

University of Michigan Law School

University of Michigan Law School Scholarship Repository

Book Chapters

Faculty Scholarship

2003

Internationalization of Labor Disputes: Can ADR Mechanisms Help?

Theodore J. St. Antoine
University of Michigan Law School

Available at: https://repository.law.umich.edu/book_chapters/314

Follow this and additional works at: https://repository.law.umich.edu/book_chapters



Part of the [Comparative and Foreign Law Commons](#), [Dispute Resolution and Arbitration Commons](#), and the [International Law Commons](#)

Publication Information & Recommended Citation

St. Antoine, Theodore J. "Internationalization of Labor Disputes: Can ADR Mechanisms Help?" In *Labor Law Beyond Borders: ADR and the Internationalization of Labor Dispute Settlement*, edited by International Bureau of the Permanent Court of Arbitration, 51-64. The Permanent Court of Arbitration/Peace Palace Papers, vol. 6. The Hague: Kluwer Law International, 2003.

This Book Chapter is brought to you for free and open access by the Faculty Scholarship at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Book Chapters by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

The Permanent Court of Arbitration/Peace Palace Papers

**LABOR LAW BEYOND BORDERS:
ADR AND THE
INTERNATIONALIZATION OF
LABOR DISPUTE SETTLEMENT**

Papers emanating from the fifth PCA
International Law Seminar
May 7, 2002

Edited by
The International Bureau of the
Permanent Court of Arbitration



KLUWER LAW INTERNATIONAL
THE HAGUE / LONDON / NEW YORK

Internationalization of Labor Disputes: Can ADR Mechanisms Help?

Theodore J. St. Antoine *

I. INTRODUCTION

Until recently, labor disputes were localized and highly site-specific in their regulation. Even if the employer was a multinational enterprise, a workplace controversy would almost invariably involve a particular union or group of employees in a given geographical location. At most, the conflict might affect the company's plants in a whole country. But still the dispute would generally be subject to a single body of familiar laws and customs. The term "international labor dispute" was simply unknown to most practitioners and scholars in the labor field.

All that is now changing. Professor Hepple, in his usual comprehensive and trenchant style, has already mapped out the emerging domain of internationalized labor disputes.¹ Before proceeding to my own topic, the potential role of alternative dispute resolution ("ADR"), I should merely like to demonstrate with a few examples that the message about this worldwide phenomenon has even reached the parochial precincts of the United States. In April 2002, the *Wall Street Journal* described how several American universities were considering cancellation of contracts with a firm near Buffalo, New York, that makes sports caps. The Workers Rights Consortium was concerned about safety conditions in the plant. Said a spokesperson for the Consortium: "We want to make sure rights are respected, whether it's Bangladesh or Buffalo."² Earlier, the National Education Association ("NEA") had reported on the efforts of high school teachers across the country, from New Hampshire to Oregon, to monitor the pay and working conditions,

* James E. & Sarah A. Degan Professor Emeritus of Law, University of Michigan; past President, National Academy of Arbitrators, U.S.A.; Member, Board of Directors, American Arbitration Association.

1. Bob Hepple, *Mapping International Labor Disputes: An Overview*, in this volume at p. 35.
2. WALL ST. J., Apr. 2, 2002, at p. 1.

especially of children and pregnant women, in factories in Bangladesh, Pakistan, Nicaragua, and elsewhere, which produce shoes, clothing, and soccer balls worn or used by American students.³

Responses and recommended responses have covered a wide range. In June 2001, Arnold Zack, past President of the National Academy of Arbitrators in the United States, urged the International Labour Organization (“ILO”) to establish a Mediation Office to resolve conflicts among governments, employers, unions, and others over compliance with ILO Conventions.⁴ About the same time, going beyond the labor field, President William K. Slate II of the American Arbitration Association (“AAA”) announced the opening of the AAA’s second International Center for Dispute Resolution, and its first in Europe, in Dublin.⁵ The AAA was already handling over five hundred international mediation and arbitration cases annually in the commercial area, involving nationals from seventy different countries.

