

**The Importance of Legal Context and Other Considerations in  
Assessing the Suitability of Negotiation, Mediation, Arbitration  
and Litigation in Resolving Effectively Domestic and International  
Disputes (Employment Disputes and Beyond)**

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GUIDO CARDUCCI<sup>†</sup>

INTRODUCTION

Over the past several decades, a remarkable volume of literature has dealt with dispute resolution mechanisms.<sup>1</sup> Significantly less attention has been given to the need to identify proper considerations enabling users to compare such mechanisms and determine the most suitable one in the circumstances related to a specific dispute. This brief Article addresses this need and submits that at least six sets of considerations deserve to be taken into account by users to compare negotiation, mediation, arbitration and litigation—leaving other dispute resolution mechanisms (conciliation, et cetera) aside—and to reach a realistic assessment of the most suitable mechanism in the circumstances.

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<sup>1</sup> Articles and books have been published on mediation and arbitration, in addition to “ordinary” litigation before national courts, in various countries. Following the progressive distinction between “domestic” and “international” arbitration, publications have progressively focused on the latter. *See generally* NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION (5th ed. 2009); GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION (2009).

The term “circumstances” in this Article covers the facts and the law that shape both the actual dispute and the operation of mediation, arbitration, and litigation with regard to that dispute. Such operation relies generally on different sources: on legislation for litigation before national courts, each forum having its procedural and substantive rules; on legal and institutional (AAA, ICC, LCIA, et cetera)<sup>2</sup> rules for arbitration, including rules that parties have agreed upon; and mostly on agreed-upon or institutional rules or schemes for mediation and, in part, for negotiation.

The six sets of considerations presented below fundamentally oppose, though aim to complement, the ordinary “out of context” presentation of negotiation, mediation, arbitration, and litigation, that is, the presentation based merely on the generally recognized features of each of these four mechanisms. That is, that the function of a mediator is to help the parties to reach an agreement under a variety of mediation models (facilitative, evaluative, transformative, with some variations), while in arbitration and litigation, arbitrators and judges are charged to settle the dispute under the relevant rules, and their outcome, awards and judgments, are binding on the parties.<sup>3</sup> The outcomes of arbitration and mediation are shared, respectively, by the combined schemes that are “Med-Arb” and “Arb-Med,” a process which starts as mediation or arbitration and may then be carried out as a mediation or an arbitration.

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<sup>2</sup> Respectively, these are the American Arbitration Association, the International Chamber of Commerce, and the London Court of International Arbitration. These and other institutions have developed, and regularly revise and update their arbitration rules. *See, e.g.*, AM. ARBITRATION ASS'N, *Arbitration*, ADR.ORG, [http://www.adr.org/aaa/faces/services/disputeresolutionservices/arbitration?\\_afLoop=280612933353289&\\_afWindowMode=0&\\_afWindowId=158jfv2j\\_299#%40%3F\\_afWindowId%3D158jfv2j\\_299%26\\_afLoop%3D280612933353289%26\\_afWindowMode%3D0%26\\_adf.ctrl-state%3D158jfv2j\\_392](http://www.adr.org/aaa/faces/services/disputeresolutionservices/arbitration?_afLoop=280612933353289&_afWindowMode=0&_afWindowId=158jfv2j_299#%40%3F_afWindowId%3D158jfv2j_299%26_afLoop%3D280612933353289%26_afWindowMode%3D0%26_adf.ctrl-state%3D158jfv2j_392) (last visited Nov. 11, 2012); *Statements, Codes and Rules*, INT'L CHAMBER COM., <http://www.iccwbo.org/display7/doctype6/index.html> (last visited Nov. 11, 2012); *Dispute Resolution Services*, LONDON CT. INT'L ARB., [http://www.lcia.org/Dispute\\_Resolution\\_Services/Dispute\\_Resolution\\_Services.aspx](http://www.lcia.org/Dispute_Resolution_Services/Dispute_Resolution_Services.aspx) (last visited Nov. 11, 2012).

<sup>3</sup> National legislation, generally in its civil procedure rules and, where applicable, institutional or ad hoc rules of arbitration, determine the function of the judiciary (national courts) and of arbitration, as well as the binding character of judgments and awards.

A realistic and necessary premise is to stress that each dispute is different in fact and in law. Disputes vary primarily in context (family versus commercial), degree of complexity (in fact and in law), dimension (geographic scope: national versus international; personal scope: status and number of parties involved—individuals, corporations, governments; substantial scope: legal and/or political disagreement, et cetera), and value (from minimal to extraordinary amounts).

The six sets of considerations examined in this Article take such variety into account and focus on factors that are meaningful for all disputes, though in different proportions. The minimum requirement for the purpose of such considerations is that the dispute relies on a disagreement in fact and in law, not merely in fact. In today's highly regulated society, the law is most often present although an individual may not perceive it correctly in facing a dispute.

The following six sets of considerations include, it is submitted, most of the essential factors that enable users to understand what dispute resolution mechanism fits best, or accommodates the most, their expectations of the dispute resolution process in light of the circumstances that, in fact and in law, shape their dispute and the operation of each dispute resolution mechanism they consider for their dispute.

As a final introductory note, in this Article that concerns both common and civil law jurisdictions: the terms "law" or "legal rules" include legislation (primary and secondary or delegated), common law, equity ("principles of equity" or "equitable remedies"), and case law, beyond the common law - civil law divide. That being said, obviously each national legal system (French Law, Italian Law, et cetera) defines what its sources of law and of legal rules are.

## I. DEGREE OF KNOWLEDGE OF THE RELEVANT RULES IN DISPUTE RESOLUTION

### A. *Labor Disputes*

Collective bargaining is a rather universally-known tool in comparative labor law. The degree to which it is used worldwide depends on the industry concerned and the degree of development of national economies. For several decades the

International Labour Organization (“ILO”) has been adopting some conventions and instruments on collective bargaining,<sup>4</sup> confirming its importance for the most governments. Most industries develop, adopt, and regularly revise and renew a variety of collective agreements.

If a collective agreement exists, its provisions are regarded in many jurisdictions as “legislative” in nature, rather than merely contractual and binding exclusively upon its parties.<sup>5</sup> As a result, the employer and the employee can agree to the terms of the individual employment contract unless public policy opposes it, but cannot freely disregard the collective agreement which applies to their contract.

This observation is also reflected in international employment disputes, but only to the extent that the applicable law so determines. As recently stated by the French *Cour de Cassation*, if French law applies to an international individual employment contract, the collective agreements that are recognized by, and valid under, French law will also apply to and govern the individual employment contract.<sup>6</sup>

Whatever its dimension, national or international, any employment law dispute raises one or more substantive legal issues that rely mainly on three sets of rules: 1) applicable legal rules (legislation and case law); 2) the collective agreement, if any, and the individual employment contract; 3) a variety of documents, entailing “rules” generally included in the staff rules, which vary from one industry to another. They generally include rules on issues such as recruitment procedures, incentive plans and promotions, job descriptions, classification of posts, compensation mechanisms, retirement, conditions and procedures for layoff, et cetera.

