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THE AMERICANIZATION OF INTERNATIONAL ARBITRATION

AN ADDRESS AT THE INTERNATIONAL LAW STUDENTS ASSOCIATION CONFERENCE AT PACE LAW SCHOOL OCTOBER 27-29, 2005*

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In preliminary discussions between members of the panel on its structure, Mr. von Mehren[1] originally expressed his belief that the topic of the panel should have been the Internationalization of International Commercial Arbitration. However, the organizers of the program entitled the program the Americanization of International Arbitration. Both titles would be accurate, as both refer to changing processes in international arbitration. This paper will develop Mr. von Mehren's introductory comments about what arbitration was like in the United States in the 1950s, in particular international commercial arbitration, and the attitude surrounding the evolution of arbitration to the present. This paper will focus on several of the major political events that influenced the American legal community to participate in international commercial arbitration. In addition, it will discuss the impact that American involvement has had on the changes in international commercial arbitration.

Litigation and arbitration are both forms of dispute resolution that involve a third party. Forms of dispute resolution other than litigation are generally grouped under the rubric of alternative dispute resolution and are widely discussed in the

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* This paper is an edited transcript of a speech made at the International Law Students Association (ILSA) Fall Conference, *Global Interdependence and International Commercial Law*, held at Pace Law School, October 27-29 2005.

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[1] Robert B. von Mehren served as moderator of the panel entitled *The Americanization of International Arbitration*, and is a retired partner of Debevoise & Plimpton, LLP and Vice-Chairman of the International Law Association.

United States. Methods of alternative dispute resolution include conciliation, mediation, "rent a judge,"[2] and dispute boards (for construction contracts). Of all the various forms of alternative dispute resolution, arbitration is the one that most resembles litigation. Arbitration awards are executed by state courts in the United States and in courts throughout the international community.

As Mr. von Mehren indicated in his introduction, arbitration in the United States existed in two forms during the post-World War II period. The first form of arbitration involved disputes of a small monetary value, while the second form concerned labor disputes.[3] The dominant form of labor arbitration concerned future contracts, although some labor arbitration concerned conflicts regarding past events.[4] Arbitration concerning future contracts is often referred to as interest arbitration.[5] There is a significant difference between arbitration that strives to result in a new agreement and arbitration that is designed to settle a dispute that has arisen in the past.

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[2] Rent-A-Judge involves the hiring of a private judge and "is an approach midway between arbitration and litigation in terms of formality and control of the parties. The parties typically present their case to a judge in a privately maintained courtroom with all the accouterments of the formal judicial process. Private judges are frequently retired or former "public" judges with subject matter expertise. This approach is gaining popularity in commercial situations because disputes can be concluded much quicker than under the traditional court system." ADR Methods and Techniques, http://www.dscc.dla.mil/downloads/legal/adr/adr_methods_and_techniques.doc (last visited Feb. 17, 2006).

[3] "For the American Arbitration Association, destiny lies in its middle name. Since the AAA's birth in 1926, its story has become intertwined with the development of modern arbitration in general, and labor arbitration in particular." AMERICAN ARBITRATION ASSOCIATION, LABOR OF LOVE: A COMMEMORATIVE HISTORY OF THE AMERICAN ARBITRATION ASSOCIATION AND THE LABOR-MANAGEMENT COMMUNITY, 1 (2001).

[4] *See* Leslie Grant, *What is Arbitration?*, http://www.mediate.com/articles/grant.cfm (last visited Apr. 24, 2006).

[5] *Id.*("Interest Arbitration (a.k.a. Contract Arbitration) is normally imposed by a statute, and involves adjudication on the terms and conditions of employment to be contained in a resulting collective agreement. Since statutes, usually prohibit a legal strike, or lock out, these contract disputes must be resolved somehow; in this case by interest arbitration. For example, collective bargaining in a new collective agreement covering a fire force or a hospital may break down into an irresolvable deadlock. The contractual matters still in dispute between the parties would be put to an interest arbitrator or tribunal for a ruling and determination, which would then form the relevant provisions of the collective agreement between the two parties.").

