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THE CHALLENGES OF INTERNATIONAL COMMERCIAL DISPUTE RESOLUTION

The Duke cannot deny the course of law;
For the commodity that strangers have
With us in Venice, if it be denied,
Will much impeach the justice of the state,
Since that the trade and profit of the city
Consisteth of all nations.

Merchant of Venice, III, iii, ll. 26-36

Shakespeare's Antonio knew what all of today's merchants and their counsel know all too well: Countries whose livelihood depends upon commerce "of all nations" must offer reliable, consistent and just enforcement of business deals.

Most companies doing business internationally are reluctant to enter their customers' courts. They fear corrupt or protective judges; they are unfamiliar with (and therefore skeptical of) local law; they seek to avoid inconsistent outcomes; they prefer private conflict resolution to public trial; they may be unfamiliar with local language and custom; they wish to pursue uniform agreements rather than modifying their contracts to comply with the sometimes obscure requirements of scores of jurisdictions.

In his time, Antonio would trust the Venetian guilds to arbitrate business dealings. And in modern times, through the New York Convention, nations' courts give judicial effect to private commercial arbitration awards. Yet companies remain largely dissatisfied with the state of international dispute resolution. Why?

A recent PricewaterhouseCoopers study concludes that a significant majority of corporations prefer arbitration to resolve cross-border disputes, particularly in conjunction with ADR mechanisms in a stepped dispute resolution process. Yet these same corporations concede lingering concern about local enforcement; dissatisfaction with the sophistication of dispute resolution provisions in contracts; errors and omissions in negotiating such crucial issues as location of the arbitration and the language of the proceeding; and the cost and duration of the proceedings, which are relentlessly climbing.

More contradictions lurk beneath the surface. Many

corporate end-users insist upon experienced international arbitrators, yet decry the lack of diversity among the arbitrator pool. They insist upon impartiality, but seek "accountability" from arbitrators, including having information on the outcomes of prior awards. They prefer well-established administrative centers like the International Chamber of Commerce yet bemoan their expense.

Meanwhile interest-based mediation, the life's-blood of commercial dispute resolution in common law countries such as the United States and the United Kingdom, lies like a sleeping giant in most of Europe, China and the Indian subcontinent - markets that literally define the future of global commerce.

Many of the leading global corporations that constitute the membership of the International Institute for Conflict Prevention and Resolution ("CPR") believe that a truly satisfactory, globally applicable dispute resolution process for cross border conflicts must include the broadly accepted practice of commercial mediation. Such acceptance awaits education. Businesses in these markets must learn the benefits of mediation in achieving commercially rational outcomes. Thus, they argue, in the future arbitration will not be improved, so much as co-opted.

CPR continues to work with businesses around the globe, and their counsel, to provide for such education. And businesses are increasingly arranging for the value-added attributes of mediation to be attempted before the more expensive and time-consuming task of arbitration is commenced. Experience has taught them that, in this way, arbitration can often be avoided entirely. Wonder of wonders. As Shakespeare said, "noble offices thou mayest effect of mediation." (*Henry IV Part II*, IV, iv, ll. 24-25) ■

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