

# ALTERNATIVE DISPUTE RESOLUTION AND INTERNATIONAL TRADE

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## INTRODUCTION

Alternative dispute resolution (ADR) is getting a great deal of attention as the modern way to resolve controversies out of court. Contrary to popular belief, however, ADR is not new; arbitration, conciliation, and mediation, three important ADR techniques, have been utilized for centuries to resolve a myriad of disputes.<sup>1</sup> ADR mechanisms continue to serve as the fora of choice in many ethnic, cultural, and religious communities. Although litigation is the primary method of dispute resolution in most western legal systems, alternatives to litigation are being sought to meet the burgeoning complexity and volume of modern international trade.<sup>2</sup> The existence and utilization of ADR to resolve international commercial disputes, in turn, hastens the growth of world trade. The importance of ADR to global commercial endeavors is evidenced by an international network of ADR support. This support is manifest through legislation on a state and multistate level, through institutional organizations, and through various chambers of commerce.

Why are alternatives to the courts so important to the resolution of international trade disputes? Primarily because ADR provides a neutral ground for parties of mixed nationalities, with different ethnic and legal systems, to resolve their controversies without fear of subjectivity by the court system of the forum state.<sup>3</sup> Many disputants also find important the privacy and confidentiality associated with most ADR mechanisms. ADR has the further advantage over litigation of resolving disputes with less damage to ongoing business relations.

Of the various ADR mechanisms available to disputants in international trade matters, arbitration is by far the most widely used. The reasons for the preference of arbitration are many. Arbitration is a forum based on party autonomy—the parties to an agreement to arbitrate mutually shape the process to their needs and practices. Arbitration is final—the parties agree to be

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1. F. KELLOR, *AMERICAN ARBITRATION: ITS HISTORY, FUNCTIONS AND ACHIEVEMENTS* 3-8 (1948).

2. See Carter, *Matching Technique to Need in the Resolution of International Business Disputes* (Discussion Paper, Intercorporate Disputes Task Force Workshop) (Apr. 14-15, 1982) (on file at the offices of the New York University Review of Law & Social Change).

3. *Id.* at 2 ("As an international practitioner . . . [l]itigation in one or more national courts is such an unattractive alternative that, as a practical matter, arbitration has seemed the only choice.").

bound by the result. Moreover, the adjudicators, or arbitrators, are experts in their fields and are chosen by the parties expressly for their expertise. With the full cooperation of the parties, arbitration is faster and less costly than litigation.<sup>4</sup> Finally, it is supported and enforceable by laws, treaties, and conventions in many nations including the United States.

Arbitration is not the exclusive means of ADR utilized in international commercial controversies, however. Mediation enjoys renewed popularity as a forum for settlement with the aid of neutral third parties. Some of the newer mechanisms, such as the minitrial, are also being explored as tools for dispute resolution in such matters. The particular ADR mechanism notwithstanding, the relationship between global commerce and ADR is one of healthy synergy; innovation and accessibility of ADR processes become increasingly evident as international trade flourishes.

## I

### TYPES OF ADR UTILIZED IN INTERNATIONAL TRADE DISPUTES

#### *A. Arbitration*

As noted above, arbitration is the most popular ADR mechanism for the resolution of international trade disputes, and has been for many years. Parties prefer a forum where they have control over choice of law, locale, arbitrator, administering authority (if any), language, and procedural rules.<sup>5</sup> In short, arbitration offers parties the option of fashioning the forum to their particular needs. For this reason, arbitration is particularly suited to international commerce disputes, where any of the above factors may prove critical to the fairness of the process. Moreover, parties gain confidence in a procedure which has proven successful in resolving conflicts arising in some of the most common areas of international commerce—long term contracts, trade disputes, joint ventures, and construction and maritime disputes.

Beyond considerations of flexibility and fairness, disputants often prefer arbitration because many nations subscribe to multilateral treaties and conventions which support its usage. Among the most important and well-known arbitration treaties is the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (N.Y. Convention),<sup>6</sup> promulgated in 1958, and presently subscribed to by almost 70 states.

The N.Y. Convention provides a framework for the enforcement of both the agreement to arbitrate and the resulting award. In most instances the en-

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4. See W. CRAIG, W. PARK & J. PAULSSON, *INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION* app. I, table 9 (1984) ("ICC Fees and Costs Based on a Sample of Hypothetical Sums in Dispute").

5. See Coulson, *Survey of International Commercial Arbitration Procedures and Results of Survey*, in *AMERICAN ARBITRATION ASSOCIATION, ARBITRATION & THE LAW*, 1981, at 228, 235 (1982).

