, 23 act as general counsel to a corporate entity, and are thus also counted under the lawyer category. There are 21 people who are involved in pursuits other than business or law: 15 are full time arbitrators, 5 are arbitrators in addition to being counted as lawyers, one is a judge on the International Court of Justice, one is an Administrative Judge, and four are in other non-business professions.⁴

The fact that so many of these potential arbitrators (83%) are lawyers is a testimonial to the way lawyers have insinuated themselves into the international commercial arbitration venue. It is this paper's contention that perhaps non-lawyers with expertise in various fields germane to international commercial arbitration should be seriously considered for arbitrator positions as they arise. It is in this way that a more reasoned approach to arbitration may occur.

II. OVERVIEW

A. Growth of International Trade and its Ramifications for the Legal Profession

Trade among nations has grown incredibly since the close of World War II, as nations have come to realize the benefits of a free and open trading system. The use of import restrictions, competitive devaluations,

² Parker School of Foreign and Comparative Law, *The 1989 Guide to International Arbitration and Arbitrators* 469 (1989).

³ Including judgeships in a national setting.

⁴ *Id.*

and other trade restraints has lessened over time. Trade volume since 1945 has witnessed a ten-fold increase,⁵ and export (international trade) value has increased from \$129.8 billion in 1960 to \$2694.5 billion in 1988,⁶ a twenty-fold increase in less than three decades. Bilateral and multilateral agreements, such as the United States-Canada Free Trade Agreement and the General Agreement on Tariffs and Trade, have helped to reduce trade barriers and have promoted this rapid growth.

As the international community moves toward a more cooperative stance in the very competitive economic arena, the legal community must reassess its role and ready itself for the multitude of trade-related problems that will occur with greater frequency. An increasingly important subject within this international scenario is the much debated growth of alternative dispute resolution ("ADR").⁷ Its objective is to "find a means of resolving disputes that is both fair and reasonably efficient, and that produces a prospect of agreement in the future."⁸

B. Alternative Dispute Resolution and the Ascendance of Arbitration

ADR has been highly regarded in the American business community for some time, and is the recipient of renewed interest, with businesses looking to cut costs in the midst of a recession.⁹ But ADR's potential is only now being tapped, as the American legal community has been slow to embrace the concept. Thrown into the forefront of this perceived shift are corporate counsel, who are bowing to management dictates regarding soaring legal costs and complaints about business relationships poisoned from litigation. In fact, some of America's largest companies have such negative feelings about litigation that they recently signed a letter pledging themselves "to negotiate and settle [disputes] early before litigation takes on a life of its own."¹⁰ This view is not the sole province of business, but has also been expressed in legal literature.¹¹

The popularity of arbitration in both domestic and international situations has been demonstrated in theory and practice. Advocates within the business community believe that arbitration is preferable over litiga-

⁵ U.S. Department of State, GIST: U.S. Trade Policy (1989), at 1.

⁶ Directorate of Intelligence, Central Intelligence Agency, CPAS 89-10002, HANDBOOK OF ECONOMIC STATISTICS 22 (1989).

⁷ ADR takes a variety of forms, from binding procedures such as arbitration to non-binding arrangements including mini-trials and mediation. Nelson, *supra* note 1.

⁸ *Id.* at 193.

⁹ See, e.g., Fisher, *How to Cut Your Legal Costs*, Fortune 185 (Apr. 23, 1989).

¹⁰ 317 Economist 89 (Nov. 10, 1990).

¹¹ "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." Nelson, *supra* note 1, at 198.

tion because arbitration is thought to be informal, faster, less costly, equitable, a way to avoid unfavorable publicity, relatively conciliatory, absorbs less management time, and is a way to get those dreaded lawyers from "Dewey Cheatham & Howe" out of the picture. Most importantly, arbitration is seen as providing the best chance to save the underlying business relationship. From a foreign perspective, the United States has become known as a horrid land of litigation. Especially as pertains to business and commerce, America has developed a reputation for gumming up the works through a mind-boggling multiplicity of statutory regulations and lawsuits. Jury awards in tort claims are viewed as outrageous, and foreign firms bend over backwards to avoid litigation either in the U.S. or with U.S. attorneys.¹² Thus, it was only natural for ADR, and arbitration in particular, to have developed as a favored method of settling international disputes and preventing them from causing serious, permanent damage to the underlying commercial relationship.

C. Western Domination of the Institutional Arbitral Setting

Cultural considerations are extremely important, as they reflect the complex interaction of the values, attitudes and behaviors displayed by the members of a particular society.¹³ One cannot ignore the relationships among individuals and groups from different cultural experiences. As regarding the resolution of disputes, cultures follow general ethological principles and have built-in safeguards to prevent disputes from going too far, though such safeguards may not always work. These safeguards apply within the bounds of the culture but, because they are not intellectually understood or made explicit, seldom function when dealing with those from another culture.¹⁴ "Clearly, within the confines of a single culture, disputes, as well as the settlement of disputes, follow reasonably well-established patterns. Otherwise there would be chaos."¹⁵

Essentially, the current institutional arbitral system reflects two things. First, it is clearly the Western world's answer to commercial disputes. Institutions such as the ICC and arbitration organizations like the AAA were founded and are dominated by the West. Second, when one notes the numerous trade associations conducting arbitrations and the many arbitration centers that have hung out their shingles in many de-

¹² "Foreign companies in particular, wary of dealing with American lawyers, discovery, depositions, and pretrial examinations, may greatly prefer the relative procedural simplicity of arbitration." Nelson, *supra* note 1, at 197.

¹³ N. Adler, INTERNATIONAL DIMENSIONS OF ORGANIZATIONAL BEHAVIOR 9 (1986).

¹⁴ E. Hall, BEYOND CULTURE 159 (1976).

