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IS INTERNATIONAL ARBITRATION BECOMING TOO AMERICAN?

GEORGE M. VON MEHREN* AND ALANA C. JOCHUM†

Whether international arbitration is becoming too American seems to be a hot topic these days. This is a relatively new phenomenon. In an important article published in 2003 in the *Ohio State Journal on Dispute Resolution*, Professor Roger Alford commented, “It is a curious fact that the Americanization of international arbitration is a topic that is often felt but rarely discussed. If we in the arbitration community do discuss it, we typically do so casually over drinks, rarely in a formal setting such as a law school symposium.”¹

Well, here we are today discussing this question at a law school symposium. In addition, just a year ago, the widely-circulated *ABA Journal* published an article entitled, “*International Arbitration Loses Its Grip – Are U.S. Lawyers to blame?*”² The article adopts an affirmative answer to the question.³ It even contains a suggestion that arbitration may be “committing suicide” as a result of American influence.⁴

Another view is that international arbitration is evolving in ways that meld together a variety of dispute resolution techniques. Professor William Park from Boston University Law School has written about this process.⁵ Although he regards it as essentially positive, he acknowledges that “one frequently hears complaints about the ‘Americanization’ of arbitration, usually related to aggressive litigation tactics that include hefty boxes of unmanageable exhibits, costly pre-trial discovery and disruptive objections to evidence.”⁶

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¹ Roger P. Alford, *The American Influence on International Arbitration*, 19 OHIO ST. J. ON DISP. RESOL. 69, 69 (2003).

² Steven Seidenberg, *International Arbitration Loses Its Grip: Are U.S. Lawyers to Blame?*, 96 A.B.A. J. 50 (2010).

³ *Id.*

⁴ *Id.* (referring to comments made by Joseph R. Profaizer, of counsel to Paul, Hastings, Janofsky & Walker in Washington, D.C.).

⁵ WILLIAM W. PARK, *AMERICANIZATION OF INTERNATIONAL ARBITRATION AND VICE VERSA ARBITRATION OF INTERNATIONAL BUSINESS DISPUTES: STUDIES IN LAW AND PRACTICE* 8 (Oxford Press 2006).

⁶ *Id.*

I had my first experience with “Americanization” some years ago when I presented a case before the ICC in Paris.⁷ Sad to say, I was the guilty party.

The case involved a contract under which a French company sold goods to an Egyptian company. It was a typical case. The seller wanted to be paid. The Egyptian buyer claimed the goods were defective and refused to pay.

The sole arbitrator was Lebanese. I represented the seller. A prominent Egyptian lawyer represented the buyer. The arbitrator had ordered that any witness who wished to testify must file an outline of his testimony a week before the hearing. My witness filed his outline. Nothing was filed on behalf of any witness for the Egyptian company.

At the hearing, my witness testified that he had worked for the Egyptian company but was now retired. He said the goods in question had been resold, and the Egyptian company had been paid for them. He acknowledged a few quality complaints but nothing abnormal.

The Egyptian lawyer then announced that his client would testify. My background as an American litigator clicked in. I was incredulous. I argued vigorously that this would violate the arbitrator’s order. I said that it would be highly prejudicial to my client because I had not had the outline in order to prepare my cross-examination. I said that to permit the testimony would violate due process.

The Egyptian lawyer responded in one sentence: “Mr. von Mehren apparently thinks he is in an American courtroom.”

I lost. The testimony was allowed. Older and wiser, I now know what was going on. The arbitrator took a civil law view of things.⁸ He was not going to give any weight to testimony by the owner of the Egyptian company. Civil law presumes that such testimony will be self-serving.⁹

The arbitrator also reasoned that, if the goods really were defective, documents would have been provided to establish that the defects existed. There were no such documents. Thus, the arbitrator already had drawn a strong inference that the defect claim was a sham. My witness’s testimony had confirmed it.

⁷ One of the advantages of international arbitration is that the parties can agree to confidential proceedings. Such were the circumstances here in this case, and no published opinion is available. I therefore respectfully request the reader to trust that the personal anecdote I convey here is a true account of my experience before this tribunal.