Both arbitration and mediation offer the parties the advantage of directly choosing an individual possessing the required knowledge and experience to deal properly with (1), (2),

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<sup>4</sup> Primarily the ILO Convention concerning the Right to Organize and to Bargain Collectively (in force since July 18, 1951). See *ILO Activities in the Post-War World (Part 1: 1946-1959) 1951*, INT'L LAB. ORG. (Dec. 12, 2011), <http://www.ilo.org/public/english/support/lib/century/content/1951.htm>.

<sup>5</sup> See, e.g., CODE DU TRAVAIL [C. TRAV.] art. L2222-1 (Fr.); R.D. 16 marzo 1942, n. 262, arts. 2063, 2066, in G.U. 4 aprile 1942, n. 79 (It.).

<sup>6</sup> Judgment available in 2011 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVE 72.

and (3), as outlined above. While the parties to a dispute generally have no right to “choose” an individual judge in litigation before national courts, the judiciary is generally experienced and specialized, and ensures the required knowledge with regard to at least (1) and (2). Generally, a national court deals with a variety of cases, all those that fall under the court’s jurisdiction, and may be less likely to be familiar with (3), that is, the variety of rules of the industry involved. This may be an “advantage” for arbitration and mediation over litigation if and to the extent that the arbitrator or the mediator is appointed in view of his or her specific knowledge of (3).

However, this likely lesser familiarity should not be overstated. It is a matter of degree and of individuals, not for doubtful generalizations. It is significantly less frequent when the court is specialized, as it is in most jurisdictions, to hear employment cases.<sup>7</sup> Additional parameters affecting such likelihood include the possibility for a judge to retain an independent expert with a specific knowledge of (3) (or generally of foreign law in international cases), the composition of the court, the background of each judge, whether he or she is a professional or a lay judge, et cetera.

In any event, parties also contribute to the adequate knowledge and understanding of the relevant rules, although they do so differently in mediation, arbitration, and litigation.

### *B. Beyond Labor Disputes*

If the subject matter of a dispute is contractual in nature but far from labor law and its prolific collective bargaining feature, then there are generally only two relevant sets of rules: (1) legal rules, and (2) the individual contract. In such cases, the “advantage” of a mediator or arbitrator selected for his or her knowledge of (3) loses significantly its weight. It loses it even more if one goes one step further and leaves contractual disputes aside to approach tort disputes or disputes based directly on statutory provisions. In that case, only the legal rules—legislation and case law—are the rules to be applied to settle the dispute, not a contract, collective or individual, nor the

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<sup>7</sup> For instance, the *Conseil de prud’hommes* in French labor law. CODE DU TRAVAIL [C. TRAV.] art. R1412-1 (Fr.).

employment rules developed by an industry. In a domestic setting, national courts and their judges interpret, construe, and apply national law on a daily basis.

From this perspective, the need for courts to know the applicable rules of law to settle the dispute over which they have jurisdiction, at times referred to as the *iura novit curia* principle, is determined by the forum's relevant standards with regard to the burden and scope of such required knowledge of the law by national courts. Such standards presently exist also with regard to arbitrators, especially in an international arbitration, although they might be less easily identifiable unless the parties agree upon them.

It is to be noted that such standards are not in themselves necessarily an issue in mediation simply because mediators are generally requested to facilitate dialogue and the parties' efforts in reaching an agreement, *not* to settle a dispute under the relevant rules of law<sup>8</sup> as national courts or arbitral tribunals

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<sup>8</sup> See, e.g., AM. ARBITRATION ASS'N, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES 15–16 (2009), available at [http://www.adr.org/aaa/faces/aoc/commercial?\\_afLoop=290824312763329&\\_afWindowMode=0&\\_afWindowId=7ksm7szle\\_10#%40%3F\\_afWindowId%3D7ksm7szle\\_10%26\\_afLoop%3D290824312763329%26\\_afWindowMode%3D0%26\\_adf.ctrl-state%3D7ksm7szle\\_58](http://www.adr.org/aaa/faces/aoc/commercial?_afLoop=290824312763329&_afWindowMode=0&_afWindowId=7ksm7szle_10#%40%3F_afWindowId%3D7ksm7szle_10%26_afLoop%3D290824312763329%26_afWindowMode%3D0%26_adf.ctrl-state%3D7ksm7szle_58) (follow “AAA Commercial Arbitration Rules and Mediation Procedures” hyperlink).

(i) The mediator shall conduct the mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome.

(ii) The mediator is authorized to conduct separate or ex parte meetings and other communications with the parties and/or their representatives, before, during and after any scheduled mediation conference. Such communications may be conducted via telephone, in writing, via email, online, in person or otherwise.

(iii) The parties are encouraged to exchange all documents pertinent to the relief requested. The mediator may request the exchange of memoranda on issues, including the underlying interests and the history of the parties' negotiations. Information that a party wishes to keep confidential may be sent to the mediator, as necessary, in a separate communication with the mediator.

(iv) The mediator does not have the authority to impose a settlement on the parties but will attempt to help them reach a satisfactory resolution of their dispute. Subject to the discretion of the mediator, the mediator may make oral or written recommendations for settlement to a party privately or, if the parties agree, to all parties jointly.

(v) In the event a complete settlement of all or some issues in dispute is not achieved within the scheduled mediation session(s), the mediator may

are.<sup>9</sup> Such standards, and the *iura novit curia* principle would become a real issue only if the parties to the mediation, or the rules applicable to the mediation, request the mediator to identify and apply relevant rules of law (without formally settling the dispute at law).

## II. GOVERNING LAW VERSUS OTHER CONSIDERATIONS

### A. “Ordinary” Cases

Preexisting personal and professional relationships between the parties and their social and cultural expectations are key in negotiation conducted directly by the parties, and/or with the assistance of their representatives. They are key also in mediation, though slightly more indirectly due to the intervention of a third party—the mediator. In both processes emphasis is put more on the relationship and on the value of its maintenance than on more confrontational arguments and legal “remedies” that parties may be entitled to at law. Pre-mediation screening should determine whether such factors are likely to lead to an effective or ineffective mediation on a case-by-case basis. In the latter case, mediation should be reconsidered.

Quite differently, legal variables, in terms of both procedural and substantive rules, play a much more substantial role where a procedure is followed and legal rules are applied to settle the merits of the dispute and determine the parties’ substantive rights and obligations, as generally occurs in arbitration (arbitration *ex aequo et bono* is not considered in this Article)<sup>10</sup> and in litigation before national courts worldwide.<sup>11</sup>

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continue to communicate with the parties, for a period of time, in an ongoing effort to facilitate a complete settlement.

(vi) The mediator is not a legal representative of any party and has no fiduciary duty to any party.

<sup>9</sup> This Article does not include *ex aequo et bono* arbitration, that is, where the parties request the arbitral tribunal to settle their disputes not strictly in compliance with the relevant rules of law. The precise scope of such discretion and departure from the law varies in national law from jurisdiction to jurisdiction.

<sup>10</sup> See *supra* note 9 (excluding arbitration *ex aequo et bono*).

<sup>11</sup> National legislations may, and probably only occasionally do, depart from such general trend.



A legally weak claim<sup>12</sup> would probably lead to a defeat if brought before a national court or an arbitral tribunal ruling at law. It might nevertheless lead to a commercially satisfactory outcome through a successful mediation, depending on elements, other than legal, of the case.

