

Betting the Farm on International
Arbitration: Is it Time to Offer an
Appeal Option?

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The last two decades have seen extraordinary expansion of the use of arbitration to resolve commercial disputes around the world. The reasons for this marked growth, particularly in the context of cross-border transactions, are manifold. Historically, and particularly in domestic arbitration, “finality,” meaning principally the lack of appeal on the merits of the dispute, has been counted among the advantages of private dispute resolution over court litigation. It is widely assumed that many parties select arbitration to resolve their disputes at least in part because an arbitral award offers an effective and early end to the dispute in a way that a court judgment does not. Increased finality, so the argument goes, brings with it corresponding advantages in speed and cost savings. Furthermore, parties whose dealings with one another are repeated and continuous can put behind them the rancor of conflict and get on with the more serene business of making money.

However, speed and finality come at a price: “The sacrifice that arbitration entails in terms of legal precision is recognized . . .”¹ As a result, however desirable it may seem at first, finality can be a universally positive quality in dispute resolution only if one of two basic assumptions is true. First, finality would always be an asset if arbitrators, unlike distinguished judges, never made mistakes. Even the most avid proponent of arbitration is unlikely to make

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¹ Sobel v. Hertz, Warner & Co., 469 F.2d 1211, 1214 (2d Cir. 1972).

such a claim.² A more likely assumption is that the stakes in arbitration are small enough that errors are tolerable and the risk of error is outweighed by the desire for speed and finality.³ While this second hypothesis may apply in many situations, it seems probable that in some cases the amount in dispute is so large that the absence of a mechanism to correct an erroneous result is unacceptable, even if the likelihood of such a result seems, *ex ante*, to be low. Given the increasing magnitude and frequency of cross-border investment and trade transactions, it seems correspondingly likely that this concern applies in particular to international arbitration.

That some large-stakes disputes are being litigated rather than arbitrated due to the lack of meaningful review is suggested by a growing body of empirical and anecdotal evidence.⁴ In a recent survey of 606 corporate lawyers from America's largest corporations, 54.3% of those who chose not to opt for arbitration said that choice was made largely because arbitration awards are so difficult to appeal.⁵ Recent articles in the press also indicate disillusionment within the

² Within the context of securities arbitration, commentators and participants have "observed the often cryptic decisions of arbitrators, who sometimes are not adequately experienced, trained or equipped to handle and evaluate the type, scope and complexity of the issues confronting them." John F. X. Peloso and Stuart M. Sarnoff, "Appellate Review of Arbitration Decisions," N.Y.L.J., April 20, 1995, at 3.

³ The fact that highly competent international arbitrators on the first three ICSID annulment panels, detailed below, found errors sufficiently egregious to warrant annulment notwithstanding an exceedingly narrow scope of review seems to suggest that material error is not merely a theoretical possibility.

⁴ Professors Hayford and Peeples suggested internal arbitral appeals as early as 1995, insisting that "it is the absence of a substantive guarantee of accurate and correct results that causes many experienced litigators to be reluctant to embrace commercial arbitration as an acceptable alternative to traditional litigation. Stephen Hayford & Ralph Peeples, "Commercial Arbitration in Evolution: An Assessment and Call for Dialogue," 10 OHIO ST. J. ON DISP. RESOL. 343, 405 (1995).

⁵ DAVID B. LIPSKY AND RONALD L. SEEGER, THE APPROPRIATE RESOLUTION OF CORPORATE DISPUTES 26 (2000). The study revealed that of twelve potential barriers to choosing arbitration, corporate counsel named only the unwillingness of the other party to agree to ADR as more

business community with arbitration as a tool to increase predictability, a realization that losing parties are “left with few options if they think the process was unfair.”⁶ The cases discussed below in which parties have attempted, with varying degrees of success, to provide for expanded review of awards by United States courts are themselves empirical evidence of a perceived need to provide some protection against the possibility of arbitral error.⁷ Similar attitudes are evident elsewhere in the world, at least anecdotally: one European lawyer recently related his experience with a client’s in-house counsel, who told him

that his past (good) experience with arbitration was with cases of minor importance but that in the present case, where a very high amount was at stake, he had difficulties explaining to his management and the supervisory board why he — having proposed a contract including an arbitration clause — had “exposed the company to the unpredictability of an arbitral award.”⁸

Some would counter that in international transactions, the use of arbitration is swiftly expanding, and that despite the commonly immense stakes in such cases, there is little indication that parties are shying away from private dispute resolution for fear of the lack of appeal. In fact,

significant than the lack of appeal. In another study that polled about fifty American and European lawyers, arbitration commentators, and corporate executives, about one-third stated that the absence of appeal was not an advantage to arbitration, while another third declared that this was a “highly relevant” advantage to private dispute resolution. CHRISTIAN BÜHRING-UHLE, *ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS* 404 (1996) [hereinafter BÜHRING-UHLE].

⁶ Louis Lavelle, “Happy Endings Not Guaranteed: Arbitration Doesn’t Always Live Up To Its Billing,” *BUSINESS WEEK*, Nov. 20, 2000, at 69, 73. The Bühring-Uhle study revealed that 72% of respondents believed that international arbitration was *not* more predictable than litigation. BÜHRING-UHLE, *supra* note 5, at 403.

⁷ Similarly, the longstanding provision for arbitral appeals as of right in commodities arbitration and the newly adopted provisions for arbitral appeals promulgated by the Center for Public Resources, both discussed below, are some evidence of a perceived need for an appeal option.

⁸ Kurt Heller, “Constitutional Limits of Arbitration,” 2000 *STOCKHOLM ARB. REP.* 7.

however, that may reflect no more than the increasing frequency of transnational transactions and associated disputes on the one hand and the absence of any acceptable alternative on the other. Often the courts in the home jurisdiction of one or both parties are perceived by the other party to be unreliable or undesirable venues, whether because of delays resulting from congested dockets, excessive discovery, unpredictable jury awards, or potential local bias — real or imagined. Furthermore, because it can be problematic to enforce a court judgment across national borders, arbitration is frequently the only way a prevailing party to an international proceeding can actually compel payment after the resolution process is complete.

Under the circumstances, we submit that, to the extent that they offer no option for the effective review of awards, the providers of international arbitration services may be failing to maximize their potential in the dispute resolution market in two distinct ways. First, some possible consumers will choose not to arbitrate because their transactions are too large to bear the risk of error without adequate means to correct those mistakes, instead taking their chances in national courts or agreeing to settle on terms that would not be acceptable if a viable dispute resolution alternative were available. Second, even among those who select arbitration, service providers may not be offering the most desirable set of options. Where such consumers are forced to buy a “one-size-fits-all” product because of the indispensable elements of neutrality and enforceability, despite discomfort with the lack of appeal, they may end up frustrated with a result they see as unjust. The upshot could be prolonged litigation in national courts, undermining both finality and accuracy in the long run, to the detriment of the international arbitral system as a whole.

Thus, both limited empirical evidence and theoretical considerations suggest that a re-examination of the possibility of providing for an appellate option in the international

commercial arbitration process is in order. To be sure, limitations on appeal may be accepted by many parties as an integral and desirable part of arbitration as a distinct system of dispute resolution, without which some of its primary benefits, namely cost effectiveness, speed, and predictability of venue, would be greatly reduced or negated. But the perception that arbitration cannot be crafted to include safeguards against egregious errors for those who desire such protection is clearly incorrect.⁹ Arbitration is, after all, a creature of contract. If parties can agree *ex ante* that they cannot afford the risk of an erroneous arbitration award without a reasonable means for correction, then the principle of party autonomy — itself part of the bedrock of the arbitral system — should make it possible to provide appeal procedures as options to be elected (or not elected) in the agreement to arbitrate.¹⁰

Naturally, contracting parties could themselves create appeal procedures on an *ad hoc* basis, overriding any conflicting elements of the governing rules they have chosen. Such an independent approach is unlikely ever to be taken, however, because of the complexity of the procedural issues involved, the transaction costs additional negotiation would engender, and because default rules are often thought to reflect a customary or optimal structure, conveying

⁹ The CPR Commission on the Future of Arbitration, led by Thomas Stipanowich, emphatically underlined that “one size does not fit all” in arbitration. “While parties may see the virtues of a private substitute for court trial in many different kinds of cases, the nature of that private alternative will vary with the circumstances.” COMMERCIAL ARBITRATION AT ITS BEST xxiv (Thomas J. Stipanowich, ed. 2001).

¹⁰ Professor Hartwell argues that arbitral appeals could be an important tool to strengthen the principle of party autonomy in international commercial arbitration. He asserts that such a procedure should be made available to make dispute resolution systems “complete,” so that “commercial communities truly may be said to regulate their own differences.” Geoffrey Hartwell, “A Possible Appeal Process for Arbitration,” *available at* www.hartwell.demon.co.uk/appeal.htm.

information about the most efficient way to manage arbitration.¹¹ By not offering appeal options, arbitral institutions ignore an opportunity to respond to needs felt by some potential users. Eventually, this may prove to be an important factor in institutional competition to serve the “high end” of this important market.

In fact, internal appeal is not completely foreign to arbitration procedure, as a number of widely-used arbitration rules include built-in avenues of recourse. The trick is to create an appeal procedure that does minimal harm to the economy and predictability gains that arbitration would normally offer.

This article will explore that possibility, examining the attitudes of national courts and arbitration institutions towards arbitral appeals, and identifying some of the essential components that would have to be addressed to tailor an appeal process to the special exigencies of high-stakes international commercial arbitration. We argue that by providing such an “appeal” module as an option for inclusion in arbitration agreements, a new area of growth will be opened for the use of ADR by large corporations otherwise unwilling to “bet the farm” on a single tribunal’s decision. As one commentator has aptly pointed out,

Entering into arbitration naturally entails risks beyond those normally associated with litigation. Arbitrators, like judges, make mistakes. When the mistakes fall within a foreseeable range, parties are generally willing to accept the risks as part of the price of arbitration. On the other hand, the risk that an arbitrator grossly misinterprets a contract or grants hugely disproportionate remedies is clearly less acceptable. Since few grounds for appeal exist, the party afflicted by such maverick arbitration awards is often left with no recourse. This is of particular concern as the use of arbitration is expanding into a wide range of new fields.¹²

¹¹ See Stewart Schwab, “A Coeasian Experiment on Contract Presumptions,” 17 J. LEGAL STUD. 237, 260 (1988).