⁸ “Civil law” refers to the system of law common throughout Europe, whereas the American tradition is based upon “common law.” In a civil law system, judges are actively engaged in the proceedings due to the fact that a judge—and not a jury—will ultimately decide the case. See Christian Borris, *The Reconciliation of Conflict Between Common Law and Civil Law Principles in the Arbitration Process*, in 4 *CONFLICTING LEGAL CULTURES IN COMMERCIAL ARBITRATION* 1, 6 (Stefan Frommel & Barry A.K. Rider eds., 1999). See also Lucy Reed & Jonathan Sutcliffe, *The ‘Americanization’ of International Arbitration?*, 16(4) *MEALEY’S INT’L ARB. REP.* 37 (2001). In civil law, the judge plays the role of fact finder in the case. As such, many of the formalities familiar to the common law tradition that are intended to protect a jury from the undue influence of certain types of unreliable evidence become irrelevant in civil law proceedings. See generally Borris, *supra*; Reed & Sutcliffe, *supra*.

⁹ Cf. Gabrielle Kaufmann-Kohler, *Globalization of Arbitral Procedure*, 36 *VAND. J. TRANSNAT’L* 1313, 1329 (2003) (explaining that civil law values the integrity of documents over oral testimony, but that witnesses are generally permitted to testify).

My procedural arguments were irrelevant. Cross-examination was unnecessary. From the arbitrator's perspective, he simply thought it was polite to allow a gentleman who had traveled all the way from Cairo to talk for a few minutes. The witness testified, but I won the case.

What, then, is "Americanization"?¹⁰ I see it as the role played by American (or, more accurately, Anglo-American) procedural tools in international arbitration—and the style used by advocates in those proceedings.¹¹

It is widely recognized that, for some time after World War II, arbitral procedures were based on civil law litigation.¹² Parties submitted written memorials to argue the facts and the law.¹³ Witness statements were used in lieu of live, direct testimony.¹⁴ And, if witnesses were to be questioned, it was most often done by the arbitrators.¹⁵ The arbitrators also initiated limited requests for the production of specific pieces of evidence—in much the same way that law suits are heard by civil law judges.¹⁶ The reason for this civil law focus was that most practitioners were civil law lawyers.

By the 1980's, that had started to change. American law firms were becoming more involved.¹⁷ This was due to the increasing globalization of business disputes,

¹⁰ "Americanization" is a somewhat loaded term. As Karamanian explains, "Americanization" suggests international arbitration is akin to dispute resolution in the United States. For some non-Americans, the observation has normative consequences; it means 'unbridled and ungentlemanly' conduct or a strategy of 'total warfare.'" Susan L. Karamanian, *Overstating the "Americanization" of International Arbitration: Lessons from ICSID*, 19 OHIO ST. J. ON DISP. RESOL. 5, 5-6 (2003) (internal citation omitted). For a more complete discussion of the controversial term, see Elena V. Helmer, *International Commercial Arbitration: Americanized, "Civilized," or Harmonized?*, 19 OHIO ST. J. ON DISP. RESOL. 35, 35-37 (2003).

¹¹ Although this Article focuses on America's more recent contributions to international arbitration, it would be erroneous to suggest that America is a new contributor to international arbitration generally. For an excellent analysis of America's early contributions to the international arbitration model stemming from the Jay Treaty of 1794 onward, see Alford, *supra* note 1, at 72-77.

¹² Cf. Javier H. Rubinstein, *International Commercial Arbitration: Reflections at the Crossroads of the Common Law & Civil Law Traditions*, 5 CHL. J. INT'L L. 303, 308 (2004) ("[T]he heavy use of written evidence in international arbitration reflects the distinct influence of the civil law tradition.").

¹³ Karamanian, *supra* note 10, at 11.

¹⁴ *See id.*

¹⁵ *See id.*

¹⁶ *See id.* at 14.