6. 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 [hereinafter cited as N.Y. Convention].

forcement is available in any signatory state, regardless of the relationship of the parties to that state. The Convention provides that a court, when adjudicating an agreement to arbitrate, "shall . . . refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."<sup>7</sup> It further provides that arbitral awards will not be enforced only for illegality of the underlying agreement, due process infirmities, exceeding the scope of the arbitral submission, where the subject matter of the dispute is not capable of settlement by arbitration under the law of the country, or where enforcement of the award would violate public policy.<sup>8</sup>

Thus, the N.Y. Convention encourages international commercial arbitration between parties from signatory nations. This Convention is not unique in providing for arbitration of disputes under its auspices, however. Also providing for arbitration between signatories are the International Convention on the Settlement of Investment Disputes Between States and Nationals of Other States,<sup>9</sup> and the Inter-American Convention on International Commercial Arbitration,<sup>10</sup> which is gaining support in Latin America. Furthermore, private bilateral or multilateral treaties between various nations, and domestic law of individual states, are designed to recognize the importance of the arbitration process to international trade and to make enforceable the arbitration agreement.

Both legislatively and judicially, the United States presents a hospitable climate for arbitration. The United States is a signatory to the N.Y. Convention<sup>11</sup> and many other bilateral and multilateral treaties which provide for arbitration of disputes.<sup>12</sup> As early as 1974, the Supreme Court, in *Scherk v. Alberto-Culver Co.*,<sup>13</sup> recognized the importance to international trade of upholding contractual agreements to arbitrate, even where the subject matter is not considered arbitrable under domestic law:

A contractual provision specifying in advance the forum in which

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7. *Id.* at art. II(3).

8. *Id.* at art. V.

9. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159. Over 75 nations, including the United States, are signatories to this Convention, which provides for resolution of disputes between signatory governments or governmental agencies, and individuals of another signatory state.

10. The United States has signed, but not yet ratified this Convention. Implementing legislation has been introduced in Congress on several occasions. See, e.g., AMERICAN ARBITRATION ASSOCIATION, *ARBITRATION & THE LAW*, 1983, at 210 (1984).

11. Accession to the N.Y. Convention did not occur until 1970. See 21 U.S.T. 2517. Implementing legislation for the N.Y. Convention is codified in Chapter 2 of the Arbitration Act, 9 U.S.C. §§ 201 *et seq.* (1982).

12. In 1982, the United States executed bilateral investment treaties with Panama and with Egypt. Pertinent parts of these treaties are reproduced in AMERICAN ARBITRATION ASSOCIATION, *ARBITRATION & THE LAW*, 1982, at 365, 368 (1983). See generally Sachs, *The "New" U.S. Bilateral Investment Treaties*, 2 INT'L TAX & BUS. LAW. 192 (1984). Moreover, it is expected that the United States will accede to the Inter-American Convention shortly.

13. 417 U.S. 506 (1974).

disputes shall be litigated and the law to be applied is . . . an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction . . . . A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages . . . . [It would] damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements.<sup>14</sup>

*Scherk* was not decided under the Convention, but the Court was mindful of the United States' recent accession to the Convention, and of Congress' intent in so doing.<sup>15</sup>

The most recent worldwide legislative effort in support of arbitration is the newly adopted Model Law on International Commercial Arbitration.<sup>16</sup> Drafted by a working group of the United Nations Commission on International Trade Law (UNCITRAL), and recommended for adoption by individual states by the U.N. General Assembly in December, 1985,<sup>17</sup> the UNCITRAL Law serves as a model for domestic arbitration legislation. The Model Law is intended to make more uniform the practice and procedure of international commercial arbitration, and to free international arbitration from the parochial law of any given adopting state.<sup>18</sup> Its existence should be of particular value not only to countries which would benefit from modernization, but also to those countries which may be adopting or expanding their arbitration laws for the first time.

The project to develop a model law was conceived in 1979 when, after a review of twenty years' favorable experience with the N.Y. Convention, UNCITRAL concluded that a protocol to the Convention was not necessary but that further work on a model law "could assist States in reforming and modernizing their law on arbitration . . . , reduce the divergences encountered in the interpretation of the 1958 Convention . . . , and minimize the possible conflicts between national laws and arbitration rules."<sup>19</sup> The final text of the

14. *Scherk*, 417 U.S. at 516-17; see also *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 105 S. Ct. 3346, 3355 (1985).