¹⁵ *Id.* at 162.

veloping countries, one is faced with recognizing the lack of uniformity that necessarily exists within the arbitral framework. It has been argued that an essential element in the increased resort to arbitration has been the emergence of a general international consensus regarding applicable substantive law and policy.¹⁶ But such a statement could not be further from the truth. This "consensus" really only reflects the imposition of Western values on business, showing our ignorance of important cultural differences and demonstrating how our cultural assumptions shape our view of business relationships.¹⁷

While the United States is the world's policeman, one of the world's two superpowers, and an economic juggernaut even in the worst of times, we remain a rather insular society with relatively little international commercial experience beyond the multinational corporate level. Compounding the problem is the fact that Americans also have little personal international experience, except for what we can garner from television. As business practices at home have been fairly modernized, simplified, and standardized by the Uniform Commercial Code, they simply may not be in accord with either our Western neighbors or our Eastern and Southern business partners. Scholars are coming to realize that "a number of fundamental principles and policies, economic and otherwise, do not give rise to a consensus between economic and legal systems; therefore, the arbitral process must reflect the actual intentions of parties, rather than consisting of rules, procedures, and persons that reflect the disposition, needs, and requirements of only one of the parties."¹⁸

Generally, developing countries have accepted the current concept of institutional arbitration. But they have done so because, as the weaker partners in the trading arena, they had to play the rules of the game as dictated by the Western players. Almost simultaneous with the rise in economic might in the Pacific Rim, institutional arbitrations have begun to move away from major European cities, with ad hoc proceedings becoming developing countries' arbitration of choice. When one of the parties is from a developing country, the jurisdiction of institutional arbitration bodies in the industrial and most developed countries is in-

¹⁶ G. Wilner, *Acceptance of Arbitration by Developing Countries in RESOLVING TRANSNATIONAL DISPUTES THROUGH INTERNATIONAL ARBITRATION* 283, 284 (T. Carbonneau, ed. 1984). ("Businessmen, arbitrators, lawyers, and the other actors in the world of commerce and trade appear to have reached a common understanding as to the basic standards that should govern transactions of various types.")

¹⁷ *Id.* at 288 (Noting that while there may be general agreement as to the utility of arbitration as a method of dispute resolution, there is no universal consensus on economic policy regarding the terms of trade, and thus no agreement on the substantive rules to be applied by the arbitrators).

¹⁸ *Id.* at 285.

creasingly rejected for political, ideological, and psychological reasons. Where one of the parties is a governmental agency, political reasons are regularly behind the rejection of institutional arbitration associations.¹⁹

While it is difficult to chart the course of the newly unshackled Eastern European countries and other socialist or communist nations, the Soviet perspective on arbitration is not unlike what one would expect.²⁰ As is evident from the preceding discussions, cultural perspectives play a prominent role in international arbitrations. Ad hoc arbitral tribunals are becoming the preferred means of dispute resolution between parties belonging to different economic, political, social, or legal systems, especially between parties from developed countries and those from less-developed or developing ones.²¹ When arbitration is chosen as the means of dispute settlement, a great emphasis is placed on the selection of knowledgeable and unbiased arbitrators.

III. COMPARISON OF INSTITUTIONAL PRACTICES IN THE SELECTION OF ARBITRATORS

Three overriding issues govern the selection of arbitrators. The first is whether institutional or ad hoc arbitration will be used. The second is the number of arbitrators that will hear the dispute, and the third issue concerns the suitability of the arbitrator(s). In the institutional context,

¹⁹ A. Goldstajn, *Choice of International Arbitrators, Arbitral Tribunals and Centres: Legal and Sociological Aspects*, in *ESSAYS ON INTERNATIONAL COMMERCIAL ARBITRATION* 27, 35 (P. Sarcevic, ed. 1989). For a discussion of arbitration in developing countries, see McLaughlin, *Arbitration and Developing Countries*, 13 *INT'L LAW* 211 (1979).

²⁰ The Soviet Union sees four ways to resolve international trade disputes: amicable conciliation by the parties, international arbitration, resort to the domestic courts of one of the trading partners, and international adjudication. "The Soviet government's receptivity to any of these methods of international trade dispute settlement is predicated upon its perception of the potential uses, abuses, and misuses of each of these devices. Soviet distrust for the resolution of international trade disputes in the courts of a foreign trading partner perhaps is surpassed only by its distrust for international adjudication. In the view of the Soviet government, resort to either of these two methods of dispute resolution invariably means that the Soviet trading party will lose control over the adjudicators as well as over the law applicable to the dispute. Conditioned by the fact that under Soviet domestic law adjudication is not totally apolitical or neutral to economic and class considerations, the Soviet trading party is unwilling to entrust its fate to the "neutrality" or "disinterestedness" of international or foreign adjudicators. To the Soviet legal mind, there is no such thing as a neutral adjudicator — if by "neutral" one means a willingness to decide disputes without regard to any overriding political and economic considerations. It follows, therefore, from the Soviet perspective, that if amicable conciliation fails, the only ideologically and politically acceptable method of resolving transnational commercial disputes is international arbitration." C. Osakwe, *The Soviet Position on International Arbitration as a Method of Resolving Transnational Disputes*, in *RESOLVING TRANSNATIONAL DISPUTES THROUGH INTERNATIONAL ARBITRATION* 184, 184-85 (ed. T. Carbonneau 1984). For a discussion of arbitration in East-West trade contexts, see Holtzmann, *Dispute Resolution Procedures in East-West Trade*, 13 *INT'L LAW* 233 (1979).

²¹ Goldstajn *supra* note 19, at 38-39.

each institution deals with these issues in its own way. It is helpful to one's understanding of the selection process to single out and examine several such organizations and conventions.

A. American Arbitration Association

1. *Description of Entity*

Founded in 1926, the American Arbitration Association ("AAA") is the largest arbitral agency in the world in terms of case load²² and facilities.²³ The AAA caseload covers labor-management relations, real estate valuation, insurance, construction, and international trade disputes, among others.²⁴ Construction and textiles disputes generally constitute roughly 50% of the commercial caseload. International cases are relatively few, totaling about 200 in 1990.²⁵

Two centers in the U.S. are maintained for purely international disputes. The World Arbitration Institute is located in New York City and normally handles Latin American and European disagreements. The Asia/Pacific Center, located in the San Francisco office, deals with disputes from that region of the globe.²⁶ Besides these two offices, AAA is a member of an international network established through agreements with foreign entities such as other arbitration agencies and chambers of commerce. Through this network, a variety of arrangements can be made. For example, an arbitration can be held outside the U.S. using AAA rules with support services provided by the foreign entity. An arbitration can also be held in the U.S. at AAA facilities under the foreign entity's rules. An arbitration can also be undertaken anywhere in the world using ad hoc rules, with the AAA or another entity charged with appointing the arbitrators or supplying administrative support.²⁷

2. *Rules Relating to the Selection of Arbitrators*

With regard to the selection of arbitrators, the parties to the dispute are free to adopt any mutually agreeable procedure.²⁸ This includes the

²² From 1986 to 1990 inclusive, 269,024 cases were filed with AAA, with a record high of 60,808 noted in 1990. Commercial cases accounted for 17,533 of the 1990 total. AAA Press Release, Feb. 20, 1991.

