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From the perspective of the arbitration practitioner, one may well wonder about the seriousness of those who are responsible for drafting international contracts. Nevertheless, international contract drafters tend to complain loud and clear about the defects of the international arbitral process. Arbitration, they say, has become too cumbersome, too expensive, and too legalistic—in sum, too contaminated by the habits of court litigation. Put on the defensive and consumed by guilt, arbitration specialists have quickly addressed such charges and have devised solutions to the alleged problems. The arbitration practitioners, however, have typically ignored the suggested solutions.

For example, in 1988 the International Chamber of Commerce (ICC) responded to the call for Alternative Dispute Resolution (ADR) methodologies as a way toward a less costly and disruptive method for resolving contractual disputes by reforming its Conciliation Rules. The response to this reform, however, has been underwhelming. Despite the simplicity, flexibility, and low cost of the process, and, more importantly, despite its significant success rate, parties have not taken advantage of this new solution. In fact, since the new ICC Conciliation Rules came into force, the number of Requests for Conciliation has been less than three percent of that of Requests for Arbitration.[1]

As a further example, in the 1970s the international arbitral process was perceived as having failed to provide more creative solutions to problems associated with long-term contracts than were available in

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1. Eric A.Schwartz, *International Conciliation and the ICC*, ICC INT'L CT. OF ARB. BULL., Nov. 1994, at 5.

ordinary courts. The life of a long-term contract depends on its ability to fill in gaps or make adjustments in light of changing circumstances. Without this ability, the contract may not last long enough to amortize the investments necessary, for example, to develop a natural gas field and its transport system. However, simply bringing such questions to arbitration may not guarantee resolution under traditional norms. (For example, the common law has a well-known aversion to enforcing "agreements to agree," and the civil law is similarly reluctant to enforce a bargain if the price cannot be determined by reference to objectively defined criteria.) Thus, in 1978 the ICC instituted the Standing Committee for the Regulation of Contractual Relations. Its purpose is to provide prompt decision-making either in the form of recommendations, which the parties undertake to consider in good faith, or to issue decisions which, while not enforceable as awards, the parties agree to respect as if they were provisions of their contracts.[2]

This initiative, however, has not been favorably received. In fact, no one has ever called upon the Standing Committee to act. Indeed, a report by Mr. Yves Derains, approved by the ICC's Commission on International Arbitration and published in *The ICC International Court of Arbitration Bulletin*, recommends that the ICC abandon this initiative.[3]

The 1990 Rules regarding Pre-Arbitral Referee Procedure offer a third and final example of the practice of the ICC.[4] This example is particularly relevant since the principal objective of the Referee initiative was to remedy the problems caused by the slowness of the arbitration process. Provisional remedies, to have any practical effect, need to be granted in a shorter period of time than is required to form an arbitral tribunal. The ICC Referee Rules are ambitious in scope, creating the authority to grant full injunctive relief. Although an ICC referee's decision is not an award, it is nevertheless binding on the parties; failure to comply may lead to sanctions by downstream arbitrators. The principle behind this initiative was a valid one. In its absence the only practical source of provisional measures are national courts, and in the international context, these courts may not always be neutral, experienced, or indeed authorized by their own laws to grant adequate relief.

2. *See* W. LAWRENCE CRAIG ET AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION § 38.04 (2d ed. 1990).

3. Yves Derains, *Report on the ICC Rules on the Regulation of Contractual Relations*, ICC INT'L CT. OF ARB. BULL., Nov. 1994, at 31.

4. *See* Craig, *supra* note 2, § 38.03.

It should be clear from the illustrations above that, no matter how clever an invention might be, one should not be too eager to revolutionize the international process. Parties who have actually participated in an arbitration tend to be very articulate about its shortcomings. Contract drafters, however, have been unable to learn from those experiences, or even to consider the possibility of new solutions.

In other words, WIPO Expedited Arbitration may well turn out to be heralded by critics only to "fail at the box office," which would force us to question whether people really know what is good for them.

Putting aside these thoughts and considering the Expedited Arbitration mechanism on its merits, one can see that WIPO is offering the international community a choice between two systems of arbitration.

The standard approach gives priority to what might be called legal security. Although it may be that in ninety percent of arbitrations a single experienced arbitrator studying an abbreviated file for fifty hours will reach essentially the same conclusion as a three-member tribunal after 1,000 hours of work, the risk of failure in the remaining ten percent is for most parties sufficient, especially in view of the large stakes involved in international cases, to justify the greater costs in terms of time and money incurred by a three-member tribunal.[5]

The alternative approach, Expedited Arbitration, is designed for parties who consider time to be of the essence, and who are willing to accept the marginal reduction in legal security for greater speed and lower costs.