¹² Stephen P. Younger, “Agreements to Expand the Scope of Judicial Review of Arbitration Awards,” 63 ALB. L. REV. 241 (1999).

A great deal of attention has been paid to judicial review of arbitral awards, particularly in light of the contradictory and often poorly-reasoned American cases elaborating extra-statutory grounds for vacatur such as “manifest disregard.”¹³ Poser suggests an interesting alternative to manifest disregard as a ground for vacatur of arbitral awards — “extraordinary lack of fidelity to established legal principles,” or “egregious departure from established law.”¹⁴ Such a proposal has some grounding in U.S. case law, but does little to assuage concerns that the federal policy favoring arbitration will be undermined, nor would such a standard of judicial intervention recommend the United States as a particularly predictable site for international arbitration proceedings. Moreover, relying on national courts to correct arbitral errors defeats the advantages of selecting neutral and potentially expert tribunals and avoiding the congestion, corruption and procedural pitfalls of national courts.

Courts in the United States and elsewhere will continue to struggle with the dilemma as to whether judicial intervention is appropriate when a tribunal has achieved a wrongheaded or unjust result. A more immediate and predictable solution must lie within the realm of the arbitral process, in the construction of arbitral appeals systems before disputes between contracting parties ever arise.

I. The Limited Attraction of Finality in International Arbitration

The most frequently heard cry from arbitration scholars in response to the suggestion that arbitral awards should in some cases be subject to more than cursory review is that such a

¹³ Stephen L. Hayford, “Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards,” 30 GA. L. REV. 731; Norman Poser, “Judicial Review of Arbitration Awards: Manifest Disregard of the Law,” 64 BROOKLYN L. REV. 471 (1988).

¹⁴ Poser, 64 BROOKLYN L. REV., *supra* note 13 at 516.

practice would undermine arbitration as an institution, since transacting parties opt for private dispute resolution in large part to obtain swift finality. According to this position, one of the primary advantages of arbitration lies in the knowledge that once an award has been rendered, the parties' conflict is essentially at an end, simultaneously cutting off the flow of expenses and allowing the parties to resume commercial relations if they so choose, efficiently calculating the risks of subsequent projects without the shadow of some far-off reversal of the result. This characterization is unfounded for two reasons: (1) for most parties to large-scale international arbitration, finality is at best a secondary advantage, and may in fact be perceived as bringing unwanted and unquantifiable risk; and (2) even to the extent it is important, finality is not guaranteed by the absence of meaningful appeal.

A. *Advantages of International Arbitration: The Limited Allure of Finality*

There is little doubt that the globalization process and the concomitant intensification of cross-border commercial transactions has led to an unprecedented expansion of international commercial arbitration.¹⁵ But what is it that induces international transacting parties to contract for mandatory arbitration? While finality may play a secondary role in this decision, it seems clear that other considerations are far more important, in particular those aspects of the arbitral process that reduce the risks involved in the resolution of cross-border disputes.

1. The Distinctive Nature of International Disputes

¹⁵ The ICC, for instance, received 529 requests for arbitration in 1999. http://www.iccwbo.org/court/english/right_topics/stat.asp. The number of international cases administered by the American Arbitration Association grew by 250% from 1995 to 1999. Lavelle, *supra* note 6, at 69.

A useful starting point in examining the draw of international arbitration is the nature of international disputes. In a number of ways, the addition of a cross-border element to a transaction intensifies the complications involved in the judicial resolution of disputes.

First, almost by definition, international disputes raise the possibility of parallel proceedings in different national judicial systems, each with its own legal rules and procedural standards. Because it is difficult to stay court proceedings in one jurisdiction on the basis of litigation proceeding abroad, cross-border litigants may find themselves simultaneously pursuing multiple avenues of relief, or defending multiple proceedings in the home country, the opponent's home state, and in the place where assets are located. Each of these fora brings with it a potentially unknown system of law and procedure, and the potential of corruption, bias, or influence, risks that cannot be accurately predicted, calculated, and compensated for in a contract. Enforcement creates a related problem, in that a court victory can be essentially worthless if the loser's assets are located outside the jurisdiction covered by the resulting court order, since international recognition of court judgments is quite rare and hedged in with conditions and limitations.

Second, although there has been little broad-based research on the subject, international arbitrations often and increasingly involve extremely large sums of money. According to the International Chamber of Commerce, 58% of the cases initiated under its rules in 1999 were worth more than US \$1 million.¹⁶ Julian Lew also notes the "increase in the size of international arbitrations" in recent years.¹⁷ To be sure, there are many huge transactions that never cross

¹⁶ Available at http://www.iccwbo.org/court/english/right_topics/stat.asp.

¹⁷ Julian D. M. Lew, "Interest on Money Awards in International Arbitration," *in* MAKING COMMERCIAL LAW 543 (1997).

national borders, and international disputes of moderate or small value. But with major infrastructure, energy, manufacturing and other contracts now attracting financing and participation with the increasing globalization of the world economy, there are more and more very large international transactions in which the stakes can be tens, hundreds, or even thousands of millions of dollars.¹⁸ Projects may involve investments lasting decades, increasing the likelihood of a major dispute at some point in the project's life. They may involve resources or undertakings that are vital to the host nation's well-being.

Finally, international transactions frequently entail rights and obligations of a technically and legally complex nature. To be sure, a great many international disputes involve relatively straightforward sales or licensing agreements. But many involve large-scale construction or energy-related contracts, because such transactions are often executed in a less-developed country with participation of funds or expertise from a fully industrialized state. Furthermore, contractual rights and obligations at issue in disputes arising out of international transactions more often than not create intricate questions of choice of law and application of substantive law from different jurisdictions.

2. International Arbitration's Multitude of Advantages

Arbitration has so many advantages in dealing with the distinctive characteristics of international disputes that the added value of finality all but disappears in comparison. Gary Born, for instance, lists eight ways in which international arbitration can be superior to judicial

¹⁸ At the very least, there is probably a perception among corporate counsel that international contracts can lead to greater exposure than the domestic variety. As Robert Biggart of PepsiCo reflected, "We're happy with finality, except in complicated international cases where there's a lot of money involved. Sometimes we will not put in arbitration clauses just because we think the exposure could be very big. We're concerned that it's too final for us." "I Will See You out of Court," CORPORATE LEGAL TIMES, Feb. 2000, *Business without Borders* at 17.

dispute resolution and does not even mention the absence of a right of appeal.¹⁹ Among the most prominent attractions of international arbitration are:

- ***Neutral Tribunal in a Neutral Place:*** Without suggesting that judges in most countries will in fact be more sympathetic to their countrymen than to foreigners, that perception is common, and in some cases no doubt with good reason.²⁰ Local parties have undeniably better information and experience in dealing with the intricacies of their own judicial system than adversaries who must conduct their cases from afar. By clearly choosing procedural and substantive rules and the arbitral seat, parties can also insulate themselves to some degree against the uncertainty of differing choice of law systems around the world. Finally, travel and other logistical costs can be equalized by designating a place of arbitration in between the parties' geographic locations.
- ***Confidentiality:*** Parties often need to preserve business reputation, protect trade secrets and company records, maintain the secrecy of investment plans or other sensitive information, or resolve their dispute in private to facilitate ongoing relations.²¹ Although the extent of an implied duty of confidentiality in arbitration varies significantly from country to country and is rarely absolute,²² under normal circumstances information

¹⁹ GARY BORN, *INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES* 5-8 (1994). Fischer and Haydock, meanwhile, mention the "finality of decisions and awards" as only one of twelve strengths of arbitration. Robert D. Fischer and Roger S. Haydock, "International Commercial Disputes: Drafting an Enforceable Arbitration Agreement," 21 WM. MITCHELL L. REV. 941, 947-948 (1996). *But compare* Samuel A. Haubold, "Opting out of the U.S. Legal System: The Case for International Arbitration," 10 INT'L L. PRACTICUM 43, 44 (1997) (stating without evidence that "[m]ost parties who elect to arbitrate rather than litigate do so because they want finality").

²⁰ *See, for example,* the difficulties encountered by Western investors in resolving disputes before courts and arbitral tribunals in Pakistan and Indonesia, Peter Cornell & Arwen Handley, "Himpurna and Hub: International Arbitration in Developing Countries," INT'L ARB. REP., Sept. 2000, at 39; Louise Barrington, *Hubco v. WAPDA*: "Pakistan Top Court Rejects Modern Arbitration," 11 AM. REV. INT'L ARB. 385 (2000).

²¹ FOUCHARD GAILLARD & GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 773 (Gaillard and Savage, eds., 1999) ("It is generally considered that the arbitral award, like the existence of the arbitral proceedings, is confidential. The confidentiality of both the proceedings and the award is of course one of the attractions of arbitration in the eyes of arbitration users.").

²² Courts in Sweden and Australia, for instance, have found no implied duty of confidentiality in arbitration, *Bulgarian Foreign Trade Bank Ltd. vs. A.I. Trade Finance Inc.*, Case T 1881-99 (Swedish Supreme Court, 2000); *reproduced in* 15(11) INT'L ARB REP. At B-1 (2000); *Esso Australia Resources Ltd. & Others v. Plowman*, [1995] 183 CLR 10. *But compare* decisions of English and French courts, which continue to enforce such a general duty. *Ali Shipping Corp. v. Shipyard Trogir* [1998] 2 All E.R. 136; *Aita v. Ojje*, Paris Court of Appeals, Feb. 18, 1986,

disclosed in arbitration is less likely to find public outlet than in litigation. Parties can resolve any ambiguity in the governing law or applicable rules by undertaking an express contractual duty of confidentiality. In the judicial context, many aspects of the dispute may automatically become part of the public record.²³

- **Enforcement:** International arbitration awards, if properly rendered, are far easier to enforce in foreign jurisdictions than court judgments. Central to this proposition are the multilateral arbitration treaties, in particular the New York Convention,²⁴ that compel courts in member states to enforce arbitration agreements and awards. In cross-border disputes, not only are the parties normally nationals of different countries, their status as international commercial players may mean that their assets are located in several jurisdictions around the world. Therefore, even if a foreign party were to prevail in litigation in his opponent's home courts, execution of the judgment may be impossible if the loser's only significant assets are situated in a third country. In most countries, a validly rendered arbitration award will be enforced much as would a local court judgment.²⁵ Thus, in many international disputes, arbitration is not just a preferable means of obtaining compensation, it is the only viable means of doing so.
- **Technical Expertise:** Because of the technically or scientifically complex subject matter of many international transactions, and due to the interplay of legal regimes that can complicate even a relatively simple cross-border sale of goods, a fair resolution may require expertise that is rarely found among judges, even in the most industrialized countries. Not only can parties select an arbitrator with technical background, a tripartite tribunal allows the parties to ensure a breadth and depth of legal and subject-matter expertise impossible to find in one person. The availability of both party-appointed and

1986 REV. ARB. 583. *See also* Hans Smit, "Confidentiality," 9 AM. REV. INT'L ARB. 233 (1988); Michael Collins, "Privacy and Confidentiality in Arbitration Proceedings," 11 ARB. INT'L 321 (1995); Yves L. Fortier, "The Occasionally Unwarranted Assumption of Confidentiality," 15 ARB. INT'L 131 (1999).

