Resolving Information Technology Disputes After NAFTA: A Practical Comparison of Domestic and International Arbitration

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I. INTRODUCTION

CEO Alice Souza slammed down the telephone receiver. "We trusted them and this is how they repay us," she angrily muttered. After such a successful business relationship, Souza wondered why Linguistics International, Inc. (LII), a former subcontractor, would do this to her company. She realized that she must act quickly to protect her company, Dialog Scan, Inc. (DSI). Maybe requesting an injunction from the United States federal courts was the best course of action. Souza dialed her outside counsel and began to relate the troubling business developments of the past few days.

DSI is a United States company that manufactures and distributes devices that allow for documents in English to be scanned and then appear on a computer screen for review or be saved on a computer disc for later use. The scanning device saves time and costs associated with manual data entry. Souza was particularly proud of DSI's software program ScanSpeed. The copyrighted software program is used to operate the scanning device which allows for the most rapid scanning process in the industry. Its logo, a racing black

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panther, is trademarked. DSI utilized several subcontractors in creating ScanSpeed, including LII, which is a joint venture between a Mexican and a Canadian corporation. LII's headquarters are located in Mexico City. DSI had licensed the program to several other companies. Souza was hoping to work with LII in the future in order to expand DSI's market by improving ScanSpeed and offering the program in other languages. LII does not make or sell scanning devices, but DSI recently learned that LII had begun marketing a rapid scanning program called ScanRead in Mexico and Canada. ScanRead not only scans documents, but can then translate them into Spanish, French or English. The software program uses a logo of a black racing horse in full gallop.

Souza informed her lawyers that she believed that LII developed its product from some of DSI's proprietary data shared during the subcontracting process. In addition, Souza thought that the name and logo for LII's program were too close to their own trademarks and might be misleading to customers. DSI's attorneys initially began to prepare a request for a preliminary injunction and a formal complaint alleging breach of contract, misappropriation of proprietary data, and copyright and trademark violations against LII. Souza worried that a costly and lengthy legal battle would drain limited company resources from marketing or research and development efforts. However, Souza received a telephone call the next morning from her attorneys. The lawyers had found an arbitration clause in the original subcontracting agreement with LII. The clause stated, "The parties agree that any claims arising under the terms of this contract shall be resolved under the rules and procedures of the Commercial Arbitration and Mediation Center for the Americas (CAMCA)."[1] DSI had used arbitration for

1. In international arbitration, parties may elect to create their own arbitration procedures and rules (ad hoc) or to seek the assistance and follow the procedures of an independent administering organization, such as CAMCA or the International Chamber of Commerce in Paris (institutional). LUCILLE M. PONTE & THOMAS D. CAVENAGH, ADR IN BUSINESS 237-38 (1999); David W. Rivkin, *International Arbitration*, *in* COMMERCIAL ARBITRATION FOR THE 1990S, at 123, 126-28 (ABA, 1991); Richard Allan Horning, *In Overseas Pacts, ADR Lets Parties Pick Forum*, NAT'L L.J., May 12, 1997, at C50. In this instance, the parties agreed to use institutional arbitration. For a discussion of various administering organizations, see PONTE & CAVENAGH, *supra*, at 238-40; Rivkin, *supra*, at 127-28; James E. Meason & Alison G. Smith, *Non-Lawyers in International Commercial Arbitration: Gathering Splinters on the Bench*, 12 NW. J. INT'L L. & BUS. 24, 31-40 (1991). Based upon the nature of the contract between DSI and LII, the parties could have opted at the outset to refer their intellectual property disputes to the Arbitration and Mediation Center of the World Intellectual Property Organization (WIPO) which offers specialized ADR services for international intellectual property disagreements. *See generally* Julia A. Martin, *Arbitrating in the Alps Rather than Litigating in Los Angeles: The Advantages of International Intellectual Property-Specific Alternative Dispute Resolution*, 49 STAN. L. REV. 917 (Apr. 1997) (article considers limitations of

domestic disputes before, but not international ones. Souza asked her attorneys for more information about CAMCA and if there were any major differences between the use of international and domestic arbitration.

The above fact pattern is a hypothetical situation, but the business problem is real. When the North American Free Trade Agreement (NAFTA) took effect in 1994, many businesses sought to take advantage of the business opportunities presented by the phase-out of trade barriers.[2] Although NAFTA sought to promote economic activity between the NAFTA nations, the agreement focuses on resolving conflicts between the signatory nations and gives little guidance to private businesses on how to resolve future business disputes.[3] NAFTA does not provide any formal mechanism for resolving private business disputes but merely encourages the use of arbitration and other ADR methods.[4] In addition, the treaty prompts the NAFTA signatories to create an Advisory Committee on Private Commercial Disputes to study and report on the availability and

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national litigation in resolving intellectual property disputes and outlines benefits of WIPO's ADR services). Before selecting a particular administering entity, the disputing parties should be familiar and in agreement with the organization's rules and procedures. Business people should not choose any administering entity without first reviewing its rules, procedures, and fees with their attorneys.

2. On January 1, 1994, NAFTA took effect between the United States, Canada, and Mexico. North American Free Trade Implementation Act, 19 U.S.C. § 3311 (1998). With 390 million customers, $8.6 trillion gross domestic product, and $437 billion in intra-region trade, NAFTA created the world's largest international free trade zone. *See* Anthony Faiola & Steven Pearlstein, *Leaving Big Brother's Shadow*; *Latin Nations Confront U.S. as Equals at Americas' Summit*, WASH. POST, Apr. 16, 1998, at A1.

3. NAFTA establishes a Free Trade Commission made up of cabinet-level ministers of each of the nations. The Commission is charged with helping to resolve conflicts between the NAFTA nations over the interpretation and application of the treaty using conciliation, mediation, and arbitration procedures. *See* North American Free Trade Agreement, Oct. 7, 1992 (effective Jan. 1, 1994) arts. 2001-2020 (LEXIS, NSAMER Library, NAFTA File) [hereinafter NAFTA]; Ginger Lew & Jean Heilman Grier, *The Role of International Law in the Twenty-First Century: A Role for Governments in the Resolution of International Private Commercial Disputes*, 18 FORDHAM INT'L L. J. 1720 (1995).

4. Under art. 2022(1), NAFTA states that "[e]ach party shall, to the maximum extent possible, encourage and facilitate the use of arbitration and other means of alternative dispute resolution for the settlement of international commercial disputes between private parties in the free trade area." NAFTA, *supra* note 3, art. 2022(1); Lew & Grier, *supra* note 3, at 1720-21. The usefulness of ADR for resolving international commercial disputes is reflected in the inclusion of an ADR clause in the Treaty on Free Trade Between the Republic of Colombia, the Republic of Venezuela, and the United Mexican States ("G-3" agreement) and the recommended use of ADR for commercial disputes in a recent report from the Asian-Pacific Economic Cooperation Pacific Business Forum. *See* Lew & Grier, *supra* note 3, at 1723-24 & nn.14-17.

effectiveness of arbitration and other ADR methods to resolve private international commercial disputes.[5]

Long before the passage of NAFTA, arbitration was a standard method for resolving international commercial disagreements. This Article will consider some of the practical differences between the use of United States domestic arbitration and international arbitration[6] in resolving this information technology dispute. In particular, this article will address the issues of: (1) substantive arbitrability, (2) requests for provisional remedies from United States courts, (3) limits on discovery, (4) conduct of the arbitration hearing, and (5) nature and enforcement of arbitral awards. Special attention will be given to how the arbitration rules of CAMCA[7] address some of these typical distinctions.

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5. *See* NAFTA, *supra* note 3, art. 2022(4); Lew & Grier, *supra* note 3, at 1720-22. Two government representatives from each NAFTA nation chair the Advisory Committee which consists primarily of private sector representatives. Lew & Grier, *supra* note 3, at 1721 n.10. From the outset, the Advisory Committee was charged with the following responsibilities:

> (1) compilation, examination, and assessment of existing means for settling private international commercial disputes; (2) identification of sectors and types of businesses that would particularly benefit from the use of ADR; (3) promotion of the use of arbitration and other procedures for resolving private international commercial disputes in the NAFTA region, including ways to increase private sector awareness of the benefits of using ADR; (4) facilitation of the use of arbitration and other procedures in the NAFTA region, including the use of model ADR and other contractual clauses; (5) opportunities for expanded cooperation between institutions with an interest or involvement in ADR in the NAFTA region; and (6) issues relating to the enforcement of arbitration agreements and awards, and other litigation issues related to ADR.

Id. at 1721-22.

6. In the United States, international arbitration may involve citizens (individuals or corporations) from different countries or may concern a dispute solely between citizens of the United States if the arbitration involves property located in another country, the performance or enforcement of an arbitral award in another nation, or a dispute with a reasonable relationship to one or more foreign nations. *See* 9 U.S.C. § 202 (1997); *see also* Bergeson v. Joseph Muller Corp., 710 F.2d 928, 932 (2d Cir. 1983); Dworkin-Cosell Interair Courier Servs., Inc. v. Avraham, 728 F. Supp. 156, 158-59 (S.D.N.Y. 1989) (both cases define concept of nondomestic or international arbitration award).