Prior to World War II and for a considerable period subsequent to it, the United States was not involved in international commercial arbitration. Cross-border disputes were not part of American legal practice. Consequently, the issues that arose from international commercial arbitrations were not prevalent in the United States. In contrast, England was actively involved in arbitration of international commercial disputes. However, English law, both substantive and procedural, governed all those arbitrations. A procedure called a "case stated" practically rendered arbitration an adjunct of the public court process.[6] Therefore, there was English *arbitration* of international commercial disputes, not English *participation* in international commercial arbitration.

Considering the absence of the United States and England from international commercial arbitration, the question remains whether there was anything that could be called international commercial arbitration in the post-World War II period. There had indeed been some international commercial arbitration, and it had been in existence since the 1920s. Two international arbitration agreements had been produced by the League of Nations and widely adopted by the international community. The 1923 Protocol on Arbitration Clauses (1923 Protocol) provided for the recognition of arbitral clauses that provided for the arbitration of issues that might arise in the future regarding a particular contract.[7] The 1923 Protocol was almost completely effective among the participating countries.[8] In 1927, the Convention on the Execution of Foreign Arbitral Awards (1927 Convention) was adopted and widely ratified.[9] The 1927

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[6] A remnant of the case stated procedure remains in the English Arbitration Act. Arbitration Act, c. 23, (1996) § 69 (Eng.), *available at* http://www.opsi.gov.uk/ACTS/acts1996/1996023.htm. For additional examples of the case stated procedure in common law countries, *see* Belize, Arbitration Act, c. 125, § 14 (Belize), *available at* http://www.belizelaw.org/lawadmin/PDF%20files/cap125.pdf.

[7] Protocol on Arbitration Clauses, Sept. 24, 1923, 27 L.N.T.S. 158, *available at* http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partII/Treaty-6.asp.

[8] There were questions regarding whether the arbitration itself had to be in conformity with both the laws of the place where the arbitration was held and the laws under which the agreement of the parties was drafted. *Cf.* Convention of Choice of Court Agreements, Art. 9(a) (June 30, 2005), *available at* http://www.hcch.net/index_en.php?act=conventions.pdf&cid=98.

[9] Convention on the Execution of Foreign Arbitral Awards, Sept. 26, 1927, 92 L.N.T.S. 302, *available at* http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partII/Treaty-7.asp.

Convention was also effective, although, the United States never became a party to either agreement. There were no real reasons why the United States should have been involved. As noted above, the arbitration of cross-border disputes was not an American practice at that time, so the international agreements were completely irrelevant to American concerns.

Despite the lack of American involvement, the fact that the international arbitration agreements had been widely accepted is significant. International commercial arbitration developed primarily on the continent of Europe, with France, Germany and Switzerland participating in a significant number of cross-border arbitrations. Many of those arbitrations were held at the International Chamber of Commerce (ICC), created in 1919 and located in Paris. One of its first actions was to adopt rules of arbitration in 1922.[10] In 1923 it created an arbitration organization, known now as the International Court of Arbitration.[11] During the first sixty years of its existence, including the years encompassing World War II (1939-1945), the ICC averaged 50 cases each year.[12] Given the time period, this was a significant number of arbitrations. The ICC was the forum for all important arbitrations of the era. Today, the ICC currently receives over 500 requests for arbitration each year.[13]

Although the ICC is headquartered in Paris, it is not a French institution.[14] Nevertheless, the location of its headquarters impacted the development of the ICC. France, Germany, Switzerland, and other continental parties primarily used the ICC's arbitral facilities while no common-law states, (including the United States and England) participated in the ICC during this period. The ICC became a civil law operation. Lawyers approach arbitration with knowledge of their own legal system, and the ICC rules developed under this premise. In other

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[10] Eric E. Bergsten, United Nations Conference on Trade and Development, *Dispute Settlement: International Commercial Arbitration*, 21 (2005), *available at* http://www.unctad.org/en/docs/edmmisc232add38_en.pdf.