¹⁷ *See, e.g.*, Alford, *supra* note 1, at 70, 80-83. At least one set of commentators believes that this fact will continue to be the most significant influence on the "Americanization" of international practice in the future:

[I]t is the involvement of U.S. legal practitioners that carries the most potential for Americanizing international arbitration practice. Some U.S.-based law firms have established international commercial arbitration departments and practice groups, while others provide arbitration services from within their traditional litigation departments. In fact, eight of the twelve most active law firms in international

the Iran-United States Claims Tribunal¹⁸ and, later, the sharp increase in bilateral investment treaty cases.¹⁹

arbitration were based in the United States. As a simple matter of human nature and training, American lawyers and American-trained foreign lawyers who practice international arbitration will continue to use American litigation techniques and tactics. Therefore, as American and American-trained lawyers become active in the governing bodies for international arbitration, it is likely that their experiences, training, and skills will shape the systems and rules that govern arbitral institutions. Barring unforeseen disruption of this trend, American influence on international arbitration will likely expand and further the “Americanization” bemoaned by many.

Kevin T. Jacobs & Matthew G. Paulson, *The Convergence of Renewed Nationalization, Rising Commodities, and “Americanization” in International Arbitration and the Need for More Rigorous Legal and Procedural Defenses*, 43 *TEX. INT’L L.J.* 359, 369-70 (2008) (internal citations omitted).

¹⁸ The Iran-United States Claims Tribunal was created by the Algiers Accord. Declaration of the Government of the Democratic and Popular Republic of Algeria, Jan. 20, 1981, 20 *I.L.M.* 224. *See generally*, CHARLES BROWER & JASON D. BRUESCHKE, *THE IRAN-UNITED STATES TRIBUNAL* (1998); David D. Caron, *The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution*, 84 *AM. J. INT’L L.* 104 (1990).

Additionally, in the early 1970’s, before the Iran Hostage Crisis, Libya nationalized foreign oil “concessions” (transfers of title to natural resources within a country for a set number of years in exchange for royalties to the investor), which resulted in three significant arbitrations between the private investors and the sovereign of Libya. *See* BP Exploration Co. (Libya) Ltd. v. Gov. of Libyan Arab Republic, 53 *I.L.R.* 297 (1979); Texaco Overseas Petroleum Co. & Cal. Asiatic Oil Co. v. Gov. of the Libyan Arab Republic, 53 *I.L.R.* 389 (1979); Libyan Am. Oil Co. (LIAMCO) v. Gov. of the Libyan Arab Republic, 20 *INT’L L. MATERIALS* 1 (1981). For an interesting account of how these three cases contributed to the growth of international arbitration and the introduction of American-style tactics into such arbitration, see Jacobs & Paulson, *supra* note 17, at 368, 376-378.

¹⁹ A bilateral investment treaty, or “BIT,” is an agreement reached between two countries in order to promote trade between the two. U.N. CONF. ON TRADE & DEV., *SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS, KEY TERMS & CONCEPTS IN IIAS: A GLOSSARY*, at 13, U.N. Sales No. E. 04.II.D.31 (2004). BITs were an outgrowth of Friendship, Commerce, and Navigation (“FCN”) treaties, which were established among some countries following World War II. *Id.* As the UNCTAD series explains:

Since the late 1950s, bilateral treaties for the promotion and (reciprocal) protection of investment have become the most widely used type of treaty in the field of foreign investment. Such treaties have replaced an earlier type of bilateral treaty, the treaty of Friendship, Commerce and Navigation which included provisions on rights of foreign nationals and companies among rules on a broad range of aspects of bilateral economic and political cooperation. By contrast, the distinguishing feature of the modern BIT is that it deals exclusively with issues concerning the admission, treatment and protection of foreign investment.

Id. The United Nations Conference on Trade and Development (UNCTAD) provides country-specific information about BITs, including lists and dates for each treaty signed by each nation. As of June 1, 2011, UNCTAD provides information regarding BITs for 178 economies. *Country-Specific Lists of BITs*, U.N. CONF. ON TRADE & DEV., <http://www.unctad.org/Templates/Page.asp?intItemID=2344&lang+1> (last updated Jun. 1, 2011).

American lawyers naturally brought with them a desire to use American trial procedures. They wanted to use cross-examination to confront adverse witnesses.²⁰ They also wanted document production to develop evidence to support their case. American clients and arbitrators were of the same mind. After all, from the perspective of those accustomed to American litigation, document production and cross-examination were critical procedural tools.²¹

It is important to note that the formal rules used in international arbitration did not act as a barrier to prevent the introduction of American procedural devices. Those rules are typically brief and general.²² Their flexibility promotes the use of a different and evolving mix of procedural tools to a far greater extent than the detailed rules used in American courts.

