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## Planning for International Disputes (and What Makes Them Distinctive)

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# Planning for International Disputes (And What Makes Them Distinctive)<sup>1</sup>

Jack Coe<sup>2</sup>

Let's get started here. First, there are two handouts coming around, one of which will be the suggested talking points for today, and I say "suggested" because they are merely that. It may be that given the assembled wisdom here that we will take this session in a completely different direction. But this outline is the default mechanism. The problem we have, of course, is that we have too many people in the room so were going to throw two people out of the room, and the procedure will be as follows: [laughter]

I'd like to propose that we very briefly, not to exceed thirty seconds, identify ourselves by name, affiliation and job description. And we will start with Mr. James.

James: Hi, I am Bill James and I work for the University of California, and I am probably one of the few non-attorneys here and I am also a mediator with the National Conflict Resolution Center in San Diego.

Caulfield: Barbara Caulfield. I am a lawyer, and I am very interested in mediating disputes.

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1. Speech given at the Conflict Management Culture seminar, hosted by Pepperdine's Straus Institute for Dispute Resolution.

2. Professor of Law, Pepperdine Law School. A specialist in private international law, Professor Coe has studied extensively in Europe. He received his LL.M. at Exeter, where he was a Rotary International Graduate Fellow. Before coming to Pepperdine, he was the assistant director and lecturer-in-law at the McGeorge School of Law International Programs in Salzburg, Austria. He also holds the Diploma from the Hague Academy of International Law, a Ph.D. from the London School of Economics, and has been a clerk to the Honorable Richard C. Allison at the Iran- U.S. Claims Tribunal, the Hague. He has been a guest lecturer in international law at the University of Amsterdam, and has taught classes in Edinburgh, Guadalajara, London, Mexico City, Moscow, and Salzburg.

Professor Coe has contributed to several monographs on international business planning, and has co-authored *Protecting Against the Expropriation Risk in Investing Aboard* (Matthew Bender 1993). His recent books are *International Commercial Arbitration-American Principles and Practice* (1997), a one-volume treatise, and *NAFTA Chapter 11 Reports* (with Brower and Dodge). Professor Coe has been a Salzburg Seminar Fellow, twice a Rick Caruso Research Fellow, and is an elected member of the American Law Institute. He is admitted to practice in California and Washington, and is a member of the Chartered Institute of Arbitrators, London, England. He is also vice-chairman of the International Commercial Arbitration Committee of the ABA's International Law Section. Professor Coe is a frequent speaker before learned and professional societies, consults in the field of international dispute resolution, and has argued international arbitral claims under NAFTA.

Professor Coe teaches Commercial and International Dispute Resolution, Corporations, Commercial Law-Sales, International Business Transactions, International Commercial Arbitration, International Investment Disputes, International Litigation, and International Public Law.

Williams: Rick Williams. I am a lawyer here in San Jose and a mediator and I have practiced for about thirty years at a local law firm Barbara knows. [laughter]

Berkowitz: Stephie Berkowitz. I am on leave from a school district as an ombudsman and a mediator. I am attending Pepperdine's course extension in mediation in Orange County.

Rashkiss: Craig Rashkiss. I have a mediation practice here in the local area. I am a graduate of the masters program in Pepperdine.

Clears: I am Kim Clears and I am a marketing consultant as well as a mediator. I do have a masters degree in dispute resolution from Pepperdine and I actually formerly was a director of marketing for a high-tech startup.

Wolf: Mary Ann Wolf, and I am an attorney and I work for Flextronics.

Oberston: Julie Oberston. I am from Seattle and a non-lawyer. I am interested in helping companies like Microsoft as they explore dispute resolution on the international scene.

Franklin: Ruth Franklin. I am in house counsel for Intel. Diane Labrador is one of the groups that I support, risk management, and I also help the facility side, so the construction arm of Intel worldwide.

Williams: Hi, I am Elizabeth Williams. I am a mediator in private practice as well as for the county of Santa Clara.

Katherine Mills: Hi, I am Katherine Mills. I am a mediator. I have been admitted to the California bar and am interested in media law and starting an LLM at Pepperdine in January.

Reed: Ken Reed. I am a mediator and arbitrator and I do law on the side to support the habit.

Casey: Well put. Jim Casey. I am General Counsel for Phillips Semi Conductors. I don't know if I have practiced law the last ten years, I give out advice, and people seem to follow it...

Reed: ...and sue you over it.

Hilton: I am Ray Leigh Hilton, I'm a business consultant in Orange County, and my focus is designing ADR systems for companies, and now I am more interested in designing preventive ADR systems in globalizing employee work forces.

Levine: Stewart Levine, a long time ago I was a lawyer, but it's been a long, long time. I do a lot of teaching and training in the area of how to resolve conflicts and how to prevent conflict in agreements and I've written two books in that area.

Wrede: Bob Wrede, I am a practicing trial lawyer and adjunct professor at Pepperdine Law School and a LLM candidate at the Straus Institute and I also arbitrate and mediate when time permits.

Coe: That's great, thank you. I noticed there is heavy weighing in the mediation field. Therefore, I stand up here as a bit of an incongruity, because we are going to talk today about the adjudicative mechanism known as arbitration.

It may seem to you to be outdated, but in international trade, arbitration has come to be the coin of the realm, first among equals. We do of course encounter mediation deployed as a complementary method, and we might talk about that today.

What I propose to do, in more or less the order presented, is to selectively address some of the headings that you find in the handout.

I always start a course like this, particularly one with a wide range of experiences represented, by asking what makes international disputes distinctive. That is, what claim do I have to teach a separate course called “international dispute resolution?” What claim does anyone have to refer to international arbitration as distinct from run of the mill domestic arbitration? Why are there international rules such as procedural rules that the ICDR puts out as distinct from AAA’s other procedural rules?