[11] International Chamber of Commerce, What is ICC?, http://www.iccwbo.org/id93/index.html.

[12] The ICC received its 3,000th request for arbitration in 1976. W. Lawrence Craig, William W. Park, Jan Paulsson, International Chamber of Commerce Arbitration 2 (3d ed. 2000).

[13] International Chamber of Commerce, *What is ICC?*, http://www.iccwbo.org/id93/index.html.

[14] Bergsten, *supra* note 10, at 21.

words, international commercial arbitration developed essentially as an adaptation of the civil law rules of procedure, and not those of the common law known in the United States and England.

International commercial arbitration has undergone a radical change in the past fifty years. At present, both the United States and England are heavily involved in international commercial arbitration. International commercial arbitration was first adopted in the United States; it became popular in England later.[15] The initial change in the American attitude toward international commercial arbitration resulted from the major political and economic developments beginning in the 1950s.

The most significant post-World War II political development that affected arbitration was decolonization. Some of the then recently decolonized countries contained underground petroleum. They became dissatisfied with the concession agreements that had been negotiated during the earlier period of colonization.[16] This resulted in a series of nationalizations, unilateral changes in the tax system or other reforms of the governing legal body.[17] Naturally, such changes disturbed oil companies worldwide. Many of the concession agreements between former colonial governments and oil companies contained arbitration clauses, which had been inserted at the request of the oil companies' lawyers. The managers of the companies had never been interested in the contract's language or the arbitration clauses.[18] Formal dispute settlement procedures had been previously irrelevant in an atmosphere where the petroleum companies had been the stronger party and matters had been settled privately. However, when host governments began to assert their rights as sovereign states by enacting laws to govern such economic relationships, the text of the contracts and the arbitration clauses became important.

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[15] International commercial arbitration did not become popular in England until after 1979 Arbitration Act. *See id.* at 19-20.

[16] *See* YVES DEZALAY & BRYAN G. GARTH, DEALING IN VIRTUE 78 (1996).

[17] *See id.* at 78-79.

[18] "Contracts in [the] eyes [of the petroleum companies] were never more than provisional pieces of paper of secondary importance. Contracts could always be amended or renegotiated according to circumstances." *Id.* at 76.

The nationalization of petroleum concessions by Iran, Abu Dhabi (currently part of the United Arab Emirates) and Libya generated a large number of arbitrations over both the financial terms of the contracts and the documentation requirements. American law firms were hired to represent the petroleum companies because of their expertise in case management and documentation, despite a lack of experience in arbitration and that the clients were seldom based in the United States. French, Swiss and other continental European law firms were typically small with less than five lawyers. On the other hand, firms in the United States were much larger, typically having between seventy and one-hundred lawyers, and when compared with a firm in Paris, they were immense. Moreover, American firms had experience litigating anti-trust cases, which similar to the oil concession cases, were documentation intensive.

American lawyers also represented the governments of decolonized countries involved in international commercial arbitration against the petroleum companies. Many American lawyers had served in the Peace Corps and they represented these clients with a certain degree of idealism. This was the first time American lawyers were exposed to international commercial arbitration[19], and they found in it elements to their liking. The American lawyers knew that the cases could not have been litigated in New York or Paris, and they did not want to litigate in Libya or Abu Dhabi; therefore, arbitration became a reasonable alternative.

American lawyers participating in international commercial arbitration brought and used American litigation skills. The Americans utilized a more aggressive form of advocacy than the continental Europeans were used to in international commercial arbitration. The European arbitrators tended to be the "Grand Old Men" of the European legal community. While this is a broad generalization, it is accurate. The American attorneys tended to be fact-oriented while European attorneys tended to be law-oriented, and wanted to hear more about the appropriate legal theories relevant to the dispute. A group of American lawyers once had copies of transcripts prepared, at great expense, for the arbitrators.[20] The arbitrators were not

[19] *See id.* at 106.