²³ With its national office in New York City, it maintains 35 offices throughout the U.S. and Puerto Rico.

²⁴ AAA, *RESOLVING YOUR DISPUTES* 3 (1988).

²⁵ Telephone interview with Frank Zatto, AAA case administration official, in New York, New York (Mar. 18, 1991).

²⁶ *Id.*

²⁷ AAA Annual Report 14 (1989-1990).

²⁸ AAA International Arbitration Rules [hereinafter AAA Rules] Art 6(1).

submission of a list of arbitrators by AAA from which the parties can delete unacceptable names, or should they wish to, the parties can ask the AAA to appoint arbitrators. Assuming that the commercial dispute does not spill over into the arbitral process itself, the parties will be able to fashion a procedure that meets their particular wishes.

The parties can choose the number of arbitrators, but if they are unable to agree, one arbitrator will be appointed unless the case administrator believes that a three person tribunal would be more appropriate owing to the complexity, size, or circumstances surrounding the dispute.²⁹ If the parties cannot agree, significant impediments to party autonomy are imposed. If no agreement has been reached within 60 days of the commencement of the arbitration regarding the designation of arbitrators or the manner in which arbitrators will be appointed, the case administrator³⁰ will, upon written request of either party, appoint the arbitrator(s) and designate the presiding arbitrator in the case of a tribunal.³¹ If the parties have agreed on the manner of selection, but have not made all the needed appointments within the time limit agreed upon, the case administrator will, again upon written request of either party, perform all the functions provided for in the selection procedure.³²

As one can readily determine, the rules allow for the fullest exercise of party autonomy in the case that they can agree on the number, manner of selection, and designation of arbitrators. But when the parties cannot reach mutual agreement, the AAA is given significant power to remove barriers to allow the case to proceed to arbitration.

3. *Actual Selection Process*

AAA maintains a central databank of more than 54,000 potential arbitrators that is broken down into 590 numbered categories delineating an extensive list of specialties. Within categories of expertise there are subcategories as well. To illustrate the delineations, actuaries are assigned number 643, admiralty law gets number 812, agricultural chemicals is noted by number 287, and international law has number 818.³³

AAA personnel conduct a "qualification word search" via computer to identify those with particular backgrounds. Thus, if a dispute involves chemical waste disposal, the term "chemical engineer" would be typed into a keyboard to start the search. Once potential candidates are identi-

²⁹ AAA Rules Art. 5

³⁰ AAA employee assigned to a case.

³¹ AAA Rules Art. 6(3).

³² *Id.*

³³ *Supra* note 25.

fied, four tangible factors and one intangible factor are taken into account in choosing particular individuals to serve as arbitrators. They are: industry expertise, legal training, prior arbitration experience, AAA training, and demeanor.³⁴

Industry expertise is viewed as the most important qualification of the five.³⁵ Its use does not necessarily signify that the services of attorneys are not included here, as some in this category have earned law degrees. However, it is primarily focused on those with substantive industry experience; participation by business executives and other professionals is seen as vital, due to their specialized knowledge and experience.

Legal training and previous arbitration experience are viewed as equally important, behind industry expertise. Approximately 40% of assigned arbitrators have a legal background, and are valued for "the certain tact and skill" they bring to the proceedings.³⁶ The same is true for those with prior arbitration experience, as they are comfortable with the proceeding and know how to conduct an arbitration in a focused and timely fashion.

AAA training is the fourth tangible factor.³⁷ The Association conducts day-long training seminars for individuals in large cities, and has training tapes available for home study for those in smaller cities and rural areas. While this training does undoubtedly give potential arbitrators some feel for AAA proceedings, it is difficult to understand why such a minor training program would be considered a primary factor in the selection of arbitrators.

A fifth factor is the intangible quality of general demeanor.³⁸ This trait is best characterized by asking how easy is it to work with this person. Also under this heading come concerns over the ease with which one can be contacted and one's ability to clear his or her calendar for several consecutive days.

B. International Chamber of Commerce

1. *Description of Entity*

The International Chamber of Commerce (ICC), founded in 1919, is one of the oldest international organizations formed to promote international commerce.³⁹ Based in Paris, the ICC was an offshoot of the

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ J. Paulsson, *Arbitration Under the Rules of the International Chamber of Commerce*, in

United States Chambers of Commerce, and is based upon the same structure.⁴⁰

The ICC is made up of internationally oriented enterprises and their national organizations.⁴¹ There are member organizations in over 100 countries.⁴² The purpose of the association is to encourage favorable actions by international organizations and governments, as well as inform the public.⁴³ The ICC does not conduct arbitration itself; rather, it supervises the caseload of its arbitrators, who are either chosen by the parties or appointed by the ICC.⁴⁴ The ICC's arbitral processes are run by the ICC Court of Arbitration. The Court's functions are to review requests for arbitration, approve "Terms of Reference"⁴⁵ which the arbitrator and the parties prepare, monitor the proceeding, and scrutinize the award.⁴⁶

In addition to administering its own arbitrations, the ICC will appoint arbitrators to work with the UNCITRAL rules, without supervision.⁴⁷ This is rare, however.⁴⁸ The ICC has evolved into "the dominant general purpose institution — as opposed to single-trade associations — in the field of international commercial arbitration. This preeminence is manifest whether one refers to the volume of cases or to the magnitude of amounts in dispute."⁴⁹

The ICC handles approximately 700 international arbitration cases a year, where AAA, the second largest organization, handles between 100 and 200 per year.⁵⁰ With this volume of cases, it is especially important to scrutinize how these arbitrators are chosen, to determine how the arbitrators get into the process, and whether most of them are in fact chosen independently by the parties or if they are appointed.

2. Rules Relating to the Selection of Arbitrators

Under ICC rules, the parties can either pick their own sole arbitra-

RESOLVING TRANSNATIONAL DISPUTES THROUGH INTERNATIONAL ARBITRATION 234, 240 (T. Carbonneau, ed. 1984).

