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**The American University in Cairo**

**School of Humanities and Social Sciences**

**ADVERSARIAL OR INQUISITORIAL:  
WHICH APPROACH IS CLOSER TO ARBITRATION?**

**A Thesis Submitted to the**

**Department of Law**

**in partial fulfillment of the requirements for the LL.M. Degree in  
International and Comparative Law**

**By**

**Ahmed Galal Zaki**

**Spring 2006**

**The American University in Cairo**  
**School of Humanities and Social Sciences**

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has been approved by**

**Professor Amr Shalakany -----  
Thesis Supervisor  
Affiliation: -----  
Date-----**

**Dr. Enid Hill-----  
Department Chair  
Date: -----**

**Dr. Ann Lesch-----  
Dean of HUSS  
Date: -----**

**DEDICATION**

**FOR THOSE WHOM I WHATEVER DO I WILL NEVER BE ABLE  
TO GIVE THEM THEIR DUE – MY MOTHER & MY FATHER**

## **ABSTRACT**

**The American University in Cairo**

**Department of Law**

**Adversarial or Inquisitorial: Which Approach Is Closer to Arbitration?**

**Student: Ahmed Galal Zaki**

**Advisor: Amr Shalakany**

Adversarial techniques such as pre-trial discovery of documents, cross-examination, and lengthy oral pleadings are now in vogue in the conduct of international commercial arbitration proceedings. This paper responds to this trend by analyzing both the adversarial and the inquisitorial systems in an attempt to demonstrate which is more fulfilling to the objectives of international commercial arbitration. These objectives are party autonomy, neutrality, efficiency, flexibility, and confidentiality. In the finale, the paper provides that although the adversarial system is in line with the autonomy rights of those who opt for arbitration, its inquisitorial counterpart is more neutral, efficient, flexible, and confidential. It argues, furthermore, that since arbitration is in essence a mechanism that comes at the expense of parties' rights in favor of the efficiency and the flexibility of the arbitral process, the inquisitorial system is more proximate to the objectives of international arbitration and, therefore, more realizing to the aspirations of its customers.

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# **ADVERSARIAL OR INQUISITORIAL: WHICH APPROACH IS CLOSER TO ARBITRATION?**

## **Chapter I: Introduction**

International commercial arbitration is a mechanism to resolve commercial disputes between international parties. It has grown to substitute for the inefficiencies of national litigation. People perceive arbitration as a way to resolve their disputes in an efficient, flexible, and speedy fashion. Indeed, the attainment of these goals depends heavily on the way arbitration is conducted, i.e., the proceedings that govern the arbitral process from its commencement to the issuance of an award. Some parties prefer the inquisitorial system with its active role of the arbitrator, while others seek to maintain control over the process by utilizing adversarial techniques, such as cross-examination and discovery of documents. We can also find parties utilizing an amalgam of both systems. Nonetheless, there is a tendency in today's international arbitration to adopt the adversarial system with its distinctive tools. This can be attributed to the influence of the American legal culture on international arbitration in general.

In response to this phenomenon, I will analyze in this paper the adversarial system by contrasting it with the inquisitorial system to see which is more compatible with the features of international commercial arbitration. In my view, the inquisitorial system, due to its efficiency, flexibility, neutrality, and confidentiality, is better than its adversarial kin. Although the latter upholds the autonomy rights of the parties, its very techniques conflict with the goals of international arbitration. Plus, maintaining rights is not the motto of international arbitration. Having decided to resort to arbitration, parties

relinquish many of the rights that are guaranteed in ordinary court litigation. They prefer arbitration to avail themselves primarily of its efficiency and flexibility.

In this academic endeavor, I will invoke the arbitration rules of two major international arbitral institutions, namely, the International Chamber of Commerce in Paris and the Cairo Regional Centre for International Commercial Arbitration. My aim is to discover their procedural nature, whether they are inquisitorial or adversarial. I will also explore the opinions of some prominent Egyptian international arbitrators about their systemic preferences when they administer the arbitral process.

In fact, this topic is a novelty to international arbitration academic studies. Although some commentators get to some extent closer to it, none of them exclusively addresses the suitability of the adversarial and the inquisitorial techniques with international arbitration. That stems in part from the fact that some of them consider the analysis of arbitration procedures in terms of their adversarial or inquisitorial nature overly simplistic.<sup>1</sup> It can also be attributed to the belief espoused by others that the practice of international arbitration has smashed all cultural barriers and adopted a set of harmonized techniques that represent the best in both adversarial and inquisitorial systems.<sup>2</sup> Nonetheless, I contend that cultural differences still play a significant role in the conduct of arbitration proceedings to the extent of frustrating the expectations of parties to arbitration from different legal cultures. Thus, it is important to analyze both the adversarial and the inquisitorial systems in order to determine which is worthy of being adopted in international arbitration proceedings as it better fits with the arbitral culture.

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<sup>1</sup>See, e.g., Kathleen Paisley, *Report: Commencement of the Arbitration and Conduct of the Arbitration*, 9 AM. REV. INT'L ARB. 107, 107 (1998).

<sup>2</sup>See e.g., Paul D. Friedland, *Combining Civil Law and Common Law Elements in the Presentation of Evidence in International Commercial Arbitration*, 12(9) INT'L ARB. REP. 25 (1997).

Chapter II of this paper presents a portrait of international commercial arbitration, its definition, features, and nature. Chapter III relates to the adversarial and the inquisitorial systems in terms of their philosophy and technique. Chapter IV analyzes the arbitration rules of both the Paris based International Chamber of Commerce and the Cairo Regional Centre for International Commercial Arbitration from an adversarial/inquisitorial perspective. Chapter V presents the opinions of some international arbitrators about the question of this paper. Chapter VI answers this question. Chapter VII serves as a conclusion.

## **Chapter II: International Commercial Arbitration**

In this part, I will present a portrait of international commercial arbitration that demonstrates its definition, features, and nature. My aim here is to single arbitration out as a means of settling international commercial disputes in order to determine later in this paper what set of procedures is most compatible with it. By design, I will emphasize the features that are most conducive to aim. Thus, there are some other attributes of international arbitration, and they are significant, that are absent from my analysis.<sup>3</sup>

### **A. What is International Commercial Arbitration?**

#### **1. Arbitration Defined.**

It is actually difficult to propose a definition of arbitration that encompasses all attempts made in this regard by national laws and arbitral institutions. However, I will give some general definitions that serve as a starting point for analyzing arbitration and illuminating its distinctive features.

Around seventy years ago, one American court provided that:

[b]roadly speaking, arbitration is a contractual proceeding, whereby the parties to any controversy or dispute, in order to obtain an inexpensive and speedy final disposition of the matter involved, select judges of their own choice and by consent submit their controversy to such judges for determination, in place of the tribunal provided by the ordinary processes of law.<sup>4</sup>

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<sup>3</sup>For example, separability of the arbitration agreement and the competence of the arbitral tribunal to determine whether it has jurisdiction to look into the dispute (*Kompetenz-Kompetenz*) are important features of international commercial arbitration, but I do not address them due to their irrelevance to the topic of this paper. *See generally* ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 298-304 (4<sup>th</sup> ed. 2004) [Hereinafter REDFERN & HUNTER].

<sup>4</sup>Wesley A. Sturges, *Arbitration – What Is It?* 35 N.Y.U. L. REV. 1031, 1032 (1960) (quoting *Gates v. Arizona Brewing Co.*, 54 Ariz. 266, 269, 95 P.2d 49, 50 (1939)).

Further, one commentator defines arbitration as:

A device whereby the settlement of a question, which is of interest for two or more persons is entrusted to one or more other persons – the arbitrator or arbitrators – who derive their powers from a private agreement, not from the authorities of a State, and who are to proceed and decide the case on the basis of such an agreement.<sup>5</sup>

Another commentator perceives arbitration as:

A private mechanism for the resolution of disputes which takes place in private pursuant to an agreement between two or more parties, under which the parties agree to be bound by the decision to be given by the arbitrator according to law after a fair hearing, such decision being enforceable as law.<sup>6</sup>

## 2. The Meaning of International and Commercial

The type of arbitration which I emphasize in this paper is that which involves different nationalities, legal cultures, and procedural systems. It is the international rather than the domestic form of arbitration. Also, I address arbitrations that relate to commercial disputes with their special character.

In order to define the term "international", two main standards are used. The first one is the *nature of the dispute* which assumes that an arbitration is international if it involves the interests of international trade.<sup>7</sup> The second standard is that of the *nationality of the parties*.<sup>8</sup> According to that standard, an arbitral dispute is international provided the

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<sup>5</sup>RENE DAVID, *ARBITRATION IN INTERNATIONAL TRADE* 5 (1985) [hereinafter referred to as DAVID].

<sup>6</sup>HENRY J. BROWN & ARTHUR L. MARRIOT, *ADR PRINCIPLES AND PRACTICE* 56 (1993) [hereinafter referred to as BROWN & MARRIOT].

<sup>7</sup>REDFERN & HUNTER, *supra* note 3, at 16.

<sup>8</sup>*Id.* at 18.

parties are of different nationalities, place of residence, or place of business management in case of corporations.<sup>9</sup>

On the other hand, it is important to know whether the legal relationship between the arbitrating parties is commercial or not. Problems that pertain to the enforcement of arbitral awards sometimes arise due to different interpretations and understandings of the term "commercial" by different countries.<sup>10</sup> Generally speaking, commercial contracts are those which are made by merchants or businesspersons with respect to the normal course of their business.<sup>11</sup> Trying to produce a monolithic approach in this regard, the UNCITRAL Model Law states the following:

The term commercial should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road.<sup>12</sup>

## **B. The Normative Features of International Arbitration**

The above definitions highlight a number of attributes that are considered hallmarks of international arbitration. They distinguish arbitration as a different means of settling international commercial disputes *vis a vis* ordinary court litigation and other ADR techniques. As far as the purpose of this paper goes, these attributes are: party autonomy, neutrality, efficiency, procedural flexibility, and confidentiality. In addition, there is

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<sup>9</sup>*Id.*

<sup>10</sup>*Id.* at 525.

<sup>11</sup>*Id.* at 20.

<sup>12</sup>*Id.* at 22 (quoting UNCITRAL Model Law on International Commercial Arbitration, footnote to art. 1(1)).

another feature that is considered, by contrast to these attributes, a disadvantage of international arbitration, namely, the limited powers of the arbitral tribunal.

### **1. Party Autonomy.**

The principle of party autonomy is considered "one of the most fundamental characteristics of international commercial arbitration"<sup>13</sup> By virtue of this principle, parties are endowed with a prior control over the arbitral process.<sup>14</sup> They can determine the scope of their arbitration,<sup>15</sup> i.e., the issues that are going to be arbitrated; they can also select their arbitrators and choose the venue of arbitration.<sup>16</sup> In addition, parties are entitled to determine the law applicable to the substance of their dispute<sup>17</sup> and, most relevantly, the procedures by which arbitrators should abide.<sup>18</sup> It follows that the parties may adopt an adversarial or inquisitorial approach to the arbitral proceedings, or even an amalgam of both.

Nonetheless, the freedom of the parties to shape the procedural framework on which the arbitration is conducted does not go unbridled. It is restricted by certain considerations,<sup>19</sup> salient among which are the following:

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<sup>13</sup>GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES: COMMENTARY AND MATERIALS 44 (1994).

<sup>14</sup>Catherine A. Rogers, *Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration*, 23 MICH. J. INT'L L. 341, 411 (2002) [hereinafter Rogers].

<sup>15</sup>See generally REDFERN & HUNTER, *supra* note 7, at 277-313.

<sup>16</sup>See generally *id.* at 210-276.

<sup>17</sup>See generally *id.* at 89-154.

<sup>18</sup>See generally *id.* at 314-387.

<sup>19</sup>There are other two considerations which are absent from this enumeration: arbitration rules and third parties, REDFERN & HUNTER, *supra* note 5, at 319.

## 1-Equality

The arbitral tribunal should treat the parties on equal footing even though they have agreed otherwise.<sup>20</sup> The UNCITRAL Model Law emphasizes this concept by stating that "[t]he parties shall be treated with equality and each party shall be given a full opportunity of presenting his case."<sup>21</sup>

## 2-Public Policy

The arbitral award may risk being unenforceable if the arbitration is conducted in a manner that contradicts with the public policy of the state in which the enforcement is sought.<sup>22</sup>

## 2. Neutrality

One advantage of international commercial arbitration is ability of the parties to avoid the uncertainties of each other's legal system and in particular national litigation.<sup>23</sup> Parties presume, for whatever reason, that they won't be afforded justice in their opponent's land.<sup>24</sup> Thus, they can agree, thanks to their autonomy, upon a neutral forum, a neutral set of arbitrators, and even neutral rules that govern both the merits of the dispute and the proceedings of arbitration. In a survey on individuals participating in international commercial arbitration, 72 percent identified "neutrality" and 64 percent identified "enforceability" as "highly relevant to their decision to arbitrate."<sup>25</sup> Moreover, In support

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<sup>20</sup>*Id.* at 317.