²³ One form of express agreement to confidentiality is the choice of arbitration rules that provide for such a duty. The UNCITRAL Arbitration Rules require that "[t]he award may be made public only with the consent of both parties." Art. 32(5). Similarly, consent of the parties is required for the publication of ICSID awards. ICSID ARBITRATION RULES, Rule 48(4).

²⁴ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 21 U.S.T., 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 (New York Convention).

²⁵ Inter-American Convention on International Commercial Arbitration, *opened for signature* Jan. 30, 1975, OAS SER A20 (SEPEF), 14 I.L.M. 336 (1975) (Panama Convention), Art. 4; New York Convention, Art. IV; European Convention on International Commercial Arbitration, *entered into force* Jan. 7, 1964, 484 U.N.T.S. 349, No. 7041 (Geneva Convention), Art. IX.

tribunal-appointed expert witnesses in arbitration lends itself to the thorough exploration of complex technical issues.²⁶

Although saving time and money is a major factor recommending arbitration in the domestic context, speed and economy are, like the closely-related “advantage” of finality, less important or negligible in the resolution of complex disputes, including many international matters. Martin Hunter recently observed,

The general preference for arbitration in *international* transactions has nothing to do with the advantages of speed and cost-saving, which are often emphasized at arbitration conferences. . . . The main reason why we see arbitration clauses in international commercial contracts is that corporations and governmental entities engaged in international trade are simply not willing to litigate in the other party’s “home” court. . . . The other positive feature of arbitration in the international context lies in the treaty obligation for enforcing arbitration awards across national boundaries.”²⁷

Given the primary importance of a neutral forum in cross-border disputes, potential cost savings may be of secondary significance: savings in procedural costs mean little when measured against potentially significant error in a high stakes dispute. Furthermore, the complexity and volume of evidence that frequently characterize international disputes has narrowed the gap considerably in the time and money spent to pursue judicial and arbitral recourse.²⁸ As a result, many practitioners today, particularly outside the United States, view arbitration as a *more* expensive

²⁶ The importance of this advantage is witnessed by the dominance of arbitration in settling construction disputes both domestically and internationally, with engineers and lawyers alike serving on specialized arbitration boards. Specialized arbitration rules for use in construction disputes include the Construction Industry Model Arbitration Rules (CIMAR) in use in the UK, the American Arbitration Association Construction Arbitration Rules, and the rules promulgated by the Fédération Internationale des Ingénieurs-Conseils (FIDIC).

²⁷ Martin Hunter, “International Commercial Dispute Resolution: The Challenge of the Twenty-first Century,” 16 *ARB. INT’L* 379, 382 (2000).

²⁸ Christopher Style, “The Role of Arbitration,” *INT’L FINANCIAL L. REV.*, April 1995, at 3.

option than litigation, but feel that the higher cost is justified by more effective enforcement, confidentiality, and expertise and above all the possibility of securing a neutral forum.²⁹

Given the pivotal importance of a neutral forum and cross-border enforceability to international arbitration, more relative values, including finality, are likely to play a less important role in the choice of dispute resolution mechanisms. Indeed, the possibility of arbitrator error and the availability of recourse in such cases may also be factors parties consider when deciding whether to arbitrate or not.

3. Finality is Not an Unmitigated Boon in International Disputes

To argue that finality may be eclipsed by other advantages as a stimulus for international parties to enter into arbitration agreements may be only half the story. In many cases, finality in and of itself may appear to be a liability, rather than an asset, discouraging contracting parties from selecting arbitration.³⁰ As demonstrated by the Cornell study and anecdotal evidence described above, corporate counsel today appear reluctant to “bet the farm” where the stakes are high. A swift and final resolution is only an advantage if either arbitrators make no mistakes, or the stakes are small enough that mistakes are acceptable in the interest of continued business relations. There is no reason to assume that arbitrators are any less fallible than judges. Indeed, one commentator suggests that many contracting parties avoid arbitration “because they have no confidence that the arbitrators’ decision will be as objective, predictable and correct as one

²⁹ A limited survey of non-U.S. lawyers conducted in 1998 revealed that 81% of respondents considered arbitration to be more expensive than litigation in national courts. Respondents were evenly split on the question whether arbitration or litigation provided speedier resolution. Herman Verbist and Johan Erauw, “Résultats de l’enquête concernant l’arbitrage et le monde des affaires: un commentaire,” 5 REVUE DE DROIT DES AFFAIRES INTERNATIONALES 689, 707 (2000).

³⁰ James M. Ringer & Martin L. Seidel, “Judicial Review Clauses in Transnational Arbitration Agreements,” INSIDE LITIG., May 1998, at 6.

would expect if the decision were made by a highly respected judge sitting without a jury.”³¹ Meanwhile, the international cases presented to international arbitration tribunals are increasingly complex, both technically and financially, increasing the likelihood of error. Furthermore, international arbitrators often face the application of legal principles from multiple countries, and there is no guarantee that they will be familiar with any of them.

Where amounts in dispute are relatively low, the prospect of continuing business relations and the quick return to normal operations may lead contracting parties to accept the risk of an erroneous decision. This may be particularly so, for example, in cases involving labor contracts or sales of goods.³² But given the magnitude of the stakes in many international claims, the risk of a maverick arbitral award with no means of correction may be too much risk for a general counsel or corporate fiduciaries to accept. In particular, arbitration bereft of appeal may be less than ideal for disputes arising out of large-scale investment transactions, in which enormous sums may be tied up for many years. In such cases, while speed of resolution remains an important consideration, accuracy is likely to be paramount in the minds of contracting parties.

B. *Lack of Appeal Does Not Bring Finality*

Even if we assume, contrary to the foregoing argument, that finality is a major factor inducing entities to include arbitration clauses in their international contracts, the absence of a meaningful appeal process does little to guarantee that an arbitrator’s award will mean the end of

³¹ Stephen A. Hochman, “Judicial Review to Correct Arbitral Error: An Option to Consider,” 13 OHIO ST. J. ON DISP. RESOL. 103, 104 (1997); Abraham Fuchsberg, “The Arbitrariness of Arbitrators,” N.Y.L. J., July 21, 1992, at 2. This perception may arise out of the sense that judges, as public figures, are more concerned about the effect each decision will have upon their reputation than arbitrators, who enjoy some degree of anonymity.

³² THOMAS OEHMKE, COMMERCIAL ARBITRATION §§ 6:1 - 6:10 (1987).

a dispute. Because arbitral awards require the confirmation of a national court at the place of enforcement in order to attach assets in the face of resistance from a losing party, and international arbitration treaties provide legitimate bases upon which awards can be challenged, the rendering of an arbitral award may be only the first step in a chain of court litigation in a variety of different jurisdictions. In fact, where the only form of recourse against arbitral awards is in national courts, the appeal process may entail more than one phase of case presentation, as the losing party attempts to force its real grievances into the recognized grounds for vacatur and pursues its contentions up the ladder of courts in the judicial system.

It seems logical that at least some portion of actions in national courts to set aside arbitration awards would not be brought in that forum if there were a meaningful form of appeal within the arbitration system. To be sure, some losing parties will always exhaust whatever avenues are open to them, and for these parties review before an arbitral appeals panel will simply add an additional, intermediate opportunity for delay. But for many of the disgruntled and vanquished, arbitral appeal may provide a preferable alternative to a motion to vacate, and they may never turn to national courts, regardless of the panel's decision. Furthermore, while the rejection of a challenge by an arbitral appeals panel may not form an absolute bar to further court litigation to overturn the award, judges are far more likely to look askance at motions to set aside awards that have already been approved twice by different tribunals. The lack of a challenge procedure internal to arbitration, therefore, may itself reduce finality in arbitration.

II. Existing Avenues of Review of Arbitral Awards

A. *Arbitral Tribunals and Institutions*

The first instance of appeal for a losing party to international arbitration may well be the tribunal itself. However, a petition to alter or re-examine an award is highly unlikely to be

successful, since most major international arbitration rules strictly circumscribe arbitrators' powers to change their final award after it is signed.³³ Most international arbitration rules establish one-tier systems, whereby awards are final, subject only to corrections of form or clerical error by the deciding tribunal.³⁴ These provisions tend to be narrowly construed by arbitrators, such that modification will generally be granted only where the tribunal would have included the modification in the original award had it been aware of the inaccuracy.

Moreover, without explicit provision in the parties' agreement for continuing jurisdiction or formation of a new tribunal, at least under U.S. law, an arbitration tribunal becomes *functus officio* and without authority to act as soon as the final award is rendered in a particular case.³⁵ Parties therefore have little basis upon which to argue that arbitrators have an implied or inherent power to revisit their own awards on substantive grounds, if the applicable arbitration rules and agreement are silent on the matter.

B. *Setting Aside Awards in Courts at the Place of Arbitration or Enforcement*

1. National Laws

³³ ICC Rules of Arbitration (1998), Art. 29(1) (tribunal may correct clerical, computational, or typographical errors within 30 days); RULES OF ARBITRATION, INSTITUTE OF STOCKHOLM CHAMBER OF COMMERCE (1999), Art. 37 (tribunal may correct miscalculation or clerical error, provide written interpretation of award, or decide additional questions submitted but not previously decided); LONDON COURT OF INTERNATIONAL ARBITRATION RULES (1998), Art. 27 (tribunal may correct clerical, computational, or typographical errors within 30 days, or decide additional, undecided questions within 60 days).

