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An Empirical Case Study of Informal Alternative Dispute Resolution

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I. INTRODUCTION

The traditional view of litigation posits a neutral and detached judge who sits back passively until counsel have framed the disputed issues in appropriate motions requiring formal judicial decisions. Disengagement and dispassion during the early stages of litigation supposedly enable judges to decide cases impartially. Under the classic model of judicial passivity, the prime responsibility for the orderly and prompt presentation of litigation rests with the bar.[1] However, this classic view of the respective roles of the bench and bar does not operate efficiently in complex litigation[2] where counsel may "waste time and expense if the judge passively waits until problems have arisen."[3]

Getting a case to trial is often an ordeal, as skirmishing over procedural matters can result in huge expenses and years of delay.[4] In complex cases with high financial stakes, counsel often display a tendency to expand the dispute and the pretrial process to the limits of the parties'

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1. *See generally* Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664, 667-70 (1979).

2. Professor Schuck defines a complex case as one that exhibits some or all of the following features:

> Numerous parties raising unprecedented claims, which are to be resolved on the basis of a massive and ambiguous factual record concerning events or relationships that span long time periods and large geographical areas, and which will require resolution of novel procedural, choice-of-law, substantive, and remedial issues. Adjudication of such a case is very costly and time-consuming, and any judgment or settlement reached, even one for money damages, is likely to be difficult to implement.

Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337, 338 n.7 (1986). For a discussion of the legal complexities of mass tort litigation, see Landes & Posner, *Tort Laws as a Regulatory Regime for Catastrophic Personal Injuries*, 13 J. LEGAL STUD. 417 (1984).

3. MANUAL FOR COMPLEX LITIGATION, Second, § 20.1 (3d ed. 1985).

4. One lawyer who practices nationally confirmed that in many courts "[y]ou learn your case as you go—after filing" a suit. With an open-ended court calendar, "you file a zillion interrogatories, 50 deposition notices and go on a great fishing expedition." Barrett, *"Rocket Docket": Federal Courts in Virginia Dispense Speedy Justice*, Wall St. J., Dec. 3, 1987, at 33, col. 3.

pocketbooks.[5] The incentive to "overwork" a complex case flows from the realization that the set of potentially relevant facts is almost limitless in complex litigation, thus leading to massive over-discovery.[6] In addition, lawyers are subject to Parkinson's Law that work tends to expand to fill the time available, a tendency which is further driven by the billable-hours syndrome.[7] For people of modest means, justice delayed is justice denied.

With the recent emphasis on alternative dispute resolution (ADR), many judges have challenged the assumption that justice is most likely to prevail when the judiciary sits back and allows free-swinging confrontation. Such judges have dropped their relatively disinterested pose to adopt a more active, "managerial" stance.[8] This active stance may be demonstrated by formalized ADR procedures or it may consist of a set of informal techniques designed to supervise case preparation and induce settlements.[9] Ad hoc judicial activism has its defenders[10] and its detractors,[11] but final judgment must await further empirical research[12] into the specific techniques utilized by managerial judges. A better understanding of the managerial process cannot exist until we learn what characteristics of cases make them appropriate candidates for particular managerial techniques. While sound first steps have been taken to study the process,[13] "one of the crying research needs in civil procedure is for empirical studies of how managerial judging actually works in practice."[14]

This Article is excerpted from a forthcoming authorized biography of Federal District Judge Robert R. Merhige, Jr. Judge Merhige has

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5. Elliott, *Managerial Judging and the Evolution of Procedure,* 53 U. CHI. L. REV. 306, 320 (1986).

6. *See* Sofaer, *Sanctioning Attorneys for Discovery Abuse Under the New Federal Rules: On the Limited Use of Punishment,* 57 ST. JOHN'S L. REV. 680, 722 (1983).

7. *See* Pollack, *Discovery—Its Abuse and Correction,* 80 F.R.D. 219, 223 (1978) (condemning a system in which "hours are the criterion of pay.").

8. Resnik, *Managerial Judges,* 96 HARV. L. REV. 376 (1982).

9. "Managerial judges believe that the system does not work; that *something* must be done to make it work; and that the only plausible solution to the problem is *ad hoc* procedural activism by *judges.*" Elliott, *supra* note 5, at 309.

10. *See* Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Ten-Stage Discovery Planning and Alternative Dispute Resolution,* 37 RUTGERS L. REV. 253 (1985); Newman, *Rethinking Fairness: Perspectives on the Litigation Process,* 94 YALE L.J. 1643 (1985).

11. *See* Resnick, *supra* note 8; Fiss, *Against Settlement,* 93 YALE L.J. 1073 (1984).

12. The acid test of an evolving theory of litigation is not whether the theory is "true" in a purely academic sense, but whether the theory is useful in describing the "real" world. *See* Elliott, *The Evolutionary Tradition in Jurisprudence,* 85 COLUM. L. REV. 38, 92-93 (1985).

13. *See, e.g.,* P. SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS (1986).

14. Elliott, *supra* note 5, at 326. *See also* Sullivan, Warren & Westbrook, *The Use of Empirical Data in Formulating Bankruptcy Policy,* 50 LAW & CONTEMP. PROBS. 195 (1987) (pointing out the lack of empirical research in bankruptcy law).

been labelled a judicial activist, a trial court's William O. Douglas,[15] and the prototype for the modern activist judge.[16] While eschewing the activist label, Merhige subscribes to the view that an effective judge has a responsibility to "push settlements."[17] Merhige's Eastern District of Virginia has been dubbed the "rocket docket" because it consistently beats all ninety-three other federal jurisdictions in elapsed time between the filing of a litigant's papers and the start of a civil trial. The national median is fourteen months, and in some districts, it is more than two years. But in the rocket docket, it is only five months.[18]

The following Article is taken from that portion of Merhige's biography that addresses the Westinghouse uranium case of the 1970s, perhaps the first of the major "complex cases" to attract national attention. This case study provides an opportunity to examine a judicial decision-making process involving four years of litigation, international discovery proceedings, judicial administrative guidelines, diverse national precepts of economics and politics, the interplay between the free market and multinational cartels and embargoes, and lastly, the personality of the trial judge. Shunning any pretense of passivity, Merhige initiated proceedings in the Westinghouse case by ignoring administrative protocol in order to fly to England and convene international discovery proceedings. Merhige refused to accept Attorney General Griffin Bell's promise to grant executive immunity to witnesses; he then issued a grant of judicial immunity which was ultimately overturned by the British House of Lords. Addressing the merits of the case, Merhige offered a qualified ruling which he used to maneuver the parties toward a settlement on damages. His settlement efforts varied from hosting negotiation cocktail parties in his own home to requiring counsel to work on "Saturdays, Sundays, and some days that aren't even on the calendar."[19] Merhige's unorthodox approach predates modern formalized ADR procedures, but his candid reflections upon his role in the Westinghouse case help reveal the impact that a judge's personality can have upon settlement of major litigation.

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15. "Merhige is one of the most respected federal judges in the country, an activist who moves cases in and out of his court like a drillmaster and who, if he is criticized at all, is faulted for too readily exercising the considerable power of his judgeship." J. STEWART, THE PARTNERS 168 (1983).

16. Macaulay, *An Empirical View of Contract*, 1985 WIS. L. REV. 465, 471.

17. Will, Merhige & Rubin, *The Role of the Judge in the Settlement Process*, 75 F.R.D. 89, 203, 217 (1977).

18. Barrett, *supra* note 4.

19. Unless otherwise noted, all quotations are from interviews with The Honorable Robert R. Merhige, Jr., conducted in Richmond, Virginia throughout 1985-87.

II. THE WESTINGHOUSE URANIUM CASE

A. *Background*

On September 8, 1975, the Westinghouse Corporation dropped a bombshell on the nuclear power industry by announcing that Westinghouse would not honor contracts to deliver seventy million tons of uranium.[20] It was a default of unheard-of proportions, representing thirty percent of total industry requirements. Within six months the open market price of uranium more than quadrupled, and every dollar rise in the price of uranium meant an additional sixty-five million dollars loss for Westinghouse.[21] Westinghouse's jilted customers filed suit to force Westinghouse to supply the uranium at the contract price, or to pay damages amounting to two billion dollars. The resulting litigation dragged on for over a decade,[22] led Merhige to London where he became the first federal judge to hold court in a foreign country, and tested his creativity in resolving a centuries-old problem of contract law.

