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PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

# The Perfect Circle: Arbitration's Favors Become Its Flaws in an Era of Nationalization and Regulation

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## INTRODUCTION

Litigation attorneys are ever alert for the word “lawsuit,” the sound of which makes any other person cringe. The image of a wood-paneled courtroom lorded over by a seasoned legal professional, however, has not always had such a poor reputation; it was once associated with such glorious ideas as “innocent until proven guilty” and “having a day in court.”

The negative connotation linked to litigation<sup>1</sup> stems from several entrenched and continuing problems, including high costs, the destruction of business relationships, and the unpredictability of the results,<sup>2</sup> which are present in both domestic and foreign conflicts. Additional problems arise

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1. The problems with litigation were evident even as early as the days of Abraham Lincoln, who observed

the limitations of the legal process: crowded circuit court dockets, with court sessions in most counties limited to a few days a year; the difficulties of procuring evidence and witnesses; the unpredictability of local tribunals and juries; and the difficulties of executing on a debt in the face of a determined, recalcitrant debtor.

Thomas J. Stipanowich, *Lincoln's Lessons for Lawyers*, 16 DISP. RESOL. MAG., no. 2, Winter 2010, at 18, 18 [hereinafter *Lincoln's Lessons*].

2. Andrew Sagartz, *Resolution of International Commercial Disputes: Surmounting Barriers of Culture Without Going to Court*, 13 OHIO ST. J. ON DISP. RESOL. 675, 678 (1998). See also Thomas J. Stipanowich, *Arbitration: The "New Litigation,"* 2010 U. ILL. L. REV. 1, 4 (2010) (“Th[e] dramatic decrease in the trial rate may be attributed, at least in part, to business and public concerns about the high costs and delays associated with full-blown litigation, its attendant risks and uncertainties, and its impact on business and personal relationships.”).

when these transactions span more than one country, forcing parties to decide on a forum, learn foreign procedures, and pay additional costs.<sup>3</sup> The impracticality of international litigation was realized after World War II in the advent of an era characterized by global commercial cooperation.<sup>4</sup> The three key issues that developed for foreign litigators were: fear of bias for the domestic party; questionable appealability in foreign fora; and potential lack of enforceability of a resulting judgment.<sup>5</sup> Consequently, international parties sought a neutral alternative to alleviate these concerns and provide more efficient, effective results.<sup>6</sup>

The goal of this article is to explore the evolution of international commercial arbitration, highlighting some of its specific aspects that have brought it under critical evaluation, and to analyze the viability of another ADR process—mediation—overtaking it in the international arena. Part I gives a brief background on international arbitration and explains how it has become so prominent and respected in the global community. It also focuses

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3. Sagartz, *supra* note 3, at 678. See also Bonnie S.C. Klotz, *Practitioner's Workshop: Practical Aspects of International and Foreign Law Litigation*, 79 AM. SOC'Y INT'L L. PROC. 328, 329 (1985) (quoting remarks by Eleanor M. Fox, Professor of Law, New York University School of Law). Ironically, some of the technological advances that make international transactions possible have contributed to the higher costs. For example, computers and the electronic transmission of information have led to a rise in "e-discovery," the gathering of archived information from electronic databases and networks. Because of the massive amounts of data that is stored, expense and burden on the parties have significantly increased, prompting a response in 2006 from the Advisory Committee to amend the Federal Rules of Civil Procedure. Rachel Hytken, *Electronic Discovery: To What Extent Do the 2006 Amendments Satisfy Their Purposes?*, 12 LEWIS & CLARK L. REV. 875 (2008).

4. Kevin T. Jacobs & Matthew G. Paulson, *The Convergence of Renewed Nationalization, Rising Commodities, and "Americanization" in International Arbitration and the Need for More Rigorous Legal and Procedural Defenses*, 43 TEX. INT'L L.J. 359, 362 (2008).

5. *Id.* There was also the potential for simultaneous litigation in multiple countries regarding the same issue, which would affect enforceability as well. Winston Stromberg, *Avoiding the Full Court Press: International Commercial Arbitration and Other Global Alternative Dispute Resolution Processes*, 40 LOY. L.A. L. REV. 1337, 1339 (2007).

6. For US attorneys, litigation as an international resolution option did not go quietly, and arbitration was forced to look to Congress for some teeth; consequently, Congress passed the Federal Arbitration Act.

The problems Congress faced were . . . twofold: the old common law hostility toward arbitration, and the failure of state arbitration statutes to mandate enforcement of arbitration agreements. To confine the scope of the Act to arbitrations sought to be enforced in federal courts would frustrate what we believe Congress intended to be a broad enactment appropriate in scope to meet the large problems Congress was addressing.

Southland Corp. v. Keating, 465 U.S. 1, 14 (1984).

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on the changes that have been made to the process because of this spotlight, as civil and common law attorneys compete to control it.

Part II hones in on the criticism that the features of arbitration which made it popular are now hindering the process, looking to the causes of this rapid deterioration. The author analyzes three attributed reasons for this decline: Americanization, nationalization, and overregulation.

Part III concentrates on mediation as the new, up-and-coming possible replacement for arbitration. This section compares the advantages of mediation and arbitration and comments on the import of these differences, concluding that neither is poised to supplant the other, but rather that each should be valued for its respective purposes and in the appropriate situations.

## PART I

### A. *International Commercial Arbitration:*<sup>7</sup> *The Beginning*

The demise of Greek society is attributed to many causes, but one that has fallen by the wayside is the inability to draft compelling contracts.<sup>8</sup> To prevent the onslaught of war—the ancient equivalent to litigation—clauses were included in contracts between city-states which stated the obligation to seek an alternative remedy for any disputes.<sup>9</sup> One example is the Pease of Nicias between Sparta and Athens, which required that “if there should arise a difference between them they will remit its solution to a procedure according to a method upon which they will come to an agreement.”<sup>10</sup> Any first-year contracts student, however, could identify the vague, nonspecific language as the literally fatal flaw; once an issue develops between parties, it is unlikely that they will agree to anything, much less a specific method of dispute resolution. Thus, the establishment of a solution before the problem arises is the more prudent course. The outcome of this early recorded

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7. “Arbitration is customarily defined as ‘a simple proceeding voluntarily chosen by parties who want a dispute determined by an impartial judge of their own mutual selection, whose decision, based on the merits of the case, they agree in advance to accept as final and binding.’” Maureen A. Weston, *Reexamining Arbitral Immunity in an Age of Mandatory and Professional Arbitration*, 88 MINN. L. REV. 449, 452 (2004) (quoting MARLIN M. VOLZ & EDWARD P. GOGGIN, ELKOURI & ELKOURI: HOW ARBITRATION WORKS 2 (5th ed. 1997)).

8. William K. Slate II, *International Arbitration: Do Institutions Make a Difference?*, 31 WAKE FOREST L. REV. 41, 42 (1996).

9. *Id.* at 41.

10. *Id.*

arbitration attempt was six short years of peace before the arrangement was broken.<sup>11</sup>

Perhaps realizing the potentially catastrophic effect of a poorly-written agreement, the English took a more successful stab at an alternative to litigation in the thirteenth century with their establishment of private tribunals to govern commercial claims,<sup>12</sup> beginning the first western dispute resolution systems. Following this cue, the Jay Treaty, created in 1794, contained a commission for similar tribunals to allow British creditors to arbitrate claims against nationals of the United States.<sup>13</sup> Arbitration was finally recognized as a legitimate system with the opening of the International Court of Arbitration, operated by the International Chamber of Commerce, in 1923.<sup>14</sup> Its value was established in the 1950s<sup>15</sup> when international litigation proved to be insufficient for the newly globalized economy,<sup>16</sup> and the practice gained worldwide notoriety with the summoning of the Convention of the Recognition and Enforcement of Foreign Arbitral Awards.<sup>17</sup> The “New York Convention,”<sup>18</sup> as the conference is fondly called, made unprecedented headway with the melding of foreign legal systems by holding party states responsible for enforcing arbitral awards rendered in other countries<sup>19</sup> and for upholding forum selection clauses,<sup>20</sup> a respect that is not even afforded to court judgments.<sup>21</sup>

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11. *Id.* at 42.

12. Stromberg, *supra* note 6, at 1343.

13. *Id.*

14. *Id.* at 1343-44. “When crafting arbitration agreements in the early to mid-20<sup>th</sup> century, commercial parties and their respective counsel focused on two main issues: (1) the neutrality of the arbitration seat and (2) the seat’s local laws affecting arbitral proceedings.” Jacobs & Paulson, *supra* note 5, at 366.

