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THE RESOLUTION OF INTERNATIONAL BUSINESS DISPUTES THROUGH COMMERCIAL ARBITRATION

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FOREWORD

Most of the material presented in this paper was researched as part of an M.S. thesis at Cornell. It was conducted under the supervision of Dr. Max E. Brunk. Virtually all of the information contained within this paper was obtained from personal interviews, questionnaires and telephone interviews with exporters, government officials, trade representatives, arbitration experts and attorneys. In addition, the author attended an arbitration hearing.

I. INTRODUCTION

The importance of U.S. agricultural exports to the American domestic economy and the world economy is well established. Domestically, one out of every three crop acres planted is for ultimate foreign consumption. Large foreign markets allow U.S. producers to expand their farms to realize economies of scale. Jobs are created and farm incomes rise. Substantial foreign exchange earnings from agricultural exports have narrowed the trade deficit and, in effect, permit U.S. consumers to buy more goods from abroad.

Internationally, American farms supply essential commodities to many countries not having this ability. More affluent countries, intent on raising their standard of living, especially diets, buy large quantities of grain which are subsequently used to increase livestock herds.

The pivotal role of U.S. farm goods in maintaining adequate supplies in many foreign countries is balanced by the importance of foreign markets to U.S. producers. The two groups - U.S. producers and foreign importers - are necessarily and irreversibly interdependent. Recognizing this symbiotic relationship, Bob Bergland, Secretary of Agriculture, in 1977 stated, "The ability of the United States to produce - especially grains, soybeans, cotton, and many other crops - is such that large overseas sales are now built into the marketing structure."^{1/}

To facilitate movement of goods, international trading channels must be kept open and free. Restrictive barriers, such as quotas, tariffs and excessive paperwork concomitant to overregulation should be reduced or eliminated. International marketing agreements that open new markets or expand existing ones should be encouraged. And finally, wide support should be given to laws and institutions that assist international businesses in resolving inevitable business disputes.

Admittedly, contract problems are a rarity, and when they do occur resolution is usually quick and amicable. It would be misleading, however, to conclude that exporters are able to ignore the consequences of transaction disputes. A dispute that is allowed to linger absorbs valuable time and resources. The spirit of good faith and mutual trust, so vital in international marketing is destroyed. It is therefore imperative that American exporters possess a working knowledge of the mechanisms that can assist them in eliminating a dispute.

And on a broader scale, conflicts between traders can lead to conflicts between nations. Countries that are denied vital resources due to obstructed trading channels have few alternatives other than the use of force. It is significant, and not coincidental, that most international organizations which provide forums for the elimination of commercial conflicts were established after the devastation caused by two World Wars.

^{1/} Foreign Agriculture, February 14, 1977, p. 3.

Simple negotiation is, and should be, the first method that exporters use when a controversy emerges. In the vast majority of cases, the dispute is solved by a single phone call or telex between the traders. Occasionally, simple negotiation fails to bring about an acceptable solution. For simplicity, this paper will treat only those conflicts which have not been eliminated through informal negotiation.

That mechanisms should be available to exporters is beyond question. The relevant issue is what form the mechanism should take. Even though adjudication mechanisms exist in countless varieties, it is nevertheless possible to generalize and define four distinct processes: conciliation, mediation, litigation and arbitration. The first two, conciliation and mediation, are rarely used by businesses. Litigation and arbitration are considered judicial settlements, and, depending upon the nature of the dispute, have considerably more to offer the exporter in trouble. This study will examine in detail the resolution of international conflicts by the arbitration process.

Numerous definitions of arbitration have been supplied by students of arbitration over the years. These normally include reference to the efficacy of arbitration as a dispute settling mechanism. Included in the definitions are such phrases as "judgement by disinterested though knowledgeable business leaders," "simple and equitable rules of procedure" and "a final and binding decision." While these definitions adequately describe the arbitration process, rarely is the economic function of commercial arbitration considered. Since all commercial hearings involve pecuniary claims, and arbitration is the vehicle through which these claims are adjusted, arbitration therefore assumes an important economic function. It becomes another part of the price-making process.

Contracts are binding agreements which require that each party fulfill specified obligations. They are entered into under known or assumed economic, political and social conditions, and, notwithstanding coercion, are mutually beneficial. During the life of the contract, however, the known or assumed conditions may change, leaving one or more of the parties in a disadvantaged if not untenable position. Fulfillment of the contract would no longer be beneficial. The result is, of course, the substitution of inferior product, late delivery and other maneuvers. The intent is to compensate for losses that would occur if the contract were fulfilled as originally agreed upon. Business and governmental agencies rarely admit that these irregularities are intentional. Nonetheless, there is strong evidence that with each round of violent price fluctuation, contract disputes inevitably increase. Furthermore, due to economic constraints, all buyers and sellers are subject to the temptation to compensate for damaging changes in external conditions. This is the case for private firms as well as governmental agencies.

It would not be correct to assume that all disputes are the result of intentional jockeying to improve economic position. It must be noted that international trade is a risky and complicated venture. Traders are separated by thousands of miles, often speak different languages and conduct their trade under diverse customs and habits. For example, a purely

routine business procedure in the U.S. may violate a law in a foreign country. The direction of trade in the future will further complicate this picture. Trade among traditional regions (the U.S., Europe, Japan and Australia) is slowly being supplanted by trade to the developing countries in Africa, Asia and the Middle East. These nations have many unfamiliar customs and commercial habits which will certainly cause problems for businesses accustomed to dealing with more Westernized trading practice. Such conditions lend themselves nicely to breakdowns in communication, and genuine disagreements.

It is impossible to determine those disputes which may be construed to be "intentional" and those which are "genuine." Regardless of the motive, however, the arbitrated adjustment results in a new price for the commodity or service rendered. Viewed in this context, then, arbitration has the extremely important and vital economic function of price determination. Such a view destroys the long-held conception of arbitration as a passive and impotent proceeding. Rather, arbitration is a dynamic and powerful process that can be a valuable ally.

Objective

The purpose of this paper is to provide exporters, or future exporters, with a description of the arbitration process. Section II will examine in detail a typical arbitration hearing. Section III will briefly discuss the history and role of sponsoring arbitration agencies. The paper will conclude with an examination of the advantages and problems associated with arbitrating international contract disputes.