The background of Westinghouse's legal and financial problems was intimately connected with the development of commercial nuclear power in the United States. Throughout the 1950s, the American government moved to solidify its position as the world's first nuclear power by encouraging vigorous expansion of the uranium mining industry.[23] By 1960, however, the Atomic Energy Commission (AEC)[24] had stockpiled an oversupply of enriched uranium. When the AEC drastically reduced its planned purchases, the uranium mining industry fell upon hard times. Within a five-year period the number of operating uranium mines declined from 730 to 320, while only thirteen of twenty-four processing mills remained in operation.[25] The government belatedly recognized that the continuing collapse of the uranium industry threatened the anticipated long-run expansion of commercial nuclear power. In order to prevent a total collapse of the uranium industry, the AEC agreed to purchase limited quantities of uranium at the fixed price of eight dollars per pound. The eight dollar price was selected because it was thought

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20. Wall St. J., Sept. 15, 1975, at 8, col. 1.

21. J. STEWART, THE PARTNERS 157 (1983).

22. *See* Florida Power & Light Co. v. Westinghouse Elec. Corp., 826 F.2d 239 (4th Cir. 1987).

23. Congress, in the Atomic Energy Act of 1954, as amended, 42 U.S.C. §§ 2011-2296 (1982 & Supp. IV 1987), initiated the program generally known as the "Atoms-for-Peace Program." 42 U.S.C. § 2013(d) (1982 & Supp. IV 1987) formulated "a program to encourage widespread participation in the development and utilization of atomic energy for peaceful purposes. . . ."

24. The AEC was vested with responsibility for effectuating the "Atoms-for-Peace Program," including the development of a commercial nuclear electric industry. 42 U.S.C. §§ 2031-2040 (1982 & Supp. IV 1987).

25. Joskow, *Commercial Impossibility, the Uranium Market and the Westinghouse Case*, 6 J. LEGAL STUD. 119, 130 (1977).

to be low enough to discourage further overproduction of uranium, yet high enough to keep some private uranium firms in business until commercial demand developed to a point where supply and demand were in balance.

When a small commercial market developed in the 1970s, the uranium industry remained trapped in a market where it could not exceed the eight dollar limit set by the AEC. The increasing commercial demand for uranium did not raise prices because the demand was still so small that it could be satisfied from existing reserves. In classic economic theory, the price could have been adjusted upward by decreasing the supply of uranium, but in practice this option was not feasible. Functioning uranium mines had to remain operational in order to avoid flooding and other types of deterioration that would make reopening of the mines expensive. In turn, the continued production of uranium tended to glut the market and hold prices at the eight dollar level imposed by the AEC. Also, the role that Westinghouse had played in depressing the open market price of uranium was soon to be revealed.

Westinghouse became the world's largest middleman supplier of uranium largely as a sideline to its major focus of constructing nuclear power plants. Westinghouse offered utility companies a complete nuclear fuel system that included the nuclear reactor, steam generating system, fuel core, and an agreement to supply fuel reloads at the eight dollar market price.[26] Such turnkey reactors were an attractive and necessary inducement to utility companies who possessed little expertise in the burgeoning nuclear power industry. The Westinghouse turnkey package, combined with the AEC's willingness to sell off its stockpile, induced many utility companies to convert to nuclear power in the expectation that the eight dollar price of uranium would continue into the foreseeable future. (It had remained relatively constant for ten years.) The utilities chose to ignore those economists who warned that the eight dollar price could not be maintained in light of the serious inconsistency between long-run demand and supply-side behavior at the current market price. Market analysts warned that while demand would grow rapidly, there was no corresponding increase in production or exploration for new sources of uranium. Between 1973 and 1975, events brought the uranium market in line with economic projections.

The year 1973 commenced with a dramatic increase in the number of nuclear reactors beginning commercial operation. Thirty-one reactors came on line, some two-and-a-half times more than in the previous five

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26. For a description of the method of generating electric power by atomic energy, see Note, *The Use of Generic Rulemaking to Resolve Environmental Issues in Nuclear Power Plant Licensing*, 61 VA. L. REV. 869, 872-74 (1975).

years.[27] When the new plants began full-time operations, the utilities belatedly turned their attention to uranium supplies. They found little available uranium because existing stockpiles and limited production capacities were already committed to other buyers. At the same time, the AEC withdrew its huge stockpile from commercial sales.[28] In desperation, the utilities were driven back to the open market where they actively bid against each other to secure uranium supplies for their expensive new plants.

Rumors that Westinghouse would not be able to fulfill its contract obligations to supply uranium further fueled the price rise. Unconfirmed reports of the Westinghouse uranium shortage began circulating in early 1974, and on July 14, 1975, Westinghouse publicly confirmed that it was short between forty and sixty million pounds of the uranium promised for the period of 1978 to 1995. The market reacted strongly to this news as the price of uranium rose to thirty-five dollars a pound within a six-month period. By the time the utility companies filed suit against Westinghouse, the price had risen to over forty dollars a pound; Westinghouse would be required to sustain a loss of two billion dollars.

Westinghouse's dilemma raised the obvious question of how the company could have allowed itself to become so seriously oversold, undersupplied, and underpriced. One economist opined that "Westinghouse's policy of going short appears to be irrational."[29] There is now little doubt that Westinghouse was poorly managed during this period. Westinghouse had concentrated on nuclear plant construction where it was losing an estimated $200 to $250 million for its turnkey reactor contracts. Westinghouse also faced serious cash flow problems and substantial reorganization of the corporation. At times like these, failures of command, communication, and control frequently occur. Thus, it is possible that, unless the shortage was an oversight, the only rational explanation was that Westinghouse had speculated on three future developments that never came about. For example, Westinghouse may have counted on the AEC reversing itself and releasing its huge stockpile at the eight dollar price, or Westinghouse may have gambled that once import restrictions were removed, cheap uranium could be obtained from foreign sources.[30] Finally, Westinghouse may have hoped that reprocessing of

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27. The first license for a nuclear power plant was issued in 1958. As of the present date, some 82 licenses have been issued. Florida Power & Light Co. v. Westinghouse Elec. Corp., 826 F.2d 239, 247 (4th Cir. 1987).

28. As the Fourth Circuit observed: "[t]he development of a program of peaceful use of nuclear power as authorized by Congress, begun with such enthusiasm, has since experienced a chequered career, marked by many changes in official policy. . . ." *Id.* at 240.

29. Joskow, *supra* note 25, at 145.

30. Enriched uranium was prohibited from import until 1973, but the AEC started relaxing restraints to begin in 1977, with all restrictions to be phased out by 1984.

spent uranium fuel would become commercially feasible.[31] None of these events came to pass, and Westinghouse's policy, if it was a conscious policy, was not well thought out.

Westinghouse, however, adamantly refused to concede that it was the architect of its own misfortune. Instead, Westinghouse blamed its shortage on the OPEC oil embargo and on a foreign cartel which conspired to fix inflated prices while freezing Westinghouse out of the uranium market. Along with notification of its inability to deliver the promised uranium, Westinghouse confronted its utility customers with a legal and economic memorandum justifying its withdrawal from the uranium supply contracts. Westinghouse relied upon section 2-615, the "commercial impracticability" provision of the Uniform Commercial Code (UCC) as excusing any legal obligation to honor the contracts.[32]

The commercial impracticability clause of the UCC is the broadest and least understood of a variety of legal excuses from contract performance. In Judge Merhige's opinion, the essence of the commercial impracticability defense is that it is manifestly unfair to require a party to a contract to perform the agreement when an unanticipated event radically increases the difficulty of performance.[33] Other courts have referred to commercial impracticability as a question of fundamental equity or justice.[34] Nebulous concepts of justice, however, are not easily applied to the complexities of international commerce between modern multinational corporations. In an attempt to structure vague concepts of equity, the drafters of the UCC formulated guidelines for establishing the defense of commercial impracticability.[35] Westinghouse interpreted these guidelines as requiring that economic impracticability be caused by the occurrence of an unforeseen contingency. Westinghouse argued that the economic impracticability of the uranium contracts was obvious

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31. The reprocessing or disposal of spent fuel has been described as the "most pressing" concern in commercial nuclear power development. Florida Power & Light Co. v. Westinghouse Elec. Corp., 826 F.2d 239, 244 (4th Cir. 1987). In 1977, President Carter deferred indefinitely the commercial reprocessing and recycling of the plutonium produced in commercial nuclear power plants. *Id.* at 245.