[20] DEZALAY & GARTH, *supra* note 16, at 108.

interested in the transcripts and never looked at them. This exemplified the tremendous differences in legal style and advocacy between the Americans and the Europeans.

One concern since the 1960s has been a perception that the judgments of American courts are not enforced by foreign courts to the extent that the judgments of foreign courts are enforced in the United States.[21] One solution offered by the American Arbitration Association was that commercial parties should include arbitration clauses in their international contracts. This became more feasible in 1970, after the United States ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter New York Convention)[22] The New York Convention assured that an arbitral award would be enforced in other Contracting States, an assurance that was not, and is not, available in regard to the judgments of the courts of the United States. Nevertheless, American participation in international arbitrations continued to be relatively rare.

In the 1970s, the United States increased trade with the Soviet Union and other state-trading countries. The American party was usually a private corporation that required an acceptable, predetermined dispute settlement mechanism. Although disputes over international trade contracts arose in only a small percent of the contracts, it was important for the parties to know how they would be settled. It was obvious that the Soviets would not participate in the American courts, and conversely that the Americans would not participate in the courts in Moscow. The Soviets did not submit trade disputes to their courts, and instead used an arbitral tribunal in Moscow that

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[21] This concern continues to this day. In order to overcome such difficulties, in 1992 the United States proposed to The Hague Conference on Private International Law that it prepare a convention on the enforcement of foreign court judgments. The negotiations turned out to be an in-depth seminar on the different conceptions of jurisdiction, and the circumstances under which the enforcement of a foreign judgment was appropriate. After thirteen years of negotiations, on June 30, 2005 the Conference adopted the Convention on Choice of Court Agreements. This convention provides for the recognition of a choice of court agreement in a commercial contract and for the enforcement of a judgment of the court stipulated. *See* Convention of Choice of Court Agreements, *supra* note 8.

[22] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 4739 U.N.T.S. 330, *available at* http://www.doj.gov.za/salrc/reports/r_prj94_intarbitration_july98/sch3.pdf.

decided international commercial disputes. The Americans refused to participate in the Soviet arbitral tribunal, and the Soviets refused to participate in ICC arbitration, mainly because they considered the ICC to be the symbol of big-business capitalism.[23]

As a result of evolving international trade affairs between major powers who did not trust each other, a new forum was needed to settle international contract disputes. Arbitration appeared to be the answer. The Soviets were used to the arbitration of trade disputes and the United States had ratified the New York Convention a few years earlier. Furthermore, the Final Act of the Conference on Security and Co-operation in Europe, signed at Helsinki on August 1, 1975, recommended that the participating states suggest "where appropriate, to organizations, enterprises and firms in their countries, to include arbitration clauses in commercial contracts . . . and that the provisions on arbitration should provide for arbitration under a mutually acceptable set of arbitration rules. . . ."[24] The only problem that remained was for the Soviets and Americans to find a mutually acceptable set of arbitration rules. It may not have been a coincidence that the United Nations Commission on International Trade Law (UNCITRAL) was already engaged in drafting recommended rules for ad hoc arbitrations. The draft rules were adopted by the UNCITRAL in 1976 as the UNCITRAL Arbitration Rules.[25]

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[23] *See* Per Runeland, *Sweden Thrives as Neutral Arbitration Ground*, *available at* http://newsletter.kilpatrickstockton.com/KSBrief/Vol4/story.aspx?ID=241 ("Although international commercial arbitration has a long history in Sweden, it was not until the 1960s and 1970s that international arbitration on a larger scale took off. This happened in the context of East/West arbitration. When trade picked up between the United States and the Soviet Union, the method of resolving any disputes was one of the key issues. Recognizing the wide acceptance of Sweden as a venue for international arbitration, the then U.S.S.R. Chamber of Commerce and Industry, the American Arbitration Association and the Stockholm Chamber of Commerce developed a model arbitration clause for use in contracts between parties in the United States and Soviet foreign trade organizations.").

