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BUSINESS, LABOR AND LAW IN THE GLOBAL ECONOMY: RESOLUTION OF INTERNATIONAL EMPLOYMENT AND LABOR DISPUTES

*William K. Slate II*¹

China as a metaphor for global economic inter-nation change places all the issues related to production, employment, services, investments, worker rights, and corporate competitiveness in a dynamic state of flux. Indeed, in February 2005, the Financial Times reported that trade between China and India will reach fourteen billion dollars (US), up from one point eight billion in 2001.² Additionally, Chinese imports and exports each soared from approximately twenty-three billion dollars in 1980, to more than four hundred and fifty billion dollars in 2003. An astounding 55% of all Chinese exports now originate from foreign-related enterprise.³

Global economic interdependence is omnipresent, and the resolution of international labor and employment disputes is inextricably in the milieu of new economic realities. However, the thesis of this paper is that business continues to utilize traditional methodologies in the resolution of employment related disputes, whether in the labor context (union and management), or with respect to individually negotiated employment contracts – typically involving executive-level employees or consultants.

This paper first considers international labor disputes, followed by an examination of employment disputes involving individually negotiated contracts. The latter will involve a case study of twenty-one closed international arbitration cases, representing the total of such cases concluded at the International Center for Dispute Resolution (ICDR), (the international division of the American Arbitration Association) for 2003 and 2004.

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² Edward Luce & Richard McGregor, *India's Prowess in Services and China's Manufacturing Strength are Complementary*, FINANCIAL TIMES (London), Feb. 24, 2005, at 17. India, China's ninth largest trading partner as late as 2001, is expected to replace the European Union as China's largest in the next few years.

³ Brad Lindenbaum & Amy Raskin, *China: Is the World Really Prepared?*, Bernstein Investment Research and Management, Research on Strategic Change, available at: https://www.bernstein.com/CmsObjectPC/pdfs/050114_ChinaBlackbook.pdf, (Dec. 2004 at 1).

WHAT IS INTERNATIONAL?

The first step in approaching the question of “what is international” is to consider the definition of these terms. “International labor dispute” can hardly find a commonly-accepted definition. The expression itself refers to two different legal concepts. One may assign the expression “labor dispute,” and the adjective “international” varied meanings, depending upon which legal system or institution is referenced.

The expression “international labor dispute” is itself complex, since it contains technical terms. First, what makes a dispute international? What is defined as “international,” as opposed to the “domestic?” The definition of what is “international” and what is “domestic” can vary from one country to another. As Bob Hepple illustrates in his article,⁴ the national definition of “labor disputes” can likewise vary from one country to another.

What makes a transaction international? In order for the arbitration to be international, the underlying contract must first be international in scope. According to Professor William W. Park, two “principal criteria” might be taken into account while defining a transaction as international: first, the parties’ residence, and second, the nature of the transaction. The author emphasizes that the parties’ citizenship may be of certain importance as well while determining if the arbitration must be conducted according to domestic or international rules.⁵ At issue here is neutrality, and the problems encountered while going through the traditional judicial system. In international litigation, there is very real concern of judges’ desires to apply their own national laws, and thereby, risk possible bias toward the party with whom the judge shares nationality.

The most developed field in the area of international arbitration is international commercial arbitration. What about labor arbitration? In the U.S. and Canada, arbitrations solves most of the domestic labor disputes.⁶ Indeed, most collective bargaining agreements contain an arbitration clause because ADR is seen as the pre-

⁴ See Bob Hepple, Q.C., Mapping International Labor Disputes: An Overview, In *Labor Law Beyond Borders: ADR and the Internationalization of Labor Dispute Settlement*, The Permanent Court of Arbitration Peace Palace Papers, PCA International Seminar (May 7, 2002).

⁵ William W. Park, *Why Courts Review Arbitral Awards*, 16-11 Mealey’s Int’l. Arb. Rep. 12, (Nov. 2001).