32. U.C.C. § 2-615 (1983) provides:

> Delay in delivery or non-delivery in whole or in part by a seller . . . is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made. . . .

Id.

33. *In re* Westinghouse Elec. Corp. Uranium Cont. Litig., 517 F. Supp. 440, 454 (E.D. Va. 1981).

34. Impracticability of performance is "essentially an equitable defense" resting firmly on the unfairness and unreasonableness of giving the contract the absolute force which its own words clearly state. 18 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS, § 1931 (3d ed. 1978 & Supp. 1988).

35. *See supra* note 32.

in light of a potential loss of two billion dollars. As to the requirement that an unforeseen contingency must occur, Westinghouse pointed to the unprecedented oil embargo and the actions of a secret international cartel which had distorted the uranium market.

The utility companies disputed the Westinghouse view of commercial impracticability, filing suit in a Pennsylvania state court and in thirteen federal district courts throughout the country. The Judicial Panel on Multidistrict Litigation[36] recognized the need for central management by a single judge, and ordered the federal suits transferred to Richmond for consolidated pretrial discovery before Merhige.[37] Merhige was selected for the task because his reputation for "managing" complex litigation[38] suggested that he was best able to deal with the complicated issues and to supervise the litigation toward its "most just and expeditious termination."[39]

At this stage of the proceedings, Merhige was not given final control of the Westinghouse case because the utilities' suits were consolidated only for the limited purpose of pretrial discovery. In the federal judicial system, such discovery proceedings avoid trial by ambush while allowing the parties to examine much of the other side's case prior to trial. After an informed appraisal of the strengths of the opponent's case, the parties are better able to balance the likely outcome of a trial against the benefits of an out-of-court settlement. In order to facilitate settlement, pretrial discovery in the federal system is quite broad. However, as international business activity has expanded, discovery in foreign nations has become increasingly important. Efforts to obtain evidence abroad often come into conflict with divergent national precepts of economics and politics. Thus, Westinghouse's attempts to discover information about the international uranium cartel proved to be a very troubling aspect of the case.

B. *International Discovery*

Westinghouse blamed the cartel for the dramatic rise in uranium prices, but this charge was difficult to prove in light of the cartel's efforts to camouflage its activities.[40] Westinghouse alleged that the cartel

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36. *See generally* Howard, *A Guide to Multidistrict Litigation,* 75 F.R.D. 577 (1977).

37. *In re* Westinghouse Elec. Corp. Uranium Cont. Litig., 405 F. Supp. 316 (J.P.M.L. 1975). The thirteen federal suits were consolidated pursuant to 28 U.S.C. § 1407.

38. Merhige's handling of school busing cases had attracted national attention. *See* Bacigal & Bacigal, *A Case Study of the Federal Judiciary's Role in Court-Ordered Busing,* 3 J. LAW & POL. 693 (1987).

39. *In re* Westinghouse Elec. Corp. Uranium Cont. Litig., 405 F. Supp. 316, 319 (J.P.M.L. 1975).

40. For an account of the "detective" work required to uncover the cartel, see J. STEWART, THE PARTNERS 170-81 (1983).

began a producer's conspiracy in Paris in February, 1972 culminating in a formal agreement executed in Johannesburg, South Africa in June of that year.[41] The participants in the cartel included most major producers in Canada, France, South Africa, and Australia, who accounted for substantially all the uranium sold outside the United States and for a large portion of American uranium imports. Upon its formation, the cartel began a concerted withdrawal of surplus uranium from the open market. The cartel initially set uranium prices below the eight dollar American figure, but the cost of uranium rose steadily as the cartel gained confidence that the conspiracy would succeed.[42] Ultimately, the cartel successfully established a minimum world price for uranium and allocated sales by country and by producer within each country. A systematic boycott to exclude Westinghouse from the uranium market began with the cartel's agreement that "reactor manufacturers or any other middleman"[43] were to be charged thirty cents per pound more than other buyers. By the mid-1970s, the cartel refused to make any sales to Westinghouse at all.

In order to conceal its activities, the cartel agreed to a rigged bidding system in which one "leader" quoted the agreed-upon minimum price, while other companies quoted higher prices in order to create the appearance of competition. The cartel further camouflaged its price-fixing activities by naming itself the Uranium Marketing Research Organization, and by releasing a cover story that it was an organization engaged in the legitimate exchange of marketing information. Westinghouse claimed that the cartel's concealment was so successful that its existence was discovered only by the fortuitous acts of environmental groups. The "Australian Friends of the Earth" environmental organization obtained cartel documents from the files of an Australian uranium producer and subsequently released the documents to the public. Westinghouse then sought to obtain additional documents that had passed between the members of the cartel, as well as the notes of all cartel meetings.[44] Efforts to obtain the documents in Australia, Canada, France, and South Africa were frustrated when those countries passed regulations to forbid disclosure of cartel documents. Westinghouse's last hope for procuring the documents hinged upon subpoenaing records from Rio Tinto Zinc (RTZ), a British mining conglomerate which was part of the cartel.

Unlike the other cartel countries, the English government had not passed regulations protecting the cartel. On the contrary, England was

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41. Comment, *The International Uranium Cartel: Litigation and Legal Implications,* 14 TEX. INT'L L.J. 59, 70-71 (1979).
42. *Id.* at 74-75.
43. *Id.* at 76.
44. Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp., 1978 App. Cas. 547, 559.

signatory to a 1970 Hague Convention designed to promote mutual judicial cooperation in civil or commercial matters.[45] The signatory nations to the Hague Convention agreed to facilitate discovery in foreign lawsuits in return for exercising the same privilege when foreign testimony was needed in suits arising in their own courts. Citing the British commitment to judicial cooperation, Westinghouse asked Merhige to issue letters rogatory to the English courts. These letters are commissions from one judge to another requesting the examination of a witness and the reception of other evidence. Merhige issued the letters on October 21, 1976, and, in the spirit of judicial cooperation, assured the English courts that "[w]e shall be ready and willing to do the same for you in a similar case when required." Reviewing this "courteous request from Judge Merhige,"[46] Lord Denning of the High Court of England held that "[i]t is our duty and our pleasure to do all we can to assist that court, just as we would expect the United States court to help us in like circumstances. 'Do unto others as you would be done by.'"[47]

Over the objection of the RTZ Corporation, Lord Denning complied with Merhige's request that RTZ executives be ordered to appear before a consular officer at the United States Embassy in London. When issuing the subpoenas, however, Lord Denning cautioned the hearing examiner to avoid a "fishing expedition."[48] English law does not permit as broad a scope of discovery as does the American judicial system, and thus Lord Denning warned that the American court may not ask for something that goes further than what is permissible in English domestic pro-

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45. *See generally* Sadoff, *The Hague Evidence Convention: Problems at Home of Obtaining Foreign Evidence,* 20 INT'L LAW. 659 (1986).

46. The letter read as follows:

> The People of the United States of America to the High Court of Justice in England. Greetings: Whereas, certain actions are pending in our District Court for the Eastern District of Virginia, Richmond Division, in which the corporations listed in Schedule A attached hereto are plaintiffs and Westinghouse Electric Corporation is defendant, and it has been shown to us that justice cannot be done among the said parties without the testimony, which is intended to be given in evidence at the trial of the actions, of the following persons residing in your jurisdiction, being directors . . . of the RTZ Services Ltd. . . . nor without the production of certain documents in the possession of the RTZ Services Ltd. . . . related to the existence and terms of various agreements, arrangements or concerted practices between RTZ Services Ltd. and the following entities . . . Rio Tinto Zinc Corporation Ltd. (England). . . . And whereas the existence and terms of such agreements, arrangements or concerted practices are relevant to the matters in issue in the actions at present in this court.
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> We, therefore, request that in the interest of justice, you cause by your proper and usual process [Sir Ronald Mark Cunliffe Turner and others] . . . to appear before any consul or vice-consul or other consular officer of the United States at London . . . to be examined orally as witnesses . . . and . . . cause the said RTZ Services Ltd. . . . to produce the documents enumerated in Schedule B hereto, being documents which appear to be or to be likely to be in the possession, custody, or power of the RTZ Services Ltd. . . .

47. Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp., 1978 App. Cas. at 560.

48. *Id.* at 561-62.

ceedings.[49] Lord Denning also noted that the question of self-incrimination might arise at the embassy hearing. Although the uranium cartel had not violated English law, there was the possibility of sanctions by the European Economic Community which had outlawed cartels, or by the United States government under its antitrust laws. Having reserved any ruling upon these potential problems, Lord Denning upheld the letters rogatory and ordered seven directors of RTZ to appear at the American Embassy on June 8, 1977.

The potential legal problems suggested by Lord Denning were realized on the very first day of the embassy hearing. The leadoff witness at the hearings was Lord Shackleton, Chairman of the RTZ Corporation and Chairman of the Honors Committee of the House of Lords. (The prestigious Committee awards knighthood, peerage, and similar high honors.) The embassy hearing took place during Jubilee Week, when the British were celebrating Queen Elizabeth's twenty-fifth anniversary as Monarch. At a time of such national pride, Lord Shackleton seemed uncomfortable asserting the American fifth amendment privilege against self-incrimination. Nonetheless, he declined to answer all questions.

The attorneys for both sides also engaged in vigorous debate over what was and was not relevant documentary evidence. The internationally famous lawyers quickly overpowered the outmatched embassy official who attempted to conduct the hearing. The embassy official put in a frantic call to Merhige, and the lawyers joined in to complain that they had been in London for six days and still did not have an answer to their first question. They pleaded with Merhige to come to London. Merhige declined, but offered to send the special master[50] he had appointed to the case, former U.S. Senator William B. Spong, Jr. The lawyers protested that only Merhige could handle the proceedings, or at least make the fundamental rulings necessary to get things started. Merhige remained reluctant to journey to England until the lawyers informed him that Lord Denning had suggested that perhaps the American judge should come to England and preside over the proceedings. The lawyers insisted that "[i]f you don't come, you will be insulting Lord Denning."[51]

Skeptical of the lawyers' claim, but unwilling to run the risk of offending the British, Merhige boarded the supersonic Concorde and convened court in the American Embassy in London. While Merhige would gain a place in history as the first federal judge to hold court in England, his actions placed him in conflict with the United States

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49. *Id.* at 555.

50. Special masters are appointed by judges to serve a special role in the case, such as supervising discovery. *See* FED. R. CIV. P. 53; Berger, *Away from the Court House and into the Field: The Odyssey of a Special Master,* 78 COLUM. L. REV. 707 (1978).

51. *See supra* note 19.

Department of Justice and the administrative offices of the Federal Courts. Before leaving for England, Merhige placed a hurried call to the administrative offices to inquire how his expenses would be handled. "The parties have agreed to pay all costs," he explained, "but I do not want to take money from any party to this case. How can we handle it so that the parties pay your office directly?" At the other end of the phone Merhige heard the muffled cries of a startled bureaucrat: "Don't do this to us, Judge, the paper work is just too complicated!"[52] In spite of the bureaucrat's plea, Merhige journeyed to England and had his expenses prorated among the parties to the case.

Upon his return to Richmond, Merhige was informed that an angry Chief Justice Burger demanded an explanation for the trip to England. In his best "make my day" tone Merhige responded, "[y]ou tell the Chief Justice that I don't work for him!" The next day, Clement Haynesworth, Chief Judge of the Fourth Circuit Court of Appeals asked Merhige to tender an explanation to the Chief Justice. Merhige remained adamant. "With all due respect, I don't work for the Chief, and, in fact, my judicial acts are reviewable only by my Court of Appeals." Haynesworth then asked Merhige to respond as a personal favor. Merhige relented to the extent that he wrote a personal letter addressed to Haynesworth. "What you do with the letter," Merhige explained, "is your business." Haynesworth subsequently informed the Chief Justice that Merhige had "graciously consented" to discuss the case. Haynesworth added that Merhige did not ask permission to go to England, but if he had, Haynesworth would have advised Merhige that it was his duty to go. Merhige never heard anything further from Chief Justice Burger. Although Burger did encourage a resolution by the Judicial Conference that it was against policy for federal judges to hold court abroad,[53] a resolution is widely ignored in international cases.[54]

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52. *Id.*

53. *Id.*

54. When disregarding the judicial infighting, Merhige offers what he regards as a perfectly reasonable explanation for his conduct:

> I know Chief Justice Burger quite well, and he is someone I respect, admire, and like. But neither he nor anyone else may show less than proper respect to the District Court. I certainly wouldn't defer to the Chief Justice any more than I defer to my own father!

See supra note 19.

Merhige explains:

> When my father visits Richmond, I often have him sit on the bench with me. During one trial, he fell asleep and I had the Marshall remove him from the courtroom. My mother was furious that I could act that way toward my father, but I told her that in the courtroom I don't have a father or mother, or any friends.

Id.

To Merhige, "the bottom line is that I love my father, and I admire the Chief Justice, but in my capacity as a federal judge I demand proper respect. Not to me personally,

Merhige had been willing to travel to England, "or to the ends of the earth," he insisted, in order to help promote settlement of the case.[55] He sensed that denying foreign discovery would create an issue for appeal and thus make Westinghouse less willing to negotiate a pretrial settlement. Merhige concluded that the administrative problems created by foreign discovery were outweighed by the possibility that full discovery would enhance settlement efforts.[56] While the administrative headaches he created were a source of irritation to Merhige, his problems with the Justice Department were of a more serious nature.

After convening the hearing in London, Merhige upheld the privilege against self-incrimination and instructed Lord Shackleton that he need not answer the questions, nor produce the documents requested in the letters rogatory. Westinghouse immediately protested Merhige's ruling to United States Attorney General Griffin Bell who sent two representatives on the flight to London that night. They delivered a forceful letter:

> Dear Judge Merhige,
>
> The United States Department of Justice ("Department") has been informed by counsel for Westinghouse Electric Corporation that to date the depositions of certain employees of the Rio Tinto Zinc Corporation, which are being taken in England pursuant to letters rogatory issued by your court . . . have been totally unproductive due to assertions of the United States fifth amendment privilege by the witnesses. We have also been informed that counsel for the letters rogatory deponents have indicated that all future witnesses will likewise assert their privilege against self-incrimination and refuse to testify.
>
> As you undoubtedly know, the Department is currently conducting a grand jury investigation into certain aspects of the domestic and international uranium industry, including the possibility that non-U.S. uranium producers, one of which is Rio Tinto Zinc Corporation Ltd., have engaged in conduct violative of United States antitrust laws. In the course of this investigation the Department has attempted, with little or no success, to obtain information directly from foreign uranium producers and their officers and employees. We therefore believe that the depositions taken pursuant to the letters rogatory issued by this court might well be the sole opportunity for our grand jury to obtain information vital to its investigation and deem it necessary to its orderly functioning that full discovery pursuant to the letters rogatory be had.
>
> Accordingly to eliminate what may be a major obstacle to discovery in the letters rogatory proceedings, the Government represents to this court and to the letters rogatory deponents listed below that it will not utilize, either directly or indirectly, the deposition testimony of a witness which is given pursuant to letters rogatory issued by this court as a basis for criminal prosecution of that witness for a violation of any United States law. This representation applies to the following individuals. . . .
>
> If you have any questions, please feel free to contact C. Forrest Bannan.[57]

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but to this court as an institution." In fairness, it must be pointed out that Merhige accords full and proper respect to the Chief Justice's institutional status. Merhige and Chief Justice Burger served together for six years on the five-member Executive Council of the Judicial Conference, and according to Merhige, "we are on a first name basis. That is, he calls me Bob and I call him Mr. Chief." *Id.*

55. *See supra* note 19.

56. *Id.*

57. Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp., 1978 App. Cas. at 628-29.