For example, the Rules of Arbitration of the International Chamber of Commerce set out all the procedural rules for establishing the facts of a case in a total of eight sentences—and, by my count, exactly two hundred words.²³ I am referring to ICC Article 20.²⁴ Compared to the provisions in the Federal Rules of Civil Procedure covering the same procedural ground,²⁵ Article 20 is amazingly brief.

²⁰ Cross-examination is fundamental to the English and American legal systems, and its use extends back centuries:

The history of the cross-examination began in the 1500's when the English courts gradually shaped themselves into a legal system whereby only such testimony that had been exposed to cross-examination was allowed. By the middle of the 1700's, the fundamental rule was that all statements which were to be used as testimony should be made only where the person affected by them had an opportunity of probing their trustworthiness by means of cross-examination.

Wm. Garth Snider, *The Linguistic Hearsay Rule: A Jurisprudential Tool*, 32 GONZ. L. REV. 331, 337 n.28 (1996).

²¹ Document production and cross-examination are part and parcel to the American litigation system. To illustrate, the Federal Rules of Civil Procedure contain extensive and detailed rules regarding document production. *See, e.g.*, FED. R. CIV. P. 34 (detailing rules for "Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes").

²² For example, other often-used rules in international arbitration include the UNCITRAL, ICSID, and SCC arbitration rules. U.N. COMM'N ON INT'L TRADE LAW, *ARB. RULES*, available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf> (last updated 2010) [hereinafter UNCITRAL Rules]; INT'L CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES, *CONVENTION, REGULATIONS, AND RULES*, available at <http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp> (last updated April 10, 2006) [hereinafter ICSID Rules]; ARB. INST. OF THE STOCKHOLM CHAMBER OF COMMERCE, *ARB. RULES*, available at <http://www.sccinstitute.com/filearchive/3/33776/Skiljedomsregler%20eng%202010%20-%20utan%20modellklausulsidan.pdf> (last updated 2010) [hereinafter SCC rules].

²³ INT'L CHAMBER OF COMMERCE INT'L COURT OF ARB., *RULES OF ARB.*, available at <http://www.uscib.org/index.asp?documentID=3262> (last updated May 1, 2010) [hereinafter ICC Rules]. In September 2011, new ICC Arbitration Rules were adopted by the ICC, which will enter force on January 1, 2012. *See ICC Dispute Resolution Rules*, <http://www.iccwbo.org/court/arbitration/id4199/index.html>. As these new ICC rules have not yet come into force, this Article focuses solely on the 1998 version of the ICC Rules currently in force and which have significantly influenced over a decade of international arbitration.

²⁴ ICC Rules, *supra* note 23, art. 20. The full text of this provision provides:

In Article 20, nothing is said *per se* about either cross-examination or document disclosure.²⁶ The authority to employ both of those procedural tools—and many others—is set out in a very general, single sentence as follows: “The Arbitral Tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means.”²⁷

How, then, do tribunals decide what procedures will be used in a particular case? To a very significant degree, they consult with the parties and consider their proposals.²⁸

Sometimes the parties present a joint proposal based on a compromise that they have reached between themselves. When that happens, the arbitrators are likely to accept it. Sometimes the parties do not agree and advance different proposals.

[1.] The Arbitral Tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means.

[2.] After studying the written submissions of the parties and all documents relied upon, the Arbitral Tribunal shall hear the parties together in person if any of them so requests or, failing such a request, it may of its own motion decide to hear them.

[3.] The Arbitral Tribunal may decide to hear witnesses, experts appointed by the parties or any other person, in the presence of the parties, or in their absence provided they have been duly summoned.

[4.] The Arbitral Tribunal, after having consulted the parties, may appoint one or more experts, define their terms of reference and receive their reports. At the request of a party, the parties shall be given the opportunity to question at a hearing any such expert appointed by the Tribunal.

[5.] At any time during the proceedings, the Arbitral Tribunal may summon any party to provide additional evidence.