³⁴ See, e.g., LCIA RULES, Arts. 27, 29; AAA INTERNATIONAL RULES, Art. 30(1), 27(1);

³⁵ See, e.g., BORN *supra* note 19, at 576-577; Saxis Steamship Co. v. Multifacs Int'l Traders, Inc., 375 F.2d 577, 581 n.4 (2d Cir. 1967) (arbitrators may not change award except to correct miscalculation). Under U.S. law, the *functus officio* doctrine arises out of the concern that "one who is not a judicial officer and who acts informally and sporadically, [should not be permitted] to re-examine a final decision which he has already rendered, because of the potential evil of outside communication and unilateral influence which might affect a new conclusion." La Vale Plaza Inc. v. R.S. Noonon, Inc., 378 F.2d 569, 572 (3d Cir. 1967).

Absent contrary agreement of the parties, most modern arbitration statutes provide limited grounds for setting aside international awards, most of which correspond to the exceptions to recognition and enforcement contained in the New York Convention.³⁶ The UNCITRAL Model Law establishes six bases for setting aside awards at the arbitral situs: (1) invalidity of the agreement to arbitrate; (2) lack of notice to a party or other inability to present the case; (3) inclusion in the award of matters outside the scope of submission; (4) irregularity in the composition of the tribunal; (5) non-arbitrability of the subject matter; (6) violation of domestic public policy.³⁷ In the United States, the international provisions of the Federal Arbitration Act allow the refusal of confirmation on the same grounds as those established in the New York Convention, as long as the award in question was rendered outside the United States.³⁸ Where the arbitral situs is within the United States, both the domestic and international sections of the FAA apply, including extra-statutory grounds for vacatur such as manifest disregard of law.³⁹

It is generally accepted that the parties to an arbitration clause may to some extent narrow the grounds upon which an arbitral award may be set aside by national courts.⁴⁰ Although in

³⁶ The English Arbitration Act 1996 provides a wide range of grounds for setting aside domestic arbitration awards, even allowing appeal as to questions of law, but requires that awards covered by the New York Convention be recognized and enforced unless one of the narrow exceptions to enforcement under that treaty is demonstrated. English Arbitration Act 1996, Arts. 67-69, 103.

³⁷ UNCITRAL Model Law, Art. 34(2).

³⁸ 9 U.S.C. § 201, *et seq.*

³⁹ Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys “R” Us, Inc., 126 F.3d 15, 24-25 (2d Cir. 1997); Industrial Risk Insurers v. M.A.N. Guttehoffnungshutte GmbH, 141 F.3d 1434, 1441 (11th Cir. 1998); Spector v. Torenberg, 852 F.Supp. 201, 205-206 (S.D.N.Y. 1994).

⁴⁰ Robert Fischer & Roger Haydock, “International Commercial Disputes: Drafting an Enforceable Arbitration Agreement,” 21 WM. MITCHELL L. REV. 941, 973 (1996).

some jurisdictions parties may not be able to waive their right to some form of judicial review of arbitration awards,⁴¹ the choice of certain arbitration rules may effect such a waiver. In particular, the LCIA Rules provide that in choosing arbitration under that system “the parties also waive irrevocably their right to any form of appeal, review or recourse to any state court or other judicial authority, insofar as such waiver may be validly made.”⁴² Even where arbitral rules are silent, many legal systems recognize the validity of “exclusion agreements,” by which the parties voluntarily restrict judicial review or eliminate it altogether.⁴³ Furthermore, failure to object to procedural irregularities during the arbitration may effect an implied waiver of recourse under some legal systems.

While some jurisdictions, like Switzerland, allow for a waiver of the right to set aside arbitral awards at the place of arbitration, it is doubtful that most legal systems would allow the parties to waive the right to object to confirmation of the award at the place of *enforcement*. The significance of the Swiss and former Belgian legislation is that it is intended to shift the locus of control from the arbitral situs, which often has little connection with the parties or their

⁴¹ In New York, for instance, the right to cross-examination has been deemed a fundamental element of due process, and therefore probably unwaivable. Steven J. Stein & Daniel R. Wotman, “The Arbitration Hearing,” *in* INTERNATIONAL COMMERCIAL ARBITRATION IN NEW YORK 87-96 (J. Stewart McClendon & Rosabel E. Everard Goodman eds., 1986). Professor Park suggests that at least in three areas, judicial review should be impossible to waive, in the interests of fairness and integrity of the arbitral system: (1) arbitrability; (2) the right to be heard; and (3) international public policy. William Park, “Safeguarding Procedural Integrity in International Arbitration,” 63 TUL. L. REV. 647, 707 (1989).

⁴² LCIA RULES (1998), Art. 26.9.

⁴³ *See, for example*, Swiss federal law on arbitration, the Loi Fédéral de Droit International Privé (LDIP), which allows express waiver of all judicial review where all parties are non-Swiss, in Art. 192. The most extreme expression of limited judicial review was under the Belgian arbitration law in force until 2000, which *as a default rule* allowed no action for annulment of arbitral awards rendered in Belgium in disputes between foreign parties. Law of March 27, 1985 (Belg.) enacting Code Judiciaire, Art. 1717.

transaction, to the place of enforcement, which is likely to be where one of the parties has substantial assets. Public policy, codified in the New York Convention, demands that states be able to withhold police power where enforcement would contravene their fundamental interests or societal goals.

2. Expanded Judicial Review Through Contractual Provisions

As described above, most national arbitration statutes set extremely narrow limits for the review of arbitration awards. This, combined with the fear of unpredictable or unprincipled arbitration awards has led some contracting parties to supplement their arbitration agreements with express provisions expanding the scope of judicial review of arbitration awards.⁴⁴ Most commonly, such agreements call for judicial vacatur of arbitral awards for errors of law, errors of fact, or both.⁴⁵

In the United States, courts are divided as to the effectiveness of contractual provisions expanding the scope of judicial review of arbitral awards.⁴⁶ The decisions reflect the conflict that arises between universally accepted American police favoring arbitration in its traditional form — without the substantive appeals — and the underlying respect for party autonomy. The Fifth and Ninth Circuits, meanwhile, have upheld the contractual expansion of judicial review, for errors of law (Fifth) and errors of fact or law (Ninth) primarily based on the rationale that

⁴⁴ Leanne Montgomery, “Expanded Judicial Review of Commercial Arbitration Awards: Bargaining for the Best of Both Worlds,” 68 U. CIN. L. REV. 529, 530 (2000).

⁴⁵ See, e.g., LaPine Tech. Corp. v. Kyocera Corp., 130 F.3d 884, 887 (9th Cir. 1997).

⁴⁶ See generally Alan Scott Rau, “Contracting Out of the Arbitration Act,” 8 AM. REV. INT’L ARB. 225 (1997); Hans Smit, “Contractual Modification of the Scope of Judicial Review of Arbitral Awards,” 8 AM. REV. INT’L ARB. 147 (1997); Stanley McDermott, III, “Expanded Judicial Review of Arbitration Awards Is a Mixed Blessing that Raises Serious Questions,” 5 DISP. RES. MAG., Fall 1998, at 18.

arbitration is a creature of contract, and that courts must attempt to honor the parties' intentions as much as possible.⁴⁷ The Third Circuit very recently ruled in *Roadway Package Sys., Inc. v. Kayser*⁴⁸ that parties may privately contract to judicial review other than that mandated by the FAA, but that they must clearly express that choice in the agreement to arbitrate. The Tenth Circuit, however, recently affirmed a district court's refusal to honor the parties' agreement to expand judicial review on a "not supported by the evidence" standard in *Bowen v. Amoco Pipeline Co.*,⁴⁹ holding that "No authority clearly allows private parties to determine how federal courts review arbitration awards," and that permitting such review would destroy the fundamental character of arbitration.⁵⁰

While momentum may be building towards honoring the parties' intentions as to scope of judicial review,⁵¹ courts in many U.S. jurisdictions have yet to pronounce on the matter. Until the U.S. Supreme Court resolves the split in circuits on this issue, therefore, the courts — at least outside the 4th, 5th, 9th and 10th circuits — will likely remain an unpredictable forum for tailoring review of arbitral awards to the needs of contracting parties.

Furthermore, in some jurisdictions outside the United States, courts will not enforce agreements to expand judicial review of international arbitration awards. In particular, French courts have held that the New York Convention and the Civil Code absolutely limit parties'

⁴⁷ *LaPine*, 130 F.3d, at 888-90; *Gateway Techs., Inc. v. MCI Telecomm. Corp.*, 64 F.3d 993, 996-97 (5th Cir. 1995).

⁴⁸ 2001 WL 694508 (3d Cir. 2001).

⁴⁹ 254 F.3d 925 (10th Cir. 2001).

⁵⁰ *Id.* at 934.

⁵¹ *Montgomery*, *supra* note 44, at 554.

freedom to contract in the area of judicial review.⁵² Some other civil law countries, such as Switzerland, provide expressly in statutes for the contractual *narrowing* of grounds for vacatur, suggesting that expansion of such grounds would be impossible.⁵³ The potential invalidity of such clauses in Europe raises the possibility that a court there could find the entire agreement to arbitrate invalid, on grounds that the parties would not have made the agreement had they known the grounds for review would be limited.⁵⁴

3. Potential Problems: *Chromalloy* and *Hilmarton*

Judicial recourse to erroneous awards at the place of arbitration is also unpredictable, and probably inferior to arbitral appeals, because a court vacatur in one country may not be honored by judges in other jurisdictions. While the New York Convention clearly designates the arbitral situs as the most appropriate venue for judicial challenge to international arbitration awards, success before a local court in seeking vacatur does not firmly close the book on enforcement outside that jurisdiction. Because the New York Convention exception to enforcement based on annulment or vacatur at the place of arbitration is worded permissively,⁵⁵ some courts have responded positively to requests for enforcement of awards that had been set aside in foreign courts. To be sure, such decisions are far from common and have been subjected to scathing

⁵² Laurence Franc, “Contractual Modification of Judicial Review of Arbitral Awards: The French Position,” 10 AM. REV. INT. ARB. 215, 218-219 (1999), *citing* Paris Court of Appeal, Dec. 12, 1989, Societe Binat Maghreb v. Soc Screg Routes, 1990 REV. ARB. 863.

⁵³ Swiss Law on Private International Law, Art. 192.

⁵⁴ *See, e.g.*, Paris Court of Appeal, 1st ch, Oct. 27, 1994, “Soc. de Diseno c. Soc. C. Mendes,” 1995 REV. ARB. 267.

