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INTERNATIONAL COUNCIL
FOR COMMERCIAL ARBITRATION

INTERNATIONAL DISPUTE RESOLUTION:

TOWARDS AN INTERNATIONAL ARBITRATION CULTURE

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with the assistance of the
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Is There a Growing International Arbitration Culture?

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I. INTRODUCTION

The topic given to Prof. Taniguchi and myself for this opening session is a question, "Is there a growing international arbitration culture?" This seems to call for a survey of attitudes and practices peculiar to international arbitration in order to answer the question. The more extended comment of the organizers assumes, as most of us would, however, that such a culture exists, and assigns to us the task of considering what laws and rules are now being developed to implement this "international culture". We also noted that the organizers expressed their conviction that this Conference must have practical and cultural *results*. I have interpreted this to call for something more that just a definition of terms and a description of significant developments, even in this first session, and will include in my remarks therefore some concrete suggestions as to what ICCA might do to further improve and implement this international arbitration culture.

In the process of preparing these papers we were helped immeasurably by suggestions submitted by our commentators, as well as, of course, by the writings of many, many colleagues who are here at this Conference. As might be expected, it was suggested that before we try to see whether it is growing we should address the question of just what is meant by "an international arbitration culture". I think that if you look in the program at the topics, you will already see what the organizers were thinking about when they used this term. They were thinking about how various techniques of dispute resolution are working together in the multicultural international context; the extent to which arbitrators in international arbitrations separate themselves and their arbitrations from the particularities of national systems; and how far courts have developed special international standards in their assistance and enforcement roles in connection with international arbitrations.

I am of course greatly relieved to be able to defer any detailed discussion of these central, difficult questions to the later presentations of distinguished speakers and commentators. As has been the case at past ICCA meetings, by looking once more at familiar, important problems we no doubt will find some new insights and solutions that are the "practical results" desired by the organizers.

What do we think about when we talk about an international arbitration "culture"? It is certainly something bigger than the sum of its parts. When someone points out to me that X country declined to enact the UNCITRAL Model Law, I instinctively assume that there were some particular provisions that they felt uncomfortable with, and that even if

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they proceed to draft their own new law they will certainly not stray too far from the UNCITRAL substantive provisions on basic points. I do this because I honestly feel that in the past 20 years we have come to some consensus as to what the basic arbitration procedures should be, as well as what should be the fundamental relationship between arbitration and the courts. If someone tells me another horror story about a judge who got it all wrong in connection with an attempt to enforce an international award, I assume, perhaps overly optimistically, that this is just another unfortunate exception to the general trend. Even when someone tells me that a bar association, or even a court, is taking the position that only lawyers from their jurisdiction can appear on behalf of parties in an arbitration, I try to smile. I say that they will eventually come to see the folly of their ways and accept the view which is held by those who understand the international arbitration culture.

This is because I really am an optimist, and I really do think that international arbitration today is a very good and special institution. Its development since 1950 has been both responsive to the commercial community's needs and responsible in implementing high standards of ethics and substantive justice. I have spent a good part of the last 25 years talking to lawyers and judges – and clients – about their experiences with arbitration and conciliation/mediation. (I have even talked with a few professors about arbitration, but I must confess that this central feature of international dispute resolution has yet to gain a prominent place in the hearts of many academics in the United States.) Most of these informants were quick to tell me of their bad experiences with arbitration – the arbitrator who retreated to his country home without a telephone for six months, or the arbitration institution which refused to extend the period for the arbitration even though all the parties and the arbitrators were in agreement. Many of them were quick to point out, however, how these problems could have been corrected by drafting a better clause. It is certainly my impression that our international arbitration mechanisms and rules have in the recent past been fine-tuned to an impressive extent. Much of this progress is due to the efforts of people sitting in this conference hall. We have recognized this new "culture" for years. It is less clear to me, however, that the lawyers who advise on resolving disputes, and particularly those corporate lawyers who draft dispute resolution clauses are sufficiently well-informed about the field. The rapid changes in rules, new statutes, and a proliferation of institutions have resulted in an information overload. Hopefully we will all take away from this Conference a renewed determination to participate in spreading practical information about this new international arbitration culture to others in a helpful way.