[6.] The Arbitral Tribunal may decide the case solely on the documents submitted by the parties unless any of the parties requests a hearing.

[7.] The Arbitral Tribunal may take measures for protecting trade secrets and confidential information.

Id.

²⁵ FED. R. CIV. P. 26. As most of the individuals reading this Article likely know, Rule 26 governs discovery in U.S. litigation in Federal court. It is a lengthy rule setting forth detailed requirements for required disclosures (26(a)); the scope and limitations of discovery (26(b)); protective orders (26(c)); the timing and order of discovery (26(d)); discovery supplementation (26(e)); and how the parties are to plan for discovery (26(f)). *Id.*

²⁶ See ICC Rules, *supra* note 23, art. 20.

²⁷ *Id.* art. 20(1).

²⁸ Tribunals utilize significant discretion in determining the procedures that a proceeding will follow and often turn to the parties for guidance in constructing them. For example, the tribunal may do this through a hearing early on in the arbitration whereby the parties are heard and supplemental procedural rules are established. See Virginia Hamilton, *Document Production in ICC Arbitration*, in ICC INTERNATIONAL COURT OF ARBITRATION BULLETIN, 63, 67 (Spec. Supplement 2006).

Then, the arbitrators usually reach a decision that reflects a compromise between the two parties' proposals.²⁹ The point is that compromise is critical to the process.

Procedural evolution in international arbitration is driven by these compromises—compromises made time after time in an ongoing series of individual cases. During the past 40 years or so, those compromises have tended to introduce important American procedural tools because of increasing American involvement in the process.

But, at the same time, those compromises have often modified and altered American procedure for use in arbitration so that it will better fit the expectations of civil law parties. This process is illustrated by the way in which document disclosure has been incorporated into international arbitration.

Document requests in American courts can be very broad.³⁰ You know what I mean—something like: “Please produce any and all documents that reflect, refer or relate in any way to business dealings between Company A and Company B during the period beginning on January 1, 1990 and continuing until the date of production.”³¹ This kind of broad request was not accepted by the civil law world. In civil law proceedings, parties are expected to develop on their own whatever evidence is necessary to support their claim.³²

The compromise generally reached on document disclosure is reflected in the IBA Rules on the Taking of Evidence in International Arbitration.³³ These Rules are

²⁹ Arbitral tribunals often do this through “procedural orders,” which become part of the rules for the arbitration. For an analysis of factors arbitral tribunals often balance in creating procedural orders for an arbitration, see *id.* at 68-69.

³⁰ See FED. R. CIV. P. 26(b)(1) (“Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or dispute—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter.”).

³¹ See *id.*

³² This is summarized by a Swiss arbitrator, who utilized his discretion to refuse discovery in a procedural order in an arbitration in 1991:

In Civil law countries, the principle *Onus probanti incumbit alleganti* is constructed as leaving to each party the full burden of collecting whatever evidence it wishes to bring to the attention of the Court. There is, in the Civil law tradition, no duty of discovery from the other side, except to the extent that each party has to indicate in advance the evidence on which it intends to rely.

Yves Derains, *Towards Greater Efficiency in Document Production before Arbitral Tribunals—A Continental Viewpoint*, in ICC INTERNATIONAL COURT OF ARBITRATION BULLETIN, ¶ 11 (Spec. Supplement 2006) (citing quote by S.R. Bond, *The 1999 IBA Rules on evidence in international commercial arbitration*, in ARBITRAL PROCEDURE AT THE DAWN OF THE NEW MILLENNIUM 99, 101 (Bruylant ed., 2005)).

³³ *International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration*, IBANET.ORG, available at http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx (last updated May 29, 2010) [hereinafter IBA Rules]. As explained in the Foreword to the IBA Rules, “[t]he IBA Rules of Evidence reflect procedures in use in many different legal systems, and they may be particularly useful when the parties come from different legal cultures.” *Id.* Foreword. The current version of the IBA Rules was issued in 2010, replacing older versions from 1999 and 1983. *Id.* The IBA Rules reflect a compromise between civil law and common law practice because participants

not binding in any arbitration unless the parties expressly agree to them.³⁴ They do, however, provide the framework used in many individual cases for decisions about whether there will be document production and how it will be implemented.³⁵

The gravamen of the IBA Rules is that each Document Request must seek a single document or a narrow and specific category of documents.³⁶ It must contain sufficient detail to identify the document or documents sought.³⁷ It must explain exactly how the requested documents are relevant to the case and material to its outcome.³⁸ In short, as American document discovery was introduced into international arbitration, it was modified to better fit the countervailing civil law culture of other participants in the process.