15. See *Scherk*, 417 U.S. at 520 n. 15.

16. Adopted June 21, 1985. The text of the Model Law may be found appended to United Nations Commission on International Trade Law, Report of Its Eighteenth Session, June 3-21, 1985, 40 U.N. GAOR Supp. (No. 17) at 81, U.N. Doc. A/40/17 (1985) [hereinafter cited as Report of UNCITRAL on the work of its Eighteenth Session].

17. G.A. Res. 40/72, 40 U.N. Press Release GA/7272 at 620 (prov. ed. 1986).

18. Herrmann, *The UNCITRAL Model Law—Its Background, Salient Features and Purposes*, 1 *ARB. INT'L* 7 (1985). See generally INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION, *UNCITRAL'S PROJECT FOR A MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION* (P. Sanders ed. 1984).

19. United Nations Commission on International Trade Law, Report of Its Twelfth Session, June 18-29, 1979, 34 U.N. GAOR Supp. (No. 17) para. 78, U.N. Doc. A/34/17 (1979).

Model Law, adopted by UNCITRAL<sup>20</sup> and endorsed by the U.N. General Assembly provides a new international regime to govern, as *lex specialis*,<sup>21</sup> the procedural aspects of arbitration. It provides parties with wide freedom to tailor the arbitration procedure to their needs,<sup>22</sup> defines broadly the terms "international" and "commercial,"<sup>23</sup> limits judicial intervention in the arbitration process,<sup>24</sup> and grants arbitrators broad decision-making authority, subject only to the contrary agreement of the parties.<sup>25</sup> Although promulgated only recently, the Model Law already has generated wide interest in the international community as it promises further harmonization and streamlining of international arbitration worldwide.

Another important reason parties choose arbitration as the forum for resolution of their disputes is the availability of several administering agencies and formal arbitration rules which guide the process. The International Chamber of Commerce (ICC) Court of Arbitration, the American Arbitration Association (AAA), the London Court of Arbitration, the Stockholm Chamber of Commerce, and the Inter-American Commercial Arbitration Commission are some of the best known organizations which provide such services, but there are many more national and international agencies.<sup>26</sup>

Each of the above agencies has its own established rules and procedures for the conduct of international arbitration. In addition to the agency rules, several agencies, such as the AAA and the ICC Court of Arbitration also administer rules drafted by UNCITRAL. All of the various rules provide for the initiation of arbitration, the selection of arbitrators, the general conduct of the hearing, the form and scope of the award, and other administrative necessities vital to orderly, fair and expeditious dispute resolution.<sup>27</sup>

Although parties are free to arbitrate without the assistance of an arbitral

20. See Report of UNCITRAL on the work of its Eighteenth Session, *supra* note 16, at para. 10.

21. See *Government Comments on the UNCITRAL Working Group Draft Text of a Model Law on International Commercial Arbitration*, in AMERICAN ARBITRATION ASSOCIATION, ARBITRATION & THE LAW, 1984, at 194, 195 (1985) (comments of the United States).

22. See United Nations Commission on International Trade Law, Report of the Secretary-General, International Commercial Arbitration: Possible Features of a Model Law on International Commercial Arbitration, June 19-26, 1981, para. 17, U.N. Doc. A/CN.9/207 (1981).

23. See Report of UNCITRAL on the work of its Eighteenth Session, *supra* note 16, paras. 18-35.

24. See *id.*, at 83 (Model Law on International Commercial Arbitration, art. 5).

25. See Herrmann, *supra* note 18, at 11, 17-22.

26. Especially noteworthy are the Asian-African Legal Consultative Committee, which is responsible for establishing arbitration centers in Cairo and Kuala Lumpur, and the Federal Economic Chamber of Austria, which participated in trilateral agreements with the American Arbitration Association (AAA) and the Hungarian Chamber of Commerce in 1984, and with AAA and the Bulgarian Chamber of Commerce in 1985. See AMERICAN ARBITRATION ASSOCIATION, ARBITRATION & THE LAW, 1984, at 213 (1985). For a complete listing of arbitral institutions worldwide, see International Council for Commercial Arbitration, 10 Y.B. COMM'L ARB. 585 (1985).

