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Binding Arbitration: A Preferred Alternative for Resolving Commercial Disputes between Mexican and U.S. Businessmen.

Hope H. Camp Jr.

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BINDING ARBITRATION: A PREFERRED ALTERNATIVE FOR RESOLVING COMMERCIAL DISPUTES BETWEEN MEXICAN AND U.S. BUSINESSMEN

HOPE H. CAMP, JR.*

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I. INTRODUCTION

A. *Thesis*

The increase of trade between Mexico and the United States will cause a corresponding increase in private commercial disputes. To resolve these disputes in the courts of either Mexico or the United States is generally not satisfactory. While conciliation, mediation and other forms of alternate dispute resolutions are possible, binding arbitration offers the best alternative for the resolution of commercial disputes that arise from or in connection with private commercial relationships between Mexican and U.S. businessmen. This paper will focus on binding arbitration that relates to private, commercial trans-

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actions rather than commercial relationships in which a government is a party.

B. *Growing Commercial Relationships Between the United States and Mexico*

Mexico is now America's third largest trading partner, with two-thirds of the trade crossing Mexico's northern border into the United States.[1] Since the 1980's, and particularly since 1985, Mexico has sharply reduced its average tariff level to only nine percent, about double that of the United States and only modestly higher than Canada's tariff level.[2] Mexico has also drastically reduced its import licensing requirements with the result that the trend in trade between the two countries is decidedly on the upswing.[3]

The continuing growth of the maquiladora industry is further evidence of increasing commercial relationships between our two nations. Maquilas currently account for one-third of Mexico-United States two-way trade.[4] The almost 2,000 maquiladora plants are engines for driving cross-border trade. Hundreds of thousands of workers in Mexico[5] are employed by these plants and over 100,000 United States workers are involved in supplying components and parts to these plants.[6] Moreover, United States trade activity with Mexico appears likely to increase even more as a result of discussions which may lead to a Free Trade Agreement modeled after the Canada-United States agreement.[7]

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1. Tricks, *Reuter Library Report*, May 22, 1990.

2. *See generally* Weintraub, *The North American Free Trade Debate*, 13 WASH. Q. 119 (1990).

3. United States manufacturing imports and exports to Mexico in 1988 each increased nearly 70% over the 1986 levels. 1988 UNITED STATES DEPT. COM., FOREIGN TRADE HIGHLIGHTS 117, 122 (1989). "During the first nine months of 1989, United States exports to Mexico rose by 26% over the same period in 1988 and our two-way trade rose by 22%. At this rate, the United States-Mexico trade may reach $53 billion this year." Brisson, *U.S.-Mexico Trade Continues to Expand and Improve*, BUS. AM., Dec. 4, 1989, at 7.

4. Gilman, *Mexico's Maquiladora Program: An Option to Retain Competitiveness*, BUS. AM., Dec. 4, 1989, at 13.

5. *Id.*

6. *Id.*

7. *See generally* Weintraub, *The North American Free Trade Debate*, 13 WASH. Q. 119 (1990). On June 11, 1990, Presidents Carlos Salinas de Gortari and George Bush issued a joint statement directing their trade officials to report in December 1990 regarding the possibility of

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C. *Differences in the Legal Systems of the Two Nations Engender Uncertainty with Respect to Dispute Resolution*

A definitive dispute resolution mechanism is fundamental to any private commercial relationship. To be successful the mechanism must promise that both the process and the results are likely to be equitable or fair. However, differences in the legal systems of the two countries create substantial uncertainty in the minds of businessmen as to whether a dispute will be resolved definitively or fairly.

The most fundamental difference between the two legal systems is the foundation upon which each is built. The United States legal system is built upon *stare decisis*, a process by which law is created as cases are decided. This system applies inductive reasoning to establish the law that governs a specific situation. In contrast, the Mexican legal system is based upon codes which set forth broad principles of law which are applied to specific instances through the use of deductive reasoning.[8] This difference of approach in analyzing legal problems substantially affects the resolution of disputes. For example, if the question is one of contract interpretation, the Mexican lawyer will look to the civil codes rather than to the decisions of courts with respect to how a particular clause or concept should be interpreted.[9] On the other hand, the American attorney will look first to the precedent that is available interpreting the contract clause or concept in question.

There are specific substantive and procedural differences in our two legal systems. The civil code of Mexico limits damages that may be recovered in a civil action, whereas United States law creates opportu-

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a free trade agreement. A free trade agreement modeled after the Canada-United States agreement could result in the planned elimination of tariffs on Mexico-United States trade.

In addition to the mutual benefits of free trade, the United States is committed to the future economic prosperity of Mexico and other western hemisphere countries as a result of vast accumulated bank loans. The two largest debtors, Brazil and Mexico, have borrowed over $216 billion from commercial creditors. *See* Ryser, Baker & Weiner, *The Debtors' Revolt is Spreading in Latin America*, BUS. WK., Jan. 4, 1988, at 88-91.

8. Murphy, *The Andean Decisions on Foreign Investment: An International Matrix of National Law*, 24 INT'L LAW. 643, 643 (1990). *See also* J. HERGET & J. CAMIL, AN INTRODUCTION TO THE MEXICAN LEGAL SYSTEM 33-36 (1978). While the Angloamerican attorney equates the word "code" to a specific topic of legislated material, a Mexican code is much more than a statute because the Mexican code contains general provisions which provide basic structure. The broad reach and interpretation of the Mexican codes is analogous to that of the United States Constitution. *Id.* at 33.

9. 1 B. CARL, DOING BUSINESS IN MEXICO § 6.05[2] (1983).

nities for unlimited damages, including punitive damages.[10] In Mexico, an injunction is not available as a remedy in commercial disputes where damages are irreparable or cannot be measured in monetary terms. In the United States, an injunction is often the preferred remedy for resolving a commercial dispute.[11] The jury is not a part of adjudication of civil dispute in Mexico, whereas it is an integral part of the system in the United States.[12] In Mexico, trial evidence is mainly presented by documentation in front of judges who question the witnesses.[13] In contrast, in the United States, trial proceedings are based upon cross-examination of live witnesses in open court by lawyers with the judge primarily playing the role of referee. Mexican law does not provide for pre-trial discovery on the same scale as United States law.[14]

These differences and others reinforce one party's doubts that the legal system of his counterpart will lead to a definitive resolution of a commercial dispute that will be fair. For example, without caselaw to guide the judge, how can the United States businessman understand how a code provision will be applied? On the other hand, the Mexican businessman may feel uncomfortably exposed to unlimited damages arising from a commercial dispute in the United States, especially where a claim for punitive damages might be made. The absence of access to injunctive relief in Mexico would discourage the United States businessman from agreeing to the application of Mexican law to resolve disputes between himself and his Mexican counter-

10. *See* Hernandez v. Burger, 162 Cal. Rptr. 564, 566 (1980) (in automobile accident, court applied "governmental interest analysis" to select Mexico's "law of limited damages" instead of California's "unlimited damages rule"); *cf.* Victor v. Sperry, 329 P.2d 728, 732-33 (1958) (Mexico's limited strict liability law violated California public policy). *See generally* Friedler, *Moral Damages in Mexican Law: A Comparative Approach*, 8 LOY. L.A. INT'L. & COMP. L.J. 235 (1986).

11. *See Hernandez*, 162 Cal. Rptr. at 564-566.

12. *See* CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS art. 14 (Porrua ed. 1987) (Mexican constitution does not provide for a jury trial); *cf.* UNITED STATES CONST. amend. VI, VII (right to jury trial).

13. *See generally* J. HERGET & J. CAMIL, AN INTRODUCTION TO THE MEXICAN LEGAL SYSTEM 75 (1978) (lawyers for either side can request judge to ask certain questions; in busier courts, court secretary may ask questions in judge's absence).

14. *Id.* "Since there is no trial in Mexico, there is no need for discovery" as it is practiced in United States courts; it is possible, however, to obtain a Mexican court order to direct the production of some evidence and testimony. *Id. See generally* Código Federal de Procedimientos Civiles (Porrua ed. 1986) (Mexican Federal Code of Civil Procedure lacks equivalent provisions of Federal Rules of Civil Procedure § V, Rules 26-37.

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part. For some Mexican businessmen, the idea of appearing before a jury in this country is positively petrifying because of the fear of prejudice or simply the lack of appreciation of how a jury could possibly reach a proper decision in a commercial matter. A United States businessman, on the other hand, is amazed by the manner in which trials are conducted in Mexico because most of the evidence is presented through documents which may contain hearsay evidence.[15] Moreover, the judge carries out most of the interrogation in open court.[16] The United States businessman prefers to have the right to have his attorney cross-examine adversarial witnesses in open court. The Mexican businessman is often appalled by the amount of time and money that is spent in civil discovery in this country and, yet, the United States businessman would be concerned about not having the right to undertake discovery were he subject to the jurisdiction of a Mexican court. All of these differences lead businessmen and their counsel, in both nations, to conclude that disputes arising from commercial transactions between them are more likely to be resolved definitively and fairly by submitting to arbitration rather than to the legal system or the courts of either country.