It should be noted that not all general aspects of American discovery have made their way into arbitration practice. Interrogatories, for example, are rarely if ever used.³⁹ Depositions—a cornerstone of American litigation—are likewise simply not currently part of arbitral practice.⁴⁰ Of course, the flexible IBA Rules would not foreclose the possibility of the use of these techniques if both parties so desired, but current international arbitration has not embraced these facets of American practice.

Understanding that the procedures used in international arbitration reflect an ongoing series of compromises provides the context for my answer to the question posed by the title of my remarks today: Is International Arbitration Becoming Too

from both traditions actively collaborated in their drafting. *See* Kauffman-Kohler, *supra* note 9, at 1323. Likewise, American techniques are included in the Rules because Americans played a significant role in their drafting. Alford, *supra* note 1, at 84.

³⁴ *See* IBA Rules, Foreword (“[P]arties and Arbitral Tribunals may adopt the IBA Rules of Evidence, in whole or in part. . . . [or] [t]hey may also vary them or use them as guidelines in developing their own procedures.”).

³⁵ *Id.* art. 3.

³⁶ *Id.* art. 3(3) states:

3. A Request to Produce shall contain: (a)(i) a description of each requested Document sufficient to identify it, or (ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of Documents that are reasonably believed to exist; in the case of Documents maintained in electronic form, the requesting Party may, or the Arbitral Tribunal may order that it shall be required to, identify specific files, search terms, individuals or other means of searching for such Documents in an efficient and economical manner; (b) a statement as to how the Documents requested are relevant to the case and material to its outcome; and (c)(i) a statement that the Documents requested are not in the possession, custody or control of the requesting Party or a statement of the reasons why it would be unreasonably burdensome for the requesting Party to produce such Documents, and (ii) a statement of the reasons why the requesting Party assumes the Documents requested are in the possession, custody or control of another Party.

Id.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *See, e.g.*, Kaufmann-Kohler, *supra* note 9, at 1328.

⁴⁰ *Id.*; Siegfried H. Elsing & John H. Townsend, *Bridging the Common Law-Civil Law Divide in Arbitration*, 18 ARB. INT’L 59, 61 (2002).

American? My answer is “No.” International arbitration has not been engaged in a wholesale adoption of American trial techniques. To the contrary, it has assimilated some aspects of American trial procedure, modified them as part of the assimilation process, and retained many of the classic procedural tools based on civil law.

This process is critical to the continued vitality of international arbitration. International arbitration is only used when the parties agree to it.⁴¹ It is generally the law all over the world that, if the parties have not agreed to arbitrate a dispute, a tribunal has no jurisdiction to decide it.⁴² We cannot expect American parties—advised by American lawyers—to agree to participate in a process that is bereft of all American procedural mechanisms. By the same token, we cannot expect non-American parties to participate if the process is entirely Americanized. As we have seen, this is not what has happened.

As I have pointed out, the recent past has essentially been one in which American procedures have been incorporated into a system that previously was heavily influenced by civil law. But what is going on today—and what will go on in the future?

I think there are several current developments that are shaping the future of international arbitration—a future that will lead to further homogenizing of procedural approaches.⁴³ The future will draw significantly on legal traditions that have not heretofore had a significant impact.⁴⁴ And the future will focus on efficiency and reducing cost as important goals for this dispute resolution process.⁴⁵

The article by Professor Alford that I referred to at the beginning of my remarks was published in 2003.⁴⁶ One of Professor Alford’s points was that “Americanization” was being caused by “the rise of the Anglo-American law

⁴¹ Parties will usually agree to arbitration through a treaty (such as a BIT) or contractual agreement, which contains an arbitration provision. Some arbitration rules even provide standard clause language for parties to include in their agreements in order to guarantee that their choice of arbitration is clear. *See, e.g.*, ICC Rules, *supra* note 23, at 3 (“All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.”) (internal quotation marks omitted).