27. For a comparison of the UNCITRAL, AAA, and International Chamber of Commerce rules, see McClendon, *Practical Considerations for the Use of Arbitration Clauses in International Contracts*, in SURVEY OF INTERNATIONAL ARBITRATION SITES, *infra* note 30.

institution (*ad hoc* arbitration), surveys show an increasing reliance on agencies.<sup>28</sup> The basis for this reliance is convenience; agencies provide not only an established and time-tested set of rules and procedures for the arbitration, but they can also provide arbitrators from a pool of screened candidates, and can arrange for ancillary items such as scheduling of proceedings, translators, and hearing rooms at whatever site the parties have chosen. Finally, most of the major arbitral institutions are prepared to administer other types of ADR cases in addition to arbitration, such as mediations and conciliations.<sup>29</sup>

In an effort to attract more international arbitration to the United States in general, and New York in particular, the American Arbitration Association formed the World Arbitration Institute in 1984. It is the Institute's mission to foster international commercial arbitration by pointing out its advantages to the business community, as well as to promote New York as an attractive site for international arbitration. The choice of an arbitration site is always an important decision, for it influences such issues as the procedural law applicable to the arbitration, the extent and nature of judicial intervention, the availability of qualified arbitrators and counsel experienced in international matters, and the administrative support and facilities available. Given the growing importance of international arbitration, world centers such as Cairo, Geneva, Hong Kong, Kuala Lumpur, London, New York, Paris, San Francisco, Stockholm, Vienna, and Zurich compete to have parties arbitrate in their agencies.<sup>30</sup> The latest entrant into the field is Canada which will soon adhere to the N.Y. Convention, adopt a version of the UNCITRAL Model Law, and open an International Commercial Arbitration Centre in Vancouver in 1986.<sup>31</sup>

The Institute does not appoint arbitrators or administer arbitrations, but rather serves as a center for information, publications, and educational activities, aimed particularly at practitioners. The Institute is cosponsored by the ICC Court of Arbitration, the Inter-American Commercial Arbitration Commission, the International Law Association, the Society of Maritime Arbitrators, the Association of the Bar of the City of New York, and the Parker School of Foreign and Comparative Law at Columbia University. Its advisory committee is comprised of an impressive list of distinguished, internationally recognized experts from the United States and abroad.<sup>32</sup>

### B. Mediation & Conciliation

Both mediation and conciliation are ancient techniques which are enjoying renewed interest as mechanisms for extrajudicial dispute resolution.

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28. See, e.g., Coulson, *supra* note 5, at 229.

29. See *infra* text accompanying notes 33-40.

30. For particulars about some of these venues, see AMERICAN ARBITRATION ASSOCIATION, SURVEY OF INTERNATIONAL ARBITRATION SITES (1984).

31. For further information, contact the British Columbia Commercial Arbitration Centre, c/o 1301, 865 Hornby Street, Vancouver, B.C. V6Z2H4.

32. More information about the World Arbitration Institute may be obtained by writing the Director at 140 West 51st Street, New York, New York 10020.

These ADR techniques have their roots in many cultures and societies. Far eastern societies such as China and Japan, for example, have relied on mediation and conciliation for centuries as the preferred method of dispute settlement.<sup>33</sup>

Mediation and conciliation have played a traditional role in international public law disputes as well. The Roman Catholic Church and international organizations such as the United Nations and International Court of Justice have served as mediators in several conflicts, in an effort to reach a peaceful, mutually acceptable solution to an escalating problem.

The AAA has conciliation agreements with Romania and the People's Republic of China for joint resolution of commercial disputes involving United States parties and commercial interests in those countries. Several cases have been resolved via joint conciliation, proving that the technique is a viable and successful one.<sup>34</sup>

For the same reasons that mediation is an excellent mode of conflict resolution in the public sector, parties involved in international trade are beginning to recognize the benefits of its use in their disputes. Especially in large, complex disputes, mediation is used increasingly as a first step toward reaching a settlement. Even where resolution of the entire controversy cannot be achieved through mediation, parties often succeed in reaching agreement on a number of adjunct factual and legal issues, thus simplifying and expediting the remaining issues for resolution through arbitration or litigation.

In surveys taken of United States practitioners involved in overseas trade, a majority have expressed interest in mediation and conciliation, and would be willing to try such procedures in their disputes.<sup>35</sup> This indicates a changing attitude in American practitioners, perhaps learned from their overseas counterparts.

Reacting to the trend toward increased interest in mediation and conciliation, several institutions have expanded their rules to include these processes. In 1980, UNCITRAL issued Conciliation Rules,<sup>36</sup> adopted by the General Assembly,<sup>37</sup> for use in international trade disputes. The rules suggest a model conciliation clause, and provide guidelines for the conduct of conciliation from initiation through settlement.<sup>38</sup>

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33. See generally Xunyi, *Conciliation is a Good Method for Settling International Economic and Trade Disputes—An Introduction to China's Practice of Conciliation*, in AMERICAN ARBITRATION ASSOCIATION, *ARBITRATION & THE LAW*, 1982, at 340 (1983).