7. In response to NAFTA and in recognition of arbitration's traditional role in the global marketplace, the British Columbia International Commercial Arbitration Centre, the Quebec National and International Commercial Arbitration Centre, the Mexico City National Chamber of Commerce, and the American Arbitration Association joined forces to establish CAMCA in 1995. CAMCA seeks to study, administer and promote the use of international arbitration, mediation, and other ADR mechanisms to help resolve private business conflicts. A twelve-member Governing Council with representatives from each NAFTA nation developed CAMCA's arbitration and mediation rules and procedures. Its international roster of arbitrators and mediators lists neutrals from each of the signatory nations as well as third party countries. Aside from actually resolving private business disputes, CAMCA serves as an educational resource for mediators, arbitrators, business people, and legal professionals seeking information about international ADR mechanisms and CAMCA procedures and services. *See* Commercial Arbitration and Mediation Center for the Americas, Mediation and Arbitration Rules, Introduction, at 1 (effective Mar. 15, 1996) <http://www.adr.org/rules/camca_rules.html>.

II. SUBSTANTIVE ARBITRABILITY

At the threshold of an attempt to resolve a dispute through arbitration is the question of substantive arbitrability. Although parties may have included an arbitration clause within their agreement, not all types of disputes may be covered by such a clause. Thus, it must be determined whether a particular issue is arbitrable under the agreement. In United States domestic arbitration, the question of arbitrability is not left, as one finds in international arbitration,[8] to the arbitrators, but is one that must be resolved by the courts.[9] It is important to note, however, that the court will not undertake an analysis of the validity of the dispute, nor will it assess the merits of the claim, but will instead limit its scrutiny to an examination of the agreement to arbitrate.[10]

Arbitration agreements that involve foreign commerce are governed by the Federal Arbitration Act (FAA).[11] Consequently, if the arbitration clause contained in the contract between DSI and LII was to be construed under domestic law, the question of arbitrability would be determined under the FAA.[12] As such, the courts would then employ a three-step analysis to determine whether to compel arbitration of the dispute.[13] First, the court must determine whether

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8. Under the doctrine of *kompetenz/kompetenz* the arbitral tribunal has power to determine substantive arbitrability. *See* Rivkin, *supra* note 1, at 129. The UNCITRAL Rules also follow the doctrine of *kompetenz/kompetenz*. Article 21 reads, "The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement." <http://www.adr.org/rules/uncitral_rules.html>.

9. *See* AT&T Technologies, Inc. v. Communications Workers of Am., 475 U.S. 643, 649 (1986). The Court held that unless clearly and unmistakably stated by the parties to the contrary, the question of whether the parties agreed to arbitrate their dispute is to be decided by the court rather than the arbitrator.

10. *See id*. at 650; *see also* Prima Paint Corp. v. Flood & Cronkin Mfg. Co., 388 U.S. 395, 403 (1967) (holding that a federal court may only consider issues that relate to the making and performing of the agreement to arbitrate); United Steel Workers of Am. v. Warrior and Gulf Navigation Co., 363 U.S. 574, 584 (1960) (cautioning that judicial inquiry be strictly confined to the question of whether the reluctant party agreed to arbitrate the grievance).

11. 9 U.S.C.A. §§ 1-16 (1998).

12. 9 U.S.C.A. § 2 provides in pertinent part:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any such contract.

See Moses H. Cone Mem'l Hosp. v. Mercury Constr., 460 U.S. 1, 24 (1983) (holding that section 2 of the FAA created a "federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act").

13. Under the FAA, 9 U.S.C.A. § 3 (1998), an aggrieved party may bring a motion in a United States district court to stay court proceedings. An aggrieved party may also petition a district court under 9 U.S.C.A. § 4 of the FAA for an order to compel arbitration of the dispute.

an agreement to arbitrate exists.[14] Next, the court must decide whether the particular issue falls within the scope of the arbitration agreement.[15] Last, the court must see whether legal or equitable reasons preclude the parties from resolving their dispute through arbitration.[16]

In applying this tripartite analysis to the hypothetical arbitration clause in the DSI contract, the first prong is easily satisfied. The contract contains an arbitration clause; thus, there is an agreement to arbitrate. With regard to the second prong of analysis involving the scope of the clause, it is important to note that courts operate under the presumption of arbitrability.[17] Specifically, a petition to compel arbitration should not be denied by the court unless there is positive assurance that "the arbitration clause is not susceptible to an interpretation that covers the asserted dispute."[18] Consequently, if the factual allegations of the dispute "touch matters" covered by the arbitration agreement, then such matters must be arbitrated.[19] Therefore, the breach of contract issue raised in the DSI complaint would be arbitrable under this analysis.

The question of whether the tort claims of misappropriation, copyright and trademark infringement as alleged by DSI fall within the parameters of the arbitration agreement must ultimately be resolved by examining the words of the clause itself. The contract compels the arbitration of "any claims arising under the terms of the contract." By its language, one can therefore infer that the parties clearly intended to exclude claims that do not arise from the

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14. *See AT&T Technologies*, 475 U.S. at 647 (citing United Steel Workers of Am. v. Warrior and Gulf Navigation Co., 363 U.S. 574 (1960)). The Court noted that arbitration was a matter of contract and thus a party could not be required to submit a dispute to arbitration where it had not agreed to do so. *Id.*

15. *See* Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985). In *Mitsubishi* the Court held that statutory claims involving antitrust issues fell within the scope of the arbitration agreement. *Id.* at 628; *see also United Steel Workers* 363 U.S. at 584 (holding that unless it may be said with positive assurance that the arbitration is not susceptible of an interpretation that covers the asserted dispute, the claim must be submitted to arbitration).

16. *See Mitsubishi Motors*, 473 U.S. at 631. The court stated that within the field of international commerce, there are strong public policy reasons that justify the enforcement of an international arbitration agreement. *Id.*

17. *See Moses H. Cone*, 460 U.S. at 24.

18. *United Steel Workers of Am.*, 363 U.S. at 574.

19. *See Mitsubishi Motors*, 473 U.S. at 625; Genesco, Inc. v. T. Kakiuchi & Co., 815 F.2d 840, 846 (2d Cir. 1987) (noting that focus must be on the factual allegations stated in the complaint as opposed to the legal cause of action asserted); *see also* Tracer Research Corp. v. National Envtl. Servs. Co., 42 F.3d 1292, 1295 (9th Cir. 1994) (holding that an arbitration clause covering disputes "arising out of" or "arising under" an agreement, applies only to those disputes that relate to the interpretation and performance of the contract itself).

interpretation or performance of the contract itself.[20] Where, however, the tort claim stems from conduct that occurred within the context of the contractual relationship between the parties, the court must scrutinize the language of the clause to determine whether a broad or narrow interpretation of the scope of the clause is warranted.[21] Generally, if a clause is construed as broad, then claims directly or indirectly related to the subject matter of the contract will be found arbitrable.[22] On the other hand, if an arbitration agreement is given a narrow construction, only those torts contemplated by the parties would be arbitrable.[23] The distinction between a broadly worded and narrowly worded clause, however, lies in how the arbitration clause is phrased.[24] A broad clause typically includes phraseology such as "arising out of *or* in relation to" the contract, while a narrow clause will simply compel the arbitration of disputes "arising out of" the contract.[25] Hence, because the arbitration clause in the DSI contract is limited only to those disputes "arising out of" the contract, it is likely to receive a narrower reading by the courts, and consequently, the misappropriation, copyright, and trademark infringement claims would not be found arbitrable.

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20. *See generally* Joseph T. McLaughlin, *Arbitrability: Current Trends in the United States*, 59 ALBANY L. REV. 905 (1996). McLaughlin notes that tort claims are not typically resolved through arbitration due to the absence of any prior contractual relationship. Since a party may only be compelled to arbitrate when it agreed to do so, such claims cannot be arbitrated. *Id*. at 931; *see also* David E. Wagoner, *Tailoring the ADR Clause in International Contracts*, 48 ARB. J. 77 (June 1993).

21. *See generally* Alison Brooke Overby, *Arbitrability of Disputes Under the Federal Arbitration Act*, 71 IOWA L. REV. 1137 (1986); *Moses H. Cone*, 400 U.S. at 24, 1144-47 (stating that the policy of the FAA requires a liberal reading of arbitration agreements and that as a matter of federal law, any doubts regarding the scope of an arbitrable issue should be resolved in favor of arbitration).

22. *See* McLaughlin, *supra* note 20, at 932; *see* Zolezzi v. Dean Witter Reynolds, Inc., 789 F.2d 1447 (9th Cir. 1986) (court held that defamation, invasion of privacy, and intentional infliction of emotional distress claims were arbitrable); Fleck v. E.F. Hutton Group, Inc., 891 F.2d 1047, 1048 (2d Cir. 1989) (claims for libel, slander, portrayal in false light, and conspiracy to commit tortious interference stemming from an employment contract held arbitrable).

23. *See* Overby, *supra* note 21, at 1148; *see* PaineWebber Inc. v. Hartmann, 921 F.2d 507, 513 (3d Cir. 1990) (holding that where an arbitration is limited in substantive scope, courts should not let federal policy favoring arbitration outweigh the intention of the parties by extending the coverage of the arbitration clause beyond what was intended by the parties).

24. *See Prima Paint*, 388 U.S. at 406.

25. *See* Overby, *supra* note 21, at 1148; *see also* Bavaratti v. Joesphal, Lyon & Ross, Inc., 28 F.3d 704, 710 (7th Cir. 1994) (holding that arbitration clause which compelled arbitration of any dispute "arising out of or in connection with the business" covered a claim for defamation); Gidadex v. Campaniello Imports, Ltd., No. 97 Civ. 9518(SAS), 1998 WL 312131 (S.D.N.Y. June 10, 1998) (holding that unfair competition, unjust enrichment, and misappropriation claims fell within scope of arbitration clause which called for arbitration of "any dispute which might arise between the parties in relation to that which is the object of the present agreements").