On June 16, 1977, Mr. Bannan appeared on behalf of the United States Department of Justice at a resumed hearing before Merhige at the United States Embassy. Bannan stated that it was the firm policy of the Department of Justice not to grant *formal* immunity to a witness in a civil dispute between private litigants such as Westinghouse and the utility companies. According to Department regulations only government witnesses in federal criminal prosecutions could be granted immunity. In light of this firm policy, Bannan explained, the most the Department could offer was the Attorney General's written promise not to use the sought-after evidence in a criminal prosecution. Bannan also emphasized to Merhige that the evidence Westinghouse sought was considered to be of paramount importance to the Justice Department, and that previous efforts to obtain such evidence in Canada, Australia, South Africa, and France had been unsuccessful. Despite Bannan's forceful plea, Merhige ruled that the Attorney General's letter could not set aside the privilege against self-incrimination. Absent a formal grant of immunity, the witnesses would not be required to answer any questions that might incriminate them.[58]

The Justice Department's heavy-handed attempts to sway Merhige outraged the officials of the English legal system. An aide-memoire was delivered to the State Department expressing Her Majesty's Government's concern at this attempt to obtain evidence for a criminal antitrust investigation by intervening in a civil case. The British stressed a "strong hope that the Department of Justice will desist from its attempts to undermine . . . [agreed upon] procedures and discontinue its intervention."[59] In spite of the British protest, the Antitrust Division of the U.S. Justice Department reversed its policy and authorized an application to Merhige for a formal grant of immunity which would require Lord Shackleton to respond to the discovery requests of the parties.

During the hearings on the application to grant immunity, RTZ sent its English barristers to Merhige's courtroom in Richmond. Despite their considerable charm,[60] the barristers could not dissuade Merhige from issuing the grant of immunity. Under the applicable statutes, a federal judge has no discretion and must honor the Justice Department's request for immunity. When the English barristers lost the battle in Merhige's

58. *See supra* note 19.

59. Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp., 1978 App. Cas. at 629.

60. To Merhige, the most enjoyable aspect of the Westinghouse case was the quality of the lawyers. Lead counsel in the case, Lewis T. Booker of Hunton & Williams and John S. Battle, Jr. of McGuire, Woods, Battle & Boothe, are generally regarded as outstanding members of the Bar. Merhige, however, has an especially fond remembrance of the English barristers. Even without their wigs and robes the barristers occasionally forgot themselves and addressed Merhige as "Your Lordship—oh, I beg your pardon, Your Honor." Merhige would always reply, "No, no, that's perfectly all right. Your Lordship will do just fine. You American lawyers pay attention to this." *See supra* note 19.

court, they took the legal war back to the British House of Lords. Complicated issues of international law were raised in the appeal, although the intriguing questions were expressed in typically understated British fashion—"[there is] some degree of procedural confusion as to the capacity in which Judge Merhige was doing the various things he did."[61] The fundamental legal question concerned Merhige's official status in London. Was he acting as judge of an American court, or was he merely a hearing examiner appointed by the English courts? Lord Denning had initially appointed a low-ranking officer of the American Embassy to conduct the hearings. It was suggested that when Merhige arrived in London he was merely taking the part of the embassy official and acting as a subordinate of Lord Denning.[62] Aside from threatening Merhige's place in history as the first federal judge to hold court in England, the controversy presented serious legal questions. The grant of immunity issued by Merhige in Richmond applied only to testimony given pursuant to *this* court's orders.[63] If the British courts in London were ordering the witnesses to appear and testify at the American Embassy, then by its own terms Merhige's grant of immunity would not protect the witnesses.

These technical issues were never resolved because the British Justice Department sought a direct political confrontation with its American counterpart. The English Attorney General petitioned the House of Lords to resolve the long-standing controversy between the British government and the government of the United States as to the claim of the latter to have jurisdiction to enforce its antitrust laws against British companies. The British regarded the American court's investigation of antitrust activities outside the United States as an unacceptable invasion of British sovereignty. Previous attempts by the American government to use the federal courts in this investigatory role had been the subject of diplomatic protests.[64] It was clear to the British that an American grand jury investigating criminal antitrust charges lacked authority to subpoena the records of a British company. Nonetheless, in March of 1977 the federal grand jury investigating criminal charges against the cartel issued subpoenas duces tecum requiring the parties to the Westinghouse case to deliver any RTZ documents obtained as part of the civil discovery proceedings.[65] Thus, the Justice Department had at-

61. Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp., 1978 App. Cas. at 638.

62. *See supra* note 19.

63. Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp., 1978 App. Cas. at 639.

64. *Id.* at 591.

65. Westinghouse filed an antitrust suit in Chicago in 1976 against 12 foreign and 17 domestic producers of uranium. Westinghouse ultimately reached a negotiated settlement in the antitrust suit, and the proceeds from that settlement were utilized in negotiating settlements of the utilities' suits. Interview with John S. Battle, Jr., private counsel, McGuire, Woods, Battle & Boothe, in Richmond, Virginia (July 29, 1986) [hereinafter Battle interview].

tempted, rather transparently, to do indirectly what it could not do in an open fashion. The American government portrayed itself as appealing to the British agreement to foster discovery in civil cases, while the United States was actually investigating a criminal matter. The British Attorney General opined that "[i]t cannot be right . . . ."[66]

The House of Lords ultimately sided with the British Justice Department in upholding RTZ's claim of privilege. Although Merhige's grant of immunity had removed the threat of criminal prosecution in America, the House of Lords cited the possibility that the European Economic Community (EEC) would impose sanctions for violating its directive against cartels. Westinghouse sought to discount this possibility by arguing that there was no real or appreciable danger of sanctions because the EEC had tacitly approved of the cartel almost from its beginning in 1972. Throughout the four-year existence of the cartel the EEC in Brussels had never taken any action to interfere with or to break up the uranium monopoly. In spite of the EEC's inaction, the House of Lords expressed concern with what might happen if the requested documents were produced in the Westinghouse case. The House of Lords concluded that "the resulting publicity in this sensitive political field might result in pressure on the Commission" to impose future penalties; thus, the threat of sanctions was not entirely "fanciful."[67] So long as there remained any possibility of criminal sanctions, the House of Lords ruled that RTZ was entitled to legitimately assert the privilege against self-incrimination. The final result of all the international proceedings was the conclusion that the cartel documents would not be produced. Westinghouse had reached a dead end and was left to make its case as best it could without the documents it had fought so hard to obtain.

With the procedural aspects of international discovery resolved, Merhige sought to begin trial on the merits of the case. He had been given initial control of the case only for purposes of pretrial discovery. Therefore, in theory, the utility companies could now return to their home jurisdictions for trial. Merhige, however, expressed his hesitancy to transfer the cases to diverse jurisdictions and require other judges to duplicate his efforts to become familiar with the essential facts of the controversy.[68] The parties themselves were unsure whether they should seek trial in their home jurisdictions, or remain before Merhige for the conclusion of the case. On the one hand, lawyers often prefer to have a hometown jury when representing a local utility company against a national corporation like Westinghouse. However, the utilities also recognized that because of his familiarity with the situation Merhige could

66. Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp., 1978 App. Cas. at 631.
67. *Id.* at 637.
68. Richmond Times-Dispatch, Jan. 25, 1978, at A-7, col. 8.

best deliver a speedy disposition of the case. A quick resolution of the controversy, through adjudication or ADR, was highly desirable because existing uranium supplies were running low. The utilities had to determine whether they could obtain the uranium from Westinghouse, or whether they had to search for it elsewhere. Certainty, at this point, was more important than squeezing the last dollar out of a jury verdict. All but two utilities volunteered to keep the case before Merhige.

