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International Arbitration of Multi-Party Contract Disputes: The Need for Change

I. INTRODUCTION

Arbitration has become an increasingly popular alternative to civil litigation as a method of resolving contract disputes in the international business community. Arbitration agreements have become a prevalent feature of international commercial transactions and are often included in international commercial contracts.¹ Recently, arbitration has become even more effective in resolving international contract disputes because the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted by the United Nations in 1968, secures the enforcement of international arbitral awards against those countries that participate in the Convention.²

The construction contract dispute is one type of agreement that may be resolved by arbitration or litigation. Because world governments and international businesses maintain positive attitudes toward arbitration, arbitration can more effectively meet the needs of the international business community than litigation. Thus, arbitration clauses are no longer used primarily in special cases, but are included in most international construction contracts.³ Although it would appear that international construction contract disputes are as easily arbitrated as other international commercial disputes, international construction contract disputes often involve multiple parties and cannot always be effectively and efficiently resolved by arbitra-

1. Leich, *The Inter-American Convention on International Commercial Arbitration*, 75 AM. J. INT'L L. 982, 983 (1981)(quoting Acting Secretary of State William Clark in a report to President Reagan dated May 18, 1981); Bixler & James, *International Arbitration—Basic Principles and Guidelines*, CONSTRUCTION BRIEFINGS, Sept. 1981, at 1.

2. Bixler & James, *supra* note 1, at 1. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *done* June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38. For further discussion of the Convention, see *infra* note 54 and accompanying text.

3. Derains, *New Trends in the Practical Application of the ICC Rules of Arbitration*, 3 NW. J. INT'L L. & BUS. 39, 43-44 (1981). The prevalence of international construction contracts is revealed by the fact that in 1977, 115 of the top 400 United States contractors signed \$15.9 billion in foreign contracts in over 125 different countries. Ford & Reed, *International Construction Contracting—Basic Principles and Guidelines*, CONSTRUCTION BRIEFINGS, Mar. 1979, at 1.

tion.⁴ The most effective way to arbitrate multi-party disputes is to bind all parties affected by a dispute to the decision made by the arbitral tribunal.⁵ However, because numerous agreements are involved in multi-party construction contracts, ancillary agreements may contain arbitration clauses which differ from the arbitration clause in the principal agreement.⁶ Parties other than the owner and the general contractor cannot be bound by the principal agreement's arbitration clause unless the other parties agree to such an arrangement. If the other parties do not consent to such an arrangement, it is difficult to resolve the dispute through arbitration.

The construction of the first natural gas pipeline from Siberia in the Soviet Union to West Germany represents one such multi-party construction contract. The United States government was not directly involved in the Trans-Siberian pipeline project until President Reagan imposed trade sanctions against European companies supplying equipment, labor, or material to the project.⁷ The European companies affected by President Reagan's ban refused to repudiate their contracts with the Soviet Union. Nonetheless, eager to resolve the dispute with the United States, the governments of West Germany, France, and Great Britain, on behalf of their respective companies, considered submitting the matter to international commercial arbitration.⁸

Had the Trans-Siberian pipeline dispute been submitted to arbitration, the question would have arisen as to which international arbitral process could have effectively resolved the dispute. Because the dispute involved a multi-party construction contract, the arbitral process employed to resolve the dispute should have been equipped to manage problems inherent in resolving multi-party contract disputes.

This comment discusses the advantages and disadvantages of arbitrating and litigating multi-party contract disputes in the context of the factual background of the Trans-Siberian pipeline controversy. In addition, this comment analyzes two kinds of arbitral processes which could have been employed to arbitrate the pipeline dispute. These two arbitral processes are analyzed by applying two sets of arbitration rules, the International Chamber of Commerce Arbitration

4. Most construction contracts involve multiple parties. Generally, the principal agreement between the owner and the general contractor is surrounded by ancillary agreements between subcontractors, guarantors, insurers, and financing institutions. Comment, *ICCA: Multi-Party Commercial Disputes*, 14 J. WORLD TRADE L. 545, 545 (1980).

5. *Id.* at 545-46.

6. *Id.*

7. L.A. Times, Oct. 18, 1982, § 1, at 14, col. 1.

8. L.A. Times, Sept. 4, 1982, § 1, at 9, col. 4.

Rules, and the arbitration rules adopted by the United Nations Commission on International Trade Law, to the Trans-Siberian pipeline dispute and will conclude that current international arbitration rules are inadequate to resolve multi-party contract disputes such as the Trans-Siberian pipeline controversy. Finally, this comment proposes changes to the current international arbitration rules which should be implemented if international commercial arbitration is to be a viable and effective alternative to litigation.

II. ARBITRATION VS. LITIGATION

Five advantages of arbitrating commercial disputes may be noted. First, parties that arbitrate avoid litigating their disputes in a foreign jurisdiction, thus eliminating the risk of facing a hostile court and the problem of obtaining competent legal counsel in a different country.⁹ Second, in contrast to civil litigation, arbitration allows the parties to manipulate several factors in the arbitration process. Such factors include the law and rules to be applied during arbitration, the location of arbitration, and the composition of the arbitral tribunal.¹⁰ Third, arbitration is generally quicker than litigation. The entire arbitration process takes between seven and twenty months, whereas bringing a case to trial can take four or more years in many jurisdictions.¹¹ Fourth, arbitration hearings are private and any decisions made by arbitral tribunals are revealed only to the arbitrating parties, whereas the outcome of litigation proceedings is public.¹² Fifth, judicial review of arbitral decisions is limited, thus contributing to the rapidity with which arbitral tribunals render decisions and to the finality of arbitral awards.¹³

Arbitration, however, can be more disadvantageous than litigation in some respects. In certain instances, arbitration is more expensive than litigation. The costs of arbitration include administrative fees, which alone can be sizeable, arbitrators' fees and costs as well as the fees and costs of experts that testify at the arbitral hearing.¹⁴ Moreover, arbitration does not guarantee that litigation

9. Bixler & James, *supra* note 1, at 1.

10. Leich, *supra* note 1, at 983. See also Bixler & James, *supra* note 1, at 1.

11. Bixler & James, *supra* note 1, at 1.

12. *Id.*

13. Stein & Wotman, *International Commercial Arbitration in the 1980's: A Comparison of the Major Arbitral Systems and Rules*, 38 *BUS. LAW.* 1685, 1687 (1983).

14. Bixler & James, *supra* note 1, at 2. INTERNATIONAL CHAMBER OF COMMERCE, *GUIDE TO ICC ARBITRATION* 34 (1963)[hereinafter cited as ICC RULES].

will be entirely avoided since arbitrating parties may appeal to the judicial process if the arbitral tribunal renders a capricious, incomplete or fraudulent decision.¹⁵

III. FACTUAL BACKGROUND OF THE TRANS-SIBERIAN NATURAL GAS PIPELINE CONTROVERSY

The construction of the first natural gas pipeline from Siberia in the Soviet Union to West Germany was the largest commercial venture ever negotiated between the Soviet Union and Western Europe.¹⁶ The first phase of the project was scheduled to be completed by early 1984 at a cost of \$10 billion and will link Siberia and Western Europe by 3,600 miles of pipe.¹⁷ The construction of a second pipeline paralleling the first will begin upon completion of the first pipeline.¹⁸ The Soviets will pump 1.4 trillion cubic feet of natural gas per year through the pipeline.¹⁹

Numerous European countries and European subsidiaries of United States-based companies were directly involved in the construction of the Trans-Siberian pipeline.²⁰ After accepting bids for thirty-eight compressor stations to be used in the pipeline, Moscow told bidders that it would not buy goods manufactured in the United States.²¹ However, bidders for the compressor station orders included one consortium consisting of a Houston-based firm,²² and European manufacturing associates of United States-based General Electric Company.²³ In addition, as of August, 1981, the United

15. Bixler & James, *supra* note 1, at 2; see also *ARBITRATION LABOR CASES 3-4* (N.A. Levin ed. 1974) (stating that arbitration decisions are less subject to appeal than court actions but nonetheless may lead to litigation).

16. Rachlin, *Flap Over Europe's Pipeline*, *NEWSWEEK*, July 5, 1982, at 22.

17. *Id.* The natural gas will run from the Siberian fields to the Czechoslovakian border and then feed into the existing Western European natural gas distribution network, eventually flowing to West Germany, France, Italy, Spain, Austria, Belgium, Switzerland and West Berlin. *Id.*

18. *Id.* at 23.

19. *Id.* at 22. Construction of the pipeline will allow the Soviet Union to increase its supply of natural gas to Western Europe from 9% to 25% per year. *Id.*

20. In 1981, the Soviet Union and West Germany reached an agreement financing pipe and equipment deliveries to the Soviet Union. *Pipeline suppliers line up for \$8 billion*, *BUS. WK.*, Aug. 10, 1981, at 36, 37. Moreover, international consortia from West Germany, France, and Italy competed for the project manager role, as well as for contracts to supply 38 compressor stations for the project. *Id.* at 37.