⁵⁵ New York Convention, Art. V(1)(e) (“recognition and enforcement of the award may be refused . . . if . . . the award . . . has been set aside or suspended by a competent authority of the country in which . . . the award was made”).

commentary by practitioners and scholars who fear a weakening of the New York Convention regime. But the possibility that judicial review will not be respected across boundaries adds further unpredictability in the eyes of those concerned with minimizing risk in high stakes disputes.

In *Hilmarton Limited v. Omnium de Traitement et de Valorisation*,⁵⁶ the French *Cour de Cassation* upheld a lower court's decree confirming a foreign arbitral award despite the fact that the award had been set aside by a court in Switzerland, the arbitral situs. The court held that although the Swiss court had applied Swiss arbitration law in deciding to deprive the award of legal force in Switzerland, the award "remains in existence even if set aside, and its recognition in France is not contrary to international public policy." This is not the first time that French courts have held that courts at the place of arbitration and the place of enforcement are equally competent to assess the validity of international arbitration awards.⁵⁷

Similarly, in *In re Chromalloy Aeroservices Inc. v. Arab Republic of Egypt*,⁵⁸ the United State District Court for the District of Columbia granted the plaintiff's motion to confirm an arbitration award rendered in Egypt against the Egyptian Air Force, although the defendant had successfully moved to set aside the award in the Egyptian courts. The federal district court relied largely on the parties' explicit waiver of judicial review in their agreement to arbitrate and the possible lack of independence of the Egyptian courts, both somewhat unusual and important considerations. However, the court also stated in more general terms that in the United States,

⁵⁶ Decision No. 484, Cour de Cassation, First Civil Chamber (1994); "Award Upheld in France Despite Annulment by Swiss Court," 9(5) INT'L. ARB. REP. 6 (1994).

⁵⁷ See, e.g. *Pabalk Ticaret Sirkeri v. Norsolor*, 1985 REV. ARB. 430 (Cour de Cassation, Oct. 9, 1984).

⁵⁸ 939 F.Supp. 907 (D.D.C. 1996).

because under the domestic provisions of the Federal Arbitration Act foreign court judgments are not a ground for vacatur, Article VII of the New York Convention allows U.S. courts to ignore such foreign decisions and enforce awards despite Article V(1)(e) of the Convention.

Many commentators have supported *Hilmarton*, *Chromalloy*, and similar court decisions as evidence of a growing trend around the world bolstering the enforceability of international arbitration awards.⁵⁹ To be sure, such cases tend to improve the currency of international awards and ensure against corrupt courts at the arbitral situs. On the other hand, however, by taking primary responsibility for judicial review from the arbitral situs, these courts have also made it nearly impossible for contracting parties to know ahead of time where they will have to litigate should they feel an arbitral award against them is defective. Indeed, if court proceedings to set aside are the parties' only means of recourse, the losing side may be forced to defend against enforcement and seek vacatur repeatedly, in every jurisdiction where that party has assets.

4. Additional Disadvantages of Judicial Review

Besides the potential lack of cross-border recognition of court orders to set aside awards, a losing party who appeals to the judicial system of any country undermines the true virtues of arbitration, to some degree injecting most of the disadvantages of the litigation process into arbitration at the appellate level. One European commentator has remarked that "it appears that the institution of arbitration is distorted, and even loses the essence of its value, if the arbitral procedure is followed by an external procedure before national tribunals."⁶⁰ At least one

⁵⁹ Emmanuel Gaillard & Jenny Edelstein, "*Baker Marine* and *Spier* Strike a Blow to the Enforceability in the United States of Awards Set Aside at the Seat," 3 INT'L. ARB. L. REV. 37 (2000).

⁶⁰ François Rigaux, "Souveraineté des états et arbitrage transnationale," in *Le DROIT DES RELATIONS ÉCONOMIQUES INTERNATIONALES* 261, 274 (1983).

commentator has suggested that parties who enter into an agreement to arbitrate their disputes breach that agreement whenever they turn to courts for assistance not contemplated by the arbitration rules they have selected.⁶¹ In any case, challenge in state courts is bound in some degree to subvert the parties' expectations of benefit from a purely private dispute resolution process. When courts are drawn into the review of arbitration awards, the parties lose the ability to tailor the proceedings to their own needs, as they subject themselves to rules and procedures crafted to apply to a broad variety of cases. In abandoning the opportunity to design an appropriate mode of operation for the decision maker at the appeal level, the parties encounter many of the complications and problems that probably led them to arbitrate in the first place.

Not least of the disadvantages of judicial review is the inevitable loss of confidentiality. While it may not be necessary to enter the entire record of an arbitration into evidence for a court to rule on the propriety of the resulting award, it is practically certain in most countries that the identity of the parties and the exact wording of the award will become publicly available when a judicial appeal is filed. Furthermore, it is likely that the submission to the public record of large portions of evidence and testimony presented to the arbitrators will be necessary to present a case for vacatur before a national court. Thus, the identity, conduct, financial condition, and even proprietary information of the parties will probably become known to competitors, business partners, reporters, suppliers, and others, and the advantage of arbitral confidentiality completely negated.

In many jurisdictions, the law on vacatur of arbitration awards is far from settled, and therefore judicial review adds something of a "wild card" to the overall outcome of international arbitration. The vague and unpredictable extra-statutory ground of "manifest disregard of law"

⁶¹ William Craig, "Uses and Abuses of Appeal from Awards," 4 ARB. INT'L 174, 181 (1987).

in the United States, for instance, presents a range of possible applications and formulations depending on the particular court in which a motion to vacate is brought.⁶² This and other rules, developed by courts and legislatures and applied by judges often without particular expertise in arbitration, undoubtedly reflect concern for the accuracy of results in particular proceedings, but make the success or failure of an action to vacate an arbitral award difficult to predict. Even if legal rules of vacatur or enforcement are predictable within a single jurisdiction, it may be difficult to predict which country's courts will eventually be asked to review a given arbitral award, and consequently which substantive and procedural rules will apply and in what cultural context the appeal will take place. While a party who has lost in circumstances he feels are unfair may welcome *any* opportunity to appeal the result, it seems probable that before any dispute arose he would have felt differently: without knowing whether an eventual arbitral award is more likely to be to his benefit or detriment, the party should rationally prefer an avenue of appeal that does *not* undermine the increased predictability that arbitration normally affords through the selection of particular procedural rules and substantive law.

Finally, the specialized expertise for which arbitrators are often selected, so vital to the accurate resolution of complex international disputes, is largely lost at the appeals stage where review is by a national court of general jurisdiction. As mentioned earlier, even the most sophisticated judges are unlikely to have extensive experience dealing with the technical details, overlapping systems of law, and other problems that typically characterize international disputes. As a result, a reviewing court may be even less likely to “get it right” than was the original

⁶² “The result of these vague and confusing judicially created standards for review is that the losers in arbitration often attempt to overturn the award on one of these imprecise grounds; such attempts are almost always futile. Thus, rather than getting arbitration instead of litigation, the parties end up with arbitration and litigation.” Hochman, *supra* note 31, at 110.

arbitral tribunal, raising the possibility of compounding arbitrator error with further misunderstanding or mistake at the review stage. While an arbitral appeals tribunal will presumably bring a new panel of decision-makers into the case, they can be chosen with the qualifications necessary for the case at hand, just as in the formation of the tribunal of first instance, increasing the probability that subtle errors of law or fact will be identified and corrected.

It is therefore fair to assume that parties who are prepared to agree to international arbitration but desire some protection against erroneous awards would prefer a private appeals process to judicial review, if a workable alternative were available, for the many of the same reasons that make arbitration attractive in the first place.⁶³ For the most part, there is presently no such extra-judicial option for the broad range of international commercial disputes – at least none that is readily available and widely accepted.

III. Constructing Effective Arbitral Appellate Review

The failure of the international arbitration community to offer potential users an appeal or review option is akin to Henry Ford's offer of any color Model T, "so long as it's black." To the extent that the community of international arbitration service providers continues to treat arbitration as a "one-size-fits-all" commodity, however, it is missing an opportunity both to offer an improved choice to its existing clientele and to expand the market to reach potential users who now refuse to participate out of concern for the absence of a mechanism to correct erroneous

⁶³ This is not to say that parties would want to completely waive the right to judicial review; it is not entirely clear that such a total waiver would be effective and permissible under the constitutions of some countries. *See Heller, supra* note 8, at 13-14 (suggesting that some European constitutions and European Union law may make it impossible for parties to completely waive the opportunity for judicial review of arbitration awards).

awards. Evidence suggests that practitioners and clients alike are under the impression that by choosing arbitration as the exclusive mode of dispute resolution, parties are largely forsaking the right to relief from even an egregious arbitral error, and are left with strictly limited and often unpredictable remedies in the national courts.

In domestic and commodities-related arbitration, some institutions have already devised tailor-made arbitral review procedures that appear to function well and match the preferences of many end users of those dispute resolution services. Paradoxically, international arbitration would seem to be in even greater need of such possibilities, given the often enormous stakes and the often irresistible compulsion to agree on a private forum, entirely independent of the supposed virtue of finality. It stands to reason that by offering optional appeals procedures, the market for international arbitration can be further increased, and satisfaction among present ADR consumers can be improved.

A. *Existing Internal Review*

While the most prominent international arbitration institutions have promulgated rules without effective internal recourse on the merits of disputes, the rules of certain specialized arbitration organizations do include appeals procedures. While some of these appellate structures are peculiarly adapted to the particular context in which they operate, some lessons can be gleaned from these approaches to internal arbitral appeals to effectively construct a more general appeals procedure for international commercial arbitration.

1. ICSID

The International Centre for the Settlement of Investment Disputes (“ICSID”) is a branch of the World Bank, itself an organ of the United Nations. ICSID was created pursuant to the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States to assist in the resolution of investment disputes between private investors and

the host governments with which the investors frequently contract. Jurisdiction of ICSID tribunals was at the outset established primarily by the state government's accession to the Washington Convention,⁶⁴ although at present a large proportion of ICSID cases find their genesis in bilateral investment treaties ("BITs") that provide for mandatory arbitration in case of investment-related disputes between one signatory state and citizens of the other signatory state.⁶⁵

The ICSID Arbitration Rules are perhaps the best known international procedural system that includes rules for recourse against arbitral awards. These provisions are contained in Chapter VII of the Rules, governing "Interpretation, Revision and Annulment of the Award."⁶⁶ Under these provisions, a losing party may request that the Chairman of ICSID's Administrative Council designate a three-member panel to review an award. While the scope of review is limited, the procedural rules used during annulment hearings are identical to those used during the main case, with no particular provision for expediting appeals.⁶⁷ The ICSID Convention further provides for complete waiver of judicial recourse, providing in Article 53 that "[t]he award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention."⁶⁸ This bar on appeal in national courts is

⁶⁴ As of September 2000, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States had been ratified by 133 countries and signed but not ratified by fifteen more. *Available at* <http://www.worldbank.org/icsid/constate/c-states-en.htm>.