To respond to my own question in a preliminary way, it seems to me that one can talk about several things. Obviously, we have in mind trans-border operations of various kinds; it goes without saying that multiple regulatory systems often become involved in even simple transactions because those systems deem themselves to have jurisdiction. Accordingly, IBM has to think about what the EU authorities have has to say about its activities just as it must consider U.S. Antitrust law as applied to those same endeavors. So there is this rather complicated superimposition and overlap of regulatory regimes; disputes may arise when a party finds itself under various forms of—perhaps conflicting—regulatory mandates. This complexity means one trying to decide a dispute or predict its outcome may have to take into account multiple bodies of law. Even in a purely private dispute—implicating no public market regulation—basic conflicts of law issues might complicate the task of those trying to determine rights and duties. Ultimately, a contract is a set of rights and obligations governed by one or more system of law—but which one given that the transaction touches multiple systems? In law school they call these “Conflicts of Law,” questions and our European friends may refer to these matters as involving “Private International Law.”

As another factor characteristic of international transactions, consider linguistic complexity. Obviously multiple languages may be involved. It’s often the interplay of these languages that not only make disputes harder to resolve but also bears on the nature of the third parties that will be asked to help resolve those disputes. Linguistic misunderstanding may also be what precipitated dispute in the first place, such as where one party is working from a bad translation of the contract. If the French word for “request” looks to the amateur translator like the English word “demand” and the rendering contains this mistake, it may be a matter of time before tensions elevate.

The licensor believes it can demand certain information and the licensee considers compliance with such requests a favor to the licensor. Other consequences of multiple languages include the added process costs that translations bring and the impact that linguistic qualifications may have on the pool of neutrals available to serve.

Then there is the when in Rome question. We all have an anecdotal sense of the potential involvement of different business and legal cultures. Can anyone give me a war story on how business cultures, different businesses cultures come into conflict, give rise to dispute in terms of expectations?

[Participant]: I worked for a Japanese company for a number of years and the difference between yes, I agree and yes, I understand, is enormous there, and if you're not aware of that you can get in a lot trouble. Absolutely true, that's classic. What they are really may be communicating is, "I see what you are saying, I understand." Others?

Reverence for written undertakings vary too. I think in the U.S. we have the expectation of writing an agreement to fix the rights and duties of the parties within the four corners, like for example, setting forth precisely obligations and exposure in a given situation. We think that's a good idea, because everybody should have shared expectations, but if you go to another country that may be an insult—that is to be too fastidious in covering every contingency. Their sense of the relationship, by contrast, may be that if the widget you supplied breaks, you better come in and fix it, as a matter of mutual good faith predicated on something deeper than a writing. Now that's a cultural misunderstanding.

Will it ever arise that they insist on a complete replacement for a minor problem? No, they are never going to demand more than they deserve, whereas certain cultures may reason that if you demand more than you deserve and you might get it. So ships cross in the night in terms of an expectations, and this may be evident from the beginning as the deal is memorialized and thereafter throughout the relationship.

[Coe]: Certainly many anecdotes or encounters have to do with the way we regard the writing and the sanctity of that paper, does that represent a starting place, a preliminary aspirational set of understandings that existed at the time of formation. Not to be confused with what evolves through our good faith dealings with each other. Or has it been handed down on the stone tablets. And one sees that in terms of legal culture too, in the way lawyers draft contracts. In the United States a multi-million dollar business is not going to be sold through a five-page document whereas in some countries it might be, in part because codes may be deemed to fill in all the blanks with standard terms of warranties for example. At the same time one must acknowledge the sense that there is a cross-pollination in legal styles that occurs and we may become accustomed to subtle borrowings from those we regularly interact with. Terms of art may be misleading as well. Performing "due diligence" such as before buying a com-

pany, may imply quite different levels of investigation in one culture as compared to another.

There are countless other examples and we could spend an hour on the topic. Among the more well known are the gestures that visitors to a new environment inflict on their hosts—gestures that send radically different messages in the host venue in comparison to its unremarkable meaning at home.

Negotiation styles, already alluded to, vary too. You know, we have this idea that we can fly to a distant venue to negotiate a deal with our return flights already booked. Depending on the culture involved, whether it's our friends in Latin America or in Asia, the deal will likely be preceded by some kind of rapport building to create a comfort level, failing which the deal does not ever materialize. Impatient clock watching and premature broaching of terms may be costly. Do these incongruities create disputes? Absolutely! And do these disputes necessarily lend themselves to an adjudicative technique? Not necessarily. You mediators may prove very useful.

Also, gift giving, when does a gift become a bribe? What's the expectation about gifts? Then again, there is an important ritual in the exchange of business cards. These anecdotes are just that of course, and are not specific to arbitration. They do give international commercial relations—and therefore the disputes they give rise to—a distinctive texture. Certainly, a legal dispute can be made worse by a cultural divergency.

The influence and caprices of sovereign states are a theme also encountered in studying international commercial disputes. They act as regulators, but also may be a party to the dispute. As regulators, they may be less than transparent and predictable, and it is not unusual for the regulation it issues to affect the terms of trade to which it is subject as a contracting party. Sue them and they may invoke sovereign immunity, and international law doctrine codified in some form in many countries. The underlying thesis is that it is unseemly for states to be dragged into the courts of other states. So you have to demonstrate commercial activity or waiver of immunity or some other kind of exception which allows one to go forward with the dispute. (In practice, where possible, one places an express waiver of sovereign immunity in the relevant documents).

The involvement of treaties is very important in the overall architecture of international commercial arbitration. There are at least three ways they come in play: first of all they may supply the substantive law; so, in the garden variety international sale of goods the Convention on the International Sale of Goods (a U.N.-drafted, multi-lateral treaty) provides essentially an international uniform commercial code. It having been ratified by dozens of states applies by virtue of the contract being "international" as defined in the Convention. The U.S. has been a party to that convention for a number of years now; therefore it is federal

law in the United States. So a mediator trying to figure out what the outcome is likely to be, and therefore predict for the parties, would look to not some local law but to the content of a treaty.