Procedure

Because of the diverse nature of this study, a personal interview approach was utilized. Twenty-five personal interviews were conducted with exporters, industry representatives and government officials. In addition, interviews were conducted with an arbitrator and the general counsel of a major arbitration organization. Observations were also made of an actual arbitration hearing.

Separate questionnaires were used for interviews with exporters and government officials, and were slightly adjusted for each interview.

II. ARBITRATION PROCEEDINGS

Introduction

The American judiciary is a familiar system. Arbitration, on the other hand, is generally a much less familiar concept. Clarification of this concept is possible through description of a typical arbitration hearing, even though technical differences exist among the various arbitration tribunals.

Arbitration Clause

The desire of exporters to settle disputes quickly and amicably is demonstrated by the inclusion of an arbitration clause in the export contract, typically reading:

"All disputes in connection with the present contract shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules."^{2/}

Traders may specify other sponsoring agencies and rules, such as those of the American Arbitration Society, United Nations Conference on International Trade Law, or relevant trade associations. These rules provide for the selection of arbitrators, language, location and date.

Exporters are encouraged to include an arbitration clause in all international contracts. Without such a clause, an agreement to arbitrate is unlikely. Once a dispute arises, communication between parties usually deteriorates and even the strongest of relationships is tested. Rather than risk such a predicament, exporters should establish a policy of including the clause in all contracts.

In practice, most international agricultural contracts contain an arbitration clause. A questionnaire was sent to trade associations in various agricultural export industries. In many of these industries, exporters used contracts written or endorsed by the trade association.^{3/} These types of contracts contain, with rare exception, arbitration clauses. Examples of such contracts are the North American Export Grain FOB contract, the American Spice Trade contract, the Dried Fruit, Tree Nuts and Kindred Products contract and the American Cotton Shippers Association FOB contract.

Great care should be taken in selecting and preparing an arbitration clause. The clause should clearly specify the disputes which are subject to resolution through arbitration and the rules and laws to be followed during the hearing. The final interpretation of an ambiguous clause will be left to the courts - the very process arbitration was meant to circumvent.

^{2/} The International Solution to International Business Disputes - ICC Arbitration, 1977, p. 19.

^{3/} See Table 1, p. 5.

Table 1. Procedural Variation in Industry Arbitration Tribunals

	Selection of Arbitrators by	Arbitration Board	Parties	Arbitration Clause Contained in Contracts			Opinions Required		Appeal Available		Stand-ard	Pri-vate	Attorneys Permitted	
				All	Most	Few	Yes	No	Yes	No			Yes	No
North American Export Grain Assn.	X			X					X				X	
American Cotton Shippers Assn.	X			X					X					
Michigan Bean Shippers Assn.	X				X		X							X
Dried Fruit Assn.		X							X			X		X
Federation of International Seedmen				X			X				X		X	
Assn. of Food Distributors	X				X				X			X	X	
Red Angus Assn. of America	X					X								
American Spice Trade Assn.	X			X							X		X	
TOTAL	3	5	5	5	2	1	4	4	3	5	5	3	6	2

Request or Submission to Arbitration

When confronted with a bona fide dispute, the aggrieved party, or claimant notifies the sponsoring organization of intent to arbitrate. The initiation of arbitration varies depending upon the nature of the contract. If an arbitration clause such as the one quoted above is contained within the primary contract, the claimant will submit a Request for Arbitration form to a special court or administrator within the sponsoring agency. This form contains the names of the parties, a brief summary of the claimant's case, and occasionally a choice of arbitrators. Evidence, usually in the form of documents, is also sent to the sponsoring agency. The claimant or administrator relays copies of the documents to the defendant who in turn replies to the charges, names preferred arbitrators, and submits relevant documents.

Occasionally, parties wish to arbitrate an existing dispute but have not included an arbitration clause in the contract. In this case, a "Submission Agreement" form is used. This is very similar to the nature of the conflict. Depending upon relevant arbitration laws, the agreement may also require the parties to name the arbitrators or specify the monetary adjustment.

While the two forms are almost identical, there are important distinctions. The request or demand for arbitration form is used when the parties have included an arbitration clause in the contract. This clause defines those disputes which are arbitrable, identifies appropriate arbitration rules and laws which will be followed and so forth. The demand form is essentially a brief summary of the claimant's case. It must adhere to the limitations and guidelines expressed in the arbitration clause. If the respondent agrees with the description of the claimant's case, the hearing proceeds as normal. There are times, however, when the respondent may feel that the dispute does not exist, or that there may be more disputes than those listed in the demand form. A remedy in this situation depends upon the governing arbitration laws. For instance, if the clause calls for arbitration under the rules of the American Arbitration Association, all requests concerning the validity of the arbitration clause or the arbitrability of the dispute are referred to American Courts. In ICC tribunals, "any decision as to the arbitrator's jurisdiction shall be taken by the arbitrator himself."^{4/} However, the authority of the ICC arbitrators is abrogated if the location of the hearings is in a country which reserves the resolution of this particular issue for itself. Hence, an ICC arbitrator will decide the validity issue in Germany, but not in Japan.

The submission agreement is used only when parties are desirous of arbitrating an existing dispute. Sincere there is no prior agreement concerning the rules and governing arbitration laws, these must be contained within the agreement. Also, both parties work jointly in drafting the submission agreement. Thus, for all practical purposes, the arbitrability and validity issued are nonexistent.

^{4/} Rules for the ICC Court of Arbitration, p. 14.

Great care must be exercised in the preparation of a submission agreement. Although it is a flexible document in that it may be amended to restrict the power of the arbitrator or limit the amount of the award, it must not violate statutory arbitration laws. Also, arbitrators are limited by law to adjust only those claims which are put forth in the submission agreement. If two or more disputes exist, but only one is slated in the agreement, the arbitrators cannot rule on the remaining disputes. Therefore multiple claims should be listed separately. Parties should also consult arbitration laws to determine if the dispute is legally arbitrable. The courts have reserved for themselves certain actions that may not be arbitrated. Criminal matters and controversies related to the broad area of public policy are two examples of disputes that are not legally arbitrated in the United States. The courts will refuse to enforce any awards in these cases.