It would be erroneous, however, to draw the conclusion that the negotiation and mediation processes operate *regardless* of the law. In defining the relationships between mediation and law, the possible formulation that mediation operates in the “shadow” of the law appears mild. First, even within “mediation,” various scenarios exist: mediations of commercial or of family disputes often require different approaches and degrees of awareness of the law and of the parties’ legal positions. Second, and more importantly, generally the law surrounds both the negotiation and the mediation processes.

Leaving personal and emotional considerations aside, the law represents the default justice for all parties concerned, that of a national court that will rule and settle the dispute under the relevant rules of law which govern the disputed right and legal relationship. Unsurprisingly the law determines the context and even the credibility of any proposal to reach a settlement.

The expected outcome of a successful commercial mediation is a commercially sound agreement. However, a legally well-advised and rational individual is less likely to accept a settlement which is substantially less favorable than what the law grants him or her. That being noted as a matter of principle, time and cost in filing an action in court to have what the law grants (substantive “right”, “interest,” et cetera) declared and then enforced are also part of the equation when deciding whether to accept the settlement, or pursue mediation further (hoping to achieve a different and more favorable settlement), or to start litigation in court.

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<sup>12</sup> In accordance to the definition of “law” or “legal rules” in this Article, *see supra* Introduction, a “legally” weak claim is one that, in view of the relevant facts (validly established in terms of evidence), appears “weak” under the relevant legislation (primary and secondary or delegated), common law, equity (“principles of equity” or “equitable remedies”) and case law.

Because time and costs matter in dispute resolution and, in particular, in identifying the most suitable dispute resolution mechanism under the circumstances (as discussed below in Section VI), it should be observed that they vary case by case, and *inter alia* country by country.

Negotiation is in principle the most expedient and unexpensive mechanism. It is, however, confrontational and not all parties can manage that easily. The intervention of a party's representative, preferably selected in view of suitable skills for the kind of dispute at stake, reduces the confrontational element. Such intervention would not transform negotiation into mediation.

Various parameters play a role in defining time and costs, including whether discovery is mandatory and whether its scope is broad ("full") or limited. For example, the scope of "discovery" is quite broad under the Federal Rules of Civil Procedure in the United States,<sup>13</sup> just as the scope of "disclosure" is quite broad in the context of New York State civil practice.<sup>14</sup>

Litigation and arbitration are less costly and time consuming where full discovery of documents is refused or, at least, limited in scope. Such refusal is generally the principle in civil law jurisdictions—including countries in continental Europe—where generally the judge is empowered to rule, on a case-by-case basis, as to what taking of evidence measures—and what scope of such measures—are needed for any civil or commercial case.<sup>15</sup> Common law jurisdictions generally require discovery or

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<sup>13</sup> See FED. R. CIV. P. 26–37.

Discovery Scope and Limits. (1) *Scope in General*. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).

FED. R. CIV. P. 26(b)(1).

<sup>14</sup> N.Y. C.P.L.R. § 3101(a) (McKinney 2011) (stating that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof").

<sup>15</sup> See, e.g., CODE DE PROCÉDURE CIVILE [C.P.C.] arts. 9–11 (Fr.).

disclosure,<sup>16</sup> although in some cases they do not require it or reduce its scope in some fast-track proceedings. For instance, in English civil procedure, rules governing the fast track permit the court to direct either standard disclosure or that no disclosure takes place or to specify the documents or the classes of documents which the parties must disclose.<sup>17</sup>

Refusal of full discovery, or at least the admission of discovery limited in scope, generally occurs under the enhanced flexibility of international arbitration, if the parties so wish and/or the applicable arbitration rules so decide.<sup>18</sup>

### B. *Exceptional Cases*

What has been observed above (Part II.A) applies to any dispute in an “ordinary” context, which encompasses the vast majority of disputes. Exceptional cases—classified as such because they operate in an “exceptional” context—are those, it is submitted, where the parties deliberately: (1) disregard any legal component of the dispute that opposes them; (2) attempt to solve it on the basis of considerations other than legal; *and* (3) will not refer to a national court in case no agreement is reached or in spite of a reached agreement,<sup>19</sup> thus excluding reliance on the by-default justice based on the relevant rules of law.

Relatively few disputes meet the requirements in (1)–(3). The three requirements are generally met, for instance, where there are disputes—domestic or international—related to cultural property, in particular disputes between museums aiming to decide what museum—or other entity—can best ensure

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<sup>16</sup> See, e.g., FED. R. CIV. P. 26.

<sup>17</sup> CPR § 28.3 (U.K.).

<sup>18</sup> Most rules on international arbitration grant the parties and, failing their agreement, the arbitral tribunal, significant latitude in defining rules of procedure for the arbitral proceedings. For instance, Article 19 of the new 2012 International Chamber of Commerce (ICC) Arbitration Rules reads:

*Rules governing the Proceedings:* The proceedings before the arbitral tribunal shall be governed by the Rules and, where the Rules are silent, by any rules which the parties or, failing them, the arbitral tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration.

INT'L CHAMBER OF COMMERCE, ARBITRATION AND ADR RULES, art. 19 (2012).

<sup>19</sup> Practice shows that at times a party enters into an agreement but later decides to claim that the agreement is void (or non-binding), seeking a better outcome of the dispute.

the conservation of cultural property, or of an artifact, exclusively on the basis of the relevant scientific criteria ensuring the best conservation of the object concerned.<sup>20</sup>

An additional and distinct framework arises where the dispute is framed more within a community than within a national legal system. Some categories of cultural property raise such a particular framework. If the dispute is dealt with by all stakeholders exclusively at a community level, considerations rooted in anthropology and specific to that community's perspective and social priorities often play a greater role than the national law of the country concerned. Importantly, on such matters, the law plays a role generally through customary law rather than legislation enacted by a centralized lawmaker. This is not to say that "customary law" is merely a product of a community, outside any legal constraint, as one may assert with regard to a "usage" or a "custom," or even a "ritual," from an anthropologic perspective.<sup>21</sup>

### III. DOMESTIC VERSUS INTERNATIONAL DISPUTES AND DISPUTE RESOLUTION

The dimension of the dispute should also be taken into account when comparing dispute resolution mechanisms and seeking to identify the most suitable mechanism given the circumstances—that is, the facts and the law that shape the dispute and the operation of those mechanisms for that dispute. The parties to a dispute generally cannot freely "choose" its domestic or international character. However, they can better define, if not optimize, the dispute resolution process by

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<sup>20</sup> On cultural property restitution claims, see GUIDO CARDUCCI, *LA RESTITUTION INTERNATIONALE DES BIENS CULTURELS ET DES OBJETS D'ART VOLES OU ILLECITEMENT EXPORTES: DROIT COMMUN, DIRECTIVE CEE, CONVENTIONS DE L'UNESCO ET UNIDROIT* [RESTITUTION OF STOLEN OR ILLICITLY EXPORTED WORKS OF ART AND CULTURAL PROPERTY: PRIVATE INTERNATIONAL LAW, EUROPEAN DIRECTIVE, UNESCO AND UNIDROIT CONVENTIONS] 490 (1997).