Second, treaties are also very important in enforcing arbitration clauses and arbitration awards. First among equals is the New York Convention, the 1958 Convention, on the enforcement of foreign arbitral awards. The title of it refers to arbitral awards but it also requires the courts of member states, and there are now 130 some odd ratifying states, to give effect to arbitration clauses, which means that the arbitration clause that you put in the contract is to be recognized in courts in any of the 130 countries. Thus, a suit involving the subject matter covered by the arbitration clause will be discontinued – under a treaty obligation – if the clause is invoked. The court will simply refer the parties to arbitration. If all the courts uniformly do that, the parties are left with the arbitration mechanism or some other thing that they arrive at by themselves in the absence of the litigation option. The main point is, that by including an arbitration clause, you can centralize the dispute in a particular place, a very important technique.

Finally, treaties can also help arbitrators and courts determine what law governs. In other words, just like there are treaties that supply substantive rules of contract law, there are also ones that instruct courts to apply one law in preference to another where either might be applied.

I'm at Roman two. I'm not going to get to all of these points. Already I've heard my voice far too much in this session. Let me just talk a little bit about the so-called strengths of litigation.

I don't know if its generally true, but an in house counsel tells me this, that in the IP community there is still a strong preference for litigation over other methods. I don't know if this is true. One can make the argument that this is not wholly irrational. Let us think about what litigation gives us: the court system and judges are in a sense free compared now to arbitration where you are paying these private adjudicators to act and paying for facilities that serve as the physical venue.

So, courthouses are free, judges are free, and these proceedings go forth according to published, predictable rules – rules of evidence, rules of procedure. The procedural indeterminacy that comes with arbitration, where much depends on the discretion of the arbitrator, is less apparent in court. Courts are also public (open) sessions. This transparency comforts those who are concerned about public rights to observe what, for example, the polluters have done and what regulations have brought to bear: in principle, that serves a public interest. Anything else we like about litigation?

[Participant]: Well, to be cynical, which of course lawyers are never suppose to be, it's a lawyer drill. I mean companies in the last fifteen to twenty years have come to realize that in most litigation, there aren't really winners or losers and lawyers are the ones who really benefit by sending out millions of dollars of bills, and I think that this cynicism has gone full circle, and you are

seeing cases that would have gone through litigation go the way of ADR; arbitration or mediation.

[Coe]: How many of you are familiar with companies that have developed in-house ADR policies that are designed to guide outside counsel, such as requiring of those they hire that mediation be robustly pursued first, with any subsequent arbitration structured to be fast and cheap, unless the circumstances warrant a more fulsome procedure. Do you notice that more of that is occurring?

[Participant]: More and more that's going on that's because these in-house lawyers are ruining it for themselves. Outside lawyers may never understanding the concept of value billing: send a fax, that's \$25 right there, and of course you round up costs (that fax took some associate twelve minutes, so you round up to an hour).

[Participant]: I am also a bit of a cynic, but I am speaking from an academic side, having been both a professor and a practicing lawyer for over thirty years, law schools do not focus on true alternative means of resolving disputes; it is simply not taught. Fortunately, the Straus Institute focuses very heavily on that. You take the usual student coming out of an ivy league or a first tier western school, a Stanford, a UCLA, SC, add any names you want – those students are not taught that one of the things a lawyer should do in the first instance is explain to clients who come to them with a dispute that there is a broad range of options available. It's, "sue the bastard." And, I think a part of it is the legal culture and economics are now driving the internal company decisions requiring ADR, and there are many standard form contracts now that require a whole series of negotiations and mediations before arbitration commences under the CPR or AAA rules, or under the International Chamber of Commerce. So, it's the economic side of things, its the business side of things driving the move toward ADR, and I think that is especially true in the international commercial dispute area, on which Jack is one of the authorities.

[Participant]: I think one of the issues that comes up is the public versus private. And, there are a lot of pieces to this. It depends on the state voters. Some people really want a public dispute and it doesn't really matter how much it costs, because if it's public, there's a lot more at stake. And, so that's like step one. So I think it's very strategic and tactical for somebody to take international litigation, and the way it starts nowadays, in the IP world for example, is you go first to Germany because in Germany there is a very fast court system. And then, depending on how public that becomes, there is a little public relations business that goes on there, and investor relations business that goes on there if it's a publicly traded company, for example, there are two publicly traded companies and then it will move to the UK or Japan, and then it'll move to the U.S.



And, so, what happens is that there is an increasing publicity that comes with international disputes, that I think we have to understand when we try to mediate or arbitrate something.

Now if people don't want it to be public, if they want to have an arbitration that says it's for this dispute and for this piece and its not worldwide, then let's talk about this market or this particular problem. Then arbitration becomes more reasonable. So, it's not only risk analysis, it's how much publicity does somebody who is a stake holder in the dispute really want?

[Coe]: Precedent setting is what you are talking about?

No, it's not even that because everyone knows it's going to resolve itself before it goes the whole nine yards. Rather, you are sending signals; you are singling to other people by the publicity aspect of it.

Right!

Market shaking, I would call it. It's not precedent. There is no precedent involved here; it's market jitters that people would like to deliver to have their very public dispute.

Taking the opposite side, in defense of litigation, that could be tremendously valuable, especially if there is a large disparity in power between the parties and there are times where, when I was a general counsel, when I specifically wanted to go to litigation because of the protections that I got from the process; and so there are some real advantages too.

[Coe]: Just a footnote to what was being said. I went to graduate school with a mid-career lawyer who was general counsel to Rolls Royce, and he spent a great deal of time traveling around the U.S. and other places interviewing law firms to help him determine how best in the face of various IP infringements to prosecute civil actions given the multiple marks, trademarks and other kinds of property that one finds in the Rolls Royce grill, and the flying lady statuette. The questions were as much about global strategy and reputation as they were about pure legal rights. For example, does one chase after the small golf cart customizer who puts mock, unlicensed Rolls Royce grills on carts? And, do you pursue the singing group Rose Royce? What messages is one trying to send and to whom? Is there a danger of being regarded as a bully? Or perhaps that is indeed the goal. "Don't mess with us because we've spent decades perfecting this mark that is known the world over, and if you do things to dilute it, we will come after you and we don't care how small you are."