An established principle of arbitration is that failure to reply to the request agreement or refusal to partake in the hearing will not invalidate the proceedings. Article 8 of the ICC Rules states:

"If one of the parties refuses or fails to take part in the arbitration, the arbitrator shall proceed notwithstanding such refusal or failure."

UN Rules, Article 28, similarly states:

"If, within the period of time fixed by the arbitral tribunal the respondent has failed to communicate his statement of defense without showing sufficient cause for such failure, the arbitral tribunal shall order that the proceedings continue."

Parties may refuse to participate in the hearing. Nevertheless, the tribunal will proceed without them and the award will be valid if no action to stay the proceedings is initiated by the party.

Location of Hearing

An additional dimension in international arbitration is the importance attached to the location of the hearing. The location determines which disputes are legally arbitrated, which laws govern the proceeding and which laws and international treaties govern the enforceability of the award. Unless the parties stipulate otherwise, the location of the trial also will determine the rules of procedure that will be used during the hearing. Clearly, the location of the tribunal can have a significant effect upon the outcome of the hearing. Exporters and counsel should bear this in mind when selecting the appropriate arbitration site and, if possible, include it in the arbitration clause. Standard arbitration rules do not normally designate a specific location, although the importer usually selects the arbitration agency. Thus, without prior agreement on this matter, the arbitrators or sponsoring agency will make a determination.

It is important to note here that local laws govern the proceedings even when rules are agreed upon in the arbitration clause. In matters that are not dealt with by the rules or when the specified rules conflict

with local laws, the local laws prevail. Very few countries allow arbitration within their boundaries to be conducted under the laws of another nation.

Where the arbitration is held determines those disputes that are arbitrable. Laws concerning the arbitrability of certain disputes vary among nations. Most countries allow commercial disputes to be arbitrated, but often differ in their definition of "commercial." In the United States, almost any type of dispute is arbitrable. In other countries, however, there are restrictions.

The location of the hearing also affects the enforcement of the award. Although the U.N. Convention is the pre-eminant international enforcement mechanism, not all countries have acceded to the agreement and are not legally required to enforce foreign arbitration awards.

Traders cannot be expected to be familiar with the arbitration laws of all countries. Yet, they can avoid problems by arbitrating only in those countries that have signed the U.N. Convention or have respected arbitration institutions.

Selection of the Arbitrators

Subsequent to an acceptable request or submission agreement, the process of arbitrator selection begins. Most sponsoring agencies maintain lists from which the parties may select arbitrators. However, some tribunals, particularly agencies such as the ICC, allow parties to select arbitrators not contained on agency lists. Most arbitration rules also require the sponsoring agency to choose an arbitrator if a party fails to do so.

A sole arbitrator or a panel of three arbitrators is customarily used. When three arbitrators are used, each party selects one, while the third or presiding arbitrator is chosen by a special body within the sponsoring agency, by the two chosen arbitrators or by mutual consent of the parties. In international tribunals, the presiding arbitrator is often from a neutral country.

Parties have the right to challenge the selection of the arbitrator nominated by the opposing party. The challenge is usually referred to a sponsoring agency panel which makes the final determination as to the acceptability of the arbitrator in question. In the event of death or withdrawal of an arbitrator, the affected party or sponsoring agency is asked to make a new selection.

Arbitrators are rarely challenged. When challenges do occur, it is usually due to a prior relationship of the arbitrator which one party feels prohibits the arbitrator from making an unbiased decision. Defining a proper impartial relationship between the party and the arbitrator is a difficult undertaking. Because most arbitrators are well-known and experienced members of the industry and would likely have had prior dealings with many firms within the industry, finding a perfectly neutral arbitrator is often impossible. United States courts have de-

clared that while a "professional relationship" is not grounds for a dismissal, a "business relationship" can be.^{5/} In any case, it is advisable for an arbitrator to resign if challenged by a party. Resignation does not, of course, imply that the charges are legitimate. Rather, it serves to expedite the hearing and to remove any doubts as to the impartiality and fairness of the award.

In some countries, including the United States, the arbitrators may assume the role of "amiable compsiteur." In this role, authority is granted to waive the strict interpretation of the law and decide the case according to the arbitrator's best judgement and sense of fairness. The legal status of "amiable compsiteur" differs among nations. In some countries, the arbitrators are required to adhere to local arbitration laws; in other countries, arbitrators are not bound to substantive law, and, in effect, all arbitrators act as "amiable compsiteur."

Arbitrators occupy a position of considerable authority and influence, but they must work within the guidelines imposed by statutory law, the rules of procedure and limitations expressed by the parties in the arbitration clause or submission agreement. Rather than discuss the role of an arbitrator in terms of what an ideal arbitrator should do, it is perhaps simpler to define what an arbitrator should not do.

An arbitrator must avoid compromising. "Splitting the difference" is not in the true spirit of arbitration although it is commonly associated with the process. A case should be decided on its merits with an award that is demanded by the facts.

Except in certain tribunals, arbitrators should not assume the role of advocate or legal advisor for one or both of the parties. It is perfectly acceptable for an arbitrator to interrupt the proceedings and to ask questions which will help uncover the facts. In practice, however, most arbitrators allow the parties to develop their own cases with a minimum of interference. Arbitrators should act as judges, not counsel.

Arbitrators must not shun their responsibilities by delegating their authority to others. There are times when outside advice must be relied upon, but as long as the arbitrator makes a final assessment as to its worthiness this responsibility has been met.

Firms often resort to arbitration because of the confidentiality of the proceedings. For example, a party may feel the need to protect an essential secret from the exposure of a public trial. Communication by the arbitrator with persons not associated with the hearing is contrary to the trust and fairness assumed of all arbitrators. Discussing the award with anyone other than colleagues is strongly discouraged. Conduct such as this destroys the integrity of the arbitrator and can only serve to raise doubts as to the veracity of the award.

And finally, any relationship which raises doubts as to personal neutrality should be disclosed by the arbitrator. Arbitrators "not only

^{5/} Aksen, Gerald. "Arbitration," New York Law Journal, January 11, 1979, p. 2.

must be unbiased, but also avoid even the appearance of bias,"^{6/} Likewise, contact with a party outside the hearing room without a representative of the party is not encouraged and, in fact, is often prohibited by the rules.