II. Two International Treaties Create the Legal Foundations for Binding Arbitration of Private International Commercial Disputes

Mexico and the United States are signatories to two multi-lateral treaties that make arbitration a viable alternative for resolution of international commercial disputes.[17] The oldest and most important such treaty is the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, usually referred to as the New York Convention.[18] Under the New York Convention, parties who

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15. J. HERGET & J. CAMIL, AN INTRODUCTION TO THE MEXICAN LEGAL SYSTEM 75 (1978).

16. *Id.*

17. The Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States of 1965 was established solely for resolving investment disputes between a government and a private national of another contracting state. It is not relevant to the scope of this article because this article is concerned with non-governmental contracts. Moreover, Mexico had not ratified this Convention as of August, 1988. 5 W. STRENG & J. SALACUSE, INTERNATIONAL BUSINESS PLANNING: LAW AND TAXATION (UNITED STATES) app. 31J.

18. U.N. Convention on Recognition and Enforcement of Foreign Arbitral Awards *opened for signature* June 10, 1958, 21 U.S.T. 2515, T.I.A.S. No. 6997, 330 U.N.T.S. 38, *re-*

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agree to arbitrate may be ordered to do so by a court of a signatory country.[19] Moreover, any award resulting from the arbitration may be enforced against either party to the agreement by the courts of a signatory country.[20]

The other convention of great interest to Mexican and United States businessmen is the Inter-American Convention on International Commercial Arbitration of 1975 which is often referred to as the Panama Convention.[21] This convention is quite similar to the New York Convention except that when arbitration is ordered by a court the arbitration must be conducted in accordance with the rules of the Inter-American Commercial Arbitration Commission (IACAC) unless the parties have agreed otherwise.[22] The IACAC does not provide for the enforcement by courts of an arbitration agreement where a national court has already asserted jurisdiction of the same matter.[23]

The importance of both the New York Convention and the Panama Convention to Mexican and United States businessmen is that they provide a clear legal basis for the enforcement of an arbitration award and, in the case of the New York Convention, enforcement of any arbitral agreement.[24] In addition, in the case of the New York Convention, it is a well accepted treaty which has been adopted by over

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printed in 4 Y.B. COMM. ARB. 226 (1979) [hereinafter cited as the New York Convention]; Mexico signed and ratified the Convention effective June 1, 1973. J. SIQUEIRO, 1 DOING BUSINESS IN MEXICO § 18.01 [2] (1983); The United States ratified it July 31, 1970. Act of July 31, 1970, Pub. L. No. 91-368, 1970 U. S. Code Cong. & Admin. News (84 Stat.) 809, 811.

19. New York Convention, *supra* note 23, art. III.

20. *Id.*

21. Inter-American Convention of International and Commercial Arbitration, *opened for signature* Jan. 30, 1975, OAS SER. A20 (SEPEF), *reprinted in* 14 I.L.M. 336 (1975) [hereinafter cited as the Panama Convention].

22. *See* 5 W. STRENG & J. SALACUSE, INTERNATIONAL BUSINESS PLANNING: LAW AND TAXATION (UNITED STATES) § 31.05[C] at 31-65 (1990).

23. *See id.* The Panama Convention was signed and ratified by Mexico in 1978. *Id.*; *see also* Holbring, *Inter-American Convention and International Commercial Arbitration: As of Sept. 10, 1990,* Amer. Arb. Assoc. Mexico-United States Arbitration Conference (Oct. 18, 1990). The Convention was signed and ratified by the United States on Aug. 15, 1990. The Inter-American Convention on International Commercial Arbitration, Pub. L. No. 101-39, 1990 U.S. Code Cong. & Admin. News (104 stat.) 675, 675 (1990). The enabling legislation for the Panama Convention added Chapter 3, §§ 301-307, to Title 9 of the United States Code. Nattier, *Current Status of International Arbitration Under United States Law,* Amer. Arb. Assoc. Mexico-United States Arbitration Conference (Oct. 18, 1990).

24. New York Convention, *supra* note 18, art. I(2)

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eighty countries.[25] Although the Panama Convention is of more recent origin, it offers great promise as a mechanism for resolving disputes between Mexico and the United States as trade and investment between the two countries increase.

In Mexico's accession to both of these treaties, Mexico has recognized that in order to participate in the larger world economy and enjoy the benefits of increased trade and investment by foreign interests in its country, it must be willing to permit its citizens and its businesses to agree to have disputes resolved in accordance with international norms rather than those established by its own government.[26]

III. Advantages of Binding Arbitration Over Judicial and Other Nonjudicial Forms of Commercial Dispute Resolution

The essence of arbitration is that parties who have agreed to arbitration desire to avoid litigation. There are several reasons why businessmen, both in Mexico and the United States, desire to avoid submitting themselves to the court systems of either country. Reasons to avoid foreign courts include: unpredictability of the enforcement of any judgment rendered;[27] fear of not being treated impartially in the other party's country; concern that their disputes will be aired in public; concern that the lack of technical expertise in a jury will lead to an improper result; and, the realization that court proceedings are almost always expensive and extremely time consuming.

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25. *See generally* W. STRENG & J. SALACUSE, *supra* note 22, § 31.05[B] and app. 310 at 310-1 to -3 (discussing New York Convention). Many awards have been rendered and enforced pursuant to this Convention. *See* Malden Mills, Inc. v. Hilaturas Lourdes, S.A., *summary printed in* DOING BUSINESS IN MEXICO, app. F3. (1983) (showing arbitral award enforcement in Mexico by the Federal District Higher Court of Appeals).

26. *See* De Vries, *International Commercial Arbitration: A Contractual Substitute For National Courts*, 57 TUL. L. REV. 42, 43 (1982).

27. *See* J. Zeevi & Sons, Ltd. v. Grindlays Bank (Uganda) Ltd., 333 N.E.2d 168, 173, *cert. denied*, 423 U.S. 866 (1975) (conflicts between domestic public policy and foreign comity resolved by domestic sense of justice and equity, as embodied in public policy); *see also* Laker Airways v. Sabena, Belgian World Airlines, 731 F.2d 909, 937 (D.C. Cir. 1984) (as an elusive concept, comity produces uncertain results); Gutierrez v. Collins, 583 S.W.2d 312, 317 (Tex. 1979) (application of public policy exception resulted in "unworkable, irrational system"). *See generally* Chow, *Limiting Erie in a New Age of International Law: Toward a Federal Common Law of International Choice of Law*, 74 IOWA L. REV. 165, 176 & n.50 (1988) (citing cases holding that comity is a voluntary policy).

A. *Enforceability*

The enforceability of awards makes binding arbitration a much more predictable way of resolving disputes than adjudication by courts of either country.[28] Enforceability as an element of predictability cannot be underestimated. The businessman dislikes uncertainty above almost all other risks of doing business. The New York Convention, which lessens uncertainty that an agreement to arbitrate will be enforced,[29] coupled with a well structured arbitration procedure, such as the New York Convention or the Panama Convention, adds assurance that support will be provided by the courts of either Mexico or the United States for the enforcement of an award rendered pursuant to arbitration.

Under a treaty that enforces arbitral agreements and awards, the businessman gains a path to final dispute resolution which can be attacked only under very limited circumstances.[30] In the case of litigation, the businessman can only hope that foreign judges will liberally apply notions of comity and be well educated in applying internationally acceptable standards[31] when considering:

1. whether the choice of law made by the parties is acceptable to the court where a judgment is sought to be enforced;[32]

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28. *See generally* Comment, *Enforcing International Commercial Arbitration Agreements - Post - Mitsubishi Motor Corp. v. Solor Chrysler-Plymouth, Inc.*, 36 AM. U.L. REV. 57 *passim* (1986).

29. New York Convention, *supra* note 18, art. II.

30. For information pertaining to the United States, see De Vries, *supra* note 26, at 52. For information pertaining to Mexico, see Malden Mills, Inc. v. Hilaturas Lourdes, S.A. (1977) and Presse Office, S.A. v. Centro Editorial Hoy, S.A. (1977), *summaries printed* in DOING BUSINESS IN MEXICO, app. F3, F4-1 (1983).

31. S. BAYITCH & J. SIQUEIROS, CONFLICT OF LAWS: MEXICO AND THE UNITED STATES 136 (1968).

32. W. STRENG & J. SELACUSE, *supra* note 22, §§ 30.03, 30.08; (courts do not allow parties unlimited discretion regarding choice of law); *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(1) (1971). The court will acknowledge the parties choice of law only if: (1) the chosen jurisdiction has a reasonable, or, in some cases, substantial relationship to the transaction, and (2) the chosen law is not contrary to a fundamental policy of the forum state, or a state having a materially greater interest in the transaction. *Id.*; S. BAYITCH & J. SIQUEIROS, CONFLICTS OF LAW: MEXICO AND THE UNITED STATES 136-145, 177-178 (1968) (comparing judicial determinations for choice of law provisions in both United States and Mexico); Sprague, *Choice of Law: A Fond Farewell to Comity and Public Policy*, 74 CALIF. L. REV. 1447, 1456 (1986) (discussing the techniques of United States courts in resolving choice of law conflicts, including: (1) most significant relationship test; (2) choice-influencing considerations; (3) vested rights; (4) government interest analysis; and (5) center-of-gravity approach); State Bar of Texas, *Advanced International Law Course Mexico/U.S. Trade and*

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2. whether the conflicts of law rules applied by the parties or by the court rendering the judgment were either correct or properly applied;[33]

3. whether, in the court's view, the award violates some basic public policy consideration;[34]

4. whether the court which heard the case based its findings upon sufficient evidence or evidence that was properly obtained; and, finally,

5. whether judgments will be enforceable as there exists no treaty between the United States and Mexico with respect to the enforcement of judgments.[35]

Binding arbitration is also preferred as a method of dispute resolution to a mini-trial,[36] mediation[37] or conciliation.[38] In the case of

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Investment Law B-25 (1989) (noting that art. 13, § V of the Mexican Civil Code specifies that law chosen must have a point of contact with buyer, seller or contract terms).