⁶⁵ Emmanuel Gaillard, "The International Centre for the Settlement of Investment Disputes," N.Y.L.J., April 2, 1998 at 3-4 (noting that six of the 10 cases submitted to ICSID in 1997 were jurisdictionally related to investment treaties, rather than the Washington Convention).

⁶⁶ ICSID ARBITRATION RULES, Rules 50-55.

⁶⁷ *Id.* Rule 53.

⁶⁸ Washington Convention, Art. 53.

far more reliable than private contractual waivers, because the Washington Convention binds all member states to ensure that their courts recognize and enforce ICSID awards on the mere presentation of a certified copy.⁶⁹ Indeed, the absence of all judicial recourse made absolutely essential the inclusion in the ICSID system of an arbitral appeals mechanism.

The grounds for overturning an ICSID award are explicitly listed in the Washington Convention, and appear to be quite narrow:

Article 52

(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:

- (a) that the Tribunal was not properly constituted;
- (b) that the Tribunal has manifestly exceeded its powers;
- (c) that there was corruption on the part of a member of the Tribunal;
- (d) that there has been a serious departure from a fundamental rule of procedure; or
- (e) that the award has failed to state the reasons on which it is based.⁷⁰

Thus, the ICSID grounds for annulment are roughly equivalent to the narrow grounds for non-recognition provided in the New York Convention.⁷¹ Despite the apparent restriction of grounds for annulment to procedural matters, the first three awards referred to appeals panels were set aside.⁷² This result raised some concerns in the arbitration community as to the finality

⁶⁹ *Id.* Arts. 53-54.

⁷⁰ *Id.* Art. 52 (1).

⁷¹ Indeed, the ICSID grounds are narrower than those in the New York Convention, as there is no provision for annulment based upon any violation of public policy.

⁷² See Holiday Inn, Klockner, et al. v. Cameroon, ICSID Case No. ARB/81/2, *reprinted in* 1 ICSID REV.-FOREIGN INVESTMENT L.J. 90 (1986); Amco v. Indonesia, ICSID Case No. ARB/81/1 *reprinted in* 25 I.L.M. 1441 (1986).

and legitimacy of ICSID awards.⁷³ In particular, critics charged that the Klockner and Amco ad hoc annulment committees had exceeded their mandate, which should ostensibly have encompassed only the safeguard of procedural regularity, and penetrated to the merits of the disputes they examined. This criticism, interestingly enough, for the most part does not take issue with the existence of internal avenues of recourse in the ICSID system, but merely suggests that *ad hoc* committees implementing the agreed-upon procedure have not carried out the limited scope of appeal contemplated by parties to the Washington Convention and contracts incorporating the ICSID Rules.⁷⁴

However, on closer analysis of the annulment panels' reasoning, there is reason to conclude that the relatively high incidence of annulment was not due to any inevitable expansion of appellate scope or systemic weakness. Rather, there appears to have been some "breaking-in" period of inexperience among both arbitrators and *ad hoc* committee members with the recently-adopted ICSID rules, or, in the words of the Klockner committee, an "absence of any previous interpretation of the Washington Convention and the lack of sufficiently clear or consistent indications from prior international practice."⁷⁵ The intent of the drafters, meanwhile, was clearly to allow annulment only in extremely rare circumstances. This goal is evidenced repeatedly in the *travaux préparatoires* of the Washington Convention; for instance, drafting committees

⁷³ W. Michael Reisman, "The Breakdown of the Control Mechanism in ICSID Arbitration," 1989 DUKE L. J. 739; Mark Feldman, "The Annulment Proceedings and the Finality of ICSID Arbitral Awards," 2 ICSID REV.–FOREIGN INVESTMENT L.J. 85 (1987); Alan Redfern, "ICSID: Losing Its Appeal?" 3 ARB. INT'L 98 (1987).

⁷⁴ Aron Broches, "Observations on the Finality of ICSID Awards," 6 ICSID REV.–FOREIGN INVESTMENT L.J. 321, 358 (1991).

⁷⁵ Klockner, at para. 118. See also Emmanuel Gaillard, "CIRDI Chronique des sentences arbitrales," 114 JOURNAL DU DROIT INTERNATIONAL (CLUNET) 135, 191 (1987).

rejected “manifestly incorrect application of the law” as a ground for annulment, and also consciously decided not to remove the word “manifestly” from the excess of powers ground in Article 52(1)(b).⁷⁶

It is not entirely clear that an *ad hoc* committee need necessarily annul an ICSID award whenever it finds grounds as enumerated in Article 52(1). Article 52(3), if fact, merely states that in such cases the *ad hoc* committee “shall have the authority” to annul the award. The Klockner Committee found that despite this apparently permissive language, finding of grounds for annulment “must in principle lead to total or partial annulment of the award, without the Committee having any discretion.”⁷⁷ The MINE *ad hoc* Committee disagreed, stating that “[a]n *ad hoc* Committee retains a measure of discretion in ruling on applications for annulment. ... It may ... refuse to exercise its authority to annul an award where annulment is clearly not required to remedy procedural injustice and annulment would unjustifiably erode the binding force and finality of ICSID awards.”⁷⁸

ICSID’s narrow scope of appellate review, combined with the total waiver of judicial recourse, demonstrates that the purpose of the appeal mechanism is quite distinct from that envisioned elsewhere in this article. Because of the particular difficulties involved in arbitrating and enforcing an award against a governmental entity, the drafters of the ICSID rules sought increased finality and neutrality through this arrangement, rather than more rigorous scrutiny of

⁷⁶ 2 CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES, ANALYSIS OF DOCUMENTS CONCERNING THE ORIGIN AND THE FORMULATION OF THE CONVENTION 851-854 (1970).

⁷⁷ Klockner, at para. 179.

⁷⁸ MINE v. The Republic of Guinea, 5 ICSID REV.–FOREIGN INVESTMENT L.J. 95, (1990), at para. 4.10.

arbitrators' findings and rulings. While the system may serve as a desirable model for some users of international arbitration services, those desiring more substantive protection against error will have to look elsewhere.

At the same time, lessons can be gleaned from ICSID that are applicable to the purely private commercial realm. The controversy that ensued in the aftermath of the Klockner, Amco, and MINE cases and the somewhat contradictory decisions those *ad hoc* Committees rendered underline first and foremost the importance of unambiguous standards of review. It seems clear that appeals procedures in commercial arbitration will need to provide several different levels of scrutiny, from which contracting parties may choose when drafting their arbitration clause. In this way, the parties can best evaluate the tradeoff between speed and protection from error, without sacrificing the clarity that will be essential in avoiding frivolous appeals and confusion among the appeals arbitrators.⁷⁹

2. Center for Public Resources (CPR)

The CPR Institute for Dispute Resolution is a private organization, based in New York, created to facilitate alternative dispute resolution. CPR was formed as an alliance of global corporations, law firms, law schools, and public institutions. CPR promotes “non-administered” or “self-administered” resolution of disputes, advocating a minimal role for itself or any other arbitration institution. CPR facilitates arbitration in a broad array of areas, however, and offers services as limited as a list of qualified neutrals or as expansive as full administrative and logistical support. While CPR’s original focus was in domestic U.S. commercial arbitration, the

⁷⁹ Nevertheless, absolute consistency in the way appellate arbitrators view their mandate cannot be achieved without both universal publication of appellate decisions and the addition of yet *another* layer of review to resolve inevitable inconsistencies -- neither of which would be a desirable addition to international commercial arbitration.

organization has expanded its scope with the promulgation of separate international non-administered arbitration rules in 1992, with extensive revision in 2000.⁸⁰ Also in 2000, CPR became the first major private commercial arbitration institution to establish separate, optional rules governing appeals procedures.⁸¹

While they can ostensibly be used in conjunction with any arbitration rules, CPR's appeal procedures are limited by their terms to arbitrations conducted in the United States.⁸² The reason for this is a bit unclear, but CPR would likely refuse to administer an appeal from an arbitration held outside the U.S. By its terms, the procedure is also only applicable to awards that state factual and legal reasoning, and where there is a record of all hearings and all evidence submitted during the original arbitration proceeding.⁸³ Otherwise, there are no explicit jurisdictional limitations on the appeals process, as long as the parties have adopted the procedure as part of their agreement to arbitrate, and the appeal is commenced within 30 days of the final award.

The appeals tribunal is normally composed of three arbitrators, drawn from a list of seven names offered to the parties by CPR.⁸⁴ These candidates, in turn, are part of a roster called the

⁸⁰ CPR RULES FOR NON-ADMINISTERED ARBITRATION OF INTERNATIONAL DISPUTES (2000).

⁸¹ CPR ARBITRATION APPEAL PROCEDURE (2000).

⁸² *Id.* at Rule 1.1. CPR is not the only largely domestic arbitral institution to institute appeals procedures. The Chambre Arbitrale de Paris (CAP), which administers arbitration mainly between French parties, provides for an automatic right of appeal in its default procedures. Under the CAP "Ordinary Procedure," a second tribunal is available at the request of either party, which in effect rehears the case under procedures identical to those used by the tribunal of first instance. The only distinction at the appeals level is that the tribunal is chosen entirely by the President of the CAP, and the parties may each replace one arbitrator. CHAMBRE ARBITRALE DE PARIS, PROCEDURE ORDINAIRE, Part B.

⁸³ CPR ARBITRATION APPEAL PROCEDURE, Rule 1.3.

⁸⁴ *Id.* Rule 4.

“Appeals Panel,” maintained by CPR and consisting exclusively of former U.S. federal court judges.⁸⁵ The selection rules require parties first to “attempt to agree on the required number of candidates from the list.” If after ten days such agreement proves impossible, the parties resubmit the list to CPR, ranked by order of preference, and CPR composes the tribunal with the names receiving the highest combined score. Designation of the arbitral chairman under the CPR Appeal Procedure raises some concerns, since the tribunal members are to “select one of their number,” and there is no provision for choosing the chairman in the absence of agreement in this regard.