In addressing the legal and equitable limitations pertaining to the third prong of analysis, the court will focus on whether the clause was entered into fairly (i.e. free from fraud, duress or other challenges to the genuineness of assent to the contract) and whether legal or public policy considerations preclude arbitrability. In the hypothetical dispute between DSI and LII, nothing in the facts suggests that DSI and LII did not voluntarily enter into a valid arbitration clause in accordance with section 2 of the FAA.[26]

As for legal and public policy concerns, courts have increasingly broadened the scope of claims subject to arbitration. This trend toward judicial promotion of arbitration, is reflected in the enforcement of agreements to arbitrate disputes involving employment discrimination, antitrust, RICO, and securities claims.[27] With regard to intellectual property disputes, though courts once considered claims for patent infringement to be precluded from arbitration,[28] federal law now expressly provides for arbitration of patent disputes.[29] Notwithstanding the absence of an express mandate from Congress enforcing the arbitration of trademark and copyright disputes, however, courts have held that agreements which compel the arbitration of trademark and copyright disputes are enforceable.[30]

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26. Under 9 U.S.C.A. § 2, arbitration clauses in commercial contracts are construed to be valid, irrevocable, and enforceable unless there are grounds in law or equity for revocation of the contract. *See* Broemmer v. Abortion Servs. of Phoenix, Ltd., 840 P.2d 1013, 1018 (Ariz. 1992) (where court held arbitration agreement to be unconscionable due to the circumstances surrounding the acceptance of the contract).

27. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 27-8 (1991) (where the Court approved arbitration for claims involving age discrimination); Scherk v. Alberto-Culver Co., 417 U.S. 506, 513 (1974) (holding that where a contract involves a truly international transaction, an agreement to arbitrate claims arising under securities is enforceable); Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 633 (1985) (holding that enforcement of arbitration agreement covering antitrust disputes was not contrary to public policy). *See* Shearson/American Express, Inc. v. McMahon, 107 S. Ct. 2332, 2340 (1987) (court enforced agreement to arbitrate claims brought by customers against brokers under RICO); Jill Pietrowski, *Enforcing International Commercial Arbitration Agreements—Post* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 36 AM. U. L. REV. 57, 61 (1986).

28. *See* Hanes Corp. v. Millard, 531 F.2d 585, 544 (D.C. Cir. 1976); Beckman Instruments, Inc. v. Technical Development Corp., 433 F.2d 55, 62-63 (7th Cir. 1970).

29. 35 U.S.C.A. § 294 (1998).

30. *See* Alexander Binzel Corp. v. Nu-Tecsys Corp., No. 91 C 2092, 1992 WL 26932, at *4 (N.D. Ill. Feb. 11, 1992) (defendant failed to carry its burden of demonstrating that Congress intended to exclude federal trademark claims from arbitration); Lombard Securities Inc. v. Thomas F. White, 903 F. Supp. 895 (1995) (holding that if Congress intended to prohibit a waiver of a judicial forum for a particular type of claim, such intent must be discernible from the statute itself or its legislative history); McMahan Securities Co. L.P. v. Forum Capital Markets L.P., 35 F.3d 82 (2d Cir. 1994) (rejecting argument that copyright claims are too complex for arbitration, court held that a copyright dispute was arbitrable). *See* Pietrowski, *supra* note 27, at 71-72, noting that other countries may refuse to compel arbitration of intellectual property disputes.

Consequently, in light of such precedent, it is likely that the copyright and trademark claims stemming from the contract between DSI and LII would be within the scope of the arbitration agreement and thus would be arbitrable under domestic law.

Contrary to domestic law on arbitration, where substantive arbitrability is determined by judicial scrutiny, under CAMCA the arbitral tribunal itself has the power to determine both the existence and validity of the contract and the existence and validity of the arbitration agreement, which is considered to be separate and independent from the contract.[31] The tribunal, however, is required to apply the law which is designated by the parties as applicable to the contract.[32] Thus, if DSI and LII included a choice of law clause in their contract which specified the federal law of the United States as the governing law, then the tribunal will be required to undergo the same analysis as employed above. In the absence of a choice of law clause however, the determination of the applicable law is left up to the discretion of the arbitral tribunal.[33]

III. ALLOWANCE OF PROVISIONAL REMEDIES

Under CAMCA's rules, parties are allowed to apply to the courts for equitable relief prior to any arbitral proceedings. Such applications are not viewed as inconsistent with arbitration agreements.[34] In the hypothetical dispute, DSI is hoping to prevent LII from selling or distributing LII's ScanRead program. DSI's attorneys are preparing a request for a preliminary injunction for the

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31. *See* <http://www.adr.org/rules/camca_rules.html#intro>. Article 16 of CAMCA Arbitration Rules provides in part:

> 1. The tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity the arbitration agreement.
>
> 2. The tribunal shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract.

Article 16 is also consistent with the *kompetenz/kompetenz* doctrine discussed in note 8, *supra*.

32. *See id.* Article 30 of the CAMCA Arbitration Rules provides in part:

> 1. The tribunal shall apply the laws or rules of law designated by the parties as applicable to the dispute. Failing such a designation by the parties, the tribunal shall apply such law or laws as it determines to be appropriate.

33. *See id.*

34. *See* Commercial Arbitration and Mediation Center of the Americas art. 23(3) (1996) <http://www.adr.org/rules/camca_rules.html#intro>. Subarticle three states that "[a] request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate." *Id.*

United States federal courts.[35] Applications for equitable relief are viewed differently depending on the national laws of the arbitral forum.

The U.S. federal courts apply the terms of the Federal Arbitration Act (FAA)[36] which provides a broad scheme for enforcing arbitral agreements and final awards and favors international and domestic interstate arbitration.[37] The Supreme Court has rendered two decisions dealing with equitable relief in an arbitral setting, *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*[38] and *Moses H. Cone Memorial Hospital v. Mercury Construction Co.*[39] In both cases, the Court limited federal court authority to grant equitable relief primarily to staying litigation in cases in which there is a valid arbitration agreement and ordering parties to engage in arbitration.[40] In light of FAA policies, the Court viewed requests for equitable relief outside these grounds as incompatible with agreements to arbitrate and as serving to delay arbitral proceedings and to intrude improperly on the authority of the arbitral panel.[41]

Based upon these earlier Supreme Court decisions, the federal courts in the past would rarely mandate any provisional remedies which may disrupt or delay the arbitration proceedings or impact the outcome of the case. At most, the federal courts would impose provisional remedies that promote the successful completion of the arbitration process, such as compelling parties to participate in arbitration proceedings, appointing members to an arbitral panel, or

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35. *See* Alison C. Wauk, Comment, *Preliminary Injunctions in Arbitrable Disputes: The Case for Limited Court Jurisdiction*, 44 U.C.L.A. L. REV. 2061, 2066-72 (1997) (article provides outstanding review of varied Supreme Court and federal court precedent on judicial grants of equitable relief in arbitrable disputes).

36. 9 U.S.C. §§ 1-16 (1998).

37. In recent years, the Supreme Court has consistently indicated that the FAA was intended to reverse traditional judicial hostility towards arbitration and to place arbitration agreements on an equal footing with other commercial contracts. *See, e.g.*, Mastrobuono v. Shearson Lehman Hutton, Inc., 115 S. Ct. 1212, 1219 (1995) (upheld arbitration clause allowing for arbitral award of punitive damages not provided for under New York state law); *Gilmer*, 500 U.S. at 27-8 (upheld use of arbitration in statutory age discrimination case); *Mitsubishi Motors*, 473 U.S. at 61 (upheld international arbitration clause for antitrust matter); *Scherk*, 417 U.S. at 513 (upheld international arbitration clause in trademark dispute).

38. *See* Prima Paint Crop. v. Flood & Cronkin Mfg. Co., 388 U.S. 395, 404 (1967); Wauk, *supra* note 35, at 2078.

39. *See* Moses H. Cone Mem'l Hosp. v. Mercury Loustr., 460 U.S. 1, 8-9 (1983); Wauk, *supra* note 35, at 2078.

40. *See Moses H. Cone*, 460 U.S. at 22-23; *Prima Paint*, 388 U.S. at 400, 403-04.