[24] U.N. Comm'n on Int'l Trade Law, *Report of the United Nations Commission on International Trade Law on the Work of its Ninth Session*, ¶ 55, U.N. Doc. A/31/17 (12 Apr.–2 May, 1976).

[25] *Permanent Court of Arbitration Procedures for Cases Under the UNCITRAL Arbitration Rules*, http://www.lawschool.cornell.edu/library/pca/pcaproceduresuncitral.htm.

I was introduced to international commercial arbitration at the time of the UNCITRAL Arbitration Rules (hereinafter Rules). Although I had been working for UNCITRAL since the beginning of 1975, I had not been involved in the earlier stages of drafting. Nevertheless, I was appointed secretary of the meeting in which the Rules were adopted. One of the most striking impressions I had at this meeting was the high degree of co-operation between Howard Holtzmann, the American delegate, and Professor Sergei Lebedev, the Soviet delegate. However, during the meeting I did not realize what was at stake for the American and Soviet delegates.

The Rules received two important endorsements within a year of their adoption. The first was that of the Asian-African Legal Consultative Committee (AALCC), now known as the Asian-African Legal Consultative Organization.[26] At the time the AALCC was composed of approximately 35 states. Endorsement of the Rules by an intergovernmental organization of mainly developing countries was an important step in overcoming resistance to international commercial arbitration in the region. The agreement in January 1977 between the Soviet Chamber of Commerce and Industry, the American Arbitration Association, and the Stockholm Chamber of Commerce, which provided for the arbitration of U.S.–Soviet trade disputes in Stockholm under the Rules, had a more significant impact on American involvement in international arbitration.[27] While the agreement was made by the arbitration organizations of the three countries, the governmental bodies of each were actively consulted. Sweden modified its existing law to accommodate the anticipated U.S.–Soviet arbitrations.[28]

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[26] *See* International Commercial Arbitration, *Note by the Secretary-General*, Add.1, U.N. Doc. A/CN.9/127 (July 5, 1976), *available at* http://www.uncitral.org/pdf/english/yearbooks/yb-1977-e/vol8-p233-e.pdf.

[27] Coincidently, on October 28, 2005, the day prior to the panel discussion at which this paper was presented, "the parties to the long-standing Russian-U.S. Optional Arbitration Clause met to review the Joint Panel of Presiding Arbitrators attached to the clause and to update their joint arrangements." American Arbitration Association, Dispute Resolution Times News—International: Historic Arbitration Panel Updated, http://www.adr.org/sp.asp?id=27115&printable=true. (last visited Jan. 10, 2006).

[28] "Ultimately, Swedish arbitration law, as modified by [Howard] Holtzmann and [Sergei] Lebedev, was chosen to be authoritative for these issues and resulted

The Soviet-American agreement was the first of a series of agreements between the American Arbitration Association and foreign arbitral organizations in Central and Eastern European countries. While the agreements were made between the arbitral organizations, they were in significant part in fulfillment of official efforts.[29] Agreements were first signed with Hungary, then Czechoslovakia and Bulgaria, and finally, just before the fall of Berlin Wall, with the German Democratic Republic. All of these agreements provided for arbitration under the Rules, but in Vienna rather than in Stockholm. Similar to Sweden, Austria also changed its law to meet the concerns of the Americans and the Hungarians.[30]

By the end of the 1970s the United States government had become a strong supporter of international commercial arbitration, and this played a key role when the American-Iranian dispute arose in 1979. Beginning in the 1950s, the United States had gradually replaced England as the dominant foreign presence in Iran. The United States strongly supported the Shah in his efforts to modernize the country. At this time, there were thousands of American companies in Iran, building infrastructure and supplying goods to both the private and the public sectors. When a revolution erupted, the Shah abdicated in January 1979. It was not clear immediately whether the Shah or the revolutionaries would be victorious. However, on November 4, 1979, the American embassy was seized by radical stu-

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in the recognition of Sweden as a new arbitration center that was acceptable to international disputants." American Arbitration Association, *supra* note 26.