33. *See generally* Bond, *How To Draft An Arbitration Clause*, 6 J. INT'L. ARB. 65, 75 (1989) (matter of contract must be amenable to arbitration in host country; copyrights, patents and antitrust matters sometimes exclusive jurisdiction of national courts).

34. "If the autonomy of the parties in regard to Contractual obligations were complete, manifestly unacceptable results might be reached in respect to public policy (*órden público*)." S. BAYITCH & J. SIGUEIROS, CONFLICTS OF LAW: MEXICO AND THE UNITED STATES 137 (1968) (*citing* the Mexican Supreme Court, 30 Seminario (6a ep.) 67 (1955)).

35. Graving, *The International Commercial Arbitration Institutions: How Good A Job Are They Doing?*, 4 AM. U.J. INT'L. L. & POL'Y. 319, 324 (1989).

36. In mini-trials, the parties prepare for trial and present their cases to a third party or each other. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 IND. L. J. 301, 344 (1989) (*citing* Green, *Growth of the Mini-Trial*, 9 LITIGATION 12 (1982)); *see also* Parker & Kradoff, *The Mini-Hearing: An Alternative to Protracted Litigation of Factually Complex Disputes*, 38 BUS. LAW. 35, 35-37 (1982).

37. Mediation is the active intervention of a neutral party who uses non-adversarial techniques to facilitate a settlement. U. SIMKIN & N. FIDANDIS, MEDIATION AND THE DYNAMICS OF COLLECTIVE BARGAINING 23-35 (2d ed. 1986). Mediators are used to: (1) reduce emotion, by depersonalizing a dispute; (2) promote discussion; (3) facilitate the use of confidential information; (4) focus issues and identify interests; (5) generate new options; and (6) reduce conflict aftermath. Phillips & Piazza, *The Role of Mediation In Public Interest Disputes*, 34 HASTINGS L. J. 1231, 1234 (1983).

38. *See generally* Calleros, *Reconciling The Goals Of Federalism With the Policy Of Title VII: Subject-Matter Jurisdiction In Judicial Enforcement of EEOC Conciliation Agreements*, 13 HOFSTRA L. REV. 257, 276 (1985) (discussing conciliation in EEOC cases); Trawick & Warner, *Symposium: Perspectives On Equal Employment Opportunity Litigation: Procedural Prerequisites for Bringing a Title VII Action*, 27 HOW. L.J. 427, 448 (1984) (discussing definition of conciliation in Title VII suits).

The importance of conciliation as an initial step in resolving international disputes is evidenced by separate conciliation rules adopted by the United Nations General Assembly in December, 1980. See UNCITRAL CONCILIATION RULES, U.N. Doc. a/35/17 (1980), *reprinted*

mini-trials, which are becoming more popular in Texas, the parties would face the same concerns as in entering the foreign court. If the Mexican party is asked to submit to a mini-trial by agreement in the contract, he would find the entire procedure not only unfamiliar but also, and worse, nonbinding. Thus, following such a proceeding, the Mexican party would always face the unpleasant prospect of trial in a United States court. If the same procedure were available in Mexico, it would not be appealing to the United States businessman.

With respect to mediation and conciliation, once the parties have elected to either seek arbitration or go to court, they are probably beyond the stage where nonbinding measures can effectively resolve the problem. In any event, the arbitrator can play a vital role as a mediator or conciliator because the parties know that the arbitrator has the authority to render a definitive decision which will finally resolve their dispute[39].

B. *Impartiality of the Decision Maker*

One of the reasons that arbitration is a preferred method for settling international business disputes is that it offers a neutral tribunal which neither party may be able to find in the country of the other.[40] The parties choose the "judge and the jury," rather than being assigned finders of fact and law as is the case in court proceedings. A properly drafted arbitration clause will also allow the parties to designate the law to be applied as well as the place and the language to be used. Such a forum for the resolution of international commercial disputes helps satisfy the business manager's need for assurance that a potential dispute will be decided fairly.

C. *Confidentiality*

A peculiarity of both arbitration proceedings and awards is that they are normally carried out privately. Indeed, the rules of several arbitration institutions require that proceedings be confidential unless

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in 3 ADAPTATION AND RENEGOTIATION OF CONTRACTS IN INTERNATIONAL TRADE AND FINANCE 409 (1985) (hereinafter cited as UNCITRAL Rules).

39. International Chamber of Commerce Rules expressly provide for concentration measures if the parties so desire. *See generally* International Chamber of Commerce, ICC Rules of Conciliation and Arbitration Pub. 447 (effective Jan. 1, 1988) app. III (hereinafter cited as ICC Rules).

40. W. STRENG & J. SALACUSE, *supra* note 22, at § 30.06.

the parties to the dispute direct otherwise.[41] Confidential arbitration awards have a distinct advantage over court adjudication in that both court proceedings and judgments are public. Because commercial relationships often involve confidential information such as trade secrets, neither party desires such confidential matters be available to third parties. In addition, because many international commercial relationships are, in fact, of long standing, it would hinder the ongoing relationship to have "dirty linen" aired in public.

D. *Technical Expertise*

Many commercial relationships involve products, services or technology that are technologically complex. For a tribunal to resolve a dispute regarding those products, services or the transfer of technology from one party to the other, the arbitrator or judge must have a considerable amount of technical knowledge concerning the subject matter in dispute. The parties, by choosing arbitrators who are technically knowledgeable, are more likely to have a "judge" with the specialized competence needed to properly evaluate technical claims.

E. *Expense*

Arbitration can be a much less expensive means of resolving a dispute than a court proceeding.[42] If either of the parties to a dispute is a small company or the amount in controversy is small, litigation may be too expensive and, therefore, not practical for resolving disputes.[43] If there is a sole arbitrator available, known to the parties, and with technical knowledge in the area, the dispute could be resolved readily so that the parties can go on about their business, often without any significant rancor existing between them.

F. *Expeditious Resolution*

Arbitration can also be a faster and more expeditious means of resolving a dispute.[44] Again, in contrast to litigation, arbitration al-

41. World Arbitration Institute AAA, International Arbitration Rules, art. 28(4) (2nd draft 1990) [hereinafter cited as AAA Rules]; ICC Rules *supra* note 39, app. II §§ 2-4.

42. *See* ICC Rules, *supra* note 39, app. III § 5.

43. ICC Rules, *supra* note 39. Even with an institutional proceeding such as that used by the ICC, a dispute involving a $50,000 claim will result in fees ranging from $3,000 to $8,000 which will include administrative fees and the cost of one arbitrator. *Id.*

44. *See* Dean Witter Reynolds v. Byrd, 470 U.S. 213, 221 (1985) (enforcing private agree-

lows the parties the flexibility to obtain an impartial arbitrator and quickly submit a dispute which cannot be resolved by negotiation. With a properly worded arbitration clause, the parties can establish a time frame within which a dispute must be resolved. A rapid resolution of the dispute allows parties to continue to do business, without being subjected to protracted court proceedings involving expensive and time consuming discovery.

IV. Preferred Mechanisms for Binding Arbitration of Commercial Disputes Between Mexican and United States Businessmen

Ad hoc and institutional arbitrations are the two principal procedural options for binding arbitration of international commercial disputes. Ad hoc arbitration in its purest sense is a complete agreement between the parties with respect to all aspects of the arbitration, including the law which will be applied, the rules under which the arbitration will be carried out, the method for the selection of the arbitrator, the place where the arbitration will be held, the language, and, finally and most importantly, the scope and issues to be resolved by means of arbitration.[45] An ad hoc arbitration may rely upon rules adopted by one of the arbitration institutions such as the International Chamber of Commerce (ICC), the Inter-American Commercial Arbitration Commission (IACAC), or the American Arbitration Association (AAA),[46] without the parties having agreed to submit the arbitration to the administration of any one of the institutions. Under institutional arbitration, on the other hand, the parties specify in the arbitration agreement that one of the above institutions, or some other institution, will administer the arbitration from the time of demand for arbitration through the award. The institution chosen may administer the arbitration according to its own rules or the rules of another institution. A significant exception is the ICC which will not administer an arbitration except under its own rules.[47]

Parties may decide in favor of ad hoc arbitration over that of an

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ments of arbitration, encouraging efficient and speedy dispute resolution principal objective of Federal Arbitration Act, 9 U.S.C. §§ 1-208 (1982)).

45. *See* Ulmer, *Drafting the International Arbitration Clause*, 20 INT'L LAW 1335, 1340, 1343 (1986).