15. Stromberg, *supra* note 6, at 1344.

16. Jacobs & Paulson, *supra* note 5, at 362.

17. Stromberg, *supra* note 6, at 1344.

18. The New York Convention was drafted based on the Geneva Convention of 1927, “which was the primary arbitration convention in force at that time.” Brette L. Steele, *Enforcing International Commercial Mediation Agreements as Arbitral Awards Under the New York Convention*, 54 UCLA L. REV. 1385, 1392 (2007). Under its terms, this early agreement required that a party seeking enforcement of an arbitral award had the burden of proving the finality and viability of the award. *Id.* The New York Convention revolutionized this harsh requirement to open the doors to international favor of arbitration, “plac[ing] the burden of proving these exceptions on the party seeking to block enforcement, instead of the party defending enforcement. This marked shift in presumption illustrates and enhances a strong policy towards recognizing and enforcing arbitration awards.” *Id.* at 1393.

19. As sovereign entities, states generally expect deference to their choice of domestic arbitration laws. However,

[s]tates which recognise international arbitration as a valid method of resolving commercial and other disputes are usually ready to give their assistance to the arbitral

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Since the New York Convention, 146 countries have agreed to uphold the newfound sanctity of arbitration.<sup>22</sup> Many of these nations have initiated private arbitration legislation to preserve the process domestically and prevent court interference with the implementation and outcomes of contractual arbitration clauses.<sup>23</sup> As a result, “arbitration has become . . . preferred over judicial methods of dispute resolution because the parties have considerable freedom and flexibility with regard to choice of arbitrators, location of arbitration, procedural rules for the arbitration, and the substantive law that will govern the relationship and rights of the parties.”<sup>24</sup> Parties look to arbitration for the perceived benefits of “cost savings, shorter resolution times, a more satisfactory process, expert decision makers, privacy and confidentiality, and relative finality.”<sup>25</sup> This dispute resolution technique, however, is increasingly coming under fire for the same insufficiencies it was designed to solve.<sup>26</sup>

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process. . . . In return, it is to be expected that they will seek to exercise some control over the arbitral process. Such control is usually exercised on a territorial basis—first, over arbitrations conducted in the territory of the State concerned, and secondly, over awards brought into the territory of the State concerned for the purpose of recognition and enforcement.

NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 69 (5th ed. 2009).

20. Jacobs & Paulson, *supra* note 5, at 363.

21. Stromberg, *supra* note 6, at 1345. See also Steven Seidenberg, *International Arbitration Loses Its Grip: Are U.S. Lawyers to Blame?*, 96 A.B.A. J. 50, 52 (2010) (“[The New York Convention] has been an enormously successful international agreement . . . but it requires countries to do more for arbitrations than for foreign court judgments. The New York Convention is the engine that makes international arbitration go.” (quoting Mark W. Friedman, a partner in the New York City office of Debevoise & Plimpton)).

22. Jacobs & Paulson, *supra* note 5, at 363; Cf. *New York Convention Countries*, NEW YORK ARBITRATION CONVENTION, <http://www.newyorkconvention.org/new-york-convention-countries> (last visited Sept. 22, 2011).

23. Jacobs & Paulson, *supra* note 5, at 363.

24. *Id.* (quoting Mark A. Buchanan, *Public Policy and International Commercial Arbitration*, 26 AM. BUS. L.J. 511, 512 (1988)).

25. Stipanowich, *supra* note 3, at 4.

26. *Id.* at 5 (“[T]he literature frequently focuses on various perceived shortcomings, including unqualified arbitrators, uneven administration, difficulties with arbitrator compromise, and limited appeal. There are, moreover, frequent complaints regarding delay and high cost.”).

### B. Evolution of Arbitration Procedures

Since its more modern beginnings, the benefits of arbitration have been tailored to apply to many situations, which has resulted in a change of the general process itself as it is administered in all cases.<sup>27</sup> Two of the key areas which have been affected are discovery and witness examination,<sup>28</sup> which ultimately reflect the different and changing styles of American and foreign attorneys.

Modern international commercial arbitration has its roots in Western Europe, primarily France and Switzerland,<sup>29</sup> though its history comes from several parts of the Western World. Now, as an internationally renowned system, arbitration is utilized and adopted by numerous legal styles and traditions.<sup>30</sup> Because of these differences, however, there has been a residual clash between civil law practiced by the “Continent,” or continental Europe, and common law as championed by the United States and the United Kingdom<sup>31</sup> since the practice was expanded globally.<sup>32</sup> The term of art for this clash has been dubbed “Americanization,”<sup>33</sup> because as international arbitration was “originally a European/civil law phenomenon,”<sup>34</sup> any changes made are associated with America or common law.<sup>35</sup>

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27. *Id.* at 11.

28. Stromberg, *supra* note 6, at 1363-67.

29. Elena V. Helmer, *International Commercial Arbitration: Americanized, “Civilized,” or Harmonized?*, 19 OHIO ST. J. ON DISP. RESOL. 35, 45 (2003).

30. Stromberg, *supra* note 6, at 1363.

31. *Id.* at 1362.

32. Helmer, *supra* note 30, at 35.

[A]n ‘academic confrontation . . . between those trained in the Anglo-Saxon legal profession and those having a Roman law orientation’ continues to produce debates in scholarly writings and at conferences as to how international commercial arbitrations are to be conducted and what is the role of Anglo-American lawyers in the development of international arbitration in general.

*Id.*

33. *Id.* The word was supposedly coined by Stephen Bond, then Secretary General of the International Court of Arbitration, established by the International Chamber of Commerce. *Id.*

34. *Id.* at 36.

35. Depending on the legal perspective of the discussion of “Americanization,” the speaker may describe the phenomenon in one of two ways. First, it could mean “converting European arbitrators to the ‘English language and to the usages of Anglo-Americans . . . , enlarg[ing] the club [of European arbitrators] and . . . rationaliz[ing] the practice of arbitration such that it could become offshore-U.S.-style-litigation.” To the opposition, however, it would take on the meaning that “‘Americanization’ or an ‘American approach’ . . . is often a code word for an unbridled and ungentlemanly aggressivity [sic] and excess in arbitration. It can involve a strategy of ‘total

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## 1. Impact of Internationalization on Discovery

Discovery is one of the main areas that has been affected by common law presence in the world of arbitration.<sup>36</sup> Civil law discovery, called “disclosure,” is a process in which the attorneys from each side simply present to the court the main documents on which their cases are based.<sup>37</sup> Europe finds this simplicity to be a point of pride because it makes adjudication faster, cheaper, and more confidential.<sup>38</sup> With the increasing involvement of American attorneys, however, representing both American and foreign clients in the international arena,<sup>39</sup> the civil law tradition has been giving way to “mass discovery routines of American-style litigation”<sup>40</sup> because of the perception that disclosure does not allow for a full finding of the facts relevant to the case.<sup>41</sup>

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warfare,’ the excesses of U.S.-style discovery, and distended briefs and document submissions.” *Id.* at 35-36.

36. Stromberg, *supra* note 6, at 1363.

37. *Id.*

38. *Id.*

39. See Roger P. Alford, *The American Influence on International Arbitration*, 19 OHIO ST. J. ON DISP. RESOL. 69, 80-81 (2003) (“According to a Chambers Global publication on the ‘World’s Leading Lawyers,’ the trend in the French legal market has been the concurrent decline of the traditional Franco-French firm, with its emphasis on individual superstars, and the rise of the Anglo-American firm, with its emphasis on tight organizational structure and teamwork. Their survey identifies seven of the top eight leading arbitration practices in France to be in Anglo-American law firms.”).

40. Stromberg, *supra* note 6, at 1363. Compared to the narrow civil law requirement to disclose only the documents that are key to the case, the common law discovery rules, though still limited to an extent, appear to be quite broad.

Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense—including the existence, description, nature, custody, condition, and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

FED. R. CIV. P. 26(b)(1). Note the difference between the burdens of the rules; civil law puts the burden of disclosure solely on the party in possession of the evidence, while common law parties have much freer rein to not only request crucial evidence, but any evidence that may or may not lead to crucial evidence.

41. Stromberg, *supra* note 6, at 1363.

[I]n recognizing its benefits, many civil lawyers and arbitrators have begun to accept limited means of discovery in international commercial arbitration. In doing so, limited discovery blends the common law approach, which seeks the production of categories of relevant documents, and individual documents, with the civil law approach, which demands that the documents be identified with reasonable specificity.<sup>42</sup>

Though this compromise was regarding procedure, which is usually not codified to afford the parties greater flexibility in conducting their arbitrations,<sup>43</sup> the International Bar Association adopted a set of model rules based on this formula which could be incorporated into a contractual arbitration agreement.<sup>44</sup>

Despite the more structured approach that institutional rules have been developing for discovery to streamline the process, many arbitrators tend “to be very liberal in the admission of evidence.”<sup>45</sup> “[A]rbitrators tend to be reluctant to refuse admittance to evidence, and . . . tend to go along so no one can say that justice has not been served—so the award will be rendered more bulletproof.”<sup>46</sup> Though it is rare for a court to overturn arbitrators for failure to admit evidence because of the wide deference given to their decisions, arbitrators still have an interest in the display of judiciousness regardless of financial or temporal expense to the arbitrating parties.<sup>47</sup> While this may be an inherent frustration to some parties, others recognize the caution as a necessary aspect of a thorough, satisfactory arbitration.<sup>48</sup> It is important, therefore, in assessing the costs and benefits of arbitration to consider the unique situation of each party and to recognize that a costly inconvenience for some parties may be worth the price.<sup>49</sup>

## 2. Impact of Internationalization on Witness Examination

The other key difference between civil and common law practices lies with the examination of witnesses.<sup>50</sup> Because international commercial arbitration turns primarily on the interpretation of business contracts,

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42. *Id.* at 1364.