The primary opposition to Merhige's jurisdiction came from counsel for Kansas Gas & Electric who argued that, "[w]e're not just looking for a negotiated settlement. We want to try this case openly in Kansas where we truly believe in the sanctity of a man's word. It wasn't long ago that if a man broke a contract in Kansas, why we would hang him." When the courtroom laughter died down, Merhige informed the red-faced counsel "[t]hat ends the matter. I'm not sending any of these corporate executives to a jurisdiction where they can be lynched." Counsel good-naturedly accepted the consequences of his overstatement, and Kansas Gas & Electric and Con Edison of New York were placed in a holding status while the majority of the plaintiffs went to trial before Merhige on the issue of commercial impracticability.[69]

C. *Commercial Impracticability*

Although the defense of commercial impracticability is a relatively new concept, its roots trace back to early English common law. Originally the common law imposed an absolute responsibility for performance on the parties to a contract. Any failure of performance, whatever the reason, constituted a breach of the contract for which the defaulting party was required to pay damages.[70] In the nineteenth century, the common law tempered this rule of absolute liability by recognizing certain legal defenses which would excuse a party from performance. If a party prevailed using one of these defenses, the contract was said to be discharged rather than breached. The first recognized defense was factual impossibility which existed whenever the means of carrying out the contract was no longer physically possible. For example, a contract would be voided by the death of an entertainer just before a scheduled concert.[71] In modern contracts the impossibility defense is often embodied in a "force majeure" clause which excuses failure of performance caused by acts of God, wars, floods, epidemics, and the like. Force majeure clauses and the concept of impossibility are defined.

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69. *See supra* note 19.

70. *See* E. FARNSWORTH, CONTRACTS 647 (1982) ("[T]he general rule that duties imposed by contract are absolute.").

71. *See generally* Posner & Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. LEGAL STUD. 83, 85 (1977).

as situations where the use of all human strength, experience, wisdom, and training cannot bring about the agreed upon performance.[72]

True impossibility of performance is a complete defense, but it is strictly defined and difficult to establish in practice. Modern commercial transactions, such as Westinghouse's uranium supply contracts, rarely involve situations in which performance is truly impossible. No matter what the occurrence, an equivalent method of performance can often be found, albeit at a price substantially higher than that in the contract. In order to temper the harshness of the impossibility defense, the common law recognized an additional concept of "frustration of purpose." In such situations performance is physically possible, yet the underlying purpose of the contract is no longer attainable. The most famous examples of this doctrine were the cases surrounding the coronation of King Edward VII of England.[73] In these cases, hopeful spectators leased apartments along the coronation's processional route in order to catch a glimpse of their new monarch. The apartments were rented for just one day and the only purpose of the lease was to give the renters a splendid view of the procession. When the procession was cancelled due to Edward's illness, the renters sought release from the rental agreement on the ground that the underlying purpose of the contract had been frustrated. The English courts ultimately divided on the extent to which discharge should be allowed. The modern formulation of the frustration of purpose doctrine requires circumstances where performance has become "so vitally different from what was anticipated [by the parties] that the contract cannot reasonably be thought to govern."[74]

The final step in the evolution of legal excuse from contract performance was the adoption of section 2-615 of the Uniform Commercial Code (UCC), which defines commercial impracticability. Under this concept, performance is physically possible and the underlying purpose of the contract is achievable, but the cost of performance is much higher than contemplated. The most notorious examples of this concept were the Suez Canal cases[75] which arose when the Egyptian government closed the canal after the 1958 war. The closing of the canal meant that cargo ships were required to sail around Africa, a voyage double the distance and an additional one-third of the cost. In the Suez Canal

72. The traditional formulation of the impossibility defense is set forth in Texas Co. v. Hogarth Shipping Co., 256 U.S. 619, 629-30 (1921).

73. *See* Krel v. Henry, 2 K.B. 740 (1903).

74. Eastern Air Lines, Inc. v. McDonnel Douglas Corp., 532 F.2d 957, 991 (5th Cir. 1976) (citing 6 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1963, at 5511 (rev. ed. 1938)).

75. *See* Transatlantic Fin. Corp. v. United States, 363 F.2d 312 (D.C. Cir. 1966); American Trading & Prod. Corp. v. Shell Int'l Marine Ltd., 453 F.2d 939 (2nd. Cir. 1972). *See* Schlegel, *Of Nuts & Ships & Sealing Wax, Suez & Frustrating Things—The Doctrines of Impossibility of Performance,* 23 RUTGERS L. REV. 419 (1969).

cases, as in the Westinghouse case, the basic problem was to decide who should bear the loss resulting from an event that rendered performance by one party economically unfeasible. Many prominent scholars have thrown up their hands at such questions and advised the court to "exercise its equity powers and pray for the wisdom of Solomon."[76]

Merhige could not turn to divine guidance nor to any definite authority on commercial impracticability because there was no Supreme Court or other high court interpretation of the commercial impracticability clause. Exactly what is meant by the clause has bedeviled the lower courts, and Merhige's Westinghouse decision is still cited in law school casebooks as one of the most significant rulings on the issue. Left to his own resources, Merhige sought to interpret commercial impracticability by examining the common law doctrines of impossibility and frustration of purpose. His legal research suggested that commercial impracticability was established if the party seeking discharge (Westinghouse) could prove four factors: (1) was performance as agreed upon rendered impractical?; (2) did the impracticability arise from an unforeseen contingency?; (3) did the parties to the contract, explicitly or implicitly, allocate the risk that the contingency would occur?; and (4) did the party seeking discharge make all reasonable attempts to assure performance?[77] The parties accepted this analytical framework and joined in battle over each of the four factors.

D. *Merhige's Decision*

At the conclusion of the evidence, legal experts felt that Westinghouse had made a plausible, but not overwhelming, case for commercial impracticability. Merhige, however, did not base his decision on the advice of legal scholars, nor on the sophisticated economic testimony of expert witnesses. Instead, he turned to fundamental principles of contract law and announced, somewhat facetiously, "I have not found the case to be a greatly complicated case."[78] He explained his intuitive feeling that people schooled in the common law are brought up to believe that a deal is a deal. "That's the way business works. People make good deals and bad deals all the time."[79] Merhige went on to explain that his father and grandfather were both merchants who schooled the young Merhige to accept the principle that making a bad bargain does not give you the right to weasel out of it. Throughout the trial

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76. 6 A. CORBIN, CORBIN ON CONTRACTS § 1328, at 344 (1962).

77. *In re* Westinghouse Elec. Corp. Uranium Cont. Litig., 517 F. Supp. 440, 451 (E.D. Va. 1981). For similar analysis, see Opera Co. of Boston v. Wolf Trap Found., 817 F.2d 1094 (4th Cir. 1987).

78. *See supra* note 19.

79. *Id.*

Merhige warned counsel of one of his grandfather's favorite sayings:

> He who sells what isn't his'n,
> buys it back or goes to prison.

According to Merhige, "[m]y grandfather's little maxim is the kind of thing that most people believe, and that's the kind of belief that commerce is based upon."[80] While counsel for Kansas Gas & Electric took quite a ribbing about his statements, Merhige agrees that "there was a lot of truth in his observation that it wasn't long ago when a man could be hung for trying to back out of a contract."[81] According to Merhige, "[a]ll the legal scholars and economists in the world can't change the fact that a man's word is his bond, and this applies just as much to businessmen."[82] Merhige believed that "this whole uranium fiasco was a business problem which should have been resolved by businessmen."[83] At the very start of the discovery proceedings, he informed the *Wall Street Journal* that he did not ever expect to finish the Westinghouse case. He expected it to be settled.[84]

Merhige is both praised and criticized for his activist role in settling cases. At one point in the Westinghouse trial, the local newspaper reported the courtroom proceedings by lamenting that "Judge Merhige leaned on his settlement horn again yesterday."[85] Merhige shrugs off the criticism: "Judges can't force settlement because good lawyers can't be forced to do anything."[86] Merhige distinguishes between helping the parties settle a case, and moving in and taking the case away from the lawyers. Merhige feels that criticism of his settlement efforts comes from attorneys who do not like his approach of involving the parties themselves in direct negotiations. These attorneys fail to realize that Merhige becomes frustrated with "lawyer talk" when the corporate chief executives, who have the ultimate power of decision, remain remote from the litigation. Merhige believes that "when a court addresses the threatened survival of one of the world's corporate giants, the leaders of industry must get together and work out their problems so that the potential loss is held to a minimum."[87] According to Merhige, "these are business problems to be resolved by businessmen. I just try to get both parties to recognize what strong arguments the other side has. Even a pancake has two sides."[88]

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80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *See* Wall St. J., June 2, 1978, at 36, col. 1.
85. Richmond Times-Dispatch, January 22, 1978, at C-4, col. 5.
86. *See supra* note 19.
87. *Id.*
88. *Id.*

In an attempt to facilitate settlement discussions, Merhige and his wife, Shirley, hosted cocktail parties in their home for the lawyers *and* the corporate executives.[89] It may not have been a crucial factor, but the social contact did facilitate discussions in a context other than confrontational litigation. Westinghouse Chairman Robert E. Kirby finally agreed to become involved in the negotiations and made personal contact with the chief executive officer of each utility. The jawboning paid some immediate benefits when six of the thirteen utility companies reached a settlement with Westinghouse before the conclusion of the trial. However, the other utilities remained adamant, and when all negotiation efforts failed, Merhige prepared to issue his ruling.