Some parties may consistently opt for Expedited Arbitration whenever they can persuade the opposing party to accept it. One can thus imagine a situation in which companies with a steady, high volume of transactions, none of which is a dominant part of their business, would take a somewhat actuarial view of disputes. In such a situation, the companies would expect that a certain percentage of their contracts would give rise to disputes, and (while they would try

5. At least since about 1387, when Chaucer's *Canterbury Tales* are thought to have been first published, the English have been dubious about quick fixes:

"Ther nys no werkman, whatsoever he be,
That may bothe werke wel and hastily;
This wol be doon at leyser parfitly."

GEOFFREY CHAUCER, *The Merchant's Tale*, *in* THE CANTERBURY TALES 386, 401 (W.W. Skeat ed. 1973). Some would say that in their quest for perfect justice the English have sometimes gone to the opposite extreme, and that too much "leyser" can be a bad thing.

to win them all) they would occasionally accept losing a case. Accordingly, they would be unwilling to spend twice as much money or twice as much time to improve their success rate by a mere ten percent.[6]

Others may prefer Expedited Arbitration because of a cynical belief that a three-member tribunal offers no more legal security than a sole arbitrator, on the assumption that an error by the presiding arbitrator will only be reinforced by a party-appointed arbitrator. While my own experience is contrary to this cynical view, there can be no accounting for the variety of human motivations, and little surprise when people do the right thing for the wrong reason.

More sophisticated parties consider both alternatives and opt for one or the other according to the circumstances. However, in view of the scarce attention given to past ICC initiatives by contract drafters, one might in fact doubt the wisdom of allowing *à la carte* use of these mechanisms.

There would be little use here in reviewing the Expedited Arbitration Rules, since the terms are fairly clear.

The drafting committee decided to provide a list of how these rules diverge from the ordinary Arbitration Rules. One might argue that it would have been preferable to reproduce the complete text including the alterations. Had we done that, however, some would have certainly argued that it would have been better to show only the alterations. In practice, this should not cause any problems.[7]

The essence of WIPO Expedited Arbitration may be summarized in two phrases: (1) constant appointment of a sole arbitrator; and (2) tightening of deadlines from beginning to end. Specific provisions of the Expedited Rules serve to further refine these two fundamental features. The end result of this process is an award which is as final, binding, and enforceable as any other. It is simply produced faster.[8]

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6. The savings reasonably to be anticipated in Expedited Arbitration relate to: (i) the time value of money, which is an obvious motive for wanting quick decisions; (ii) the fact that legal fees ought to be far less where the well-known maxim "work expands to fill available time" is reversed; and (iii) the systematic elimination of co-arbitrators. On the other hand, the fees payable to the sole arbitrator in Expedited Arbitration will be no less than those payable in ordinary arbitration. Indeed, it may be that accelerated proceedings may be so disruptive that they justify fixing the sole arbitrator's fee at a higher level within the *ad valorem* range.

7. The WIPO Arbitration Center makes available upon request the consolidated text of the Expedited Arbitration Rules, with modifications appearing in bold-face type.

8. Two special provisions are worthy of mention in this context. Article 53(b) of the Expedited Arbitration Rules provides that hearings must be convened within 30 days of receipt of the Statement of Defence, and that only in "exceptional circumstances" may they last more than three days. *Expedited Arbitration Rules*, WIPO art. 53(b) (copy on file

Thus, the remaining questions for drafters of dispute resolution clauses are whether they believe arbitrations can be conducted more quickly without becoming hasty, and whether less expensive inevitably means "cheap."

Fast-track arbitration received renewed attention in Europe as a result of a large number of cases decided by a tribunal constituted under the Rules of the International Chamber of Commerce in late 1991. In one of these disputes, the price of a commodity was to be redetermined under a contract requiring the new price to be established within 60 days of the Request for Arbitration, half of this period constituting the standard thirty day limit available for submission of the response under the ICC Rules. Under the chairmanship of Professor Hans Smit, the arbitral tribunal received the file on December 20, 1991, ordered all additional written materials to be submitted by December 30, 1991, held a one day hearing on the merits on January 2, 1992, and rendered an award only 36 hours later (even though the ICC Court did not issue its decision until January 7, 1992). This case generated much discussion. The ICC itself published information about this new approach.[9]

At the same time, it was realized that this case involved an unusual set of circumstances: cooperating parties from similar business cultures (the United States and Canada); able and cooperating counsel; a contractually stipulated time limit justifying powerful procedural initiatives by the arbitral tribunal; and last, but not least, a panel of compatible, competent, and energetic arbitrators.

Could this example serve as a model for parties to replicate such speed-inducing factors? That is precisely what WIPO has set out to do. It remains to be seen whether there will be any takers and, if so, how satisfactory the process will turn out to be.

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with author). Article 55(a) requires that experts named by the arbitrator must complete their mission within 30 days. *Id.* art. 55(a) (copy on file with author).

9. *See generally* ICC INT'L CT. OF ARB. BULL., Nov. 1992.