43. Helmer, *supra* note 30, at 55.

44. Stromberg, *supra* note 6, at 1364-65.

45. Stipanowich, *supra* note 3, at 15.

46. *Id.* (quoting Telephone Interview by Thomas J. Stipanowich with David McLean, Managing Partner, New Jersey Office, Latham & Watkins LLP (Oct. 7, 2008)).

47. Interview with Thomas J. Stipanowich, William H. Webster Chair in Dispute Resolution and Professor of Law at Pepperdine Univ. Sch. of Law, in Malibu, Cal. (Feb. 11, 2011) [hereinafter Stipanowich Interview].

48. Thomas J. Stipanowich, *Arbitration and Choice: Taking Charge of the “New Litigation,”* 7 DEPAUL BUS. & COM. LAW J. 384, 385-86 (2009).

49. Stipanowich Interview, *supra* note 48.

50. Stromberg, *supra* note 6, at 1363.



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arbitrators tend to focus more on written documents than oral testimony.<sup>51</sup> Civil law traditionally also tends to favor written over oral testimony, and thus, the preference was originally adopted in the development of international arbitration.<sup>52</sup> This is not to say, though, that common law procedure did not have an impact. “Attorneys with civil law backgrounds have come to recognize that examining witnesses, especially through cross-examination, has many benefits.”<sup>53</sup> This realization, like that of the benefits of the discovery process, is not codified in any rules to regulate proceedings in the interest of maintaining the flexibility of arbitration, but the arbitrators are given the discretion to limit the scope of examination and cross-examination.<sup>54</sup> They also tend to participate more heavily in the cross-examination process than a typical common law judge to ensure that the information they receive is complete and accurate.<sup>55</sup> To further ensure that the memorialized record is as useful as possible, condensed summaries of witness testimony are prepared to “promote certainty and common understanding in the witnesses’ testimony by reconciling inconsistencies and adding to the quality of the arbitrator’s decision-making.”<sup>56</sup>

### C. *Common Law Infiltration Into Civil Law Arbitration*

“Americanization” is a topic that has been much discussed for over a decade as the United States has become a more looming presence in international commercial arbitration after the ratification of the New York Convention in 1970.<sup>57</sup> Most notable is the effect that the presence of American attorneys on the international scene has had on procedure, as noted by the differences in discovery and examination of witnesses; “the continuing flow of American newcomers” brings trial tactics that are familiar to common law practitioners<sup>58</sup> but overly aggressive to civil

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51. *Id.* at 1366.

52. *Id.* at 1362.

53. *Id.* at 1366.

54. *Id.* at 1367.

55. *Id.*

56. *Id.*

57. Helmer, *supra* note 30, at 43.

58. *Id.* at 46. *See also* Alford, *supra* note 40, at 83 (“Whether the skills are transferable or successful in international arbitration is not the point. With the overwhelming influence of American law firms on the global scene, the fact that these tactics are tried is altering the atmosphere of international commercial arbitration.”).

practitioners.<sup>59</sup> To understand the course of the changes that American law is encouraging in international commercial arbitration, it is important to trace why there are differences between civil and common law,<sup>60</sup> and from where they stem. The underlying justification for legal procedures and practices appears to generally flow from the social ethics on which they are based. Thus, a comparison of the doctrinal ethics of civil and common law should shed some light on the foundation for each system's procedures and be illustrative of where their principles diverge.

### 1. Civil vs. Common Law Ethics

American law students are indoctrinated with the ethical model standard of "zealous advocacy," which is touted as the quintessential behavior for a practicing attorney.<sup>61</sup> With this high bar in mind, aspiring young graduates apply this requirement to every aspect of legal practice, and to perform any lesser standard reeks of potential malpractice allegations.<sup>62</sup> As a result of this mantra, "[c]ommon law lawyers . . . often[ ] demonstrate[ ] greater energy and training in obtaining, analyzing[, ] and arguing the facts on which most arbitrations are won or lost."<sup>63</sup> Considering this assessment by a Swiss attorney, it seems to be no mystery why European practitioners would be resentful of the strong litigation techniques exemplified by American lawyers that so often tip the outcome of a case in their favor.<sup>64</sup>

By contrast, civil law systems have no such archetypal standard to which their attorneys feel morally and professionally bound.<sup>65</sup> "[T]he rules of professional conduct 'are handed down from generation to generation as some kind of "oral law," uncodified and restricted to prohibitions of the obvious conflicts of interest."<sup>66</sup> Some jurisdictions do not have set guidelines at all, but rather rely on volunteer organizations to develop a code for the noble-minded that has only force of conscience.<sup>67</sup> Far from

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59. Helmer, *supra* note 30, at 35-36.

60. *Id.* at 36-37 ("The whole debate of Americanization of international commercial arbitration springs from what has been called the 'Common Law-Civil Law Divide.'").

61. Stipanowich, *supra* note 3, at 11.

62. *Id.* at 12.

63. Helmer, *supra* note 30, at 47 (quoting Nicolas C. Ulmer, *A Comment on "The 'Americanization' of International Arbitration?"*, 16 MEALEY'S INT'L ARB. REP. 24, 24 (2001)).

64. Helmer, *supra* note 30, at 47.

65. See Mary C. Daly, *What Every Lawyer Needs to Know About the Civil Law System*, 1998 PROF. LAW. SYMP. ISSUES 37, 46 (1998).

66. *Id.*

67. *Id.* See Rona R. Mears, *Ethics and Due Diligence: A Lawyer's Perspective on Doing Business with Mexico*, 22 ST. MARY'S L.J. 605, 609-11 (1991).

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lamenting the lack of ethical guidance, British practitioners, who follow the same undefined principles as civil law attorneys, “th[ink] it quaint that American lawyers fe[el] in need of legal rules for their governance, but they recall[ ] that Americans seem[ ] to need legal rules for everything.”<sup>68</sup>

While the import of these ethical differences may not be immediately apparent, it does explain the impetus behind the techniques utilized by common and civil law practitioners. Common law practitioners are more likely to feel professionally obligated to engage in litigious techniques that meet the standard of “zealous advocacy,” even in the context of arbitration, because they are compelled to do so on behalf of their clients.<sup>69</sup> Civil law practitioners, on the other hand, have the freedom to adapt their techniques to what they believe is appropriate for the situation as there is no firm standard of performance to which they will be held accountable.<sup>70</sup> This conclusion suggests that the aggression of American law that is so loathed by civil law practitioners is unlikely to subside unless the ethical standards ingrained in the minds of American law students are amended to provide for differences between litigious and dispute resolution situations.<sup>71</sup>

68. Daly, *supra* note 66, at 46 n.29.

69. See Stipanowich Interview, *supra* note 47. It is important to keep in mind that the ethical obligations of attorneys in an arbitration are not equated to the rules of litigation; zealous advocacy does not require the Federal Rules of Civil Procedure scope of discovery to be applied to the resolution of every dispute. *Id.* Rather, a client may want or be willing to have less discovery, in which case zealous advocacy would mean finding the fastest and cheapest solution. *Id.* After all, in the words of William Gladstone, “justice delayed is justice denied.” *Id.* Discovery as practiced in litigation has essentially been priced out of the market to the point of impracticality and does not need to be brought to arbitration for a lawyer to meet the standard of ethics. *Id.* See also THE COLLEGE OF COMMERCIAL ARBITRATORS, PROTOCOLS FOR EXPEDITIOUS, COST-EFFECTIVE COMMERCIAL ARBITRATION: KEY ACTION STEPS FOR BUSINESS USERS, COUNSEL, ARBITRATORS & ARBITRATION PROVIDER INSTITUTIONS 26 (Thomas J. Stipanowich ed., 2010) [hereinafter PROTOCOLS].

70. See Catherine A. Rogers, *Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct*, 41 STAN. J. INT’L L. 53, 99-100 (2005) [hereinafter *Regulating Arbitrators*].

[C]ivilian attorneys are assigned an obligation to be ‘independent’ from their clients. In this role, civilian attorneys do not present their clients’ positions in their strongest, most uncompromising form . . . . Instead, they mediate their strongest position, presenting a pre-screened and more restrained view of their clients’ cases to the inquisitorial judge.

*Id.* Accordingly, civil law judges do not interpret the applicable codes and statutes, but rather simply apply the law for the correct outcome. *Id.* at 100.