21. *Id.*

22. This consortium consisted of Cooper Industries Inc. and Rolls-Royce Ltd. *Id.*

23. The European manufacturing associates of General Electric Co. involved were Italy's Nuovo Pignone, Great Britain's John Brown Engineering Ltd., West Germany's AEG-Telefunken and others. *Id.*

States-based Caterpillar Tractor Company was almost certain to be granted more than \$500 million in earth-moving and pipe-laying equipment orders.²⁴

In response to the Polish government's imposition of martial law throughout Poland in December, 1981,²⁵ President Reagan imposed trade sanctions on European companies supplying equipment, labor, or materials to the Trans-Siberian pipeline. As a result, the United States government became directly concerned with the construction of the pipeline. In June, 1982, President Reagan retaliated against European subsidiaries of United States companies which had already shipped or were in the process of shipping turbines to the Soviet Union by refusing to supply natural gas or petroleum technology to those subsidiaries.²⁶ Reagan refused to lift the sanctions until European subsidiaries agreed to limit high-technology exports and economic credits and loans to the Soviets.²⁷ However, the European companies affected by Reagan's ban refused to breach their contracts with the Soviet Union, most of which were signed before President Reagan imposed the sanctions.²⁸ Finally, in November, 1982, before the problem could be submitted to international arbitration, President Reagan lifted the sanctions and announced that the Western allies had reached agreement on a broad and "historic" set of principles under which trade with the Soviet Union would be conducted.²⁹

IV. INSTITUTIONAL AND PRIVATE ARBITRATION IN THE INTERNATIONAL REALM

Institutional, or agency-administered arbitration is guided by rules adopted by international agencies such as the International Chamber of Commerce (ICC).³⁰ International arbitration agencies have only recently been created by private businesses, professional organizations, governments, and inter-governmental agencies to provide permanent arbitration rules and facilities for the international business

24. *Id.*

25. L.A. Times, Oct. 18, 1982, § 1, at 14, col. 1; L.A. Times, July 23, 1982, § 1, at 6, col. 1.

26. L.A. Times, Sept. 4, 1982, § 1, at 9, col. 2.

27. *Pipeline Ban: Reagan Digs In His Heels*, U.S. NEWS & WORLD REP., June 28, 1982, at 8. See also L.A. Times, Oct. 18, 1982, § 1, at 14, col. 1.

28. L.A. Times, Sept. 4, 1982, § 1, at 9, col. 4.

29. L.A. Times, Nov. 14, 1982, § 1, at 1, col. 5. France and Great Britain, however, declared they were not parties to the agreement and made no concessions to persuade President Reagan to lift the United States embargo. L.A. Times, Nov. 16, 1982, § 1, at 1, col. 5.

30. See J. LEW, APPLICABLE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION 19-20 (1978).

community.³¹ *Ad hoc* or private arbitration operates through rules determined by the arbitrating parties themselves.³² The United Nations Commission on International Trade Law (UNCITRAL) has proposed guidelines to be used during international *ad hoc* arbitration.³³ Parties who choose *ad hoc* arbitration may choose to incorporate some, all, or none of the UNCITRAL rules into the arbitral process.

There are advantages and disadvantages to using agency-administered arbitration rather than *ad hoc* arbitration to resolve international disputes. Agency-administered arbitration is more advantageous than *ad hoc* arbitration because the "non-nationality" of *ad hoc* arbitration rules may make the arbitral process confusing and uncertain. Moreover, if the arbitrating parties cannot agree on the rules to be used during arbitration, or on particular issues which arise during arbitration, the parties may be forced to litigate their dispute.³⁴ Further, with no permanent arbitration facilities at its disposal, the *ad hoc* arbitral tribunal must act as its own administrator and secretary during arbitration.³⁵ Agency-administered arbitration, however, is more disadvantageous than *ad hoc* arbitration in that institutional arbitration may take longer than *ad hoc* arbitration.³⁶ In addition, institutional arbitration rules may be too formal and inflexible to resolve unusual disputes.³⁷

V. THE INADEQUACIES OF CURRENT INSTITUTIONAL AND AD HOC INTERNATIONAL ARBITRATION RULES IN RESOLVING MULTI-PARTY CONTRACT DISPUTES

To decide whether institutional or *ad hoc* arbitration may successfully resolve multi-party contract disputes, this comment compares one set of institutional arbitration rules, the arbitration rules of

31. *Id.* at 19. The duties of such institutions include appointing arbitrators, and supplying clerical and secretarial services to arbitral tribunals and arbitrating parties. Bixler & James, *supra* note 1, at 3.

32. LEW, *supra* note 30, at 33-34.

33. United Nations Commission on International Trade Law Arbitration Rules, G.A. Res. 31/98, 31 U.N. GAOR Supp. (No. 39) at 182, U.N. Doc. A/31/39 (1976)[hereinafter cited as UNCITRAL Rules]; *Text: The UNCITRAL Arbitration Rules (1976)*, 27 AM. J. COMP. L. 489-503 (1979).

34. LEW, *supra* note 30, at 34.

35. *Id.*

36. Bixler & James, *supra* note 1, at 3.

37. LEW, *supra* note 30, at 33. For example, institutional arbitration rules may restrict the choice of arbitrators to individuals who may not be qualified to handle certain kinds of cases. *Id.*

the International Chamber of Commerce (ICC Rules), and the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL Rules), which guide *ad hoc* arbitration. In determining that one set of rules may be more successful than the other set in resolving multi-party disputes, the goals of international commercial arbitration must be considered. These goals include speed, limited but effective judicial support of arbitral procedures, neutral and objective arbitral proceedings, reasonable costs, and limited judicial review of arbitral awards.³⁸ Using the Trans-Siberian pipeline dispute as an example of a multi-party dispute, and analyzing how that dispute would have been resolved under the ICC and UNCITRAL rules illustrates that both institutional and *ad hoc* arbitration inadequately settle multi-party disputes.³⁹

A. Background

Although the ICC is located in Paris, France, it is represented by national committees in over fifty countries. It has created thirty working groups, such as commissions, standing committees, and councils, to carry out its functions.⁴⁰ Members of the ICC national committees comprise the ICC Court of Arbitration. The ICC Court of Arbitration administers arbitrations and holds private sessions once a month to review arbitrator challenges, approve awards, and set fees and administrative costs.⁴¹ A "secretariat" located at the Paris office assists the court by reviewing and filing documents and securing physical facilities for arbitrators.⁴²

Unlike the ICC, the UNCITRAL does not have a "secretariat" or facilities to administer arbitrations, or a separate judicial body to review arbitrator decisions. The UNCITRAL rules were designed for use by parties with different "legal, social and economic" backgrounds and to "contribute to the development of harmonious international economic relations."⁴³ The rules may be used in *ad hoc* arbitration or in arbitration administered by a private international commercial arbitration organization. The parties may designate any

38. Stein & Wotman, *supra* note 13, at 1687.

39. It should be emphasized that the dispute between the United States and the European countries involved in the construction of the Trans-Siberian pipeline has been resolved. Nonetheless, the facts behind the dispute form the basis of a hypothetical situation which is used throughout this comment for the purpose of comparing the ICC and UNCITRAL rules.

40. Stein & Wotman, *supra* note 13, at 1695.

41. *Id.*

42. *Id.*

43. *Id.* at 1696.

arbitral institution, including the ICC, as the administrative authority and/or the arbitrator appointing authority.⁴⁴

B. Commencing Arbitration

The ICC arbitration rules are invoked only when the parties to an international contract have agreed to submit disputes that arise under the contract to ICC arbitration. This agreement may be made before or after the dispute arises.⁴⁵ Furthermore, an ICC arbitration agreement is strictly interpreted and binds only the parties that sign the agreement to ICC arbitration.⁴⁶ Similarly, the UNCITRAL arbitration rules apply only to those parties that agree in writing to be bound by the rules.⁴⁷ Because both sets of rules apply only to parties which agree to be bound thereby, material suppliers to the Trans-Siberian pipeline project⁴⁸ could not have arbitrated their dispute with the United States under the ICC or the UNCITRAL rules unless the United States had agreed to arbitrate. Because of the strong anti-Soviet sentiment prevalent in the Reagan Administration, and the adverse domestic, as well as international, political effects that would result from President Reagan submitting the dispute to arbitration and compromising the goals of his embargo, the United States would probably not have agreed to arbitrate the dispute.

C. Joint Arbitration Clauses

The ICC rules allow joint arbitration clauses to be used when parties cannot agree on arbitration procedures.⁴⁹ When joint arbitration clauses are used, a committee composed of representatives chosen by each party selects the arbitration location and procedures.⁵⁰ This procedure allows each arbitrating party to have its interests represented when the arbitration rules are selected.

The UNCITRAL rules, however, do not provide for the use of joint arbitration clauses. This is unfortunate because joint arbitration clauses may encourage certain parties to arbitrate who would not otherwise do so if a joint arbitration clause were not included in the

44. *Id.*

45. ICC RULES, *supra* note 14, at 15.

46. *Id.*

47. UNCITRAL RULES, art. 1.

48. Some of the material suppliers included Italy, West Germany, France, and Great Britain. *See supra* notes 20-24 and accompanying text.

49. ICC RULES, *supra* note 14, at 17.

50. *Id.*

contract. For example, the United States might have agreed to arbitrate the Trans-Siberian pipeline dispute if it had been certain that the American Arbitration Association (AAA) and the ICC would have jointly arbitrated the dispute. Perceiving the AAA to sympathize with its position, the United States might have been encouraged to arbitrate once the AAA became involved. The UNCITRAL rules, on the other hand, would preclude such an arrangement, thus discouraging the United States from arbitrating the dispute.