46. W. STRENG & J. SALACUSE, *supra* note 22, § 30.6[B] at 30-46 to -47.

47. *Id.*

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institution because the parties believe they will be able to: 1) save money; 2) accelerate the procedure; or 3) structure their proceedings in a manner that suits their own needs.[48] Another reason for ad hoc arbitration may be a belief on the part of the parties that an inherent bias exists in favor of one of them in a particular institution and, therefore, one or the other party will not want a particular institution charged with the responsibility of applying its rules and proceedings to the arbitration.[49]

As an alternative to ad hoc arbitration, the parties may elect to have their arbitration structured and administered by an institution.[50] Using an arbitration institution has several advantages including: 1) availability of pre-established rules which are known to be used by the institution; 2) administrative assistance, if the institution has its own secretariat or, as is the case with the ICC, its own court of arbitration; 3) appointment of arbitrators; 4) physical facilities in which to hold the arbitration and support services of secretaries and translators; 5) assistance with technical advice, and 6) review of the final award which will help assure that it meets basic requirements for enforcement. Further, an institution can also aid in encouraging a reluctant party to go forward with the arbitration.

The primary disadvantages to institutional arbitration are the costs and delays. In addition to legal fees incurred under ad hoc or institutional arbitration, the institution will charge administrative fees for the use of its services and facilities, and for the arbitrator's services. The ICC is the most active of arbitral institutions and also receives most of the criticism concerning fees and charges.[51] Under ICC rules, charges and fees are calculated as a percentage of the claim.[52] Thus, the higher the amount of the claim, the higher the arbitration cost regardless of the nature of the matter under dispute.[53]

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48. A. REDFERN & M. HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 8 (1986).

49. W. STRENG & J. SALACUSE, *supra* note 22, § 30.6[B] at 30-46.

50. *See generally*, R. DAVID, ARBITRATION INTERNATIONAL TRADE 37-47 (1985) (discussion of major arbitral institutions); Graving, *supra* note 35, at 320 (description of leading arbitral institutions).

51. *See* Goekjian, *Conducting ICC Arbitration Proceeding*, MIDDLE EAST EXECUTIVE REPORTS, Feb., 1980 at 2 (ICC arbitration favored over ad hoc, but high cost of ICC may diminish its attractiveness).

52. *See* Graving, *supra* note 35, at 334.

53. Goekjian, *ICC Arbitration from a Practitioner's Perspective*, 14 J. INT'L L. & ECON. 407, 433-434 (1980).

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Another major disadvantage of institutional arbitration is the expense associated with disputes over large amounts because all fees are based on an ad valorem charge.[54] Other criticisms of institutional arbitration include the claim that bureaucracies that administer the institution often promote delays and add costs to the parties, and that the institution may force the respondent to answer or provide responses in an unrealistically short time frame.[55]

If the parties decide in favor of institutional arbitration, they must agree on a specific institution to arbitrate their disputes. The two institutions that are most likely to be available for the resolution of disputes between Mexican and United States businessmen are the ICC and the AAA.[56]

Usually, the ICC is preferred by Mexican businessmen because it has more experience and does not have an association so directly linked with the United States. Although the ICC and the AAA are the usual choice, there appears to be a growing preference for the IACAC among experienced arbitrators in Mexico. As trade and investment grow between the two countries, the AAA with its new International Rules of Arbitration and its desire to entertain more international disputes, may grow in favor. Additionally, AAA proceedings are administered less expensively than the ICC because it does not have the same high level fee structure of the ICC.[57]

Whether the parties elect ad hoc or institutional arbitration, they will need to decide which rules will be applied. While the parties may formulate their own special rules for a particular arbitration, it is probably advisable to conduct the arbitration in accordance with the rules of a specific arbitral institution such as the ICC, IACAC, or AAA.[58] Most of the rules cover all aspects of an arbitration commencing with the notices, the composition and method of selecting arbitrators, and an outline of the procedures to be followed in the

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54. A. REDFERN & M. HUNTER, *supra* note 48, at 39.

55. *See* AAA Rules, *supra* note 41, art. 3 (provides 30 day response to all claims); *see also* ICC rules, *supra* note 39, art. 4 (provides 30 day response).

56. The Inter-American Arbitration Commission can administer arbitrations as well and can perform some of the administrative duties, but it does not have the same facilities available for conducting arbitrations that are available through the ICC or the AAA.

57. According to the AAA office in Dallas, Texas, the current fees for the use of an AAA institution range from $1750 for a $100,000 dispute, to $20,000 for a $10 million dispute. Corresponding ICC administrative expenses are: $3,500 for a $100,000 dispute and $30,000 for a $10 million dispute. Graving, *supra* note 35, at 334 n.62.

58. W. STRENG & J. SALACUSE, *supra* note 22, § 30.06[B] at 30-46 to -47.

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arbitration itself including the method of stating claims, defenses and amendments to claims and defenses. The rules also provide the procedure for pleas with respect to jurisdiction, the method of presenting evidence, the availability of interim protective measures, the qualifications of experts and the presentation of their evidence, and the procedures for default. The rules will also express how the award it is to be formulated and whether or not it will include a statement of reasons, and finally, an outline of costs and administrative fees. As noted, the leading institutions have their own rules available for use and, except for the ICC, all of the institutions will administer the rules of another institution.[59]

The rules of each of the institutions are similar in most aspects. There is, however, a growing acceptance of the rules of the United Nations Commission on International Trade Laws (UNCITRAL) because they seem to be more compatible to the world's differing legal systems.[60] An additional advantage is that a record of decisions rendered under these rules is available in the reports of the Iran—United States Claims Tribunal at the Hague.[61]

A. *Recommendations for Mexico—United States Commercial Arbitration*

1. Ad Hoc Arbitration

Ad hoc arbitration with respect to disputes between Mexican and United States businessmen is preferable in most cases. In my experience these relationships will often be long-term and quite personal. Ad hoc arbitration offers an opportunity for crafting an arbitration agreement allowing for procedures that meet the wishes and needs of the parties in their particular commercial relationship.

When disputes arise from relationships between small and medium-size businesses, institutional arbitrations are too expensive and time consuming. In these circumstances an ad hoc proceeding is not only less expensive and more expeditious, but also tends to preserve the

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59. Graving, *supra* note 35, at 330.

60. W. STRENG & J. SALACUSE, *supra* note 22, § 30.06[B] at 30-47.

61. See Graving, *supra* note 35, at 330. I have not discussed the rules of the Stockholm Chamber of Commerce or the London Court of International Arbitration because they are not, in my judgment, as useful to the resolution of disputes that may arise between Mexican and United States businessmen.

cordiality of the relationship because it has been crafted to meet individual needs.

Structuring and drafting such an agreement requires a much higher degree of cooperation between the parties and their counsel than is ordinarily seen in negotiations of arbitration agreements. This exercise is useful to Mexican and United States businessmen because of the special historical relationship between the two countries and the differences in business cultures which the parties must take into consideration.[62] As Professor Redfern says, "[T]he difference between an ad hoc arbitration and an institutional arbitration is like the difference between a tailor-made suit and one which is bought 'off-the-peg.' "[63] In my experience, Mexican and United States businessmen must approach their relationship with the care with which a tailor approaches making a finely tailored suit instead of one that is mass produced. Unless this approach is taken, the relationship between the parties is not likely to prosper.

This does not mean that I encourage the parties to draft their own special arbitration rules. Rules can be supplied by various institutions and I strongly urge the parties to refer to the UNCITRAL rules. These rules seem to be institution neutral and take into account the differences in the legal systems of the two countries.[64]

Drafting special ad hoc rules can be expensive and time consuming. When it comes to selecting rules for the arbitration, it is probably not necessary to re-invent the wheel. Parties should take care, however, in adopting without reservation the rules of the ICC, the AAA or the IACAC. These rules make references to the institutions that have created them, and such references may result in confusion in initiating and enforcing the arbitration.[65]

2. Institutional Arbitration

Institutional arbitration may be appropriate where the disputed matter is complex and/or involves a large amount of money. The parties must be able to bear the financial burden of an institutional process. Under these circumstances, the institution is able to provide a ready-made administrative structure which not only leaves the par-

62. Friedler, *supra* note 10, at 236.
63. A. REDFERN & M. HUNTER, *supra* note 48, at 40.
64. *Id.*
65. *Id.*

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ties free to concentrate on resolving the issues but which also supports an orderly, expeditious and fair resolution of the dispute.[66]

The IACAC is growing in favor but care should be taken to ensure that it is able to effectively administer a large, complex matter. The IACAC has substantial support in the Mexican business community, particularly among experienced arbitrators.

Parties should also consider the AAA. The AAA has gained almost universal acceptance in the United States as the United States Supreme Court has continued to enlarge the range of "permissible issues for arbitration, (including now even such public law matters as antitrust and securities regulation. . .)."[67]

Another feature of AAA arbitration is that its arbitrators are not required under the AAA rules to render a reasoned award, which may aid in enforcement, since a reasoned, or written, award tends to provide exceptions for the losing party to attack on appeal.[68] However, "unreasoned awards . . . are considered contrary to *ordre public* in some Civil Law jurisdictions and therefore unenforceable."[69]

V. Drafting the Arbitration Agreement

A. *Activity to Ensure a Successful Arbitration*

Drafting an arbitration agreement may be the best method of ensuring a successful arbitration. The draftsman must strive toward two objectives: 1) each arbitration agreement or clause must be drafted in accordance with the needs of the particular situation; and 2) each arbitration agreement or clause must be expressed clearly and unambiguously. There must be close consultation between the Mexican businessman, his United States counterpart and their legal counsel to achieve these objectives.