⁴⁰ Graving, *The International Commercial Arbitration Institutions: How Good a Job Are They Doing?*, 4 AM. U. J. INT'L L. & POL'Y 319, 331 (1989).

⁴¹ Paulsson, *supra* note 39, at 240.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Graving, *supra* note 40, at 332.

⁴⁵ The Terms of Reference "define the contested issues and settle procedural details." *Id.*

⁴⁶ Graving, *supra* note 40, at 332.

⁴⁷ *Id.* at 336. See also *infra* text accompanying notes 94-109.

⁴⁸ *Id.* at 336 n.67.

⁴⁹ Paulsson, *supra* note 39, at 236.

⁵⁰ Graving, *supra* note 40, at 330; see also *supra* note 25.

tor, or they can request that the ICC Court appoint one or a panel.⁵¹ If, however, the parties cannot agree to the arbitrator, the ICC Court will step in and appoint one.⁵² In that circumstance, or if the ICC Court is making the appointment upon request, the Court will first choose which country the arbitrator will come from, if not specified in a previous agreement between the parties.⁵³ Then the ICC Court will ask that country's nominating committee to nominate an arbitrator.⁵⁴ The nominated arbitrator is generally chosen.⁵⁵ This process can be time consuming, which may be burdensome to the parties. However, it does spread out the responsibility for nomination of arbitrators to national ICC committees. This may have the effect of letting more players into the game, or it may instead simply shift the concentration of power to several locations.

3. *Actual Selection Process*

The United States National Committee of the ICC responsible for nominating arbitrators is the Council of International Business, located in New York. This entity maintains a roster of arbitrators compiled from information sent in by American arbitrators located all over the world.⁵⁶ The roster consists of hundreds of names.⁵⁷ Submission of biographical information and curriculum vitae guarantees inclusion on the roster. However, when the Council reviews the roster for arbitrators to nominate, it screens the potential arbitrators at that time.⁵⁸

One of the criteria in selecting an arbitrator is the location of the arbitrator. For instance, if the arbitration will take place in Paris, an arbitrator located there will take precedence.⁵⁹ Thus, part of the determination of which arbitrators to use, and which arbitrators get used more frequently, depends on how much competition is in that particular locale. In New York, there are many arbitrators on the Council's roster, whereas in Paris and in San Francisco, there are fewer.⁶⁰ The Council of International Business only nominated fourteen arbitrators in 1990, and

⁵¹ Stein and Wotman, *International Commercial Arbitration in the 1980's: A Comparison of the Major Arbitral Systems and Rules*, 38 BUS. LAW. 1685, 1700-1703 (Aug. 1983).

⁵² *Id.* at 1703.

⁵³ *Id.* at 1702.

⁵⁴ *Id.*

⁵⁵ Paulsson, *supra* note 39, at 235.

⁵⁶ Telephone interview with Deborah Enix-Ross, Council of International Business (March 27, 1991).

⁵⁷ *Id.* See also *supra* note 2. This book does not contain an exhaustive list of arbitrators, but many names are the same as the Council's roster.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

none in 1991 as of March. The reasons for so few nominations are several. First, the U.S. is the second largest user of the ICC.⁶¹ Since the arbitrator cannot be of the same nationality as the parties, this precludes American arbitrators from being used in many instances. Arbitrators are most commonly appointed from France, Switzerland, and Britain.⁶² Secondly, in many arbitrations, the parties appoint their own arbitrators. The parties are turning to the national committees with increasing frequency for suggestions, however. The Council of International Business will give the names of three suggested arbitrators to the parties which contact it.⁶³

Thus, it appears that the direction of ICC arbitration, at least, is away from the United States, and toward self-help.

C. International Centre for the Settlement of Investment Disputes (ICSID) and its Additional Facility

1. Description of Entity

Through the efforts of the International Bank for Reconstruction and Development (World Bank), ICSID was created by international agreement.⁶⁴ A public international organization, ICSID's purpose is the provision of facilities for the arbitration and conciliation of investment disputes.⁶⁵ It has its own set of rules on which parties can rely if they have not agreed upon others. ICSID does not engage in arbitration itself, but rather utilizes arbitrators appointed by the parties or provided by the Convention. The Convention also obliges the signatories to recognize an ICSID award as though it were a final judgment of their own national courts.⁶⁶ The World Bank continues to house this institution.

In 1978, an "Additional Facility" was established⁶⁷ which broadened the scope and jurisdiction of the Centre. Three categories of pro-

⁶¹ *Id.*

⁶² Paulsson, *supra* note 39, at 254.

⁶³ *Id.*

⁶⁴ Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, [1965] 17 U.S.T. 1270, 575 U.N.T.S. 159. [hereinafter Convention]. As of mid 1990, a total of 99 states had signed the Convention and 92 of those had also ratified it. 1990 Annual Report 6.

⁶⁵ Convention, *supra* note 64, at Art. 25(1). While the term "investment" is not defined, ordinary commercial transactions are implicitly precluded under the Convention. See ICSID Doc. ICSID/12 at 6. Its use is limited to disputes occurring between a signatory State (or one of its subdivisions or agencies) and a national of another signatory State.

⁶⁶ Convention, *supra* note 64, at Arts. 53-54.

⁶⁷ Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes (hereinafter Facility)(many of its provisions concerning the appointment of arbitrators are either identical or substantially similar to the Convention provisions).

ceedings which were not within the jurisdiction of the ICSID were delineated as within the scope of the Additional Facility. Further, none of the provisions of the Convention are applicable to the Additional Facility.⁶⁸ In addition to fact finding proceedings,⁶⁹ jurisdiction was expanded to include nonsignatories to the Convention.⁷⁰ Most importantly, the ICSID can now take disputes which do not arise directly out of an investment, so long as at least one party is a signatory or a national of a signatory State.⁷¹ But the door has not been fully opened, as “ordinary commercial transaction[s]” are not covered.⁷² The Additional Facility is meant to cover transactions involving longterm relationships or the commitment of substantial resources and those of special importance to the economy of the State party, such as major civil works contracts.⁷³ Thus, the Additional Facility is not available for the settlement of ordinary commercial disputes.