<sup>21</sup>Model Law, United Nation Commission of International Trade Law, Art. 18.

<sup>22</sup>See REDFERN & HUNTER, *supra* note 3, at 318.

<sup>23</sup>See BROWN & MARRIOT, *supra* note 6, at 72.

<sup>24</sup>Christopher R. Drahozal, *Commercial Norms, Commercial Codes, and International Commercial Arbitration*, 33 VAND. J. TRANSNAT'L L. 79, 95 (2000) [hereinafter Drahozal].

<sup>25</sup>*Id.* n. 83 (citing Christian Buhning-Uhle, *Arbitration and Mediation in International Business* 395 (1996)).

of this advantage of arbitration, Charles N. Brower, a distinguished international arbitrator made the following statement:

By and large, parties to international transactions choose to arbitrate eventual disputes . . . because neither will suffer its rights and obligations to be determined by the courts of the other party's state of nationality. International arbitration thus in large measure a substitute for national court litigation.<sup>26</sup>

### 3. Efficiency

It has been noted that efficiency is one of the normative goals of international arbitration.<sup>27</sup> Indeed, arbitration ensures this feature in a multifold fashion. First, arbitration is a cost-and-time-saving means for settling international commercial disputes. While some believe that arbitration is not always more cost-effective than litigation,<sup>28</sup> arbitration is still a privilege if we take into account the costs of delay and appeals before ordinary courts.<sup>29</sup> It should be noted, moreover, that the parties in their agreement, to guarantee a speedy determination of their disputes, may provide for a time-limit for the tribunal to render the award.<sup>30</sup> Some arbitral institutions provide also for this time-limit. For instance, the ICC Rules of Arbitration oblige the tribunal to render the award within six months from the date on which the terms of reference were signed by the tribunal or

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<sup>26</sup>*Id.* at 95 (quoting CHARLES N. BROWER, INTRODUCTION TO INTERNATIONAL ARBITRATION IN THE 21<sup>ST</sup> CENTURY: TOWARDS JUDICIALIZATION AND UNIFORMITY? ix-x (RICHARD B. LILICH & CHARLES N. BROWER EDS., 1994)).

<sup>27</sup>*See* Rogers, *supra* note 14, at 408-410.

<sup>28</sup>*See* REDFERN & HUNTER, *supra* note 3, at 28. (stating that "fees and expenses of the arbitrators (unlike the salary of the judge) must be paid by the parties; and in international commercial arbitrations of any significance, these charges may be substantial.").

<sup>29</sup>M.I.M. ABOUL-ENEIN, PEACEFUL SETTLEMENT OF COMMERCIAL DISPUTES 28 (2005) [hereinafter ABOUL-ENEIN].

<sup>30</sup>*See* DAVID, *supra* note 5, at 268-269 (noting that providing for a time-limit "may be regarded as useful to hasten the arbitrators.").

the parties or the date on which the tribunal was notified by the secretariat that the court approved these terms.<sup>31</sup>

Secondly, the arbitral award is final<sup>32</sup> and it has a *res judicata* effect.<sup>33</sup> This means that the award, taking into account any procedures for challenging it,<sup>34</sup> disposes finally of the issues submitted to the arbitral tribunal and terminates the mandate conferred upon it.<sup>35</sup> In addition, parties are not allowed to submit to another forum, whether arbitral or judicial, what has been decided by the arbitral tribunal.<sup>36</sup>

Thirdly, the arbitral award is a binding determination of the legal rights of the parties.<sup>37</sup> By this binding nature, arbitration is distinguished from other alternative dispute resolution techniques.<sup>38</sup> In addition, businesspersons perceive arbitral awards as binding because this is a promise made *ab initio* by them when they concluded the arbitration agreement and they fear being criticized by and having a bad reputation within their business community.<sup>39</sup> A corollary of this binding effect is the international enforceability of the arbitral award.<sup>40</sup> Arbitral awards are easier to enforce internationally than national court verdicts.<sup>41</sup> That actually stems from the fact that

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<sup>31</sup>ICC Arbitration Rules, *infra* note 139, art. 24.1.

<sup>32</sup>*See generally* REDFERN & HUNTER, *supra* note 3, at 442.

<sup>33</sup>*See generally id.*, at 459-461.

<sup>34</sup>For those procedures, *see generally id.*, at 479-509.

<sup>35</sup>*Id.* at 417.

<sup>36</sup>DAVID, *supra* note 5, at 356.

<sup>37</sup>*See* MICHAEL J. MUSTILL, THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION IN ENGLAND 44 (1982).

<sup>38</sup>For a thorough knowledge of alternative dispute resolution techniques *see generally* REDFERN & HUNTER, *supra* note 3, at 41-54.

<sup>39</sup>DAVID, *supra* note 5, at 357.

<sup>40</sup>*See generally* REDFERN & HUNTER, *supra* note 3, at 510-561.

<sup>41</sup>*See* W. MICHAEL REISMAN ET AL., INTERNATIONAL COMMERCIAL ARBITRATION: CASES, MATERIALS AND NOTES ON THE RESOLUTION OF INTERNATIONAL BUSINESS DISPUTES 1215 (1997) (stating that "[a]rbitral awards as a whole enjoy a higher degree of transnational certainty than judgments of national courts").

several international conventions, salient among which is the New York Convention,<sup>42</sup> were concluded to ensure the enforceability of international arbitral awards throughout the world.

That said, I wish to have managed to draw your attention to the fact that efficiency is an important, if not the most, attribute of international commercial arbitration. It is reflected in its expeditiousness, finality, and binding effect.

#### **4. Procedural flexibility**<sup>43</sup>

Procedural flexibility is considered one of the advantages of arbitration over litigation.<sup>44</sup> Formal and complex procedural rules are incompatible with aims of international commercial arbitration.<sup>45</sup> Complexity detracts from the efficient and speedy resolution of the arbitral dispute. Due to this flexibility, parties are privileged to tailor-made their arbitration procedures to fit with the nature and circumstances of their dispute.<sup>46</sup> They can espouse the adversarial techniques of the presentation and taking of evidence or their inquisitorial counterparts; also possible, they can adopt a mishmash of both systems.<sup>47</sup> They may refer, moreover, to certain institutional arbitration rules<sup>48</sup> or a specific national arbitration law.

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<sup>42</sup>Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517 (hereinafter New York Convention).

<sup>43</sup>For a thorough understanding of the conduct of the proceedings in international arbitration, *see generally* GEORGIOS PETROCHILOS, *PROCEDURAL LAW IN INTERNATIONAL ARBITRATION* (2004) [Hereinafter PETROCHILOS]; *see also* REDFERN & HUNTER, *supra* note 3, at 314-387.

<sup>44</sup>*See id.* REDFERN & HUNTER, at 85.

<sup>45</sup>*See* GABRIEL M. WILNER, *DOMKE ON COMMERCIAL ARBITRATION* 24 (1984).

<sup>46</sup>REDFERN & HUNTER, at 85-86.

<sup>47</sup>*See Id.*, at 319-321. For a comparison of both the adversarial and inquisitorial systems, *see infra* chapter III.

<sup>48</sup>*E.g.*, The International Chamber of Commerce Arbitration Rules, and the Cairo Regional Centre for International Commercial Arbitration, an elaborate analysis of both institutions will be provided later, *see infra* chapter IV.

Actually, since the parties rarely provide for procedural details in their agreement, the determination of the shape and character of the arbitral procedures is vested in the arbitral tribunal in the case of ad-hoc arbitration; and the arbitral institution in the case of institutional arbitration. Accordingly, the nature of the procedures hinges heavily on the professional background and experience of the arbitrators and the systemic predilections of the arbitral institution.

This last point raises a very important and pertinent question; since the determination of the procedures to be followed in the arbitral process rests, at the end of the day, in the hands of the arbitral institutions and most precisely the arbitral tribunal, should it be considered an infringement on fairness and a breach of neutrality if the arbitral tribunal adopts the procedural religion, i.e., adversarial or inquisitorial, of one party rather than the other? In other words, is the arbitral tribunal free to determine the systemic nature of the proceedings as long as the parties' agreement is silent?

In an answer to this question, one commentator provides a list of procedural principles that are believed to be widely applicable in international arbitration. One of those principles states the following:

[t]he arbitral procedure should be neutral, conforming neither to the inquisitorial nor the adversarial model, and should be adapted to the particular circumstances of the case. In particular:

- (a) oral pleadings should be strictly reasonable in length;
- (b) full disclosure (as opposed to disclosure of documents on certain points only) should be discouraged;
- (c) the tribunal should retain full control over the proceedings; and
- (d) the tribunal should not proceed to fix the particular rules of conduct of the proceedings without consulting with the parties.<sup>49</sup>

In my view, since the arbitral tribunal derives its mandate from the agreement of the parties, it follows that as long as this agreement does not provide for a certain procedural

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<sup>49</sup>PETROCHILOS, *supra* note 43, at 219.

system, implicitly or explicitly, the tribunal is not being biased or unjust when it adopts the system it sees fit for the conduct of the proceedings.

As a final point, this feature of arbitration is being constantly overridden as arbitration becomes more formalized and judicialized. This is the subject of my discussion in the next section.

## **5. Confidentiality**

Another hallmark of international commercial arbitration is its exclusion of publicity.<sup>50</sup> This option is not available when parties to a dispute go to an ordinary court of law, where press and public are present.<sup>51</sup> In fact, commercial people resort to arbitration in order to be able to keep their trade secrets, know-how, financial losses, and difficulties of enterprises.<sup>52</sup> A former Secretary-General of the ICC once stated that "[i]t became apparent to me very soon after taking up my responsibilities at the ICC that the users of international commercial arbitration, *i.e.* the companies, governments, and individuals who are parties in such cases, place the highest value upon confidentiality as a fundamental characteristic of international commercial arbitration."<sup>53</sup>

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<sup>50</sup>DAVID, *supra* note 5, at 12.

<sup>51</sup>REDFERN & HUNTER, *supra* note 3, at 32.

<sup>52</sup>DAVID, *supra* note 5, at 12.

<sup>53</sup>Redfern & Hunter, *supra* note 3, at 32.

### C. The Nature of International Arbitration

International arbitration was, roughly until twenty years ago, an informal method of settling commercial disputes.<sup>54</sup> The role of the arbitrator was merely to approximate the positions of the parties, trying to reach a compromise based on principles of fairness rather than express legal rules.<sup>55</sup> Today, this image is changing as arbitration is metamorphosing into a judicial, formal, and adversarial process.<sup>56</sup> The following lines will analyze this trend both in the U.S. and internationally, trying to identify its key causes and repercussions.

#### 1. The New Trend in the United States.

Edward Brunet describes the transformation of arbitration in the United States in a noteworthy manner.<sup>57</sup> He dubs the style upon which arbitration used to proceed as *folklore*.<sup>58</sup> Under this *folklore* model, arbitration was a speedy, cheap, private, final, expert-based method of resolving disputes.<sup>59</sup> The usual rules of evidence were not observed; and there was no little or no discovery.<sup>60</sup> The rights of the parties were decided

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<sup>54</sup>Rogers, *supra* note 14, at 350.

<sup>55</sup>*See id.* at 351.

<sup>56</sup>For an overview of the process of judicializing arbitration *see generally* YVES DEZALAY & BRYANT G. GARTH, *Merchants of Law as Moral Entrepreneurs: Constructing International Justice out of the Competition for Transnational Business Disputes*, in DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER 33 (1996) [hereinafter DEZALAY & GARTH].

<sup>57</sup>*See generally* Edward Brunet, *Replacing Folklore Arbitration with a Contract Model Arbitration*, 74 TUL. L. REV. 39 (1999-2000) [hereinafter Brunet].

<sup>58</sup>*Id.* at 42-45.

<sup>59</sup>*Id.*

<sup>60</sup>*Id.* at 45.

according to equitable principles rather than formal legal rules and there were no reasoned awards.<sup>61</sup>

According to Brunet, the *folklore* model still exists but it has been commonly replaced by a judicialized form of arbitration that is called, in Brunet's terminology, contract model arbitration.<sup>62</sup> The main characteristics of this new form are: document discovery, deciding the dispute according to formal legal rules, written and reasoned awards, and even appellate review.<sup>63</sup> Brunet attributes this new trend to the competition in the arbitration market between arbitration providers and a need on the part of disputants for a judicialized model of arbitration.<sup>64</sup>

I believe that Brunet manages to contrast the extremes of the transformation process in a way that portrays how arbitration has turned into a judicial method of settling disputes in the U.S. Now, I turn to this transformation with respect to international arbitration.