The Appeal Procedure establishes expedited briefing, a useful tool to minimize the time and cost involved in pursuing an appeal. The initiator of the appeal is allowed one opening brief and one response, while the appellee can submit only one brief, unless he initiates a cross appeal.⁸⁶ However, oral arguments are available at the request of either party, new evidence may be submitted, and the only time constraint after the composition of the tribunal is that the parties and arbitrators must make best efforts to conclude the process within six months.

The Appeal Procedure establishes relatively broad grounds upon which the appeals tribunal may annul the original award and replace it with a new, binding decision. Rule 8 provides that an Appellate Award modifying or setting aside the original award may be rendered on any of six bases. First, a new award can be had for errors of law or fact, that is, if the original award (1) contains material and prejudicial errors of law of such a nature that it does not rest upon any appropriate legal basis; or (2) is based upon factual findings clearly unsupported by the record. Both of these substantive grounds are crafted to ensure that only severe substantive

⁸⁵ *Id.* Rule 1.2.

⁸⁶ *Id.* Rule 7.2.

errors will justify vacatur, although the meaning of such terms as “prejudicial,” “any appropriate legal basis,” and “clearly unsupported by the record” are bound to be subject to dispute. The Procedure also allows the Appeals Tribunal to set aside an award for a violation of any of the four grounds for vacatur set forth in Section 10 of the Federal Arbitration Act.⁸⁷

CPR has also included two cost provisions designed to deter frivolous appeals. First, where the Appeal Tribunal affirms the original award, the appellant is obliged under Rule 12 to reimburse the appellee for attorneys’ fees and other out-of-pocket expenses related to the appeal. The tribunal has discretion to allocate costs as it sees fit if the original award is modified or set aside. Second, parties to the Appeal Procedure undertake to reimburse opponents for costs associated with any unsuccessful subsequent court actions aimed at challenging the original or appellate award.

The CPR Appeal Procedure has certain disadvantages for international disputes, including its inexplicable territorial restriction and the designation of retired American judges as the only possible appeals arbitrators. Furthermore, the balance between specificity and flexibility reflected in the standards of review and the lack of strict deadlines may cause contracting parties to think twice before signing on to the Appeal Procedure. Nevertheless, CPR’s foray into the largely unexplored territory of appeals in private commercial arbitration will serve as a useful starting point for future attempts to design effective structures for use in large international disputes.

⁸⁷ *Id.* Rule 8.2(b). These grounds are:

- (1) award procured by corruption, fraud or undue means;
- (2) evident partiality or corruption in arbitrators;
- (3) arbitrators guilty of misconduct in refusing to postpone the hearing, or refusing to hear evidence pertinent and material to the controversy; or any other misbehavior by which the rights of a party are prejudiced;

3. Commodity Arbitration

International commodity arbitration is a specialized form of alternative dispute resolution, designed to adjudicate disagreements connected with the shipment of natural, primarily agricultural, products from one port to another. Because commodity sales are executed for the most part on the basis of written description, rather than sample, disputes frequently arise between the buyer and seller regarding the quality and condition of the goods received. Trade associations around the world related to particular commodities have for over a century provided members with standardized form contracts, which include an arbitration clause, and also promote and administer arbitration under rules they promulgate. Arbitrators under most commodities rules are people drawn from the relevant trade, and need not be lawyers. Under many such systems, the parties are not represented by lawyers during the proceedings, although counsel is often employed by the parties to prepare the case, collect evidence, and draft documents.

Many of these commodity arbitration rule systems include separate, default procedures for appeal. Appeal is commonly heard by a panel or board with five members, drawn from a list of approved arbitrators maintained by each trade association. As a rule, appeals board members are senior practitioners in the trade with experience in arbitrating complex disputes.

While these appeal procedures are generally speaking more formal than the initial commodities proceedings,⁸⁸ they are still quite informal when compared to standard commercial arbitration proceedings. Party submissions are normally more a statement of claim than a full brief or argument, and the parties or their representatives are expected to flesh out the case orally before the Appeal Board. In some commodities appeal systems, relatively short deadlines

(4) arbitrators exceeded or imperfectly executed powers.

⁸⁸ Communication with Peter Brown, of Peter Brown Associates, London, Jan. 30, 2001.

restrict the amount of time between the request for appeal, appellant submission, appellee submission, and hearing – two or three weeks in the Coffee Trade Federation (CTF) Rules, for instance. Generally speaking, commodities appeal boards entertain appeals completely *de novo*, accepting all manner of new evidence and arguments.⁸⁹ According to one English commentator, “nowadays, whatever the original arbitration award might say, an appeal involves a new hearing, so that the Board is entitled to look at the matter afresh and not pay over much attention to the original award.”⁹⁰ Indeed, while until the 1970’s many commodities associations required an Appeal Board to vote by at least a 4-1 majority in order to overturn an award, this practice has now been eliminated, allowing straightforward majority rule in issuing new or modified awards. Minority or dissenting opinions are not generally allowed; the entire Appeal Board must issue a single award.⁹¹

It is not entirely clear why appeal has so long been an integral part of the international commodities arbitration system. To be sure, the range of issues commonly examined are limited to quality of goods delivered – although this may be a highly complex technical question requiring expertise in both arbitrators and witnesses. Because most commodities cases involve similar questions of law and fact, the appeals process may be naturally expedited and the issues in dispute narrower than in the general run of commercial arbitration. It could be that, regardless of the amount in dispute, the stakes for commodity producers are extremely high in every

⁸⁹ GRAIN AND FEED TRADE ASSOCIATION (GAFTA) ARBITRATION RULES, Rule 10; COFFEE TRADE FEDERATION (CTF) ARBITRATION RULES, Rule 40; LONDON RICE BROKERS’ ASSOCIATION (LRBA) ARBITRATION RULES, Rule III.

⁹⁰ DEREK KIRBY JOHNSON, INTERNATIONAL COMMODITY ARBITRATION 39 (1991) (commenting on Rule 10 of the Grain and Feed Trade Association (GAFTA) Rules).

⁹¹ Communication with Peter Brown, of Peter Brown Associates, London, Jan. 31, 2001.

arbitration, in that a single award condemning the quality of goods sold could have serious reputational repercussions within the trade.

In any case, the sweeping review powers of commodities Appeal Boards provides twofold guidance in thinking about appeals in the context of international commercial arbitration. First, sacrificing some finality and economy for accuracy of result has done nothing to harm the popularity or effectiveness of commodities arbitration as a whole. Indeed, the frequency with which parties invoke appeals procedures in these cases appears to be quite low, approximately 15-20%.⁹² Second, the actual procedures widely used to govern arbitral appeals in the commodities trade are probably too informal and the scope of review too broad to be easily adapted to standard international commercial disputes. Still, the emphasis on expedition and expertise in Appeal Boards has clear application in the commercial realm, and the success of the longstanding cross-border commodities appeal practice gives reason to believe that equally successful procedures can be crafted for other categories of international disputes.

B. *Minimizing Damage to Arbitration, Maximizing Fairness: Necessary Components*

In designing a future arbitration appeals system, it seems clear from the outset that such a structure must be optional, available for the consideration of the parties but not necessarily included automatically in every agreement to arbitrate. The focus of critique in this article is precisely the lack of choice currently available to contracting parties, a situation that has arisen out of the longstanding but, we submit, not entirely solid assumption that finality is invariably a virtue in the eyes of all who consider resolving international disputes through arbitration. In this section, we present a list, by no means exhaustive, of some of the most important elements that could be considered in developing an international arbitration appeals procedure, demonstrating

⁹² Communication with Peter Brown, of Peter Brown Associates, London, Jan. 31, 2001.

the range of choices that can be made available to contracting parties in striking a balance between finality and accuracy that best suits their preferences and the nature of their transactions.

- ***Modules with Default Values:*** In constructing an efficient and equitable internal arbitral appeals option, two conflicting interests must be balanced. First, there must be enough detail to provide predictability and to minimize collateral disputes over the interpretation or implementation of the rules. Secondly, the system must be sufficiently flexible to encompass the preferences of a wide variety of contracting parties, and in particular to accommodate a range of different attitudes towards the value of efficiency and finality as compared to accuracy and fairness. To this end, the introduction of default and optional modules will be extremely useful. In each of a comprehensive list of topics, an appeals rule system should provide clear default provisions, allowing the parties to easily adopt the working set as a whole, if they so desire. At the same time, alternative versions of most rule sections should be provided, such that the parties can negotiate and tailor a future appeal system to their preferences with regard to the scope, form, level, costs, and speed of appeal, as well as other aspects of the review process.
- ***Expedited Procedure:*** The desirability of expediency and cost reduction in resolving any dispute suggests that the process should, wherever possible consistent with its principal objectives, simplify and accelerate the appeals process. If the parties choose to restrict or exclude new evidence at the appeals stage, a significantly shortened time frame may be possible relative to the time needed if more evidence is to be permitted. Proposals as to how procedures can be accelerated without sacrificing too much accuracy can be gleaned in part from existing fast track arbitration rules, published by such organizations as the AAA,⁹³ WIPO,⁹⁴ LCIA,⁹⁵ and CAMCA.⁹⁶ “Fast track” mechanisms could include time limits on initial submissions and subsequent briefs, accelerated tribunal formation or standing appeal panels, caps on the length of oral hearings, and short deadlines for the rendering of an award.
- ***Scope and Standard of Review:*** The core of any future appellate mechanism will be the scope of review. By choosing the appropriate standard, parties would be able to select a narrower or broader scope in accordance with the needs of the transaction at hand,

⁹³ AMERICAN ARBITRATION ASSOCIATION, COMMERCIAL DISPUTE RESOLUTION PROCEDURES, EXPEDITED PROCEDURES, Art. E-1 to E-10, *available at* www.adr.org/rules/commercial/AAA235-0900.htm#E-1.

⁹⁴ WORLD INTELLECTUAL PROPERTY ORGANIZATION, EXPEDITED ARBITRATION RULES, *available at* www.arbiter.wipo.int/arbitration/expedited-rules/index.html.

⁹⁵ LONDON COURT OF INTERNATIONAL ARBITRATION, ARBITRATION RULES, Art. 9.