D. Conciliation

The ICC rules include an informal procedure called "conciliation" which may be used before formal arbitration begins. ICC conciliation, administered by a "Conciliation Committee," may be used by parties who have not signed an ICC arbitration agreement, and is organized only when all interested parties agree to conciliate.⁵¹ During the conciliation hearing, each party briefly states its position, supported by documentation, and answers the committee's questions. After the hearing, the committee compiles a report which notes the agreement reached by the parties, makes recommendations through which the parties are encouraged to settle their dispute, or states the failure of the parties to conciliate.⁵²

The ICC rules do not limit the number of parties that may participate in conciliation procedures. Therefore, the ICC rules may be interpreted to allow all parties affected by a contract dispute to conciliate. Parties to multi-party disputes who have not signed arbitration agreements would prefer this interpretation so that their claims may be heard. For instance, even though the United States was not a party to any of the Trans-Siberian pipeline contracts and thus would not have been bound by an arbitration agreement included in the contracts, the United States might have been able to settle its problems with the European companies through conciliation.

The UNCITRAL rules do not contain conciliation procedures. This is unfortunate since aggrieved parties are more likely to submit to conciliation as it is informal, not binding on the conciliating parties, and yet provides a forum through which parties may resolve their disputes. Moreover, parties generally prefer to informally arbitrate

51. ICC RULES, *supra* note 14, at 18. Conciliation is conducted by a Conciliation Committee, consisting of two members from the same countries as the conciliating parties and a third member from a neutral country, designated as the committee's chairperson. Ford & Reed, *supra* note 3, at 7.

52. ICC RULES, *supra* note 14, at 19.

before resorting to formal arbitration or litigation. Thus, the United States might have arbitrated the Trans-Siberian pipeline dispute under the ICC rules rather than the UNCITRAL rules because the ICC rules include informal conciliation procedures. In addition, by encouraging the United States to conciliate its differences with those companies, ICC arbitration would have also benefitted those European companies which could not effectively perform their contracts with the Soviet Union because of President Reagan's sanctions.

E. Enforcement of Arbitration Rules

The ICC and UNCITRAL rules differ in the manner in which they are enforced. The International Court of Arbitration enforces the ICC rules,⁵³ however no similar international tribunal enforces the UNCITRAL rules. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention) enforces arbitral awards in general, but does not specifically enforce UNCITRAL arbitral awards.⁵⁴ By choosing ICC arbitration, the parties to the Trans-Siberian pipeline dispute could have relied on the International Court of Arbitration to enforce and review decisions rendered by the ICC arbitral tribunal. If UNCITRAL arbitration had been chosen to resolve the dispute, no tribunal would have existed to enforce or review decisions made by the UNCITRAL arbitral tribunal. Because disputing parties generally prefer to arbitrate under rules supported by a separate tribunal that enforces and reviews awards rendered under those rules, disputing parties would prefer to arbitrate according to the ICC rules.

F. Selection of Arbitrators

The ICC and UNCITRAL rules differ as to the number of arbitrators selected to conduct arbitration. If the arbitrating parties do not stipulate to the number of arbitrators to be on the arbitral tribunal, one arbitrator is selected under the ICC rules⁵⁵ and three arbitrators are selected under the UNCITRAL rules.⁵⁶ However, three arbitra-

53. See ICC RULES, *supra* note 14, at 21.

54. See *supra* note 2 and accompanying text. The New York Convention became effective in the United States on December 20, 1970. The implementing legislation to the Convention is found in Chapter 2 of the Federal Arbitration Act, 9 U.S.C. §§ 201-208 (1976). The Convention is in force in 60 nations. Stein & Wotman, *supra* note 13, at 1688, n.16.

55. ICC RULES, *supra* note 14, at 21-22.

56. UNCITRAL RULES, art. 5.

tors may be chosen under the ICC rules if the International Court of Arbitration decides that the dispute is too important or complex to be heard by one arbitrator.⁵⁷ This is important because one arbitrator alone may not be able to resolve complex multinational, multi-party contract disputes, while three arbitrators may combine their different arbitration skills and approaches to effectively resolve such disputes. In this respect, both sets of rules may adequately resolve multi-party contract disputes.

The appointment of arbitrators differs under the ICC and UNCITRAL rules. Under the UNCITRAL rules, if the arbitrating parties cannot agree on the composition of the arbitral tribunal, an "appointing authority" selected by the arbitrating parties or the Secretary-General of the United Nations Permanent Court of Arbitration may appoint the arbitrators.⁵⁸ If the parties arbitrating under ICC rules cannot agree on the composition of the arbitral tribunal, the ICC may select the arbitrators, a process which may take several weeks, if not months, and delays the commencement of arbitration proceedings.⁵⁹ Thus, parties arbitrating pursuant to the UNCITRAL rules are permitted to participate in the selection of arbitrators by ranking their preferences for the appointing authority, whereas parties arbitrating under the ICC rules do not participate in the selection of arbitrators.⁶⁰ Since arbitrating parties themselves are often more aware of the complexity of multi-party contract disputes than the arbitrators selected to resolve such disputes, it is important that the arbitrating parties, knowing what particular qualifications are needed to effectively arbitrate such disputes, assist in selecting the arbitral tribunal. Therefore, had the United States and the European suppliers to the

57. ICC RULES, *supra* note 14, at 22.

58. UNCITRAL RULES, art. 6(3). The "appointing authority" sends an identical list of possible arbitrators to the arbitrating parties. The arbitrating parties rank their preferences and the appointing authority selects the arbitral tribunal according to the parties' ranked preferences. *Id.* However, article 6(3)(b) of the UNCITRAL rules provides that the appointing authority may decide "in its discretion that the use of the list procedure is not appropriate for the case."

59. Bixler & James, *supra* note 1, at 4. First, the court selects the country of the arbitrator's nationality at one of its monthly meetings and forwards a nomination request to that country's national committee. Second, the national committee nominates the arbitrator. Finally, the court must confirm the arbitrator at another monthly meeting. Stein & Wotman, *supra* note 13, at 1702.

60. However, both sets of rules are similar in that the appointing authority will normally select an arbitrator from a country other than that of the parties, thereby enhancing the neutrality of the proceedings. ICC RULES, *supra* note 14, at 22; UNCITRAL RULES, art. 6(4).

pipeline project arbitrated the Trans-Siberian pipeline dispute, UNCITRAL arbitration would have been preferred in this respect because it allows each arbitrating party to assist in the selection of the arbitral tribunal. As a result, the United States might have been more likely to arbitrate the dispute.

G. Challenging the Selection of Arbitrators

The procedures for challenging appointed arbitrators differ under the ICC and UNCITRAL arbitration rules.⁶¹ During ICC arbitration, any challenge of an arbitrator's objectivity or competency must be presented to the International Court of Arbitration, but need not be supported by specific reasons.⁶² Because the International Court of Arbitration reviews all arbitrator challenges, the ICC procedure precludes arbitrary and unsubstantiated challenges. Similarly, arbitrator challenges under the UNCITRAL rules must comply with certain procedural requirements, thus discouraging frivolous challenges. The UNCITRAL rules, however, provide detailed procedures for challenging an arbitrator. For instance, UNCITRAL arbitrator challenges must be in writing, supported by specific reasons, and communicated to all arbitrating parties, the challenged arbitrator, and the other unchallenged arbitrators.⁶³ Therefore, arbitrator challenges under the UNCITRAL rules are procedurally more structured than under the ICC rules.

The ICC and UNCITRAL rules both provide for the review of arbitrators' qualifications. Arbitration rules should include procedures to review arbitrators' qualifications since unqualified arbitrators cannot effectively make decisions. Because multi-party contract disputes are extremely complex, the arbitrators of such disputes must be well-qualified. Therefore, the need to review arbitrator qualifications in multi-party contract disputes is even greater than during simple contract dispute arbitration. Furthermore, to ensure the rapidity of arbitration, any decisions concerning arbitrator challenges should be conclusive and nonreviewable by local courts during the pendency of the arbitration. Neither set of rules permits local courts to review

61. However, the purposes of both sets of rules in this area are similar: the arbitrator or arbitral tribunal must remain independent and impartial. Stein & Wotman, *supra* note 13, at 1704 n.113.

62. ICC RULES, *supra* note 13, at 23. The International Court of Arbitration makes the final decision whether or not to replace arbitrators challenged by the arbitrating parties. *Id.*

63. UNCITRAL RULES, arts. 9-12.

such decisions. Had the Trans-Siberian pipeline dispute been arbitrated, either set of arbitration rules would have allowed the arbitrating parties to challenge the arbitrators' qualifications without judicial interference, and hence, both sets of rules would have been inadequate in this regard.

H. Selection of Language Used During Arbitration

The ICC and UNCITRAL rules are similar in determining what language will be used during arbitration. Both sets of rules allow the arbitral tribunal to determine the language used during arbitration.⁶⁶ Under the UNCITRAL rules, the arbitral tribunal determines what language is used at the arbitration proceedings based on all relevant factors and subject to any language provision included in the disputed contract's arbitration clause.⁶⁴ Similarly, the ICC rules allow the arbitral tribunal to choose the language which is most convenient to the tribunal and the arbitrating parties.⁶⁵ Therefore, in complex multinational contract disputes, such as the Trans-Siberian pipeline dispute, both sets of rules give the arbitrators broad discretion to choose the language used during arbitration. Because both sets of rules would not have precluded the arbitrators from using English during arbitration, the United States might have been encouraged to arbitrate its dispute with the European companies.