41. *See Moses H. Cone*, 460 U.S. at 22-23; *Prima Paint*, 388 U.S. at 404; PONTE & CAVENAGH, *supra* note 1, at 255; Wauk, *supra* note 35, at 2078-79; Susan Cohen, *International Commercial Arbitration: A Comparative Analysis of the United States System and the UNCITRAL Model Law*, 12 BROOK. J. OF INT'L LAW 703, 716 (1986).

confirming final arbitration awards.[42] Applying this line of precedent, United States courts are unlikely to grant DSI's application for provisional relief, regardless of whether it is domestic or international arbitration. Therefore, in the DSI-LII dispute, the United States courts may likely defer to the authority of and final award by the arbitral panel before considering any equitable measures.[43]

However, this Supreme Court precedent has not always been consistently followed by the circuits which have split over the issue of judicial authority to award equitable relief in arbitrable disputes in certain instances.[44] Some courts have asserted that the court may grant interim relief if the parties have explicitly allowed for such judicial intervention in their arbitration agreement.[45] Other circuits have stated that the courts may grant equitable relief in order to preserve the status quo and the meaningfulness of the arbitration process.[46] Also, some courts have granted requests for equitable remedies on a temporary basis to maintain the status quo until the arbitral panel has had an opportunity to assemble and make its own determination as to equitable remedies.[47]

Yet, in applying each of these different approaches, it is still unlikely that DSI will be successful in its request for arbitral relief in the United States courts. First, the arbitration clause does not specifically state that the courts may provide interim relief. Second, if DSI's request is granted, it will not maintain the status quo since stopping the sales and distribution of ScanRead will seriously injure LII's financial and market position, even if granted on only a temporary basis until the panel assembles. In addition, any arbitration

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42. *See, e.g.*, Borden, Inc. v. Meiji Milk Products Co., Ltd., 919 F.2d 822, 826 (2d Cir. 1990), *cert. denied*, 500 U.S. 953 (1990) (court upheld district court injunction compelling arbitration in international trademark dispute). *Cf.* International Shipping Co. S.A. v. Hydra Offshore, Inc., 875 F.2d 388, 391 (2d Cir. 1989), *cert. denied*, 493 U.S. 1003 (1989) (court determined lack of subject matter jurisdiction since moving party was not seeking to compel arbitration or enforce arbitral award); McCreary Tire & Rubber Co. v. CEAT S.P.A., 501 F.2d 1032, 1037 (3d Cir. 1974) (appeals court overruled district court grant of attachment as equitable measure as it would allow avoidance of agreed-upon arbitration process).

43. *See* PONTE & CAVENAGH, *supra* note 1, at 255; Cohen, *supra* note 41, at 716-17.

44. *See* Wauk, *supra* note 35, at 2066-72.

45. *See id.* at 2067-68, 2070-71, 2086-88 (citing Peabody Coalsales Co. v. Tampa Elec. Co., 36 F.3d 46, 48 (8th Cir. 1994); RGI, Inc. v. Tucker & Associates, Inc., 858 F.2d 227, 229-30 (5th Cir. 1988); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hovey, 726 F.2d 1286, 1292 (8th Cir. 1984); Erving v. Virginia Squires Basketball Club, 468 F.2d 1064, 1067 (2d Cir. 1972).

46. *See id.* at 2066, 2068-69 (citing Teradyne, Inc. v. Mostek Corp., 797 F.2d 43 (1st Cir. 1986); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley, 756 F.2d 1048 (4th Cir. 1985)).

47. *See id.* at 2071-72 (citing Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dutton, 844 F.2d 726 (10th Cir. 1988); Merrill Lynch, Pierce Fenner & Smith, Inc. v. Salvano, 999 F.2d 211, 214 (2d Cir. 1993).

to determine whether LII has acted illegally will not be a meaningless formality, since the arbitral panel would have the authority to award equitable relief and damages to compensate adequately DSI for its past losses.

Outside the United States, some nations have adopted the terms of the Model Law of United Nations Commission on International Trade Law (UNCITRAL)[48] or have adopted certain national laws which allow their national courts to grant a wide range of provisional remedies.[49] The courts in other countries may grant requests for attachments, restraining orders, and injunctive relief based on their perception of the likely outcome of the arbitration process. Such requests are not typically viewed as incompatible with the arbitration process.[50] DSI's lawyers must determine whether the laws of Canada or Mexico provide their courts with the authority to consider and to order the preliminary injunction.

In the past, similar to the United States, the Canadian courts viewed arbitration with a certain degree of judicial hostility and allowed for judicial intervention in the process.[51] However, in 1986, Canada became the first nation to adopt the UNCITRAL Model Law on a federal basis,[52] and the provinces have enacted somewhat varying versions of the Model law into their codes.[53] In line with UNCITRAL's call for limited judicial intervention,[54] the Canadian federal courts may be less likely to grant equitable relief as Canada

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48. In 1985, UNCITRAL established its model law on international arbitration in an attempt to harmonize existing national laws on international arbitration and to reduce impediments to the use of international arbitration as a method of conflict resolution. The model law contains detailed rules for party use in international arbitration. A number of countries, including Canada and some states in the United States have adopted the model law. *See* PONTE & CAVENAGH, *supra* note 1, at 236; Horning, *supra* note 1, at C50; Cohen, *supra* note 41, at 705. *See also* UNCITRAL Arbitration Rules (effective Dec. 1976) <http://www.adr.org/rules/uncitral_rules.html>. The UNCITRAL Model Law tries to limit judicial intervention in order to allow for the rapid resolution of disputes through arbitration. *See* Rivkin, *supra* note 1, at 125; Paul J. Davidson, *Symposium: Current Issues in International Commercial Arbitration: International Commercial Arbitration Law in Canada*, 12 J. INT'L. L. BUS. 97, 105 (1991).

The UNCITRAL procedures specifically allow for the arbitral panel to issue orders for interim relief. UNCITRAL Arbitration Rules arts. 26(1-2), 32 (effective Dec. 1976) <http://www.adr.org/rules/uncitral_rules.html>. In addition, the rules leave the door open for parties to seek equitable relief from the courts. UNCITRAL Arbitration Rules art. 26(3) (effective Dec. 1976) <http://www.adr.org/rules/uncitral_rules.html>. The relevant article states that "[a] request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement."

49. *See* PONTE & CAVENAGH, *supra* note 1, at 255; Cohen, *supra* note 41, at 716.

50. *See* PONTE & CAVENAGH, *supra* note 1, at 23; Cohen, *supra* note 41, at 716.

51. *See* Davidson, *supra* note 48, at 97-99.

52. *See id.* at 105.

53. *See id.* at 105-06.

54. *See* Rivkin, *supra* note 1, at 125; Davidson, *supra* note 48, at 105.

continues to promote the use of commercial arbitration through lessened court intervention in arbitral proceedings.[55] Since the provinces have adopted their own versions of UNCITRAL, DSI's lawyers must also review the case law in specific provinces before applying for equitable relief.

In Mexico, injunctive relief is not presently available under its civil code for commercial matters.[56] Under the Calvo Doctrine, which is incorporated into Mexico's Constitution, Mexico sought to insure that foreign nationals and corporations would not receive better treatment than Mexican nationals and corporations in its courts.[57] Based on this concept, the Mexican courts may be unlikely to mandate equitable relief in our hypothetical international arbitration case since such remedies are not available to Mexican nationals and businesses involved in commercial litigation disputes. However, DSI's lawyers will have to thoroughly consider Mexico's evolving arbitration and commercial laws before deciding whether to apply for equitable relief.

In United States domestic and international arbitration, it is common for the arbitral panel to have the authority to independently issue interim measures in order to protect property that is the subject of the dispute.[58] In this case, it may be more appropriate for DSI to seek injunctive relief from the arbitral panel, rather than applying to the national courts of any of the NAFTA signatory nations. This approach could also save all the parties' time and money associated with any court battle over the issue of equitable measures that are unlikely to be granted. Under CAMCA's rules, the arbitrators independently possess the authority to grant provisional remedies to

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55. *See* Davidson, *supra* note 48, at 97, 106.

56. *See* Hope H. Camp, Jr., *Dispute Resolution and U.S.-Mexico Business Transactions*, 5 U.S.-MEXICO L.J. 85, 89 (1997).

57. *See* Jane L. Volz & Roger S. Haydock, *Foreign Arbitral Awards: Enforcing the Award Against the Recalcitrant Loser*, 21 WM. MITCHELL L. REV. 867, 882-83 (1996). The Calvo Doctrine was established in response to the exploitation of Latin American nations by foreign multinationals. *See id.* at 882.

58. *See* Commercial Arbitration Rules of the American Arbitration Association § 34 (1996) <http://www.adr.org/rules/commercial_ rules. html> (allowing arbitrators to order interim relief needed to protect property that is subject matter of arbitration without prejudice to party rights or arbitral outcome; silent as to party applications to courts for interim relief); International Arbitration Rules of the American Arbitration Association art. 21 (1997) <http://www.adr.org/rules/international_arb_rules.html> (permitting arbitrators to order interim relief to protect and conserve property including injunctive relief and interim awards; resort to judicial branch for such measures not viewed as incompatible); UNCITRAL Arbitration Rules art. 26(1-2) (effective Dec. 1976) <http://www.adr.org/rules/uncitral_rules.html> (allows arbitral panel to protect goods in dispute through interim measures; resort to judicial branch for such measures not viewed as incompatible).

parties in an arbitration.[59] Therefore, DSI's best option for interim relief is to apply to the arbitral panel for assistance.

IV. LIMITATIONS ON DISCOVERY

In this complex technological dispute, a great deal of discovery may be required in order to meet one's burden of proof or to defend one's position. In the DSI-LII dispute, substantial evidence will need to be gathered regarding the nature of the disclosures of proprietary data between DSI and LII as well as the development of ScanRead. Extensive witness testimony and documentary evidence would be needed to support party claims, counterclaims, and defenses. The differences in approaches to discovery between United States domestic and international arbitration are critical in this case.