71. Because of the increasing formalities associated with arbitration and its supposed likeness to litigation,

## 2. Ethical Differences Applied to Arbitration

Though arbitrators are touted essentially as neutral magistrates in the disputes over which they preside, it would be foolish to pretend that they are immune to the influences of their national countries.<sup>72</sup> While this may not be as crucial with the application of procedural rules such as scope of discovery and format of examination, ethical considerations pervade into every aspect of any legal proceeding.<sup>73</sup> However, in order to unify the ethical values of international arbitrators, any standards that are developed “must be linked to the values of the international arbitration system and the procedures that reflect those values.”<sup>74</sup> Because international arbitration is “the only viable means for resolving international business disputes,” the necessary inclination toward increased predictability and accountability must be achieved, but only as governed by a set of ethical standards to which arbitrators can be held accountable.<sup>75</sup>

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[t]he zealous advocate who jealously guards (and does not share) information, who does not reveal adverse facts (and in some cases, adverse law) to the other side, who seeks to maximize gain for his client, may be successful in arbitrations and some forms of mini-trials and summary jury trials.

However, the zealous advocate will likely prove a failure in mediation, where creativity, focus on the opposing sides’ interests, and a broadening, not narrowing of issues, may be more valued skills.

Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers’ Responsibilities*, 38 S. TEX. L. REV. 407, 427 (1997).

72. See Catherine A. Rogers, *Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration*, 23 MICH. J. INT’L L. 341, 376 (2002) (“In the absence of articulated norms and express enforcement mechanisms, arbitrators likely assess the conduct of attorneys based on private—and untested—standards informed by the arbitrators’ legal and cultural backgrounds.”). Therefore, it is impractical to expect ethical norms to “effectively be resolved on an ad hoc basis during proceedings.” *Id.* at 377.

73. The different roles that the various legal systems contemplate for attorneys

reflect the larger cultural values of the societies that produce them. . . . [T]he greater authority of civil law judges reflects . . . a greater acceptance of authority and less tolerance for uncertainty. . . . [T]he expanded control of parties in U.S. proceedings, and the consequent role of the U.S. attorney as strategist and lobbyist, are said to be linked to the American commitment to individualism and an exaltation of due process over efficiency and even fact-finding accuracy. Thus, while legal ethics are often regarded as universal by virtue of their intimate relationship to moral philosophy, they are in fact vitally linked to the cultural values of the systems that produced them.

*Id.* at 394.

74. *Id.* at 395.

75. *Id.* at 422.

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Arbitrators are equated to judges because of the significant control that they have over parties in contractual, statutory, and other legal capacities<sup>76</sup> despite the fact that there are no formal minimum qualifications, including the possession of legal training.<sup>77</sup> Regardless of this questionable disparity, there is little that parties can do legally in the event of arbitrator misconduct because of the confidentiality<sup>78</sup> of the process.<sup>79</sup> Additionally, “arbitration associations ‘have an economic disincentive to enforcing their codes of ethics. There is an inherent conflict of interest for arbitration associations: they must enforce codes of ethics enough to preserve the good name of arbitration, but not so much that they generate unwanted publicity and lawsuits.’”<sup>80</sup> This financially-motivated conundrum is mirrored for the arbitrator as well, who must determine whether there is an ethical need to disclose conflicts of interests<sup>81</sup> which may result in dismissal from the case.<sup>82</sup>

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76. Weston, *supra* note 8, at 452. Arbitrators even have the inherent power to determine their own jurisdiction under the doctrine of competence. NIGEL BLACKABY ET AL., *supra* note 20, at 347. The decision made regarding this authority is given wide deference and only results in a reversal “in very unusual circumstances.” *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 942 (1995). See also *PacificCare Health Sys., Inc. v. Book*, 538 U.S. 401, 407 (2003) (“questions whether [the contractual provisions] render the parties’ agreements unenforceable and whether it is for courts or arbitrators to decide enforceability . . . the proper course is to compel arbitration.”).

77. *Regulating Arbitrators*, *supra* note 70, at 56.

78. Sometimes the process can be too confidential when the parties request, but do not receive, an explanation for the award.

An arbitrator should be free to decide the dispute before him without fear that he will have to explain the basis for his decision, and how he arrived at it, at some later date. If the parties to an arbitration agreement want to know the arbitrator’s reasoning, they may request that he include it in his award . . . . Once an arbitrator issues an award, however, his role is complete and, like a judge or jury, he may not be required to answer questions about why he reached a particular result.

*Hoelt v. MVL Group, Inc.*, 343 F.3d 57, 68 (2nd Cir. 2003) (overruled on other grounds). What the court does not mention is that *unlike* a judge or jury, an arbitrator is hired by the parties, and it would seem that it would be within their rights to demand his full services for their payment, at least to the extent of a written opinion.

79. Weston, *supra* note 8, at 463-64. Because of the confidential aspect of arbitration, there are also “no guarantees of due process, discovery, appeal, or other protections that are available in the judicial system.” *Id.*

80. *Id.* at 469.

81. Interestingly, one of the biggest key differences between civil and common law lies with conflicts of interest.

American attorneys brought . . . practices that profoundly affect arbitrator conduct, such as a compulsively persnickety approach to conflicts-of-interest. . . . [T]he reality and

Thus, it has been firmly established that it is necessary to have a system of ethics to which international arbitrators would be obligated.<sup>83</sup> The process of creating such a system appears to be rather simple; “relatively few direct conflicts appear to exist among national codes of professional conduct.”<sup>84</sup> While the biggest differences appear in the approaches to ethics in civil and common law jurisdictions,<sup>85</sup> even these are deemed to be

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perception of U.S. conflict-of-interest standards contrast sharply with European standards and practices, which permit the same and other close relationships to be legitimately withheld.

*Regulating Arbitrators*, *supra* note 70, at 63. In his article, Alan Rau suggests that the current lack of set ethical obligations leans too far toward the civil law approach:

[A]ll of the arbitrators on international panels are expected to be both impartial and independent of the party appointing them. They may, however—without violating in any way this theoretical obligation—quite acceptably share the nationality, or political or economic philosophy, or “legal culture” of the nominating party—and may therefore be supposed from the very beginning to be “sympathetic” to that party’s contentions or “favorably disposed” to its position.

Alan Scott Rau, *The Culture of American Arbitration and the Lessons of ADR*, 40 TEX. INT’L L. J. 449, 459 (2005). This assessment, however, is insultingly narrow-minded in its assumption that simple commonality of ideology will lead to discriminatory behavior. While ADR was once practiced with the attitude that “anyone who would engage in ADR must of necessity be a moral, good, creative, and of course, ethical person,” the pendulum does not need to swing so far the other direction that any familiarity with a party’s background will warrant disqualification. Menkel-Meadow, *supra* note 71, at 408.

82. *Regulating Arbitrators*, *supra* note 70, at 71-72.

83. See Cyrus Benson, *Can Professional Ethics Wait? The Need for Transparency in International Arbitration*, 3 DISP. RESOL. INT’L 78, 78-79 (2009). A failure to develop a universal code of arbitral ethics

can easily breed procedural unfairness in the particular case, and it matters generally because it attacks the integrity of the system of international arbitration. [Without practical guidance for counsel,] [t]he system of self-policing may become impossible and there may be a gradual deterioration in the standards of legal professional conduct. The international arbitral process would then be brought into disrepute and, once its good reputation was lost, it could take decades to rebuild confidence.

*Id.* See also Menkel-Meadow, *supra* note 71, at 418 (“ADR now needs ‘ethics’ or standards in part because of its successes—it is being challenged from within as well as without.”).

84. Benson, *supra* note 83, at 82.

85. *Id.*

Most common law codes of professional conduct are far more detailed in identifying conduct to be regulated than their civil law counterparts, where lawyer conduct is governed by general standards of integrity and good faith. Further, common law systems of ethics incorporate a lawyer’s duty to the tribunal or court, in addition to that owed to the client. This duty is largely unrecognised in civil law systems.

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unlikely to affect the arbitrators “in aspects that are most relevant to their ethical obligations.”<sup>86</sup> Therefore, the most widely-advocated method for cultivating a system of international arbitration ethical standards is to specify broad standards – “based on adherence to ethical, moral, and ‘good’ non-adversary principles” – that are supplemented by the principles of common law which guide ethical legal processes.<sup>87</sup>

From these standards, several codes could be developed which parties would be able to adopt and adapt to their situations in the true spirit of arbitration.<sup>88</sup> Theoretically, the greater discretion of the parties in governing the conduct of the arbitrators would warrant greater involvement by the institutions, which would hopefully increase the transparency of how the institutions are run and correct the market’s perception of them.<sup>89</sup> While this increased transparency would not necessarily guarantee more ethical arbitrators or outcomes, it could enhance the legitimacy of institutional arbitration, which depends on the appearance of impartiality on the part of the neutrals.<sup>90</sup> Thus, the harmonization of civil and common law traditions in procedural arbitral practices should be applied to the ethical standards as well to create a reliable framework to which arbitrators would be held accountable.

## PART II

### A. *Arbitration’s Full Circle*

Tracing the path of the evolution of arbitration and investigating the influences behind its course are vital to determine where the process is likely

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*Id.*

86. *Regulating Arbitrators*, *supra* note 70, at 109.