The organizers realistically recognized that we are still a good way from a true consensus which would lead in the immediate future to total uniformity in the international arbitration field. They expressed their hope that there would be an important "cultural" result from our discussions, because "knowledge of diversity should bring tolerance". My experience in teaching students and conducting seminars for lawyers on cross-cultural problems over many years leads me to add that an *understanding of the reasons behind* those diverse attitudes and approaches helps greatly in reaching the desired level of tolerance. In fact, we are blessed today and tomorrow to be in a wonderfully stimulating general cultural atmosphere as we discuss how various legal

cultures can interface effectively. We find in Korea a vigorous, independent culture surviving between two superpowers, and we have a chance to learn how these three cultures differ yet interact in significant ways. Hopefully many of our speakers and commentators will give us insights into the relation of the general culture of their country to their "dispute resolution" culture. Part of our task at this particular Conference must be to look for improved ways of solving disputes between parties from different general cultures as well as legal cultures. For example, we might reconsider from this point of view the impact of the common practice of having an umpire from a third country, in effect adding a third culture to those of the two parties. Perhaps familiarity with the cultures of each of the parties is an arbitrator qualification which we might want to add to the list? Can we at least agree that this cross-cultural aspect of the arbitration proceedings is a topic that we should recognize explicitly and plan for when possible? I recall hearing our late colleague Prof. Michida say often during the preparations for the Tokyo Conference that it was important that arbitrators help to bridge the gap between national cultures as well as legal cultures. He and our other colleagues who have given us the excellent UNCITRAL products were well aware of the effort this requires. Hopefully all of us will participate in arbitration more effectively because of the insights we receive at this Conference in Korea.

I would like now to raise some questions for our consideration about some of the new laws and rules affecting international arbitration and about some of the problems commonly noted in connection with international arbitration which even these new rules and norms may leave unsolved. Finally, I will ask what we as individuals and as an organization should be doing to continue making progress toward the main goals in this new "international" arbitration culture.

II. STATUTES AND RULES

For those of us who have been observing the arbitration scene for the last 30 years, the centrality of the work of UNCITRAL is obvious; it has produced outstanding rules and a modern model act. Perhaps equally important is the fact that through its work the idea has gained acceptance that there is something important going on in the international trade field which is beyond the control of any country or group of countries, something which calls for efforts to understand and unify or otherwise improve jointly the legal framework for that trade, a feeling which is a basic component of this international "culture" we are discussing today. The way in which the Vienna Sales Convention was drafted contributed greatly to this perception. Perhaps some of the younger generation accept as natural the willingness of the UNCITRAL national representatives to call into question basic legal approaches of their own systems and eventually agree on a text which in many cases diverged from them. In fact, it was very difficult to arrive at a consensus on many of the conclusions reached. The representation on the commission of a wide range of economic and political systems as well as the full discussion in the sessions of all points of view smoothed the way to a new level of acceptance of these "different" new rules. The expansion by Unidroit of this text into a more complete set of

international contract law principles carried on this tradition, and particularly significant to us here because these principles are already showing their utility in the arbitration context. I will return later to this point, for we tend to forget that it is still difficult for many judges and lawyers to understand and implement some of the "different" provisions of the UNCITRAL model arbitration act.

Should countries adopting new arbitration legislation have separate statutes covering domestic and international arbitrations? Many of us feel that there are important insights from the international experience which are helpful in designing a domestic scheme. Some have felt, however, that the integrity of the UNCITRAL Model Law should not be sacrificed by adapting it for inclusion in an all-purpose statute. My experience as adviser in several countries has made it clear to me that good new legislation is the important goal, not whether it comes in one statute or two, and not whether it is patterned 100% on another country's legislation or a model act. The existence of the UNCITRAL model may provide the impetus to reexamine legislation as it relates to international arbitrations at least provides an opportunity to modernize the law for domestic arbitrations as well.

I hope this will in fact be the case in the United States. We have an antiquated federal statute giving attention to international proceedings only in its implementation of the New York Convention. The additional general arbitration statutes in most states are sometimes more helpful than the federal act on general arbitration questions. Now a number of states have enacted special statutes covering international arbitration, most of them drafted with an eye on the UNCITRAL model. We have a number of unanswered questions about the appropriate coverage of these various acts, and consideration of the UNCITRAL model act at the federal level may lead to an improved general act. The United States may have dispute resolution fever, but we have not yet been able to get our legislation in order.

As we look around the world, what is happening in regard to arbitration statutes? We are all encouraged by the fact that many countries have enacted the Model Law. At least equally reassuring is the fact that other countries have used the Model Law as the core of their new legislation, and have customized – I am sure they feel, improved upon it. If these improvements are then adopted by others, the course of uniformity is not fatally jeopardized. For example, we are told that Hong Kong may follow the lead of the new Singapore statute in some fine-tuning of its UNCITRAL-based law. As the culture recognizes general "improvements" which might be made in the model act, what will be done?