⁶ See THEODORE J. ST. ANTOINE, *Internationalization of Labor Disputes: Can ADR Mechanisms Help?*, 57, 58, in *LABOR LAW BEYOND BORDERS: ADR AND THE INTERNATIONALIZATION OF LABOR DISPUTE SETTLEMENT, THE PERMANENT COURT OF ARBITRATION PEACE PALACE PAPERS*, (The International Bureau of the Permanent Court of Arbitration eds., 2003).

ferred process. But preferred in what sense? Part of the answer is in a psychological sense. Since both parties retain a high level of freedom in arbitration, they approach it as a less coercive process; faster, less costly, more informed, final, and binding. Nevertheless there are no international labor dispute cases in the ADR field. The absence of clear definitions, the variability of national laws, and the applicability of national laws in multinational enterprises may be part of the explanation.

WHAT ARE LABOR DISPUTES?

Labor disputes may be defined as: “[a] controversy between an employer and its employees concerning the terms or conditions of employment, or concerning the association or representation of those who negotiate or seek to negotiate the terms or conditions of employment.”⁷ To use a more technical vocabulary, this issue deals with “international labor relations.” What are “international labor relations?” In *Comparative Labour Law and Industrial Relations in Industrialized Market Economies*, R. Blanpain defines them as: “relations between headquarters in one country and employees in one or more other countries, on issues such as co-responsibility of the parents for the debts of the daughter.”⁸

In the international arena, the most developed arbitration field is the commercial one. Thus, one of the first questions to ask is, since we already have a fertile place for international commercial arbitration, can we consider labor disputes as commercial to make them benefit from those rules? In other words, can an employment or labor contract be considered a commercial transaction? The issue here is that such contracts deal directly with individuals, their conditions, and status at work. These contracts actually deal with what is internationally known as “individual rights.”⁹ Nevertheless, California provides guidance on the issue. In his article, Theodore J. St. Antoine¹⁰ cites a California case in which, in the context of the New York Convention of 1958¹¹, a labor dispute may be considered as falling under the umbrella of “commercial relationship.”¹² If other courts fol-

⁷ BLACK'S LAW DICTIONARY 890 (8th ed. 2004).

⁸ R. Blanpain, *Introduction to R. BLANPAIN ET AL., COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS IN INDUSTRIALIZED MARKET ECONOMIES*, 6 (R. Blanpain ed., Kluwer Law International) (8th ed. 2004).

⁹ G.A. Res. 217 A III, U.N. Doc. A/810, at 75 (1948).

¹⁰ St. Antoine, *supra* note 3, at 1.

¹¹ UNITED NATIONS CONFERENCE ON INTERNATIONAL COMMERCIAL ARBITRATION, UN CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS, U.N. Doc. E/CONF.26/8/Rev.1, U.N. Sales No.: 58.V.6. (1958).

¹² *Prograph International Inc. v. Barhydt*, 928 F. Supp. 983, 989 (N.D. Cal. 1996).

low this example, the rules applicable to International Commercial Arbitration may be applicable to international labor disputes as well.

WHAT IS THE SPECIFIC CONTEXT IN WHICH SUCH DISPUTES CAN OCCUR?

The International Monetary Fund describes globalization as follows: “[e]conomic ‘globalization’ is a historical process, the result of human innovation and technological progress.”¹³ It refers to the increasing integration of economies around the world, particularly through trade and financial flows. The term sometimes also refers to the movement of people (labor) and knowledge (technology) across international borders. There are also broader cultural, political and environmental dimensions of globalization that are not covered here. Markets promote efficiency through competition and the division of labor – the specialization that allows people and economies to focus on what they do best. Global markets offer greater opportunity for people to tap into more and larger markets around the world. It means that they can have access to more capital flow, technology, cheaper imports, and larger export markets. However, markets do not necessarily ensure that all individuals share equally in the benefits of increased efficiency. Countries must be prepared to embrace the policies needed, and in the case of the poorest countries they may need the support of the international community as they do so.¹⁴