87. Menkel-Meadow, *supra* note 71, at 451. For an example of such a set of standards, see Benson, *supra* note 83, at 88-94.

88. *Regulating Arbitrators*, *supra* note 70, at 111. While parties already have the flexibility to create and implement codes of ethics on arbitrators in their agreements to arbitrate, the idea would be to give extra incentive to do so by making available templates to incorporate. *Id.* at 112. Though not discussed by the author, the effectiveness of this new system would rely on the responsibility of the parties’ attorneys in choosing the applicable code—a level of responsibility that has not always been demonstrated in the world of international arbitration.

89. *Id.* at 111-12.

90. *Id.* at 118-20.

to go and what its fate may be. When it was widely introduced as a viable alternative to litigation in the early 1900s, advocates lauded arbitration's key characteristics—efficiency,<sup>91</sup> lower expense, and finality<sup>92</sup>—as a perfect escape. Their tune soon changed however to denounce the process for the same shortcomings from which litigation suffered: “‘judicializ[ation],’ formal[ity], cost[ ], and time-consum[ption].”<sup>93</sup> If this condemning view is accurate, arbitration may be subject to the same backseat position to which it assigned litigation when it rose to the international spotlight as an effective dispute resolution alternative.

Arbitration was implemented globally with little critique for the first century of its prominence; numerous institutions were established to promote its powers, many of which saw significant growth.<sup>94</sup> There is no question of its success, and at one time, as much as ninety percent of international commercial transactions contained arbitration clauses.<sup>95</sup> Arbitration is accepted as an indispensable alternative to litigation and is still much preferred in the international arena despite some concerns about its rules and prominent fora; its value is particularly known to those who have experienced it.<sup>96</sup> However, disapproval of arbitration techniques is now rampant, citing several causes including heavy American influence, nationalization, and overregulation.

#### 1. American Litigation: Bettering International Commercial Arbitration?

The most blatant attempt to blame American influence for the deterioration of arbitration comes from foreign litigators associating it with “judicialization.”<sup>97</sup> American attorneys are often charged with trying to make arbitration procedures mirror those of the U.S. court system “in order to increase its predictability, reliability, and equity.”<sup>98</sup> The result however is

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91. Though the Federal Arbitration Act came long after the introduction of arbitration, it has actually begun to undermine the efficiency of the process it was designed to promote. Dean Witters *Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985) (“The preeminent concern of Congress in passing the Act was to enforce private agreements into which the parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is ‘piecemeal’ litigation . . .”).

92. Stipanowich, *supra* note 3, at 8.

93. *Id.*

94. Stromberg, *supra* note 6, at 1351-52.

95. *Id.* at 1342-43.

96. Stipanowich Interview, *supra* note 48.

97. Helmer, *supra* note 30, at 36.

98. *Id.*



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said to be that those procedural changes convert arbitration into U.S.-style litigation.<sup>99</sup> The implication that Americans becoming involved in international commercial arbitration is the sole cause of its downfall seems to be a bit far-fetched. For instance, despite the fact that the process began in Western Europe, the application of American procedures in stages such as discovery and witness examination has had a lasting impact on arbitration itself.<sup>100</sup> Simply because international commercial arbitration is no longer exclusively governed by civil law does not mean that it will automatically suffer the same fate as the system—American litigation—which has influenced it. Regardless of the truth of this conclusion, civil law systems still insist on circumventing the influence of American techniques, namely by exercising greater control over the substantive arbitral process through increasingly detailed contract clauses.<sup>101</sup>

Further, a certain amount of American influence in almost any industry should be expected per past global trends.<sup>102</sup> One author has cited as many as nine key trends initiated by contact with American litigation styles, none

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99. *Id.*

100. *See supra* nn. 41 & 52 (indicating the willingness of civil law attorneys to incorporate American methods of discovery and examination into arbitration procedures).

101. Rau, *supra* note 81, at 453-54.

In substantial transactions one is increasingly seeing a use of custom-tailored arbitration clauses—often intended to diminish the finality of awards or to increase formality in arbitral procedure. This is surely but one manifestation of what is often described and decried as the “judicialization” or “legalization” or arbitration . . . . The increased involvement . . . of American litigators in transnational arbitration also undoubtedly plays a role; the habits—and perceived duties—of such litigators may, it is said, lead them “to push to enlarge the limited means of appeal and therefore expand the control of the courts over private justice.”

*Id.*

102. Alford, *supra* note 40, at 87-88. Alford draws an analogy to the film industry to imply that American involvement in up-and-coming ideas is inevitable:

[C]inema was born in Paris on December 28, 1895 . . . . Much of the early history of film has its roots in Europe rather than the United States. The greatest films were German, the best editing techniques were Russian, and much of the best equipment was developed in France. But it was the establishment in the 1920s of major Hollywood motion picture studios . . . that led to the golden age of Hollywood. Those studios created an economic juggernaut that assimilated the best and the brightest artists and directors from Europe . . . . Today we all know that the United States is the dominant force in film.

*Id.* And so the same can be true for America’s influence in international commercial arbitration.

of which can take credit for arbitration's potentially deteriorating success.<sup>103</sup> Rather, a different global trend triggered by the increasingly interconnected economies of various nations should be examined – nationalization.<sup>104</sup>

## 2. The Effects of the Natural Nationalization Process

Nationalization “is part of a privatization-nationalization cycle found in many places throughout the world.”<sup>105</sup> It is instigated by a host of effects, including “political ideology, foreign relations, decapitalization of the host country, a desire for increased control and independence, market domination, culture, and even religion.”<sup>106</sup>

The rise of government control over once-private industries began with the growth of fossil fuel use to produce energy; the spike in demand necessitated more resources to meet these quotas, which could only be supplied by the government.<sup>107</sup> At first, the supplying countries only required larger shares of the profits of oil-producing companies, but it was simply a matter of time before the governments “increase[d] their roles in the management of the oil companies’ ventures.”<sup>108</sup> Because the countries themselves now owned such lucrative international industries, any disputes that arose came between their governments.<sup>109</sup>

Though relations between countries have come a long way since the Peace of Nicias,<sup>110</sup> resolving international disputes is still far from perfect. With politics involved with international commercial issues, the number of claims has skyrocketed, as has the amount of money associated with them<sup>111</sup> as the heads of states are perceived to be easier targets, and are connected with far more potential parties through various contractual obligations and bilateral investment treaties.<sup>112</sup> While some countries have responded more aggressively than others,<sup>113</sup> challenging the validity of their own contracts to

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103. Alford, *supra* note 40. Alford lists the following influences: rise of Anglo-American law firms, legal training, style, discovery, choice of law, venue, published precedent, language, and institutional personnel. *Id.*

104. Jacobs & Paulson, *supra* note 5, at 375.

105. *Id.*

106. *Id.*

107. *Id.* at 375-76.

108. *Id.* at 376.

109. *Id.* at 381-85.

110. Slate, *supra* note 9, at 41-42.

111. Jacobs & Paulson, *supra* note 5, at 384.

112. *Id.*

113. Argentina was inundated with requests for arbitration after its 2001 economic crisis “that led to its defaulting on foreign debt and the devaluation of the peso.” *Id.*

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prevent liability, there is no question that the myriad of defense strategies such as expropriation and breach of contract will result in arbitration becoming “more complicated, more costly, and less efficient.”<sup>114</sup> If this assertion sounds familiar, it is; it is the same claim that scholars have made about the effect of Americanization on arbitration.<sup>115</sup>

There are two main procedural solutions that have been proposed by those who express concern with this trend: better delineation of legal principles that could lead to preliminary determinations; and more efficient techniques for discovery and disclosure tactics.<sup>116</sup> First, with the flood of claims that have been brought against the governments of countries who have nationalized prominent producers of crucial resources, it is highly unlikely that they are all meritorious.<sup>117</sup> American litigation disposes of frivolous claims through summary judgments and other preliminary procedures; however, “[o]ne disadvantage of international arbitration is that issues that may be dispositive of a case and appropriate for a motion to dismiss or summary judgment in court litigation may often be considered by arbitrators only after a full evidentiary hearing on all of the issues.”<sup>118</sup> Recognizing this detriment, the suggested solution has been to draft arbitration clauses to include specific language to provide for these determinations.<sup>119</sup> Practically speaking, it would also be prudent for arbitral

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Argentina responded with a multi-layer legal defense strategy: it challenged [the International Centre for Settlement of Investment Disputes]’s jurisdiction to hear the disputes and argued that bilateral treaties do not supersede Argentina’s constitution, which requires claims to be brought before Argentine courts; it proceeded to defend the claims on their merits and asserted the doctrine of sovereign rights and the national emergency clause in its [bilateral investment treaties] to justify its monetary policies; it scrutinized the compliance with contractual obligations by each contractor since the beginning of the contract and threatened termination; it challenged the validity and enforceability of awards, including expanded review by the Federal Supreme Court of Argentina.

*Id.* Though Argentina’s tactics are geared toward economic and global political survival, their effectiveness could lead to similar defenses in other countries. This is harmful because it could draw out the timing and cost of arbitration, particularly with the increase of claims against the governments of the countries involved.