34. See Note, *Commercial Dispute Resolution Between the United States and the People's Republic of China: Problems and Prospects*, 7 SUFFOLK TRANSNAT'L L.J. 329 (1983); see also Press Release of American Arbitration Association (Oct. 28, 1977) (reporting on first Sino-American conciliation effort) (on file at the offices of the New York University Review of Law & Social Change).

35. See generally Coulson, *supra* note 5.

36. 35 U.N. GAOR Supp. (No. 17) para. 106, U.N. Doc. A/35/17 (1980).

37. G.A. Res. 35/52, 35 U.N. GAOR Supp. (No. 48) at 260, U.N. Doc. A/35/48 (1980).

38. See AMERICAN ARBITRATION ASSOCIATION, *ARBITRATION & THE LAW*, 1981, at 196 (1982).

The AAA promulgated the Commercial Mediation Rules, which became effective in September 1984, for the resolution of all types of commercial disputes through mediation. Mediation rules for the construction industry have been in effect since 1980, and have proven successful, although these are used largely in domestic disputes. Like the UNCITRAL Rules, the AAA Rules provide a model clause and procedures from initiation of the mediation through settlement.<sup>39</sup>

Both the UNCITRAL Conciliation Rules and the AAA Commercial Mediation Rules stress the importance of confidentiality and nondisclosure throughout the process and after settlement. Mediation, in particular, works only if the parties can have full confidence in the privacy of their disclosures to the mediator, who tries to get all parties to disclose all facts relevant to the dispute. Thus, viability of the process is threatened if the mediator is not bound by confidentiality in post-settlement actions or in actions brought after unsuccessful attempts at settlement.<sup>40</sup>

The International Chamber of Commerce has also promulgated Conciliation Procedures. The ICC rules are less detailed than those of UNCITRAL or of the AAA, but provide generally for the same procedure. A model clause is suggested, as well.<sup>41</sup>

## II

### NEWER METHODS OF ADR IN INTERNATIONAL DISPUTE RESOLUTION

#### A. *The Minitrial*

The minitrial, one of the newer ADR techniques enjoying popularity, has been described as "an Information Exchange,"<sup>42</sup> or "formally structured settlement negotiations."<sup>43</sup> The procedure consists of summary presentations of each side's best case to top management executives who have full settlement authority. Often, neutral third parties are also involved. The goal of the minitrial is to turn a legal dispute into a business problem. The process is especially well-suited to cases which do not involve constitutional problems, novel

39. The AAA mediation clause reads:

If a dispute arises out of or relates to this contract, or the breach thereof, and if said dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by mediation under the Commercial Mediation Rules of the American Arbitration Association, before resorting to arbitration, litigation, or some other dispute resolution procedure.

AMERICAN ARBITRATION ASSOCIATION, COMMERCIAL MEDIATION RULES (1986).

40. See *Confidentiality and Immunity in Mediation and Other ADR Mechanisms*, 9 LAW. ARB. LETTER (Am. Arb. A.) 1 (Dec. 1985).

41. See W. CRAIG, W. PARK & J. PAULSSON, *supra* note 4, at app. II (1984).

42. Green, *The Mini-Trial Approach to Complex Litigation*, in CENTER FOR PUBLIC RESOURCES, *DISPUTE MANAGEMENT: A MANUAL OF INNOVATIVE CORPORATE STRATEGIES FOR THE AVOIDANCE AND RESOLUTION OF LEGAL DISPUTES I-A.1* (1980).

43. Carter, *supra* note 2, at 10.



questions of law, issues of credibility, or multiple parties.<sup>44</sup>

Both the AAA and the Center for Public Resources have promulgated minitrial procedures. Although the process is generally structured according to the mutual desires of the parties, the procedures set out general requirements such as a written agreement, selection and presence of a neutral advisor, rendition of an advisory award where settlement is not reached, and preservation of the confidentiality of the proceedings.

The minitrial procedure was used effectively in the resolution of a recent transnational dispute between a German machinery manufacturer and its American distributor.<sup>45</sup> After the German firm terminated a long-standing agency relationship with the American company, the distributor withheld monies payable to the manufacturer and filed suit using long-arm jurisdiction. The German supplier moved to dismiss on the grounds of improper service. Instructed to make service anew, and mindful of delay involved, the U.S. company's attorney suggested a minitrial and the German firm agreed.