Because the language of the proceedings is not determined when the arbitrator is appointed under the ICC and UNCITRAL rules, the arbitrator may not be fluent in the language of the proceedings.⁶⁷ For instance, in considering all the "relevant factors,"⁶⁸ including the language of the contract, the ICC arbitral tribunal may choose a language for the proceedings which is better suited for the parties than for itself. When multiple foreign parties arbitrate it is highly likely that the arbitrator will not be fluent in the language of the contract or all of the parties. For example, the parties to the Trans-Siberian pipeline dispute spoke Italian, French, English, Russian, and German. To find an arbitrator who could speak all of those languages would

66. ICC RULES, *supra* note 14, at 26; UNCITRAL RULES art. 17(1).

64. *Id.* at art. 17(1).

65. ICC RULES, *supra* note 14, at 26. The language of the contract is the primary factor used although other "relevant considerations" may be noted. Stein & Wotman, *supra* note 13, at 1710.

67. The language of the proceedings is not a factor in selecting the sole arbitrator or chairperson of the arbitral tribunal. ICC RULES, *supra* note 14, at 26; UNCITRAL RULES, arts. 6(4), 7; Stein & Wotman, *supra* note 13, at 1710 n.166.

68. See *supra* note 64 and accompanying text.

have been extremely difficult. Thus, the arbitrator would have been required to employ translators and interpreters during multi-party international arbitration, adding expense and delay to the proceedings.⁶⁹ Therefore, in this respect, under both sets of rules, multi-party international arbitration would have been expensive and slow.

I. Filing and Amending Arbitration Claims

The procedures for responding to a "Request for Arbitration" are similar under the ICC and UNCITRAL rules. Within a period determined by the arbitral tribunal, arbitrating parties may file a "Statement of Defense" with the claimant and arbitral tribunal in response to the claimant's Request for Arbitration. The responding party's Statement of Defense may also include a counterclaim against the claimant, to which the claimant may respond with its own Statement of Defense.⁷⁰

The procedure to amend arbitration claims, however, is different under the two sets of rules. According to the UNCITRAL rules, any arbitrating party may amend its claim or defense during arbitration unless the arbitral tribunal considers the amendment inappropriate.⁷¹ The ICC rules do not contain an amendment provision. Because the UNCITRAL rules contain an amendment provision, they are more flexible and accommodating to facts uncovered during arbitration than the ICC rules. Amendment provisions should be included in arbitration rules so that arbitrating parties may amend their claims or defenses when additional facts and theories of recovery are uncovered during arbitration. These provisions are particularly important when multi-party disputes are arbitrated because such disputes may involve complicated facts and multiple theories of recovery all of which may not be known when arbitration begins. Therefore, had the complex Trans-Siberian pipeline dispute been arbitrated, the arbitrating parties would have preferred to arbitrate under the UNCITRAL rules which include an amendment procedure.

J. Reviewing the Arbitral Tribunal's Jurisdiction

Once arbitration begins, the procedures used to review the arbitral tribunal's jurisdiction to settle disputes differ under the ICC and UN-

69. See Stein & Wotman, *supra* note 13, at 1710 n.166.

70. ICC RULES, *supra* note 14, at 26; UNCITRAL RULES, art. 19.

71. UNCITRAL RULES, art. 20.

CITRAL rules.⁷² During ICC arbitration, objections to the arbitral tribunal's jurisdiction are reviewed by the International Court of Arbitration.⁷³ The ICC rules allow a judicial body, detached from the arbitral process, to objectively review jurisdictional problems. Despite the International Court of Arbitration's review, however, the arbitral tribunal itself may rule on jurisdictional challenges.⁷⁴ On the other hand, during UNCITRAL arbitration, the tribunal itself reviews objections to the tribunal's jurisdiction.⁷⁵ Thus, objections to the tribunal's jurisdiction are directed at the same legal body that ultimately reviews such objections. In any legal proceeding, objective review procedures are necessary to correct erroneous decisions. The need for adequate review procedures increases with the complexity of the proceeding. Hence, in complicated multi-party arbitration, any decision rendered by the arbitral tribunal, including decisions relating to the tribunal's jurisdiction, should be reviewed by a neutral, detached body.⁷⁶ Had the Trans-Siberian pipeline dispute been arbitrated, the arbitrating parties would have preferred to use the ICC rules which permit the International Court of Arbitration, a neutral and detached entity, to review the arbitral tribunal's jurisdictional decisions.⁷⁷

72. Challenging the arbitral tribunal's jurisdiction to settle disputes before arbitration begins will not be discussed in this comment. For a good discussion, however, of pre-arbitration jurisdictional challenges, see Stein & Wotman, *supra* note 13, at 1690-93.

73. ICC RULES, *supra* note 14, at 23. The court rules on jurisdictional challenges at its monthly meetings. See *supra* note 41 and accompanying text. If the challenger presents prima facie evidence that the arbitral tribunal may exercise jurisdiction, the arbitration continues. Stein & Wotman, *supra* note 13, at 1694.

74. ICC RULES, *supra* note 14, at 25.

75. UNCITRAL RULES, art. 21(1).

76. Because one of the goals of arbitration is to limit judicial intervention, these review procedures need not be judicial in nature, i.e. subject to review by the local courts. The International Court of Arbitration is not a local court, but an objective, detached administrative agency.

77. For example, had the Soviet Union and the European parties to the pipeline contract agreed to arbitrate their differences and the United States refused to participate in the arbitration by claiming that the tribunal arbitrating the dispute had no jurisdiction over the United States, and the arbitral tribunal refused to assert jurisdiction over the United States, the ICC rules would have allowed the European parties to object to the International Court of Arbitration for the tribunal's refusal to assert jurisdiction over the United States. Under the UNCITRAL rules, however, the European parties would have been forced to complain to the tribunal itself, the same body that made the decision not to include the United States in the arbitration. Had the tribunal been unwilling to reverse itself as most judicial bodies are, the European parties would have been deprived of an opportunity for their complaint to be objectively reviewed.

K. Location of Arbitration

The procedures for selecting an arbitration location differ under the ICC and UNCITRAL rules. The arbitration location is extremely important during ICC arbitration since the law of the country where arbitration occurs applies to the arbitral proceedings and the enforcement of arbitral awards, unless the arbitrating parties stipulate otherwise.⁷⁸ Under the ICC rules, the hometown of one of the arbitrators is usually the locale of arbitration, whereas under the UNCITRAL rules, the arbitral tribunal chooses the arbitration locale.⁷⁹ Because ICC arbitrators generally limit the choices for the arbitration location to the arbitrators' hometowns, whereas the UNCITRAL arbitral tribunal is not so restricted, the UNCITRAL arbitrators have more discretion than the ICC arbitrators to decide where arbitration will occur. The UNCITRAL arbitrators are not limited to considering specific factors, but have broad discretion to consider all the circumstances of the arbitration in selecting the place of arbitration.⁸⁰ Having a wider field from which to choose, the UNCITRAL arbitral tribunal may choose a convenient and objective arbitration location more easily than the ICC arbitrator whose field is generally limited to three countries.⁸¹ When many countries are involved in a contract dispute, such as the Trans-Siberian pipeline dispute, there are many possible arbitration locations: the hometown of either the arbitrators or the arbitrating parties, or the place where the contract dispute arose. Because the ICC rules limit the choices, the Trans-Siberian pipeline

78. ICC RULES, *supra* note 14, at 26-27. The arbitration location must also provide adequate support facilities, including hearing rooms, interpreters and stenographers; ensure the security of the parties; and allow the parties to freely travel to the proceedings. Stein & Wotman, *supra* note 13, at 1697.

79. *Id.* at 26; UNCITRAL RULES, art. 16. The ICC method of selection does not account for the fact that physical evidence, witnesses, and parties involved in international commercial disputes may be located in various countries. The rationale for this approach is that arbitration will be delayed and expensive if the arbitrator is required to travel long distances to the place of arbitration. However, the costs of obtaining physical evidence and transporting witnesses will be greater than the cost of transporting the arbitrator to the place of arbitration. Stein & Wotman, *supra* note 13, at 1698.

80. Stein & Wotman, *supra* note 13, at 1697.

81. Three arbitrators compose the typical ICC arbitral tribunal. See *supra* note 57 and accompanying text. Each arbitrator comes from a different country, and represents his or her own country. Therefore, three countries are represented on the typical ICC tribunal and one of those countries is the location of arbitration. See *supra* note 79 and accompanying text.

parties would have preferred to use the UNCITRAL rules in selecting an arbitration location.⁸²

L. "Amiable Compositeur" Provisions

The procedural laws applicable during arbitration are determined by the laws of the country where arbitration occurs, unless the parties agree otherwise. During UNCITRAL arbitration, however, the UNCITRAL rules govern unless one of the rules conflicts with an applicable law of the country where arbitration occurs and from which the parties cannot derogate.⁸³ Should the parties not agree on the substantive law to apply during arbitration, the arbitrators' power to decide matters of law is similar under both sets of arbitration rules. Neither the ICC nor the UNCITRAL arbitral tribunal is bound to apply the conflict-of-law principles prevailing in the jurisdiction where arbitration occurs.⁸⁴ Moreover, the ICC and UNCITRAL rules give the arbitrators "amiable compositeur" status, under which they may waive a strict application of the law during arbitration. However, the arbitrating parties must agree to this provision before the arbitrators can decide legal issues in a manner inconsistent with the law chosen to be used at the arbitral proceedings.⁸⁵ The purpose of this provision is to give the arbitrators more flexibility in resolving disputes by not limiting the arbitral tribunal to apply only one set of legal principles.