[Participant]: Well that is exactly what I was going to say. I have had clients that felt that was very important to make a showing and draw that line in the sand because they were very concerned that if they didn't, word would get around and you know, people would be running amok and not honoring contracts.

I think that's the quagmire certain companies are finding themselves in right now in trying to determine which portions of their empire to protect in which ways; it's kind of amusing that one of the things some are trying to do is domi-

nate the arbitration process. And, it's just ludicrous! There are some cases on point. So, obviously the culture of ADR has not sunk in to a level where they actually understand it. But, I think in reference to using these different kinds of processes, you know they strategize and figure out where they want public recognition, where they do not.

[Coe]: The idea of precedent is important. Sometimes the precedent, whether good or bad is useful, because it adds certainty to the marketplace. Hopefully, if you are lucky, you establish a good precedent, which is then followed. There is also an obvious strategic factor if one is comparing litigation to the arbitral option. Arbitration has a very limited discovery. So, if you anticipate that success will require discovery, then that argues for toward litigation because federal style discovery is not the norm in arbitration. Also, returning to precedent, litigation may be associated with an ordered system of hierarchical cases and other sources whether it is the common law system or others. In arbitration we tend not to think, at least in a formal sense, of a system of precedent, in part because awards are often not published. Traditionally, each arbitration is a separate dispute, treated as an ad hoc matter (though one usually consults authorities on the governing law). Recently, certain awards—particularly investor-state awards—have begun to become more readily available. Not surprisingly, advocates tend to deploy them where they are available, and arbitrators tend to take them into account (though not as binding).

[Coe]: To continue the examination of the litigation option, systems vary in levels of judicial independence and expertise, but often judges are subject to moderating influences as part of a constitutional order. Rightly or wrongly, in some quarters arbitrators are regarded as ad hoc participants with no post-award accountability; they have other jobs somewhere and get appointed for a specific case. Of course, in truth there are ethical canons binding arbitrators.

And there might be something to be said for the independence they have because they do not stand for reelection

[Participant]: In contrast to mediation, but like litigation, arbitration tends to be a zero-sum enterprise; it produces a winner and a corresponding loser.

[Participant]: Well, I do think that you can set up an arbitration so that you can mitigate the risk of loose-win. You can, by mediating, make people comfortable with arbitration. I know that is a model that is talked about a lot in various places, but the way those things are strung together is really remarkable, because you can say, "alright, there is a big smashing issue that if we get to it we will go to court about that, but we can mediate and arbitrate other issues. For instance, you can pick a question like patent rights to arbitrate and by agreement we cap the damages, and agree there is not going to be an injunction. But, if you say were going to a panel of three people, three different nationals,

on an international basis and you don't know them and never going to know them, and we are going to allow them to make an injunction enforceable worldwide, people will not do that arbitration. I'm just thinking about circumstances where the business risks are so huge, one does not want to arbitrate it, but if you could negotiate or mediate a narrowed arbitral terms of reference, you could manage the risk of going to somebody to call the balls and strikes as to certain issues.

I think the way these things usually work out is that about two-thirds of the way through mediation some officer that is sitting in there is going to go, "excuse me, can we take a couple of days break now? Cause, I've heard as much as I need to hear here." And, then, you need to have very good mediators standing by to say, "OK, we are finishing, or are we going back to kind of where we got stuck in the mediation?" And, I have seen more things fit together well in that way, but you have to start with a mediation that sets up whose going to call the balls and the strikes, if you will, in an arbitration, but it can't be the whole ball of wax, because its too risky in most of the big issues. Or, too emotional, whatever you want to call it. This reminds me of when I was starting to litigate. People would offer conventional wisdom about how much of a recovery to expect given the technical features of the case. But, when you talk to juries they often put it together differently: They may say, "oh, yeah, there was a wrong, but they are asking for too much money. So maybe we ought to just say there's not a wrong." They blur and blend considerations, without necessarily following a strictly rights based decision path. Now, we who like to think the ADR methods are separate may be getting it wrong. I really think they fit together more than we like to think, because people think that way.

I have to say that's one of my pet projects, to think about how the two methods could be integrated. As she pointed out, there are myriad ways.

Is it Paul? Yeah!

On that point, and that is a very important subject. The statistics of the AAA show a very large percentage of cases do not settle when they are arbitrated. I don't know what the situation is on the international side, but they have been trying to study why that is the case. I can tell you from personal experience, being a lawyer and an arbitrator, that as an arbitrator, I am prohibited from even addressing the issue of settlement or trying to coax the parties to settle. The only thing I am allowed to say is sort of standard-Miranda warning, which is, I hope you are aware that you have available to you the services of mediators sponsored or approved by the association. But then, I've litigated in arbitration cases which is supposed to be an oxymoron, but it isn't, and very much wanted in one case to mediate the dispute to get the dispute before the mediator and there was no way to get the other side to go to mediation and there was no one there to encourage or coax them such as very powerful federal court judge. So it's an interesting irony if you will, and, I would be interested in hearing your thoughts on how those might be worked into the process.

[Coe]: I have, sort of, several reflections somewhat on that both very useful interventions. One is that when you move outside the U.S. and into different systems you find the lines between mediation and arbitration sometimes merge, or at least become blurred, a bit; that there is a stronger sense that arbitrators are duty-bound to do what they can to facilitate settlement. The literature is, of course, full of debate: how far can arbitrators go? The more reserved arbitrators would limit themselves to saying, “we stand ready to be helpful in furthering settlement” or perhaps to arrange the hearing to allow time for negotiation or mediation at an advanced stage of the proceedings. More fluid, less rigid are systems (Germany and Hong Kong come to mind) in which hybrid techniques are utilized that make traditionalists in other systems shudder, such as where the mediation and arbitration functions might be performed by the same neutral. That would seem to the neutral to forget the mediation when the time to issue an award arrives. The ability and desirability of neutrals to do so is part of an ongoing, rich debate.