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66. As many as 89 countries a year were represented before the ICC Court of Arbitration through 1987. The ICC has the most experience and is well accepted in Mexico. ICC Rules, *supra* note 39, at 4.

67. Graving, *supra* note 35, at 337; *see also* General Motors Corp. v. Soler Chrysler Plymouth, Inc., 473 U.S. 614, 627-28, (1985) ("we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration . . ."); Sherk v. Alberto-Culver, Inc., 417 U.S. 506, 515-17 (1974) (international arbitration agreements receive more favored treatment than domestic agreements, and all to be enforced as a matter of overriding federal policy because of their importance to international commerce).

68. Graving, *supra* note 35, at 338.

69. *Id.*

1. Scope of Arbitration

Because a list of all the possible issues that could be subject to a dispute in the course of a business relationship is unrealistic, the arbitration clause should be as broad as possible. A possible clause could include the following language:

> Any dispute or controversy or claim arising out of or in connection with or relating to this contract, or breach or termination or invalidity thereof, shall be finally settled by arbitration in accordance with the rules of (preferred rules) which are then in force.[70]

Attaining clarity requires considerable attention since both Spanish and English will be used in writing the agreement. For example, words such as "claims" or "differences" or "disputes" must be discussed carefully to ensure that there is a common understanding between the parties as to what is meant. The phrasing of the scope clause set out in the previous paragraph is an amalgam of work done by lawyers from around the world in the course of drafting the UNCITRAL arbitration rules.[71] However, while satisfactory for many situations, the terms may need further clarification to fit individual cases.

Other phrases requiring examination of limitations in the context in which they are used are "in connection with," "in relation to," "in respect of," "with regard to," "under," and "arising out of".[72] Eng-

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70. The contrast between the model arbitral clauses used by arbitrational institutions and the more detailed clause required for an ad hoc arbitration is well illustrated by the difference between the ICC and UNCITRAL model clauses:

"All disputes arising in connection with the present contract shall be finally settled under the Rules of [Conciliation and] Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules." ICC Arbitration Rules.

> Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force. Note — Parties may wish to consider adding: (a) the appointing authority shall be. . .(name of institution or person); (b) the number of arbitrators shall be. . .(one or three); (c) the place of arbitration shall be. . .(town or country); (d) the language(s) to be used in the arbitral proceedings shall be. . . .

UNCITRAL Arbitration Rules. REDFERN & HUNTER *supra* note 48, at 125-26.

71. *Id.* at 116.

72. *See, e.g.*, Mediterranean Enter., Inc. v. Sangyong Corp., 708 F.2d 1458, 1463-64 (9th Cir. 1983) ("arising hereunder" inferred as narrow scope, limiting arbitration to contract performance and interpretation; contract fraud could not be arbitrated); J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A., 863 F.2d 315, 321 (4th Cir. 1988) ("in connection with this Agreement" inferred as somewhat narrow scope, limiting issues subject to arbitration); *see also*

lish courts have given the widest meaning to the phrase "arising out of," and this wording will usually embrace all disputes capable of being submitted to arbitration except when the issue is whether or not the contract had any existence *ab initio*.[73]

Although it is important to draft the clause as broadly as possible, some matters are not subject to arbitration. An arbitration clause cannot cover matters which are not capable of being submitted to arbitration. As is discussed later, an issue that is unable to be arbitrated may arise in connection with foreign investments, joint ventures involving foreign investment, and technology licenses governed by Mexican technology transfer laws.

2. Choice of Arbitrator

The most important step in any arbitration is the selection of the arbitrator or panel of arbitrators. It is important, therefore, that the agreement to arbitrate be clear regarding the method for selecting the arbitrator. If the parties have adopted the rules of one of the institutions, particularly the UNCITRAL rules, the ICC rules, or the AAA rules, then the method for choosing the arbitrator is fixed.[74] If the parties have agreed to an ad hoc form of arbitration, the arbitration clause should expressly state how the arbitrator will be selected. The most important element of the selection criteria is whether the arbitrator must have a special skill. If a specific skill is required, such as special technological training, it should be specified in the arbitration agreement.

Normally, arbitral tribunals in international arbitrations consist of a panel in which each party to the agreement appoints one arbitrator and the two arbitrators choose the third arbitrator who acts as the

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Bond, *How To Draft An Arbitration Clause*, 6 (2) J. INT'L ARB. 65, 70 (1989) (concluding that courts have drawn a sharp distinction between "broad" scopes, which allow arbitration of issues separate from the contract, and "narrow" scopes, which allow arbitration only of direct contract issues). Where a broad scope is desired, the standard ICC clause has three key items: 1) "all disputes. . .;" 2) "in connection with. . .;" 3) until "finally settled. . . ." ICC Rules, *supra* note 39.

73. Art. 1442 Decree Law No. 81-500 (May 12, 1981) (cited in A. REDFERN & M. HUNTER, *supra* note 48, at 117). Similar wording has been given effect in France. "The arbitration clause is the agreement by which the parties to a contract undertake to submit to arbitration *any dispute which may arise* relating to the contract." *Id.*

74. Art. 2 of the ICC Rules sets out the method of selection of arbitrators under the ICC rules. ICC rules, *supra* note 39, art. 2. Arts. 5 and 6 set out the method of determining arbitrators under the AAA rules. AAA Rules, *supra* note 41, art. 5-6.

presiding arbitrator.[75] The panel need not be selected in this way, but whatever method is chosen, it should be clearly written in the arbitration agreement. If the arbitration is to be conducted by a sole arbitrator, the method for choosing that arbitrator should be articulated including a clause stating what should happen if the parties cannot agree.[76]

While a panel of arbitrators is the usual standard for international commercial arbitrations, a sole arbitrator is often preferable. This is especially so where the parties have a long-standing relationship, and the issues to be resolved do not involve a large amount of money. With a sole arbitrator overall costs are substantially less, and the dispute will be resolved much more quickly than by a panel of arbitrators.

3. Choice of Law

Parties to a Mexico—United States commercial transaction may stipulate that the law of one or the other country govern the transaction. Indeed, if the transaction involves technology transfer contracts, the law of Mexico must be chosen in order to obtain approval for registration of the license agreement.[77] In general, however, neither party will find the law of the other totally acceptable, and the parties should focus upon general international standards and the customs and usages of trade.

Insofar as it will not offend the laws of either country to the extent of preventing the arbitral award from being enforced, the parties should attempt to avoid having a particular body of national law apply to the transaction. Rather, parties should specifically authorize the arbitrator to decide future disputes in accordance with general principles of international law relating to international trade or investment or customary rules of equity and commerce.[78] Such a provision avoids the difficulties of applying laws of either nation. It also insu-

75. *See, e.g.*, ICC Rules, *supra* note 39, art. 2.

76. *See* AAA Rules, *supra* note 41, art. 6; UNCITRAL Rules, *supra* note 38, arts. 6, 7. Where the parties cannot agree on a sole arbitrator, a method of striking from a list of arbitrators may be adopted.

77. Secretará de Comercio y Fomento Industrial, Ley Sobre el Control y Registro de la Transferencia de Tecnología y el Uso y Explotación de Patentes y Marcas, art. 7 (1987).

78. *See International Parties, Breach of Contract, and the Recovery of Future Profits*, 15 HOFSTRA L. REV. 323, 334-36, 342-43 (1987).

lates the parties from unilateral changes in the law of either Mexico or the United States.

Authorizing the arbitrator to decide the dispute by acting as an *amiable compositor*[79] or on the basis of *ex aequo et bono*[80] is growing in popularity. Under this the provision the arbitrator is permitted to decide the dispute on the basis of justice and fairness rather than on the basis of specific rules of law. While this type of "choice of law" has been criticized and not permitted in countries such as England,[81] it would probably not encounter difficulty in the United States or in Mexico.

4. Choice of Location

A well drafted arbitration clause must provide specifically for the location of the arbitration, naming both the city and the country. In addition, the country selected should be stable,[82] and have a judiciary which does not significantly interfere with arbitration.[83]

5. Choice of Language

The arbitration clause or agreement should specify the language to be used in the arbitration proceeding. The parties may designate one language as the official language and allow the option of having a simultaneous translation of the other language. The technology for simultaneous translation is well advanced and can be employed in all but the most complicated circumstances. The use of simultaneous translation would make arbitration of commercial disputes between

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79. *Amiables compositeurs* (amicable compounders) are "arbitrators authorized to abate something of the strictness of the law in favor of natural equity." BLACK'S LAW DICTIONARY 74 (5th ed. 1979).

80. *Ex aequo et bono* is a "phrase derived from the civil law, meaning, in justice and fairness; according to what is just and good; according to equity and conscience." BLACK'S LAW DICTIONARY 500 (5th ed. 1979).