Because the ICC and the UNCITRAL arbitral tribunals may waive a strict application of local substantive law and decide matters of law according to their own legal principles, the law used during arbitration proceedings may vary according to the location and the composition of the tribunal. Consequently, the applicable law may not be uniform, and the outcome of the proceedings may be unpredictable. During complex multinational arbitration, however, it may be difficult to arbitrate without waiving a strict application of local law and applying the laws of different countries. Thus, flexibility is

82. For instance, had the United States agreed to arbitrate and had the arbitrators been European, the ICC rules would have confined the arbitration location to Europe. If the most convenient location for arbitration had been in the Soviet Union where the contract was to be executed, however, the ICC rules would have precluded arbitration in the Soviet Union because none of the arbitrators lived in the Soviet Union. The United States, on the other hand, might have agreed to arbitrate under the UNCITRAL rules, knowing that arbitration could occur in a location other than the arbitrators' hometowns and perhaps in a more convenient and neutral location than Europe, such as Canada or Mexico.

83. UNCITRAL RULES, art. 1(2).

84. Stein & Wotman, *supra* note 13, at 1713.

85. ICC RULES, *supra* note 14, at 27; UNCITRAL RULES, art. 33(1).

more important than predictability in resolving international multi-party disputes.⁸⁶ For example, had the Trans-Siberian pipeline dispute been arbitrated and French law exclusively applied during arbitration, the dispute might not have been effectively resolved. But had the arbitrators been allowed to apply other international legal principles, the dispute could have been efficiently and equitably resolved.⁸⁷ Because both the UNCITRAL and ICC rules contain an amiable compositeur provision, the Trans-Siberian pipeline parties would not have preferred either set of arbitration rules in this regard.

M. "Terms of Reference" Statements

The ICC rules include a "Terms of Reference" requirement which the UNCITRAL rules do not include.⁸⁸ An ICC Terms of Reference statement⁸⁹ which must be compiled by the arbitral tribunal, approved by the International Court of Arbitration, and signed by the arbitrating parties before the statement can be used during arbitration.⁹⁰ This provision limits the ICC arbitral tribunal's jurisdiction by forcing the arbitral tribunal to focus on disputed issues and guides the tribunal in accepting evidence and testimony. Had the European parties to the Trans-Siberian pipeline dispute been unable to perform their contracts with the Soviet Union because of President Reagan's sanctions and had they arbitrated their disputes with the Soviet Union, the arbitrators would have been unable to hear the European companies' complaint against the United States unless the Reagan sanctions issue was listed in the Terms of Reference statement.

The ICC Terms of Reference requirement is particularly important in resolving multi-party disputes which involve complicated facts,

86. Using an amiable compositeur provision may also cause problems in later proceedings to enforce the arbitral award in those countries where the tribunal is required to follow the law of the place of arbitration in resolving the dispute. Stein & Wotman, *supra* note 13, at 1714.

87. Different legal approaches dictated the actions of the various parties to the Trans-Siberian pipeline dispute. These different approaches should have been considered in resolving the dispute. President Reagan's actions may have been "legal" under United States law, but may have been illegal under French law. To exclusively apply United States law would allow Reagan's embargo to stand and unjustly deprive the affected French companies of a remedy at law. To exclusively apply French law would unjustly invalidate President Reagan's "legal" action. Therefore, had United States *and* French law been applied, a compromise between the two positions, and a solution to the dispute, might have been achieved.

88. ICC RULES, *supra* note 14, at 28.

89. A Terms of Reference statement includes a summary of the parties' respective claims and a definition of the issues to be determined. ICC RULES, *supra* note 14, at 28.

90. *Id.*

voluminous evidence, and numerous witnesses, because it precludes the arbitral tribunal from hearing irrelevant facts, determines which issues the arbitral tribunal may hear, and ultimately dictates the outcome of arbitration. Hence, the Terms of Reference requirement, if improperly drafted, may seriously undermine the arbitration process. To prevent this from occurring, the International Court of Arbitration reviews and corrects any errors in the Terms of Reference statement drafted by the arbitrators and informs all of the arbitrating parties about the statement's contents so that they may review the statement.

The advantages of the ICC Terms of Reference requirement coupled with the safeguards against possible abuses of this requirement make this provision an invaluable component of multi-party arbitration.⁹¹ Unfortunately, the UNCITRAL rules do not include a Terms of Reference provision. For these reasons, had the Trans-Siberian pipeline dispute been arbitrated, the arbitrating parties would have preferred to arbitrate under the ICC rules.

N. Procedures During Arbitration Hearings

The arbitration hearing procedures are similar under the ICC and UNCITRAL rules. Under both sets of rules, the arbitral tribunal may conduct the proceedings in whatever manner it considers appropriate. Arbitral hearings are informal non-jury proceedings held *in camera*, and are usually conducted according to the law of the jurisdiction from which the chairman comes or where arbitration occurs.⁹³ However, the burden of producing evidence falls differently under the two sets of rules. During ICC arbitration, the arbitrators may use whatever means necessary to ascertain the facts of a case. The ICC arbitrators decide which documents are required to decide the case, may request the arbitrating parties to produce these documents, and may terminate the hearing when they have sufficient information to make an award.⁹⁴ Under the UNCITRAL rules, the

91. The utility of the ICC Terms of Reference procedure is disputed. Some commentators consider the procedure a "significant obstacle, delaying commencement of the arbitration proceeding . . ." while others claim that the procedure is extremely valuable, "resolving key procedural issues at an early state." Stein & Wotman, *supra* note 13, at 1699 n.86.

92. ICC RULES, *supra* note 14, at 28-29; UNCITRAL RULES, art. 15(1).

93. Stein & Wotman, *supra* note 13, at 1715.

94. ICC RULES, *supra* note 14, at 28-29. In short, ICC arbitrators have unlimited authority to conduct arbitration hearings in whatever manner necessary to ascertain the facts of a case. This may include the acceptance of secondary and hearsay evidence. Bixler & James, *supra* note 1, at 5.

arbitrating parties have the burden of producing evidence. The UNCITRAL arbitral tribunal may require each arbitrating party to deliver a summary of the documents and evidence it intends to present during the arbitration to the other arbitrating parties.⁹⁵ The UNCITRAL arbitrators determine the admissibility and weight of evidence presented to the tribunal, but may not specifically request the arbitrating parties to produce relevant documents.⁹⁶ Although the tribunal may summon witnesses, it must give the parties a full opportunity to present their cases.⁹⁷

Arbitrating parties may prefer the ICC rules over the UNCITRAL rules because the burden of producing evidence under the UNCITRAL rules falls mostly on the arbitrating parties. This burden may be particularly difficult to meet when international multi-party disputes involving complicated facts and an overwhelming amount of evidence are arbitrated. Under the ICC rules, the arbitral tribunal helps the arbitrating parties decide which documents and evidence are relevant to resolve the dispute. The parties may still be required to spend time and money producing documents for the tribunal, but do not need to prepare their cases as carefully as parties arbitrating under the UNCITRAL rules. On the other hand, arbitrating parties under the UNCITRAL rules may have more control over the evidence produced for and eventually reviewed by the arbitrators. For example, had the Trans-Siberian pipeline dispute been arbitrated pursuant to the UNCITRAL rules, the European companies would have incurred tremendous expenses to gather sufficient evidence to prove that they had been unable to perform their contracts with the Soviet Union because of President Reagan's sanctions. Had the dispute been arbitrated under the ICC rules, the arbitral tribunal would have incurred some of the expenses to gather the evidence required to resolve the dispute. Therefore, because the arbitrating parties would have spent more time and money preparing their cases under the UNCITRAL rules than the ICC rules, the parties to the Trans-Siberian pipeline dispute would

95. UNCITRAL RULES, arts. 15, 24. A provision in the UNCITRAL Rules also requires each arbitrating party presenting witnesses at the arbitration hearing to give the witnesses' names and addresses, and a description of the subject matter of the witnesses' testimony to all other arbitrating parties 15 days before the hearing begins. *Id.* at art. 25(2). This provision prevents "surprise" witnesses from testifying at the arbitration hearing and allows the arbitrating parties to thoroughly prepare their cases. Therefore, a witness testimony disclosure requirement similar to the UNCITRAL requirement is particularly useful during multi-party contract arbitration when numerous witnesses may testify.

96. UNCITRAL RULES, arts. 24(3), 25(6).

97. UNCITRAL RULES, arts. 16(2), 15(1).

have preferred to arbitrate under the ICC rules.