How, in this context of opening cross-border circulation of people, goods, money, etc. (in other words, investment), does ADR appear to be a better forum than the judicial process for resolving international labor and employment disputes? Firstly, let us note the presence of several important participants, including multinational corporations (MNCs), multinational enterprises (MNEs), and transnational corporations (TNCs). The nature of such structures implies the intervention of many nationalities, through the workers, who are often citizens of the place of incorporation of those structures, and through those corporations who are of the nationality of their home state. In such a context, how does one determine the applicable law and the competent jurisdiction in cases of conflict arising between an employee and an employer? Between the employer and a union? Between the company and the state of incorporation? Between the state of incorporation and the home state? Because the answers can be as complex as the question in terms of judicial resolution and remedies the best method is ADR and more specifically, arbitration. Indeed, the latter is

¹³ See IMF Staff, *Globalization: Threat or Opportunity?* (Apr. 12, 2000) (Corrected Jan. 2002), available at <http://www.imf.org/external/np/exr/ib/2000/041200.htm>.

¹⁴ See generally David Held & Anthony McGrew, *Globalization, Entry for Oxford Companion to Politics*, available at <http://www.polity.co.uk/globo/globocp.htm>.

characterized by the possibility that the parties can choose the applicable law in case of a dispute, and by the opportunity to collaborate on the appointment of an arbitrator whose award will be binding on both parties and enforceable by the courts of the *arbitral situs* and by other courts that are linked by the issue through the actors involved.

GLOBALIZATION INVOLVING THE MULTIPLICATION OF MNE'S, MNC'S AND TNC'S, ESPECIALLY IN DEVELOPING COUNTRIES.

One of the reactions of the international community regarding the new issues raised by the globalization process was the regulation of the multinational corporations in order to ensure fair and equal conditions for workers. Thus, the international community has developed many international labor laws and standards.¹⁵

To focus on the context: disputes arising in MNEs, MNCs, and TNCs typically find that the applicable law is the national law of the state of incorporation.¹⁶ When incorporated in developing countries, those national laws were an incentive when deciding where to incorporate. To limit the costs, most of the MNCs invested in developing countries because the labor laws were less restrictive. This was one of the reasons why in the 1990's, a movement to develop a code of regulations for the MNEs started to emerge. But if the rules applied in such context are the national laws and practices of a given country, then how does the arbitration process fall under the umbrella of international arbitration? The potential dispute that can occur between the employer and the employees or unions may be a national matter. Is the foreign nationality of the parent company enough to make the arbitration international? As further discussed, the international characteristic of the arbitration process usually comes from the international nature of the "transaction."

¹⁵ In his report, the Director-General of the International Labor Organization (ILO), reacted as follows to the globalization debate focusing on "developments in industries where manual labor and low skills dominate production." "The aim is not for the ILO to achieve uniformity in the level of social protection in order to ensure a proper international competition. Rather the idea is simply to place social progress into a relationship with the economic progress expected from the liberalization of trade and globalization." Report of the Director-General, The ILO, Standard Setting and Globalization, IL Conf., 85th Sess. (1997), available at <http://www.ilo.org/public/english/standards/relm/ilc/ilc85/dg.rep.htm> (last visited Sept. 19, 2005).

¹⁶ See *Introduction to the OECD Guidelines for Multinational Enterprises*, Paragraph 7 (1976); see also *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy of the ILO*, No. 8 (1977).

CONTRACT LAW AND THE ARBITRATION CONVENTION OR CLAUSE

In the international context, one must distinguish and avoid confusion between the law applicable to the contract (that should be referenced by the parties in their contract) and the law the parties choose to apply to the arbitration process. For instance, consider a commercial contract between a Syrian independent contractor and a German company. Presume that according to the parties' will, German law is applicable to the commercial contract itself and the French law of international arbitration is applicable to the arbitration contract (or the arbitration clause, if directly incorporated into the commercial contract).