81. W. STRENG & J. SALACUSE, *supra* note 22, § 30.05[e][i], at 30-27 to -33.

82. *See* National Iranian Oil Co. v. Ashland Oil, Inc., 641 F. Supp. 211, 213-14 (S.D. Miss. 1986). In a contract drafted before the Iranian Revolution against the Shah, Iran was fixed as the site of arbitration; the court refused to grant the Iranian party's request to change the arbitration situs to the United States. *Id.*

83. The place of arbitration should be a country which has adhered to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. no. 6997, 330 U.N.T.S. 38. *See generally* Zickerman, *The Use of Pre-Judgment Attachments and Temporary Injunctions in International Commercial Arbitration Proceedings; A Comparative Analysis of the British and American Approaches*, 50 U. PITT. L. REV. 667, 681 and n.99 (1989) (noting that over 75 nations have signed the New York Convention).

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Mexican and U.S. businessmen even more attractive than other methods of dispute resolution.

7. Choice of Rules

Institutional rules must be either specifically referred to or the drafting of the ad hoc rules must include at least these basic provisions: 1) the procedure to initiate arbitral proceedings; 2) the method for giving notice; 3) the means for dealing with the refusal of one party to proceed after the other party has properly invoked the arbitration procedure; and 4) a reference to the scope and limitation of discoverable documents. Moreover, the hearing procedures should be outlined along with the form of the award, whether it should be a written reasoned award, and the enforcement procedures.

VI. Specific Situations in Which Arbitration Is a Preferred Method

A. *Introduction*

I have chosen several examples from my experience which illustrate how arbitration is preferred as a mechanism for dispute resolution over litigation. They include: 1) contracts for the sale of goods; 2) distribution agreements; 3) joint venture agreements involving foreign investment; 4) technology licensing; and 5) maquila operations, especially those involving subcontracts or shelter contracts.

B. *Sale of Goods*

The growth of trade, mainly in the form of contracts for the sale of goods, has increased dramatically with Mexico's accession to the General Agreement on Tariffs and Trade (GATT) and a reduction of its own trade barriers, both tariff and non-tariff.[84] The export of consumer goods into Mexico has increased remarkably since 1986, when it began to dramatically lower its import restrictions.[85] In addition, there has been a corresponding surge in manufactured goods exported from Mexico to the United States beginning at about the same time.[86]

The resolution of disputes arising from this two-way trade has been made easier because both nations are parties to the United Nations

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84. *U.S.-Mexico Trade Continues To Expand and Improve*, BUS. AM., Dec. 4, 1989, at 6.
85. *Id.*
86. *Id.*

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Convention on Contracts for the International Sale of Goods,[87] commonly referred to as the Vienna Convention (Convention).[88] The Convention sets forth rules that govern contracts for the sale of goods between the two nations. Article 1 of the Convention provides as follows:

> This convention applies to contracts for the sale of goods between parties whose places of business are in different states: (a) When the states are contracting parties; or (b) When the rules of private international law lead to the application of the law of a contracting state.[89]

Since both Mexico and the United States are contracting parties, the Convention would apply to contracts for the sale of goods between the two nations.[90] Of course, the Convention would not apply where the parties have determined by contract that other legal standards replace the Convention in whole or in part.[91] Unlike the U.C.C. in the United States or the Commerce Code in Mexico, the Convention imposes no restrictions on the freedom of the parties to establish contract terms between themselves.[92]

The overall content and application of the convention is similar to the U.C.C. However, there are some major deviations from fundamental United States business practices which may create problems for unwary contractors.[93] Perhaps the most significant difference is that article 11 does not require a writing in order to prove the existence of a contract.[94] The United States could have declared in its

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87. Vienna C.I.S.G. *opened for signature* April 11, 1980, UN Doc. A/Conf. 908/18 (1980), 52 Fed. Reg. 6262 (1987), [hereinafter Vienna C.I.S.G.] *reprinted in* 19 I.L.M. 671 (1980).

88. 2 G. LETTERMAN, LETTERMAN'S LAW OF PRIVATE INTERNATIONAL BUSINESS 321-22 (1990).

89. Vienna C.I.S.G., *supra* note 87 at art. 1. The United States signed with the reservation that it was not bound by art. 1(b) of the Convention. 22 I.L.M. 1371 (1983).

90. 2 G. LETTERMAN, *supra* note 88, at 321-322. Mexico's entry into the Convention took effect on January 1, 1989, and the United States' entry took effect on January 1, 1988. *Id.*

91. Vienna C.I.S.G., *supra* note 87, art. 6. Art. 6 of the Convention permits parties to exclude the application of the Convention. *Id.*

92. Código de Comercio y Leyes Complementarias, arts. 78, 79 (Porrua ed. 1972); *see also* U.C.C. § 2-201 (1978).

93. Like domestic legislation, the CISG resulted from a series of compromises. Since sovereign nations are generally free to reject international treaties, the CISG drafters provided arts. 92-96 for individual nations to declare exceptions.

For purposes of understanding the CISG, the Senate was provided a legal analysis which compared CISG provisions to corresponding sections of art. 2 in the U.C.C. This comparison is reprinted in 22 I.L.M. 1368-1380 (1983).

94. "A contract of sale need not be concluded in or evidenced by writing and is not

instrument of ratification under article 96 that it would not be bound by convention provisions which dispense with formal requirements.[95] The United States did not make such a reservation.[96]

The parties must specify in their contract that the Convention will apply. The parties should also agree to submit any disputes arising from their contract to arbitration. The arbitrator is free to apply the law specified by the parties or to decide the dispute *ex aequo et bono*, regardless of the choice of law or conflicts of law rules of the two countries.[97] Even in the absence of such an authorization a dispute resolution clause that contemplates arbitration would likely permit arbitrators to base a decision on principles and rules different than those of the individual countries of the disputants.

The UNCITRAL Model Law on International Commercial Arbitration supports this view in article 21.8 which provides that "[t]he arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute."[98] Article 28.2 of the Model Law provides that "[f]ailing any designation by the parties the arbitral tribunal shall apply law determined by the conflicts of law rules which it considers applicable."[99] If the parties follow such an approach in their contracting, some inconsistencies that arise as a result of conflicts between the laws of their two nations will be avoided.

Examples of conflicts include the respective courts applying conflict or choice of law rules in a court-resolved dispute. Since article 11 of the Convention provides that a contract for sale need not be in any particular form and may be proved by any means, the requirement of a writing as set forth in the statute of frauds could be avoided and permit the enforcement of oral agreements.[100] Articles 14 through 24

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subject to any other requirements as to form. It may be proved by any means, including witnesses." Vienna CISG, *supra* note 87, art. 11.

95. Apparently the U.S.S.R. was the primary impetus for this reservation. *See* J. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION § 129 (1987).

96. Department of State, Public Notice 1004, 52 Fed. Reg. 6262 (1987).

97. *See* 1961 Geneva Convention on International Commercial Arbitration art. VII (2) 484 U.N.T.S. 349, 374; UNCITRAL Model Law on International Commercial Arbitration, art. 28(3), adopted June 21, 1985, *reprinted in* 24 I.L.M. 1302, 1309 (1985) [hereinafter cited as Model Law].

98. Model Law, *supra* note 97.

99. *Id.* The French code of civil procedure has already incorporated this concept.

100. U.N. Convention On Contracts For The International Sale of Goods, U.N. Doc.

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of the Convention codify rules governing the formation of contracts and draw into harmony the concepts of offer and acceptance in the common law system and the civil law system. Specifically, article 15 outlines whether an offer is effective, and how it may be withdrawn. This provision neutralizes conflicts between the common and civil law.[101] Articles 25 through 88 of the Convention deal with remedies, and regulate the rights and obligations of the parties to international sales contracts.[102] Clarifying remedies, and when a party may be able to avoid the contract, avoids possible conflicts arising from the differences between the Mexican and United States legal systems. Article 42 addresses third party claims based on intellectual property rights.[103] If the parties refer to the Convention in their contract, or in the dispute resolution provisions, third parties should be able to adjudicate intellectual property rights claims by means of arbitration. Other areas of conflict addressed by the convention include notice provisions, terms for curing a breach of the contract, and specific circumstances under which the buyer may accept a reduction in the price as a means of resolving a dispute about nonconforming goods.[104]

Problem areas not covered by the Convention include responsibility for product liability for personal injury or death, and sales of stock, shares, investment securities, negotiable instruments, money, ships, vessels, hovercraft, aircraft, and electricity. Except in cases involving intellectual property rights, third parties are excluded and are thereby unaffected by the Convention. Substantial performance is also excluded, except in contracts for the manufacture or production of goods.[105] Even though these areas are excluded, specific reference to them in the Convention should assist the parties both in negotiating their contracts, and in considering which items should be subjected to the dispute resolution mechanism that the parties wish to have govern their relationship.

The Convention allows for specialized dispute resolution in accord with internationally accepted rules that regulate the sale of goods, rather than subjecting any dispute that arises under such a contract to

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A/CONCF. 97/18 (1980), *reprinted in* 19 I.L.M. 671 (1980). This, by the way, is the direction that international commercial contracts are heading.