The United States has had some experience in this area, for its uniformity in the area of contract and commercial law has come about by adoption by each of the 50 states of a proposed uniform text, the Uniform Commercial Code (UCC). Some made changes in the mold at the time of adoption, and others made significant subsequent amendments over the past 30 years. Amendments and additions to the model UCC have been overseen by a permanent editorial board, and perhaps this is what is needed for the UNCITRAL progeny. Unidroit has in effect performed part of that function for the sales convention. The Unidroit drafters made some improvements on the original UNCITRAL text in addition to adding provisions regarding validity, etc., in their *Principles of International Commercial Contracts.* It would seem that the UNCITRAL Secretariat is in a difficult position in this regard once their final text is approved. Their principal role is to promote

the adoption of the present official text as adopted, not to serve as a collector and promulgator of possible desirable amendments and additions.

Is this a situation that ICCA should address formally in connection with the arbitration texts? I have had the experience of participating in the drafting of new arbitration statutes for several countries, and as I noted above, it was always clear to me that it was the best statute that was desired – not just one that would be uniform with other countries. Many of you here have written perceptively about problems that have surfaced in the Model Law. For example, it would be desirable to clarify exactly what constitutes a writing to satisfy the statute. As a consultant I would not advise simply adopting the original version once I am aware of the problem and an improved text that provides a clearer rule. While I can refer in the course of that work to my colleagues' publications, it would be more persuasive to refer the drafters in those countries to a formal report and recommendation of a committee of this body.

The same comments might be made in reference to the UNCITRAL Arbitration Rules. Their widespread acceptance by arbitration centers and by parties in their individual contracts is a major fact in the new international arbitration culture. As with the Model Law, some assistance in monitoring amendments or additions by the various centers, as well as refinements introduced in the usage of experienced practitioners in their drafting of dispute resolution clauses might be a good idea. For example, an ICCA committee might decide to recommend for general adoption the salutary provision of the new AAA International Arbitration Rules providing that in the event of the death of an arbitrator, in default of party agreement on the point the replacement arbitrator can decide to continue on the record made to date. A committee could serve as a clearing house for such improved or additional provisions, and in some cases might redraft the text in order to fit them into the UNCITRAL rule system and terminology.

III. SPECIAL PROBLEM AREAS

While we are all aware of the broad consensus reached on many points in this new international culture, there remain a number of especially difficult problems in the international field, problems for which the solutions are still not substantially uniform. Some of these may reflect differences in domestic legal systems. I remember a spirited debate at the Stockholm Conference over whether an arbitrator could substitute his opinion for that of an expert. Other stubborn problems that may be dealt with include multiparty arbitrations, availability and form of interim relief, and whether courts should develop separate (and more lenient) basic public standards for opposing enforcement of an international award. We should help judges to appreciate one of the most significant concepts in this new culture, namely that international arbitration deserves special treatment. That is certainly the tendency. Foreign awards are insulated from direct attack even in the jurisdiction where they were made, as in Belgium and Switzerland. Even the United States Supreme Court followed this pattern in allowing arbitration of securities and antitrust claims first only in international arbitration and then subsequently allowed it in domestic disputes as well.

IV. HOW DOES ICCA FIT INTO THIS INTERNATIONAL CULTURE?

I am a simple consumer of ICCA products. I have never had to work behind the scenes to make it possible for us all to enjoy conferences such as this one. I have benefited tremendously from the *Yearbook* and from the conference proceedings, and I am sure there are many other contributions that the organization and individuals in the name of the organization have made which many of us know little about. Since the organizers have enjoined us to be sure the Conference has "practical results", we should not neglect to ask ourselves at each session whether there are any new things ICCA should be doing.

I assume that in our arbitration work we all have at least two principal goals: Having as good an arbitration as possible, and getting enforcement of the resulting award.

The UNCITRAL Rules and the new or improved rules of many institutions have contributed greatly to improving the quality of the arbitration proceeding itself. Better statutory frameworks in many countries also help to ensure a better arbitration. We have also seen a proliferation of training programs for arbitrators, and these programs have in fact contributed to a clearer understanding of the fundamentals of this new culture.

This is one aspect of arbitration both domestic and international where many of us tend to equivocate. Over the years we have often talked of arbitration as being less formal, more flexible, speedier and less costly than litigation, but do we really fight hard to keep it that way? Both lawyers and arbitrators have commented on how often arbitrations today are converted into court-like battles by counsel who are used to litigation. Common Law lawyers are undoubtedly the worst offenders in this regard. I attended last summer a program at the annual meeting of the American Bar Association entitled: "What's Wrong With Arbitration and How Can We Fix It?" Almost all of the discussion focussed on how it was possible to arbitrate without giving up procedural advantages. How to get discovery in arbitration proceedings, and how to get the courts to give various supportive orders. I listened in horror as one naive Harvard law professor suggested that probably arbitration was most suited for determination of the facts, and that it would be desirable to provide for an appeal to the courts on points of law. Several of the participants advised the lawyers in the audience to try to get retired judges as arbitrators, for they would be more sympathetic to the way the lawyers wanted to conduct the hearings.