APPLICABLE LAW QUESTION

When talking about the applicable law, one must remember that it usually refers to the contract itself. And here comes the question of arbitration in itself. If the governing law of the labor contract is a national law, and if the national law in question does not allow the submission of labor disputes to arbitration (as is the case in France and many other nations), or any kind of ADR process, the arbitration is not an option because arbitration cannot be used to avoid national laws.

In France, the *Conseil des Prud'hommes* is the exclusive jurisdiction for labor disputes.¹⁷ Consequently, domestic labor disputes are not arbitral. A part of the French Doctrine tried to influence the legislature to change the law on this point. On April 18, 2001, the French Senate reformed article 2061 of the Civil Code, dealing with arbitrability. The new version of the article states that arbitration clauses are valid in contracts concluded in the context of a professional activity (of any kind, commercial, civil, etc.) – unless otherwise stated by the Law – on the condition that the contract is a professional matter for both parties. The question arose, concerning employment and labor contracts, as to whether the disposition of L. 511-1 of the *Code du Travail* could fall under the umbrella of the “unless otherwise stated by the Law” disposition. The implied answer of the legislature seems to be “yes,” since no reform was made in this area. One explanation was that worker protection was the priority in the employment context since workers are considered the weak party to the contract, and thus need more protection. Because arbitration is not yet seen as a safe way to solve conflicts, despite the international area, it seemed to the

¹⁷ See CODE DU TRAVAIL [C. TRAV.], art. L. 511-1 (Fr.).

legislature that making labor and employment disputes arbitrable was too risky regarding the workers' interests and protection.¹⁸

In the U.S. most domestic labor disputes are efficiently settled through arbitration.¹⁹ One reason for this is that arbitration is used as a solution when market flexibility is the priority. Does that mean market flexibility dominates worker interests in the U.S.? The answer is "no." One must know that arbitration offers exactly the same guarantees and protections that are available in a traditional court system. It is simply a different forum for dispute resolution.

ARBITRAL ENFORCEMENT PROBLEMS AND THE NEW YORK CONVENTION OF 1958

When contemplating international arbitration, an important issue is the enforceability of arbitral awards. The New York Convention was created for this purpose, and its signatories are bound by it.²⁰ As previously mentioned, courts have interpreted the "commercial relationships" to cover labor relations. The efficiency and enforcement of arbitral awards across national borders should be possible, but many countries will doubtlessly have to adopt new national laws to accomplish such a result.

POTENTIAL SOLUTIONS

According to the international conventions and laws already in place, ADR can and should be seen as a solution in the emerging area of international labor disputes. The efficiencies found in the domestic arena and the commercial area should be utilized in the international and global context. Indeed, the ADR process is less expensive, faster, and gives greater voice to the parties than the judicial process does. Also, a labor dispute does not necessarily only occur at the end of a contract. Thus, there is a chance that the parties will stay in the contractual relationship afterwards. In this case, ADR appears to be a much less coercive process than litigation. Nevertheless, because labor disputes involve specific matters that are directly related to the individuals as workers, one can think about a specific convention that

¹⁸ In 1999, in its annual report, The French Supreme Court (*Cour de Cassation*) stated that arbitration clauses were void in employment and labor contracts in order to protect the worker and to allow him to go to the *Prud'hommes* where a binding proceeding of conciliation and the possibility for an union to bring an individual action on behalf of the employee (in specific cases mentioned by the Law), is offered to workers.

¹⁹ See 29 U.S.C. 7.

²⁰ Art. III, each signatory state "shall recognize Arbitral Awards as binding and enforce them in accordance with the rule of procedure of the territory where the award is relied upon."

would settle the rules of international labor disputes through ADR in case this solution is possible under national law. Last, but not least, the parties must be informed of the existence of such solutions and must be able to trust the system.