Dispute resolution on an international level presents some unique problems. Commercial litigators, for example, have expressed dissatisfaction with the operation of the China International Economic and Trade Arbitration Commission (“CIETAC”).⁶ They reportedly question the impartiality, independence, and professionalism of CIETAC’s arbitral panels. A majority of the arbitrators deciding cases involving foreign countries are Chinese, and CIETAC does not yet appear to have acquired a truly transnational character. Its caseload has declined steadily, from 829 in 1994 to 543 in 2000. If that is the experience in the commercial field where business people presumably share

3. NEA TODAY ONLINE, Nov. 1999, at <http://www.neaorg/neatoday>.

4. See Arnold M. Zack, *Resolving Disputes over ILO Convention Compliance: A Proposal for a Mediation Service to Help Resolve Conflicts among Governments, Employers, Unions, and NGOs over Conformity to ILO Conventions*, 12(8) WORLD ARB. & MEDIATION REP. p. 220 (2001).

5. See William K. Slate II, *AAA, Coming to a Country Near You*, 56(2) DISP. RESOL. J. p. 1 (2001). The AAA has informed me that its International Centers now handle about 30–35 employment cases annually, coming from Europe, Asia, and the Americas. See also Brian A. Langille, *International Collective Bargaining: Canada*, in 15 WORLD CONGRESS OF LABOR LAW & SOCIAL SECURITY p. 101 (Roger Blanpain ed., 1997).

6. *News Abroad, CIETAC Arbitration may be Declining in Stature and Performance*, 12(12) WORLD ARB. & MEDIATION REP. p. 304 (2001). For cooperative efforts by the AAA and CIETAC, see *ADR News, CIETAC-AAA Meeting Yields Agreement*, 56(2) DISP. RESOL. J. p. 4 (2001).

many values in common, one can see where the pitfalls multiply in an area such as labor and employment, with all its potential for class and economic conflict.

My task is to assess the ways in which ADR procedures may be adapted to deal with international labor disputes. ADR refers to various methods by which neutral third parties assist persons engaged in a conflict to settle their differences without invoking the decision-making power of the state or another sanction-imposing body. Both mediation and arbitration are included among such methods. In mediation, the neutral aims for the parties to agree on a mutually acceptable solution. In arbitration, the neutral imposes a solution after presentations by the contending parties. A third term – conciliation – is sometimes used and generally connotes a milder form of intervention than mediation. A conciliator may simply start the parties talking and do little to direct the course of their exchanges. A mediator usually aims at a more structured dialogue. In each instance, the ADR procedure is a substitute for a more formal adversarial action before a court or administrative agency. At their best, mediation and arbitration have the advantages of speed, cost savings and informality over court or administrative proceedings.

II. INSTITUTIONAL AND CULTURAL DIFFERENCES

Any effort to use ADR procedures to settle labor disputes in an international setting must take into account that the parties may come from very different legal systems and widely varying cultural backgrounds. Even in the so-called Western World, the diversity of civil law and common law approaches to arbitration have created problems that require harmonization.⁷ Examples include distinctions between the “inquisitorial” and “adversarial” processes; the limited or extensive cross-examination of witnesses; elaborate or conclusory written pleadings; neutral or partisan expert witnesses; proof of foreign law as a matter of “law” or of “fact”; and the allocation of costs (an issue on which the common law systems of the United Kingdom and the United States differ).