2. Convention Rules Relating to Selection of Arbitrators

Convention Articles 37-40 govern the appointment of a sole arbitrator or arbitral panel. Article 37 (2)(a) permits the parties to appoint a sole arbitrator or a panel made up of an uneven number of arbitrators. But when the parties cannot agree on either the number or method of appointment, a three person panel (tribunal) is automatically imposed, with each party selecting its representative and the third (the president) selected jointly by the parties.⁷⁴ If a delay of more than 90 days is incurred in the selection of the arbitrators, the chairperson of the Administrative Council (President of the World Bank)⁷⁵ will, upon request of either party to the dispute, appoint non-party national arbitrators to the vacant positions⁷⁶ from a panel of arbitrators.⁷⁷ Article 13(1) provides that each contracting State can designate four persons to the panel, with the chairperson permitted to designate ten,⁷⁸ each with a different nationality.⁷⁹ Those designated to the panel must meet the qualifications of Article 14, which requires that they be drawn from the commercial, in-

⁶⁸ Facility, *supra* note 67, at Art. 3.

⁶⁹ *Id.* at Art. 2(c).

⁷⁰ *Id.* at Art. 2(a).

⁷¹ *Id.* at Art. 2(b).

⁷² *Id.* at Art. 4(3).

⁷³ *Id.* at Art. 4, Comment iii.

⁷⁴ Convention, *supra* note 64, at Art. 37(2)(b)

⁷⁵ *Id.* at Art. 5.

⁷⁶ *Id.* at Art. 38.

⁷⁷ *Id.* at Art. 40 (1).

⁷⁸ As of October 1990, only three have been named; all are attorneys.

⁷⁹ Convention, *supra* note 64, at Art. 13(2).

dustrial, financial, or legal communities, with an explicit preference for the latter.⁸⁰ Article 39 mandates that the majority of seated arbitrators not be nationals of the party opponents, except if agreed otherwise by the parties. While all arbitrators must meet the qualifications of Article 14, they need not be members of the Panel, except in the case of appointments under Article 38.

3. *Actual Convention Selection Process*

Of those designated to the Panel of Arbitrators pursuant to Article 13, 141 of 222 (64%) immediately appear to be either attorneys or professors of law, based upon the titles of their present or past occupations.⁸¹ Western nations have typically appointed full slates of attorneys, while developing nations have appointed a mixture of attorneys and non-attorneys, with an emphasis on the latter. And of those actually appointed to serve as arbitrators, "they have almost uniformly been lawyers."⁸²

4. *Facility Rules Relating to the Selection of Arbitrators*

Article 6(3) permits, at the parties' discretion, either a sole arbitrator or a tribunal of any uneven number.⁸³ The only restriction on the parties' autonomy lies in Article 9, which requires that arbitrators be persons who can exercise independent judgment and have "recognized competence in the fields of law, commerce, industry, or finance."⁸⁴ Absent an agreement between the parties, Article 6 sets the number of arbitrators and their method of selection. One arbitrator is appointed by each party and a third is selected jointly by the parties to be the president of the tribunal.⁸⁵ Article 10 stipulates the procedure to follow in this instance.⁸⁶ The claimant will name two individuals, one of whom does not have the same nationality as either party, as its arbitrator, and the other as its nominee for president of the tribunal.⁸⁷ The respondent must

⁸⁰ *Id.* at Art. 14 (1).

⁸¹ See e.g. ICSID Doc. ICSID/10 (Oct. 1990).

⁸² Telephone interview with Antonio R. Parra, Esquire, ICSID, in Washington, D.C. (Apr. 1, 1991) [hereinafter Parra Interview]. Of those that immediately came to mind, 55 of 60 seated arbitrators were attorneys, with two of the remaining five having legal training but no longer actively engaged in the practice of law.

⁸³ This is identical to Art. 37(2)(a) of the Convention.

⁸⁴ Note the subtle difference with Convention Art. 14, as it dropped the explicit preference for attorneys.

⁸⁵ Facility, *supra* note 67, at Art. 6(1). This is substantially identical to Convention Art. 37(2)(b).

⁸⁶ There is no corresponding language in the Convention.

⁸⁷ Facility, *supra* note 67, at Art. 10(a)(i).

name a non-party national as its arbitrator, and either concur in the selection of the president or propose another.⁸⁸ In the latter situation, the claimant must then promptly notify the respondent of its concurrence in or rejection of its candidate for president.⁸⁹ If there is difficulty in this procedure, the chairperson of the Administrative Council will, upon request of either party, select those not yet appointed.⁹⁰ When the chairperson is called upon to designate the arbitrators, the majority must be of different nationalities than the parties,⁹¹ and the appointment of arbitrators having the same nationality as either party is forbidden.⁹²

At this point in time, the Additional Facility has not been tested, as it has never been formally utilized.⁹³

D. United Nations Commission on International Trade Law

1. *Description of Entity*

The United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration ("Model Law") was adopted by the U.N. in 1985.⁹⁴ The UNCITRAL Model Rules of Arbitration ("Model Rules") were adopted in 1976.⁹⁵ The Model Law is broader in scope than the Model Rules, which are designed to govern arbitration proceedings with or without further revisions.

The Model Rules differ from those of other institutions in that they stand alone. The organization which can operate to choose arbitrators under the Model Rules, if there is no agreement among the parties, is the Permanent Court of Arbitration in The Hague.⁹⁶ Other than that organization, the Model Rules operate to instruct and govern arbitration procedures, but not to provide human assistance. The UNCITRAL Arbitration Rules were prepared for universal use,⁹⁷ developing countries

⁸⁸ *Id.* at Art. 10(1)(b).

⁸⁹ *Id.* at Art. 10(1)(c).

⁹⁰ *Id.* at Art. 6(4). This is substantially identical to Convention Art. 38.

⁹¹ *Id.* at Art. 7(1).

⁹² *Id.* at Art. 7(2). This is substantially identical to the final clause of Convention Article 38.

⁹³ Parra Interview, *supra* note 82.

⁹⁴ Herrmann, *The UNCITRAL Model Law on International Commercial Arbitration: Introduction and General Provisions*, in *ESSAYS ON INTERNATIONAL COMMERCIAL ARBITRATION 3* (P. Sarcevic ed. 1989).

⁹⁵ G.A. Res. 31/98; 31 U.N. GAOR Supp. (No. 39) at 182; U.N. Doc. A/31/39 (1976); 31 U.N. GAOR Supp. (No. 17) at 22; U.N. Doc. A/31/17 (1976).