One of the main benefits of United States domestic arbitration is the savings in time and money through more strictly limited discovery than is found in standard litigation.[60] Yet most participants in United States domestic arbitration normally expect to conduct some discovery before the hearing.[61] After a preliminary conference between the parties and the arbitral panel, a truncated discovery process will follow, often involving the collection of information within specific time frames through the limited use of interrogatories, depositions, and productions of documents.[62] At a minimum, this

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59. *See* Commercial Arbitration and Mediation Center of the Americas art. 23 (1996) <http://www.adr.org/rules/camca_rules.html#intro>. The CAMCA article states that:

> 1. At the request of any party, the tribunal may take whatever interim measures it deems necessary, including injunctive relief and measures for the conservation of property.
> 2. Such interim measures may be taken in the form of an interim award and the tribunal may require security for the costs of such measures.
> 3. A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.

Id.

60. *See* PONTE & CAVENAGH, *supra* note 1, at 184.

61. *Id.* at 177, 254.

62. *See* PONTE & CAVENAGH, *supra* note 1, at 177; A DRAFTER'S GUIDE TO ADR 13 (American Bar Association, Bruce E. Hayerson & Corinne Cooper eds., 1991). The AAA's domestic commercial arbitration rules clearly illustrate this expectation. For example, under Section 10, during a preliminary hearing, arbitrators have the authority to "establish (i) the extent and schedule for the production of relevant documents and other information, [and] (ii) the identification of any witnesses to be called. . . ." Commercial Arbitration Rules of the American Arbitration Association, Section 10 (revised and effective July 1, 1996) <http://www.adr.org/rules/ commercial_rules.html>. In addition, the AAA rules specify that domestic arbitrators may subpoena witnesses or documents either upon request of one of the parties or through their own volition. Commercial Arbitration Rules of the American Arbitration

limited discovery will provide some important data collection for both sides in this conflict.

In international arbitration, the extent of discovery will depend primarily on whether the discovery phase tends to follow the approach found in civil law nations.[63] These legal systems provide for little or no pre-hearing discovery or other disclosures.[64] Disputants may ask the arbitral panel to order discovery, but such discovery is usually much more limited than that encountered in United States domestic arbitration. Arbitrators in international arbitration may mandate limited productions of documents, but are less likely to require parties to respond to interrogatories, depositions, or requests for admissions.[65] In this conflict, much of the relevant evidence that the parties need is contained either in the witness testimony or corporate documents of their opponents. This approach may require the parties to independently collect the evidence they will need to support their positions, which will make it very difficult for DSI to support its allegations under its initial burden of proof, and may limit LII's ability to pursue fully counterclaims or defend itself against DSI's charges.

CAMCA's rules do not directly address the nature and scope of the discovery process. Under its rules, the arbitral panel is permitted to order parties to present to each other summaries of documents and other evidentiary materials. Although the tribunal may request further documentary or demonstrative evidence during the proceedings, there is no clear mandate for other pre-hearing party disclosures.[66]

Association, Section 31 (Revised and effective July 1, 1996) <http://www.adr.org/rules/commercial_rules.html>.

63. *See* PONTE & CAVENAGH, *supra* note 1, at 254-55; Rivkin, *supra* note 1, at 131-32; Wagoner, *supra* note 20, at 79-80. For example, in Mexico, pre-trial discovery is limited and not as extensive as the discovery process found in U.S. litigation. Camp, *supra* note 56, at 89.

64. *See* PONTE & CAVENAGH, *supra* note 1, at 254-55; Rivkin, *supra* note 1, at 131-32; Wagoner, *supra* note 20, at 79.

65. *See* PONTE & CAVENAGH, *supra* note 1, at 255; Rivkin, *supra* note 1, at 132; Notes on International Arbitration, at 1 <http://www.law.vill.edu/forarbnt.html>.

66. *See* Commercial Arbitration and Mediation Center for the Americas, Arbitration Rules art. 21 (effective Mar. 15, 1996) <http://www.adr.org/rules/camca_rules.html>. The rule states that:

> 1. Each party shall have the burden of proving the facts relied on to support its claim or defense.
> 2. The tribunal may order a party to deliver to it and to the other parties a summary of the documents and other evidence which that party intends to present in support of its claim, counterclaim or defense.
> 3. At any time during the proceedings, the tribunal may order parties to produce other documents, exhibits or other evidence it deems necessary or appropriate.

Id. This rule is identical to the International Rules of the American Arbitration Association art. 19 (as amended and effective on Apr. 1, 1997) <http://www.adr.org/rules/international_arb_rules.html> and

Since DSI did not specify a more detailed discovery process in its subcontracting agreement, the arbitrators will have the discretion to determine whether any discovery mechanisms will be mandated. Unlike United States domestic arbitration, businesses seeking to retain opportunities to undertake discovery will need to specify that in their international arbitration clauses[67] or agreements, or else successfully persuade the arbitral panel that some discovery is needed to allow the parties to fairly present their cases.[68]

V. CONDUCT OF THE HEARING

The nature and conduct of arbitral hearings vary depending upon whether it is a United States domestic or international process. The United States business person must make decisions not often required in United States domestic arbitration about arbitrator nationality, language differences, evidence presentation and objective expert witness reports in the conduct of the international arbitration process.

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virtually identical to the UNCITRAL Arbitration Rules art. 24 (effective Dec. 1976) <http://www.adr.org/rules/uncitral_rules.html>. However, the AAA international rules specify that the arbitrators may hold a preparatory conference involving a discussion of methods for expediting the proceeding, but no explicit language on scheduling or organizing discovery. *See* International Rules of the American Arbitration Association art. 16(2) (as amended and effective on Apr. 1, 1997) <http://www.adr.org/rules/international_arb_rules.html>. Neither the rules of CAMCA or UNCITRAL address the convening of any pre-hearing conference.

67. *See* PONTE & CAVENAGH, *supra* note 1, at 255; Wagoner, *supra* note 20, at 80. As Attorney Wagoner points out:

> The contractual dispute resolution provision should address [the discovery] issue squarely by indicating that the scope of discovery is a matter for arbitrators to decide. The provision should also set forth the standards that the arbitrators should apply in exercising their discretion. That will help to ensure that arbitrators follow the intention of the parties concerning discovery.
>
> One approach would be to limit document discovery to central issues and depositions to key persons, for example:
>
> Subject to the approval of the arbitrators, any party may have limited prehearing discovery of documents relating to central issues and depositions of key persons. The parties shall cooperate with each other to expedite discovery on an informal basis, and all discovery shall be completed no later than 90 days after the order of the arbitrators allowing discovery.

Wagoner, *supra* note 20, at 80.

68. Under CAMCA's rules, arbitrators are given broad discretion to fashion a fair and equal process. The rules state that "[s]ubject to these rules, the tribunal may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case." Commercial Arbitration and Meditation Center for the Americas, Arbitration Rules art. 17(1) (effective Mar. 15, 1996) <http://www.adr.org/rules/camca_rules.html>. *See* International Arbitration Rules of the American Arbitration Association art. 16(1) (as amended and effective on Apr. 1, 1997) <http://www.adr.org/rules/international_arb_rules.html> (identical provision); UNCITRAL Arbitration Rules art. 15(1) (effective Dec. 1976) <http://www.adr.org/rules/uncitral_rules.html> (virtually identical provision).

These issues involve not only tactical concerns but costs in both time and money.

In United States domestic proceedings, parties generally need not focus on the nationality of arbitrators[69] nor the language for arbitral documents and sessions.[70] However, in international proceedings, parties must address these issues either when inserting the original arbitral clause or initiating the arbitral process.

Concerning the selection of arbitrators, disputants may wish to consider not only the educational credentials and professional experience of the arbitrators, but also each potential arbitrator's nationality.[71] To avoid issues of national bias, the parties may decide to select arbitrators that equally reflect the backgrounds of each of the participants or choose arbitrators from other unrelated countries. For example, DSI and LII may agree to each appoint one arbitrator who is a national of their own country or opt to choose panelists who are not from Canada, Mexico, or the United States. Under CAMCA's rules, the parties may request or the case administrator on his or her own initiative may select arbitrators from countries other than those of the participants.[72] However, using arbitrators from other nations clearly entails added expenses in arbitrator travel, accommodations, and translation services.

In international arbitration and under CAMCA's rules, the parties may look to the language of the arbitration agreement to determine which language will be used during the proceedings, unless otherwise agreed upon by the parties.[73] Under other international rules, the

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69. Under the AAA's U.S. domestic arbitration rules, parties are allowed to request arbitrators from countries other than those of the parties in international arbitration proceedings. *See* Commercial Arbitration Rules of the American Arbitration Association § 16 (revised and effective July 1, 1996) <http://www.adr.org/rules/ commercial_rules.html>.

70. The AAA's U.S. domestic rules contain a provision in which any party needing an interpreter must make its own arrangements for employing and paying the costs of an interpreter. *See id*. art. 24.

71. *See* UNCITRAL Arbitration Rules art. 6(4) (effective Dec. 1976) <http://www.adr.org/rules/uncitral_rules.html>.

72. *See* Commercial Arbitration and Mediation Center for the Americas, Arbitration Rules art. 7(3) (effective Mar. 15, 1996) <http://www.adr.org/rules/camca_rules.html>. CAMCA has developed an international panel of arbitrators from the NAFTA signatory nations as well as other non-NAFTA countries. *See* Toni L. Griffin, *First International Dispute Resolution Center Created to Resolve Private, Cross-Border Commercial Disputes Relating to the North American Free Trade Agreement—Commercial Arbitration and Mediation Center for the Americas* (Dec. 4, 1995) <http://www.adr.org/press/camca.html>.