<sup>21</sup> On the opposition and interactions between the legal and the anthropologic perspectives, see Guido Carducci, *Rituale und Recht – Innerstaatliche und internationale Perspektiven* [*Rituals and Law (Domestic and International)*], in 15 *PARAGRANA INTERNATIONALE ZEITSCHRIFT FÜR HISTORISCHE ANTHROPOLOGIE* 236 (2006) (published in German).

considering the proper consequences of the relevant dispute's character. Only a few of these consequences can be illustrated in this short Article.

#### A. *Some Consequences*

If the dispute is purely a domestic one, the parties' professional, social, and cultural expectations are usually relatively similar. Dialogue, if not mutual understanding, is facilitated. Such an environment facilitates negotiation and increases the prospects of success, that is, reaching a settlement. It is generally suitable also to attempt a mediation.

Above all, in a domestic context all legal variables belong to the same legal system. Such variables are thus presumably known, or easily known, by the parties. Their assessment of the dispute, of the suitable dispute resolution mechanism, and the likely outcome is relatively simple and accurate. The expected legal predictability threshold is relatively high.

Quite differently, international disputes are far more difficult to deal with and less predictable in time, costs, and outcome. To start, professional, cultural, and social expectations often diverge. A more precarious and heterogeneous set of values and expectations surround the negotiation, which is expectedly less smooth and more at risk in its outcome. Worse, legal rules, if not principles and even legal traditions, differ.

Examples of legal diversity are numerous and well-known in comparative law. For instance, historically—and, to a significant extent, still presently—jurisdictions in continental Europe deal with a breach of contract by requiring the breaching party to specifically perform in order to put the promisee in the position in which he or she would have been if the promise had been performed.<sup>22</sup> A more pragmatic approach in English law imposes on the party in breach a duty to pay money damages,<sup>23</sup> and only imposes the equitable remedy of specific performance in a few cases. These two distinct remedies, specific performance versus damages, have spread over the centuries in civil and common law legal traditions, with some subsequent national adjustments according to the local sense of justice for breach of contract.

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<sup>22</sup> See, e.g., CODE CIVIL [C. CIV.] arts. 1143–44 (Fr.).

<sup>23</sup> Which amounts to specific performance only if the promise was to pay a sum of money.

This and other existing examples of legal diversity drawn from comparative contract law represent the underlying legal context to which, in the international arena, the far-reaching diversity of national legal rules is to be added for each industry relevant to the actual dispute.

### *B. Mediation*

Compared to domestic disputes, international disputes suffer in mediation from an increased variety—at times, a heterogeneity—of the socio-economic and cultural environments and expectations that increase the risk of bias and make dialogue and consensual solution-finding through the mediator often more problematic.

In addition, different legal rules may apply in an international mediation, although, as we have observed before and in contrast to arbitration and litigation, such rules in mediation have a limited scope and significance. In particular, they generally do not require a mediator to “settle a dispute” under the relevant rules of law. Rather, mediation rules focus on procedure, including confidentiality, unless the parties agree otherwise.

Parties to international mediation, more than in domestic mediation, should clarify what exactly they expect from the mediator. A cautious approach is needed as the role of a “mediator” is tuned differently, at law and in society, in various parts of the world. An example arises from the terms “mediator” and “conciliator.” They are clearly distinct in some cultures, while functionally equivalent, or even identical in meaning, in others.

### *C. Arbitration and Litigation*

Compared to a domestic dispute, the international dimension of a dispute affects arbitration and litigation by far more in terms of legal rules—both in procedure and substance—than in terms of increased divide of socio-cultural expectations.

Private international law (jurisdiction, conflict of laws, recognition and enforcement of foreign judgments) is recognized worldwide as a complex field of law and represents the legal field common to all international (“private law”) disputes, for instance contractual disputes.

National authorities determine whether their national arbitration law should offer users one regime, covering both domestic and international arbitration, or two distinct regimes.<sup>24</sup> The latter option has gained popularity.<sup>25</sup> The international arbitration regime is usually more liberal and flexible than the domestic arbitration regime, to reflect the fact that legal diversity is a reality and to better accommodate the parties to an international contract if they have reached agreed-upon solutions or rules, in particular on procedural issues. For example, such agreements may be reached on the issue of discovery, which is dealt with differently in common and in civil law jurisdictions as discussed above in Part II.B.

Arbitration has rapidly become the reference mechanism in international dispute resolution, especially for commercial and investment disputes. Although not all the reasons can be properly considered in this short Article and each arbitration is different, the more frequent reasons explaining the success of international arbitration include: arbitration's flexibility as a tailor-made system with regard to procedure and, to a significant extent, the substance of the dispute; its expediency; its confidentiality; its neutrality, which is appreciated particularly in investment arbitration between governments and foreign private investors; its choice of arbitrators with the required expertise for the specific dispute; its degree of voluntary compliance; its relatively smooth recognition and enforcement of foreign awards abroad under treaty law, et cetera.

The flexibility of international arbitration allows the parties or, failing their agreement, the arbitral tribunal, to optimize the process in view of their actual needs. The parties' or the tribunal's decision often includes the exclusion of full discovery of documents, for the sake of expediency and costs.

International litigation remains a solid option for those who, for whatever reason, prefer to have their case heard by national courts in spite of the international character of their dispute and

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<sup>24</sup> For instance, French arbitration law has entailed two distinct and fully-operational regimes since 1980. See G. Carducci, *The Arbitration Reform in France: Domestic and International Arbitration*, ARBITRATION INTERNATIONAL 2012, N°I, 125.

<sup>25</sup> However, the opposite model, that is, refusing two distinct and fully-operational regimes, has been adopted recently by the 2010 Hong Kong Arbitration Ordinance No. 17. Hong Kong Arbitration Ordinance, No. 17 (2010).

the availability of alternative dispute resolution (“ADR”) mechanisms. More than in international arbitration, and leaving the absence in it of a proper forum’s law (*lex fori*) aside, the forum’s private international law plays a crucial role in international litigation in determining issues of jurisdiction, conflict of laws, and conditions under which foreign judgments may be recognized and enforced. Careful selection of the forum allows the parties to have their dispute heard under procedural (forum’s law) and substantive rules (according to the forum’s relevant conflict of laws rule) that are known to the parties. This logical objective is self-evidently important for the sake of legal predictability.

#### IV. SUBJECT MATTER, LEGAL CONTEXT, AND THEIR RELATIONSHIP TO THE SUITABILITY OF DISPUTE RESOLUTION MECHANISMS

The subject matter of the dispute matters significantly. Paraphrasing George Orwell, if all disputes are equal, some are more equal than others, and are so because of their subject matter and the regulation of the disputed substantive right in the relevant legal context. What follows clearly shows how a dispute’s subject matter, which is part of a specific branch of law with its own objectives and priorities—primarily labor law in this Article—affects the disputed substantive right and its dispute resolution potential and mechanisms.

The priorities embodied in the relative branch of law affect the operation, and thus the advantages, disadvantages, and finally the “suitability,” of mediation, arbitration, and litigation in effectively resolving domestic or international employment disputes. In spite of some common trends, in part internationally codified through the ILO’s law-making—mostly treaty-making—power,<sup>26</sup> national governments pursue different labor policies and national legal systems enact different legal rules in labor law.