## **2. The Judicialization of International Arbitration.**

As I mentioned before, international arbitration began as an informal, equitable way of settling disputes. Arbitrators were generally experts from the same trade with little or no legal background.<sup>65</sup> They relied in their decisions upon gentlemanly principles such as amiable composition and *ex aequo et bono*.<sup>66</sup> Also, the use of the law of merchants or *lex*

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<sup>61</sup>*See Id.* at 42.

<sup>62</sup>*Id.*, at 45.

<sup>63</sup>*Id.*

<sup>64</sup>*Id.*, at 41.

<sup>65</sup>Rogers, *supra* note 14 at 351; *see also* DAVID, *supra* note 5, at 44-45.

<sup>66</sup>*See* John Beechey, *International Commercial Arbitration: A Process Under Review and Change*, DISP. RESOL. J. 32 (2000) (describing the doctrine of amiable composition as "allowing arbitrators to decide cases in accordance with customary principles of equity and international commerce. This power permits arbitrators to arrive at an award that is fair in light of all circumstances, rather than strict conformity with legal rules, [but] ...generally [they] may not disregard mandatory provisions of substantive law or public policy of the forum state").

*mercatoria* was in vogue.<sup>67</sup> Indeed, in the old days, there was an emphasis on the just rather than the legal determination of the arbitral dispute. Furthermore, procedurally speaking, arbitrators had a strong grip over the arbitral process.<sup>68</sup> They had the upper hand in determining what document to present and which witness to call.

This *modus operandi* of international arbitration has recently become out-of-date. The resolution of international dispute via arbitration is not at the moment so different from litigation.<sup>69</sup> Arbitrators are now ordinary lawyers or academics rather than persons engaged in the same business as the parties to the dispute.<sup>70</sup> They rarely, if ever, invoke amiable composition or *lex mercatoria* principles.<sup>71</sup> Instead, parties refer in their agreements to formal legal rules as they are more predictable and accountable.<sup>72</sup> At odds with the normative principles of confidentiality and privacy, arbitral awards tend to be reasoned and recurrently published.<sup>73</sup> In a nutshell, arbitration has become a court-like dispute resolution method.<sup>74</sup>

Most notably, this transformation has been carried out on an adversarial scale. Arbitration procedural rules, being more textured but not entirely sophisticated, shifted to a considerable extent the control over the arbitral process from the arbitrator to the

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<sup>67</sup>Rogers, *supra* note 14, at 351-352 (stating that "[t]he hallmark of *lex mercatoria* is its insistence on the notion that a duty of good faith informs all contract interpretation and performance. In applying the *lex mercatoria's* requirement of good faith, arbitrators could imply terms to achieve a more equitable result . . .); see also David, *supra* note 5, 14.

<sup>68</sup>Rogers at 351.

<sup>69</sup>DEZALAY & GARTH, *supra* note 56, at 54-57.

<sup>70</sup>See Jacques Werner, *The Trade Explosion and Some Likely Effects on International Arbitration*, J. INT'L ARB. 5, 11 (1997).

<sup>71</sup>See Drahozal, *supra* note 24, at 129. (stating that Stephen Bond's study of the arbitration agreement of parties involved in the ICC arbitration in 1987 and 1989 found that only a handful selected "general principles" of law to govern the parties' dispute and none specified the *lex mercatoria* to be the basis for the arbitrator's decision. Only three percent of the clauses in 1987 and four per cent in 1989 authorized the arbitrators to decide in equity (*ex aequo et bono* or as *amiable compositeur*)).

<sup>72</sup>See Rogers, *supra* note 14, at 345.

<sup>73</sup>*Id.* at 353.

<sup>74</sup>See DEZALAY & GARTH, *supra* note 56, at 57-58.

parties.<sup>75</sup> This manifests itself in the newly-invented parties' power to request disclosure of documents, decide which witnesses to present, and interview and cross-examine them.<sup>76</sup>

In an article written almost three years ago, Dr. Mohamed Aboul-Enein<sup>77</sup>, Director of the Cairo Regional Centre for International Commercial Arbitration<sup>78</sup>, admits that:

[T]he last few years witnessed the birth of another new trends toward the application of some pure adversarial procedural patterns in cases where there is no participation of arbitrators, parties or counsel from any of the common law countries. A notable number of the cases administered by the Cairo Centre in the last decade involve parties from civil law countries, i.e., Egyptians, French, Italians, Kuwaiti, Saudi, Romanian and others. It is noteworthy that the procedures in some of these cases were oriented towards oral hearings, although the arbitrators and lawyers involved were all from civil law countries. Pre-trial Discovery and cross-examination of witnesses were widely practiced. All details of the cases were pleaded at the oral hearings the same way as in the adversarial common law system.<sup>79</sup>

### **3. The Influence of the American Legal Culture on International Arbitration.**

The transformation of the arbitral process into a judicial one derives from a variety of reasons,<sup>80</sup> salient among which is the growing influence of the American legal culture and in particular the Anglo-American law firm on international arbitration.<sup>81</sup> As arbitration has approached court litigation in the United States, this trend radiates towards the operation of arbitration throughout the world. Due to the fact that international

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<sup>75</sup>See Rogers, *supra* note 14, at 353.

<sup>76</sup>*Id.* at 412-414.

<sup>77</sup>For information about Dr. Aboul-Enein, *see infra* note 211.

<sup>78</sup>For information about the arbitration system of the centre, *see infra* note 129.

<sup>79</sup>M.I.M. Aboul-Enein, Multicultural Arbitrations: New Procedural Trends in Arab Countries, IFCA Newsletter, June 2003.

<sup>80</sup>For these reasons, *see generally* DEZALAY & GARTH, *supra* note 63.

<sup>81</sup>*See Id.* at 48-52; *see generally* Roger P. Alford, *The American Influence on International Arbitration*, 19 OHIO ST. J. ON DISP. RESOL. 69 (2003).

arbitration is considered by American attorneys as a kind of "offshore litigation",<sup>82</sup> it is no wonder then to find some techniques that were once deemed anathema to international arbitration, such as document discovery, cross-examination, and depositions, sought after by parties and adopted by arbitrators.

With that in mind, important questions come increasingly to the fore. Does this judicialization, or *a fortiori* adversarialization, phenomenon comport with the ethos of international commercial arbitration? Or it rather bears, as one commentator put, its "decline"?<sup>83</sup> Is the adversarial system capable of achieving the hopes of those who resort to arbitration? Or should we download inquisitorial software to arbitration proceedings? Which one of the two procedural systems is better? Which one is closer to arbitration? Before embarking on an answer, let's first know what each system has in store; and also which one is preferred by international arbitral institutions and international arbitrators.

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<sup>82</sup>REDFERN & HUNTER, *supra* note 3 (3d ed. 1999), at 283.

<sup>83</sup>DEZALAY & GARTH, *supra* note 56, at 57.

## Chapter III: The Adversarial and the Inquisitorial Systems

Procedural systems are mainly divided into two: the adversarial and the inquisitorial, each belonging to the common law and the civil law families respectively.<sup>84</sup> Although they sometimes overlap, each system has some features that distinguish it from the other. Further, each is associated with, or at least inspired by, a set of social and political beliefs that are thought to underlie its *modus operandi*. In this chapter, I will analyze both systems with respect to their philosophy and technique, recognizing conspicuous features that differentiate between them.

### A. Philosophy.

It is difficult to grasp adversarial and inquisitorial techniques outside the cultural contexts in which they function. The two systems are direct manifestations of certain cultural and political attitudes. To be sure, every system is considered appropriate by its proponents, not only because it is efficient or just, but also because it serves some firmly entrenched values and conceptions.<sup>85</sup>

While the adversarial system emphasizes rights, the inquisitorial emphasizes duties.<sup>86</sup>

While the adversarial calls for emancipation, the inquisitorial calls for control.<sup>87</sup>

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<sup>84</sup>For comparisons between the common law and the civil law systems with respect to adversarial and inquisitorial civil procedures, see MARY ANN GLENON ET AL., *COMPARATIVE LEGAL TRADITION IN A NUTSHELL* 95-99, 235-242 (2d ed. 1999) [hereinafter GLENON ET AL.]; see also KONARD ZWEIGERT & HEIN KOTZ, *INTRODUCTION TO COMPARATIVE LAW* 264-284 (2d ed. 1998) [hereinafter ZWEIGERT & KOTZ].

<sup>85</sup>*Cf.* Robert S. Summers, *Evaluating and Improving Legal Processes – A Plea for Process Values*, 60 *CORNELL L. REV.* 1, 4 (1974) (arguing that a legal process can be good not only as a means to good results but also as a means of implementing the values of this process).

<sup>86</sup>See A. G. Chloros, *Common Law, Civil Law and Socialist Law: Three Leading Systems of the World, Three Kinds of Legal Thought*, 9 *CAMBRIAN L. REV.* 11, 14-15, 17-19 (1978) [hereinafter Chloros].

<sup>87</sup>*See Id.*

Historically, adversarialism has always been associated with individualistic cultures in which individual liberties transcend government power.<sup>88</sup> As Oscar G. Chase put it, "[there] is an antipathy toward bureaucracy, hierarchical ordering. . . ."<sup>89</sup> Thus, the fairness of trial outcomes is believed to be linked to the diminished powers of the judge in trial proceedings.<sup>90</sup>

On the other hand, inquisitorial systems are most common in cultures where the state maintains law and order by virtue of its paternal authority for which everyone has to pay respect.<sup>91</sup> There is no clamor for liberty as much as for discipline.<sup>92</sup> To this end, judges are endowed with full control over the fact-finding process in order to get to the truth themselves.

## **B. Technique.**

### **1. The Adversarial Process**

Given the fact that judicial authority is viewed askance, it is the parties, in adversarial systems, who dominate the evidence and fact gathering process.<sup>93</sup> Each party is given the privilege of choosing which evidence to present. They have the right to select and cross-

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<sup>88</sup>See John Lande, *Failing Faith in Litigation? A Survey of Business Lawyers' and Executives Opinions*, 3 HARV. NEGOTIATION L.REV. 1 (1998).

<sup>89</sup> Oscar G. Chase, *Legal Processes and National Culture*, CARDOZO J. INT'L & COMP. L. 1, 18 (1997) [hereinafter Chase].

<sup>90</sup>See Lara M. Pair, *Cross-Cultural Arbitration: Do the Differences Between Cultures Still Influence International Commercial Arbitration Despite Harmonization?* 9 ILSA J. INT'L & COMP. L. 57, 62 (2002) [hereinafter Pair]

<sup>91</sup>See Chloros, *supra* note 86, at 17-19.

<sup>92</sup>See *Id.*

<sup>93</sup>ZWEIGERT & KOTZ, *supra* note 84, at 281.

examine witnesses.<sup>94</sup> The same thing applies to appointing and examining experts.<sup>95</sup> They also have the right to request from each disclosure of certain evidence or document, which is known by the right to discovery.<sup>96</sup> While the evidence is being presented by the parties, judges are all ears.<sup>97</sup> They observing the game from their bench and only intervene if one of the parties breaks the rules or asks for help.<sup>98</sup> They can also question the witness, but they are not expected to do that very often. There is a statement that sums up the passivity of judges in adversarial proceedings: "[a judge who] descends into the arena . . . is liable to have his vision clouded by the dust of the conflict."<sup>99</sup>

Another corollary of the unreliability of judges' power is jury trial. Indeed, it is this element that unpacks a bundle of techniques with which adversarial proceedings acquired their distinctive status.<sup>100</sup> At the outset, since the jury panel is composed of laymen, that historically were illiterate, evidence is primarily presented to them in an oral fashion.<sup>101</sup> This justifies, and at the same time explains, the heavy dependence on oral evidence rather than written documents in the adversarial trial in general. Equally important, given that the jury members are impaneled on a part-time basis, it is difficult to constantly summon them.<sup>102</sup> Therefore, the trial is consolidated into a single continuous "event"<sup>103</sup>

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<sup>94</sup>*Id.*

<sup>95</sup>*Id.*

<sup>96</sup> For an elaborate analysis of the disclosure of documents technique with respect to commercial arbitration, *see generally* Wendy Ho, *Discovery in Commercial Arbitration Proceedings*, 34 HOUS. L. REV. 199 (1997) (hereinafter Wendy).

<sup>97</sup>ZWEIGERT & KOTZ, *supra* note 84, at 282.

<sup>98</sup>*Id.*

<sup>99</sup>*Id.* (quoting Lord Green, *Yuill v. Yuill* (1945), at 15-20).

<sup>100</sup>*Id.* at 280 (stating that "[o]ne decisive fact explains many of the peculiarities of Anglo-American procedure: it is that the procedure results from the *jury trial*.").