In a time of rapid inflation, increased uncertainty in commodity prices, governmental protection of national corporations, and growing international cartels, the Westinghouse case, given its size and visibility, was of significant importance. Merhige's decision was anxiously awaited not only because of its effect on Westinghouse, but also because of its potential to send a dramatic message to the modern multinational corporations controlling most of the world's trade. The stage was set for a momentous and definitive decision as Westinghouse insisted on complete discharge from its contract obligations while the utilities demanded full damages. Each side sought an all-or-nothing resolution of the long unanswered question of what constitutes commercial impracticability in modern business dealings. During its closing argument, Westinghouse solemnly intoned that the continuing evolution of the doctrine of commercial impracticability was being placed in Merhige's hands. In a dramatic gesture, counsel turned to Merhige and pleaded: "We have done the best we can to get the torch here today. I hand it to Your Honor."[90]

Westinghouse and the utilities treated the doctrine of commercial impracticability as a dichotomy, as if the only choice were between enforcing the contract with an award of full damages or discharging the contract with an award of no damages. Merhige perceived a possible intermediate solution. He announced his position from the bench:

> [T]he Court feels constrained to state its decision that Westinghouse did not meet its burden of establishing that it is entitled to excuse. . . .
>
> The plaintiffs should not be misled by today's holding to the effect that Westinghouse is not excused from its contractual obligations. If anything, the Court is disposed to believe that, just as Westinghouse is not entitled to excuse from its contractual obligations, the plaintiffs are not entitled to anything near the full measure of their prayer for relief.
>
> The Court has previously stated its belief that [the position of some of the plaintiffs] does not take realistic account of the litigation risks either before this Court or on

89. Will, Merhige & Rubin, *supra* note 17, at 213.
90. Richmond Times-Dispatch, June 4, 1978, at F-1, col. 4.

appeal, nor does it take account of the equitable considerations which weigh in favor of compromise.[91]

Merhige had earlier divided the case into two aspects: (1) whether Westinghouse was liable for any damages or whether it was excused from performance; and (2) to what extent the utilities had been damaged by Westinghouse's default. Having resolved the issue of liability against Westinghouse, Merhige made another attempt to push the parties to settle on the damage issue:

> In some senses the questions that still remain unanswered are more important and perhaps more difficult of resolution than those the Court has already addressed. . . .
>
> [T]hese are cases which I think everybody admits should be settled if at all possible, in the public interest, and they are really business problems, and should be settled as business problems by businessmen as I have been urging from the very first.
>
> I expect the utilities and Westinghouse to enter into serious and intense negotiations [on the proper amount of damages] . . . if it gets out of hand, I'll make whatever rulings I have to. I'm going to try to cut down the expense of this case, as ridiculous as that may sound.[92]

Seeking compromise and accommodation, Merhige had found the middle ground between the extremes of full damages or no damages. Merhige refused to become trapped in rigid interpretations of commercial impracticability, recognizing that the broader purpose of the UCC was embodied in such concepts as "flexible adjustment machinery" and equitable action when "neither sense nor justice is served."[93] Merhige saw the flexible nature of the UCC as permitting some reduction in damages when commercial impracticability was less than a complete defense. From the bench, he suggested an approach which would break damages down according to how much of the price rise was due to Westinghouse's policy of oversell, how much damage was caused by the actions of the cartel or by OPEC, and any other unforeseen events. Although Westinghouse would be liable for the damages caused by its own actions, the utilities would not be permitted to recover for the damages caused by the cartel or by the OPEC embargo.

Utilizing his expertise in alternative dispute resolution, Merhige offered each party a carrot and a stick. The utilities received an important bargaining chip with Merhige's recognition that Westinghouse was subject to some liability. By warning the utilities that they would not receive the full damages they requested, Merhige significantly strengthened Westinghouse's bargaining position. Merhige encouraged the parties to negotiate the damage award by appealing to their good faith and willingness to work toward fair and equitable solutions of myriad complex

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91. Excerpts from the trial record, *quoted in* E. FARNSWORTH & W. YOUNG, CASES AND MATERIALS ON CONTRACTS 981 n.6 (3d ed. 1980).

92. *Id.*

93. Jennings, *Commercial Impractiability,* 2 WHITTIER L. REV. 241, 255 (1980).

problems. He expressed confidence that a workable and appropriate resolution could be reached which would be beneficial to the parties and to the public as well. He kept the pressure on the parties to negotiate by announcing that the court would meet and confer with counsel in an effort to assist them in reaching an agreement. Finally, Merhige warned that "[i]n the event that the Court's hope in this regard does not reach fruition, then the Court stands ready to issue a decree which insures that Westinghouse pay no more, and the utilities receive no less, than is fair."[94]

Merhige maintained the pressure to reach a settlement by having the court's special master, former U.S. Senator William B. Spong, Jr., conduct marathon negotiation sessions with the parties. Merhige agreed to counsel's request for an open-door policy which permitted any attorney to visit the judge's chambers without notifying other counsel. This open door policy was feasible only because the lawyers trusted that no advantage could be gained by speaking with Merhige informally. Merhige favored the policy because, "when I talk to lawyers, I learn more from them than they do from me."[95] When settlement negotiations stalled, Merhige stepped up the pressure by moving proceedings much faster than most judges. Out-of-town lawyers were astonished by Merhige's requirement that they come to court on weekends, early mornings, and late evenings. At one point, Merhige threatened to have counsel work on "Saturdays, Sundays, and some days that aren't even on the calendar."[96] Local counsel smiled knowingly at Merhige's work schedule and referred the out-of-town lawyers to the Judicial Almanac which gives this insider's tip on Merhige: "Be prepared for ten hour court days."[97]

The stalemate in the settlement negotiations developed because of Merhige's attempt to keep the parties guessing as to the damages he might ultimately award. Merhige's rejection of the commercial impracticability defense had raised the settlement ante as far as Westinghouse was concerned. However, the utilities also felt the pressure because they were left to speculate as to the extent of the compensation to be awarded. Merhige warned the utilities that they were "too smart" to believe that they had won their case and need not be concerned with proving damages.[98] The issue of equitable damages was finally resolved when Westinghouse began separate negotiations with each individual utility company. John Battle, lead counsel for Westinghouse, concluded that "as long as we tried to deal with the utilities as a group, it was an

94. *See supra* note 19.
95. *Id.*
96. *Id.*
97. ALMANAC OF THE FEDERAL JUDICIARY, 4th Cir. 30 (B. Johnson ed. 1988).
98. *See supra* note 19.

impossible task because the common denominator became the demand of the most obstinate. No real progress was made until we broke up the group and tailored individual settlements."[99]

Lewis Booker, liaison counsel for the utilities, agrees that compromise was possible only because of individual tailoring of the settlements. "Each settlement was unique," according to Booker, "because it fit the needs of each utility in terms of uranium, equipment, extended warranties, and the like. Although the utilities received minimal cash up front, they received many long run concessions from Westinghouse."[100] Each settlement package (the details of which are still confidential) was very complex because only the experts could understand such matters as the economic value of a warranty extended to the year 2005. Booker feels that,

> Merhige was very astute in recognizing that the parties and the experts could negotiate on matters that a judicial verdict could not cover. For example, the utilities could agree to accept a turbine generator in lieu of damages, but Merhige would have been powerless to order that. His verdict would necessarily have been limited to computing dollar damages.[101]

Each side ultimately benefited from the flexibility inherent in negotiated settlements. On its part, Westinghouse could manufacture a piece of equipment which would cost $700,000 to make, but which was worth $1,000,000 to a utility company. Thus, the utility could report to its regulatory body that it had received a $1,000,000 in compensation, while Westinghouse could report to its stockholders that it had paid only $700,000 in damages.[102] Merhige's efforts to force negotiation paid handsome dividends when all parties eventually settled out of court. Merhige was never required to assess damages and confesses that he had never worked so hard to avoid making a decision. When Kansas Gas & Electric submitted its settlement agreement to the court, Merhige reminded counsel of his previous reference to lynchings in Kansas and congratulated counsel because, "to have reached settlement in this case without the loss of life is a monumental accomplishment."[103]

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99. Battle interview, *supra* note 65.