73. *See* Commercial Arbitration and Mediation Center for the Americas, Arbitration Rules art. 15 (effective Mar. 15, 1996) <http://www.adr.org/rules/camca_rules.html>. This article states that:

> [I]f the parties have not agreed otherwise, the language(s) of the arbitration shall be that of the documents containing the arbitration agreement, subject to the power of the

arbitral panel determines the language or languages to be used during the hearing process, in the absence of party agreement on this issue in advance.[74] In this instance, DSI's copy of the subcontract with LII is in English and contains a reference to CAMCA's rules. Therefore, if all party copies of the contract were executed in English, then that will be the official language of the proceedings. If the contract was executed in French, Spanish, and English, then the parties must be prepared to translate their documents into each of these languages. Also, the international arbitral panel in its discretion may mandate that parties provide original documents accompanied by versions translated into the other applicable languages.[75] Securing quality translation services to interpret documentary evidence and witness testimony can further increase the costs and time needed for the arbitral process. In order to save time and money, the parties may agree upon one uniform language for the process.[76]

One of the traditional benefits of ADR mechanisms is that these processes try to preserve the business relationship between the parties. The confidentiality provided by the arbitration process can help the parties to resolve their dispute without negative publicity or embarrassing revelations[77] which may help to maintain business

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> tribunal to determine otherwise based upon the contentions of the parties and the circumstances of the arbitration. The tribunal may order that any documents delivered in another language shall be accompanied by a translation into such language or languages.

See International Rules of the American Arbitration Association art. 14 (as amended and effective on Apr. 1, 1997) <http://www.adr.org/rules/international_arb_rules.html> (identical provision). Typically, the respondent is given the opportunity to propose the language for the proceedings within 30 days. *See id.* art. 3(3); International Rules of the American Arbitration Association art. 3(3) (as amended and effective on Apr. 1, 1997) <http://www.adr.org/rules/international_arb_rules.html>.

74. *See* UNCITRAL Arbitration Rules art. 17(1) (effective Dec. 1976) <http://www.adr.org/rules/uncitral_rules.html>.

75. *See* Commercial Arbitration and Mediation Center for the Americas, Arbitration Rules art. 15 (effective Mar. 15, 1996) <http://www.adr.org/rules/camca_rules.html>; International Rules of the American Arbitration Association art. 14 (as amended and effective on Apr. 1, 1997) <http://www.adr.org/rules/international_arb_rules.html>; UNCITRAL Arbitration Rules art. 17 (effective Dec. 1976) <http://www.adr.org/rules/uncitral_rules.html>.

76. However, it is important to note that even if the parties select an official language, misunderstandings may still occur due to differences in party interpretations of disputed terms, particularly when such terms may have distinct technical and ordinary meanings. *See* CAROLYN HOTCHKISS, INTERNATIONAL LAW FOR BUSINESS 130 (1994) (citing Frigaliment Importing Co., Ltd. v. B.N.S. Int'l Sales Corp., 190 F. Supp. 116 (S.D.N.Y. 1960) (commercial case involving shipment of frozen chickens in which parties disputed technical versus ordinary meaning of word "chicken").

77. Confidentiality is a common aspect of both international and domestic arbitration limiting any release of arbitration documents to instances of party request or judicial mandate. *See* Commercial Arbitration and Mediation Center for the Americas Arbitration Rules art. 36 (effective Mar. 15, 1996) <http://www.adr.org/rules/camca_rules.html>; Commercial Arbitration Rules of the American Arbitration Association § 46 (revised and effective July 1,1996)

relationships in the long-term. In this hypothetical situation, DSI needs to expand its market in order to succeed. The company is planning to improve its current version of ScanSpeed and to offer the program in other languages. Although LII does not produce scanning devices, LII has already come up with a method for scanning documents into other languages. LII may need a reliable hardware platform for its program. Both parties could benefit from a continued business affiliation.

The potential for a "win-win" result tends to be readily identifiable in such methods as negotiation, mediation, summary jury trials, and minitrials. However, this objective may seem unattainable in United States domestic arbitration. In the United States, the domestic arbitration process reflects the highly adversarial nature of its litigation system.[78] Domestic arbitration proceedings are similar to abbreviated trials with parties expecting their attorneys to elicit witness testimony, to introduce demonstrative and documentary evidence, to cross-examine the other party's witnesses, and to make persuasive opening and closing statements.[79] Although the rules of evidence are relaxed, business executives are likely to be under the pressure of attorney questioning.[80] Therefore, it may become even more difficult for the businesses to work together in the future.[81]

However, in international arbitration, parties frequently elect to forego the formal hearing process. Borrowing from the hearing style of civil law legal systems, parties often present their cases in written form.[82] Rather than the adversarial atmosphere of the courtroom, documentary evidence and witness testimony are given to the arbitral

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<http://www.adr.org/rules/commercial_rules.html>; International Rules of the American Arbitration Association art. 34 (as amended and effective Apr. 1, 1997) <http://www.adr.org/rules/international_arb_rules.html>; UNCITRAL Arbitration Rules art. 25(4) (effective Dec. 1976) <http://www.adr.org/rules/uncitral_rules.html>.

78. *See* PONTE & CAVENAGH, *supra* note 1, at 177-78, 187.

79. *See id.* at 177-78.

80. *See id.* at 177-78, 187; Rivkin, *supra* note 1, at 123.

81. *See* PONTE & CAVENAGH, *supra* note 1, at 187; Rivkin, *supra* note 1, at 123. Parties in domestic arbitration may waive the oral hearing. Commercial Arbitration Rules of the American Arbitration Association § 37 (revised and effective July 1, 1996) <http://www.adr.org/rules/commercial_rules.html>. However, the rules clearly provide a detailed order of proof for the hearing process, including witness testimony and documentary evidence; reflective of the tendency in U.S. domestic arbitration towards oral adversarial proceedings. *See* Commercial Arbitration Rules of the American Arbitration Association §§ 20, 31 (revised and effective July 1, 1996) <http://www.adr.org/rules/commercial_rules.html>.

82. *See* PONTE & CAVENAGH, *supra* note 1, at 187; Rivkin, *supra* note 1, at 123, 132. Because Mexico is a civil law legal system, evidence in Mexican courts is primarily offered in documentary form with the judges asking questions of the parties and witnesses to clarify legal or factual issues. *See* Camp, *supra* note 56, at 89.

panel and the other party in written pleadings and statements.[83] Oral questioning is typically limited to inquiries from the arbitrators clarifying points raised in the written submissions.[84] After an arbitral award, business people may be able to work with each other in the future if they have avoided the adversarial confrontations found in United States domestic arbitration hearings.[85]

Under CAMCA's rules, parties retain the right to present testimony in an oral hearing.[86] However, in line with the more common international arbitration practice, CAMCA's rules also allow parties to opt for the delivery of witness testimony through written submissions instead of confrontational questioning.[87] DSI and LII may want to consider this option to allow them both the opportunity to avoid hostile clashes that could prevent or deter future business dealings.[88] Also, the use of written testimony may help to reduce productivity losses of business executives who must channel their time and effort into preparing and presenting oral testimony.

Lastly, in a technical dispute like this one, United States business people expect to seek the assistance of expert witnesses to support their case in a domestic arbitration.[89] In this case, company employees and other outside technical consultants may be called upon to provide written or oral testimony. However, in international arbitration, United States business people must be aware that the

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83. *See* PONTE & CAVENAGH, *supra* note 1, at 187; Rivkin, *supra* note 1, at 123, 132-33.

84. *See* PONTE & CAVENAGH, *supra* note 1, at 187; Rivkin, *supra* note 1, at 132.

85. *See* PONTE & CAVENAGH, *supra* note 1, at 187; Rivkin, *supra* note 1, at 123, 133.

86. *See* Commercial Arbitration and Mediation Center for the Americas Arbitration Rules arts. 22(1), (3)-(4) (effective Mar. 15, 1996) <http://www.adr.org/rules/camca_rules.html>; UNCITRAL Arbitration Rules art. 15(2) (effective Dec. 1976) <http://www.adr.org/rules/uncitral_rules.html>. The AAA's international rules appear to assume that there will be an oral hearing without party request. International Rules of the American Arbitration Association art. 20 (as amended and effective Apr. 1, 1997) <http://www.adr.org/rules/international_arb_rules.html>.

87. *See* Commercial Arbitration and Mediation Center for the Americas Arbitration Rules art. 22(5) (effective Mar. 15, 1996) <http://www.adr.org/rules/camca_rules.html>; International Rules of the American Arbitration Association art. 20(5) (as amended and effective Apr. 1, 1997) <http://www.adr.org/rules/international_arb_rules.html>; UNCITRAL Arbitration Rules art. 15(2) (effective Dec. 1976) <http://www.adr.org/rules/uncitral_rules.html>.

88. In addition, CAMCA offers mediation services which may help the parties work together with the help of an experienced mediator to resolve their conflict in a manner that best serves both of their business interests. *See* Commercial Arbitration and Mediation Center for the Americas, Mediation Rules (effective Mar. 15, 1996) <http://www.adr.org/rules/camca_rules.html>. The AAA also provides opportunities for parties to opt for mediation throughout the arbitration process. *See* Commercial Arbitration Rules of the American Arbitration Association § 10 (effective Mar. 15, 1996) <http://www.adr.org/rules/camca_rules.html>.