The length of this brief Article does not allow a detailed comparative and jurisdiction-by-jurisdiction analysis of relevant parts of labor law. However, it does allow an emphasis on the inherent relativity of “suitability” and the existence of a

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<sup>26</sup> Upon a decision of the Conference of its Member States. See Int’l Labour Org. [ILO], *Constitution*, art. 19, available at <http://www.ilo.org/ilolex/english/constq.htm>.



significant relationship associating the degree of public policy regulation involved in the employment dispute—and in disputes in comparable fields of law—on the one side, and the degree of suitability of mediation, arbitration, and litigation in solving domestic or international employment disputes on the other. The world of legal diversity is necessarily simplified—hopefully not over-simplified—in the following discussion of two groups of countries featuring two opposing trends.

A. *Employee as an “Ordinary” Party, Low Degree of Public Policy Regulation, and Dispute Resolution*

In those jurisdictions where the law regards the employee as a normal party to a contract—not a presumed “weaker” party—the degree of public policy regulation of the employment relationship is low and the relationship is mostly left to party autonomy—as it is known in general contract law—with regard to the making of the employment contract and the performing of its obligations. Such jurisdictions are likely to offer the following features in dispute resolution: Negotiation and mediation are commonly-used dispute resolution mechanisms because their subject-matter is left to freedom of contract, and reaching and entering into a settlement is just an ordinary exercise of such freedom.

While each national legal system may require different conditions for, and grant different scope to, “freedom of contract,” what this Article means by such freedom is essentially the recognition at law of the parties’ freedom to choose (1) with whom (partner) to contract, (2) on what (clauses and terms of contract) they will contract, (3) what type of contract they will use, and (4) whether the parties will<sup>27</sup> enter into a binding agreement, an enforceable contract at the end of the negotiation timeframe.

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<sup>27</sup> The other option consists merely in ending the negotiations, in spite of the time and/or costs that they might have implied, with no conclusion of a contract. Some legal systems, for instance Italian, German and French Laws, limit the exercise of such second option by a good faith pre-contractual duty or requirement preventing unjustified discontinuance of negotiations. See Alberto M. Musy, *The Good Faith Principle in Contract Law and the Precontractual Duty To Disclose: Comparative Analysis of New Differences in Legal Cultures*, 1 GLOBAL JURIST ADVANCES 1, 2–6 (2011), available at <http://www.icer.it/docs/wp2000/Musy192000.pdf>.

By the same token, in negotiation and mediation undertaken in such jurisdictions, an employee has basically few “vested substantive rights” rooted in law (primarily legislation) to lose by accepting a poor settlement, other than what the employment contract—negotiated with an economically stronger employer—grants him or her. Few or no public policy rules would override contractual terms to add, or at least strengthen, an employee’s substantive right.

Arbitration is a frequently used tool, although any use of arbitration—be it frequent or occasional with regard to a national or an international dispute—is possible only to the extent that the “arbitrability” of the dispute in its objective (with regard to subject matter) and subjective (with regard to the parties involved) dimensions is not excluded by law. The jurisdictions considered in this Section generally do not exclude arbitrability and their national courts lack an exclusive jurisdiction over employment disputes.

Where does labor arbitration stand in the United States? Leaving this complex question to U.S. specialists, it can be observed here that the exclusion in section 1 of the Federal Arbitration Act (“FAA”) of “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce”<sup>28</sup> leaves to the operation of state arbitration laws a great deal of individual employment contracts and excludes these contracts from the immediate benefit of the clear principle under the FAA that arbitration agreements are valid, irrevocable, and enforceable “save upon such grounds as exist at law or in equity for the revocation of any contract”.<sup>29</sup> Unsurprisingly repeal of the employment exclusion is envisaged.<sup>30</sup>

Beyond arbitrability, any variation of “arbitration”—to the extent that relevant legal rules apply and govern the arbitral proceedings and the merits of the dispute—is more rooted in the law than negotiation and mediation are (bearing in mind that *ex aequo et bono* arbitration is not considered here and, more

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<sup>28</sup> 9 U.S.C. § 1 (2006).

<sup>29</sup> *Id.* § 2.

<sup>30</sup> And called for, for instance, in Edward J. Brunet et al., *ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT* 104 (2006).

generally, non-mandatory provisions may be derogated by contract and parties may thus agree upon their own rules if they are not contrary to public policy).

In an international context, recognition and enforcement of awards is likely to be sought in a country other than where the arbitration had its “seat” and the award was made. Under the New York Convention on the Recognition and Enforcement of Foreign Awards (1958), which is applicable to its presently 146 State Parties, an award is in principle easily recognized and enforced in another jurisdiction, as long as the latter shows no strong divergent labor policies that would be tantamount to a forum’s public policy refusal to recognize and enforce the award. However, recognition and enforcement of an award abroad can be expected to be significantly more difficult in countries that are not State Parties to the New York Convention and whose legislation is less arbitration-friendly.

*B. Employee as a “Weaker” Party, High Degree of Public Policy Regulation, and Dispute Resolution*

In most jurisdictions nowadays lawmakers and case law presume employment relations to be economically unbalanced and deem an employee to be a “weaker party” to the employment contract. Consequently, the law is called to balance the relationship by protecting the employee, to an extent which varies over time and from one jurisdiction to another. The resulting consequences are multifaceted and include a reduced party autonomy in employment contract law and a highly regulated legal employment relationship. Public policy principles or rules and “mandatory” rules are the principle rather than the exception. They are by far more present in the field of employment contracts than in other fields, such as in the field of commercial sales between professional dealers (leaving consumer protection aside). In such jurisdictions, including Member States of the European Union (“EU”) that has been enacting

legislation—“regulations”<sup>31</sup> and “directives”<sup>32</sup>—in this direction, the following features are likely to characterize dispute resolution.

### 1. Negotiation and Mediation

Negotiation and mediation are possible options for both employees and employers. However, employees often benefit from public policy rules or mandatory provisions that override incompatible terms of the individual employment contract and grant certain “vested substantive right(s)” that the employee is presumably not willing to lose by accepting a “poor”—that is, less favorable—settlement. For instance, under French Law, an employer may not terminate an employment contract in breach of some legal requirements. Any such “termination” would be legally void and, in spite of the employer-declared “termination,” the employment contract would still be binding between the employer and the employee.<sup>33</sup>

The relevant legal rules may oppose even an employee’s waiver of such rights in case he or she accepted a less favorable settlement and, *ex officio* or *ex parte* depending on the jurisdiction concerned, invalidate, or deem ineffective, any settlement to the extent that it embodies such waiver.

The employee tends to maintain a peaceful relationship with the employer, generally for fear of losing his or her job. This is especially true during periods of economic uncertainty, such as that which we are experiencing at present time. In this climate, the employee often favors mediation to arbitration and litigation.