If you are willing to spend the money and to plan things, you can combine mediation and arbitration, either in a step process, or as complementary parallel processes. The latter is exemplified by “shadow mediation” in which arbitration goes forward in pursuit of a binding adjudication while a separate neutral attempts to obviate the award by bringing the parties to settlement. The mediating neutral is accommodated by the fully aware arbitral tribunal by allowing the mediator to be present in the hearings and perhaps by scheduling hearings with the parallel process in mind. Thus, the mediator with the tacit cooperation of the tribunal intervenes at key junctures likely to present new opportunities for settlement. Opportunities to mediate come along in windows, such when the case is first initiated, when a round of pleadings has been digested, and after the hearing but before the award. The parties’ view of their respective cases may be different at each of these junctures so that the possibilities and terms of settlement may vary at each window. Obviously, as the process advances, costs accumulate, but there is usually some attraction to each side—even late in the process—in taking the decision out of the tribunal’s hands. The prospect of being on the wrong end of a zero-sum process simply evaporates when settlement occurs

There is also arbitration-mediation, where the arbitrators withhold the award to allow a final chance to settle. We mediate in the light and shadow and sort of the past in the fear that someday soon the award is going to be revealed. All kinds of variations on a theme can be implemented, provided that we don’t do things that jeopardize the ultimate award—things that undermine due process. That is, it would ordinarily be wrong for an arbitrator to break role by seeking to caucus, *ex parte*, with a disputant although some would argue to do so would be

allowed if the award had been written and signed but not yet revealed. Again, I know of an arbitrator in Hong Kong who uses this technique.

[Coe]: What about other arbitration/litigation comparisons? When you think about arbitration, you think about a system that is private (as opposed to being opened to the public). If you've got trade secrets, in arbitrating your dispute you have the ability to keep the Wall Street Journal and your biggest competitor from walking through the hearing door to study every word for the duration. Now, privacy of course is not to be confused with confidentiality; which relates to what both parties and the arbitrators tell outsiders. Arbitrators tend to be bound by ethical canons; but the parties only by agreement.

Arbitration has no jury, and litigators, who make the transition from litigation to arbitration sometimes forget that they are not playing to a jury. Arbitrators don't appreciate theatrics.

The virtue of relative "finality" (an end to the dispute supported by limited appeal) is often attributed to arbitration. In litigation, systems of appeal and review for legal errors are common. In international arbitration, review on the merits is often unavailable. When there is a bad decision, the virtue becomes a defect, but most regard the limited scope for attack on the award to be a good thing on balance, for with relative finality comes speed. Under American law, there is a very strong pro-arbitration bias, reflected in judicial disinclination in international cases to meddle with the parties' chosen process and the result it yields.

International arbitration also Autonomy, in the business planning sense, as I say, starts with the award and ought not to be overlooked. Often [a] problem, of course, is that people drafting the dispute resolution clauses are not the same people who ultimately have to participate in the arbitration. So, you've got the guys in the business-planning wing, or someone in-house using standard forms, which they pulled out of a file, which worked five years ago. Particularly in cases involving intellectual property, one would love to tailor the process to take full advantage of flexibility in arbitration in terms of speed and other characteristics.

And what about this idea of being able to pick your own judges. It's central to the idea of arbitration that you get to designate, who, which, third party or third parties, will decide your fate. What are the implications of that? Why does that lend attractiveness to arbitration for IP?

[Participant]: For one, you can choose someone with very good expertise in the technical field or surrounding your dispute, and that means that you don't have to educate the tribunal and that they are less likely to be hoodwinked by party experts.

You can by definition pick experts who wouldn't necessarily get from the normal docketing processes from the local court, and you can similarly pick people with particular linguistic abilities. And how does one go about doing that, though? Well, you know the old saying about mediation is only as good as

its mediator. Well in arbitration we have the same saying, except we say we tried it first and then those who know China's history say, "well no, no you didn't think of it first."

Well its really a control issue, parties to a litigation, that have experience in litigation, can realize that it can spin out of control in many directions very easily, not just on a cost basis but on a facts basis or many other bases. If you get into an arbitration situation you have control over the process to the extent, you think, you can pick someone who has the appropriate expertise or the appropriate linguistic skills or whatever. And, I think control is a big issue.

All right sir. You certainly want someone particularly where you have in mind a subject matter that needs fast tracking, and in IP, you know, a nanosecond is important because yesterday's technology is on sale under a tent somewhere. So, an arbitrator who understands this is not an expropriation claim, which is, thought to go on for three years there are lost of witnesses or so on. But, if you can pick--and we all understand that to some extent you can designate your arbitrators--but what do you look for in a foreign arbitrator and how do you find it? I know some of you want to raise your hand up and say, "Call me."

One of the interesting contradictions on the issue of picking an arbitrator, is in most of the organizations that administer arbitrations, they will provide you with a list, and I have been in situations on a number of occasions where I've called the opposing counsel and he said, "well this arbitrator A and arbitrator B would be really good for the dispute." And, even if opposing counsel agrees on a intellectual level by the time he or she goes back to the client and says Paul suggested so and so, the client doesn't want that person, so you get this problem, where if one party suggests, the other party may just say no just because the first party wants it. So, in terms of getting these panels you are constantly trying to strategize, almost like a jury situation where you have pre-emptory challenges, to try to figure out who among that list of potential arbitrators is going to be very bad and you are going to strike that person or else rank them somewhere maybe not on top, but in the middle somehow and hope they don't get picked.