89. In U.S. domestic arbitration, parties are expected to provide the witnesses necessary to support or defend their positions, similar to the circumstances found in U.S. civil litigation. Commercial Arbitration Rules of the American Arbitration Association § 29 (revised and effective July 1,1996) <http://www.adr.org/rules/commercial_rules.html>.

arbitrators may appoint an objective expert witness in the proceedings, aside from the parties' experts. The arbitral panel will order the parties to provide the neutral expert with any relevant information or documentation for the expert's review. The expert witness then develops a written, impartial report on the technical aspects of the dispute for the arbitral panel and the participants. The disputants may question the expert at any arbitral hearing as well as provide expert witnesses of their own to support or refute the expert's report.[90] The cost of the neutral expert witness is an added expense for the parties aside from the costs of their own employees and technical consultants. However, some savings in time and money may be reaped if a party finds that the neutral expert supports their viewpoint, and, therefore, that party may not need to engage additional expert witnesses.

VI. ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARDS

At the heart of a successful arbitration is the enforcement of the award. Generally, once an arbitrator issues a decision, his or her responsibility ends.[91] The arbitrator has no power to enforce an award

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90. *See* Commercial Arbitration and Mediation Center for the Americas Arbitration Rules art. 24 (effective Mar. 15, 1996) <http://www.adr.org/rules/camca_rules.html>. Article 24 states that:

> 1. The tribunal may appoint one or more independent experts to report to it, in writing, on specific issues designated by the tribunal and communicated to the parties.
> 2. The parties shall provide such an expert with any relevant information or produce for inspection any relevant documents or goods that the expert may require. Any dispute between a party and the expert as to the relevance of the requested information or goods shall be referred to the tribunal for decision.
> 3. Upon receipt of an expert's report, the tribunal shall send a copy of the report to all parties, who shall be given an opportunity to express, in writing, their opinion on the report. A party may examine any document on which the expert has relied in such a report.
> 4. At the request of any party, the parties shall be given an opportunity to question the expert at a hearing. At this hearing, parties may present expert witnesses to testify on the points at issue.

See International Rules of the American Arbitration Association art. 22 (as amended and effective Apr. 1, 1997) <http://www.adr.org/rules/international_arb_rules.html> (identical rule); UNCITRAL Arbitration Rules art. 27 (effective Dec. 1976) <http://www.adr.org/rules/uncitral_rules.html> (virtually identical rule).

91. Under domestic arbitration, arbitrators are not required to provide an explanation of their decision. *See* American Arbitration Association Commercial Arbitration Rules, Commercial Arbitration Rules of American Arbitration Association §§ 42-43 (revised and effective July 1, 1996) <http://www.adr.org/rules/commercial_rules.html>. However, under international arbitration regimes, arbitrators are required to state the reasons upon which the award is based. *See* CAMCA art. 29(2) <http://www.adr.org/rules/camca_rules.html>; UNCITRAL Rules art. 32(3) <http://www.adr.org/rules/uncitral_rules.html>.

against the losing party.[92] As a result, a party that has received a valid, binding arbitral award must journey to a court and persuade the judicial forum to use its power to enforce the award. Taking into account the nationalities of the parties involved in the hypothetical dispute between DSI and LII (i.e. Canadian, Mexican, and American), there are two enforcement regimes that must be considered: the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (commonly referred to as the New York Convention)[93] and the Inter-American Convention on International Commercial Arbitration [hereinafter Panama Convention].[94] Due to the existence of these conventions, enforcement of an international arbitration award is relatively easier than achieving enforcement of a foreign judgment issued by a domestic court in a foreign jurisdiction.[95]

The New York Convention has been recognized as the most important contemporary agreement relating to international commercial arbitration.[96] It has been ratified by more than ninety countries, including the United States, Canada, and Mexico.[97] The New York Convention applies to those arbitral awards "made in the territory of a State other than the State where the recognition and enforcement of such awards are sought," and to awards "not considered as domestic awards in the State where their recognition and enforcement are sought."[98]

With respect to the hypothetical dispute between DSI and LII, it is possible that the award recipient may seek enforcement in Canada, Mexico, and the United States. As such, a court is likely to find the New York Convention applicable on that basis. Alternatively, the nationality of the parties alone is likely to lead a court to the

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92. *See* Volz & Haydock, *supra* note 57, at 871.

93. *See* United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 (1959) [hereinafter New York Convention] (effective in the United States on Dec. 29, 1970) *reprinted in* 9 U.S.C.A. §§ 201-208.

94. *See* Inter-American Convention on International Commercial Arbitration, January 30, 1975, O.A.S. Treaty Series no. 42. Pub. L. No. 101-369 [hereinafter Panama Convention] *reprinted in* 9 U.S.C.A. §§301-307 (1998).

95. *See* Volz & Haydock, *supra* note 57, at 869.

96. *See* ALBERT J. VAN DEN BERG, THE NEW YORK CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION (1981).

97. *See* JACK J. COE, JR., INTERNATIONAL COMMERCIAL ARBITRATION: AMERICAN PRINCIPLES AND PRACTICE IN A GLOBAL CONTEXT app. 47 (1997); <http://www.adr.org/un1.html>.

98. New York Convention, *supra* note 93, art. 1(1); *see* Dworkin-Cossell Interair Courier Servs., Inc., v. Avraham, 728 F. Supp. 156, 158 (S.D.N.Y. 1989).

conclusion that the arbitral award stemming from the dispute is not domestic.[99]

Under United States law for example, Congress attempted to clarify which types of awards were covered by the New York Convention in section 202 of the FAA which states, in part:

> An agreement or award arising out of such a [commercial] relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages some performance . . . abroad, or has some other reasonable relation with one or more foreign states.[100]

Thus, since the hypothetical dispute between DSI and LII is not between United States citizens, an arbitral award based on such a dispute would not qualify as domestic.

The hypothetical dispute also meets the other jurisdictional requirements for applicability under United States law. As permitted under article I(3) of the New York Convention, the United States availed itself of the reciprocity reservation, which makes the New York Convention inapplicable unless the arbitral award is made in the territory of a Contracting State.[101] Since Mexico and Canada are contracting parties to the New York Convention, this requirement is met. Additionally, under United States law, the New York Convention only applies to disputes considered "commercial" in nature.[102] Licensing agreements have long been considered commercial relationships under United States case law.[103] Thus, having satisfied the jurisdictional requirements, a United States district court is likely to find enforcement of the arbitral award derived from the DSI/LII dispute to be governed by the New York Convention.

Determining whether a Canadian court would construe the arbitral award based on the hypothetical dispute under the New York Convention is less straight forward. Canada acceded to the New York

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99. The definition of the word "domestic" is left up to the law of the enforcing State. *See id.*

100. 9 U.S.C.A. 202 (1998); *see* Coastal States Trading v. Zenith Navigation, S.A., 446 F. Supp. 330, 341 (S.D.N.Y. 1977).

101. *See* 9 U.S.C.A. 201 (1998); *see also* RESTATEMENT OF FOREIGN RELATIONS LAW (THIRD) § 487(1).

102. *See* 9 U.S.C.A. 202 (1998) which provides: "An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial . . . falls under the Convention."

103. *See* Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974); *see also* GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES 288 (1997) (setting forth examples of the broad interpretation given to the "commercial" relationship requirement under United States case law).

Convention in 1986.[104] Unfortunately however, each Canadian province ratified a slightly different version of the legislation.[105] Although all of the provinces decided to include a commercial reservation as permitted under Article I(3) of the New York Convention, the legal definition of "commercial relationship" is not consistent from province to province.[106] Furthermore, while some provinces require reciprocity (i.e. that the arbitral award be made in a Contracting State), others do not.[107] Consequently, the award recipient in the dispute between DSI and LII may wish to examine the federal legislation in addition to the laws of the particular province or provinces in which they seek enforcement prior to petitioning a Canadian court to apply the New York Convention.

Like Canada, the application of the New York Convention under Mexican law is also obfuscated. In a move away from the Calvo Doctrine,[108] Mexico ratified the New York Convention in 1971.[109] Its accession to the New York Convention was without reservations.[110] Mexico has also drastically overhauled its laws on commercial arbitration to accommodate current international standards.[111] Despite these advances, however, the Mexican Constitution still stands as an obstacle to acceptance of the New York Convention. Because the New York Convention eliminates some procedural law guarantees under the Mexican Constitution,[112] Mexican courts may not enforce awards obtained in violation of such guarantees.[113] Furthermore, the

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104. *See* Joost Blom, *An International Transaction in the Canadian Conflict of Laws*, 7 FLA. J. INT'L L. 403, 424 (1992).

105. Under Canadian law, only the federal government has power to enter into treaties with foreign states, but if the subject matter of the treaty falls within the classes of subjects over which the provinces have exclusive legislative competence, only the provinces may enact legislation to implement the treaty. *See* Davidson, *supra* note 48, at 99-100; Volz & Haddock, *supra* note 57, at 889.

106. *See* Volz & Haddock, *supra* note 57, at 889-90.

107. *See id.*

108. *See* Lisa C. Thompson, *International Dispute Resolution in the United States and Mexico: A Practical Guide to Terms, Arbitration Clauses, and the Enforcement of Judgments and Arbitral Awards*, 24 SYRACUSE J. INT'L L. & COM. 1, 27 (1997) (discussing Calvo Doctrine).

109. *See* Jeffrey J. Mayer, *Recent Mexican Arbitration Reform: The Continued Influence of the "Publicistas,"* 47 U. MIAMI L. REV. 913, 926 (1993).