Legal differences, being primarily intellectual constructs, may be the easier divide to bridge. Cultural differences, going to the essence of who we are, could be the subtler but more stubborn obstacle. Such differences have been

7. See, e.g., Julian D.M. Lew & Laurence Shore, *International Commercial Arbitration: Harmonizing Cultural Differences*, 54 DISP. RESOL. J. p. 32 (1999).

said to be a major barrier to the effective use of mediation in resolving disputes under the North American Free Trade Agreement (“NAFTA”).⁸ Yet the “extraordinary diversity” of the workforce at the United Nations has not been found an impediment to the successful operation of that organization’s quasi-legal Joint Appeals Board for handling internal grievances.⁹

Are there practical ways to minimize the adverse effects of cultural factors on the implementation of mediation and arbitration? The starting point has to be a recognition that cultural differences and a diversity in the ethnic background of the parties will play a part in any proceedings. It was only in the last couple of decades that neutrals in my country fully faced up to this as a fact of life in the American workplace.¹⁰ A healthy reaction was a deliberate effort to increase the number of minorities and women in the ranks of arbitrators and mediators. In mediation, especially, there is a need for creating trust in the neutral on the part of the disputants.¹¹ Engaging persons for the neutral role whose backgrounds are similar to the contending parties is invaluable. There must be careful attention to the nuances of language use and communication styles. Some ethnic groups are accustomed to more formal, rational exchanges, and others to more relaxed, emotive ones. When agreement is reached, its immediate memorialization in writing may be advisable in Anglo-American cultures. In certain Asian and Hispanic cultures, insistence on speedy documentation might betoken distrust, and caution should be exercised.

8. North American Free Trade Agreement, Washington, Dec. 17, 1992, entry into force Jan. 1, 1994, U.S.-Can.-Mex., 32 I.L.M. p. 605. See Steven K. Andersen, *NAFTA: Mediation and the North American Free Trade Agreement*, 55 DISP. RESOL. J. p. 56 (2000).

9. C. Stephen Baldwin, *ADR in a Multicultural Political Setting: A Look at the UN Joint Appeals Board*, 54 DISP. RESOL. J. p. 67 (1999).

10. See, e.g., Bruce Fraser, *A New Diversity in the Workplace – the Challenge to Arbitration*, in ARBITRATION 1991: THE CHANGING FACE OF ARBITRATION IN THEORY AND PRACTICE, PROCEEDINGS OF THE 44TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS p. 143 (Gladys Gruenberg ed., 1991); Lamont E. Stallworth & Martin H. Malin, *Conflicts Arising out of Work Force Diversity*, in ARBITRATION 1993: ARBITRATION AND THE CHANGING WORLD OF WORK, PROCEEDINGS OF THE 46TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS p. 104 (Gladys Gruenberg ed., 1994).

11. Donna M. Stringer & Lonnie Lusardo, *Bridging Cultural Gaps in Mediation*, 56 DISP. RESOL. J. p. 29 (2001).

III. MEDIATION

Good arbitrators do not necessarily make good mediators, and vice versa. The ideal mediator will be a person of infinite patience, empathy and flexibility.¹² When handling a case, a top-notch arbitrator will tend to be more impersonal and decision-oriented. Probably the more important practical question is *when*, if at all, a person should try to perform as both mediator and arbitrator in the same proceedings. I am satisfied the answers will vary considerably depending on the temperament of the arbitrator, the chemistry existing between a given arbitrator and the disputants, and a subtle intuition of what particular circumstances permit or ordain. Everyone recognizes that there is one substantial risk; if mediation is attempted and fails, the would-be arbitrator may by then be privy to confidential disclosures from one or both sides (for example, the parties' "bottom line" for settlement) that could be highly prejudicial when the arbitrator moves into a decision-making mode. Once one has been told about elephants, it is hard to put them out of one's mind. Yet, the pragmatic response is that mediation before arbitration often works, and that, when it does, it saves all concerned much time, money, and psychic wear-and-tear. This has led to the process known as "med-arb."¹³

Various classifications have been devised for analyzing different approaches to mediation. These are not watertight categories and the same mediator may shift from one type to another, even in the same proceedings. But one classification scheme¹⁴ I have found helpful is the following, listed in ascending order of intervention by the neutral:

Transformative or Collaborative Mediation – The focus is on the state of the parties' relationship and its long-term development. The mediator does not try to lead so much as to encourage the parties to discover their own separate and mutual resources and to understand the other person's point of view. This is a

-
12. One of the best general treatments of mediation is WILLIAM E. SIMKIN & NICHOLAS FIDANDIS, *MEDIATION AND THE DYNAMICS OF COLLECTIVE BARGAINING* (2nd ed. 1986). See also John Kagel, *Mediating Grievances*, in *ARBITRATION* 1993, *supra* note 10, at p. 76; *ADR & THE LAW* (American Arbitration Association, 16th ed. 2002). Cf. Thomas R. Colosi, *The Principles of Negotiation*, 57 *DISP. RESOL. J.* p. 28 (2002).
 13. Thomas J. Brewer & Lawrence R. Mills, *Combining Mediation & Arbitration*, 54 *DISP. RESOL. J.* p. 32 (1999).
 14. For a different taxonomy of mediation, see Douglas E. Noll, *A Theory of Mediation*, 56 *DISP. RESOL. J.* p. 78 (2001).

good starting point from which to move on, if necessary, to other forms of mediation. It is not easy, however, to shift *back* to transformative mediation from a more active type.

Evaluative Mediation – The mediator does not attempt to come up with a specific solution but concentrates rather on showing the respective strengths and weaknesses of each party’s position. Mediators using this technique may begin by holding separate meetings with the parties in an effort to fully understand their perspectives. Thereafter, especially if the parties have had a longstanding relationship, the effort will generally be to keep them together as much as possible, talking and listening to the mediator and each other. Without the evaluation, this approach is known as “facilitative” mediation.

Directive or Result-Oriented Mediation – Here, quite deliberately, the aim is to bring the parties to a certain goal that the mediator, at some point in the process, has concluded is appropriate and achievable. Some mediators employing this approach will sit down with both parties and let them talk to the mediator, but not to each other, with the more agitated party going first. However, each party hears the other’s story with the fervor behind it. The ground rules will forbid personal attacks by the speaker or interruptions by the listener. Even so, caucuses may be required from time to time to cool tempers, permit confidential communications to the mediator, and move the negotiations along toward closure. Other mediators will spend the bulk of their time meeting separately with the opposing parties.

Transcending all these questions of technique is a very simple human factor that constitutes a key ingredient of success in mediation: the trust and confidence which the parties come to repose in the neutral third party. And, for me, that reflects the principal glory of the mediation process. Other aspects of dispute resolution, both traditional and alternative, may be more intellectually challenging and philosophically oriented. But in mediation the emphasis is on the total input of all three participants – the claimant, the respondent, and the neutral – in working together to reach a solution that is mutually acceptable to the contending parties. The result may lack the coherence and elegance of a finely reasoned judicial or arbitral opinion. But the mediation product is a joint, voluntary creation, and its frequent rough edges bear testimony to its source in multiple human hands. Even as mediators may wince at the imperfections of the final settlement, they can take pride in the knowledge that the trust and confidence they generated led two opposing camps to find their own common ground, without the fiat of some external force.

The graduated steps of neutral involvement that characterize the various forms of mediation just described have obvious attractions in the international labor field. Parties that may initially be suspicious of or even hostile to any sort of outsider intervention can be introduced to the process through the least intrusive type: transformative or collaborative mediation. Once trust and confidence in the mediator have thus been established, the parties can be led gradually, if that is necessary, into the stages or kinds of mediation where the neutral plays a more active and directive role.