Ok, just operating in the abstract here, because you will see that there are models that have emerged that one might associate with the ICC, one is to turn over to the institution, and say that part of what we expect from the institution is to help us find arbitrators. And, they do it through a list system where each side excises from the list two of the five or two of the seven and ends up with a list of acceptable arbitrators from which the two parties will pick three. There's an advantage to that, first of all, the problem you mentioned about them discounting, or good people get kicked off the island because they get this immediate discounting of the source, right? It also clears up this problem of who the party

is for the arbitrator. What does that mean in terms of independence and impartiality? Because the institution will give the parties the three arbitrators and the arbitrators will have to figure out among them who is the chair. It does not follow the pattern where each side picks one and then the relationship of either party to the arbitrator becomes an issue. So, model one is, just turn it over to the institution and that's helpful, not only for that reason, but that they have people on their roster they check out, they make a trainee you know if not gotten really poor reviewers from people who have used them from the past, or who are still there.

Just in fairness, the model of using institutions is a good one, but in considering report cards, there is always possibly self-restraint in expressing what people really think, because lots of users don't file what would be considered constructive criticism of an arbitrator because you never know whether it finds their way to them, or not. Or, it's attributed to you and you are going to meet up with that person later, so you see things going on at the same time, "well, we had such and such a person and it turned out in a bad way"; "well, did you say anything to the institution?" "Well, absolutely not because you know it's going to get back to them and we're going to see that person again." Because they get chosen by a lot of people as the common denominator, for no other reason. Just because this is their full time occupation and they can be chosen again. So, I am speaking from the clients' fear point and it may be unrealistic, but that is what kind of tilts around in people's minds when they look at institutional selection.

[Coe]: That's why, alive and well, is the second sort of model. Each side picks one arbitrator and the two party-appointed arbitrators pick a third, known as the president or the chair, or something to that effect. And, in a very real sense, at least to that extent, you not only have influence over whom you pick as party-appointed, but since the party appointed arbitrator is entitled, even under conservative ethical cannons, to talk to you about who would make a suitable third arbitrator, he is able to have some influence over that selection as well. Let's assume you're not in the model where you give it to the institution, but you're in the model where you are looking for an arbitrator, where do you start?

[Participant]: Well, for companies like that, there is so much material on arbitrators. You can go to the law firms and pay a ton of money, and they do a search and send emails out and get feedback on this person, such as "[he] is the kiss of death," or "[he] is great." Everyone has some kind of history, and so I haven't had much of a problem finding some kind of information, even if it's, "hey this is the type of cases he can handle."

How did you come up with the name in the first place?

Well, people have favorites and I have had favorites, and so if we are using someone let's say JAMS, or whatever, (and it may have been that the provision required the parties to use JAMS), and they are going to have a history, so we start going to law firms and finding out how they fare and whether this person has an antitrust background? Or, they have an employment background, or

something in that nature, and it seems that everyone that I have talked to have favorites and seems to have a list of independent arbitrators that they use. That's my experience, unless you go back to the old days of a permanent arbitrator, which is a slightly different approach.

[Participant]: A couple points here by way of digression. In international arbitration, it's not necessarily common but it certainly is accepted, to have an arbitration without any institution, which is an interesting possibility, we call that "ad hoc arbitration." There are pros and cons in doing that, probing the number of people who might look at your technology and they have absolute control over it. No one intervenes with some sort of institutional procedure that they find very important for the clerical purposes, but which may be a nuisance to you. The downside of course, is that the arbitrators really have to run the arbitration. And, it's a little bit like a high wire act with all but the thinnest veil of a net below.

[Coe]: But, thinking about arbitrators has, as you say, gone up a notch in sophistication just in the last ten years because of communications databases and that kind of thing, where you have to be careful, but you have certain list serves and other kinds of groups that will have contact. I get phone calls or emails saying, "We're thinking about one of these three people as a party-appointed arbitrator, would you care to react on a confidential basis?" And, I say, "You realize this person used to work for the state department, so since one of the parties is the United States, you are aware that's an obvious issue. On the other hand in these three cases he went in the majority against the United States," so this is the rarefied atmosphere of domestic disputes; direct domestic disputes. But, what do you look for, though? What characteristics what makes a favorite? And, I'm wondering, is it the same thing, when you talk about JAMS and international arbitration?

[Participant]: So many of our agreements, even international provisions, require domestic arbitration. We're in the type of business where you have so many people on the ballot for California there's some, you know, nexus, and so, you know, I've gone on extremes of allowing arbitrators I know the other side just loves, because you know, I want to get on with them and I know my realm or my exposure is at a certain level and for some I'm not that concerned. And, you know I believe that an arbitrator is a businessperson, and for consequence there not going to you know, on the most part, I'm not going to make poor decisions. You know, I'm not going to hire them, and so, I'm looking primarily at someone who has technical or legal or whatever background I need, so they understand it. I have one case where, I, there's an employment matter, and arbitrator was a wills and estate, and I made the decision that we should have knew that the first gulf war was going to take place and we should retain that person.



Even though the gulf war didn't take place for another three months, and we should have anticipated that, and not let the person go, and I don't understand this, I mean, I'm looking primarily for background, some experience, you know, and then I look around to see if they fall outside that, you know that continuum. Are they way left or way right? You know, are they pretty much in the middle? Then think, I have a pretty good shot.