The parties adopted purposefully simple procedures in a one page letter of agreement. Each side would have a principal in attendance authorized to settle the matter; each side's attorney would have approximately one hour to make a presentation; no neutral adviser would be used and anyone present would be free to ask questions. The agreement also provided that after the information exchange the principals themselves would meet to attempt to resolve the matter.

In describing the case to the AAA, Charles Parlin, counsel for the U.S. company, noted that outside counsel helped make the minitrial work by marshalling the evidence. For example, outside counsel prepared a chronological chart demonstrating what he believed he could prove regarding the German company's real motives behind the termination. Opposing counsel, in turn, prepared a tabulation designed to show that the U.S. party had a grossly excessive view of the damages.

During the course of the minitrial, several options were presented by the American party to encourage settlement. After the information exchange the two sides lunched separately to evaluate the presentations. The parties later reconvened and struck a deal within minutes.

Mr. Parlin asserted that the minitrial was substantially different from traditional settlement discussions. First, the attendance of executives authorized to settle moved the parties a long way toward resolution of the dispute. Second, the minitrial presented an unusual opportunity in the international context for each attorney to directly address the opposing party's executives. Mr. Parlin concluded that European companies tend to be fearful of litigation

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44. Hoellering, *The Mini-Trial*, in AMERICAN ARBITRATION ASSOCIATION, ARBITRATION & THE LAW, 1982, at 309 (1983).

45. See Minutes of American Arbitration Association Corporate Counsel Committee (May 2, 1984) (on file at the offices of the New York University Review of Law & Social Change).

in the United States and are thus very receptive to any mechanism that holds out promise for fast, inexpensive and equitable resolution of disputes.<sup>46</sup>

### B. Other ADR Techniques

A combination of mediation and arbitration, called "med-arb," is a relatively new ADR method.<sup>47</sup> With the aid of a neutral, the process calls for mediation of the dispute first, where negotiations and efforts at settlement are explored. Whatever issues remain after mediation are arbitrated before the same neutral, who renders a final and binding award. One of the main difficulties with med-arb is that the neutral first acts as mediator, and thus learns the strengths and weaknesses of each party's case. With this confidential information in hand, the neutral must then adjudicate the dispute as an arbitrator. Inasmuch as this creates a delicate situation, it is critical that the parties to med-arb have the utmost confidence in the neutral chosen.<sup>48</sup>

Another ADR mechanism is dispute resolution by advisory committees.<sup>49</sup> The advantage of this system is that a dispute may be immediately resolved at the time it arises by a joint committee representing the interests of all parties. Such committees have been used successfully in complex construction disputes, where immediate resolution of arising conflicts is critical to the production schedule.<sup>50</sup>

Finally, non-binding arbitration has been used with success, especially by the European construction industry. Although the result is not binding, it is admissible in any subsequent action between the parties. This "threat" of admissibility seems to be enough to encourage the parties to accept the award.<sup>51</sup>

### CONCLUSION

Extrajudicial dispute resolution methods for international trade have been, and continue to be, important for the growth of transnational commerce. The value of ADR lies not only in the fact that it is a private mode of dispute settlement, but also in that it frees the participants from worry about parochial legal systems and applicable law.

Although arbitration has enjoyed the most popularity as the favored ADR mechanism in international commercial disputes, other methods, such as mediation, conciliation, the minitrial, and advisory arbitration are increas-

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46. For a copy of Minitrial Procedures, contact the AAA, 140 West 51st Street, New York, New York 10020.

47. See *The Growing Field of Alternative Dispute Resolution*, 7 LAW. ARB. LETTER (Am. Arb. A.) 1 (Dec. 1983); Carter, *supra* note 2, at 17.

48. Hoellering, *New Approaches to Resolving Disputes in the Building Industry*, N.Y.L.J., Apr. 12, 1979, at 1, col. 1.

49. *Id.*

50. A. Mathews, *A Better Way to Deal with Construction Disputes* 5 (Feb. 1985) (unpublished manuscript) (on file at the offices of the New York University Review of Law & Social Change).

51. Hoellering, *supra* note 48.

ingly used with a good deal of success. Because of the positive experiences with its various forms, more and more parties are willing to try ADR to resolve their disputes, rather than risk litigation in one or more foreign fora. With its newly found popularity, we can expect broader innovation and application as people tailor ADR to meet their needs.