IV. ARBITRATION

In arbitration, the neutral is no longer an intermediary or “matchmaker” between the disputants, but rather a decision-maker.¹⁵ The process is still generally voluntary in that the parties have agreed to enter into it and have agreed on the arbitrator or on the manner of selecting that person. Yet, once the proceedings are under way, the arbitrator is largely in charge. Lacking are much of the informality and nearly all the sense of a voice in the outcome that are found in mediation. That makes it especially important, when dealing with parties from widely varying cultural and socio-economic backgrounds (as often occurs in international arbitration), to ensure fairness and the *perception* of fairness to all concerned. Nonetheless, arbitration still shines in letting determined combatants meet in an arena that is less intimidating, less rule-driven, and less likely to disrupt ongoing relationships than a courtroom or an administrative agency. And, if administered intelligently, arbitration can also be gentler on the parties’ pocketbooks, their timesheets, and their psyches.

Other contributors to this volume address the need to formulate workers’ rights in what could otherwise become an oppressive global economy.¹⁶

15. Standard works on arbitration include LABOR ARBITRATOR DEVELOPMENT: A HANDBOOK (Christopher Barreca, Anne Harmon Miller & Max Zimny eds., BNA 1983); FRANK ELKOURI & EDNA ASPER ELKOURI, HOW ARBITRATION WORKS (Marlin Volz & Edward P. Goggin eds., BNA 5th ed. 1997); THE COMMON LAW OF THE WORKPLACE: THE VIEWS OF ARBITRATORS (Theodore J. St. Antoine ed., BNA 1998); ARBITRATION IN PRACTICE (Arnold M. Zack ed., Cornell 1984); LABOR ARBITRATION: A PRACTICAL GUIDE FOR ADVOCATES (Max Zimny, William F. Dolson & Christopher A. Barreca eds., BNA 1990).

16. See, e.g., Arnold Zack, *ADR and the Settlement of International Labor Disputes: A Proposal for Conciliation through the Permanent Court of Arbitration*, in this volume at p. 125.

Arbitrators can play only a limited role in this process. The most common form of arbitration is so-called grievance or “rights” arbitration, dealing with claims arising under existing contracts, statutes, or other regulations. Here, the standards or criteria to be applied are external to the arbitrator, typically supplied either by a prior agreement of the disputing parties or by legislative or administrative action. Even in the rarer type of “interests-” or new-contract arbitration, the arbitrator will generally be directed to draw upon the models established in the existing contracts of comparable parties. Thus, arbitrators may have a significant hand in the enforcement or even the extension of workers’ rights, but seldom if ever in their original creation. The latter will largely be the responsibility of other bodies.

In the United States, the single arbitrator has become the norm in labor disputes. Arbitrators may be full-time professionals or part-timers drawn from university faculties of law, economics, or industrial relations. The individual may be selected by the parties *ad hoc*, either by mutual agreement or by selection from a list furnished by a public or private “designating agency.” Or the arbitrator may be a “permanent umpire” or a member of a rotating panel maintained by a particular company and a particular union. For most parties, the choice of the arbitrator is a critical matter. There is evidence that this may be less important than it seems; that there is a remarkable similarity in the conclusions reached by different arbitrators, even those with relatively little experience.¹⁷ Nonetheless, it would be hard to convince most parties, especially those coming from the far corners of the earth, that the identity of the arbitrator does not make much difference. Indeed, in international disputes, it *may* make more difference than it does when both parties are located in the same city or country. In any event, parties everywhere typically want decision-makers who “include people who look and think like them.”¹⁸

The solution, at least in the early years of international arbitrations, has been a tripartite panel. This was once fairly common in the United States, and it is still used in some very important or complicated cases, particularly those

17. Robben Fleming, a past President of the National Academy of Arbitrators, asked one of his labor law classes to decide, on the basis of the records, a number of cases he himself had heard. The students agreed with him at least 71% of the time. See ROBBEN W. FLEMING, *THE LABOR ARBITRATION PROCESS* p. 81 (Illinois 1965). I have had a parallel experience, with law students in accord with my rulings 83% of the time.