<sup>101</sup>*See* GLENON ET AL., *supra* note 84, at 239.

<sup>102</sup>*See* ZWEIGERT & KOTZ, *supra* note 84, at 280; *see also*, H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD 212 (2000) (stating that jurors have day jobs).

<sup>103</sup>This term is used in GLENON ET AL., *supra* note 84, at 240.

proceeding without interruption until its termination by a ruling.<sup>104</sup> This also has a significant impact on the style of adversarial proceedings. It virtually dissects the process into pre-trial and in-trial. As a result, lawyers have to shape their case before trial in order to avoid any uncertainties in this one-time-shot process.<sup>105</sup> They actively gather evidence supporting their client's claim.<sup>106</sup> They also select witnesses and interview them assuring exactly what they will say in trial.<sup>107</sup> Even more, they have the right to seek help from their opponents asking for disclosure of any information or documents that pertain to the case.<sup>108</sup>

By the time trial commences, parties will have constructed their cases, set up their arguments, assembled their evidence, and prepared their witness. Meanwhile, the judge does not even have a clue about what the dispute is about.<sup>109</sup> This actually explains to a considerable extent why the parties should be in the vanguard in presenting evidence and facts as they are more knowledgeable about their case than the judge really is. With the foregoing, although afraid of being censured with oversimplification, I've tried to show that the adversarial process is an edifice of complex structures that are built upon each other, the basis of which is the passive role of the judge and the presence of a jury.

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<sup>104</sup>For a thorough discussion of the repercussion of consolidated and discontinuous trials, *see generally* ARTHUR VON MEHREN, LAW IN THE UNITED STATES, A GENERAL AND COMPARATIVE VIEW 75-82 (1989) [hereinafter MEHREN].

<sup>105</sup>*Id.* at 80.

<sup>106</sup>*Id.*

<sup>107</sup>*Id.* This behavior is considered unethical in inquisitorial systems, *see* ZWEIGERT & KOTZ, *supra* note 84, at 281.

<sup>108</sup>*Id.*

<sup>109</sup>*Id.*

## 2- The Inquisitorial Process

If the point of departure in adversarial proceedings is passivity on the part of the judge, it is the opposite in inquisitorial trials. After pleadings have been submitted by the parties, judges assume a proactive role in managing proceedings and gathering evidence.<sup>110</sup> They ask parties to produce evidence and documents.<sup>111</sup> They may depose and examine witnesses themselves rather than the parties.<sup>112</sup> As the trial proceeds, judges may introduce new theories and issues.<sup>113</sup> They are actually vested with the task of framing and reformulating the issues of the case with the aim of facilitating and expediting settlement.<sup>114</sup> Parties help in achieving this goal by producing documents, selecting witnesses; but the lead is given to the judge. To depict this dynamic job of the judge in inquisitorial trials, let me quote the following:

[T]he German judge sits high and exalted over the parties, dominating the courtroom scene; at the same time he is constantly descending to the level of the litigants, as an examiner, patient or hectoring, as counselor and adviser, as insistent promoter of settlement.<sup>115</sup>

Since inquisitorial trials are conducted in the absence of jurors, by contrast to adversary proceedings, a gamut of consequences ensues. The inquisitorial trial is a process of continuous hearings and meetings that take place over a period of time, in which evidence and facts are presented to the judge.<sup>116</sup> The need for a single concentrated

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<sup>110</sup>See Chase, *supra* note 89, at 3.

<sup>111</sup>*Id.* at 4.

<sup>112</sup>*Id.* at 4-5.

<sup>113</sup>GLENON ET AL., *supra* note 84, at 96.

<sup>114</sup>*Id.*

<sup>115</sup>Chase, *supra* note 89, at 5 (quoting Benjamin Kaplan, Arthur T. von Mehren & Rudolf Schaefer, *Phases of German Civil Procedure*, 71 HARV. L. REV. 1472(1958)).

<sup>116</sup>See GLENON ET AL., *supra* note 84, at 95-96.

trial, *a la adversarial*, vanishes as there is no necessity to collect a group of often busy people for whom the facts are presented.<sup>117</sup> Thus, there is no watershed between pre-trial and in-trial procedures. Parties can not ask each other, as a right, to disclose information before trial. If it is necessary in adversarial proceedings to prepare for the case beforehand to avoid ambiguities, parties in inquisitorial proceedings can ask for adjournment to another session if they come across anything they deem worthy of study.<sup>118</sup> Also consequential, parties can not approach witnesses before, or even after, the trial starts as this is considered a conduct of "improper influence".<sup>119</sup>

To sort out the chaff from the grain, I'll sum up the main differences between adversarial and inquisitorial processes:

#### 1- Evidence

Adversarial trials depend heavily on oral evidence more than written documents. As stated above, this derives from the fact that the facts of the case are decided by a jury of commoners. Live evidence is believed to be more persuasive than papers.<sup>120</sup> Conversely, inquisitorial judges rely on written documents as they can extract facts more quickly from papers than lengthy testimonies and oral arguments.<sup>121</sup>

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<sup>117</sup>*See id.* at 97.

<sup>118</sup>*See* ZWEIGERT & KOTZ, *supra* note 84, at 281.

<sup>119</sup>*Id.*, *see also* MEHREN, *supra* note 104, at 81 (stating that "[t]he rationale advanced is that fresh and unrehearsed testimony is inherently more reliable than testimony given by witnesses who have already discussed the case with one of the lawyers.").

<sup>120</sup>*See* Pair, *supra* note 90, at 63.

<sup>121</sup>*Id.*

## 2- Witnesses

In adversarial proceedings parties can be deposed as witnesses, while in inquisitorial systems this is unfamiliar and even proscribed.<sup>122</sup> Moreover, presenting witnesses and cross-examining them is undertaken by parties as this is the best way to ascertain their credibility; but this is, generally, the job of inquisitorial judges with some help from the parties.<sup>123</sup>

## 3- Discovery of Documents

Disclosure of documents, especially before trial, is an important technique in adversarial trials. As discussed above, this stems in part from the fact that parties have to be acquainted with their case in order to be prepared for the trial event. While the trial-event concept in inquisitorial proceedings does not exist, there is no inter-partisan activity before trial. And even if discovery exists, it is always restricted by privacy considerations.<sup>124</sup>

## 4- Record-Keeping

The recording of the proceedings and witness statements in adversarial and inquisitorial processes manifests itself in a manner that is consistent with the rationale of each side. Since the adversarial system places considerable significance on oral evidence, witness testimony is kept in a verbatim transcript, in order for lawyers to utilize every possible

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<sup>122</sup>*Id.* at 65.

<sup>123</sup>*Id.* at 65-66.

<sup>124</sup>*Id.* at 64.

word in confronting witnesses by cross-examination.<sup>125</sup> But while this is not the approach of the inquisitorial system, judges just take notes of testimonies composing a summary of what has been said.<sup>126</sup>

By and large, while both systems may possibly overlap, we have always to remind ourselves that the "grand discriminant"<sup>127</sup> between them is the active role of the judge *vis a vis* party control. Indeed, this point should inform our analysis of any potential procedural systems should we wish to recognize their systemic nature.

Having exposed the philosophy and technique of both adversarial and inquisitorial processes, let's now turn to analyze the arbitration proceedings of the International Chamber of Commerce in Paris and the Cairo Regional Centre for International Commercial Arbitration in order to know to which procedural system they belong.

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<sup>125</sup>Lawrence W. Newman, *International Arbitration Hearings: Showdown or Denouement?* 5 TUL. J. INTL & COMP. L. 3933, 395-396 (1997) [hereinafter Newman].

<sup>126</sup>*Id.*

<sup>127</sup>This term was used by John Langbein when describing the difference between American and German procedural systems stating that the "grand discriminant between the two legal cultures [is] adversarial versus judicial responsibility for gathering and presenting the facts", John Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 863 (1985) [hereinafter Langbein].

## Chapter IV: Institutional Procedural Rules

In this chapter, I will analyze the procedural rules of two major international arbitral institutions, namely, the Paris based International Chamber of Commerce (ICC) and the Cairo Regional Centre for International Commercial Arbitration (CRCICA). My objective here is to observe how the arbitral process proceeds according to the rules of these two institutions and, thereby, determine the nature of their procedural systems; is it adversarial, inquisitorial, or an amalgam of both? Therefore, I will emphasize the rules that are most conducive to this aim. It should be noted, furthermore, that choosing these two institutions is far from gratuitous. On the one hand, the ICC is the oldest and most well-established arbitral institution all over the world.<sup>128</sup> On the other hand, the CRCICA is a relatively new-player in the international arbitration market.<sup>129</sup> It will be interesting, thus, to know on which procedural yardstick old and new arbitral institutions conduct their arbitrations.

Examining the procedural rules of the ICC<sup>130</sup> and the CRCICA<sup>131</sup> from an adversarial/inquisitorial perspective involves the following:

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<sup>128</sup>See generally W. LAWRENCE CRAIG ET AL, *INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION* (2d ed. 1990); see also Eric A. Schwartz, *The Resolution of International Commercial Disputes Under the Auspices of the ICC International Court of Arbitration*, 19 HASTINGS INT'L & COMP. L. REV. 719 (1994-1995).

<sup>129</sup>See generally M.I.M Aboul Enein, *Arbitration Under the Auspices of the Cairo Regional Centre for Commercial Arbitration*, INT'L TAX & BUS. LAW 256 (1986).

<sup>130</sup>See International Chamber of Commerce Rules of Arbitration (Jan. 1, 1998), available at [http://www.iccwbo.org/court/english/arbitration/pdf\\_documents/rules/rules\\_arb\\_english.pdf](http://www.iccwbo.org/court/english/arbitration/pdf_documents/rules/rules_arb_english.pdf). (hereinafter ICC Rules).

<sup>131</sup>Arbitration Rules of the Cairo Regional Centre for International Commercial Arbitration (Oct. 1, 2000), available at [http://www.crcica.org.eg/arbitration\\_rules.html](http://www.crcica.org.eg/arbitration_rules.html). (hereinafter CRCICA Rules). Please note that the Cairo centre is currently amending its arbitration rules, the draft amendment of these rules is available at [http://www.crcica.org.eg/CRCICA\\_New\\_English\\_Rules.pdf](http://www.crcica.org.eg/CRCICA_New_English_Rules.pdf).

- A. Initiation of the proceedings.
- B. The Role of the Arbitral Institution.
- C. The Role of the Arbitral Tribunal.
- D. The Role of the Parties.
- E. Hearings.
- F. Witnesses and Experts.
- G. Discovery.

### **A. Initiation of the Proceedings**

Under the ICC procedural system, the arbitral process kicks off with a "request" lodged by the claimant to the secretariat of the International Court of Arbitration (the arbitral body of the ICC) which, on its part, informs the respondent of the receipt of this request and the date of such receipt;<sup>132</sup> this date serves as the opening date of the arbitral process.<sup>133</sup>

But this technique differs when shifting to the CRCICA procedural rules; in that the claimant gives a "notice" to the respondent expressing its need to resort to arbitration.<sup>134</sup> The date on which the respondent receives such notice is considered to be the date of initiating arbitration.<sup>135</sup>

This is to illustrate the active role of the parties under the CRCICA rules in initiating the arbitral process, while there is a considerable involvement by the arbitral institution in such process under the ICC rules.

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<sup>132</sup>ICC Rules, *supra* note 130, art. 4(1).

<sup>133</sup>*Id.* art. 4(2).

<sup>134</sup>CRCICA Rules, *supra* note 131, art. 3(1).

<sup>135</sup>*Id.* art. 3(2).

## **B. The Role of the Arbitral Institution**

The arbitral body of the ICC is the International Court of Arbitration (the ICC Court).<sup>136</sup> It functions independently of the ICC to ascertain the settlement by arbitration of international, or non-international, commercial disputes in tandem with the ICC rules of arbitration.<sup>137</sup>

In contrast, the CRCICA does not have a parallel arbitration court, and it does not even play that pivotal role which is assumed by the ICC International Court of Arbitration in administering the arbitral process. To single out this role on the part of the ICC court, I will compare the ICC and the CRCICA arbitration rules with respect to two areas, the establishment of the arbitral tribunal and rendering the award.

### 1- Establishing the Arbitral Tribunal

The ICC court plays a salient part in establishing the arbitral tribunal. It enjoys ample powers in appointing and confirming arbitrators.<sup>138</sup> From the outset, in case the parties do not agree upon the number of arbitrators, the ICC court appoints a sole arbitrator, unless the ICC court estimates that the dispute needs to be settled by three arbitrators.<sup>139</sup> If it does, each party then has to nominate one arbitrator.<sup>140</sup> In case the parties agree to appoint one arbitrator for settling their dispute, they have to agreeably nominate one

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<sup>136</sup>ICC Rules, *supra* note 130, art. 1(1). To get yourself acquainted with this court, *see id.*, appendix I (Statute of the International Court of Arbitration of the ICC) & appendix II (Internal Rules of the International Court of Arbitration of the ICC).