That's consistent with what a statement has to be in teaching tried to boil things down to clever mnemonics, and I was thinking, "ok the seven A's." You want someone who is "attentive." And, what I mean by that, obviously to the listener that talk about the interview process, one model I am familiar with that is actually quite prevalent involves interviewing the party for an arbitrator and also attention to detail. And, how you test that is a bit tricky, but you want someone who is not only a big picture kind of doctrinal, theoretical person; rather, someone who is going to dig in and understand the way things fall on a timeline. A: it's just not a gestalt. So an attentive person. A: Number 2, "authoritative," somebody that brings recognized expertise and corresponding influence. In a three arbitrator setting, it only takes two arbitrators to form an award, so even if the other party's appointed arbitrator doesn't agree, an outcome can be achieved. Someone who is sufficiently well versed that he brings, or she brings, something to the table in the deliberative process may be preferred if the chair will have to take sides. Third "A." You want someone who is an "amenable." Amenable to what? Your position, now that's tricky, because you also want someone who is autonomous the standard in international now because of the revision of the AAA/ABA Code of Ethics. All arbitrators are to be impartial and independent; that's the standard. And, while that's not true in every sector, that's the practice that's the international standard, so we don't want to appoint anybody whose got an obvious conflict, who will be challenged with this whole process unless that's what you are trying to do, in which case I think that's an abuse of the process. But amenable, I mean the ability, the capacity to be sympathetic to your position.

Another A: "available." Some of the players that come to mind immediately are very, very busy, and some of them are also quite senior, so their health is actually a factor in availability. Having the right arbitrator without an opportunity to become fully acquainted with the case is like having the wrong arbitrator. It delays everything. There are a lot of sad stories that go along with that. Finally A for "affable." If someone is a pariah in a three-arbitrator tribunal and they tend to be shunned by the other two the entire time; which brings us to the interview process. International arbitration often involves the interview of the candidate for party appointment. The tricky thing is understanding what the function of the interview is; its not, despite what you may have been led to believe by certain domestic practices, a strategy session. It is not a situation where you try out a hypothetical, thinly veiled or not so thinly veiled, and say how would you rule on this? The standard ethics rules entitle you to talk to the pro-

spective arbitrator about availability experience, possible conflicts get a sense of linguistic ability and other kinds of things; your not entitled to talk about the merits. And, its very useful for the arbitrator who is prospective, if he or she decides to give an interview (and there are some arbitrators that say they wont) send out a memo saying, "thank you for wanting to interview me, you've got a half hour, it will take place in my offices, no one's buying my lunch."

I'm starting Roman eight, if anyone is following along. Many of you bring your own insights to these questions and it is clear we needed about eight hours for this syllabus. A few quick words about the arbitration clause might by way of introducing some of the standard points. As a conceptual, doctrinal matter, the arbitration agreement is central to the overall mechanism. It's the source of the arbitrators' jurisdiction; it's that agreement that the law regards as conferring power to bind on what would otherwise be hapless volunteers. Because of the doctrine of severability, a fundamental defect in the main agreement does not necessarily impact arbitral jurisdiction, even though as a physical matter, the arbitration clause is embedded in the main agreement. The arbitration agreement is regarded as autonomous.

Drafting arbitration clauses requires great attention. How complex should the clause be? There is one school of thought that holds that one should not deviate too far from the tried and true models provided by institutions, given their levels of expertise. But experienced lawyers realize that the safest way to ensure a particular feature of the process is to draft in detail to leave little doubt.

For some counsel, the natural urge to protect the client or to import familiar litigation features may lead to highly complex clauses, anticipating the process in great detail. In international arbitration, even a minimalist drafter should include the parties' agreement on applicable substantive law, the place of arbitration, number of arbitrators, and language of the proceedings. In this connection, let's consider number of arbitrators—what is your default position—one or three, and if one, when would you ever use three?

[Participant]: Clients are always concerned about the added cost of three arbitrators, but having three spreads the risk. Its like, are you going to put your entire 401K in one stock? Or, are you going to buy, you know, a number so that's an important issue if you have three arbitrators you are spreading the risk a little bit, you are minimizing the likelihood that you are going to get a wild man or wild woman as the case may be, and then finally you always have to have an odd number whether its one, three or five to avoid impasse.

[Coe]: I think your risk-spreading notion—the risk being a poor sole arbitrator—is a valid consideration. That is offset against the extra cost of three, compared to one. Might it slow the process?

[Participant]: I think with three how the calendars come together is a more difficult point. If you have three outstanding busy people, then you have to skip a date because someone has appendicitis, you could be a year getting three weeks together.

[Participant]: Amen. That is what I think a lot of people worry about; you go to arbitration and try to get that quickly. The argument for three is the need for diversity, synergism and balance. I think the second factor is, how international is your dispute? I know that is a theme we are talking about here, because there is a worry of being “home-towned” and hometown takes on a whole new meaning in international disputes because it has language, it has culture, it has unfamiliar procedures. Do we think civil law is better than precedent law? And so, maybe you want to have three people because maybe you have a dispute between a U.S. enterprise and one based in another country, and maybe you want to put in a neutral chairperson. So, you want to match the nationalities, and in a neutral chairperson, because then you have some faith that with all those fair people sitting in the room together, the nuances will not be missed, but there will be somebody in charge to say, “remember that’s how the French system works, or remember you know those U.S. folks they have that whole western tradition,” and then you have a fair discussion, a fair conflict resolution, all the time listening to the facts, that’s the theory. I don’t know if that works or not, but if you say, “ok,” your all going to put your faith in this one arbitrator that comes from a country that none of us are familiar with, you are really stretching the bounds of our faith in the system, and that’s why sometimes if it’s a multinational dispute you’ll see it work out that way.

[Participant]: Jack. I happen to have an anecdote that’s precisely to your question about when to use three arbitrators. I was involved in an ICC arbitration involving machine gun manufactured in this country brought through Switzerland to the final user in the Untied Arab Emirates. The question was whether or not the ammunition complied with U.S. military standards or specifications. Our party appointed as an arbitrator the general director of military sales in the Middle East, so he brought to the table knowledge of how you deal with Middle East military customers and he was an engineer as well so he understood the technical issues of standards and specifications. The company that manufactured the allegedly defective ammunition appointed a noted authority in international arbitration, who is a professor of law expert in the Illinois uniform commercial code that controlled the contract. So we had someone who was an expert on the substantive law and the ICC appointed a fellow who ultimately became president of the ICC Court of Arbitration, which is the court in Auburn, who was an expert on procedure. So, we had procedure, technical and substantive law experts, all of whom got along fabulously, who listened carefully and understood what was going on. To me that was the ideal combination and it worked. We won.