Evidence

There is a dearth of laws and regulations regarding the admission of evidence. Furthermore, laws that govern evidence in court trials do not apply in arbitration hearings. Evidence that would be required in a court of law may not be necessary in an arbitration tribunal. Likewise, some evidence that would not be admissible in the courts may be admitted in arbitration.

Practically all evidence submitted by the parties will be admitted, even if there are doubts as to its relevance or authenticity. However, admission of such evidence is usually followed by a statement by the arbitrators to the effect that "It will be considered for what it's worth." It may be worth nothing at all, but arbitrators would rather admit too much evidence than too little. While awards have been vacated because a party did not have the opportunity to present its evidence, very few awards are ever overturned because too much evidence was heard. There is a trade-off between the admission of much evidence and unnecessarily prolonging the trial. Yet, the consequences of curtailing the admission of evidence are far more unpleasant than those of prolonging the hearing.

It is a standard practice, and in many instances required by the rules, for the parties to send copies of evidence which they will submit during the hearing to the arbitrators and to the other party before the hearing begins. New evidence is also transmitted to all parties during the proceedings.

Evidence may be in the form of documents, oral testimony or affidavits. It is a fundamental right of the parties that evidence be presented in their presence only. Furthermore, arbitrators may not, upon their own initiative, question witnesses or conduct independent inquiries without the permission of the parties. Arbitrators who persist in such activities are violating the spirit, if not the law of arbitration.

In some states, arbitrators have the authority to subpoena witnesses or documents. Failure to respond to the subpoena will result in contempt charges, and the penalty for such an action will be assessed by the courts. In international tribunals, however, arbitrators can do little but encourage third parties to submit evidence.

Affidavits are generally used when the presence of a witness is either impossible or impractical. Affidavits are sworn statements made in writing usually before a justice of the peace or other authorized

^{6/} Ibid, p. 2.

person. A major drawback of an affidavit is that the parties and the arbitrators do not have the opportunity to cross-examine or otherwise contest the testimony of the witness. For this reason, arbitrators are advised to weigh such evidence "for what it's worth."

Lawyers

Presentation of evidence and cross-examination of witnesses is usually left to counsel. Historically, the presence of lawyers in an arbitration tribunal, and particularly in commercial tribunals, has been the source of much controversy and apprehension. Lawyers, it was thought, served no other purpose than to delay or disrupt the hearing. In fact, some sponsoring agencies were so apprehensive about their presence that they prohibited lawyers from attending the hearings. A study in 1961 of tribunals sponsored by trade associations found that approximately 40% of those surveyed prohibited lawyers from the hearing.^{7/} However, with few exceptions, most notably the cotton industry, lawyers are permitted in arbitration tribunals associated with agricultural export industries.

Most sponsoring agencies, such as the ICC and AAA, are more progressive in their approach to the presence of lawyers. In fact, these organizations usually encourage participants to seek the advice of counsel.

Nevertheless, the fears expressed by the business community are not unfounded. A study of hearings before the AAA concluded "...lawyers' participation not only failed to facilitate decision, but was so inadequate as to materially lengthen and complicate the presentation of the cases."^{8/}

The AAA was very interested in this study, especially in light of the fact that the Association actively encourages the presence of counsel. In a subsequent study, the AAA concluded that lawyers delayed the hearing because they tended to be underprepared and often adhered strictly to courtroom practices. This predicament is due in part to their unfamiliarity with the arbitration process. Law schools generally have failed to provide students with adequate training in arbitration.

In contrast to litigated trials, where lawyers devote countless hours combating layers of legal formalities, there is very little activity that is not directly associated with the merits of the case in arbitration. In litigation, a lawyer's attention is often focused on pretrial motions and conferences, while the merits of the case are given only superficial treatment. cursory consideration of the merits is justifiable, however, because legal technicalities are an integral part of a successful defense. Often, the goal in certain litigated cases is to prevent the case from ever being tried. Success in this milieu is not only dependent upon familiarity with the case, but also upon the ability of the lawyer to maneuver within the legal framework.

^{7/} Mentschickoff, Soia. "Commercial Arbitration," Columbia Law Review, 1961.

^{8/} Ibid, p. 859.

The Award

Substantiating the respective claims and cross-examing witnesses will, in most cases, take no longer than three or four days. In very complex cases, however, the hearing may last significantly longer. It is the responsibility of the arbitrators to ensure that each party is given the opportunity to present their case, while at the same time preventing dilatory tactics by enterprising lawyers or other participants. The most common complaint voiced by arbitrators is the lack of adequate tools to curb unnecessary questions and other such tactics. Nevertheless, the arbitrator is culpable if such tactics are allowed to delay or disrupt the hearing.

It is not uncommon for parties to settle their conflict during the hearing. Approximately 40% of all cases submitted to the AAA in 1977 were settled after the demand or submission was initiated, but before an award was announced.^{9/} While no statistics concerning purely international cases are available, it is reasonable to assume that parties in these cases also reach acceptable agreements without the aid of arbitrators.

When a common agreement is reached, the parties may ask, or the rules may stipulate, that the agreement must be in the form of an award, that is, in writing similar to an arbitrated award. This insures that the agreement is legal and valid, and carries the force of law.

Arbitration rules usually contain provisions that insure prompt settlement of the dispute. The AAA demands an award within thirty days; the ICC permits six months. Courts may invalidate an award that is not announced as required by the rules.

When three or more arbitrators are used, a simple majority usually suffices. If for some reason a decision cannot be reached, the presiding arbitrator or a special committee will be responsible for the award. In some jurisdictions, however, the hearing will be invalidated under these circumstances and a new hearing will be necessary.

The award must be in writing and must be signed by the presiding arbitrator or by those in the majority. Arbitrators may arrive at the award in a number of ways; they may meet as a group after the hearing has been terminated, or each arbitrator may send a separate opinion to the presiding arbitrator, who in turn formulates the final award. Whatever the process, there can be only one award.

An issue that repeatedly arises in arbitration is the attachment of an opinion to the award. Arbitrators in most commercial tribunals are not required to include an opinion. Dissenting, or minority opinions are an equally fruitless gesture. The courts do not attach any weight to the arbitrator's decision-making process or reasoning when the validity of a decision is questioned. Without opinions it is also impossible to appeal an award, except, of course, for flagrant procedural errors.