101. *See id.* art. 15 *reprinted in* 19 I.L.M. at 675.

102. *See id.* art. 25-88 *reprinted in* 19 I.L.M. at 677-92.

103. *See id.* art. 42 *reprinted in* 19 I.L.M. at 680-81.

104. *See id.* art. 25-88 *reprinted in* 19 I.L.M. at 677-92.

105. *See id.* art. 3, 4, 5 *reprinted in* 19 I.L.M. at 672-73.

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the laws of either nation. By adopting arbitration and referring to the Convention in the contract, the parties have empowered the arbitrator to apply the convention's rules, customs, and usages of trade.

C. *Distribution Agreements*

It is estimated that "sales representatives and independent distributors handle over one half of world-wide trade."[106] This number is likely to grow dramatically with respect to commercial transactions between Mexico and the United States. Since Mexico acceded to GATT, there has been a dramatic increase in the number of distributorships established on both sides of the border. A continuing concern of distributors, as well as their principals, is how their agreement will be treated under the laws of the other party's country. There is a strong perception on the part of parties to distribution agreements that local laws will favor the distributor as opposed to the principal.[107] This concern is valid to some extent in the United States, but is not based on a distinction being drawn between foreign distributors or local distributors. The preference occurs because of equitable considerations that arise when the principal seeks to terminate the appointment of a distributor or agent in this country after that agent or distributor has invested considerable sums in establishing itself and the identity of the principal. Article 285 of the Federal Labor Code of Mexico creates legal protection derived from equitable considerations by requiring indemnity for commercial agents, salesman, company representatives, promotional agents and similar agents when their relationship to the principal can qualify them as "employees."[108] The activity of such persons will be classified as that of an employee if it is of a permanent nature, that is, they work exclusively for one principal and are directed in their activities to a considerable degree by that principal.[109]

The laws in both countries are designed to protect the distributor from unjustified termination. To the extent that the dispute between a principal and a distributor concerns the termination of the distributor

106. 2 G. LETTERMAN, *supra* note 88, at 287.

107. *Id.* at 288.

108. Ley Federal del Trabajo (cited in E. CALVO & E. VARGAS, MICRO THEMIS LABORAL § 285 (1988).

109. *Id.*

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or agent, the laws of the two countries may appear to block the resolution of such a dispute by private arbitration.

It is my view that the laws of the two countries would not necessarily prevent the arbitration of disputes arising in connection with distribution contracts if the parties have clearly elected to resolve the dispute through arbitration in accordance with any of the generally accepted rules. The rules of UNCITRAL, Inter-American Arbitration Association or the ICC should certainly suffice to justify an arbitral award which could be enforced under the laws of either country.

Other disputes that can arise which could more readily be dealt with through arbitration include the territorial limits of the distributorship,[110] minimum purchase requirements, circumvention of distributors' rights or violation of a noncompete clause, protection of intellectual property rights (who has the duty to protect them), accountings between the parties, approvals of advertising, and the interpretation of exchange rate loss protection clauses. Here, as in the case of sales agreements, the advantages of resolving disputes that arise between the principal and the distributor by means of arbitration clearly outweigh resorting to the courts of either country. With respect to the choice of law to be included in the arbitration clause of a distributorship agreement, it would be preferable that the parties adopt customs and usages of the trade, rather than refer to any particular international law. Indeed, the relationship between distributor and principal presents an excellent opportunity to authorize the arbitrator to act as an *amiable compositeur* or to use the notions of fairness and equity and act *ex aqueo et bono*.

Among the reasons for granting the arbitrator such broad powers in this relationship is that no convention exists that would regulate the terms of an agreement between the parties. In addition, distributorship arrangements can have many unique qualities, including the definition of the products to be distributed, the territory in which the distributor is to work, the standards by which performance is measured, and minimum purchase and/or supply requirements.

Selecting an arbitrator in a distributorship relationship is especially crucial. Because the relationship is designed to be long term, the arbitrator or panel of arbitrators should be inclined to resolve disputes

110. *See* Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, 473 U.S. 614, 629 (1985) (in suit involving manufacturer and distributor, antitrust claim subject to arbitration, even though same suit in a domestic context may have another result).

that will prolong the relationship. Such sensitivity requires an appreciation of the internal and external forces that influence the performance of both parties on a day-to-day basis. Import restrictions, difficulties with transport companies, and employee relations are examples of factors that can affect the performance of either party, and should be taken into account when claims of failure of performance are brought to arbitration.

Because of the intimate relationship that normally develops between the principal and the distributor, special ad hoc rules and proceedings might be arranged to ensure that any dispute is resolved quickly and expeditiously. These rules could include liberal guidelines for submitting evidence through written statements by both parties, which the arbitrator could review without leaving his place of residence. Unless the distribution relationship involves parties with virtually unlimited resources, arbitration will usually have a distinct advantage as a dispute resolution mechanism over resort to the laws or courts of either country.

D. *Foreign Investments*

1. Investments in the United States

Arbitration should appeal to the Mexican investor in a joint venture with Americans as a means of avoiding a judicial system that neither he nor his lawyers can accept without reservation. Disputes between joint venturers could be resolved more readily by arbitration than in the courts, and could be based upon international law or principles of equity and fairness rather than the law of either country. Disputes that could be resolved in arbitration include disagreements among shareholders concerning dividend policy or its application, disputes concerning the veto rights of minority shareholders, and other disputes that involve interpretation of statutes and bylaws of the company. Where a party is a public company over which the Securities and Exchange Commission has jurisdiction, arbitration agreements, especially with a foreign investor, probably would be honored, and the award enforced.[111]

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111. *See* Sherk v. Alberto-Culver Inc., 417 U.S. 506, 519, 520 (1974) (upholding agreement to arbitrate a securities law claim).

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2. Investments in Mexico

If the foreign investment in Mexico is owned one hundred percent by the foreigner, there will be no dispute that could be resolved by arbitration because there is no opposing interest inside the company. However, if the foreign investment is similar to a joint venture in the United States, a number of areas of potential dispute exist which could be addressed effectively by arbitration. Letters of intent or joint venture agreements that precede the actual establishment of a Mexican corporation are areas in which I have encountered disputes which sometimes lead to the stillbirth of a joint venture. Such disputes generally arise from different understandings of what was intended in the joint venture agreement. Areas of misunderstandings include the amount of the financial contributions that were to be made to purchase share ownership, the time period within which those investments were to be made in order to receive issuance of stock certificates, the scope of any veto powers that the minority shareholder had been guaranteed in the joint venture agreement, the extent to which the venture was to be financed by debt rather than equity, and the terms and conditions under which technology would be transferred by the foreign investor to the joint venture.

Once the venture is established, other disputes arise that could be submitted to arbitration. Among these disputes are development of new product lines, where, when and how to expand, hiring and firing of top management, and operations financing—when, how much, and the method of borrowing money.

Disputes often arise in the course of dissolving a joint venture. Arbitration may assist the parties toward a more just and expeditious dissolution when the parties are unable to agree. Examples of such disputes include the division of assets, the rights to intellectual property, the right to customer lists, and the extent to which the parties want to restrict each other with respect to competition.

Before assuming that these issues can be resolved by arbitration, the parties should analyze the extent to which any or all of these issues must be resolved by a Mexican governmental agency, and the extent to which an arbitrarial issue might violate Mexico's sense of public order. In my opinion, all of these issues could be resolved by arbitration unless the arbitrator increased the foreigner's ownership and control of the corporation beyond the limits set in the Mexican foreign

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investment law.[112] Barring that kind of an award, it seems to me that the arbitrator's decision would be enforceable in both the United States and Mexico, pursuant to either the New York Convention or the Inter-American Convention.

It seems clear that whether the investment is in the United States or Mexico, both of the joint venturers would prefer to submit any the above issues to a sole arbitrator or even to a panel of arbitrators rather than submitting them to the laws and courts of either nation. The time and expense involved in litigating corporate disputes is almost always disproportionate to the economic value that the dispute represents. The problem with attempting to resolve such matters in court is that often the judge and/or the jury do not understand the issues. In addition, the privacy of an arbitration is much preferred.

E. *Technology Transfer Licenses*

This discussion must be divided between technology licenses granted in the United States and those that involve the transfer of technology or licensing of technology to Mexico because the Mexican law on the transfer of technology[113] imposes some very strict requirements for government approval before a license can be enforceable in Mexico.[114]

1. Licenses of Technology Granted in the United States

Apart from certain anti-trust considerations with respect to tying relationships and export controls, most disputes that arise under a technology transfer agreement can be resolved using arbitration. Because most technology licensing relationships are long term, and almost always involve the transfer of confidential information, arbitration is much preferred to litigation. The arbitration process preserves the confidentiality of the matters in dispute. The arbitration procedure also tends to preserve the integrity of a long term relationship. As such, arbitration encourages further transfer of technical

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112. Ley Para Promover la Inversión Mexicana y Regular la Inversión Extranjera, art. 5, *reprinted in* DOING BUSINESS IN MEXICO, app. I1-2, 3 (1983).

113. Ley Sobre el Control y Registro de la Transferencia de Tecnología y el Uso y Explotación de Patentes y Marcas *reprinted and translated in* DOING BUSINESS IN MEXICO app. J2A (1983) [cited hereinafter as Mexican Law on the Transfer of Technology].