[Coe]: That certainly does express a couple of the important dynamics. When you have three, speed of the process may suffer. With busy people you limit available date because you ordinarily can't hold a hearing without all the arbitrators there. The synergy model that you referred to also could be very important. One thing I would add is, it is exceedingly valuable to have arbitrators who can function in the primary language of the dispute; you would want one that is absolutely fluent, if for no other reason than to catch bad interpretations by the translator. There is a misinterpretation risk whether its simultaneous or consecutive translation. Interpretation, even without introducing technical terms of art or purposeful mistranslation, is an art form, not a scientific process. Therefore, it is useful to have an arbitrator to say, "no that's not what was said." That is invaluable.

[Participant]: Plus, the knowledge of the relevant local law and these kinds of things. There was also an interesting point on hometown bias and the place of arbitration. We should underscore a related point. Parties have the power in the negotiation process to designate the place (juridical seat) for the arbitration. Now, how does one go about picking that? Well you say, "pick your hometown." Well maybe yes, if you had considerable bargaining power and wanted to use it that way, but maybe you don't want to expend the bargaining power you have because you just worked so hard to get that added one percent royalty, or whatever it is. How do you pick a place of arbitration and why does it matter?

One thing you do, and I've considered this technique, is to pick an equally painful place, the idea being that maybe people would think twice before they trek off to the designated place. I don't know if I ascribe to that but sometimes it turns out that way, where I say, "gee, how about New York," and somebody will say, "it can't be anyplace but Paris." So then you say, "we've got New York, we have Paris," then what do you think after that? London, then people say, "no," but that's one way to say it, where is a neutral place and that is equal travel distance and is perceived as fair? So in some sense, one could take a straight line from the two suggested places and say, "Bermuda it is."

[Coe]: I'm going to muddy the water a little bit more by saying, "first of all, as far as the equal pain, drafters of rules and model laws know legislation have taken that into account, and so you'll find in all modern systems of rules, and the underlying statutes, something that says the arbitrators may meet wherever they deem appropriate for the convenience of the tribunal. This is virtually *carte blanche*. Say the clause, for instance, designated Baghdad. That could be the deemed place for purposes of defining juridical seat, but the arbitrators can hold hearings in Paris.

Secondly, the treaty idea. The reason treaties must be considered is that they are the key to global enforcement of awards. Through such treaties (notably the

1958 “New York” Convention) American arbitration awards are more globally enforceable than American court judgments. It is curious but it’s true. The U.S. is a party to no convention that requires the U.S. judgments be enforced abroad whereas there are 130 countries that-subject to some limitations-will enforce awards rendered in the U.S. So as a minimum requirement, the place designated should be in a country that has ratified the New York Convention. So, returning to the above hypothetical, assuming that Iraq is a member of the New York Convention, and we named it as the arbitral seat even though our meetings were in London, the resulting award is an Iraqi award and a New York Convention award. That award is entitled to enforcement anywhere where the New York Convention has a member.

[Participant]: Arbitration abroad makes me nervous largely because of two additional reasons. One is, the availability of judicial review, which varies markedly in different signatory countries. And, the second, is the power vested by the jurisdiction where the tribunal is actually sitting, not where it says its sitting, to provide assistance to the process. The state of California, for example, has detailed arbitrational law that vests in arbitrator’s authority to issue subpoenas. There are lots of jurisdictions that don’t give that power to arbitrators. So, you could be sitting in North Dakota and have no power to do it. I am involved in a problem right now, where the question of the authority to issue interim relief is contested, and it’s a thorny one. The bigger enterprise went charging into court, even though we have a highly competent seated arbitrator who is moving the proceedings along. It wants an attachment to put pressure on the little guy. The argument is well, its already before the arbitrator, the CPR rules are adopted, the CPR rules allow interim relief to be awarded by the arbitrators, but the other side runs into court and says, “oh yeah, but the state of California also has a provision that says, ‘you can get interim relief.’ “ And so, you’ve got problems.

[Coe]: Let me pull together some of the rudiments that he mentioned. The problem with my Baghdad example, is not so much that we have to hold the arbitration there, it is that if anyone wants to attack the award, or get judicial assistance of some sort, under the prevailing doctrine Iraqi courts have exclusive jurisdiction to set aside the award. Courts outside of Iraq may also be disinclined to issue injunctive relief, believing that it is for the courts of the place of arbitration. So this idea of an arbitration having a juridical seat has jurisdictional consequences.

In practice one does not pick a place where the courts are inclined. But rather select places with modern arbitration laws, typified by self-restraint in the courts and no review of awards on the merits. The prevailing paradigm is attacks on the award should be limited to jurisdiction and due process kinds of issues. So not only do you pick a place that’s got modern telecommunications that you can get to that arbitrators could get to, but you want the court system there to be not too inter-meddling. Yes, you do want them available if an arbi-

trator dies or resigns; ready to appoint in the case an institution is unavailable to do so. But, an open door policy that invites every arbitral procedural ruling to be second-guessed would be undesirable.

Note also that if one leaves selection of the place of arbitration to an institution or to the tribunal, there is a risk that the convenience of the arbitrators may be determinative. We've talked about the importance of the arbitration clause. If we had time, and if we were in a frolicsome mood, we might examine some misguided attempts to draft an arbitration clause. But, instead, we can talk in the abstract about what makes for a dysfunctional clause, that is, one that implodes. A classic problem is the use of ambivalent language suggesting arbitration is merely optional. Another classic is naming a non-existent institution to administer the arbitration or an institution that exists but doesn't administer arbitrations: "The Straus Institute shall be the appointing authority and shall administer the arbitration." The Straus simply do not administer arbitrations. Similarly, a reference to UNCITRAL as an administering institution is nonsense. Many more clause disabilities could be mentioned, but we have run out of time.