18. Delissa A. Ridgway, *International Arbitration: The Next Growth Industry*, 54 *DISP. RESOL. J.* pp. 50, 51 (1999).

that require setting the terms of a new contract as distinguished from resolving a grievance under an existing agreement. The usual procedure is for each party to select its own “delegate” or panel member, and then for those two to choose a third, impartial person to act as chair and cast the deciding vote. The great advantage is that each side knows that there is someone who will be able to speak quietly with the other arbitrators in executive session, and who can make sure that the other arbitrators have not misunderstood some point or discounted the importance of a given position. When parties speak different languages, have different ethnic, socio-economic and religious backgrounds, and may be quite unequal in bargaining strength, it could be all the more reassuring to have a voice on the inside.

This also underlines the urgent need to develop a cadre of international labor arbitrators fluent in various languages and comfortable in multicultural settings, who can serve either as chairs of tripartite panels or be the sole decision-makers if and when that becomes generally acceptable. I have handled arbitrations with French, Russian, and Spanish translators, and it worked reasonably well. But those cases involved a single system of law and employment practice. We move to another level of complexity and potential mistrust in an international labor dispute.

The Biblical King Solomon is often cited as the first arbitrator. In deciding between the two women claiming the one surviving infant, Solomon relied much more on his assessment of maternal instincts than on technical niceties such as rules of evidence, burden of proof, and established precedent. It almost seems as if arguments have raged ever since about whether creeping legalism would be the ruination of arbitration. In the labor field in the United States, employers, unions, and their representatives have tended over time to favor increasing formality in the proceedings and a reliance on prior rulings in the decisions. That structured approach promotes predictability and the autonomy of the parties, as it limits the discretion of the arbitrators.¹⁹

The Anglo-American common law has devised an elaborate body of evidentiary rules to determine what kinds of testimony and exhibits are admissible in court proceedings. The aim is to accept only what is competent – that is, of a credible nature – and relevant, *i.e.*, bearing a logical relationship

19. For a provocative analysis of this story, see Richard Mittenenthal, *Whither Arbitration?*, in *ARBITRATION* 1991, *supra* note 10, at p. 35.

to the issues in a case. A major function of these rules is to protect juries from misleading and extraneous evidence. Most arbitrators will point out that they are not jurors in a civil trial and therefore do not feel bound by the technical rules of evidence. Nevertheless, there is a wealth of common sense in the *principles* or rationales underlying most evidentiary rules, and arbitrators will generally pay heed to these.²⁰

An example is the treatment of hearsay.²¹ Hearsay is the testimony of a witness about what someone else said, when offered to prove the truth of that other person's statement. It is objectionable because it is not subject to cross-examination and is therefore less credible. Hearsay also includes documents such as affidavits, reports, *etc.* Courts exclude hearsay, subject to a number of exceptions such as records prepared in the normal course of business. Much hearsay is admitted in arbitrations, but it is given less weight than direct evidence. Doctors' certifications that an employee was absent from work because of illness are usually accepted, although they are not necessarily conclusive. However, an employee's discharge would rarely if ever be upheld on the basis of hearsay alone.

The burden and the standard of proof are other areas where arbitration draws on legal concepts but introduces its own variations.²² As in a court, the moving party, whether a union, employee, or employer, ordinarily has the burden of proof, *i.e.*, the requirement of satisfying the arbitrator that its position should be upheld. That is certainly accepted in claims of a contract violation. But in employee disciplinary cases, the long-established practice in labor arbitrations in the United States has been that the employer bears the burden of proof. Now, as a practical matter, it makes sense that the employer, who best knows why it decided to discipline or discharge the worker, should go first in presenting its evidence. That alone, however, does not justify placing the

20. See generally FAIRWEATHER'S PRACTICE AND PROCEDURE IN LABOR ARBITRATION (Ray J. Schoonhoven ed., BNA 4th ed. 1999); MARVIN F. HILL & ANTHONY V. SINICROPI, EVIDENCE IN ARBITRATION (BNA 2nd ed. 1987); DISCIPLINE AND DISCHARGE IN ARBITRATION 333-368 (Norman Brand ed., BNA 1998); Michael S. Winograd, *Rules of Evidence in Labor Arbitration*, 55 DISP. RESOL. J. p. 45 (2000) (arguing against rules).