114. Secretaría de Comercio y Fomento Industrial, Reglamento de la Ley Sobre el Control y Registro de la Transferencia de Tecnología y el Uso y Explotación de Patentes y Marcas, art. 15 *reprinted and translated in* DOING BUSINESS IN MEXICO app. J4-1, 5 (1983).

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assistance that is necessary for the success of the enterprise. Additionally, referring such a dispute to arbitration enables the parties to chose a tribunal with industry- or product-specific knowledge. In my experience, it is unrealistic to expect a judge or a jury to fairly and expeditiously resolve a dispute that requires an understanding of a complex technology.

2. Technology Licenses in Mexico

Mexican law regulating the transfer of technology specifically approves arbitration as a means of resolving disputes pertaining to the licensing of technology in Mexico. Article 7 of the Law provides that "[t]he acts, agreements or contracts referred to in [this Law] shall be governed by Mexican Laws or by the applicable international agreements or treaties to which Mexico is a party."[115] Mexico is a party to international arbitration agreements, and those agreements have been upheld by the Mexican courts as superseding national law.[116] Notwithstanding the foregoing, Mexican law regulating the transfer of technology could be asserted to prevent enforcement of an arbitration award that modified the terms of a technology contract already approved by the Mexican government.[117] In addition, any claim of patent infringement which may be part of a dispute with respect to a technology transfer license would probably be governed by article 59 of the Mexican Law on Inventions and Trademarks.[118] This article gives exclusive jurisdiction to the Mexican Executive Branch through the Department of Inventions and Trademarks to determine whether an infringement has occurred. However, articles 213 and 214 of the same law give to the individual disputants the right to go to the civil court for damages, but presumably only when it is established that an infringement has occurred.[119] It is uncertain whether a suit could go forward if the Mexican Invention and Trademark Department had decided that no infringement occurred with respect to a patent which

115. Mexican Law of Transfer of Technology, *supra* note 112, art. 7 at J2A-3.

116. *See* Malden Mills, Inc. v. Hilaturas Lourdes, S.A. *summarized and translated in* DOING BUSINESS IN MEXICO, app. F3; *see also* Presse Office, S.A. v. Centro Editorial Hoy, S.A. *summarized and translated in* DOING BUSINESS IN MEXICO, app. F4.

117. *See* Mexico Law on the Transfer of Technology, *supra* note 112, art. 2 at J2A-2 (listing agreements to be registered).

118. Ley de Invenciones y Marcas, D. O., Feb. 10, 1976, *reprinted in* DOING BUSINESS IN MEXICO, app. K1.

119. *Id.*

is subject to a civil damage suit in the Mexican courts. More importantly, it is also unclear who would prevail in the event of a clash of decisions between the Invention and Trademark Department of the Mexican government and the Mexican courts as to whether an infringement of a patent occurred. If the conventions to which Mexico is party are indeed of higher priority, then a good case can be made that a patent infringement claim could be submitted to arbitration. If such claims could be arbitrated, it would promote the confidence of both parties in the prospects for a definite resolution of disputes, including claims to patent rights.[120] It may be determined, however, that the validity of patents is a matter of basic public order which the parties may not take from the jurisdiction of the legal system of the country for resolution by arbitration.[121]

There are types of licensing disputes that can be resolved by arbitration and which would not violate any of the approvals given by the Mexican government in permitting registration of a licensing agreement. These include: accountings for royalties and technical assistance fees; resolution of licensee complaints that it is not getting what it bargained for under the terms of the license agreement; distinctions between innovation and modification of the technology (the licensee is claiming that it is entitled to innovations and the licensor demurring on the grounds that the technology being transferred is simply a modification); disputes concerning component and raw material purchasing requirements; and disputes concerning the terms of the cancellation provisions.

All of these disputes could be handled by a sole arbitrator with product-specific or industry-specific knowledge. The disputes could be adjudicated in accordance with institutional or ad hoc rules more quickly, inexpensively and confidentially than if the dispute were submitted to a court of law in either country.

F. *Maquiladora Operations Involving Subcontractors and Shelter Operators*

Maquiladoras, or twin plant operations, are production-sharing arrangements authorized under Mexican Law whereby foreign investors may own one hundred percent of a manufacturing operation in Mex-

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120. Constitucion Politica de Los Estados Unidos Mexicanos, art. 33 (Porrua 85th ed. 1988).

121. New York Convention, *supra* note 18, art. V § 2(b).

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ico, as long as the plant's total production is dedicated to export from the country.[122] As already noted in this article, these types of investments have produced great benefits for both Mexico and the United States. The focus of this part of the paper is upon the ways certain maquiladora operations are structured, requiring the use of subcontractors and/or what are termed shelter operators. Because of their structure, maquiladoras operated by a subcontractor or a shelter operator have the potential for disputes which can either be resolved in the courts of either country, or by arbitration. The subcontractor arrangement involves a Mexican manufacturer who is willing to allow a portion of his unused factory or production facilities to be used to process or assemble the products of the foreign investor/maquiladora owner. The Mexican subcontractor provides facilities, employees and management, while the foreign investor provides the component parts, equipment, machinery drawings and specifications for the products to be processed or assembled in the Mexican manufacturer's plant. The foreign investor pays for the services rendered by the Mexican manufacturer on an hourly or piece-rate basis, usually through what is called an assembly services agreement.

A shelter operator is usually a Mexican service company that provides the maquiladora owner with employees, including support staff and administrative staff. The foreign maquiladora operator establishes a Mexican subsidiary that supplies raw materials and may hire direct labor and exercise some quality control. The shelter company is paid for its services on an hourly or piece-rate basis under an assembly services or shelter agreement. The differences between the two types of operations can be great or small. In both situations there is a contractual relationship between the foreign investor and the Mexican supplier of services. These assembly services agreements are quite extensive and complex and contain a number of issues over which disputes can arise in the course of a relationship. These kinds of disputes should be resolved rapidly and definitively.

First, disputes may arise with the landlord whether the maquiladora is operated through a subcontractor or a shelter operation, or is directly operated from abroad by the foreign investor. Lease contracts for maquila operations can become quite complicated. There

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122. Decreto Para el Fomento y Operación de la Industria Maquiladora de Exportación, D.O., Aug. 15, 1983, *reprinted in* R. DAVIS, INDUSTRIA MAQUILADORA Y SUBSIDIARIAS DE CO-INVERSION: REGIMEN JURIDICO Y CORPORATIVO, app. V, 459 (1985).

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can be differences of opinion between the landlord and the tenant regarding their respective rights and obligations over the course of a lease. Such disputes are resolved more efficiently by arbitration than by litigation in the courts of either country for the reasons already set forth.

Disputes with subcontractors and shelter operators include whether correct and timely payments have been made, whether production schedules are being met by the subcontractor or shelter operator, whether too much overtime is being authorized by the subcontractor or the shelter operator, whether new and/or different machinery and equipment are necessary, and who has the responsibility for maintenance. Even though responsibility for all of these issues is thought to be well-expressed in the subcontracting or shelter agreement, in my experience, disputes over these issues are chronic. The problem is how they should be resolved if the parties cannot resolve them by negotiation. It seems obvious to me that it is more useful to have these disputes resolved quickly by an arbitrator previously selected by the parties, than to allow them to grow stale and collect with other unresolved disputes until the overall relationship is threatened.

Generally, ad hoc arbitration with its greater flexibility and lack of reliance upon an outside institution would better meet the needs of the parties than institutional arbitration. If ad hoc arbitration is to be the course followed, the parties should give greater care to the dispute resolution mechanism included in the contract when negotiating and drafting the subcontractor and shelter agreements.

VIII. Conclusion

As commercial contacts between the two nations grow, so will the disputes arising from these contracts. Thus, there should be mechanisms for dispute resolution that encourage, rather than frustrate, these commercial contacts. Resorting to the laws and courts of the two nations causes unnecessary conflict that often does not lead to resolution of the dispute and can be both slow and expensive.

This paper describes an experiment. The experiment is to move away from traditional mechanisms for dispute resolution which have produced far more problems than satisfactory results. By making arbitration a preferred mechanism for dispute resolution, we may be able to avoid many of the disputes that arise because the parties realize that if they cannot come to terms the matter will be resolved definitively and probably quickly by an arbitrator or panel of arbitrators.

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Because resolution by arbitration will be definitive and swift, there is an added respect for the arbitration clause. If the parties were free to haggle indefinitely over disputed claims with certain knowledge that the other party's only alternative is to sue, many disputes may remain unresolved. Fortunately, the record of compliance with arbitration awards is quite good under either the New York Convention or the Panama Convention. As a result there is a growing body of precedent to indicate that the parties will not resort to interminable appeals once they have agreed to arbitration and an award has been issued. Growing commercial contacts between the two nations require that Mexican and United States businessmen seek out dispute resolution mechanisms which will promote that growth rather than hinder it. Binding arbitration provides such a mechanism.

NOTE: At the time this article was written, a new intellectual property law was pending before the Mexican Congress. In the event the proposed law is passed, references in this article to the Mexican law on the Transfer of Technology may be superseded.

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