^{9/} Personal conversation with Gerald Aksen, General Counsel of the American Arbitration Association.

There are those who disagree with this philosophy. Their arguments are founded on the belief of accountability. A written opinion has the potential to expose uninformed or biased arbitrators. Opinions may also have preventive powers and could provide a degree of consistency in awards. Whether or not written opinions would accomplish these goals is debatable.

The arbitrators should only decide those issues which have been submitted to them by the parties. Arbitrators have had a tendency to comment on issues outside their purview. Such an award may be vacated by the courts. The award should be final, in that it addresses each disputed issue and should be certain in that each issue is clearly decided. The parties should not have to resort to other adjudicating mechanisms.

Enforcement of the Award

The success of international commercial arbitration depends upon the existence of an effective enforcement mechanism. In domestic hearings, the courts insure compliance by their ability to revoke corporate charters, to confiscate assets or to levy fines or jail sentences. Yet, these tools are largely ineffectual in forcing compliance by foreign concerns. What is required, therefore, is an agreement among major trading nations that guarantees the enforcement of foreign arbitration awards. Fortunately, such an agreement exists - the 1958 United Nations Conference on International Commercial Arbitration.

Despite the endorsement of the Convention by the American Arbitration Association, the International Chamber of Commerce and the large number of important trading nations who ratified and acceded to the agreement, the United States did not sign the agreement until 1970, twelve years later. Since 1970, however, the United States has actively supported the concepts of the agreement, and a special section concerning international arbitration has been adopted by the U.S. Congress. U.S. courts have, in general, dismissed suits contrary to the principles of the agreement.

Stripped of particulars, the convention requires signatory countries to accept the validity of the arbitration clause, to recognize the award as final and binding and to guarantee enforcement within its boundaries. Regarding enforcement of the award, Article III states:

"There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this convention applies than are imposed on the recognition or enforcement of domestic arbitration awards."

Signatory countries have committed themselves to enforcing awards between a national and a foreigner as well as between foreign parties who have elected to arbitrate in their country. The same tools used to enforce domestic awards, namely confiscation of assets or contempt charges, may be used. For example, if an American and a Swede agree to arbitrate

on French soil, the French authorities have the power to confiscate assets of a recalcitrant party that is in France. Furthermore, other signatory nations not involved with the hearing are also required to enforce the award. Suppose the Swedish party does not comply with the award, but has assets in Greece. The Greek government, though not involved in the proceedings, can be called upon to enforce the award through the confiscation of the Swede's assets. While this example is certainly extreme, and rarely do cases ever reach this stage, it does demonstrate the considerable power of the agreement.

Although at first glance the agreement may appear to infringe upon the right of nations to control legal issues within their boundaries, this is not the case. The Convention recognizes the inherent rights of nations to refuse to enforce foreign arbitration awards under certain circumstances. The convention recognizes two broad areas where arbitration awards may be vacated. The first concerns the right of the parties to obtain a fair hearing. In summary, Article V states that countries can refuse to recognize an award if:

- a. the arbitration agreement is not valid,
- b. a party was not given the opportunity to present their case,
- c. the dispute is not within the scope of the submission agreement or arbitration clause,
- d. the composition of the arbitrators is not in compliance with the arbitration rules or laws,
- e. the award is not yet binding or has been set aside by an authority in which the award was rendered.

Section 2 of Article V also stipulates that nations may refuse to enforce an award if:

- a. the subject matter of the difference is not capable of settlement by arbitration under the law of that country.
- b. the recognition or enforcement of the award would be contrary to the public policy of that country.

The Convention, like all other international legal agreements, must tread the precarious path of constructing a practical and useful agreement, while at the same time avoid undermining national judicial systems. In an attempt to circumvent this problem, supporters of international commercial arbitration have campaigned vigorously for the unification of national arbitration laws. Unification would end discrepancies that exist among national arbitration laws and would promote a better understanding of the arbitration process. Traders would know which disputes are arbitrable, what constitutes an acceptable arbitration agreement and so forth. International solutions could be applied to international problems. So far, however, progress in this area has been limited and it is debatable if success is attainable.

Appeals

As a rule, neutral agencies such as the ICC and AAA consider the award final and binding, and appeals related to the merits of the case are not permitted. Certain tribunals sponsored by private trade

associations, such as those in the cotton and spice trade industries, do have appeal mechanisms which are referred to a special body within the sponsoring agency. This panel will either retry the case or review the evidence and determine if the appeal is justified.

When no appeal mechanisms are available, a party may resort to the courts. In the U.S. and most other nations, the courts will not comment on the merits of the case or the arbitrator's reasoning behind the award. The courts have assumed that those who arbitrated forfeit their right to resolution through the courts and will not reopen the case or comment on the merits of the award, although they will rule on procedural and technical errors. An arbitrator who has failed to disclose a damaging or biased relationship, a party that has not been given the opportunity to fully present its case, or an award that does not comply with the arbitration agreement are examples of procedural violations that may result in a vacated award.

Fortunately, very few cases are ever appealed. When appeals occur, the basis is usually related to either the validity of the arbitrator or a technical or procedural violation.

A party may attack the validity of the arbitration clause. One of the fundamental principles of arbitration is that the agreement to arbitrate is strictly voluntary; no party can be forced. Likewise, a party cannot be "tricked" into arbitration. For example, a contract may include the important obligations of the parties on the frontside, and the minor responsibilities, including the arbitration clause, in fine print on the back. If the contract is signed on the front, are the parties legally bound to the conditions written on the back? In other words, is the arbitration clause valid? Regarding the validity of the arbitration clause, U.S. courts have ruled:

"An agreement to arbitrate must be clear and direct and must not depend solely upon the conflicting fine print of commercial forms which cross one another but never meet."^{10/}

With this decision, the courts have recognized the existence of "short cuts" in commercial transactions and the voluntary nature of arbitration.

The second problem relates to the arbitrability of the disputes. That is, can the dispute in question be referred to arbitration. The ICC clause quoted above began with "All disputes arising in connection with the present contract..." Some arbitration clauses are neither as precise nor comprehensive, and as a result, parties may not agree on whether or not the dispute is subject to adjudication through arbitration.