21. See, e.g., John Kagel, *Practice and Procedure*, in THE COMMON LAW OF THE WORKPLACE, *supra* note 15, §§ 1.54-1.56, pp. 33-35.

22. See, e.g., Dennis R. Nolan, *Standards for Discipline and Discharge*, in THE COMMON LAW OF THE WORKPLACE, *supra* note 15, §§ 6.9, 6.10, pp. 177-180.

ultimate burden of proof or persuasion on the employer. Perhaps the loss of a job (or other serious discipline) is such a major blow, economically and otherwise, to an employee that it is thought fair and reasonable for the employer to have to demonstrate the appropriateness of its action.

In civil actions at common law, the *standard* of proof, or required quantum, is a simple preponderance of the evidence – that is, the factual position of the party with the burden of proof must be more likely true than not (*i.e.*, at least fifty-one percent likely) for that party to prevail. Most arbitrators will apply that standard in contract interpretation cases. It becomes more complicated in employee disciplinary cases. A few arbitrators will accept the argument that a termination amounts to “economic capital punishment” and that the criminal law standard of proof beyond a reasonable doubt ought to apply. Other arbitrators emphasize that a discipline case, even one involving a discharge, is still a civil proceeding, so the standard of proof by a preponderance of the evidence should suffice. Because of the impact on the employee, a substantial number of arbitrators (perhaps a majority) demand “clear and convincing proof” in a discharge case, at least when the alleged misconduct involves acts of moral turpitude which could adversely affect the worker’s future job prospects and reputation in the community.

There are respected American arbitrators who insist that concepts like the burden or standard of proof are of no practical significance. They feel that they must always decide which party is more convincing. But once in a great while I find I cannot make any such determination; the evidence is in equilibrium. It is then that burden of proof comes into play, and the party bearing it loses. Similar variations exist in arbitrators’ attitudes about the standard of proof, especially in discharge cases. Regardless of how one answers these questions, however, I believe they will occasionally have to be confronted and resolved.

One preliminary step that is generally unnecessary in union-management arbitrations may frequently be required in arbitrations involving individual employees and their employers. That is “discovery,” the process by which interrogatories (a set of written questions) or depositions (sworn pre-hearing testimony) are used to obtain disclosure of pertinent background information. In the collective bargaining context, such material is customarily secured in the contractually provided grievance procedure preceding the hearing, or even preceding the decision to arbitrate. But the individual employee does not normally have access to this relatively informal method of getting the facts needed to prepare for and conduct the arbitration.

Discovery calls for a difficult balancing act by the arbitrator. Enough discovery must be granted to apprise both parties of the critical facts of the case. But discovery must not be permitted to be carried to such lengths that it becomes a tactic for stall-and-delay, draining the resources of the weaker party, as often happens in court litigation. Somewhat arbitrary quantitative limits may have to be placed on the questions asked, depositions taken, and time allowed. Perfect justice is not a feasible goal for arbitration; the price is simply too great. A reasonably fair result, without an excessive expenditure of time and money, is the realistic objective.²³

V. JUDICIAL ENFORCEMENT

American courts enforce both agreements to arbitrate and awards issued by arbitrators.²⁴ The U.S. Supreme Court has held that a dispute is subject to arbitration if the claim “on its face is governed by the contract,”²⁵ adding: “Doubts should be resolved in favor of coverage.”²⁶ In enforcing an arbitral award, courts should not attempt to “review the merits” and correct mistaken findings of fact or misinterpretations of the contract.²⁷ A court may set aside an award only on grounds such as fraud or corruption, the arbitrator’s exceeding of the authority granted by the parties’ submission, or a violation of positive law or “‘some explicit public policy’ that is ‘well defined and dominant, and is to be ascertained by reference to laws and legal precedents and not from general considerations of supposed public interests.’”²⁸ The net effect is a high degree of judicial deference to the arbitration process. The arbitrator’s judgment is what the parties bargained for and their commitment should be honored.