EMPLOYMENT CONTRACT DISPUTES

In an individually negotiated contract, the sole existing relationship is between the company (the employer) and the employee (an independent contractor). This, of course, differs from the triangular relationship involved in a collective bargaining agreement where there are three actors in the process – the employer, the employee, and the union.

In the domestic arbitration field, independently negotiated employment contracts administered by the American Arbitration Association and not covered by collective bargaining agreement, progress differently from those cases where a company promulgates plans for all employees. The latter are governed specifically by the Association's *National Rules for the Resolution of Employment Disputes* (amended and effective Sept. 15, 2005)²¹ and the Association's *Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of the Employment Relationship*.²² The *Due Process Protocol* was developed in 1995 by a Special Task Force, comprised of individuals representing management, labor, employment, civil rights organizations, private administrative agencies, government, and the American Arbitration Association.²³ It encourages mediation and arbitration of statutory disputes, arising out of company promulgated plans, provided due process safeguards exist.²⁴ By contrast, employment disputes arising out of independently negotiated contracts may utilize the Association's *Commercial Arbitration Rules and Mediation Procedures* (amended and effective Sept. 15, 2005) because such employment contracts may also refer to a range of commercial matters such as employee stock options, loans, proprietary consulting services, and severance pay.²⁵

To further examine whether independently negotiated employment contracts in an international setting differ in arbitration from

²¹ American Arbitration Ass'n, Nat'l Rules for the Resolution of Employment Disputes, <http://www.adr.org/sp.asp?id=22075> (last visited Sept. 15, 2005).

²² American Arbitration Ass'n, *Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of the Employment Relationship*, <http://www.adr.org/sp.asp?id=22078> (May 9, 1995).

²³ *See id.*

²⁴ *See id.*

²⁵ *See* American Arbitration Ass'n, *Commercial Arbitration Rules and Mediation Procedures*, <http://www.adr.org/sp.asp?id=22440> (last visited Sept. 15, 2005).

those executed domestically, the author undertook a review and analysis of twenty-one closed international arbitration cases administered by the International Center for Dispute Resolution (ICDR) (the international division of the American Arbitration Association).²⁶ In all of these cases, the contract was an independently negotiated employment agreement.

LEGAL GROUNDS FOR CLAIMANT'S ARBITRATION DEMAND IN CASE STUDIES

In most all respects, the legal grounds articulated by the claimant when initiating an international arbitration under an independently negotiated contract, fairly mirrored the kinds of issues that one would find in domestic cases. Allegations addressed included wrongful termination, breach of contract, failure of the company to abide by certain agreements respecting termination benefits, debate over the expiration of stock options issued to an employee, and a dispute over an employment agreement tied to a loan for a company owned by the employee. In only two out of the twenty-one closed cases studied was there a specific "international" component. In one, an employee demanded that he be compensated for unpaid tax equalization benefits, resulting in an underpayment to employee by virtue of the way his company calculated foreign taxes. The second, to be discussed later, involved a claimant's attempt to invoke Turkish law.

LAW GOVERNING THE AGREEMENT TO ARBITRATE

The governing law expressed in the referenced contracts was overwhelmingly the law of individual states, which was to be applied by the arbitrator(s). Ten cases referred to the law of New York, four to California, and the laws of the following states were each invoked once: Texas, Colorado, New Jersey, Pennsylvania, and Michigan. In one instance, the arbitration clause merely referred to "the law of the state where the claim arose." In just one out of the twenty-one cases was a law outside of the U.S. referenced in the contract as the governing law. In that one instance it was the law of Puerto Rico.

NATURE OF THE CASE DISPOSITIONS

Once again the method used to conclude the studied international cases was quite comparable to their domestic counterparts. Of the twenty-one cases, only five were concluded as a result of an arbitration award. One case was mediated, ten were settled, and five were withdrawn or transferred.

²⁶ On file with International Center for Dispute Resolution.