Relief may also be sought through the courts when the conduct of the arbitrator is objectionable. Arbitrators may fail to admit important

^{10/} Doughty Industries, Inc. vs Pantasate Company, 2d 216, 233 NYS 2d 488, 1962.

evidence or appear to be biased. In such cases, the courts may demand a retrial or the selection of a new arbitrator.

Procedural or technical errors are often grounds for an appeal. While arbitration is a relatively informal process, there are certain regulations that must be followed. Violation of these regulations may result in a vacated award.

Fees

The expenses associated with arbitration normally include an administration fee and the arbitrator's fees. Other smaller charges, such as a request or submission fee and adjournment fee, are occasionally assessed by the arbitrators or sponsoring agency.

The administration fee is usually a percentage of the claim. The assessment varies among sponsoring agencies. For example, in a million dollar claim, the ICC administrative fee is \$13,250, whereas the AAA only charges \$4,350. Many private tribunals charge substantially less and often on a piecemeal basis (per bale, per case, etc.). Refunds are usually provided when the case is adjusted prior to the selection of the arbitrators. Once the hearing has commenced, however, refunds are not ordinarily granted.

Compensation to arbitrators differs substantially among sponsoring agencies. Arbitrators in AAA tribunals often serve without pay, while parties to ICC hearings are required to reimburse each arbitrator a percentage of the award. Returning to the example above, each arbitrator in an ICC hearing would receive a minimum fee of \$7,625 and could receive as much as \$29,000. Since most disputes are heard by three arbitrators, the total cost to the parties could be as high as \$87,000. Fortunately, not many sponsoring agencies reimburse their arbitrators as generously as does the ICC. In the past, arbitrators were expected to serve without compensation. This attitude has changed somewhat and currently arbitrators are expected to be reasonably compensated for their services. Parties may also be required to pay for travel and lodging expenses incurred by the arbitrators during the hearing.

Payment of fees and expenses is usually determined by the arbitrator and is part of the award. The arbitrators have the authority to apportion the expenses as they see fit.

III. STRUCTURE OF INTERNATIONAL ARBITRATION

The growth of arbitration is, to a large degree, dependent upon the existence of organizations which sponsor arbitration tribunals. Even though arbitration hearings are established ad hoc, permanent agencies which maintain arbitration facilities are necessary. Students of arbitration have recognized that national legislative bodies and courts will not support the arbitration process unless they are satisfied that the rules of procedure are fair, that the arbitrators are competent and that the awards are equitable. Permanent bodies have acted to ensure that these requirements are met. They also serve as centers for debate and discussion of arbitration problems and issues, and encourage the refinement of arbitration rules and laws. They allow parties to dispose of their disputes quickly and economically. And they act as advocates for the promotion and expansion of arbitration.

There are more than a hundred permanent arbitration sponsoring agencies. The structure of these organizations may be loosely divided into two groups. The first is formed of those agencies which are sponsored by industry or trade groups. The second includes those which are national or international in scope and whose services are available to traders of any nation or commodity.

Industry Sponsored Tribunals

Tribunals sponsored by industry trade groups have played an important role in the development of international commercial arbitration. Virtually all of the early arbitration tribunals were associated with industry trade groups. The relevant history of private trade tribunals can be traced back to the 14th century. Prior to that time small and autonomous feudal units, or fiefdoms, dominated the European continent. Trade among these fiefdoms was limited due to the lack of adequate communication and transportation channels. Trade within and between friendly units was controlled by industry guilds. Merchants relied heavily upon these guilds for controlling membership, maintaining quality standards and resolving conflicts. The guilds bear some striking similarities to the trade associations of today. However, whereas many modern trade associations are largely impotent organizations, the guilds of this period maintained absolute control over all facets of the industry. Members of the guild with substandard commercial ethics were ostracized, which effectively prohibited these merchants from trading.

The significance of this arrangement from an arbitral point of view was that traders were permitted to regulate themselves. Unfortunately, self-regulation deteriorated with the emergence of nations in the 14th century. Small and independent fiefdoms consolidated into larger units. As these nations matured and developed, the universal acceptance of the "merchants law" promulgated by the guilds slowly evaporated. Merchants now had to conduct business within the framework of national, rather than self-imposed, laws.

As trade between nations expanded, merchants recognized the need for an extra legal mechanism for resolving their disputes. Ostracism, an effective device for maintaining order before the emergence of nations, was no longer useful. Also, as the volume and scope of international trade grew, the nature of trading became increasingly less personalized. Predictably, as the distance between traders lengthened, disputes became more common. Perhaps the single most important factor in the quest for an extra legal mechanism was the historical inclination for self-regulation. Merchants felt that those immediately familiar with the unique problems and customs of the trade would be in the best position to judge the dispute.

As a result, numerous industry arbitration facilities were established and London, which was the foremost commercial center, quickly became the arbitration capital of the world. Even today, London is the headquarters for many trade tribunals.

Because industry tribunals were formed to meet the esoteric needs of a particular industry, deviations from the "typical" hearing are common. An analysis of selected procedural requirements of eight agricultural trade associations with international interests is presented (Table 1, page 5). There is very little uniformity among trade group requirements. This is in contrast to the other type of tribunals, which exhibit many of the characteristics similar to the hearing described in Section II.

Arbitration within trade tribunals circumvents many irritating legal problems experienced by national and international tribunals, particularly those associated with the enforcement of the award. Trade associations often have the power or authority to discipline members who do not abide by an award. Parties who engage in such actions may be denied membership or have their names placed on an industry "black list" (as seen in the cotton industry). Tactics like these may appear to be dictatorial, and, in fact, have been criticized as such. Some critics have complained that the use of these tactics deprives merchants of their right to a fair trial. Nevertheless, it is unlikely that arbitration within trade tribunals presents any threat to the rights of merchants.

The importance of industry tribunals, both in terms of the volume of disputes handled and their influence in international arbitration matters, has declined in recent years. They are continually being overshadowed by such organizations as the American Arbitration Association and the International Chamber of Commerce, to be described shortly. However, industry tribunals are an essential element in the international arbitration network. More than anything else, they provide an alternative to the international institution. Because they cater to a select group, the proceedings of industry tribunals are easily adjusted and refined to meet the special needs of the merchants. And industry tribunals are a manifestation of business's desire to regulate and control their own affairs.