⁴² This is the very purpose of Bilateral Investment Treaties (such as, for example, the U.K.-Czech Republic BIT) and multilateral investment treaties (such as NAFTA), which permit countries to expressly consent to arbitration for the purpose of promoting an investment. *See* Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Czech and Slovak Federal Republic for the Promotion and Protection of Investments, U.K.-Czech Rep., 10 July 1990, *available at* http://www.unctad.org/sections/dite/ia/docs/bits/czech_uk.pdf; North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 289 (containing chs. 1-9), 32 I.L.M. 605 (containing chs. 10-22).

⁴³ The term “homogenized” is what commentators Lucy Reed and Jonathan Sutcliff used to describe the path international arbitration practice would take in 2001. Reed & Sutcliff, *supra* note 8, at 37. A decade later, my own experience confirms this “homogenization” has continued and will likely do so in the future.

⁴⁴ *See, e.g.*, Alford, *supra* note 1, at 77-79.

⁴⁵ *See generally* Derains, *supra* note 32 (discussing the need for greater efficiency and reduced costs in discovery in international arbitration).

⁴⁶ Alford, *supra* note 1.

firm.”⁴⁷ I agree that was correct when Professor Alford wrote it, but things have changed.

At the beginning of this century, the major law firms involved in international arbitration tended to rely heavily on American or English litigators to represent clients, but this has changed in two ways.⁴⁸ First, those American litigators have gained a decade or more of experience in international arbitration. Rather than seeking to use directly what they learned in American courtrooms, they now have a far more comprehensive and nuanced understanding of the full panoply of tools available in international arbitration. They have, if you will, changed from being American litigators to international arbitration specialists.

More importantly for the long run, however, those law firms have changed. To be international in the year 2000 meant that a firm had some offices outside the United States or London run by senior lawyers who were American or British.⁴⁹ Now, firms are much more significantly internationalized in terms of their lawyer population with an ever growing number of non-American (even non-European) lawyers in senior positions.⁵⁰

What this means is that new lawyers from other parts of the world have begun to participate meaningfully in running arbitration cases. As they do so, they bring their own perspectives to the ongoing process of compromise that shapes and reshapes the process. That is true of lawyers from Asia, South America, and Eastern Europe—parts of the world that have been historically underrepresented in the process.⁵¹

At the same time, there is growing transparency in the arbitral process. Arbitral awards have traditionally been confidential and unavailable to the public.⁵² That tradition has, however, been partially broken by ICSID’s practice of publishing awards⁵³ and the growing availability of Bilateral Investment Treaty decisions

⁴⁷ *Id.* at 80.

⁴⁸ See, e.g., *The International Who’s Who of Commercial Arbitration* (2012), WHO’SWHOLEGAL.COM, http://www.whoswholegal.com/research/pdfs/20/WWL_Arbitration_2012.pdf (last visited Sept. 28, 2011).

⁴⁹ “Prior to World War II, only four U.S. law firms had an overseas office. By 2004, the number had grown to 381 foreign law offices in seventy-six cities in forty-eight different foreign countries.” Catherine A. Rogers, *International Litigation and Arbitration: Lawyers Without Borders*, 30 U. PA. J. INT’L L. 1035, 1036 (2009) (internal citations omitted).

⁵⁰ The publication “The International Who’s Who of Commercial Arbitration” nicely illustrates the globalization of commercial arbitration. In examining those individuals listed from U.S. firms, one can see that a plethora of nationalities are represented among those identified as key players in this field. *International Who’s Who of Commercial Arbitration*, *supra* note 48.

⁵¹ *Id.* The Who’s Who list recognizes accomplished individuals from firms in such diverse places as Bangladesh, Bolivia, Egypt, Georgia, Hong Kong, Iran, Kazakhstan, Nigeria, Serbia, Saudi Arabia, Singapore, Tunisia, United Arab Emirates, and Venezuela. *Id.*

⁵² See Christopher R. Drahozal, *Commercial Norms, Commercial Codes, and International Commercial Arbitration*, 33 VAND. J. TRANSNAT’L L. 79, 108 (2000) (discussing international arbitration confidentiality, which contributes to the lack of data about such arbitrations).