114. *Id.* at 385.

115. *Id.*

116. *Id.* at 386.

117. *Id.* at 384.

118. *Id.* at 397.

119. *Id.* at 398.

institutions to consider such changes to their procedures to encourage the practice more widely in contracts that employ their rules.<sup>120</sup>

Second, the process of arbitral discovery has fallen victim to the cumbersome use of expert witnesses, who may or may not contribute any meaningful information to the cases.<sup>121</sup> Even the most contributive experts impose extra costs and time on the parties to the conflict, and because of their lack of neutrality, detract from the spirit of the arbitration process.<sup>122</sup> Because education of the arbitrators on the central issues of the case is necessary, it not practical to eliminate the role of experts entirely; rather, the proposed remedy has been to increase the transparency of their technical conclusions, and to request that they simply submit their findings with the result to enhance the efficiency of the examination and cross-examination stage.<sup>123</sup>

### 3. Overregulation: Taking Too Much Control from the Parties

Finally, while arbitration is often paraded as a model procedure that maintains flexibility of process<sup>124</sup> and provides a solution, the increase in arbitral institution regulation is beginning to defeat that assertion. The clash between the origins of international commercial arbitration in civil law and the rising influence of American and British common law<sup>125</sup> has necessitated

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120. Currently, the International Bar Association only has a vague reference to preliminary rulings on the issues in its Rules on the Taking of Evidence in International Commercial Arbitration: “[E]ach Arbitral Tribunal is encouraged to identify to the Parties, as soon as it considers it to be appropriate, the issues that it may regard as relevant to the outcome of the case, including issues where a preliminary determination may be appropriate.” *Id.* at 397 (quoting IBA Rules on the Taking of Evidence in International Commercial Arbitration pmbl. 3 (1999)).

121. Jacobs & Paulson, *supra* note 5, at 398.

122. *Id.* at 399. American litigation has come to refer fondly to this head butt of professional, qualified witnesses as “battle of the experts,” which has led to significant debate over who exactly falls within the description of “expert” and when their testimony is considered valid.

123. *Id.* “[A]dditional mandatory disclosures would promote greater neutrality, transparency, and objectivity . . . .” *Id.*

Those additional mandatory disclosures, which would be established early in the arbitration process, should include: the expert’s entire file including draft reports, correspondence, data, documents, and notes used in the evaluation of the issues within his or her expertise; a list of proceedings and cases in which the expert has provided testimony in the previous five years; and if the expert’s work includes any sampling or testing, then the expert and party must take duplicative samples and timely provide them to the opposing party and submit the results of all samples and tests.

*Id.*

124. Stipanowich, *supra* note 3, at 1.

125. *See supra* note 60.

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a litany of rules and treaties to ensure that arbitration maintains its effectiveness.<sup>126</sup> In order for the rules themselves to maintain neutrality, they do not reflect the legal customs or systems of the countries that provide them, ideally to afford the greatest possible flexibility for arbitrators.<sup>127</sup> While this is helpful in conducting the actual arbitration, the disparities amongst the various possibilities have created problems in enforcing the awards and how each country is to treat the credibility of the arbitration award.<sup>128</sup> The goal of the New York Convention was to address these problems, but differences in the interpretation of the Convention language have lessened the effect of this treaty.<sup>129</sup>

While the purpose of the New York Convention was to ensure the finality of arbitral awards and protect them from the uncertainty of judicial review, this end is ironically contrary to the ultimate idea of arbitration as a flexible institution. Not every party that embarks on alternate dispute resolution is seeking finality or an absolute avoidance of the courtroom.<sup>130</sup> Some users of arbitration wish to retain the option of a second opinion in the event that they feel the outcome is unfair, but have no grounds on which to overturn it; in this case, they would incorporate a judicial review provision.<sup>131</sup> This tool allows parties to explore the flexibility of dictating the arbitration proceedings through the language of their contract without committing to the finality that is usually so integral to the process.<sup>132</sup>

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126. See Stromberg, *supra* note 6, 1352-58. There are several global arbitral institutions that have developed model sets of rules for parties to incorporate into arbitration clauses, including: International Chamber of Commerce, American Arbitration Association, London Court of International Arbitration, China International Economic and Trade Arbitration Commission, and Hong Kong International Arbitration Centre. *Id.*

127. Helmer, *supra* note 30, at 55.

128. Kenneth F. Dunham, *International Arbitration is Not Your Father's Oldsmobile*, 2005 J. DISP. RESOL. 323, 343 (2005).

129. *Id.*

Procedures are left to national arbitration laws, and this problem could be remedied by uniform procedural rules of enforcement. There is also a need for consistency among nations in the application and interpretation of the convention. . . . Some nations such as Canada do not consider the convention as controlling over its own laws.

*Id.*

130. Stipanowich Interview, *supra* note 48.

131. *Id.* See also Stipanowich, *supra* note 3, at 17-18.

132. See *Cable Connections, Inc. v. DIRECTV, Inc.*, 44 Cal.4th 1334, 1355 (2008). The California Supreme Court recently confirmed that parties can agree to wider judicial review of an

However, the stringent requirement of the New York Convention to recognize arbitration awards without including the courts<sup>133</sup> threatens to impede on this option.<sup>134</sup>

An additional pitfall for the suggestion of uniform, effective arbitration rules comes from the fact that the arbitrator's authority is dictated by the scope of the contractual language,<sup>135</sup> allowing parties to create their own process. The force and deference of arbitration clauses have improved since arbitration has risen to prominence, upheld even in the face of allegations of fraud or illegality.<sup>136</sup> The purpose for safeguarding tailored arbitration clauses is to promote the freedom of parties to contract and to protect the agreements that they make, but for the system to be able to handle and process the "wide range of business disputes, including many large, complex cases, arbitration procedures have tended to become longer and more detailed."<sup>137</sup> Thus, the goal of providing flexibility to arbitrating parties by allowing them to devise their own procedures and choose their own forum has in fact led to stronger and more varied regulations that have taken away this flexibility.

The increasingly formality and rule-oriented nature of arbitration has forced parties to seek alternative courses, still within arbitration but by navigating around the rules. By drafting international agreements "with greater precision and . . . intentionally choosing what law they want to govern interpretation and enforcement of their agreement," parties avoid the

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arbitration award through a specific provision. *Id.* This provision will ideally state the level of finality that the parties expect from the award, and in what circumstances it can be appealed. *Id.* "If the parties constrain the arbitrators' authority by requiring a dispute to be decided according to the rule of law, *and* make plain their intention that the award is reviewable for legal error, the general rule of limited review has been displaced by the parties' agreement." *Id.*

133. Though the California Supreme Court had the authority to uphold judicial review provisions in *Cable Connections* for state arbitrations falling under its jurisdiction, the federal courts incorporated the more stringent New York Convention requirements for judicial review in the Federal Arbitration Act. For example, the Ninth Circuit determined that arbitrators do not "exceed their powers" . . . when they merely interpret or apply the governing law incorrectly;" rather, there must be a "manifest disregard of law" or an irrational decision for the courts to even consider reviewing the award. *Kyocera Corp. v. Prudential-Bache Trade Services, Inc.*, 341 F.3d 987, 997 (9th Cir. 2003). Considering the standard that appellate courts use to review lower court decisions, arbitral awards tend to receive far more deference than the opinions of federal judges.

134. While flexibility is important to preserve arbitration as a process, judicial review provisions create too many difficulties for users, according to Professor Stipanowich. Business users in particular should look to the grounds of vacatur in the Federal Arbitration Act for relief if necessary; if more options are desired, a carefully written appellate arbitration procedure can be adopted in the contract. Stipanowich Interview, *supra* note 49. See also PROTOCOLS, *supra* note 69, at 38-42.

135. Dunham, *supra* note 129, at 328.

136. Stipanowich, *supra* note 3, at 10.

137. *Id.* at 11.

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involvement of intervening substantive law that would otherwise fill the gaps.<sup>138</sup> Still, it is unfortunate for parties to have to evade a process that was designed to maximize the efficiency of the resolution of their disputes simply because it became too entangled in its own technicalities.<sup>139</sup>

### PART III

#### A. *Mediation: The New Alternative to Arbitration*

Despite the mounting concern over the effectiveness and longevity of arbitration, it remains certain that most countries still prefer alternative dispute resolution processes to the rigors of litigation.<sup>140</sup> “Many nations are disenchanted with litigation . . . because of the significant problems surrounding the recognition and enforcement of litigated judgments. In addition, many nations generally mistrust the supposed neutrality of foreign legal systems.”<sup>141</sup> Arbitration was a natural successor to this dying system, but now suffers from its own impracticalities, including, as noted, a perceived American influence, more centralized national governance, and increased arbitral institutional regulation.<sup>142</sup> Though arbitration was once the favored alternative dispute resolution because of its predictable enforcement practices,<sup>143</sup> for some scholars, the next logical step is to “make greater use of conciliation [mediation] as a pathway to the settlement

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138. *Regulating Arbitrators*, *supra* note 70, at 66-67.