National and International Tribunals

The services of national and international tribunals are not restricted to a particular group with related interests. Rather these organizations open their facilities to traders of all commodities and nationalities. These organizations maintain the viability of international commercial arbitration.

Many were founded during the early years of the twentieth century. World leaders, cognizant of the destruction caused by the First World War, turned to arbitration as the panacea for the resolution of international political conflicts. Although their aspirations were not completely realized, interest was generated in the arbitration process for the resolution of commercial conflicts. Two important organizations, the International Chamber of Commerce (ICC) and the American Arbitration Association (AAA) were established during this period. After the Second World War, other attempts to provide an international forum for resolving conflicts led to the creation of the United Nations (UN) which actively encourages commercial arbitration. More recently, the World Bank established the International Centre for the Settlement of Investment Disputes (ICSID). Each has played an important role in the development of international commercial arbitration.

V. SUMMARY AND CONCLUSIONS

Advantages of Arbitration

From a business point of view, a desirable feature of arbitration is its ability to circumvent many unnecessary and time-consuming procedural rules and legal technicalities. Although these rules often insure a fair trial in other types of disputes, they are often unnecessary baggage in a commercial trial. Most commercial disputes relate to such matters as the quality of goods, the delivery time or terms of payment. These are conflicts of fact, not law. Consequently, legal rules and precedents can be ignored without appreciably affecting the outcome of the hearing. There are rules that must be followed, but these are simple, streamlined and, if implemented wisely, assure a speedy trial.

Submitting commercial disputes to legal institutions in foreign countries is not a viable alternative for many international traders. There is often much bias toward foreign concerns and increasing state intervention and nationalization are further complicating the situation. Because arbitration is a simple process and generally void of narrower national interests, it has the support of many international organizations. Included in this group are the ICC, the United Nations and many influential trade associations. Recent efforts by these groups in promoting universal acceptance have been moderately successful.

Traders separated by thousands of miles enjoy the flexibility of arbitration. An arbitration hearing is established ad hoc at the convenience of the parties. Congested court calendars, particularly in many commercial centers, are avoided.

An important aspect of arbitration tribunals is their confidentiality. The parties are spared adverse and unwarranted publicity which might seriously affect sales or reputations. Sensitive trade secrets, essential to the survival of many firms, are preserved. Only those directly involved in the hearing are permitted to attend, and even guests may be required to sign a statement which protects the confidentiality of the hearing. Furthermore, there is no public record of the hearing or award. This is in contrast to judicial trials, where the case becomes a matter of public record.

The evolution of trial by jury is the greatest achievement within the judicial process. Likewise, judgement by informed business leaders is the most auspicious element in the development of arbitration hearings.

Theoretically, juries are chosen because they are neutral, indifferent to the case at hand and are guided by long-standing rules of evidence and precedence. In most commercial cases, the jury is not familiar with the jargon and customs of the trade. As a result, they, and most probably the judge as well, must be educated during the trial as to the nature of international marketing. This is a very time-consuming and often unsuccessful undertaking.

Arbitrators, on the other hand, are chosen by the parties because of their knowledge of the industry, as well as their integrity. When arriving at a decision, they rely upon years of experience in a very complicated, technical and narrowly defined field. In short, knowledge of trade practice is more conducive to a fair settlement than knowledge of legal precedent. As a result, traders have more confidence in the outcome of the hearing. Statistics bear this out; in most tribunals, over ninety-five percent of the awards are complied with voluntarily.

From earliest times, the business community has been inclined to regulate its own affairs without external interference. Arbitration frees industry trade groups and associations to dispose of disputes privately and economically. Although arbitration is a legal settlement, the process is largely outside the judicial system. Sponsoring agencies are able to select their own experts to serve as arbitrators. Each agency has the right to formulate specific rules of procedure which meet the unique needs of the industry. Occasionally, the courts are asked to confirm or vacate an award, but in general, the courts do not interfere in the process.

Arbitration can also standardize trading practices within an industry. Some trade associations maintain files of previous disputes which are available to all members. An exporter who is confronted with a problem may examine past cases and determine if a legitimate complaint exists. In this way, many disputes are prevented from going to trial and also precedents for future transactions are established.

Arbitration tends to be less expensive than alternative mechanisms. Simple rules, nominal fees, knowledgeable arbitrators who are able to distinguish and prevent dilatory tactics result in a relatively inexpensive hearing. And although it is generally inadvisable, it is even possible in some cases to proceed without counsel. Disputes which are determined through the courts may last weeks or even months. In contrast, an arbitration hearing usually lasts for only a day or two.

Disadvantages of Arbitration

Although arbitration can be an invaluable asset in a contract dispute, it is not problem free. The exporter contemplating arbitration must recognize its limitations and act accordingly. Indiscriminate use is risky, inadvisable and potentially expensive.

Arbitration is not suitable for disputes that are of a legal nature. Rules of evidence and precedence, conveniently ignored in arbitration, are essential to the adjustment of these conflicts. Consequently, simplified procedural rules that insure flexibility in arbitration tribunals may also lead to confusion and injustice when legal cases are considered. It is in the best interests of the exporter to litigate these types of disputes.

A second, and perhaps more serious problem, is the complete reliance upon the arbitrator to conduct the hearing efficiently, impartially and

equitably. The arbitrator must assume the role of both judge and jury, have the facility to grasp the facts quickly and to weigh relevancies accurately, insure that each party is given the opportunity to present their case within the framework of the rules and to be knowledgeable, logical and openminded. A legitimate criticism is the inability of some arbitrators to conduct hearings in a professional manner. While they may possess considerable knowledge of their industry, they often do not have the experience necessary to control the trial. In short, the success of arbitration is highly dependent on the performance of the arbitrator. It follows, then, that exporters who are seriously considering including an arbitration clause in their contract learn as much as is possible about the arbitrators available within their industry. Traders must realize that an arbitrator has the power to turn a businesslike, equitable and inexpensive process into a time-consuming, disordered and costly fiasco.

Enforceability of the award can be another obstacle, although fortunately, this is a problem more in its potential than in reality because the overwhelming majority of traders comply with the decision. International pacts and treaties insure that awards are enforced in foreign countries.

Exporters must also realize that in most cases, and contrary to litigation, decisions may not be appealed. Only in very specific and limited instances, such as a flagrant procedural error, are cases reopened.