<sup>137</sup>ICC rules arts. 1(1), 1(2).

<sup>138</sup>*Id.* art. 9.

<sup>139</sup>*Id.* art. 8(2).

<sup>140</sup>*Id.*

arbitrator; this nomination is nonetheless subject to the ICC court's confirmation.<sup>141</sup> But if they fail to do so, this arbitrator should be appointed by the ICC court.<sup>142</sup> In case the parties agree to appoint three arbitrators, each party has to nominate one arbitrator to be confirmed by the ICC court.<sup>143</sup> The third arbitrator is to be appointed then by the ICC court, provided the parties did not agree on nominating this arbitrator themselves or by any other means.<sup>144</sup> In the latter situation, as the case always is, this nomination is subject to the ICC court's confirmation.<sup>145</sup> Again, if the parties fail to nominate the third arbitrator within certain periods of time, the ICC court should appoint this arbitrator.<sup>146</sup> In addition to these powers in appointing and confirming arbitrators, the ICC court assumes an equal clout in cases of challenging<sup>147</sup> or replacing<sup>148</sup> arbitrators.

When we turn our attention to the CRCICA, establishing the arbitral tribunal is mainly vested in the parties. That is why I will discuss it in relative details in the forthcoming section of The Role of the Parties. Suffice it to note here that the arbitral institution under the CRCICA rules appoints arbitrators or designate appointing authorities only if the parties ask it to make such appointment or designation in certain cases.<sup>149</sup>

## 2- Rendering the Award

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<sup>141</sup>*Id.* art. 8(3).

<sup>142</sup>*Id.*

<sup>143</sup>*Id.* art 8(4).

<sup>144</sup>*Id.*

<sup>145</sup>*Id.*

<sup>146</sup>*Id.*

<sup>147</sup>*Id.* art. 11.

<sup>148</sup>*Id.* art. 12.

<sup>149</sup>*See infra* notes 188, 190, 192.

Arbitral awards under both the ICC and the CRCICA procedural rules are rendered by a majority, reasoned decision.<sup>150</sup> However, the ICC empowers its court with a distinctive function to ensure the proper application of its arbitration rules. The tribunal should present a draft form of the award to the court in order to review and approve it.<sup>151</sup> Rendering the award is contingent upon such approval by the court.<sup>152</sup> It may possibly adjust the form of the award as it sees fit, and it can also give notice to the tribunal with respect to substantial issues.<sup>153</sup> The same applies to any correction or interpretation directed to the award by the tribunal.<sup>154</sup> It should be noted, furthermore, that the court members, when reviewing the draft award, bear in their minds the mandatory law of the place in which arbitration takes place.<sup>155</sup> That actually raises a question pertaining to potential contradictions between mandatory law provisions and the arbitral agreement, which one overweigh the other? I will answer this question when writing my comments at the end of this part.

### **C. The Role of the Arbitral Tribunal**

The arbitral tribunal plays a very proactive role in administering the arbitral process under the ICC arbitration rules. To begin with, the tribunal is vested with the task of drawing up, in the presence of the parties, the terms of reference which include, *inter alia*, the claims of the parties and the issues to be determined.<sup>156</sup> Also, the tribunal is

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<sup>150</sup>ICC Rules, arts. 25(1), 25(2); CRCICA Rules arts. 31(1), 32(3).

<sup>151</sup>ICC Rules, art. 27.

<sup>152</sup>*Id.*

<sup>153</sup>*Id.*

<sup>154</sup>*Id.* art. 29.

<sup>155</sup>Appendix II, *supra* note 136, art. 6.

<sup>156</sup>ICC Rules, art. 18(1).

presumed to establish, with help from the parties, a timetable by which arbitration should proceed.<sup>157</sup> Most importantly, the tribunal assumes the responsibility of establishing the facts of the case as expeditiously as possible by every proper manner,<sup>158</sup> provided the parties are treated fairly and impartially.<sup>159</sup> To this end, it is "in full charge of the hearings".<sup>160</sup> It can, with assistance from the parties, appoint experts and decide to hear witnesses.<sup>161</sup> It may ask any party to provide additional evidence.<sup>162</sup> It can order, in response to parties' demand, conservatory or interim measures.<sup>163</sup> Further, it can ask the ICC court to extend the time limit for rendering the final award.<sup>164</sup> Finally, the tribunal may close the proceedings when it rests assured that the parties presented their respective sides with a "reasonable opportunity".<sup>165</sup> Before shifting to the CRCICA rules, I would like to draw your attention that the ICC rules in their final article assign the tribunal, and the court, with the task of ensuring that the award will be "enforceable at law".<sup>166</sup> Could this be at the expense of the expectations of the parties? In other words, are the tribunal and the court entitled to disregard the provisions of the arbitration agreement in order to make sure that the award will be enforceable? I will get to this point in my final comments.

Under the CRCICA procedural rules, the arbitral tribunal has the privilege of conducting the arbitration by any means it sees fit as long as the parties are treated

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<sup>157</sup>*Id.* art. 18(4).

<sup>158</sup>*Id.* art. 20(1).

<sup>159</sup>*Id.* art. 15(2).

<sup>160</sup>*Id.* art. 21(3).

<sup>161</sup>*Id.* arts. 20(3), 20(4).

<sup>162</sup>*Id.* art. 20(5).

<sup>163</sup>*Id.* art. 23.

<sup>164</sup>*Id.* art. 24(2). Article 24(1) of the ICC Rules stipulates that "[t]he time limit within which the Arbitral Tribunal must render its final award is six months."

<sup>165</sup>*Id.* art. 22(1).

<sup>166</sup>*Id.* art. 35.

equally and fairly.<sup>167</sup> The tribunal can hold a preliminary meeting with the parties in order to sign the terms of reference and set a procedural timetable for running the arbitration.<sup>168</sup> Besides the statements of claim and defense, the tribunal can ask the parties to submit additional written statements.<sup>169</sup> Further, the tribunal can order the production of documents or evidence upon which the parties depend in their statements of claim or defense or any other documents or evidence within certain periods of time as the tribunal decides.<sup>170</sup> If any party requests, the tribunal can order any appropriate interim measure.<sup>171</sup> It can also appoint experts to uncover certain intricacies.<sup>172</sup>

It should be noted, in addition, that the CRCICA tribunal can at its own discretion prolong the time limits provided for the communication by the parties of statements of claim and defense.<sup>173</sup> And it reserves the right to terminate or continue the proceedings in case the claimant fails to communicate its statements of claim or the respondent fails to communicate its statement of defense, respectively, within fixed periods of time.<sup>174</sup> Also, the tribunal may go on with a hearing even though one of the parties does not show up.<sup>175</sup> It can decide the case on the available evidence in case one of the parties does not provide for the documentary evidence required from it.<sup>176</sup> At last, having made sure the parties have presented their cases satisfactorily, the tribunal can order the closure of

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<sup>167</sup>CRCICA Rules, *supra* note 131, art. 15(1).

<sup>168</sup>*Id.*

<sup>169</sup>*Id.* art. 22.

<sup>170</sup>*Id.* arts. 24(2), 24(3).

<sup>171</sup>*Id.* art. 26(1).

<sup>172</sup>*Id.* art. 27(1).

<sup>173</sup>*Id.* art. 23.

<sup>174</sup>*Id.* art. 28(1).

<sup>175</sup>*Id.* art. 28(2).

<sup>176</sup>*Id.* art. 28(3).

hearings;<sup>177</sup> nonetheless, it can reopen them discretionally or pursuant to a plea from a party for "exceptional circumstances".<sup>178</sup>

From the foregoing, the active role of both ICC and CRCICA tribunals is obvious, but it is more conspicuous under the ICC rules.

#### **D. The Role of the Parties**

As demonstrated above, parties to an arbitration under the ICC Rules play a subordinate role to that of the ICC court in establishing the arbitral tribunal. Even after the establishment of that tribunal, their role remains typical of its auxiliary character. Here are some of the privileges given to the parties while participating in ICC arbitrations. At first, they take part *ab initio* in drawing up the terms of reference and the procedural timetable.<sup>179</sup> They are entitled to a "reasonable opportunity" for presenting their positions.<sup>180</sup> Moreover, they are entitled to a hearing<sup>181</sup> in which they can question experts appointed by the tribunal.<sup>182</sup> They can also appoint witnesses and experts.<sup>183</sup> Also noteworthy, parties can agree between themselves to shorten the time limits provided for by ICC Rules.<sup>184</sup> However, this agreement is subject to the approval of the arbitral

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<sup>177</sup>*Id.* art. 29(1).

<sup>178</sup>*Id.* art. 29(2).

<sup>179</sup>ICC Rules, *supra* note 130, arts. 18(1), 18(4).

<sup>180</sup>*Id.* art. 22(1).

<sup>181</sup>*Id.* arts. 20(2), 21.

<sup>182</sup>*Id.* art. 20(4).

<sup>183</sup>*Id.* art. 20(3).

<sup>184</sup>*Id.* art. 32(1).

tribunal<sup>185</sup> and the discretion of the ICC court to extend any time limit curtailed by the parties.<sup>186</sup>

On the other hand, the role of the parties to CRCICA arbitrations is by no means minor. Initially, they participate vigorously in establishing the arbitral tribunal. In case of appointment of one arbitrator, they may agree between each other on the name of such arbitrator, or the appointing authority to make such appointment.<sup>187</sup> If neither technique worked out, they can ask the CRCICA to make such appointment.<sup>188</sup> Further, in case of agreeing to settle the dispute by three arbitrators, each party should appoint one arbitrator and the two appointed arbitrators should agree between themselves upon the third presiding arbitrator.<sup>189</sup> If any of the parties refrained from appointing its arbitrator, the other can ask the appointing authority, previously agreed upon by the parties, to make such appointment; and if this ended in vain or the appointing authority did not exist from the beginning, the CRCICA should appoint such arbitrator or designate the appointing authority upon request from this party.<sup>190</sup> If the two appointed arbitrators did not manage to agree on the third one, the appointing authority should make this appointment, following the same foregoing procedures.<sup>191</sup> Parties, also, can agree on the number and means of appointing arbitrators in case of multi-party arbitrations; and if they fail, the CRCICA kicks in to establish the tribunal upon request from the parties.<sup>192</sup> Equally notable, parties participate in the processes of challenging and replacing arbitrators.<sup>193</sup>

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<sup>185</sup>*Id.*

<sup>186</sup>*Id.* art. 32(2).

<sup>187</sup>CRCICA Rules, *supra* note 131, arts. 6(1), 6(2).

<sup>188</sup>*Id.* art. 6(2).

<sup>189</sup>*Id.* art. 7(1).

<sup>190</sup>*Id.* art. 7(2).

<sup>191</sup>*Id.* art. 7(3).

<sup>192</sup>*Id.* art. 8(bis).

<sup>193</sup>*Id.* arts. 9-13.

Furthermore, unlike the case with ICC arbitrations, the burden of proof with respect to the facts of a case submitted to CRCICA arbitration lies on the parties.<sup>194</sup> Therefore, parties are entitled to a "full opportunity" for presenting their cases.<sup>195</sup> They can ask for a hearing in order to present witnesses, experts or for oral arguments.<sup>196</sup> They can, also, examine experts appointed by the tribunal and present their own expert witnesses who give testimony on contentious issues.<sup>197</sup>

### **E. Hearings**

As stated above, parties under both ICC and CRCICA procedural rules are entitled to hold hearings in which oral evidence is presented, witnesses are heard, and experts are examined. Nonetheless, this right turns into a discretionary tool in the hands of the tribunal unless the parties avail themselves of it. In other words, if neither one of the parties requests a hearing, it is merely up to the tribunal to hold such a hearing or to determine the case only on the basis of written documents or other materials submitted to it.<sup>198</sup>

In tandem with the confidentiality of arbitration, moreover, hearings are not held in public without parties' approval.<sup>199</sup> Also, persons alien to the arbitral process are denied access to it without the authorization of both the tribunal and the parties.<sup>200</sup>

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<sup>194</sup>*Id.* art. 24(1).

<sup>195</sup>*Id.* art. 15(1).

<sup>196</sup>*Id.* art. 15(2).

<sup>197</sup>*Id.* art. 27(4).

<sup>198</sup>*Id.* art. 15(2); ICC Rules, art. 20(6).

<sup>199</sup>CRCICA Rules, art. 25(4).

<sup>200</sup>ICC Rules, art. 21(3).