139. While it may seem that arbitration is essentially shooting itself in the foot with its overregulation, it should be noted that there are certain parties practicing arbitration who welcome the strict structure that has been created by the institutions. See Menkel-Meadow, *supra* note 71, at 408 (“To the extent that ADR has become institutionalized and more routine, it is now practiced by many different people, pursuing many different goals.”).

140. Julie Barker, *International Mediation—A Better Alternative for the Resolution of Commercial Disputes: Guidelines for a U.S. Negotiator Involved in an International Commercial Mediation with Mexicans*, 19 LOY. L.A. INT’L & COMP. L.J. 1, 5-6 (1996).

141. *Id.* at 5.

142. In addition to the downfalls of international commercial arbitration that were the focus of the preceding section, some other problems that have contributed to decreasing popularity are: involvement of multiple national legal systems; expensive, lengthy, adversarial, adjudicative-type procedures; uncontrolled result; and limited appellate review. *Id.* at 7.

143. Steele, *supra* note 19, at 1385.

of economic and business disputes, rather than automatically taking the more complex arbitration route to dispute settlement.”<sup>144</sup>

Mediation is often viewed as a more conciliatory method by which to resolve a dispute<sup>145</sup> as compared to arbitration because its key purpose is to facilitate an agreement between the parties<sup>146</sup> rather than to impose one.<sup>147</sup> As a result, there is no guarantee of an outcome,<sup>148</sup> but those that are forged are thought to be more satisfying for the parties, particularly as mediation is designed to address the “non-arbitrable” issues such as “intangible feelings, personal interests, and emotional concerns.”<sup>149</sup> Thus, one of the most lauded benefits of mediation is the preservation of the business relationships in which the parties were engaged before the dispute arose.<sup>150</sup>

### B. Exploring the “Unique Benefits” of Mediation

To evaluate whether mediation is truly an effective way to circumvent arbitration *and* litigation, the merits of the processes should be directly compared. Three of mediation’s most boastful characteristics are: the potential creativity of the outcomes; the informality of the proceedings, leading to a faster and cheaper result; and the ability of the parties to discuss their positions so that they feel that their views have been considered.<sup>151</sup> To assume, however, that none of these features could be achieved in arbitration is to ignore one of arbitration’s fundamental premises – its flexibility. Arbitrators can be creative with their awards so long as they do not overstep

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144. Barker, *supra* note 140, at 8 (quoting Linda C. Reif, *Conciliation as a Mechanism for the Resolution of International Economic and Business Disputes*, 14 *FORDHAM INT’L L.J.* 578, 580-81 (1990-1991)).

145. See Int’l Chamber of Commerce, *2009 Statistical Report*, DISPUTE RESOLUTION LIBRARY (2009), available at <http://www.iccdri.com> [hereinafter *Statistical Report*]. Mediation is one of the International Chamber of Commerce’s token ADR processes; appropriately, the ICC’s version of ADR stands for “Amicable Dispute Resolution,” rather than the traditional American “Alternative Dispute Resolution.” *Id.* Perhaps most significantly, the ICC does not include arbitration in its classification of ADR as America includes it in its own version. This rather telling difference demonstrates the global disillusionment with arbitration as a non-adversarial process, though it is still often perceived as such in the U.S. as compared with the vicious American litigation system.

146. *Id.* at 10.

147. Mediation has been an important technique for centuries. Abraham Lincoln used a key neutral tactic to learn the true interests of a slandered client in order to win her an apology and save the opponent from bankruptcy. *Lincoln’s Lessons*, *supra* note 2, at 19-20.

148. Barker, *supra* note 140, at 10.

149. *Id.* at 8.

150. *Id.* at 10.

151. *Id.* at 9.



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the bounds of their discretion.<sup>152</sup> Additionally, as arbitration is a creature of contract,<sup>153</sup> the parties have the choice of how formal the proceedings will be, including the possibilities of making their own presentations to the arbitrators to ensure that their feelings are considered.

Other “distinct” attributes of mediation are its wide application to any kind of conflict and the confidentiality of the process.<sup>154</sup> Arbitration, though, has never been limited to a particular type of field, and also assures its users of the utmost confidentiality.<sup>155</sup> Thus, the purported advantages of mediation over arbitration are actually common to both processes because of their comparable flexibility that can be found in alternative dispute resolution techniques.

While mediation shares many of its qualities with arbitration and other ADR processes, it still retains a personality of its own. Its advocates tout the absence of a binding decision, the ability to solve deeper, relational issues, and increased cultural sensitivity.<sup>156</sup> Though these may be valuable considerations in circumstances where the parties are willing to take the time

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152. Steele, *supra* note 19, at 1393. According to Article V(1) of the New York Convention, arbitration awards may be unenforceable if “(c) the arbitrator acted outside his authority.” *Id.* They may similarly be invalid if “[t]he recognition or enforcement of the award would be contrary to the public policy of that country.” *Id.* Though written in broad terms, these provisions are construed rather narrowly to give arbitrators broad discretion in making their awards. *Id.* at 1394. Rather, the most important limitation on arbitration awards that must be recognized is the scope of the arbitrator’s authority, delineated by the contractual terms. See NIGEL BLACKABY ET AL., *supra* note 20, at 107.

An arbitration agreement confers a mandate upon an arbitral tribunal to decide any and all of the disputes that come within the ambit of that agreement. It is important that an arbitrator not go beyond this mandate. If he does, there is a risk that his award will be refused recognition and enforcement under the provisions of the New York Convention. Article V(1)(c) provides that recognition and enforcement may be refused: “If the award deals with a difference not contemplated by or not falling within the terms of the submission to the arbitration, or if it contains decisions on matters beyond the scope of the submission to arbitration.”

*Id.* The same restriction on scope similarly applies to mediation as a fellow contractual delineation.

153. Stipanowich Interview, *supra* note 48.

154. Barker, *supra* note 140, at 9.

155. Stipanowich, *supra* note 3, at 4.

156. See generally Barker, *supra* note 140. The author discusses benefits of mediation like control over process and outcome, but without considering that with the control comes the obligation to agree on how to control these aspects to make mediation viable. Considering the complexity of party interaction on the international level generally, it is questionable as to whether this approach would be preferable.

to engage in such therapeutic tactics, these practices are not appropriate in the international commercial setting. Where a commercial agreement is at stake in today's fast-paced business world, an assured outcome is crucial, which is one reason to value arbitration.<sup>157</sup> And although it would be ideal to preserve a good business relationship where one exists, this is not always the case, making the outcome of the dispute the most important focus, not the parties' personal issues; regardless, with the plethora of commercial options that exist globally, the time sacrificed hashing out individual differences is usually ill-spent.<sup>158</sup> Finally, cultural sensitivity is very important on the international level, but those who wish to put mediation at the forefront of global ADR ignore the possibility that arbitration could incorporate this beneficial technique. By encouraging arbitration institutions to train their arbitrators to respond to ideological differences, arbitration could take a page from mediation's book in making itself a more viable process.

### C. *The Practicality of Mediation as the New Arbitration*

Because of the early prominence of arbitration in the international field, it has gained more deference than mediation amongst countries that recognize its usefulness. The New York Convention provides that its signatories uphold foreign arbitration awards without judicial review, except under a limited set of circumstances.<sup>159</sup> As a result, the treaty "plays a vital role in the predictability of international business" because it gives a set of guidelines that have led the way for precedential decisions on which arbitrators can rely for consistency in their opinions.<sup>160</sup> Additionally, the Convention only recognizes those awards that are "binding" on the parties to

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157. "Even if mediation does not lead to a resolution, the parties are no worse off because they may still take advantage of arbitration or litigation." Barker, *supra* note 140, at 10. This assessment is overly optimistic because it ignores the potentially disastrous consequences that delays can have in the commercial world. The time taken to engage in a good-faith effort to mediate could cost a company significantly more than is worth the questionable outcome of the attempt. Additionally, at this point in the conflict, it is probable that the parties have engaged in negotiations to resolve the issue amicably, likely with the help of sophisticated counsel, which makes successful mediation even less likely.

158. Though preservation of party relationships is usually not a prioritized practice of arbitration and is generally seen as a key benefit of mediation, there are arbitral techniques that focus on future contracts. For example, interest arbitrators are "expected . . . to devise the actual contract provisions that will bind the parties during a future term." Rau, *supra* note 81, at 473. This type of arbitration, however, is generally not chosen in the international commercial context because the resulting contractual relationship is usually not as important as the resolution of the immediate issue. *Id.*

159. Steele, *supra* note 19, at 1393.

160. *Id.* at 1394.