⁹⁶ UNCITRAL Rules Arts. 6(2), 7(2)(b), (3).

⁹⁷ Arbitration Rules of the United Nations Commission on International Trade Law, Res. 321/98 adopted by the General Assembly on December 15, 1976.

participated in their drafting and the Rules were adopted by the U.N. General Assembly without dissent.

2. *Rules Relating to the Selection of Arbitrators*

Since the UNCITRAL Model Rules operate relatively independently of an arbitral body, there is not as much direct control over the selection of arbitrators. The Model Rules include provisions for party selection of arbitrators, as well as selection by a designated authority, the Secretary-General of the Permanent Court of Arbitration in The Hague.⁹⁸

The Model Rules allow the parties to select either one arbitrator or a panel of three.⁹⁹ If the parties cannot agree on the number of arbitrators, a panel of three arbitrators is appointed.¹⁰⁰ The parties are, however, free to modify the rule to provide for a different number if they so desire.¹⁰¹

The Model Rules are flexible. They allow the parties to make many decisions on their own. For instance, "article 6(1) provides that when the Tribunal is composed of one arbitrator, either party may propose to the other the names of one or more persons to serve as the sole arbitrator and the names of one or more institutions or persons to serve as appointing authority, if no appointing authority has been agreed upon When the panel is composed of three arbitrators, article 7(1) provides that each party is to appoint one arbitrator."¹⁰² Provisions are also made in the event the parties cannot make these decisions. If the parties fail to agree on the identity of a sole arbitrator, the appointing authority will choose.¹⁰³ Similarly, the Secretary-General of the Permanent Court of Arbitration can choose an appointing authority if the parties cannot decide on one.¹⁰⁴

The UNCITRAL Model Law does not specify qualifications which

⁹⁸ UNCITRAL Rules, *supra* note 96, at Art. 6.

⁹⁹ *Id.* at Arts. 5, 6, 7; see also Baker and Davis, *Establishment of an Arbitral Tribunal Under the UNCITRAL Rules: The Experience of the Iran-United States Claims Tribunal*, 23 INT'L LAW 81, 91 (1989).

¹⁰⁰ The use of a "panel of three arbitrators is an accepted practice in international arbitration, and under the UNCITRAL Rules is the default composition that applies if the parties do not agree to only one arbitrator." Baker and Davis, *supra* note 99, at 91.

¹⁰¹ UNCITRAL Rules, *supra* note 96, at Art. 1(1) (permitting modification to any provision of the Rules by agreement of the parties).

¹⁰² Baker and Davis, *supra* note 99, at 92-93.

¹⁰³ UNCITRAL Rules, *supra* note 96, at Art. 6 (2).

¹⁰⁴ *Id.*

an arbitrator must possess.¹⁰⁵ Thus, there is no mention of legal qualifications, status, or experience,¹⁰⁶ as is the case with the ICSID's explicit preference for attorneys. The only controlling factor, then, is the arbitrator's own national law.¹⁰⁷

The absence of specified qualifications reflects two things. First, the general European view is that legal qualifications are not necessary.¹⁰⁸ Secondly, it follows the flexible, "do-it-yourself" tone of the Model Rules, such that the parties are encouraged to pick the arbitrator right for them; the parties are more apt to know whether that includes a legal, business, or international background, or some combination thereof.

In the event an appointment is necessary, the appointing authority may send a list of names to the parties who can then choose an arbitrator from that list.¹⁰⁹ The selection process for this list is such that no specific experience is necessary for inclusion on the list.

IV. ATTRIBUTES OF SELECTED PROFESSIONS

A. Several Intangible Qualities

Before examining the particular attributes of a few professions, it is best to acknowledge and discuss those intangible qualities that are not limited by social status, culture, education, or type of employment.

In this arena, "[n]o quality is more important than that of impartiality. It may well be that no person can be absolutely free from bias or prejudice of any kind, but it is not too much to expect an arbitrator to be able to divest himself of any personal inclinations, and to be able to stand between the parties with an open mind."¹¹⁰

Arbitrators appointed by one of the parties may not be completely neutral. This may not be a total negative, however, as "[p]arty-appointed arbitrators are most often in a position . . . to appreciate and . . . explain to the other arbitrators the legal theories, cultural assumptions, and general approach of the party that appointed them."¹¹¹ This fact does not demonstrate an impermissible or even unwanted bias. Instead, "it is a

¹⁰⁵ Voskuil and Freedberg-Swatzburg, *Composition of the Arbitral Tribunal*, in *ESSAYS ON INTERNATIONAL COMMERCIAL ARBITRATION* 64, 70 (P. Sarcevic, ed. 1989).

¹⁰⁶ This point is reiterated in Strohbach, *Composition of the Arbitral Tribunal and Making of the Award*, in *UNCITRAL'S PROJECT FOR A MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION* 103, 107 (P. Sanders ed. 1984).

¹⁰⁷ Voskuil and Freedberg-Swatzburg, *supra* note 105; *see also* Strohbach, *supra* note 106.

¹⁰⁸ *ENCYCLOPEDIA OF INTERNATIONAL COMMERCIAL ARBITRATION* 340, 343, 361 (1986).

¹⁰⁹ *UNCITRAL Rules*, *supra* note 96, at Art. 6 (3).

¹¹⁰ F. Elkouri and E. Elkouri, *HOW ARBITRATION WORKS* 140 (1985).

¹¹¹ Baker and Davis, *Establishment of an Arbitral Tribunal Under the UNCITRAL Rules: The Experience of the Iran-United States Claims Tribunal*, 23 *INT'L LAW* 81, 123 (1989).

natural and useful function."¹¹²

The quality of honesty is not satisfied unless the arbitrator fully believes that what he or she is doing is right. If both parties believe that an arbitrator is doing just that, they will respect the arbitrator's honesty regardless of whether they agree with the decision rendered.

Objectivity is another important quality. An arbitrator who deliberately tries to please both sides by "splitting" awards is not one who decides cases objectively. It is the arbitrator's fairness and good judgment, as indicated by his or her general reputation, with which the parties should be concerned. Naturally, extensive arbitration experience is one indication of ability, as past awards can, in some cases, be scrutinized.