O. Expert Testimony

Both the ICC and the UNCITRAL rules allow the introduction of expert testimony at the arbitration hearing. Under both sets of rules, the arbitral tribunal has sole discretion, whether on its own accord or upon a party's request, to appoint or hear expert testimony. A report is made by an expert chosen by the arbitral tribunal and sent to the arbitrating parties for comments.⁹⁸ This provision allows the arbitrators to consider the "expert report" and the parties' comments to the report in lieu of interrogating the expert and permitting the arbitrating parties to cross-examine the expert during the hearing. An expert report, however, may not be an adequate substitute for the interrogation of experts before the arbitral tribunal because interrogation is designed to elicit facts and allow the expert's credibility to be assessed. Therefore, precluding expert interrogation during arbitration hearings may not help the arbitral tribunal effectively resolve disputes. The UNCITRAL rules, however, differ from the ICC rules in that during UNCITRAL arbitration, should the tribunal choose to hear expert testimony, the parties may interrogate the expert at the hearing. Moreover, the parties may present their own experts to testify before the tribunal.⁹⁹ Because the Trans-Siberian pipeline dispute involved complex factual and legal issues, the testimony of many experts would have been required to help the arbitral tribunal resolve the dispute. In this respect, the arbitrating parties would have preferred the UNCITRAL rules to the ICC rules because the arbitrators could have interrogated the experts at the arbitration hearing and presented their own experts to testify. Had the dispute been arbitrated under the ICC rules, the experts' contribution to the arbitration would have been limited to the contents of the expert report. Moreover, challenges to the credibility and qualifications of the experts would have been restricted to written comments on the report, an inadequate substitute for in-person cross-examination.

P. Default Provisions

Both the UNCITRAL and ICC rules include default provisions which allow arbitration hearings to proceed even though one or more

98. UNCITRAL RULES, art. 27; ICC RULES, *supra* note 14, at 29.

99. UNCITRAL RULES, art. 27.

of the parties who signed the arbitration agreement does not appear at the hearing.¹⁰⁰ In addition, the UNCITRAL rules allow the proceedings to continue even though an arbitrating party did not file a Statement of Defense with the arbitral tribunal within the prescribed time period.¹⁰¹ By allowing arbitration to continue in the absence of an arbitrating party, these default provisions encourage aggrieved parties to appear and represent themselves at the hearing or assume that risk that the arbitration will continue without the absent parties being represented. The provisions also move disputes quickly through the arbitration process. If the ICC and UNCITRAL rules did not include default provisions, multi-party dispute arbitration could be prolonged for months or years while the arbitral tribunal waited until every party appeared at the hearing or filed statements of defense before commencing arbitration.

The ICC default provisions, however, do not take into account the complexity of multi-party disputes. Arbitrating parties who cannot appear at the hearing for legitimate reasons are deprived of their right to be represented.¹⁰² Under the UNCITRAL rules, however, a party may postpone the commencement of arbitration until a Statement of Defense is filed if sufficient cause for the delay may be shown.¹⁰³ For example, had the United States agreed to arbitrate the Trans-Siberian pipeline dispute under the ICC rules even though it did not have enough information to file a Statement of Defense within the time prescribed by the arbitral tribunal, the hearing would have nonetheless continued. Under the UNCITRAL rules, had the United States shown sufficient cause for its failure to file a Statement of Defense, the arbitration would not have proceeded until the United States had filed its statement, whereas arbitration under the ICC rules would have continued despite the showing of sufficient cause. Therefore, if a party anticipates problems in filing a Statement of Defense, which could readily occur in complex multi-party disputes, in this respect, the UNCITRAL rules would have been preferred because they toll arbitration proceedings for good cause.

Q. Arbitration Awards

The procedures for making arbitration awards differ under the UNCITRAL and ICC rules. Awards made by a UNCITRAL arbitral

100. UNCITRAL RULES, art. 28(2); ICC RULES, *supra* note 14, at 15.

101. UNCITRAL RULES, art. 28(1).

102. ICC RULES, *supra* note 14, at 15.

103. UNCITRAL RULES, art. 28(2).

tribunal are final and binding, whereas the International Court of Arbitration must approve awards made by the ICC arbitral tribunal.¹⁰⁴ By requiring a separate international judicial body to review awards made by the arbitral tribunal, the ICC rules provide for objective review of arbitration awards and avoid involving local courts in the process. Under the UNCITRAL rules, the arbitrating parties may request the tribunal to correct or supplement the award within thirty days after the arbitrating parties receive the award.¹⁰⁵ Similar to the ICC review process, this procedure does not allow the local courts to review the award.¹⁰⁶ However, the UNCITRAL rules are different because they allow the same body which made the award to review the award. This provision is undesirable because the arbitral tribunal may be reluctant to admit that it made an erroneous decision and to correct or supplement the award. Therefore, in this respect, arbitrating parties may prefer ICC arbitration over UNCITRAL arbitration.

The time within which arbitral tribunals must make awards also differs under the UNCITRAL and ICC rules. The UNCITRAL rules do not include a time limit, whereas the ICC rules require the arbitral tribunal to make an award within sixty days from the date when the arbitrating parties signed the Terms of Reference.¹⁰⁷ The sixty-day time limit forces the arbitral tribunal to resolve disputes quickly, but may be an unrealistic limitation when complex disputes are arbitrated. Consequently, the ICC rules permit the arbitral tribunal to extend the sixty-day period if the tribunal needs more time to arbitrate complex disputes,¹⁰⁸ such as the Trans-Siberian pipeline controversy. Therefore, in effect, neither set of rules limits the period within which the arbitral tribunal must make awards.

Provisions relating to settlement arbitration awards, i.e. awards made by the arbitral tribunal after the arbitrating parties have settled

104. UNCITRAL RULES, art. 31; ICC RULES, *supra* note 14, at 31. The International Court of Arbitration reviews the arbitral tribunal's award and remands the award to the tribunal for revision if the award is inconsistent with the Terms of Reference statement submitted in the case. ICC RULES, *supra* note 14, at 31. The International Court of Arbitration is also permitted to bring substantive problems with the arbitral award to the arbitrators' attention for further consideration. Stein & Wotman, *supra* note 13, at 1720.

105. UNCITRAL RULES, arts. 35-37.

106. If the local court is allowed to correct or supplement the award, several goals of arbitration are undermined. Specifically, the enforcement of the award is delayed, costs are increased, and the award itself is no longer final and binding. Stein & Wotman, *supra* note 13, at 1721.

107. ICC RULES, *supra* note 14, at 30.

108. *Id.*

their differences, are significantly different under the ICC and UNCITRAL rules. Under the ICC rules, the arbitral tribunal must record settlement arbitration awards,¹⁰⁹ and the awards become part of the public record. In contrast, settlement arbitration awards made during UNCITRAL arbitration are recorded only if the settling parties agree to record the awards.¹¹⁰ This is an important difference because business entities generally prefer not to publicize their legal problems and thus, prefer that arbitral awards rendered against them not be recorded. Therefore, arbitrating parties who anticipate settling their dispute before an award is rendered may prefer the UNCITRAL rules over the ICC rules because the UNCITRAL rules give the settling parties an option to record settlement arbitration awards. Had the Trans-Siberian pipeline dispute been arbitrated, the United States would have been more likely to arbitrate under the UNCITRAL rules than the ICC rules, knowing that any settlement reached with the European companies against the United States would not have to be recorded and thus, would avoid bad publicity in the international business community.

R. Arbitration Costs

The methods of determining international arbitration costs are different under the two sets of rules. The ICC bases the administrative and arbitrator fees on the amount at issue in the arbitration and according to predetermined percentage schedules. Hence, ICC arbitration costs increase as the amount of the claim increases.¹¹¹ Because the administrative fees are used to support ICC activities in other areas besides arbitration, ICC arbitration costs are higher than the actual costs and value of the arbitration services provided.¹¹² UNCITRAL administrative fees, however, are determined by the arbitral tribunal itself.¹¹³ Under the UNCITRAL rules, the arbitrators' fees are to be "reasonable in amount," and the arbitral tribunal considers international fee schedules in setting arbitrators' fees only if the tribunal determines it is "appropriate in the circumstances of the case."¹¹⁴ Therefore, UNCITRAL arbitration fees accurately reflect

109. *Id.*

110. UNCITRAL RULES, art. 34(1).

111. Stein & Wotman, *supra* note 13, at 1722.

112. *Id.* The ICC will fix the arbitration costs at a lower figure than the percentage schedules dictate only in exceptional circumstances. *Id.* at 1723.

113. UNCITRAL RULES, art. 38.

114. UNCITRAL RULES, art. 39.

the administrative costs and value of the arbitrator services rendered during arbitration. Because international multi-party disputes are complex and generally involve large claims, the costs of arbitrating such disputes under the ICC rules which do not accurately represent the actual costs of arbitration, would be higher than UNCITRAL arbitration costs. Hence, with regard to costs, the parties to the complex Trans-Siberian pipeline dispute would have preferred the UNCITRAL rules.