⁵³ The International Centre for the Settlement of Investment Disputes (ICSID) website maintains an extensive collection of pending and concluded arbitrations brought under the ICSID rules, an effort which has significantly increased the available body of international

rendered under the UNCITRAL rules.⁵⁴ While the substantive aspects of those decisions focus on public international law issues, the procedural aspects are largely applicable to all of international arbitration. And, because the major arbitrators in treaty cases usually also sit in commercial cases,⁵⁵ it has become easier to get a more sophisticated understanding of how arbitration is evolving. Greater and more complete knowledge allows a broader spectrum of participants to participate in meaningful ways.

The large increase in the number of conferences about international arbitration is having the same effect.⁵⁶ These are well-attended by practitioners—particularly as law firms identify international arbitration as a growth area. As the arbitral community moves from one meeting to another, ideas percolate and new approaches evolve.

And, finally, the market for arbitration specialists is becoming somewhat mature—meaning that competition has increased among the major firms that act in this area.⁵⁷ That, together with client pressures on cost and efficiency that gained significant momentum during the last recession, has produced a real commitment to find ways to make international arbitration less expensive and quicker. Often criticism of “Americanization” has not focused on what Americans have introduced into the process. Rather, the criticism focuses on the increased cost and time due to how the panoply of available tools are used in specific cases—irrespective of the “national origin” of those tools and irrespective of the nationality of the lawyers who use or misuse them.⁵⁸

arbitration case law. However, the publication of awards is still subject to the consent of the parties. *See ICSID Cases*, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=Cases_Home (last visited Aug. 22, 2011).

⁵⁴ *See* UNCITRAL Rules, *supra* note 22.

⁵⁵ *See, e.g.*, INTERNATIONAL ARBITRATION INSTITUTE, http://www.iaiparis.com/pages_p_html.asp (last visited August 23, 2011). This resource assists parties in identifying those experienced in the field of international arbitration and is specifically helpful in choosing arbitrators, most of whom have experience in both treaty and commercial arbitration. *See Directory of Members*, INTERNATIONAL ARBITRATION INSTITUTE, http://www.iaiparis.com/drm_result.asp (last visited Aug. 23, 2011).

⁵⁶ Conferences regarding international arbitration are held in cities worldwide addressing numerous topics relevant to the field, which has created an ongoing international arbitration dialogue. *See, e.g.*, International Arbitration Planner, <http://www.arbitrationevents.com/Public/ViewEvents.aspx?PlannerType=Events> (last visited Aug. 22 2011) (listing numerous international arbitration conferences).

⁵⁷ *See generally* *The International Who's Who of Commercial Arbitration*, *supra* note 48.

⁵⁸ *See* Derains, *supra* note 32. Derains presents this larger criticism of international arbitration generally—it's excessive cost and inefficiency—in a manner that captures the heart of the criticism as one resulting from the growing pains of blending multiple traditions without labeling it as “Americanization.” By using document production as the primary example of a legal culture clash, Derains poses that the solution to greater efficiency is to focus not on one legal system's viewpoint of “discovery” over another, but rather, to focus on what is actually needed in order for a party to discharge its burden of proof:

To be efficient, document production must serve the purpose of bringing to the arbitration tribunal's knowledge not just any documents relevant and material to the

This certainly is true of many of the serious issues raised by the article last year that was published in the ABA Journal.⁵⁹ But the answer is not to de-Americanize arbitration; it is to manage the process more efficiently and effectively, and to develop new and better ways—in the words of the ICC’s Article 20—to “proceed within as short a time as possible to establish the case by all appropriate means.”⁶⁰

As I have said, international arbitration is truly international—not American. It is an extremely flexible process. The name of the game today is to use all available procedural tools to develop an increasingly efficient and effective process. Some of that will come from American sources, but much will come from elsewhere.

outcome of the dispute, but documentary evidence without which a party would not be able to discharge the burden of proof lying upon it.

Id. at ¶ 14.

⁵⁹ Seidenberg, *supra* note 2, at 50.

⁶⁰ ICC Rules, *supra* note 23, art. 20.