The integrity of the arbitrators should be of the highest quality. Careful consideration of personal and business backgrounds and affiliations is enlightening in this respect. Has the arbitrator any financial or business interest in the affairs of either party? Has there been any such interest in the past? Does the arbitrator have any personal affiliations, either directly or indirectly, with either of the parties? Does the arbitrator have strong opinions in favor of either party? What has been his or her past record as an arbitrator?¹¹³

B. Attorneys

Persons formally trained in the law often make able arbitrators, and many parties prefer lawyers as arbitrators, especially for the position of neutral chairperson of arbitration tribunals.¹¹⁴ The advocacy skills sharpened in the profession can be well suited to an arbitral proceeding, but are not necessarily immediately transferable to or successful in arbitration. "There are some similarities, but also major differences, between convincing international arbitrators and presenting a case before a court or a jury."¹¹⁵ Overly aggressive speech and demeanor can and does put off many arbitrators, especially the sole, neutral tribunal officer, or wholly neutral tribunal members. In the event of an equal number of party representatives and a neutral presiding chairperson, aggressiveness by one party turns up the flame inherent in all litigators to match and raise the temperature a few degrees.

Legal training can be helpful to the presentation of one's case, but lawyers certainly do not lay sole claim to organizational abilities. Some

¹¹² *Id.*

¹¹³ F. Elkouri and E. Elkouri, *HOW ARBITRATION WORKS* 140-41 (1985).

¹¹⁴ *Id.* at 142.

¹¹⁵ Tschanz, *A Breakthrough in International Arbitration: Switzerland's New Act*, 24 *INT'L LAW* 1107, 1109 (1990).

lawyers simply do not make good arbitrators, such as the lawyer who is so concerned with technical rules of evidence and procedure that the arbitration process is made unduly complicated. Such concern also may result in an award which fails to give sufficient consideration to the real merits of the dispute.

We have all heard our legal mentors and peers assert that legal training is the be-all and end-all which allows one to analyze and evaluate facts, be objective, and be less likely to be moved by personal bias or extraneous evidence. We submit that such assertions are self-serving, and do not warrant further discussion.¹¹⁶

The decades-old debate over the attorney v. non-attorney question echoes the quadrennial debate within the Capitol Beltway concerning the President's prerogative to appoint ambassadors under Article II of the U.S. Constitution.¹¹⁷ The bottom line is that legal training is not indispensable. Arbitrators need not be lawyers, and especially with the use of tribunals, technical as well as legal experts can and should be included.¹¹⁸

C. Foreign Affairs Professionals

The term "Foreign Affairs Professionals" is meant to be broadly inclusive, encompassing those (mainly in government) that have either built their careers upon, or had significant experience in, foreign affairs. From Foreign Service officers to intelligence analysts to members of the Foreign Commercial Service, the wealth of talent in this classification is tremendous. Many in this broad area have served their government at the highest levels, are experienced negotiators practiced in finding solutions to complicated problems, and, of course, are accustomed to handling matters of the greatest confidentiality. They have an extensive

¹¹⁶ Perhaps an argument can be made if attorneys are compared to those uneducated in our society.

¹¹⁷ "[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors. . ." Const. Art. II, section 2, clause 2. The career v. non-career debate pits political operatives, party loyalists, and foot soldiers against the U.S. Foreign Service and its labor union, the American Foreign Service Association. "Those who favor the appointment of non-career ambassadors contend that Foreign Service officers have been bureaucratized, made overly timid, bogged down in inefficiency and locked into bilateralist views of U.S. foreign policy interests ("localitis") which inhibits their perception of broader foreign policy goals." *THE MODERN AMBASSADOR* 9-10 (M. Herz, ed. 1983). The opposing view holds that non-career ambassadors are at worst bumbling, transient amateurs, and at best mediocre, un-distinguished diplomats. Considering that most non-career ambassadors hail from leadership positions in professional fields such as business, education, law, the military, and government (anyone not a member of the Foreign Service at the time of the ambassadorial appointment is considered non-career regardless of their prior Foreign Service or government status), it is truly amazing that many decry this constitutionally-based practice. The same basic argument is made with regard to the selection of non-attorneys as arbitrators.

¹¹⁸ Nelson, *supra* note 1, at 197-98.

international contact base and are able to communicate successfully in the context of differing cultural backgrounds. In addition, legal backgrounds and assignments are not uncommon. This group remains, however, a virtually untapped, unrecognized, and wasted resource in terms of international commercial arbitration.¹¹⁹

The importance of cultural awareness and understanding has been noted earlier,¹²⁰ and we will not belabor the point here except to say that, in ensuring the maintenance of the business relationship between parties of different countries, it can only aid the process if the arbitrators are knowledgeable about foreign affairs generally, and have an appreciation for how differing perceptions may have developed with regard to the same set of facts. After all, since we treat international commercial arbitration separately from domestic commercial arbitration, implicitly suggesting there is something unique about it, perhaps we Americans should put the "international" back in the international commercial arbitral process.

D. Business/Technical Professionals

The use of persons with technical expertise as arbitrators is a logical practice, such that participation in the arbitral setting by those with management or industry experience offers the best chance for a realistic assessment of the parties' respective positions, and presents the best chance for a timely, equitable, and beneficial settlement of the dispute.¹²¹ First, business people have qualities which make them desirable choices. Secondly, business professionals with experience in the actual area which is the subject of the dispute may be invaluable in terms of cutting down expenses for bringing the arbitrator "up to speed," and in obtaining a general understanding of the background issues and practices common to the field.

Business professionals have characteristics which make them unique in the arbitral process.¹²² Conducting business from the vantage point of the executive consists of three phases: planning, via setting objectives and goals; implementing those goals through decision-making; and controlling the business once it is established. All of these phases must be accomplished with efficiency and effectiveness. Additionally, to accomplish

¹¹⁹ For example, despite some early successful arbitration and mediation efforts, the International Council for Dispute Resolution, composed of former American and foreign ambassadors, has not been called upon in over three years to assist parties with their disputes.

¹²⁰ See *supra* notes 13-21 and accompanying text.

¹²¹ Nelson, *supra* note 1, at 206.

¹²² Of course, not all business people have all these characteristics, but many of these qualities will be present in the successful business professional.

each phase, the executive must have administrative skills, including the ability to mediate between and counsel those employees for which he or she is responsible.