[29] In 1978 Hungary and the United States entered into a trade agreement in which firms in the two countries were encouranged to provide in their contracts for arbitration under internationally recognized rules in third countries, that were parties to the New York Convention. Szász, Austria's qualifications as the venue for Arbitration in East/West commercial disputes, unpublished paper given at Conference "30 Years Vienna International Arbitral Centre," Vienna October 20 – 21, 2005 (on file with author).

[30] Zivilverfahrens-Novelle 1983 [Civil Procedure Amendment] Bundesgesetzblatt [BGB1]No. 135/1983, § 126-132 (Austria). The changes to the pre-existing law were restricted to those deemed necessary to meet the most important concerns expressed by the American-Hungarian working party. In December 2005, Austria adopted a new arbitration law based upon the UNCITRAL Model Law on International Commercial Arbitration, effective 1 July 2006. *See* Schiedsrechts-Äenderungsgesetz [Arbitration Law Amendment Act] in the Austrian parliamentary documents, Stenographisches Protokoll, 129. Sitzung des Nationalrates der Republik Österreich XXII, *available at* http://www.parlinkom.gv.at.

dents and embassy personnel were held hostage. Though some of the hostages were released relatively quickly, fifty-two were held for four hundred-forty four days.[31] This assault on the American embassy became known in the United States as the Iran Hostage Crisis.

There was an important economic element affected by the Iran Hostage Crisis. Iran had approximately $8 billion on deposit in the United States, which were frozen soon after the embassy was seized. On the other hand, there were thousands of American companies that claimed that contracts with Iranian public and private entities had been improperly terminated. Tensions were high between the United States and Iran, and the two countries were unable to successfully resolve those issues through negotiation. Fortunately, both Iran and the United States had good diplomatic relations with Algeria. This bond ultimately led to the Algiers Declaration.[32] The Algiers Declaration led to the release of the remaining hostages in Iran and the establishment of the Iran-United States Claims Tribunal. Under the Settlement Agreement, which was part of the Algiers Declaration, the Tribunal was to conduct its business in accordance with the UNCITRAL Arbitration Rules, with such modifications as were deemed necessary to carry out the agreement.[33]

The Agreement is anomalous for several reasons. First, it called for state-to-state arbitration in regard to any dispute concerning the interpretation of the Settlement Agreement. Second, private claims for greater than $250,000 were to be presented by the claimant itself, while private claims for less than $250,000 were to be presented by the government of the claimant As a result of the Settlement Agreement, lawyers rep-

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[31] *See* Jimmy Carter Library & Museum, *The Hostages and The Casualties*, http://www.jimmycarterlibrary.org/documents/list_of_hostages.phtml (last visited Apr. 24, 2006). *See also* CBS News, *Iran Contra Anniversary* (Jan. 18, 2001), *available at* http://www.cbsnews.com/stories/2001/01/18/iran/main265244.shtml.

[32] *See* Declaration of the Government of the Democratic and Popular Republic of Algeria (General Declaration) (Jan. 19, 1981), *available at* http://www.iusct.org/general-declaration.pdf.

[33] Declaration Of The Government Of The Democratic And Popular Republic Of Algeria Concerning the Settlement of Claims By the Government of the United States of America and the Government of the Islamic Republic of Iran) (Claims Settlement Declaration) (Jan. 19 1981), Art. III, § 2, *available at* http://www.iusct.org/general-declaration.pdf.

resenting the private claimants became intimately involved in the arbitration proceedings, and thousands of American lawyers were exposed to the international arbitration of commercial disputes under the Rules. Following this exposure, American lawyers gained an appreciation for international commercial arbitration, viewing it as a way of settling not only ordinary commercial disputes, but also highly contentious disputes with commercial elements.