23. See generally David E. Wagoner, *Managing International Arbitration: A Shared Responsibility of the Parties, the Tribunal, and the Arbitral Institution*, 54 DISP. RESOL. J. p. 15 (1999).

24. See, e.g., Olivier Antoine, *Judicial Review of Arbitral Awards*, 54 DISP. RESOL. J., p. 23 (1999); Theodore J. St. Antoine, *The Law of Arbitration*, in LABOR ARBITRATION UNDER FIRE p. 1 (James Stern & Joyce Najita eds., Cornell 1997).

25. *Steelworkers v. American Mfg. Co.*, 363 U.S. p. 564, at p. 568 (1960).

26. *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. p. 574, at pp. 582–583 (1960). See also *AT&T Technologies v. Communications Workers*, 475 U.S. p. 643 (1986).

27. *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. p. 593, at pp. 596–599 (1960).

28. *Paperworkers v. Misco, Inc.*, 484 U.S. p. 29, at p. 43 (1987) (quoting *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. p. 757, at p. 766). See also *Eastern Assoc. Coal Corp. v. Mine Workers Dist. 17*, 531 U.S. p. 57 (2000).

American courts have been similarly expansive in enforcing international arbitration agreements, applying both the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”)²⁹ and the United States Arbitration Act.³⁰ The New York Convention provides that a state may declare it is applicable only to “relationships, whether contractual or not, which are considered as commercial”³¹ A “commercial” relationship in this context has been held to include employment.³² The New York Convention, to which some 125 countries are now parties, limits the grounds for not enforcing a foreign arbitral award. They include the invalidity of the arbitration agreement under whatever law is applicable, a denial of due process to a party, an award in excess of the scope of the submission, an unauthorized arbitral tribunal or procedure, or a violation of the public policy of the country where enforcement is sought.³³ In light of the worldwide acceptance of the New York Convention, it appears that judicial enforcement will be the least of the problems in making ADR an effective device for handling international labor disputes.

VI. CONCLUSION

ADR procedures exhibit some very special attractions in the international arena, and perhaps especially for less affluent disputants from developing nations. Properly administered, ADR does not entail the cost or time or trauma of a court suit. Beyond that, it possesses one supreme attribute: it maximizes the involvement of the opposing parties. This is pre-eminently true of mediation, of course, where nothing is final until the parties themselves say so. Yet, even in arbitration they have a major voice. Subject to legal restrictions, they can select the arbitrator, frame the issue, define the remedies, and even spell out procedural details. Participation and empowerment are central to

29. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, June 10, 1958, 330 U.N.T.S. p. 3 [hereinafter New York Convention].

30. See generally Ronald C. Peterson, *International Arbitration Agreements in United States Courts*, 55 DISP. RESOL. J. p. 44 (2000); Jessica Thorpe, *A Question of Intent: Choice of Law and the International Arbitration Agreement*, 54 DISP. RESOL. J. p. 16 (1999). See also Markus R. Frick, *When Foreign Arbitral Awards Are Late . . . Should U.S. Courts Enforce Them?*, 57 DISP. RESOL. J. p. 40 (2002).

31. See New York Convention, *supra* note 29, art. 1(3), codified in 9 U.S.C. § 201 (1999).

32. Prograph International Inc. v. Barhydt, 928 F. Supp. p. 983 (N.D. Cal. 1996).

33. New York Convention, *supra* note 29, art. V.

INTERNATIONALIZATION OF LABOR DISPUTE SETTLEMENT

ADR, and the resolution of any dispute is most likely to be accepted and lasting when the contending parties have had a hand in its fashioning.