## **F. Witnesses and Experts**

Parties under both the ICC and the CRCICA procedural rules have the privilege, as stated above, to present witnesses and experts. The tribunals of both institutions have the power, also, to appoint experts to report on certain issues. Notably, the rules of both institutions give the parties the right to examine only experts appointed by the tribunal. There is no reference whatsoever to any powers conferred upon the parties to examine, let alone cross-examine, witnesses or experts initially presented by them.

In addition, with an adversarial attitude, the CRCICA rules, at odds with ICC rules, consider signed written statements of witnesses "affidavits" valid evidence.<sup>201</sup>

## **G. Discovery**

There are two provisions in CRCICA rules that bear some resemblance to those articles which provide for disclosure of documents as practiced in adversarial systems. The first states that "[a]ll documents or information supplied to the arbitral tribunal by one party shall at the same time be communicated by that party to the other party."<sup>202</sup> The second states the following:

The arbitral tribunal may, if it considers it appropriate, require a party to deliver to the tribunal and to the other party . . . a summary of the documents and other evidence which that party intends to present in support of the facts in issue set out in his statement of claim or statement of defense.<sup>203</sup>

If we consider such approach to be a discovery of documents, there is not an equivalent to it in ICC rules.

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<sup>201</sup>CRCICA Rules, art. 25(5).

<sup>202</sup>*Id.* art. 15(3).

<sup>203</sup>*Id.* art. 24(2).

After analyzing the procedural systems of both institutions, I will consume some lines to make the following arguments:

First, under the ICC procedural system, the helm of the arbitral process is assumed by both the International Court of Arbitration and the arbitral tribunal, with assistance from the parties. The court maintains a strong grip over appointing arbitrators and rendering awards, by virtue of its approval capacities. The arbitral tribunal also dominates the conduct of the proceedings by the vast powers vested in it by the ICC rules. Further, this dominant role on the part of both the court and the tribunal gets all the more vigorous by the fact that the court considers, when reviewing awards, the mandatory law of the place of arbitration,<sup>204</sup> and the fact that they both have to ensure the enforceability of these awards.<sup>205</sup> This possibly implies that the tribunal, when deciding disputes, and the court, when reviewing awards, can set aside some provisions the parties have explicitly stipulated in their arbitral agreement for the sake of bowing down to the mandatory law of the place of arbitration, and for guaranteeing the enforceability of the prospective award. Indeed, this puts into question the commitment on the part of both the court and the tribunal to a fundamental arbitral principle, namely, party autonomy, and sheds, thereby, some curtains of doubt over the suitability of the active roles of both the court and the tribunal with the values of international commercial arbitration.

Second, while the arbitral tribunal under the CRCICA rules is actively involved in the conduct of the proceedings, the parties also assume a dynamic part in pushing the arbitral process forward. As stated earlier, they initially start the arbitral process with no support from the CRCICA; they are vested with the task of appointing arbitrators; they also shoulder the responsibility of proving the facts of their cases. Therefore, under the

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<sup>204</sup>*See supra* note 155.

<sup>205</sup>*See supra* note 166.

CRCICA rules, the progression of arbitration is an undertaking divided equally between the arbitral tribunal and the parties.

Third, the procedural systems of both the ICC and the CRCICA have a lot in common, such as deciding the dispute only on the basis of documents in case neither party requests a hearing. However, the ICC rules are distinctive with some inquisitorial techniques, such as the powerful grip of the ICC court and tribunal over the proceedings. And the CRCICA rules are distinctive with some adversarial features, namely, affidavit evidence, and, as I may call it, "distorted" discovery of documents.

Fourth, although CRCICA rules embrace the above stated adversarial techniques, they lack many features that are eponymous of the adversarial system, and indeed vital in measuring the adversariality of a given procedural system, for instance, the dichotomy of the trial process into pre-trial and in-trial. Equally noteworthy, cross-examination of witnesses and experts is nonexistent. As stated above, the only kind of examination is mentioned with regard to experts appointed by the tribunal rather than the parties. Also, the concept of a hearing, in which oral evidence is submitted, is not clearly underscored, as the tribunal can do without a hearing and decide the dispute on the basis of documents absent the parties request for a hearing.

Fifth, against this background, I can say that the ICC arbitration rules are purely inquisitorial; the tribunal and the ICC court are in the vanguard of the arbitral process; parties are only assistants; hearings are not mandatory and the tribunal can decide the dispute only on the basis of documents; all adversarial techniques are absent. On the other hand, I can not say that the CRCICA rules are either adversarial or inquisitorial; leading the proceedings is divided between the tribunal and the parties; the concept of a hearing is not given prevalence; although there are some adversarial techniques, others

are not established. Thus, in my view, these rules are an amalgam of both the adversarial and the inquisitorial systems.

Having consulted the ICC and the CRCICA about which procedural system is most convenient with international commercial arbitration, let's do the same with international arbitrators themselves.

## **Chapter V: Opinions of International Arbitrators**

In this chapter, I will explore the opinions of five Egyptian international arbitrators about which procedural system, i.e., adversarial or inquisitorial, better fits with international commercial arbitration. Their opinions were obtained through interviews conducted personally with them, save for Dr. Mohamed Aboul-Enein whom I interviewed by telephone. I held interviews with other international arbitrators, but I chose to display only the opinions of these five for purposes of conciseness as they embrace all potential answers to my question. These arbitrators are: Dr. Karim Hafez, Sarwat Abdel-Shahid, Dr. Mohamed Aboul-Enein, Dr. Mohamed Abdel-Ra'oof, and Dr. Mohamed Badran.<sup>206</sup>

### **A. Dr. Karim Hafez<sup>207</sup>**

Dr. Hafez believes that it is impossible to determine the suitability of either adversarial or inquisitorial proceedings with international arbitration in general because there is no arbitral yardstick against which we can do so. There is no monolithic culture of arbitration that encompasses general principles and features with which a set of procedures fits and another does not. The culture of arbitration is amoebic. It has no uniform character. It includes different types of arbitration with different attributes. There is maritime arbitration, construction arbitration, petroleum extraction arbitration, and so on. Although they are all international and commercial, every kind has its exigencies that call for a certain type of procedure. For example, the adversarial system might fit with maritime arbitration, given the fact that the substantive law that applies to this kind of

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<sup>206</sup>These names are put in an alphabetical order.

<sup>207</sup>Attorney at law; international arbitrator; LL.M., LL.D., Cambridge University.

arbitration is affected by British common law and the attorneys representing parties are mainly British. Meanwhile, this system might not fit with other types of arbitration such as construction arbitration.

Moreover, the suitability of any of the two procedural systems with international arbitration, Dr. Hafez thinks, raises no problems in practice. All participants of international arbitration, whether arbitrators, parties, or institutions, no longer maintain these dogmatic predilections with respect to a certain procedural system. Their exposure to different legal systems makes them more receptive to procedures of other cultures. When empanelled as an arbitrator, Dr. Hafez provides, he does not care whether he follows adversarial or inquisitorial procedures. He just attempts to respect the expectations of the parties and the cultural background of his colleagues on the arbitral panel. In sum, Dr. Hafez does not believe there is an international arbitration culture out there that is consistent with one procedural system over another. This issue has to be determined on a case by case basis.<sup>208</sup>

### **B. Sarwat Abdel-Shahid<sup>209</sup>**

Mr. Abdel-Shahid considers the adversarial system more appropriate for international arbitration than the inquisitorial system. In his view, the latter corresponds to the most important principle of international arbitration, i.e., party autonomy. Plus, it achieves a speedy settlement of the arbitral dispute by empowering parties and giving them a dominant role over the proceedings, as direct communication between them is the best way to expedite the arbitral process. With respect to truthfulness, it is the adversarial

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<sup>208</sup>Interview with Dr. Karim Hafez, Cairo (Apr.20, 2006).

<sup>209</sup>Former judge at the Egyptian State Council; attorney at law; international arbitrator; head of Sarwat Abdel-Shahid Law Firm.

system that is closer to achieving this value. By techniques such as discovery of documents, no party can hide any document or evidence that is crucial to reach the truth. Additionally, this technique allows the arbitral tribunal to ensure the real intentions of the parties. Cross-examinations is also a vital technique to uncover the truth. With the parties examining each other's witnesses and disproving each other's arguments, the arbitrator can tell which argument is more truthful. Overall, Mr. Abdel-Shahid deems the adversarial system not only more suitable for international arbitration, but generally superior to the inquisitorial system.<sup>210</sup>

### **C. Dr. Mohamed Aboul-Enein<sup>211</sup>**

Dr. Aboul-Enein does not favor one procedural system over the other. He deems one of the most valuable advantages of arbitration to be its procedural flexibility that permits the parties to tailor the arbitral proceedings according to their needs and the nature of their dispute. By reason of this flexibility, parties can combine the best techniques in both systems in their arbitration. On the one hand, Dr. Aboul-Enein prefers the arbitrator to have a dominant role over the proceedings. The arbitrator should appoint experts, question witnesses, and ask parties to provide further evidence. This guarantees an efficient and speedy resolution of the arbitral dispute; and it prevents the stronger party from overshadowing the weaker. On the other hand, he prefers such adversarial techniques as cross-examination and discovery of documents. They are also required for an efficient resolution of the dispute. But still they both should be under the supervision of the judge, particularly, discovery of document. It should not be as expansively

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<sup>210</sup>Interview with Sarwat Abdel-Shahid, in Cairo (Apr.18, 2006).

<sup>211</sup>Former judge at the Egyptian Supreme Constitutional Court; head of Cairo Regional Centre for International Commercial Arbitration; international arbitrator; LL.M, University of California; S.J.D, University of Southern Methodist.

practiced as in U.S. courts; such expansion would encumber the arbitral process and render it less speedy.<sup>212</sup>

#### **D. Dr. Mohamed Abdel-Raof<sup>213</sup>**

In Dr. Abdel-Raof's view, the procedural system that best comports with international arbitration is the one that is most conducive to its objectives, namely, justice, efficiency, speed, and flexibility. The inquisitorial system is more fulfilling of these goals. The active role of the arbitrator guarantees the just and efficient resolution of the arbitral dispute. To illustrate the significance of this role, Dr. Abdel-Raof recalled a personal experience. In one of the arbitral disputes in which he was impaneled as an arbitrator, there was a document that one party was supposed to submit. This party did not submit this document and the other two arbitrators were not willing to ask for its submission. Dr. Abdel-Raof managed to convince his colleagues to change their passive attitude. They then ordered this party to present the required document. Surprisingly, this document was so vital to the extent that it changed their previous approach to the dispute. On the other hand, Dr. Abdel-Raof considers such adversarial techniques as discovery of documents and verbatim record-keeping time-consuming and impractical. However, he sometimes permit parties to cross-examine each other's witnesses but under his control and supervision.<sup>214</sup>

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<sup>212</sup>Telephone Interview with Dr. Mohamed Aboul-Enein, Cairo (May 3, 2006).

<sup>213</sup>Secretary General, Cairo Regional Centre for International Commercial Arbitration; attorney at law; international arbitrator; LL.M., Cairo University; LL.D., Montpellier University.

<sup>214</sup>Interview with Dr. Mohamed Abdel-Raof, Cairo (Apr.18, 2006).

**E. Dr. Mohamed Badran<sup>215</sup>**

Dr. Badran believes, at the outset, that it is difficult to determine the consistency of either system with international arbitration without accompanying cultural inclinations. Those of common law countries think that their adversarial system is fairer and more efficient and therefore more suitable with international arbitration. The same applies to those of civil law countries with respect to their procedural system. However, in my interview with him, Dr. Badran tried to give his cultural bias a break in order to determine the suitability of adversarial and inquisitorial procedures with international arbitration. He deems the inquisitorial system more proximate to fairness and justice at the expense of practicality. By contrast, the adversarial system is more flexible and practical but to the detriment of fairness and justice. In his view, that stems from the fact that the inquisitorial system grew in the civil law system which was developed by scholars and academics who put rigid principle to govern people's dealings with little regard for the constantly changing circumstances. But the adversarial system matured in the common law system which was developed by traders and merchants who were all the more keen to establish flexible rules to cope with different times. Thus, since parties resort to international arbitration for its flexibility, it is the adversarial system that responds to their expectations.<sup>216</sup>

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<sup>215</sup>Head of Public Law Department, Faculty of Law, Cairo University; attorney at law; international arbitrator; LL.M., LL.D., Birmingham University.

<sup>216</sup>Interview with Dr. Mohamed Badran, Cairo (May 3, 2006).

After displaying these five opinions, I will make the following comments:

First, all opinions approach the suitability issue from different perspectives. Two of them favor the adversarial system, one favors the inquisitorial, one favors a mixture of both systems, and one basically deems this suitability inconceivable.