⁹⁶ COMMERCIAL ARBITRATION AND MEDIATION CENTER OF THE AMERICAS, ARBITRATION RULES, Art. 39.

balancing expediency against breadth of recourse. It will be essential that whatever standard of review is selected, it be defined clearly in order to avoid time-consuming disputes over appellate jurisdiction. In addition, it should be clear that the appellate tribunal itself has the exclusive jurisdiction to determine whether the complaint submitted falls within the parties' agreement as to scope. Possible standards could fall anywhere in the range between the minimal review provided by the New York Convention or the UNCITRAL Model Law and the *de novo* review employed in commodities arbitrations. Review could be limited to errors of law⁹⁷ or provide for remedies where, for example, an award was found not to be supported by any evidence, by substantial evidence or by a preponderance of the evidence or was against the great weight of the evidence. Since different standards provide different trade-offs of speed and accuracy, it may be most effective to allow the parties to choose among two or more alternatives to tailor the proceeding to their own needs.

- **Monetary Limits:** Because the magnitude of international contracts and resulting disputes is in at least some cases a decisive deterrent to adoption of arbitration clauses by corporate counsel, it seems a reasonable assumption that the pre-dispute preference for arbitral appeals should be weaker where the stakes happen to be small. While the cost of pursuing an appeal may in and of itself discourage parties from taking advantage of these mechanisms where the potential gain from a reversal is minimal, the parties may also prefer to contractually limit arbitral review to cases worth more than some threshold amount. Such a provision may also reduce the probability of nuisance or extortion-motivated appeals. The minimum amount in dispute to trigger the right of appeal could be established by default, but is readily susceptible to negotiation and agreement between the parties.
- **Cost Shifting:** The proliferation of non-meritorious or vexatious appeals can be mitigated by imitating on a contractual level the tools that courts use to reduce caseload glut. The most fundamental tool for reducing non-meritorious appeals is cost shifting. At the very least, this would mean that should an appeals panel affirm the arbitration award, the party instituting an arbitral appeal would be responsible for paying his opponent's reasonable legal costs and other reasonable out-of-pocket expenses connected with the appeal.⁹⁸ The so-called "English Rule" of costs following the event, used in courts

⁹⁷ A report by a committee of the National Conference of Commissioners on Uniform State Laws (NCCUSL) on expanded judicial review of arbitral awards suggests that the advantages of arbitration are less undermined by appeal concerning mistakes of law than those grounded in mistakes of fact. The committee recommended changing the Uniform Arbitration Act to recognize parties' right to contract to heightened judicial scrutiny of awards, but only as to matters of law, not issues of fact. NCCUSL Study Committee Report, Recommendation No. 2 (1995).

⁹⁸ Because cost shifting is more common in international commercial arbitration than in American litigation, it might be argued that a cost-shifting provision will do little to further alter the incentive to bring an arbitral appeal. However, cost-shifting is by no means a foregone conclusion in international arbitration. John Y. Gotanda, "Awarding Costs and Attorneys' Fees

throughout the Commonwealth countries, is widely perceived to discourage appeals where the chance of success is slight.

- ***Security for costs:*** If a losing party will already be drained of assets by the enforcement of the arbitral award against it, the additional prospect of paying both sides' appeal costs will pose no deterrent threat. Appeals tribunals could therefore be empowered by the parties' agreement to require a deposit of security to cover the costs incurred by the appellee during the procedure. While a default rule should probably leave the question of security for costs to the appeals panel's discretion in order to avoid shutting out impecunious parties with highly meritorious complaints, alternative language could provide for security for costs in all appeals, or in all cases where matters of fact or law are at issue, rather than appeals as to procedural defects.
- ***Sanctions:*** In national courts, legal ethics rules and lawyer sanctions are used to increase the pain involved in bringing non-meritorious actions. An arbitral appeals system could do the same, giving the appeals tribunal the discretion to assess penalties upon either the appealing party or his attorney where the request for review is found to have no legitimate basis. A related device is the provision of post-award interest. When any delay in the payment of an award caused by the losing party in opting for arbitral review is reflected in the final amount assessed, neither party is likely to employ dilatory tactics at the appeal level, and the frequency of appeals with a low probability of success will be further reduced.
- ***Waiver of Judicial Remedies:*** One of the more controversial elements that might be incorporated into an internal arbitral appeals system to minimize the detrimental effect of such an agreement on speed and finality is a waiver of judicial remedies. Such a rule would deprive the losing party of the opportunity to request vacatur or to oppose enforcement of the award before judicial bodies anywhere in the world, whether prior to and instead of applying to the agreed-upon tribunal, or after that body decides an appeal.⁹⁹ As explained above, if such a clause is effective in a wide range of jurisdictions

in International Commercial Arbitration," 21 MICH. J. INT'L L. 1, 2 (1999) ("awards of costs and fees in international commercial arbitration are often arbitrary and inconsistent"). Explicit provision for a "costs follow the event" rule at the appeals stage will therefore remove all discretion and uncertainty as to the distribution of legal costs, sapping the power of losing parties to extort advantageous settlement from the victor by threatening appeal.

⁹⁹ Such a waiver is generally enforced under English law, and can probably bar judicial recourse for practically any procedural irregularity, except for challenges to the validity of the agreement to arbitrate itself. Wessamen's Koninklijke Fabrieken NV v. Isaac Modiano, Brother & Sons Ltd., [1960] 2 Lloyd's Rep. 257; MICHAEL J. MUSTILL AND STEWART C. BOYD, COMMERCIAL ARBITRATION 579 (1989).

around the world, the result could be a dramatic *increase* in efficiency and finality over the standard situation where courts provide the exclusive forum for challenge.¹⁰⁰

- ***Standing Body or Ad Hoc Tribunal:*** Given the concern for flexibility, it is not entirely clear that one or more standing appellate bodies (such as that in use in the WTO dispute resolution facility) would be a more effective solution than *ad hoc* panels formed from a list of qualified arbitrators established by relevant administering organizations. Both options could provide the necessary expertise in appeals arbitrator candidates. Standing panels could provide speedier resolution of challenges and more uniform interpretation of appeals clauses. On the other hand, *ad hoc* tribunals would reduce additional administrative costs to international institutions and consequently to the parties, and may better respond to the details of the parties' agreement in each dispute. A combination of the benefits of *ad hoc* and standing panels could be achieved if international arbitration institutions maintained extensive lists of appeals arbitrators, made available for a fee to parties that have opted for an appeals procedure.
- ***Appellate Remedies:*** The scope of remedies available to an arbitral appeals panel is as important an aspect of a review system as the review itself. Should such a panel decide that an award is erroneous, there are a number of actions that it could take, and the parties should agree at the outset which of these options will be available to the appellate panel, to avoid disputes over the appeal tribunal's authority and to better reflect the parties' preferences with regard to economy and accuracy. If an award is flawed but not fatally so, an appeal tribunal could be empowered to reform the award, or to issue a new award replacing the erroneous one. Alternatively, the award could be reversed and remanded, either to the original panel or, in some rare circumstances where the original arbitrators were unavailable or somehow suspect or disqualified given the issues on appeal, to a new panel, with instructions on how errors were to be corrected.

This list of components of a potential appeal option is in no way exclusive, and additional research and discussion among practitioners and corporate counsel will be required to draft effective clause language and evaluate the practical results of all options.

¹⁰⁰ Again, as explained above, a waiver of judicial recourse is more likely to be effective at the arbitral situs than at the place of enforcement, because of states' interest in safeguarding public policy when an award is closely connected to their territory or citizens.

IV. Conclusion

In suggesting that an appellate option is vital to adapting international arbitration to the high technology context, former general counsel Thomas Klitgaard remarked that

Speed and finality are virtues, but only if you win. They are not virtues if a fundamental mistake has been made. The arbitral institutions dealing with high technology disputes should set up a mechanism for an appeal. It would be up to the parties to elect the mechanism in their agreement. If they did not [so elect], they would assume the risk of an unprincipled or fundamentally erroneous decision. But at least the issue involving the possibility of review would be focused for the business persons on each side, who often become aware of the lack of an appeal only after the remedy of international arbitration is already selected.¹⁰¹

Lord Justice Dyson, meanwhile, aptly underlined in a recent lecture the tradeoff involved in expanding review and appeal in any dispute resolution system: “[t]he more generous the scope for challenging decisions by appeal or review, the greater the chance of eliminating error. But often at a heavy price.”¹⁰² But as recent evidence suggests, such an exchange of finality and speed for accuracy is one that some parties to international arbitration may feel is necessary if arbitration is to be an acceptable method for dispute resolution. The benefits of arbitration in the international context are manifold. However, given the stakes often involved in transnational investment and other contracts, finality and speed may be decidedly secondary to neutrality, enforceability, and technical expertise, among others. In particular, those stakes may dramatically reduce the significance of increased time and costs incurred through appeal in relation to the potential cost of an erroneous decision.

¹⁰¹Thomas J. Klitgaard, “The Transnational Arbitration of High-Tech Disputes,” presentation given to the Seventh Annual Transnational Commercial Arbitration Workshop, Dallas, Texas, June 20, 1996. Available at <http://www.wirepaladin.com/spch0696.htm>.

¹⁰²Lord Justice Dyson, “Finality in Arbitration and Adjudication: The Eversheds Lecture 2000,” 66 ARBITRATION 288 (2000).

We do not mean to suggest that internal appeals processes become a mandatory fixture of institutional rules or model arbitration clauses. But when the assumption of the value of finality is considered in light of the high stakes and factual and legal complexity of many modern transnational transactions and increasingly suggestive empirical evidence, it is apparent that there is potentially a significant market for optional appellate procedures in international arbitration. For the most part, the community of arbitration service providers does not offer a solution satisfactory to this segment of potential consumers. By establishing clause modules that will establish clearly-defined standards of review, deadlines, evidentiary limitations, and other procedural details, the parties' negotiated compromise between finality and accuracy can be implemented faithfully, allowing both sides to calculate future risks and feel confident entrusting their international disputes to arbitral tribunals. Furthermore, whatever harm may be done to the "ideals" of economy and finality can be effectively minimized through the addition of generally applicable provisions on fast-track panel formation, cost-shifting and sanctions, and expedited review.

Perhaps most important in drawing skeptical corporate counsel into the arbitral fold with regard to large international contracts is a fundamental shift in attitudes among practitioners and commentators in the field. As long as internal appeals are viewed in the arbitration community with suspicion as antithetical to the arbitration system, contracting parties will likely assume that such review is not a viable option. We hope that this article will contribute to an intensified discussion of the admittedly complex range of possibilities in this field, and that the resulting debate will lead to the forging of useful appeals options that can further broaden the marketability of international arbitration.