Unsurprisingly, however, the governing law plays a role. For instance, national law in the jurisdictions considered here often makes it rather difficult for the employer to lawfully dismiss employees.<sup>34</sup> By so doing, national law reduces the risks

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<sup>31</sup> Consolidated Version of the Treaty on the Functioning of the European Union art. 288, Mar. 3, 2010, 2010 O.J. (C 83) 47, 171–72, *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:en:PDF>. EU Regulations shall have general application and be binding in their entirety and directly applicable in all Member States. *Id.*

<sup>32</sup> Directives “shall be binding, as to the result to be achieved, upon each Member State to which [they are] addressed, but shall leave to the national authorities the choice of form and methods.” *Id.*

<sup>33</sup> CODE DU TRAVAIL [C. TRAV.] art. L. 1226-13 (Fr.).

<sup>34</sup> For instance, the legally void “termination” of an employment contract by an employer under French labor law. *See id.*

of lawful layoff for the employee. Consequently, it also reduces the added value that mediation represents, as opposed to arbitration and litigation, which are based on such protective governing law with regard to the merits. Mediation is a less confrontational, relationship-friendly dispute resolution mechanism. However, it does not per se guarantee that the reached agreement, if any settlement is reached, complies with such protective legislation.

## 2. Arbitration and Collective Agreements

Collective agreements are one of the legal tools most frequently retained by national labor lawmakers. Through them, lawmakers take position, among others, in terms of dispute resolution. For instance, under French law, a collective agreement may contain a provision allowing and organizing arbitration proceedings.<sup>35</sup> If the collective agreement contains no such provision, the parties to an individual employment contract may agree to submit their dispute to arbitration, but they may do so only to the extent that their dispute has been preliminarily submitted to mediation or conciliation and has not yet been settled.<sup>36</sup>

## 3. Arbitration and Individual Employment Contracts

Arbitration is also frequently used in employment dispute resolution, in particular for its expediency, flexibility, and, for some categories of employees, its confidentiality as discussed below in Part VI. However, as highlighted above, consideration should preliminarily be given to whether the dispute is regarded as “arbitrable” in its objective (with regard to subject matter) and subjective (with regard to the parties involved, employee and/or employer) dimensions under the relevant law.

Generally, parties are allowed to settle their dispute by arbitration as long as the dispute concerns a right that parties freely dispose of and that is not in conflict with public policy concerns.<sup>37</sup>

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<sup>35</sup> *Id.* art. L. 2524-1.

<sup>36</sup> *Id.* art. L. 2524-2.

<sup>37</sup> CODE CIVIL [C. CIV.] arts. 2059–60 (Fr.).

Time also matters. Unsurprisingly, time is a variable in labor law and in employment disputes resolution. An inexperienced employee may enter into an arbitration agreement as early as the time the individual employment contract is entered into—even though he or she would not accept the same agreement, once a dispute has arisen, in the form of a submission to arbitration. That is the position of French law for domestic arbitration. This law validates the subsequent submission to arbitration (*compromis*), once the dispute for breach of the employment contract has arisen and the parties realize its nature, scope, and the concrete consequences of opting for litigation before the national courts or for arbitration, but invalidates the arbitration agreement entered into at the same time as the employment contract (*clause compromissoire*), before any dispute arises.<sup>38</sup>

It is important to note that lawmakers and judiciaries achieve the threshold of protection for employees in dispute resolution that they deem adequate in national legislation or case law through a variety of legal techniques and/or mechanisms. Besides the arbitrability of the dispute, which may vary in its subject matter (*ratione materiae*) and with regard to the parties involved in the dispute (employer and employees), two additional legal techniques consist of distinguishing first between the regimes of “domestic” and “international” arbitration and then between the validity and “opposability” of the arbitration agreement. While Garner’s Black’s Law Dictionary<sup>39</sup> and the Dictionary of Legal Usage<sup>40</sup> do not include the latter term, it is generally taken to mean that the arbitration agreement is regarded as valid, and thus binding for all its parties, and that it cannot be “opposed” in view of a forum’s paramount consideration.

That is what the French *Cour de cassation* has held in an international arbitration where the arbitration agreement (*clause compromissoire*, that is, an agreement concluded before the dispute arose) inserted in the contract—an agreement which, as stated above, is generally void in domestic arbitration—was held valid and binding, but could not be “opposed” and bind the

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<sup>38</sup> See CODE CIVIL [C. CIV.] arts. 2059, 2061 (Fr.).

<sup>39</sup> See BLACK’S LAW DICTIONARY (9th ed. 2010).

<sup>40</sup> See DICTIONARY OF MODERN LEGAL USAGE (3d ed. 2011).

employee that had validly selected a French court that has jurisdiction over that kind of dispute under French law.<sup>41</sup> This holding applies regardless of the law applicable to the international employment contract. The reasoning of the Court was thus clearly articulated in terms of jurisdiction, not of conflict of laws.

Specifically in international arbitration, one of the numerous challenging questions is which law should govern arbitrability. Interestingly, from the French *Cour de cassation* standpoint, the arbitrability of the dispute is distinct from the law governing the merits, and is not to be denied simply because the subject matter is governed by a public policy provision, or even an “overriding” rule.<sup>42</sup>

#### 4. Seeking the “Final Verdict” in ADR

Any settlement obtained through a successful negotiation or mediation, as well as any arbitral award, is certainly important for the parties and, in principle, for the predictability of their legal relations. However, both settlements and awards do not necessarily represent the final “legal verdict” between the parties, and may be annulled under some conditions that vary depending on the applicable law. If they are not annulled and awards become *res iudicata*, they are enforceable against a reluctant debtor to the extent that they comply with some public policy principles that vary from one jurisdiction to another. Though not necessarily numerous in number and broad in scope, such principles do exist. A preliminary case-by-case, jurisdiction-by-jurisdiction analysis aimed at identifying them under the relevant rules of law is recommended.

#### 5. International Litigation: Substantive Issues and Applicable Law

In international litigation, and to a lesser extent in international arbitration, the forum’s private international law plays a key role in governing the merits of private legal disputes—among others, those resulting from a valid and

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<sup>41</sup> Cour de cassation [Cass.][supreme court for judicial matters] soc., Mar. 12, 2008, Bull. civ. V, 01-44654 (Fr.), available at <http://curia.europa.eu/common/recdoc/convention/gemdoc2009/pdf/41-u-fr-09.pdf>.

<sup>42</sup> On “overriding” rules, see *infra* Part IV.B.5.

enforceable international individual employment contract. The applicable law is specified by the forum's conflict of laws rule ("conflicts-justice").

The principle of "party autonomy" and choice of law by the parties is generally allowed in comparative conflict of laws. Such choice allows the parties to significantly increase legal predictability with regard to their international contract by choosing the applicable law at an early stage.<sup>43</sup> However, at times parties do not reach an agreement and no law is "chosen" in the contract, nor at a later time. The applicable law is then specified by the forum's conflict of laws rule.

In addition to conflict of laws and its complexity, "overriding" rules or "internationally mandatory rules" are substantive rules, not conflict of laws rules, and represent a form of "material-justice"—justice as generally pursued in a domestic context. They may intervene in international courts, inter alia to protect the employee in some international litigations as well as in some international arbitrations. Because international arbitral tribunals have no forum's law (*lex fori*), all overriding provisions are "foreign" provisions. Conversely, in international litigation before national courts the forum's overriding rules prevail over any incompatible foreign overriding rules.