During the 1960s and 1970s, the American Arbitration Association (AAA) actively promoted international commercial arbitration in the United States, although its principal focus remained labor and other forms of domestic arbitration. By 1986, the AAA had adopted Supplementary Procedures for International Disputes to its Commercial Arbitration Rules.[34] As the American Arbitration Association became more prominent in the field of international commercial arbitration, it created a new division, the International Center for Dispute Resolution (ICDR). The new division took the word "American" out of the title to increase the appearance of neutrality.

By 2005, the American business and legal communities accepted arbitration as the preferred method of settlement of international commercial disputes.[35] Consequently, American lawyers and parties have become significant actors in international arbitration. For example, about one-fourth of the cases heard before the ICC involve an American party. While it may be too much to claim that international commercial arbitration has been Americanized, as the title of this session suggests, the American presence has had an important impact on it.

American lawyers tend to see the courts and arbitration as two different forums for the litigation of commercial disputes, but often they use the same litigation techniques in both. On the other hand, the Europeans tend to litigate before the courts and arbitrate before an arbitrator. While the European "Grand

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[34] *See* Supplementary Procedures for International Commercial Arbitration of the American Arbitration Association (AAA) (February 1, 1986), http://www.asser.nl/ica/categorieen/intro.asp?sub_categorie=16 (last visited Apr. 24, 2006).

[35] *See e.g.*, Christopher R. Drahozal, *Commercial Norms, Commercial Codes, and International Commercial Arbitration*, *available at* http://law.vanderbilt.edu/journal/33-01/33-1-3.html. ("International commercial arbitration is the accepted way of resolving international business disputes. . .[o]ne estimate is that ninety percent of all international contracts contain arbitration clauses.").

Old Men's" approach to arbitration from fifty years ago is no longer prevalent, there is a general feeling that litigation techniques, in particular procedural disputes, do not belong in arbitration. Nevertheless, the trend in international arbitration is to move towards the American style of litigation.[36] For example, procedural disputes have multiplied, jurisdictional objections are common, and cross-examination is prevalent.[37] While American style discovery remains anathema, the limited discovery procedure discussed in Article 3 of the International Bar Association Rules of Evidence has become commonplace. International commercial arbitrations also permit the interviewing of witnesses, which was traditionally considered unethical. Furthermore, there are many additional procedural issues that have been introduced by American lawyers into international commercial arbitration in recent years.[38]

The international commercial arbitration experience during the last fifty years is analogous to the experience of immigration into a country. Immigrants must adjust to their new country, but the country will also change to accommodate them. This is what happened to international commercial arbitration when the Americans arrived, and things have been evolving ever since.

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[36] *See* Elena V. Helmer, *International Commercial Arbitration: Americanized, "Civilized," or Harmonized?* 19 OHIO ST. J. ON DISP. RESOL. 35 (2003) ("The author believes that American influence on international arbitration is significant, but falls short of Americanization. Rather, the current trends and developments in international commercial arbitration demonstrate an ongoing process of harmonization in many areas of international arbitration. This includes national arbitration laws, rules of major arbitration institutions, and arbitration practices, as demonstrated by the United Nations Commission on International Trade Law (UNCITRAL) and International Bar Association (IBA) documents as well as procedures adopted by international arbitral tribunals.").

[37] *See id.* ("The whole debate of Americanization of international commercial arbitration springs from what has been called the 'Common Law-Civil Law Divide.' The differences between the two legal systems are most visible in the area of procedure. . .").

[38] The UNCITRAL Notes on Organizing Arbitral Proceedings serve as an excellent checklist of procedural issues that should be considered in the conduct of an arbitration, and particularly one between parties from different states. U.N. Comm'n on Int'l Trade Law, UNCITRAL Notes on Organizing Arbitral Proceedings (May 28 – June 14, 1996), 5-8, *available at* http://www.uncitral.org/pdf/english/texts/arbitration/arb-notes/arb-notes-e.pdf.