Second, I do not share with Dr. Hafez his view that there is no arbitral standard with which we can determine the compatibility of either procedural system with international arbitration. It might be true that there are various types of arbitration, each one maintaining an exclusive nature. However, that does not mean that there is no overarching arbitration culture, under which all kinds of arbitration share common features and objectives that distinguish them from ordinary court litigation. As I stated in part one of this paper, party autonomy, neutrality, efficiency, flexibility, and confidentiality are all features that should attend the arbitral process. Without these features, international arbitration loses its *raison d'etre*. Thus, we can assess the suitability of any potential procedural system with international arbitration by invoking such features.

Third, although Dr. Aboul-Enein favors a mishmash of adversarial and inquisitorial procedures, his attitude essentially favors the inquisitorial system. Given the fact that the main difference between the adversarial and the inquisitorial systems is the passive *vis a vis* active role of the judge, and since Dr. Aboul-Enein supports an active role of the arbitrator, he actually drifts towards the inquisitorial system. His support for such adversarial techniques as discovery of documents and cross-examination is of little significance here, since they should be conducted, in his view, under the control of the arbitrator.

Fourth, Dr. Badran's analysis is too general to determine the attributes of both adversarial and inquisitorial proceedings. Rather than examining the real mechanisms of

both systems, he puts all his credit in evaluating the cultural backgrounds of their respective parent systems. Although supportive, cultural underpinnings should not divert our attention from analyzing the actual procedural devices of adversarial and inquisitorial processes in the pursuit of identifying their features. Moreover, Dr. Badran's analysis just tackles the law-making rationale of common law and civil law systems, with no regard for the direct cultural justifications for trial proceedings in both systems. He does not explain why judges in common law systems should remain passive throughout the trial process while their civilian counterparts remain active, and how this informs the character of the trial. In sum, Dr. Badran's analysis, in my view, lacks the required specificity to capture the real characteristics of the adversarial and the inquisitorial systems.

Fifth, although they reach the same conclusion, Mr. Abdel-Shahid deviates from the road taken by Dr. Badran in his analysis. He emphasizes the very techniques of the adversarial system, considering them more compatible with the principles of international arbitration.

That said, let me now give my personal opinion about which procedural system better fits with the international commercial arbitration.

## Chapter VI: Which Is Better?

In this chapter, I will measure the proximity of both adversarial and inquisitorial systems to the normative attributes of international commercial arbitration which I set out in part one of this paper, i.e., party autonomy, neutrality, efficiency, flexibility, and confidentiality. I will explain first why it is important to know which procedural system is more compatible with international arbitration. Then, I will proceed with my analysis showing at the end that the inquisitorial system is generally more fulfilling to the aspirations of those who resort to arbitration.

### **A. Why is it important to explore the suitability of both systems with international arbitration?**

As demonstrated earlier in this paper, arbitration is moving in the route of judicialization and adversarialization.<sup>217</sup> Today, adversarial techniques are noticeably taking root in the conduct of international arbitration proceedings. It is important, therefore, to scrutinize this phenomenon to know whether the adversarial system is in harmony with international commercial arbitration, and accordingly whether parties should utilize it in their arbitrations.

Furthermore, given the fact that neither ad hoc nor institutional arbitration provide *ab initio* for answers to the nitty-gritty of arbitration proceedings,<sup>218</sup> background cultural differences between the parties to arbitration, as opposed what Dr. Hafez believes,<sup>219</sup>

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<sup>217</sup>See *supra* notes 65-79 and accompanying text.

<sup>218</sup>See Francis J. Higgins, William G. Brown, and Patrick J. Roach, *Pitfalls in International Commercial Arbitration*, 35 BUS. LAW. 1035, 1045-1046 (1980).

<sup>219</sup>See *supra* note 208 and accompanying text.

pose a considerable threat to the predictability of its proceedings and, thereby, to the proper resolution of arbitral disputes.<sup>220</sup> Possibly, one common law party might regard discovery of documents as a means of building its case, while the other civilian party perceives such technique, if ever has a clue of what it means, as hazardous to its commercial secrets.<sup>221</sup> One party might perceive cross-examination as the most efficient way of testing witness credibility, while the other depends on the judge to do this job. One party might prepare and coach its witness prior to standing for testimony, while the other sees this conduct as unethical.<sup>222</sup>

Even worse, this discrepancy finds expression in the attitudes of the arbitrators themselves. To give an example, an arbitrator with a civil law background might regard an extensive oral argument by a common law lawyer as superfluous and therefore untrustworthy.<sup>223</sup> Meanwhile, a common law arbitrator might be dissuaded by a succinct oral argument made by a civilian lawyer.<sup>224</sup> Should the scope of this paper permit, I can enumerate a list of similar inconsistencies.

It is important, therefore, to determine, in a common law/civil law cultural vacuum, the suitability of both adversarial and inquisitorial proceedings with international arbitration in order for the arbitration community at large, whether parties, arbitrators, or institutions, to cast away any cultural predilection, and adopt the very set of procedures that is compatible with the features and objectives of international arbitration. Although it is not that easy to root out cultural beliefs, I would be more than satisfied if answering this question managed, even to a little extent, to do so.

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<sup>220</sup>See Newman, *supra* note 125, at 399.

<sup>221</sup>Rogers, *supra* note 14, at 375.

<sup>222</sup>See *id* at 358-362.

<sup>223</sup>*Id.* at 376.

<sup>224</sup>*Id.*

## **B. The Suitability of the Adversarial and the Inquisitorial Systems with the Normative Attributes of International Commercial Arbitration.**

The suitability test involves the following:

### **1. Party Autonomy**

As demonstrated earlier, party autonomy is one of the most basic principles of international arbitration.<sup>225</sup> It is the very right that authorizes parties to eschew judicial jurisdiction and opt for arbitration. Similarly, it is the same principle that characterizes adversarial trials and gives reason to many of its taken-for-granted techniques, such as cross-examination and discovery. Indeed, both the adversarial system and arbitration share in common the philosophy of sidelining state power, incarnated in its judicial authority, in favor of party independence and domination. Parties in both institutions do not trust the government to administer their disputes. They prefer to sort out their own affairs themselves.

In contrast, the inquisitorial system detracts from the autonomy of the parties to arbitration. It confers more control over the arbitral process upon the arbitral tribunal rather than the parties. They just assist the tribunal to decide their dispute. In that sense, the inquisitorial system contradicts with the autonomy rights of the parties with which they are entitled to initiate their arbitration in the first place. I illustrated this contradiction when analyzing the arbitration rules of the ICC.<sup>226</sup> By virtue, of the vast powers vested in them in administering the arbitral process, the ICC court and the arbitral tribunal may disregard manifest provisions the parties have agreed upon. It follows, then,

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<sup>225</sup>See *supra* notes 13-22 and accompanying text.

<sup>226</sup>See *supra* pp. 45-46.

that the adversarial system is more fulfilling of that aspect of arbitration than its inquisitorial counterpart. It is the system that corresponds with and supplements the autonomy of the parties when conducting arbitration. But, does that suffice to conclude that the adversarial system is generally more compatible with arbitration than the inquisitorial? Of course it does not. Parties do not turn to arbitration just for exercising their autonomy; there are other considerations that should not fall out of our evaluation. Let's move on with the suitability test.

## 2. Neutrality

Contesting parties from different countries resort to international arbitration, as noted above, because they fear they will not be afforded justice by each other's national courts.<sup>227</sup> Impartiality and justice are, indeed, significant targets that parties aspire to attain by going to arbitration. Let's now see how adversarial and inquisitorial systems work to achieve these valuable concepts.

Some commentators argue that since inquisitorial judges must have prior knowledge of the case before them in order to be effective managers at trial, they unwittingly develop intuitive preconceptions and hypotheses that tend to be in favor of one side rather than the other.<sup>228</sup> This bias informs the kind of questions judges raise at trial and, even worse, the receptiveness of information gathered generally through the whole process.<sup>229</sup>

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<sup>227</sup>See *supra* note 24 and accompanying text.

<sup>228</sup>See Mirjan Damaska, *Presentation of Evidence and Factfinding Precision*, 123 U. PA. L. REV. 1083, 1092 (1975) (citing J. Herrmann, *Die Reform Der Deutschen Hauptverhandlung Nach Dem Vorbild Des Anglo-Amerikanischen Strafverfahrens* 363 (1971); A. TRANKELL, RELIABILITY OF EVIDENCE 27-28 (1972); Fuller, *The Adversary System*, in TALKS ON AMERICAN LAW 43, 44 (H. Berman ed. 1971); Lind, Thibaut, & Walker, *Discovery and Presentation of Evidence in Adversary and Nonadversary Proceedings*, 71 MICH. L. REV. 1129, 1142 (1972).

<sup>229</sup>*Id.*

But this is not the case with adversarial judges as they do not know about the case prior to trial.<sup>230</sup>

Although at first blush makes some sense, this argument, if deeply looked into, proves unpalatable. On the one hand, we can not assume that judges are necessarily biased when they begin trial on an informational basis. Pre-informed judges are like scientific researchers. They initiate their research with a modicum of data. Their knowledge increases as the research process goes on. Although they might have *ab initio* some preconceptions about the result of their investigation, their desire to reach the truth leads them to find out facts that might steer them toward a totally different destination. Their integrity and skillfulness get them back on track, should they go astray, particularly when they know that they might harbor such inclinations. Having personal stakes or being professionally incompetent are fairly different issues. On the other hand, it is actually the passive role of the judge and parties domination over trial proceedings that generate this bias. Adversarialism, I believe, lends a validation for the stronger party to overshadow the weaker. With its capacities, resources, and techniques, the latter is more privileged to present its case more cogently than the former. Passive judges would then fall for the stronger argument regardless of their supposed impartiality at the outset of trial. Indeed, bias is more rampant in the adversarial process than its inquisitorial sibling.

In addition, if we approached impartiality as the ability of trial proceedings to produce truthful results, the balance would once again tip in favor of the inquisitorial system.

Having portrayed the *modus operandi* of adversarial and inquisitorial proceedings,<sup>231</sup> I believe that truth evaporates with the heat of the adversarial battle. Parties are not as much concerned with unearthing reality as they are with winning their contest. As an American judge once put it, "[the] adversary system rates truth too low among the values

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<sup>230</sup>*Id.*

<sup>231</sup>*See supra* Chapter III.B.

that institutions of justice are meant to serve."<sup>232</sup> On the contrary, and as the case always is, the inquisitorial judge leads keenly the locomotive of trial until it arrives at the station of truth.

Let's see for example how things work with respect to witness testimonies. Due to the fact that lawyers can hold interviews with prospective witnesses, this contact, as stated above, turns into a means of informing witnesses what they are going to say in trial. This actually emasculates the veracity of the testimony as witnesses take sides in the dispute according to the party that selected them, regardless of the truthfulness of their statements.<sup>233</sup> Even if cross-examination is utilized to counteract this deficiency, it is deemed to be inefficient itself as it is always subject to intimidation and trickery.<sup>234</sup>

On the other extreme, inquisitorial procedural ethics prohibit party-witness contact. There is neither coaching nor preparation of witnesses. They are selected by the judge with assistance, rather than supervision, from the parties. Testimonies are kept intact until uttered in court. Examination is undertaken by an impartial judge who is eager to get to the truth. Thus, truth is preserved in a twofold way; on the one hand, it is protected from distortions; on the other, it is afforded an appropriate avenue to get out through.

Mirjan Damaska recognized this truth-seeking discrepancy between adversarial and inquisitorial models in an article written by him around twenty years ago.<sup>235</sup> Although his arguments relate to criminal trials, two of them fit with, and therefore merit importation into, this analysis of civil procedure.<sup>236</sup> Damaska argues that in the

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<sup>232</sup>Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1032 (1975).

<sup>233</sup>See Langbein; *supra* note 127, at 833.

<sup>234</sup>See *id.*

<sup>235</sup>See generally, Mirjan Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 580-584 (1973).

<sup>236</sup>The third argument concerned the notion that criminal procedures in Anglo-American systems were historically used to frustrate substantive criminal law rather than abiding by the truth. I see this

adversarial model, emphasis is placed more on observing the rules of the contest between adversaries than the truthful determination of the facts of the case.<sup>237</sup> But in the non-adversarial model "the concern for ascertaining the facts of the case is much more central."<sup>238</sup> Further, he attributes this truth-seeking variance to the disparate ideological conception espoused by the two systems. Due to the fear of state power, the evidentiary barrier in the adversarial model is so high that truth can not always overcome.<sup>239</sup> Conversely, since state power is not viewed with so much disdain in inquisitorial systems, the same evidentiary obstacles found in adversarial proceedings are perceived as being unnecessary in the pursuit of truth.<sup>240</sup>

To round out the picture, the inquisitorial system is more bias-moderating and truth-seeking than the adversarial system. As a result, the latter is more fulfilling to arbitral neutrality than the former.