The first internationally (though EU only) adopted definition of overriding rules is to be found in the "Rome I" EU Regulation on the Law Applicable to Contractual Obligations (2008), which characterizes them as the rules "the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation," and that claim application in spite of a foreign "applicable law."<sup>44</sup>

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<sup>43</sup> For instance, in the United States, section 186 of the Restatement (Second) of Conflict of Laws states that "[i]ssues in contract are determined by the law chosen by the parties in accordance with the rule of § 187 and otherwise by the law selected in accordance with the rule of § 188." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 186 (1971).

<sup>44</sup> Regulation (EC) 593/2008, of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I), art. 13, 2008 O.J. (L 177) 6, 13. See G. Carducci, *The Impact of E.U. Regulation "Rome I" on International Litigation and Arbitration, A-National Law, Mandatory and Overriding Rules*, II ICC INT'L CT. ARB. BULL. 31 (2011).



Shifting now from definitions to implementation and case law, French courts will generally apply French rules concerning the employees' representation and protection as overriding rules to a corporation that has its seat abroad but has employed staff in France, despite a foreign law that—in principle—would be applicable.<sup>45</sup>

Recognition of, and attitude towards, overriding rules vary over time and space. For instance, differently from the acceptance of overriding rules codified in the Rome Convention on the Law Applicable to Contractual Obligations in 1980,<sup>46</sup> and in the EU Rome I Regulation in 2008, the United States' Restatement Second, Conflict of Laws<sup>47</sup> does not directly recognize “overriding” rules or “internationally mandatory rules” per se.<sup>48</sup>

Even if no overriding or internationally mandatory rule exists in the relevant legal system and applies to the legal issue disputed by the parties, at least in Europe under the Rome I Regulation, “conflicts-justice” has evolved towards result-oriented rules with regard to the protection of employees and consumers.

In international litigation in the EU, the choice of law in an individual employment contract cannot have the result of depriving the employee of the protection afforded to him or her by the mandatory provisions (that is, it cannot be derogated from by agreement) under the law of the country where the employee habitually carries out his or her work in performance of the contract.<sup>49</sup> The consequences of this mechanism are far-reaching. They require the parties to proceed to a proper assessment of the

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<sup>45</sup> Cour de cassation [Cass.][supreme court for judicial matters] Mar. 3, 1988 (Fr.); Cour de cassation [Cass.][supreme court for judicial matters] Feb. 14, 2001 (Fr.).

<sup>46</sup> The Rome Convention on the Law Applicable to Contractual Obligations was adopted in 1980. It was also subject to a second acceptance—though more restrictive with regard to foreign overriding rules—in the EU Rome I Regulation adopted in 2008.

<sup>47</sup> The Restatement Second, Conflict of Laws dates back to 1971 and was inspired by the search of a balance between rigidity—represented by the First Restatement—and flexibility and result-oriented rules.

<sup>48</sup> See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187–88. Section 187(2)(b) might serve as basis to explore whether this provision might grant a potential and indirect recognition of overriding mandatory rules. See *id.* § 187(2)(b).

<sup>49</sup> Regulation (EC) 593/2008, of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I), art. 8, 2008 O.J. (L 177) 6, 13.

relevant substantive rules (“renvoi” of conflict of laws rules is excluded) in both legal systems—that in the choice of law provision and that where the employee habitually carries out his or her work in performance of the contract.

An important observation is that the Rome I Regulation is binding upon EU Member States (except Denmark) and their national authorities and, therefore, their national courts. However, the Rome I Regulation is not per se binding upon arbitral tribunals that are not national authorities established by law with their seats in such states.

## 6. International Litigation: Jurisdiction and Court of Choice Agreements

It would be erroneous to believe that the legal protection of the employee, in the jurisdictions that deem him or her a “weaker party” to the employment contract, takes exclusively the form of *substantive* rules, such as a national provision granting X minimum number of months of maternity leave to an employee or—with regard to international employment contracts—the *Directive 2005/56, of the European Parliament and of the Council of 26 October 2005 on Cross-border Mergers of Limited Liability Companies*, under which “[t]he rights and obligations of the merging companies arising from contracts of employment or from employment relationships and existing at the date on which the cross-border merger takes effect shall . . . be transferred to the company resulting from the cross-border merger.”<sup>50</sup>

Lawmakers do not hesitate to extend such legal protection beyond substantive provisions, particularly in terms of jurisdiction for international employment litigation. A clear example is the *Council Regulation No. 44/2001, of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters*. Under this Regulation:

- a) the employee can file a claim against the employer where the employer is domiciled or in another EU Member State where the employee habitually carries out his work or, failing such habitual place, where the

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<sup>50</sup> Council Directive 2005/56, of the European Parliament and of the Council of 26 October 2005 on Cross-border Mergers of Limited Liability Companies, art. 14(4), 2005 O.J. (L 310) 1, 7 (EC).

business which engaged the employee is or was situated; quite differently, the employer is not granted such options and can file a claim against the employee exclusively before the court of the employee's domicile;<sup>51</sup>

- b) a choice of court agreement related to an individual employment contract may be entered only, either after the dispute has arisen, thus ensuring the parties to decide knowingly how and where to proceed, or if the agreement allows the employee, not the employer, to bring proceedings in courts other than those mentioned above.<sup>52</sup>

## 7. International Arbitration and Circulation of Awards

In the international context, the recognition and enforcement of awards is likely to be sought in a country other than where the arbitration had its "seat." Under the *New York Convention on the Recognition and Enforcement of Foreign Awards* (1958), the recognition and the enforcement of a foreign award may be refused only in few circumstances, such as if the award either settles a dispute which is not arbitrable under the law or violates public policy of the country where enforcement and recognition is sought.<sup>53</sup> Diversity of national employment policies and legal regulations in different parts of the world are likely to lead to such a refusal, particularly if public policy is at stake.

It is needless to overstress that "globalization" is an economic phenomenon, not per se a legal phenomenon. At law there are no "universal" criteria for defining public policy and arbitrability, and they are and remain fundamentally national legal categories and tools.

The numerous considerations presented in this Section IV (Subject Matter and Legal Context), which examines both a "liberal" (A) and an "employee-protective" (B) setting, are particularly important to enable users to properly assess the advantages and disadvantages of mediation, arbitration,

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<sup>51</sup> Council Regulation 44/2001, of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters, arts. 19–20, 2000 O.J. (L 12) 1, 7 (EC).

<sup>52</sup> *Id.* at art. 21.

<sup>53</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V, June 10 1959, 330 U.N.T.S. 38.

litigation, and what the parties can realistically expect from them for their dispute, in light of the specific legal context and regulation of the disputed substantive right.

Adequate legal advice is necessary, especially for significant disputes. Its cost is in principle compensated, at times well beyond the original cost depending on the amount in dispute, by a properly chosen dispute resolution mechanism.

#### V. IS THERE A NEED FOR THE SETTLEMENT, THE AWARD, OR THE JUDGMENT TO BE ENFORCED ABROAD ?

This question should also be asked when the parties evaluate each dispute resolution mechanism. This question is to be asked regularly with regard to international disputes, while only exceptionally with regard to domestic disputes. For the latter, the debtor is under the presumption, though rebuttable, to be based and have sufficient (in relation to the recognized debt) assets, in the territory of the forum.