The method of distributing arbitration costs is similar under both the ICC and UNCITRAL rules. Under both sets of rules, the unsuccessful arbitrating parties pay all arbitration expenses, which include the arbitrators' fees and travel expenses, witness and expert fees, and administrative fees.¹¹⁵ The UNCITRAL rules, however, specifically permit the arbitral tribunal to apportion arbitration expenses between *all* arbitrating parties if the tribunal "determines that apportionment is reasonable, taking into account the circumstances of the case."¹¹⁶ This provision is important when multi-party disputes are arbitrated because the cost of arbitrating such disputes is particularly high. The cost of arbitrating the Trans-Siberian pipeline dispute, for example, would have been exorbitant, considering the number of arbitrating parties, the complexity of the factual and legal issues, the duration of arbitration, the distances traveled to the arbitration location, and the translation costs.¹¹⁷ The ICC rules, however, are not as explicit as the UNCITRAL rules in allowing the arbitral tribunal to apportion arbitration costs between the parties.¹¹⁸ The apportionment provision of the ICC rules is vague and does not provide the arbitrator with specific guidelines on how to apportion costs. Therefore, the United States would have been more likely to arbitrate the pipeline dispute under the UNCITRAL rules than the ICC rules, knowing that if the arbitral tribunal had ruled against the United States, the tribunal would have been more likely to apportion costs between all the arbitrating parties, and thus, it would not have had to pay *all* the arbitration expenses.

115. ICC RULES, *supra* note 14, at 30-31; UNCITRAL RULES, arts. 39, 40.

116. UNCITRAL RULES, art. 40(1).

117. The arbitral tribunal considers these factors in determining the costs of arbitration. UNCITRAL RULES, art. 38.

118. The apportionment provision of the ICC rules states that the arbitrator has discretion to decide which party shall bear the costs of arbitration, or in what proportion the costs shall be distributed. ICC RULES, *supra* note 14, at 34-35.

S. *Recent Amendments to the ICC Arbitration Rules*

The ICC and UNCITRAL rules have not been significantly amended since they were drafted in 1975 and 1976, respectively. In 1980, however, the International Court of Arbitration adopted a new rule which allows the court's arbitration powers to be partially delegated to a "Committee of the Court." Under the ICC rules, this Committee of the Court, consisting of the chairman and two members of the International Court of Arbitration, decides routine cases and prepares preliminary reports on complex cases.¹¹⁹ Based on these preliminary reports, the court as a whole, then resolves the complex cases.¹²⁰ The UNCITRAL rules have not been amended to include a similar committee rule.

The new committee rule may help effectively resolve multi-party disputes only if the committee is qualified to prepare these preliminary reports. If the International Court of Arbitration were to make a decision based on an erroneous preliminary report, the entire arbitration process would be undermined. If members of the International Court of Arbitration are qualified as arbitrators, the Committee of the Court should also be qualified to prepare the preliminary reports. However, whether the members of the International Court of Arbitration are qualified as arbitrators is an issue to be determined by arbitrating parties. For example, had the complex Trans-Siberian pipeline dispute been arbitrated under the ICC rules, and the International Court of Arbitration reviewed the final arbitration award as the court must do under the ICC rules, the Committee of the Court would have probably prepared a preliminary report for the court to use in reviewing the award. Hence, the committee's qualifications to prepare a preliminary report on such a complex dispute would have been extremely important to the arbitrating parties. Had the arbitrating parties considered the committee to be unqualified to prepare a preliminary report on the dispute for the court, the parties would have preferred to arbitrate under the UNCITRAL rules, which do not provide for review by a Committee of the Court.

Another aspect of the committee approach which may deter aggrieved parties from ICC arbitration is the absence of guidelines within which the committee works. The committee prepares preliminary reports for the International Court of Arbitration to use in resolving

119. The Committee has bimonthly meetings, and must reach unanimous decisions. Stein & Wotman, *supra* note 13, at 1695.

120. Derains, *supra* note 3, at 51.

complex disputes. The full court approves the arbitration award because the expertise of each member is needed to determine whether or not the award is appropriate. The expertise of the full court is particularly useful when complex multi-party disputes are involved. Once the committee exceeds its authority and expertise in deciding preliminary matters, and begins to act as the court, the committee approach becomes ineffective.

Moreover, because the terms "preliminary" and "routine" are vague, the ICC rules offer no specific guidelines to the committee on what it can decide. Without guidelines, the committee may easily exceed its authority and competence in deciding preliminary and routine issues. Should the committee exceed its ill-defined authority and make inappropriate decisions upon which the court will base its approval of arbitral awards, the rights of the arbitrating parties may be undermined. Thus, whether ICC arbitration will be chosen over UNCITRAL arbitration may depend on how well the committee stays within its boundaries and decides only "preliminary" and "routine" matters. If the committee decides matters beyond the scope of their competence and authority, arbitrating parties will prefer the UNCITRAL rules which do not include a committee provision.

VI. PROPOSALS TO CHANGE CURRENT INTERNATIONAL ARBITRATION RULES

The ICC and UNCITRAL arbitration rules do not adequately resolve multi-party disputes because neither set of rules permits consolidation or intervention by third parties. Consolidation of arbitrations prevents arbitral tribunals from making conflicting rulings in related cases. For example, under California arbitration rules, arbitrating parties may petition the court to consolidate arbitration proceedings. The court may also consolidate *sua sponte* when the same parties are involved in the proceedings, and the disputes arise from related transactions. Once consolidation occurs, the court resolves conflicts between the consolidated arbitration clauses and determines the rights of the parties during one arbitral proceeding.¹²¹ Like consolidation, intervention allows third parties to participate in arbitration proceedings between contracting parties. To intervene, however, third parties need not be parties to the contract upon which the dispute is based, but may intervene only if their rights would be substantially

121. CAL. CIV. PROC. CODE § 1281.3 (West 1982). See generally ACRET, ATTORNEY'S GUIDE TO CALIFORNIA CONSTRUCTION CONTRACTS AND DISPUTES § 5.7 (1976 & Supp. 1982).

affected by the final arbitration decision.¹²² Had the United States arbitrated the legality of President Reagan's sanctions against the French and British companies involved in the Trans-Siberian pipeline dispute, and had the California arbitration procedures for consolidation and intervention been available to the arbitrating parties, Italy could have intervened in the arbitration. Because Italy's performance of its contract with the Soviet Union was also hindered by Reagan's embargo, Italy's rights would have been substantially affected by the final arbitration decision, and hence, intervention would have been appropriate.

Consolidation and/or intervention are used when third parties cause or are affected by, disputes which arise between contracting parties. The purpose of these procedural devices is to reduce the costs and time involved in resolving numerous disputes that arise from the same transaction or occurrence. For example, the Soviet Union was directly affected by the dispute which arose between the United States and the European companies supplying materials to the pipeline project. By imposing sanctions, the United States hindered the European companies' performance of their contracts with the Soviet Union. Separately arbitrating each dispute that arose from the pipeline project would have been expensive and inefficient. Therefore, rather than separately arbitrating each dispute, all disputes could have been consolidated and arbitrated in one proceeding. Under the ICC rules, however, the International Court of Arbitration cannot consolidate arbitration proceedings or allow third parties to intervene.¹²³ The UNCITRAL rules contain a similar provision.¹²⁴ Under both sets of rules, arbitration proceedings cannot be consolidated nor may third parties intervene unless all of the arbitrating parties consent to the consolidation or intervention, and obtaining consent is a difficult, if not impossible, task when various foreign entities are involved.¹²⁵

122. See generally 2 CALIFORNIA CIVIL PROCEDURE BEFORE TRIAL (VOL. II) §§ 25.1, 25.10 (C.E.B. 1978).

123. Comment, *supra* note 4, at 548.

124. *Id.* at 546.

125. *Id.* at 548. Consent is "obtained" by coordinating the arbitration clauses of all the consenting parties with regard to the applicable substantive law during arbitration, the composition of the arbitral tribunal, and the procedural rules to be used at the arbitration hearing. *Id.* at 546. For example, had the Soviet Union and the European suppliers to the pipeline project arbitrated their dispute (the "primary dispute" for purposes of this discussion), the United States' dispute with the suppliers would have been consolidated with the primary dispute only if the Soviet Union, the European companies, and the United States had unanimously consented to the consolidation by agreeing on the legal principles and

Because the ICC rules do not permit consolidation of arbitration proceedings, the International Court of Arbitration has proposed several alternatives to consolidation. These alternatives are designed to reduce the time spent by ICC arbitral tribunals resolving related cases by allowing testimony admitted at one proceeding to be automatically admitted at related proceedings. The first alternative suggests that the ICC nominate the same persons to arbitrate related cases. The second alternative recommends that arbitrating parties appoint the same arbitral tribunal to resolve related disputes. The third alternative suggests that the same arbitral tribunal examine related cases in chronological order.¹²⁶ The success of these alternatives depends on the selection and composition of the arbitral tribunal. If the arbitral tribunal is qualified to effectively resolve the original dispute, it will also be qualified to handle related cases. Moreover, because these alternatives are proposed within the context of the current ICC rules, the success of the alternatives as a substitute for consolidation depends on how effective the current rules are in resolving multi-party disputes. Without modifying the current ICC rules, however, these alternatives will not accomplish their purpose.