Responsibility for employees is something which is lacking from attorneys and is attenuated with diplomats, at least in organizational structure. Businesses are set up in a pyramid shape, whereas law firms are set up in layers (partners and associates), one of which is not directly responsible for the other. Diplomats do not have to meet a financial bottom line, and normally work alone as a cog in a relatively small staff. Businesses are comprised of many employees, all with different functions. Business professionals must interact with those employees below them, those on a lateral footing, and those above them, every day. The skills learned in these interactions are invaluable to arbitration, where the ability to understand the dynamics of organizations is necessary, as well as is experience bringing parties with disparate beliefs or interests together. The business professional has had experience with these activities, both within his or her organization itself, and in the organization's dealings with the outside world.

The second characteristic which makes business people desirable choices as arbitrators is knowledge of the actual field that is the subject of the dispute. Knowing what the technical terms mean, and having an understanding of the nature of the business, will cut down on the time necessary to bring the arbitrator "up to speed." This time saved will mean money saved, as well as a more efficient process generally. Secondly, the business person familiar with an area will be aware of the subtexts. If the dispute is over something which is a common occurrence, the arbitrator may deal with it differently than if it is a novel problem. For instance, if in a particular industry, certain language is common in a contract, and the standard business interpretation is established, then the arbitrator for a dispute over the meaning of the language will have knowledge which will help to guide the reasoning necessary to solve the problem.

A final consideration is that arbitrators who are themselves business professionals may be more "user-friendly" to the parties. Although "[o]ften only onlookers to litigation battles dominated by their lawyers, in arbitral proceedings management may have an active role in defining the issues and structuring a solution."¹²³ Thus, in several ways, business professionals are desirable arbitrators.

¹²³ Nelson, *supra* note 1, at 199.

V. CONCLUSION

The choice of arbitrators involves many tangible and intangible factors. When the parties to a disagreement belong to different legal, economic, and social systems, these factors grow in importance. The advantage gained by having an arbitrator who is a technical expert can be diminished if he or she lacks legal training and knowledge. It imposes a greater burden to educate the arbitrator on legal matters.¹²⁴ But legal training alone is not enough to make an able arbitrator; a combination of legal training and other qualifications will make an even better arbitrator.¹²⁵

The prime objective should be to involve in the dispute settlement process knowledgeable people aware of and committed to the importance of settling differences while maintaining as much as possible an affirmative atmosphere for continuing the business relationship.¹²⁶ Toward this end, parties should naturally focus on the qualifications of the individuals they choose to serve as arbitrators, or the individuals chosen for them by an appointing authority, for “[a]rbitration is worth as much — or as little — as the arbitrators themselves.”¹²⁷ The ability of the parties to select arbitrators who are well-equipped to deal with the issues specific to their dispute is arguably the most important aspect of the arbitral process.

Many unsatisfactory arbitrations can be traced to a lack of experience in conducting the proceedings.¹²⁸ Prior arbitration experience is always a welcome addition to an arbitral proceeding. The individual is familiar not only with what has worked well in the past regarding the presentation of the case, use of expert witnesses, and so on, but has also learned from his or her missteps, and, it is hoped, will not commit those same errors down the road in another proceeding.

But owing to the legal profession's cornering of the market, non-attorneys have basically not been given the opportunity to participate in the field; attorneys possessing little or nothing more than their legal education are favored in place of those with a broader base of experience, which often includes legal training. This begs the real question. Is legal experience the most important characteristic in an arbitrator's professional repertoire? For reasons stated earlier, we believe it is not. No

¹²⁴ G. Yates, *Arbitration or Court Litigation for Private International Dispute Resolution: The Lesser of Two Evils*, in *RESOLVING TRANSNATIONAL DISPUTES THROUGH INTERNATIONAL ARBITRATION* 230 (T. Carbonneau, ed. 1984).

¹²⁵ Raffaele, *Lawyers in Labor Arbitration*, 37 *ARB. J.* 3, 14 (1982).

¹²⁶ Nelson, *supra* note 1, at 198.

¹²⁷ Baker and Davis, *supra* note 99, at 90.

¹²⁸ Tschanz, *supra* note 115, at 1109.

countries other than Spain, Portugal, and some countries in Latin America require that a lawyer be appointed as an arbitrator in international arbitrations.¹²⁹ In all the other countries of the world, the tradition is that arbitrators be “invested with a mission of conciliation rather than with a mission of ‘juris-dictio’ proper. The most important things in this conception [are] the authority and respect which [are] commanded by a person in his relations with the parties . . . any person may be appointed as an arbitrator, irrespective of any particular qualifications, and this is so even in the countries where arbitration is regarded as akin to justice administered by the state courts.”¹³⁰

In all, we believe that, while legal training can prove an invaluable tool, business or industry expertise and international experience can greatly facilitate international commercial arbitration with a reduced risk of harm to the underlying business relationship. To find individuals that possess these qualifications, one must venture to an area that has been totally overlooked in the past: the non-career ambassador. This is, arguably, the sole area in which one can easily locate men and women who combine legal, international, and business expertise, crowned by negotiating experience in the international context. Why not avail ourselves of distinguished Americans such as Sol Linowitz¹³¹, John Louis¹³², Elliot Richardson¹³³, and Robert Stuart, Jr.¹³⁴? We can do better than we have in selecting arbitrators. Great strides can be made in preserving fundamental business relationships between disputing parties through the selection of truly qualified arbitrators. This would also go a long way toward improving the sagging relationship between the legal and business communities.

¹²⁹ R. David, *ARBITRATION IN INTERNATIONAL TRADE* 250 (1985).

¹³⁰ *Id.*

¹³¹ Currently senior counsel of Coudert Brothers, with prior appointments as Ambassador to the Organization of American States and to the Middle East peace negotiations.

¹³² Currently a member of the Board of Directors of Baxter International, Gannett Co., S.C. Johnson & Son, and Ralston Purina, among others and former Ambassador to the United Kingdom and Chairman of the Combined Communications Corporation (later merged into Gannett).

¹³³ Currently senior resident partner with Milbank, Tweed, Hadley & McCloy, with former appointments as Secretary of Defense, Attorney General, and Ambassador to the United Kingdom and Law of the Sea Conference, among numerous others.

¹³⁴ Currently active in real estate development and formerly Chairman and CEO of the Quaker Oats Company and Ambassador to Norway.