A few years ago, I was one of three contracts professors interviewed by the parties as possible arbitrators for a large domestic commercial dispute. We were all horrified to see that in a lengthy submission agreement drafted by dispute counsel to replace a simple provision in the contract the lawyers had included a good deal of specific procedural guidance for the arbitrator. They had even agreed that we must follow the Federal Rules of Evidence in the hearing! Since none of us was an experienced litigator, we were quite concerned that our bad decisions might jeopardize the enforceability of the award. When I later asked them why they had put it in, they were genuinely surprised that we were concerned. They had no conception of arbitration as a process basically different from litigation, but simply thought of it as a trial where you could pick the judge.

My initial reaction was a certain smugness, thinking that in the international field this culture that had developed made the international "system" look quite developed by

contrast with these misdirected American goals. But as I reflected further, I realized that there does seem to be a tendency even in this new international culture to let the litigators take the lead in setting the tone of the hearings. I realized that over the years I had heard much more discussion about rules of evidence for arbitration than about the need to keep procedures simple enough for non-lawyer arbitrators to understand. I recalled remarks at one of these conferences a few years ago by a senior figure in English arbitration to the effect that he often gave suggestions to the parties for non-lawyer expert arbitrators, implementing thereby one of the often-cited advantages of arbitration. He had noticed, however, that a few months down the road when the actual selections were being made with the help of counsel, the parties often chose a lawyer instead. The lawyers knew who would appreciate their arguments. Certainly much of our discussion of application of legal rules by arbitrators assumes a lawyer's grasp of the issues. In most of our discussions of reasoned opinions it seems that the speakers assume there will always be lawyers on the panel, and that if there is only one, he or she will always be responsible for writing the opinion. I have had a client tell me he thought a non-lawyer arbitrator did a good job, but I never heard that view from a lawyer.

The question of more or less litigation-style approach to the conduct of the hearings is one of degree, and we might reflect on whether we want to encourage these neophytes to leave their litigation attitudes behind as they enter the hearing room. Perhaps the heated advocacy of some lawyers about the necessity for local counsel in arbitrations has been based in part on their insufficient experience with less formal arbitration hearings conducted by experienced arbitrators. In our individual and our institutional educational efforts we often get a chance to swing the pendulum back toward simpler procedures if we really think that is a good thing. What do we really think?

And finally, we come to what is always the bottom line in our world: What can we do to help ensure the enforcement of international arbitration awards? We have all welcomed the assistance of the New York Convention or similar modern statutes which require the enforcement of foreign awards with few excuses allowed. Perhaps we forget too often that even in jurisdictions with modern arbitration statutes there is still the human factor to contend with. As Neil Kaplan said in a talk in Vietnam last January, "It is ... quite unfair on judges to expect them overnight to attach much significance to a piece of paper signed by however eminent an arbitrator in a far flung part of the world." Even after we get the New York Convention and good legislation on the statute books, there is indeed a great deal of work to do country by country in educating the judiciary to really embrace the new arbitration culture's view of their role in enforcing foreign arbitration awards.

In an enforcement proceeding in Thailand recently the judge was of the opinion that his ethical duty as a judge required him to satisfy himself concerning the substantive fairness of the award. I have been involved in the drafting and implementation of new arbitration legislation in several Asian countries over the past few years, and I have seen that bringing the judiciary on board is in fact the most crucial link in the enforcement process. In many countries there is no substantial practice of using arbitration domestically, so education about enforcement of foreign awards involves much more than just making them aware of the technical defenses under the New York Convention.

Judges with a firm grasp of what they can and cannot do can guide inexperienced lawyers very easily, but it is hard for even the most knowledgeable attorney to educate the novice judge during one enforcement hearing. In the Thai case mentioned above, the perceptive, professional lawyer decided that any attempt to educate the judge at that time about the court's limited role under the New York Convention would prejudice his chances for enforcement, so he reluctantly went through proof of the substantive fairness of the award.

What can be done? Perhaps this organization has an important educational role to play. The full fruits of the new international arbitration culture will continue to elude our grasp until *all* the domestic legal systems stand ready to enforce awards obtained from skilled arbitrators in fair proceedings. The trial judge to whom the award will normally be taken may well be getting his or her first exposure to international arbitration. The case of the Thai judge may be extreme but is not unique. How can we reach this audience most effectively? If ICCA could arrange for any judge to sit down with Neil Kaplan, or another distinguished judge with extensive enforcement experience, he or she would get the kind of assurance that a judge needs to do only what we hope will be done. Maybe the participation in such a session of lawyers who can describe the proceedings they have participated in would also help judges to get up to speed quickly. Given the importance of the goal, the lack of sophisticated trainers in most countries and the reluctance of many judges to admit they need help, putting the credibility of the ICCA to work in such a cause seems worthy of serious consideration.