### **3. Efficiency**

Efficiency is an important element of the arbitral process.<sup>241</sup> It guarantees, as set out earlier, the final, binding, time-saving, cost-minimizing, and practical resolution of the arbitral dispute.<sup>242</sup> To be sure, it is the most salient feature that distinguishes arbitration

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argument too criminally ridden to be incorporated into my analysis of civil proceedings, *see Id.*, at 584-587.

<sup>237</sup>*Id.* at 581.

<sup>238</sup>*Id.* at 582.

<sup>239</sup>*Id.* at 583.

<sup>240</sup>*Id.* at 584.

<sup>241</sup>*See supra* note 27 and accompanying text.

<sup>242</sup>*See supra* notes 28-42 and accompanying text.

from court litigation. With that in mind, which one of our two compared procedural systems is more efficient?

- The Adversarial System

In fact, the adversarial process comprises a set of techniques that reflect the time-consuming, costly, and ineffective nature of that system. With the passive role of judges and their refraining from prompting parties to settle their dispute, the adversarial case tends to drag on. The domination of the proceedings by the parties and their dedication to "leave no stone unturned"<sup>243</sup> in gathering facts takes its toll on the economy and accuracy of this process.

For instance, in a typical discovery of documents practice, the claimant submits to the respondent a list of every document that relates to the issues of their dispute.<sup>244</sup> The latter responds with a variety of objections and a lower number of documents than requested.<sup>245</sup> The claimant then submits supplemental document requests with deposition demands of every relevant person.<sup>246</sup> Again, the respondent meets these requests and demands with either objection or ignorance.<sup>247</sup> The requests and objections tend to go back and forth adding much to the cost and time of resolving the dispute.<sup>248</sup> In addition, if we postulate that discovery is needed to prevent unfair surprises in trial proceedings,<sup>249</sup> it still does not match the nature of international arbitration. More to the point, discovery, when applied

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<sup>243</sup>Langbein, *supra* note 127, at 846.

<sup>244</sup>Wendy, *supra* note 96, at 214.

<sup>245</sup>*Id.*

<sup>246</sup>*See id.*

<sup>247</sup>*See id.*

<sup>248</sup>*See id.* at 215.

<sup>249</sup>*See* Alan Scott Rau and Edward F. Sherman, *Symposium on International Commercial Arbitration: Tradition and Innovation in International Arbitration Procedure*, 30 TEX. INT'L L. J. 89, 102 (1995).

to arbitration proceedings, can not function as it does in adversarial systems because the power conferred upon the arbitral tribunal are far less than what a typical court of law enjoys.<sup>250</sup> Therefore, arbitrators lack direct authority to sanction noncompliance with discovery orders and the required resources to supervise the process.<sup>251</sup> Even when adverse inference is taken against recalcitrant parties, it has arguably little practical effect.<sup>252</sup>

Another manifestation of this inefficiency on the part of the adversary system is its inherent tendency to present evidence orally with lengthy verbal arguments comprising irrelevant details and cross-examinations that tend, in my view, to concentrate on impeaching witnesses rather than illuminating relevant issues. Also, the verbatim recording of the hearings, which includes every single word uttered by parties or witnesses, is believed to be yet another addition to the expense of the proceedings.<sup>253</sup>

In sum, the adversary system, I believe, nurtures superfluity at the expense of precision; it makes room for wastefulness rather than objectivity.

#### - The Inquisitorial System

The investigatory nature of judicial control renders inquisitorial proceedings result oriented.<sup>254</sup> It purges those excessive steps taken by parties to gain strategic benefits. The

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<sup>250</sup>REDFERN & HUNTER, *supra* note 3, at 29; on powers of the arbitral tribunal, *see generally id* at 277-313.

<sup>251</sup>Bruce A. McAllister & Amy Bloom, *Fourth Newport Symposium: The Use of Evidence in Admiralty Proceedings: Evidence in Arbitration*, 34 J. MAR. L. & COM. 35 (2003); *see also* Wendy, *supra* note 96, at 222.

<sup>252</sup>Wendy at 222.

<sup>253</sup>*See* Interview with Dr. Mohamed Abdel-Raoof, *supra* note 214; *see also* Andreas F. Lowenfeld, *The Two Way Mirror: International Arbitration as Comparative Procedure*, 7 MICH. YBI LEGAL STUD. 163, 167(1985).

<sup>254</sup>Langbein, *supra* note 127, at 846.

machine of fact finding goes into play only if common sense dictates.<sup>255</sup> Judges narrow the issues of the dispute to those most needed for its settlement.<sup>256</sup> They rely more on written evidence from which they can speedily extract facts and evidence. The summarized record keeping does away with any unnecessary and tautological statements.<sup>257</sup> Moreover, lawyers help in drawing consideration to functional evidence or useful facts.<sup>258</sup> Examining witnesses is primarily undertaken by an impartial judge. When parties question witnesses, this lengthy adversarial cross-examination is not permitted. There is no discovery of documents as practiced in adversarial trials, and no depositions either. In my view, by reason of the fact that there is always behind the inquisitorial process someone, i.e., the judge, who is all the more enthusiastic to get the dispute to a resolution, the inquisitorial system is expeditious, teleological, and, as a result, efficient.

Form the foregoing, the inquisitorial system is more fulfilling to arbitral efficiency than its adversarial cousin. The former is speedy, cost-saving, and objective while the latter is sluggish, expensive, and wasteful.

#### **4. Flexibility**

The adversarial system comprises a set of such techniques and procedures as pre-trial discovery, pre-trial depositions, cross-examinations, oral arguments, verbatim transcripts, which reflect the complex nature of that system. This complexity stems from the fact that adversarial techniques are rationalized by and dependent upon each other. Oral evidence

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<sup>255</sup>*Id.* at 846.

<sup>256</sup>*Id.*

<sup>257</sup>*Id.*

<sup>258</sup>*Id.* at 830.

is justified by the presence of a jury; the active role of the parties finds expression in cross-examination, pre-trial discovery is justified by the dichotomy of trial and the fact that parties has to be prepared before the hearing event; the verbatim transcript is necessary for the conduct of cross-examination. To be sure, the absence of one of these techniques detracts from the efficiency of another.

By contrast, the inquisitorial system does not maintain such a complex structure since it is absent those concepts espoused by the adversarial system. It lack this interdependency of procedures. There is no jury, no dichotomy of trial, no hearing event. Consequently, there is no need for oral argument, cross-examination, or discovery. If such instruments happen to be used, it is at the discretion of the judge; there is no inherent right of cross-examination or discovery; parties can present their evidence orally, but this is not the norm. I'm trying to depict here the flexibility of the inquisitorial system in the sense of the nonexistence of this gamut of interdependent procedures that attend the adversary system. Therefore, when utilized in arbitral proceedings, the former, in my evaluation, is more satisfying to the value of flexibility than the former.

## **5. Confidentiality**

In addition to its previously stated disadvantages, discovery of documents, I believe, is an adversarial tool by which much of the confidentiality of arbitration goes into the air. By the parties requesting each other to present every document that comes to their mind, their keenly maintained commercial secrets are divulged. Whereas the inquisitorial system is absent this technique, or at least its unbridled version, it is thus more saving to the privacy of the parties and their business dealings.

### C. An Argument

In the final analysis, my important question, and it is a difficult one, poses itself; which of the two procedural systems is closer to arbitration? As for the adversarial system, it is the one that endows parties with autonomy and control, significant features of arbitration. However, it is inefficient, complex, biased, untruthful, and unveiling to commercial secrets. On the other extreme, the inquisitorial system is better in all these respects save for the principle of party autonomy. Obviously, the answer of my question is not in the absolute. It is not totally siding by either the adversarial or the inquisitorial models. There is no entirely arbitral one of them. Each one paradoxically contains arbitral and non-arbitral elements. The answer, rather, tells of which one is closer to arbitration than the other. And here lies the difficulty of this question.

To answer this question, I believe, we have to determine whether there is a hierarchy among the principles of international arbitration, i.e., whether some principles take prevalence over others. By so doing, the procedural system which is closer to arbitration is the one that embraces the most prominent principles of international arbitration.

In my view, the notion of rights is not firmly entrenched in the *modus operandi* of arbitration. Arbitration comes at the expense of many rights of the parties. By opting for arbitration, they surrender their right to resort to a natural judge within a natural court of law. They are not even guaranteed their fundamental rights in the arbitration proceedings themselves.<sup>259</sup> Arbitration rules requiring arbitrators to grant the parties a fair opportunity of presenting their sides<sup>260</sup> do not substitute for applying a full-blown set of procedural

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<sup>259</sup>See generally Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. REV. 81 (1993) (hereinafter Brunet).

<sup>260</sup>E.g., ICC Rules, *supra* note 180; CRCICA Rules, *supra* note 195.

rights and guarantees. Twenty years ago, the United States Court of Appeals for the Eighth Circuit denied parties to arbitration constitutional safeguards in the proceedings holding that "[t]he present day penchant for arbitration may obscure for many parties who do not have the benefit of hindsight that the arbitration system is an inferior system of justice, structured without due process, rules of evidence, accountability of judgment and rules of law . . ." <sup>261</sup> Although the appellate court's view does not unconditionally apply to modern day arbitration, it captures its essence. Arbitration, in fact, sacrifices rights for the sake of efficiency, expeditiousness, and flexibility. This is the *raison d'etre* of arbitration and its main disparity with ordinary court litigation. That is why people, when having a dispute, resort to arbitration.

Having said that, yes there is a hierarchy among the principles of international arbitration, in which the autonomy rights of the parties come second to the efficiency and flexibility of the arbitral process. It follows then that the inquisitorial system is closer to arbitration than its adversarial counterpart. It guarantees the efficient, flexible, neutral, and confidential determination of the arbitral dispute. It may curb the autonomy rights of the parties, but sustaining rights is never the prime objective of such dispute resolution system named international commercial arbitration.

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<sup>261</sup>Brunet, *supra* note 259, at 99 (citing 783 F.2d 743 (8<sup>th</sup> Cir.), *cert. denied*, 476 U.S. 1141 (1986), at 751 n.12).

## Chapter VII: Conclusion

International commercial arbitration is a system that functions in a universal context. It does not relate to a certain culture; rather, it has one of its own that is known by a unique set of principles and objectives. This fact should be born in mind by those who avail themselves of this dispute resolution mechanism. They should relax their cultural convictions when negotiating arbitral agreements. They should leave their national code of procedure at home when heading to arbitral tribunals. They should, rather, adopt those proceedings that are most compatible with their purpose for going to arbitration in the first place. Otherwise, the option of national courts would not be much different.

This paper responds to the current tendency of utilizing adversarial techniques in arbitration proceedings. It concludes that these techniques are generally inappropriate for international commercial arbitration. The inquisitorial system, by contrast, is more proximate to the features of arbitration. However, this should not be taken as a culturally-driven preference of the inquisitorial system *per se*. It is actually an impartial demonstration of the suitability of its very tools with international arbitration. They are efficient, flexible, neutral, and confidential, and therefore they are more fulfilling to the ambitions of those who prefer international arbitration over national litigation.

In corroboration with this conclusion, the ICC makes use of inquisitorial techniques and avoids adversarial procedures. On the one hand, it empowers its court and arbitral tribunal with such capacities to dominate the arbitral process as inquisitorial judges do. On the other hand, it abandons these instruments which are espoused by the adversarial system. Furthermore, as the CRCICA rules have shown to be a mixture of both systems, they are absent many adversarial devices. There are no pretrial activities save for the construction of the arbitral tribunal, no deeply established right to a hearing, no cross-

examinations, and even the shape of discovery of documents is not clearly recognized. Indeed, this is a manifestation of the inconveniency of the adversary system within the arbitral process in general.

For those international arbitrators who see in the adversarial system more appropriate procedures, I say you are far from accurate. In spite of the fact that the adversarial system is hospitable to the autonomy rights of the parties, it comprises a set of techniques that go against the grain of international arbitration. Autonomy rights are not in essence its only and prime objective. Further, some of these techniques are direct upshots of a certain approach with which international arbitration has no affinity. There is no jury panel in arbitration sessions that justifies the presentation of evidence orally rather than in writing, with the attendant lengthy arguments, examinations, and cross-examinations.

Last but not least, one international arbitrator<sup>262</sup> told me that in countries where the judicial system is efficient, flexible, and speedy, people tend to prefer ordinary court litigation over arbitration. In addition to that, with the judicialization of international arbitration and the incorporation of these inefficient, complex adversarial techniques into the arbitral process, international arbitration, I believe, would find many a reason to vanish.

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<sup>262</sup>International arbitrator, Dr. Mohammed Badran, *see supra* note 215.