For the ICC and UNCITRAL arbitration rules to be effective in resolving multi-party disputes, arbitrators must be well qualified. The current methods used to select ICC and UNCITRAL arbitrators do not guarantee that the arbitrators will be qualified to resolve international multi-party disputes. If arbitrators were selected from a field of arbitrators who arbitrate domestic multi-party disputes, the arbitrators would have adequate experience. Even though international multi-party disputes may be more complex than domestic multi-party disputes, many of the legal principles used to arbitrate domestic disputes are applicable to resolve international disputes. Arbitrators with this kind of experience are more likely to effectively resolve such disputes than persons without similar experience. For example, arbitrators that have arbitrated domestic construction contract disputes are more qualified to arbitrate the Trans-Siberian pipeline dispute than arbitrators that have resolved only domestic labor disputes.

If the ICC and UNCITRAL rules guaranteed that the arbitrators were qualified to arbitrate multi-party disputes, various problems with the two sets of rules would be corrected. If the UNCITRAL ap-

procedural rules to be used during arbitration, the location of arbitration, and the composition of the arbitral tribunal. For the Soviet Union, the European companies, and the United States to have unanimously agreed on all these matters would have been extremely difficult.

126. Comment, *supra* note 4, at 547-48.

pointing authority were well qualified, the arbitrators chosen by the authority would also be well qualified. The Terms of Reference Statement drafted by arbitrators would be accurate and complete if the arbitrators were experienced in arbitrating multi-party disputes. ICC and UNCITRAL expert reports would also be complete and accurate if well qualified arbitrators prepared the reports, thus reducing the need to interrogate experts during arbitration.

Even if the qualifications of ICC and UNCITRAL arbitrators were guaranteed, the UNCITRAL rules would not effectively resolve international multi-party disputes until they are amended to require certain arbitrator actions to be reviewed. Unlike the ICC rules, the UNCITRAL rules do not require a separate judicial body to review UNCITRAL arbitrator actions.¹²⁷ The ICC requirement is designed to correct erroneous decisions made by arbitrators and to discourage them from abusing their discretionary powers at important stages of the arbitration proceedings. For these reasons, the UNCITRAL rules should require a separate tribunal to review the arbitrator decisions as is required by the ICC rules.¹²⁸ The tribunal should review challenges to the arbitral tribunal's jurisdiction, decisions relating to the rules' default provisions, and final arbitration awards. UNCITRAL needs to create a new judicial body to review these procedures. The new tribunal's role in UNCITRAL arbitration should be limited to reviewing arbitrator decisions and should not include arbitration itself. If the new tribunal were to arbitrate disputes, parties would be precluded from selecting their own arbitrators, and private arbitration conducted under the UNCITRAL rules would become institutional arbitration.

Permitting third parties to appear and testify at arbitral hearings without being legally bound to the arbitration decision¹²⁹ would also assure effective resolution of multi-party disputes. This would encourage a party to participate in arbitration as it would be unnecessary to obtain the party's consent to arbitrate. For example, had the Trans-Siberian pipeline dispute been arbitrated and the arbitrators decided that the United States' sanctions imposed on the European suppliers

127. The International Court of Arbitration reviews certain actions of ICC arbitral tribunals.

128. It should be emphasized that the tribunal which is proposed should be international in nature. To avoid review of arbitrator decisions by local courts, one of the goals of arbitration, the tribunal should include neutral international arbitrators, and be created in a manner similar to the selection of the ICC International Court of Arbitration.

129. Comment, *supra* note 4, at 546-47.

prevented those companies from performing their contracts with the Soviet Union and were therefore unlawful, by merely appearing at the arbitral hearing and not consenting to be bound by the tribunal's decision, the United States would not have been required to lift the sanctions. Thus, the United States would have been encouraged to attend the hearing and give relevant information to the arbitral tribunal because it would not have been bound by the arbitrators' final decision.

Another alternative to the current ICC and UNCITRAL rules would be to create a separate legal organization to exclusively arbitrate international multi-party contract disputes. Such an organization would eliminate the need for institutional and private arbitration in this area.¹³⁰ The advantages of both the ICC and UNCITRAL arbitration rules could be combined into one set of arbitration rules which would control international multi-party contract dispute arbitration through this organization. This organization would maintain separate divisions and specialized rules to resolve particular kinds of multi-party contract disputes. For example, one division, supplied with its own personnel and rules adapted to settle international construction industry problems, would resolve multi-party construction contract disputes, while another division would settle international multi-party labor disputes.

The creation of one set of international multi-party contract dispute arbitration rules, however, would not eliminate the need for the UNCITRAL and ICC arbitration rules. The ICC and UNCITRAL rules would still be used to resolve simple disputes. For example, ICC and UNCITRAL arbitrators would not arbitrate a case that they believed was too complex to be effectively resolved under either the ICC or UNCITRAL rules, but they would send the case to the international multi-party arbitration organization to be resolved under the "multi-party arbitration" rules. Similarly, "multi-party arbitrators" would transfer a case to be arbitrated under the ICC or UNCITRAL rules if the arbitrators believed the case was not complex enough to warrant multi-party arbitration. In effect, each arbitral tribunal would have discretion to hear each case submitted to it. Although parties to an international multi-party contract dispute might refuse to use multi-party arbitration, the parties would benefit more from using multi-party arbitration rather than the UNCITRAL or ICC rules since neither UNCITRAL nor ICC rules may adequately resolve such dis-

130. For a discussion of the problems in eliminating *ad hoc* arbitration, see Part VII of this comment.

putes. By giving ICC and UNCITRAL arbitrators the authority to transfer cases to multi-party arbitration, parties that refuse to use multi-party arbitration would be forced to comply with the arbitrators' decision or not arbitrate. By foreclosing the possibility of arbitrating international disputes and forcing parties to litigate their disputes in foreign jurisdictions, multi-party arbitration would, in effect, become mandatory.

VII. CONCLUSION

Arbitrating international multi-party disputes is more advantageous than litigating such disputes. However, current international commercial arbitration rules cannot effectively resolve these disputes. The Trans-Siberian pipeline dispute serves as an example of an international multi-party contract dispute which would not have been effectively resolved under the current arbitration rules. The ICC arbitration rules, illustrative of institutional or agency-administered arbitration rules, would have adequately resolved certain aspects of the dispute, whereas the UNCITRAL rules, which guide *ad hoc* or private arbitration, would have adequately resolved other aspects of the dispute. Because neither set of rules alone can adequately resolve multi-party disputes, current arbitration rules should be modified or replaced.

If current arbitration rules are not modified, new international multi-party arbitration rules should be created. To effectively resolve multi-party disputes, new international multi-party arbitration rules should allow related arbitral proceedings to be consolidated and third parties to intervene in arbitral proceedings between contracting parties. Moreover, the new arbitration rules should include procedures to guarantee that arbitrators are qualified to resolve multi-party disputes and should require an international judicial body, detached from the arbitration process, to review arbitrator decisions.

International multi-party contract disputes can be most effectively resolved by combining the advantages of the various international commercial arbitration rules into one set of multi-party arbitration rules. A multi-party arbitration organization should also be created to draft, implement, and enforce multi-party arbitration rules. The multi-party arbitration organization would exclusively administer multi-party contract disputes, utilizing the multi-party arbitration rules. The resources required to establish the multi-party arbitration organization could be donated by businesses interested in developing efficient and equitable arbitration procedures in the international business

community.

If a multi-party arbitration organization were established, contracting parties would no longer incur expenses during the formation of contracts deciding which arbitration organization or arbitration procedures should be used to resolve disputes that might arise under the contract. Once the multi-party arbitration organization decides what constitutes a multi-party dispute, any international dispute that qualifies under the organization's definition would automatically be arbitrated pursuant to the organization's multi-party arbitration rules. By forcing multi-party disputes to be arbitrated by an international organization according to established rules, institutional arbitration would in effect replace *ad hoc* arbitration with respect to international multi-party disputes. Because one of the advantages of *ad hoc* arbitration is permitting the arbitrating parties themselves to select the parameters of the arbitral proceedings, thus encouraging disputing parties to arbitrate rather than litigate, eliminating *ad hoc* arbitration may discourage arbitration, and more importantly, international contracting.

Once the success of the international multi-party dispute arbitration organization becomes apparent, however, contracting parties will no longer need *ad hoc* arbitration to resolve disputes. Knowing that a neutral, diversified international organization will arbitrate complex disputes according to successful and effective arbitration rules, contracting parties would not hesitate to make international contracts because they would no longer be uncertain about the effects and ultimate outcome of arbitrating disputes that might arise under the contract. Moreover, by replacing *ad hoc* arbitration with institutional arbitration administered by the multi-party arbitration organization, contracting parties would no longer spend time and money drafting complex, and often irreconcilable arbitration agreements between all the parties to a multi-party contract. In short, the alternatives for resolving multi-party disputes would be narrowed to litigation or arbitration under the multi-party arbitration rules.

Undoubtedly, some qualifying parties might refuse to arbitrate under the multi-party arbitration rules and try to arbitrate their dispute with another organization or under other arbitration rules. To encourage these parties to use the multi-party arbitration rules, the advantages of the new arbitration rules should be widely publicized in the international business and legal communities, as well as to persons that arbitrate international contract disputes. If international arbitrators were encouraged to use the new rules and refuse to arbitrate under

rules other than the new multi-party arbitration rules, a professional standard would be established within the international arbitration community which international arbitrators would hesitate to violate. Ultimately, all international business would arbitrate under the new multi-party arbitration rules. Consequently, international commercial arbitration would be more effective and equitable than current international commercial arbitration, and international contracting would be stimulated.

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