110. *See* Jose Luis Siquieros, *Mexican Arbitration—The New Statute*, 30 TEX. INT'L L.J. 229, 243 n.163 (1995).

111. *See* Thompson, *supra* note 108, at 27; *see also* Margarita Trevino Balli & David S. Coale, *Recent Reforms to Mexican Arbitration Law*: *Is Constitutionality Achievable?*, 30 TEX. INT'L L.J. 535, 536 (1995).

112. *See* Mayer, *supra* note 109, at 926-27; Balli & Coale, *supra* note 111, at 537.

113. There are three cases in which Mexican courts have enforced the New York Convention. However, since Mexico does not follow a common law regime, these court decisions do not constitute precedent and consequently may be of limited value. *See* Thompson, *supra* note 108, at 28. The cases are: Presse Office, S.A. v. Centro Editorial Hoy, S.A., Malden

New York Convention permits the nonenforcement of awards that are contrary to that country's public policy.[114] As a result, even if an arbitral award in the dispute between DSI and LII falls under the jurisdiction of the New York Convention, Mexican courts may not apply the Convention to enforce the award under Mexican law.

Assuming the jurisdictional requirements are satisfied however, the award recipient must still be prepared to defend itself against the exceptions set forth in Article V(1) and Article V(2) of the New York Convention.[115] The exceptions contained in Article V(1) may only be raised by a party and, for the most part, address the integrity of the contract and protect against procedural defects in the arbitral process.[116] The exceptions delineated in Article V(2) may be invoked sua sponte by the enforcing court.[117] These exceptions permit the enforcing court to determine whether the dispute between the parties meets the substantive arbitrability and public policy standards of the forum.[118] As discussed previously in this Comment, it is likely that a

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Mills, Inc. v. Hilaturas Lourdes, S.A., and Mitsui de Mexico, S.A. v. Alkon Textil, S.A. See Mayer, *supra* note 109, at 927-33, for a detailed discussion of the cases. *See also* Camp, *supra* note 56, at 90.

114. *See* New York Convention, *supra* note 93, at Article V(2)(b). For example, under Mexican Law, recovery of damages is limited and punitive damages are not available. *See* Camp, *supra* note 56, at 89.

115. *See* New York Convention, *supra* note 93, art. V. In summary, the New York Convention provides that recognition of an arbitral award may be refused if:

> 1. Article V(1)(a)—The parties, under the applicable law, lacked capacity, or the agreement is invalid under either the applicable law or the law of the country where the award was made.
> 2. Article V(1)(b)—The losing party was not given proper notice of the appointment of the arbitrator, or of the arbitration proceedings, or was not able to present his case.
> 3. Article V(1)(c)—The award involves a difference not contemplated or falling within the terms of the submission by the parties to arbitration.
> 4. Article V(1)(d)—The arbitral procedure or composition of arbitral panel was not in accordance with the parties' agreement or the law of the country in which the arbitration took place.
> 5. Article V(1)(e)—The award is not yet binding on the parties or has been set aside or suspended by a competent authority in which or under the law of which the award was made.
> 6. Article V(2)(a)—The subject matter of the dispute is not capable of being settled by arbitration under the law of the enforcing country.
> 7. Article V(2)(b)—The recognition or enforcement of the award is contrary to the public policy of the enforcing country.

116. *See* J. Steward McClendon, *Enforcement of Foreign Arbitral Awards in the United States*, NW. J. INT'L L. & BUS. 58, 63-64 (1982). For a discussion of U.S. cases involving the defenses delineated in article V of the New York Convention, see Coe, *supra* note 97, at 335-42.

117. *See* GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES (1994).

118. *See* Coe, *supra* note 97, at 342-45.

United States court would find the dispute between DSI and LII substantively arbitrable.[119] With respect to public policy, United States courts have held that the enforcement of an arbitration award should only be denied under Article V(2)(b) where it would violate the forum state's "most basic notions of morality and justice."[120] Assuming that the award is, in the United States, enforceable under the New York Convention, a party would then simply present an authenticated original award, or certified copy, and the original or certified copy of the original agreement.[121]

Turning to another mechanism for enforcement of foreign arbitral awards should also be considered by the successful party in the dispute between DSI and LII. The award recipient may seek recognition and enforcement of its award under the Panama Convention. The provisions of the Panama Convention are substantially similar to the New York Convention, including jurisdictional requirements and enforcement procedures.[122] Thus, it is likely that the arbitration award derived from the DSI/LII dispute would be enforceable under both conventions.

The award recipient however, should carefully look to the domestic law of the country in which it seeks enforcement. An important consideration is the membership of the Panama Convention, which mostly consists of Latin American countries.[123] Specifically, Mexico and the United States are members, but Canada

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119. See discussion on pages 6-14 of this Comment and footnotes contained therein.

120. Fotochrome Inc. v. Copal Co., 517 F.2d 512, 516 (2d Cir. 1975) (citing Parsons & Whittenmore Overseas Co. v. Societe Generale de l'Industrie du Papier, 508 F.2d 967, 974 (2d Cir. 1974)); *See* Jessica L. Gelander, *Judicial Review of International Arbitral Awards: Preserving Independence in International Commercial Arbitrations*, 80 MARQ. L. REV. 625, 630-32 (1997) (discussing trends in the application of the public policy exception by United States courts).

121. *See* 9 U.S.C.A. § 207 (1998). Once the arbitral award has been presented for enforcement, a further concern for the award recipient is the currency of the award. Traditionally, national courts have only been willing to enforce a judgment that has been rendered in the currency of the country in which enforcement is sought. *See* Hans Smit, *Substance and Procedure in International Arbitration: The Development of a New Legal Order*, 65 TUL. L. REV. 1309, 1319 (1991). Consequently, if an arbitration award is expressed in a foreign currency, the enforcing court would simply convert the foreign currency award into domestic currency at a particular date determined by the court. *See id*. This approach has recently been reexamined by United States courts who have enforced arbitral awards in a currency other than United States dollars. *See* Mitsui & Co. v. Oceantrawl Corp., 906 F. Supp. 202 (1995); *see also* N.Y. Jud. Law § (b) (1998) (specifying conditions under which a foreign currency judgment may be enforced); RESTATEMENT OF LAW, THIRD, FOREIGN RELATIONS LAW OF THE UNITED STATES § 823(1), American Law Institute, 1987 (expressly allowing United States courts to render judgment in the currency in which the obligation is denominated or in which the loss occurred).

122. *See* Panama Convention, *supra* note 94. See also BORN, *supra* note 117, at 319, for a discussion of differences between the Panama Convention and the New York Convention.

123. *See* Siquieros, *supra* note 110, at 243.

is not.[124] Under United States law, in the event that both the Panama Convention and the New York Convention apply, the New York Convention governs unless a majority of parties to the arbitration agreement are citizens of states that have ratified the Panama Convention.[125] Thus, taking into consideration the nationality (United States, Mexico, and Canada) of the parties involved in the dispute, the award recipient arguably could use the Panama Convention to enforce their arbitral award. Notwithstanding the potential applicability of the Panama Convention, however, given the more global acceptance of the New York Convention and the number of judicial decisions that involve its provisions, the award recipient may be better off using the more interpreted convention.[126]

VII. CONCLUSION

As commercial trade grows after NAFTA, there will be an inevitable growth in private commercial disagreements. NAFTA promotes the use of arbitration and other methods of alternative dispute resolution in private commercial disputes between businesses from the NAFTA signatory nations. However, in proceeding with international arbitration, DSI and its attorneys will need to consider differences between domestic and international arbitration regarding substantive arbitrability, provisional remedies, strict limitations on discovery methods, the conduct of the arbitration hearing, and the nature and enforcement of the arbitral award.

In this information technology case, the parties can use international commercial arbitration before a panel from CAMCA to help them expeditiously and efficiently resolve their dispute. DSI could avoid costly and time-consuming judicial intervention by seeking rulings on substantive arbitrability and provisional remedies directly from the CAMCA arbitral panel rather than requesting national court assistance. Further savings in time and money could be garnered through a strictly limited discovery process and the waiver

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124. *See* Volz & Haydock, *supra* note 57, at 883. The countries which have ratified the Panama Convention are: Argentina, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Panama, Paraguay, Peru, the United States, Uruguay, and Venezuela. *See* Coe, *supra* note 97, app. 47 (list of members of the Panama Convention as of Apr. 1, 1996); *see also* Inter-American Convention on International Commercial Arbitration <http://www.asser.nl/ica/iaci.html>.

125. *See* 9 U.S.C.A. § 305 (1998); *see also* Coe, *supra* note 97, at 123.

126. *See* Coe, *supra* note 97, at 345 (noting that few arbitral awards have ever been presented for enforcement under the Panama Convention in United States courts). Furthermore, if LII has assets in Canada, the Panama Convention would be unavailable as a means of obtaining assets located within Canadian borders.

of an oral hearing. In addition, the DSI-LII business relationship may be better preserved if business executives are not subjected to adversarial questioning in deposition sessions or at the arbitral hearing. However, DSI and LII must recognize that these advantages must be weighed against the need for sufficient testimonial and documentary evidence needed to successfully bring and defend their claims and defenses.

At the conclusion of the international arbitration process, DSI and LII can expect to receive a reasoned award that explains the bases for the arbitral panel's award. Such a detailed award could provide grounds for a subsequent appeal. But with the existence of the New York and Panama Conventions, grounds for appeal are limited and the final award will be easier to enforce than any national court's order.