Because arbitration allows industry groups to ignore the judicial system and to resolve their disputes privately, abuses of the process may occur. Critics claim that a few large firms able to dominate the trade associations can manipulate the process to their advantage. In addition, arbitrators from small firms may fear retaliatory action by larger firms, making impartial judgement unlikely. Generally, arbitrators are employed by the larger firms in the industry. Because their method of conducting business may be unlike those of smaller firms, an impartial or fair trial may become impossible. Abuses such as these often go unchecked because the industry group is isolated from the judicial community.

Summary

Nearly fifty years after the enactment of the United State's first arbitration statute, the institution of arbitration has attained maturity and respect within the international community. The 1958 New York Convention on the recognition and enforcement of International Arbitral Awards is a telling example. It is a document which establishes the legitimacy of the arbitration process and insures enforcement of awards across sovereign boundaries. It has been acceded to, with rare exception, by major trading nations. And it is a testimony to the efforts of men and women from many nations who have succeeded in elevating arbitration from a private reconciliation mechanism into an internationally acceptable form of adjudication.

Yet, despite the proliferation of sponsoring arbitration agencies, the ratification of a comprehensive international arbitration agreement and the initiation of unification efforts, serious problems continue to frustrate widespread utilization. It would not be appropriate to couch the success of arbitration in terms of the number of disputes submitted to arbitration agencies. An equally valuable function of arbitration is its ability to prevent disputes. The significance of this particular feature of arbitration is, of course, impossible to ascertain. Rather, the desirability and usefulness of commercial arbitration should be measured more in terms of the sentiments and opinions of those businesses involved with the process.

The attitudes of businesses toward arbitration varies from absolute confidence to a complete absence of knowledge. At first glance such a range of views would appear to shed little light on the efficacy of arbitration. However, a closer examination reveals that those who react positively to arbitration are those who have participated in, or who are familiar with, the arbitration process. Similarly, arbitration was not held in high regard by those who were unfamiliar with the mechanism. Because of this lack of knowledge and information, many traders are unaware of its advantages. This is particularly evident in small firms, and accounts for many of the problems currently encountered in attempts to increase the use of arbitration.

At the same time it may also be interpreted as an encouraging sign to advocates of arbitration. Since those who have used the process are generally satisfied with it, drastic or radical changes in the procedure are not warranted. What appears essential, then, is an international campaign by sponsoring arbitration agencies to disseminate information regarding arbitration practices, laws and institutions. Providing information to international merchants presents a totally different challenge to arbitration officials. Remedies to historical problems, such as the formulation of an agreement to recognize foreign arbitral awards, only required the presence of plenipotentiaries and arbitration officials from major nations. On the other hand, education efforts require the cooperation of industry trade groups, government officials and arbitration agencies, and most importantly, the participation of international merchants. Obviously, these types of activities will require considerable funds and an extended time before discernable results are evident.

Fortunately, the groundwork for such an extensive and protracted campaign already exists in the multitude of sponsoring agencies. Recent events which have eliminated many confusing aspects of arbitration, such as the initiation of efforts to unify arbitration laws, should facilitate any educational campaign.

In fact, the seeds of such a campaign have already been planted. Several new arbitration journals have begun publication. Many arbitration institutions have organized seminars and workshops in an attempt to work directly with merchants. There has also been an increase in the number of agreements between sponsoring agencies which will facilitate the proceedings. These efforts must be continued and if possible expanded.

Despite the best intentions of these organizations, they cannot succeed without the cooperation of governments. It is interesting and paradoxical that the condition which led to crystallization of international commercial arbitration - the rise of nations and the accompanying multiplicity of commercial and legal systems - continues to hamper expansion of arbitration. The diversity of national arbitration laws and the lack of cooperation by some nations obviously plays an important role in the limited utilization and effectiveness of arbitration. Some authorities have gone so far as to state that international commercial arbitration, at least in the technical sense, does not exist because it is not truly international. They feel that it is still too closely linked to national judicial systems.

Theoretically, there are three alternatives that could be adopted to confront this problem. Perhaps the most desirable, albeit the most improbable, is the establishment of an international judicial system. Such a system would undoubtedly encounter intense opposition from many nations. Moreover, even if nations could agree on the fundamental tenets and functions of this system, it would, like any other judicial system, take decades before it would function equitably and efficiently. For these reasons, a veritable international judicial system has not received significant interest.

Another option would be the reversal of the current trend of arbitrating disputes in international tribunals. Increasingly, these tribunals are overshadowing those of industry organizations. However, because these organizations are intimately familiar with trading practices and problems, they are better able to meet the need of their members. Each industry tribunal could alter the procedural requirements to facilitate the hearings for their members. Through their influence and authority, they are able to encourage recalcitrant parties to comply with the award. The result of these actions is the avoidance of national judicial systems. However, it is questionable whether this option would completely eliminate all of the legal and informational problems. Some industries do not have the ability to establish an arbitration tribunal. Furthermore, there are certain logistical problems which will necessitate disputes being arbitrated in the international tribunals. For example, which industry tribunal is used when the traders belong to competing or different organizations? Or, how would an industry tribunal enforce its decision on a party which is not a member? Nevertheless, increased involvement by industry trade organizations in the arbitration process would certainly contribute to the dissemination of information concerning arbitration and eventually result in increased participation.

The final option, and one which is currently being pursued, is the unification of national arbitration laws. Coordinated arbitration laws would eliminate much of the confusion associated with international arbitration and would promote wider utilization. At the same time, it would preserve the integrity of national judicial systems.

This study has addressed only superficially many of the important issue in international commercial arbitration. Other pressing issues

have been passed over. Hopefully, however, it has provided the exporter, or potential exporter, with a useful summary of the arbitral process. A final word regarding the selection of adjudication mechanisms: the preceding discussion strongly endorsed arbitration as an effective mechanism for settling disputes in international trade. It was not meant to be a general indictment of alternative adjudication methods. Each of these is, in its own right, a desirable and productive process. The availability of these mechanisms reflects the many facets of conflict and the persistence of human ingenuity to overcome them. It is the responsibility of every exporter to learn about each mechanism so that, when confronted with a dispute, the appropriate form of adjudication may be chosen.

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