Annually, approximately 48% of cases that begin with a demand for arbitration are settled both domestically and internationally. Thus, this category of executive contract cases is quite comparable with that statistic. It is also routine for upwards of 80% of the “settled” cases to be concluded prior to the empanelling of an arbitrator(s). This was true for the cases studied, and for other international and domestic cases as well.

One case was concluded as a result of a successful mediation, two other cases attempted resolution via mediation. These three reflect about 9% of the total twenty-one cases. Typically about 6% of all international parties will attempt resolution through mediation, even when the case has begun because of an arbitration clause.

THE NUMBER OF COUNTERCLAIMS IN INDEPENDENTLY NEGOTIATED EMPLOYMENT CASES

Only three out of the twenty-one cases studied had a counterclaim filed by the respondents. Again this is typical of domestic cases as well.

THE NUMBER OF ARBITRATORS CALLED FOR IN THE PRE-DISPUTE CLAUSE

A single arbitrator was referenced in sixteen pre-dispute clauses out of the twenty-one cases studied. A panel of three arbitrators was referenced in four clauses, and in one clause there was no reference to the number of arbitrators to be utilized. It is the practice of the American Arbitration Association to recommend one arbitrator for matters with amounts in controversy of \$500,000 or less. The cases studied overwhelmingly included amounts in controversy below that figure. Thus, the number of arbitrators referenced in pre-dispute clauses would be quite similar to like matters, either domestic or international in nature.

TIMEFRAME FROM ARBITRATION DEMAND FILING UNTIL CASE CLOSURE

The total period from filing the arbitration demand until the closure of a case averaged seven and a half months for the twenty-one cases studied. The shortest timeframe for a case was one month and the longest period was sixteen months. While the average timeframe for all cases of seven and a half months would be quite similar to domestic case dispositions, it is slightly less than the eleven-month average disposition time for all international cases during the past three years.

INSTITUTIONAL RULES REFERENCED IN THE CONTRACTS

All arbitral institutions provide users a variety of discreet subject-matter rules and procedures, which govern the way in which an arbitration case will be administered and proceed to disposition. It is typical in all contracts that invoke arbitration for the parties to include in their dispute resolution section the identity of the rules to be utilized. In the instant case study, no parties cited the ICDR International Rules, which would be the default rules employed if other rules were not specifically referenced. It is difficult to draw a concrete conclusion from this fact since parties may not have seen these disputes as purely international cases, or, they may have simply preferred to use the Association's Employment or Commercial Rules. Examples of the language found in the cases studied include the following: "binding arbitration in accord with the rules of the American Arbitration Association then in effect," "arbitration under the Commercial Arbitration Rules and Mediation Procedures of the AAA," and "arbitration administered by the American Arbitration Association under its National Rules for the Resolution of Employment Disputes."

SELECTED OBSERVATIONS REGARDING THE CASES STUDIED

In addition to the trends and data previously referenced, a few further observations with respect to the cases reviewed include the following:

- While most demands for arbitration were succinct and consumed one to two typed pages, others were twenty or more pages in length, including one which set out of one hundred and thirty eight numbered statements in establishing the claim.
- A limited number of cases included the following language "the arbitrator shall issue a written award and decision explaining the basis for it."
- Other language of interest included: "before the invocation of arbitration or promptly after commenced, the parties shall meet to discuss in good faith the possible resolution of the matter without formal proceedings," "each party shall be entitled to reasonable costs and attorneys' fees to the extent that party prevails," "the prevailing party in any arbitration shall be entitled to injunctive relief in any court of competent jurisdiction," "the parties agree that the company shall be responsible for the cost of arbitration unless the arbitrator orders the employee to pay part or all of the cost."

- While all of the above observations have no uniquely international characteristics, one case did employ the use of a so-called “step clause.” Step clauses may be found in domestic employment disputes and they are increasingly utilized in international contracts. The language found in the negotiated employment contract discussed here included the following language: “[i]n the event of any dispute over the terms and agreements of this contract, the parties agree to engage in the following steps hereafter more fully defined: 1. an internal grievance procedure; 2. an external mediation; and 3. final and binding arbitration.”