The difficulty inherent to such question is its being time-conditioned. Because the location of the debtor and of its assets may change over time, an assessment made at the time mediation, arbitration, or litigation is chosen, or shortly after the related process or proceedings have commenced, may prove obsolete at the time the resulting settlement, award, or judgment needs to be enforced domestically or abroad. However, this uncertainty naturally fades away in the case of solid debtors and/or small debt amounts.

It is fair to observe that at present time arbitral awards “circulate,” that is, they may be recognized and enforced abroad, under the New York Convention, if it is applicable, more easily than national court judgments that are generally subject to a less liberal regime. To the extent that the awards are enforceable under the New York Convention, and leaving other considerations aside, the successful party would probably consider international arbitration preferable to litigation.

However, at the regional level, the *Council Regulation No. 44/2001, of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters* has significantly improved the circulation of

judgments within the EU.<sup>54</sup> It has also compensated, in part, the advantage arbitration has for circulation of awards purposes under the New York Convention.

However, circulation is not all. Seeking enforcement abroad is not the ineluctable destiny for any *res iudicata*, be it an arbitral award or a court judgment. Enforcement abroad may not be needed in situations where money damages have been awarded if the debtor's assets are sufficiently present in the country of the court that settled the case ("forum") and, in the case of an order for specific performance, if the debtor or one of its agents or branches can perform in the same country on its behalf.

Voluntary compliance is an additional option, not merely wishful thinking. It occurs more or less frequently depending on numerous factors, though probably less frequently in the international context under the current economic uncertainties. Bad faith debtors rely on the high costs of bringing litigation for enforcement of an award or a judgment in a foreign jurisdiction to deter creditors from collecting on the debts.

The remarks made above also apply to a settlement entered into following a successful international mediation or negotiation. In contrast to awards and judgments, however, a settlement is a contract and raises conflict of laws issues rather than conflict of jurisdictions questions. In these cases, what matters is the law governing the settlement.

Not all mediations are successful and lead to a settlement. Even if the mediation is successful, the settlement that the parties reach is often, formally and legally, "just" an agreement concluded by the parties. Though binding if entered into validly at law, as it usually occurs, the agreement is merely a private legal act. Only some settlements are submitted for approval and even fewer are indeed approved by a court in the course of proceedings. If a settlement has been approved in a EU Member State, its recognition in another EU Member State is

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<sup>54</sup> See Council Regulation 44/2001, of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters, arts. 32-56, 2000 O.J. (L 12) 1, 10-12 (EC).

significantly facilitated because, under *EU Regulation 44/2001*, its legal nature is regarded from a different perspective, as an authentic act, not as a contract.<sup>55</sup>

If, under the circumstances, there appears to be no need for the settlement, award, or judgment to be enforced abroad, litigation offers a remedy that is more straightforward than arbitration or mediation in those legal systems that enforce a judgment directly over the debtor's assets in the forum. The enforcement of an award or of a settlement following a successful mediation in the forum against a reluctant debtor abroad generally requires an *exequatur* or enforcement proceedings, the requirements for which vary in comparative law.

## VI. TIME, COSTS, CONFIDENTIALITY

Time, costs, and confidentiality are left last in the list of suggested users' main considerations when deciding upon a course of dispute resolution, but certainly not because they lack weight in practice. In fact, time, costs, and confidentiality are major considerations taken into account by every user. In addition, what represents "excessive" time and/or costs is a subjective evaluation. Last but not least, because time and costs are associated with each procedure, in particular with discovery and disclosure of documents, time and costs have been, in part, considered above in Part II.B. As a result, they will only be considered briefly here.

Litigation before national courts is generally not the most expeditious option, nor the one that will ensure confidentiality of the proceedings, unless the forum's law or the judge requires it under the circumstances. The flexibility of mediation and arbitration allows the parties to consider, to agree upon, and to adjust to their needs the costs, time, and confidentiality of their mediation.

Negotiation is obviously different and offers several advantages as long as the parties do succeed in settling their dispute. Negotiation is confidential and generally cheaper and faster than any other dispute settlement mechanism to the extent that no third-party is involved.

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<sup>55</sup> *Id.* at art. 58.

However, as we have seen before, law always matters. Therefore it matters where and under what law(s) the dispute resolution process is undertaken. Also, parties do not always reach an agreement. Diverging views might not fade away even through prolonged negotiations. For instance, if no agreement is reached between the parties as to whether they have a duty of confidentiality in an international arbitration, the new French arbitration law does not impose such duty upon the parties,<sup>56</sup> while in the same circumstances the new Hong Kong arbitration law would impose that duty.<sup>57</sup>

### CONCLUSION

Each topic dealt with in this brief Article deserves further analysis by concerned parties, with regard to each set of elements that characterize each actual dispute in fact and in law (where, when, why, how, who, under what substantive and procedural rules, et cetera). Law matters, and thus it matters where and under what law(s) the dispute resolution process is undertaken.

It is submitted that mere “out of context” comparisons of dispute resolution mechanisms based on their general features (see Introduction) are insufficient. Instead, several parameters in fact and in law, specific to each existing dispute and to the operation of the relevant mechanism for such dispute, deserve to be taken into account by users. This may be obvious for professional users, but not all users of dispute resolution mechanisms are professional users, nor are they necessarily experts in the legal aspects (procedure and substance) of domestic and international disputes.

It is submitted that such parameters should include at least the six considerations developed in this Article and that these considerations also have an impact on the ordinary and rarely neglected commercial considerations. In particular, the dispute's subject matter and the governing law shape the disputed right and make it what it is at law.

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<sup>56</sup> CODE DE PROCEDURE CIVILE [C.P.C.] art. 1506 (Fr.).

<sup>57</sup> Hong Kong Arbitration Ordinance, 2010, No. 17, § 18 (2010).

By taking all six sets of considerations into account, users would acquire an understanding of what dispute resolution mechanism best fits their dispute (in fact and in law) and of their realistic dispute resolution expectations, which is better and more thorough than by an “out of context” comparison of dispute resolution mechanisms. Such an enhanced understanding is key for proper dispute resolution management, for preventing pointless proceedings, for preventing the waste of time and funds that might be expended engaging in an inappropriate dispute resolution mechanism, and for strengthening the legal predictability of parties’ rights and interests. These advantages are likely to abundantly compensate most users for the time and the potential costs of legal advice that the implementation of the six considerations would require.

These advantages do not fade away even though *not all* six considerations will necessarily converge in a given set of circumstances and indicate *one and the same* dispute resolution mechanism as the most suitable (for instance “evaluative mediation” as best option under all six sets of considerations). Such a potential result should not come as a surprise and would reflect the facts that (1) the “suitability” of any dispute resolution mechanism is *relative*, to be measured in degrees, and circumstances-conditioned; and (2) the relevance of each such circumstance is not necessarily “exclusive,” that is, relevant exclusively for one dispute resolution mechanism.

Even so, implementing the six sets of considerations would make the final choice between such mechanisms an informed one for someone seeking the most suitable dispute resolution mechanism, and that is the objective. For the rest, that choice is and remains human.