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it, excluding, for the most part, mediation agreements, unless they have been approved by a court.<sup>161</sup> Because mediation is classified as a “noncompulsory process,” even the clauses that commit parties to its procedures are given less force than arbitration clauses.<sup>162</sup>

Though mediation has not overtaken arbitration in the way that arbitration replaced litigation,<sup>163</sup> its value is not unknown. “Increasing academic and professional interest in other ADR methods is, to a great extent, a reaction to arbitration’s deteriorating technical advantages, since

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161. *Id.* There has been much debate over the meaning of “binding” and whether it can be extended to mediation agreements interpreted as contracts, though international legal trends suggest that the Convention should be limited solely to arbitral awards. *Id.* at 1396-97. Though it would be ideal to assume that as voluntary settlements, mediation agreements would be voluntarily carried out, the failure to establish an enforcement mechanism would be naïve and ignorant of the realities that often follow amicable resolutions. *Id.* at 1387.

162. *Id.* at 1399. Regarding the comparatively voluntary nature of arbitration and mediation, “[b]oth arbitration and mediation require consent to initiate the process, but mediation participants retain the right to terminate the process at any time. Once parties initiate arbitration, they are bound by the arbitrator’s decision.” *Id.* at 1399 n.87 (citing Ellen E. Deason, *Procedural Rules for Complementary Systems of Litigation and Mediation-Worldwide*, 80 NOTRE DAME L. REV. 553, 589 (2005)).

Mediation is a fundamentally different process than arbitration. . . . The decision of whether to settle and on what terms is left to the parties. Mediation convening and due process standards are unique because the mediator does not bear binding decision authority. Since agreement is made by consent, parties are generally free to create value with their settlement—for example, by developing new business relationships that were not originally contemplated.

Steele, *supra* note 19, at 1399. *See also* NIGEL BLACKABY ET AL., *supra* note 20, at 341 (“An arbitral tribunal may only validly resolve those disputes that the parties have agreed that it should resolve. This rule is an inevitable and proper consequence of the voluntary nature of arbitration. In consensual arbitration, the authority or competence of the arbitral tribunal comes from the agreement of the parties; indeed, there is no other source from which it can come.”). This is a reflection of the principle that alternative dispute resolution methods are primarily creatures of contract and only extend as far as the parties have consented by agreement. Stipanowich Interview, *supra* note 47.

163. Though the number of cases filed for ADR with the ICC doubled in 2009 as compared to the past seven years (90% of which were referred to mediation), the total came to twenty-four compared to the record 817 arbitration cases filed. *Statistical Report*, *supra* note 146. While the number of ADR cases has been steadily rising, so has the number of arbitration cases, indicating the tenacious hold that arbitration retains in the world of international disputes. Unlike litigation, it appears that its influence is unlikely to fade in the near future. *But see* Jacqueline M. Nolan-Haley, *Mediation: The “New Arbitration”* (Fordham Law Legal Studies Research Paper No. 1713928), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1713928&http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1713928](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1713928&http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1713928) (suggesting that arbitration’s popularity is decreasing in favor of mediation).

the institution can no longer be indisputably regarded as the cheap, expeditious, and informal mechanism it was once advertised to be.”<sup>164</sup> Arbitration is being substantially changed by mediation; with more mediation hearings before arbitration, cases are increasingly settled, which reduces the need for arbitration.<sup>165</sup>

With mediation as a rising dispute resolution trend, however, the concern is for it to truly follow the path of arbitration, and to lose its effectiveness in the quagmire of misuse and overregulation.<sup>166</sup> The natural tendency for legal procedures is for them to become rigid and reflexive because lawyers are formal and process-oriented, and as processes grow, they change.<sup>167</sup> While this change may not be deliberate, it comes with the experience of using mediation, and does not necessarily have to have a negative effect.<sup>168</sup> Arbitration has evolved to be the method it is today, and though it is no longer as fast as it once was, it is not necessarily less efficient,<sup>169</sup> and may even afford greater justice because of the increased attention to procedural and substantive fairness. Thus, mediation will evolve into its role as it rises as a choice for the resolution of international commercial disputes.

The key issue with the contention between mediation and arbitration is that their respective supporters tend to see them as mutually exclusive instead of being more or less appropriate in particular types of situations.<sup>170</sup> Rather than sharing the spotlight, they are viewed as competitors for the

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164. Amr A. Shalakany, *Arbitration and the Third World: A Plea for Reassessing Bias Under the Specter of Neoliberalism*, 41 HARV. INT’L L.J. 419, 438 (2000).

165. Stipanowich Interview, *supra* note 48.

166. There are two uses for arbitration that Shalakany denotes in his commentary: technical and political. Shalakany, *supra* note 164, at 434. Though he readily admits that the technical uses for arbitration have significantly devolved, he cautions the reader against underestimating the lasting political effects of arbitration. *Id.*

[A]rbitration’s political advantages . . . are yet intact and growing all the more indispensable with the current surge of foreign investments in emerging markets. The most serious residual advantages of arbitration thus appear to be political, chief among which is arbitration’s ability to offer a legitimating medium for the effective disempowerment of national legislative potentials.

*Id.* “However, ADR advocates usually disregard arbitration’s political advantages—advantages that both comprise and far surpass those of alternative ADR mechanisms.” *Id.* at 438.

167. Stipanowich Interview, *supra* note 48.

168. *Id.*

169. *Id.*

170. See Barker, *supra* note 139, at 8 (supporting an in-text quote by a Canadian law professor who stated that mediation is the way for international commercial disputes).

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vacancy that litigation left when it was pushed aside in favor of ADR methods.

### CONCLUSION

From its very beginnings, arbitration has been developed to serve the noble cause of keeping peace between international parties. Though the nature of these conflicts has evolved significantly, the practice is still in use, and has risen to a position of international notoriety for its famed cheaper, faster, and more effective and final results. With arbitration's more widespread use, however, the need to adapt its benefits to more kinds of conflicts has converted these benefits into detriments that are deplored by champions of other forms of dispute resolution.

The start of international commercial arbitration can be found in Western Europe, which practices primarily civil law techniques. With the increased economic interaction between countries, disputes began to arise, and the impracticalities of global litigation were quickly revealed. The key problems—impracticality of enforcement, long duration, legal and cultural barriers, amongst others—saw a solution with arbitration, and it was developed through the attention of arbitral institutions and international treaties.

The ratification of the New York Convention by the United States led to an increase in American involvement, which subsequently led to accusations of “Americanization” of the international commercial arbitration system. Though admittedly U.S. litigation techniques have found their way into arbitration practices, the fact that they are retained suggests that they have had a more positive influence than not.

That arbitration proceedings are becoming lengthier, more expensive, and more varied throughout the world has been credited to involvement by U.S. attorneys. To assert, however, that U.S. participation has single-handedly destroyed the effectiveness of arbitration is irresponsible, especially given the positive impact that it has had on the two techniques discussed; this connection even proposes the idea that if any positive changes are to come to international commercial arbitration, perhaps they should come from the United States.

Other factors must be taken into consideration as well, and the rise of nationalization and overregulation of arbitration proceedings are more likely to be the culprits. Government-led companies are susceptible to more claims than those that are privately owned, and so are more likely to try to tweak proceedings to protect themselves at the expense of their efficiency.

Additionally, the application of arbitration to a wider variety of disputes requires more specific, stringent rules, which by their very nature deprive parties of the ability to manipulate the process.

With its notable success and domestic popularity in many countries, including the United States, arbitration will not likely be ruled obsolete, at least in the near future. However, its benefits in the international arena are quickly eroding, making way for other types of dispute resolution to replace it as it replaced litigation. It is important to recognize the fate of international commercial arbitration, if not to revive it, then to prevent the same deterioration of its potential successor.

Mediation has attempted to rise to the position of that successor, claiming superficially distinguishing characteristics that are actually inherent to the flexibility of arbitration. With its increasing attention, however, mediation runs the risk of falling victim to its own advantages of which arbitration has been found guilty.

Rather than try to replace arbitration, mediation should fall into its own niche, and the value of each should be recognized for its potential. For all of the pros and cons of the processes, arbitration is ultimately most valuable for resolving conflicts that are time-sensitive and often routine. Mediation, on the other hand, is beneficial in situations where relationships need to be preserved, the disputes are less pressing, and the outcome should be more careful and detailed in its treatment of each party. Thus, each of the procedures is appropriate in its own context, which shifts the responsibility to the legal community to determine what the parties' interests are and which method is more appropriate for the situation.

Creation through contract, using this system of assigning arbitration and mediation, would still be effective; clauses could simply state that matters pertaining directly to the terms of the original contract would be resolved through arbitration, while other disputes, such as future contracts or subsequent negotiations, could be referred to mediation.

Arbitration is already beginning to show signs of wear and tear from misuse because it is being overly employed in too many inappropriate situations. The key to preserving ADR processes is to use them properly, as the rules governing each are designed to apply to the types of conflicts for which they are designed. The beauty of their flexibility is that if there does need to be a change made, it can be so done without detrimentally affecting the process. The carelessness with which arbitration has been treated as it has been flung into every conceivable contract has deteriorated the process. By realizing this problem, the legal community can take a proactive approach to prevent the successive decline of every ADR process when it is brought in to replace the previous technique, starting with the prevention of arbitration from going the way of the Greeks.