INTERNATIONAL LEGAL NEXUS

The one instance in the study where a party advanced a true international legal argument involved a claim brought by an employee against a company that hired him to work in Turkey. The governing law section of the independently negotiated employment contract read as follows: “[t]his agreement shall be governed by and construed in accordance with the laws of the state of Texas (except that no effect shall be given to any conflicts of law principals thereof that would require the application of the laws of another jurisdiction).”

The essence of the claimant’s demands were that upon arriving in Turkey he was informed that he would be required to work six days a week, and a typical work day would have him away from his home for eleven and a half hours. As a result, the employee felt that he was entitled to overtime compensation and that his overtime claim was supported by the terms of Turkish law as it related to the services provided by him while in Turkey. He further contended that his contract specified that he could be terminated for failing to comply with “local custom or laws.” That language built the terms of Turkish labor law into the agreement and bound the company as well. Finally, the employee maintained that even if the company’s contention that Texas law applied was allowed, the company was still bound by the terms of the Fair Labor Standards Act (FLSA), which defines the workday in light of “local laws and the customs of the workplace.” Of course the company maintained that the claims were devoid of legal support because Turkish law did not and could not be applied.

After reviewing the arguments of the claimant and the respondent, the arbitrator found the claimant’s invocation of Turkish labor law did not to apply in this case. Specifically the claimant had referenced the contract’s “termination clause” in citing one ground for termination for cause being defined, but not limited to, “failure to comply with local customs or laws.” However, the arbitrator found that the

applicability of Turkish law in another provision of the agreement did not necessarily follow from this provision; i.e. references to termination for cause do not per se relate to references dealing with payment for overtime. In so finding, the arbitrator relied upon well-known language to the effect that in construing a contract one must afford the words contained in the document their plain, common, and generally accepted meaning.²⁷

As to the claimant's contention that Turkish law might still be applied through the provisions of the Fair Labor Standards Act (FLSA), the arbitrator found that under 29 U.S.C. § 254(b) (2001), an employer is not relieved from liability under the FLSA for overtime compensation and related activities if such activity "is compensable by either – a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or non-written contract." The arbitrator found that provision did not appear to address the claimant's situation, and that the claimant had presented no case indicating that it did. In addition, the arbitrator went on to find that the FLSA did specifically provide, at 29 U.S.C. § 213(f) (2001) that the minimum wage and maximum hours provisions of the FLSA, as found at 29 U.S.C. §§ 206 and 207, "shall not apply with respect to any employee whose services during the workweek are performed in a workplace within a foreign country." The independently negotiated contract had, as referenced earlier, specifically provided that the claimant's services were to be performed in Ankara, Turkey. On its face, the FLSA exempted the claimant's arguments from its provisions, and the arbitrator found that the FLSA did not apply to the overtime claims.

CONCLUSION

As discussed here, in both international labor disputes and international employment contracts, current practices in each of those areas of conflict resolution continue in large measure to follow the national or domestic practices already in place, as opposed to being addressed in a broader international context. It does appear possible for international labor disputes to assume the efficiencies and well-documented historical benefits realized in international commercial arbitration and mediation. However, for such a course to be successful there will have to be a number of changes to national laws, especially in a significant number of nations where specialized tribunals are in place to address labor-related issues. Regarding independently negotiated employment contracts, parties appear to continue to largely ad-

²⁷ *Hance, Scarborough, Wright, Ginsberg & Brusilow, L.L.P. v. Kincaid*, 70 S.W.3d 907, 911 (Tex. App. 2002).

dress disputes in the manner in which domestic mediations and arbitrations are carried out. However, in that respect the differences with international norms are more compatible and less at odds than in the labor dispute area.

As global economic interdependence continues its rapid pace forward, it is natural to expect that independently negotiated contracts, and arbitral and mediation proceedings, involving many more parties and multiple nations, will increasingly reference issues involving conflicts of laws.