100. Interview with Lewis T. Booker, private counsel, Hunton & Williams, in Richmond, Va. (Aug. 5, 1986) [hereinafter Booker interview].

101. *Id.*

102. Westinghouse reported its settlement with the Tennessee Valley Authority at a cost of $36 million. The TVA, on the other hand, put a price of $130 million on the value of the settlement. Richmond Times-Dispatch, May 16, 1979, at B-2, col. 6. Kansas Gas & Electric valued its settlement at $94 million, while Westinghouse placed the value at $47 million. Richmond Times-Dispatch, Jan. 15, 1980, at A-6, col. 2. Union Electric valued its settlement at $200 million, Westinghouse claimed costs of $125 million. Richmond Times-Dispatch, Dec. 21, 1979, at A-10, col. 6. The disparity in reporting the settlements caused major problems with the I.R.S. *See* Richmond Times-Dispatch, Dec. 30, 1979, at C-4, col. 4.

103. *See supra* note 19.

After world-wide publicity, international proceedings, four years of litigation,[104] and vigorous debate among economists and legal scholars, the Westinghouse case ended with a whimper instead of a bang. Rather than issuing an all-or-nothing decision on commercial impracticability, Merhige's approach alerted the legal community to the possibility of equitable compromise. To Merhige, the bottom line was that the parties to the proceeding were satisfied. As Lewis Booker sums up the case:

> The overall feeling by everyone was that justice had really been done. The utilities got what they needed to continue operations, while Westinghouse was able to stay in business, keep its plants running and its people employed. In the final analysis, Westinghouse, the utilities, and the judicial system had all gotten a fair shake.[105]

Although the litigants were satisfied, many academic observers expressed disappointment over Merhige's failure to identify a general principle which would resolve future questions of commercial impracticability in the modern world.[106] Merhige, however, offers no apologies for his approach: "To me, the function of a judge is not to make decisions which may be proper in theory, yet have disastrous effects in practice. As I said from the very first, these problems were basically business problems to be resolved by businessmen."[107] Merhige expresses an intuitive feeling[108] that, "a court should not throw all of its weight behind one side of an economic controversy because there are no legal solutions to financial problems. I gave each side some support so that they could bargain from equal strength. Isn't that what free enterprise is all about?"[109]

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104. The transcript of the Westinghouse proceedings was in excess of 22,000 pages. Richmond Times-Dispatch, July 16, 1979, at A-9, col. 6.

105. Booker interview, *supra* note 100.

106. *See, e.g.*, Dawson, *Judicial Revision of Frustrated Contracts: The United States*, 64 B.U.L. REV. 1, 8 (1984) (objections to the "pursuit of an ephemeral equity"); Halpern, *Application of the Doctrine of Commercial Impracticability: Searching for the "Wisdom of Solomon,"* 135 PA. L. REV. 1123, 1137 (1987) (Judge Merhige's approach is intuitively appealing, but raises serious obstacles in the application of doctrine.). But Judge Merhige's approach may have served as precedent in the "ALCOA" case. Aluminium Co. of America v. Essex Group, Inc., 499 F. Supp. 53 (W.D. Pa. 1980). Professor Macauley's assessment of the real value of the ALCOA decision sounds like a description of Judge Merhige's actions:

> The District Judge's opinion and the uncertain result of the appeal changed the balance of bargaining power, but it did not impose a final result on the parties. The decision plus the appellate process worked as a form of coercive mediation. Faced with the situation, the parties worked out their own solution.

Macauley, *supra* note 16, at 476.

107. *See supra* note 19.

108. Merhige has admitted that a court must often apply "its own sense of fairness." *In re* Westinghouse Elec. Corp. Uranium Cont. Litig., 517 F. Supp. 440, 478 (E.D. Va. 1981).

109. *See supra* note 19.

III. POSTSCRIPT

Alternative Dispute Resolution has no generally accepted theoretical definition, but it does have a fundamental premise—to permit legal disputes to be resolved outside the courts for the benefits of all parties.[110] While offering no definitive interpretation or evaluation of Judge Merhige's ADR efforts, this postscript merely acknowledges some questions, perhaps obvious ones, raised by the proceedings.

The most immediate concern is the propriety of sanctions, mild though they may have been, applied directly to the attorneys.[111] The billable hour syndrome[112] combined with the "Type A" personality of many lawyers induces long hours of work without any push from a judge. Nonetheless, even totally dedicated attorneys reach a point where their interests in personal comfort may conflict with the best interests of the client. While no lawyer is likely to sell out his client for an extra hour of sleep, the pressures in the Westinghouse case were of a more covert and pervasive nature. The subtle effect of those pressures is apparent when the participants recount their version of the marathon negotiation sessions.

Former U.S. Senator William B. Spong, Jr., presided over the settlement negotiations while serving as special master in the case. He ruefully recalls Merhige's insistence that the Westinghouse litigation team spend its weekends negotiating in the Richmond federal courthouse.[113] Many of the Westinghouse attorneys were forced to forego attendance at their hometown Pittsburgh Steeler football games. (These were the years of the Steeler's Super Bowl teams.) On Fall Sundays, Merhige would place counsel in a conference room while he retired to his chambers to watch the Redskins game on television. Periodically, Merhige would look in on the negotiators and ask "[h]ow are you guys coming? The 'Skins aren't doing well. No word yet on the Steeler game. Wonder why they're not announcing any score?"[114] Spong admits that the normally pleasant courthouse took on the aura of Spandau Prison. The Westinghouse lawyers grudgingly forfeited their weekends for an entire football season, but balked at spending the next Fall under those same conditions. Only the timely settlement agreements allowed them to enjoy that second season of football.

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110. *See* Lieberman & Henry, *Lessons from the Alternative Dispute Resolution Movement,* 53 U. CHI. L. REV. 424, 425 (1986); Sander, *Varieties of Dispute Processing,* 70 F.R.D. 111 (1976).

111. "Many of the most effective techniques of managerial judging imposes costs which, because of their nature, fall heavily on lawyers (rather than being passed on to clients). . . ." Elliott, *Managerial Judging and Evolution of Procedure,* 53 U. CHI. L. REV. 306, 312 n.22 (1986).

112. *See generally* Pollack, *supra* note 7, at 223.

113. Speech of William B. Spong, Jr. in Richmond, Va. (Aug. 29, 1987).

114. *Id.*

While it may be absurd to suggest that a disgruntled fan would abandon his client in order to attend a football game (even one played by the Super Bowl Steelers), it is just as naive to believe that the lawyers' personal discomfort played no part in their willingness to settle. The client, of course, retains final authority to approve or reject the lawyers' settlement proposal, but a complicated case like Westinghouse increases the client's dependence on the expertise of counsel. Merhige's approach placed counsel in an uncomfortable position of balancing, at least subconsciously, their personal interests against the interests of the client.[115]

Merhige defends his tactics by noting that the parties were satisfied with settlement agreements, and all parties echo this feeling. The satisfaction of the particular parties, however, is not always the sole measure of whether justice has been done. One important group not represented in the Judge's courtroom was the consumers of electrical power—you and me. To the extent that the public interest was neglected in the parties' settlement agreement, it may not be accurate for Merhige to characterize the Westinghouse case as a business dispute to be settled by businessmen. When the public interest is affected by the litigation, it is dangerous to assume that a settlement, particularly one which remains secret, is always beneficial simply because the parties voluntarily subscribe to it. As Professor Fiss queried, would the public interest be better served by a negotiated settlement in *Brown v. Board of Education,* or by recognition of the constitutional principle that separate is not equal?[116] Another observer suggests that quiet deal-making undermines the longstanding legal notion that defendants ought to meet their accusers publicly. Major litigation can provide society with "sagas where we define good and bad."[117]

Another question raised by the proceedings is whether Merhige's proper judicial role was to play coercive mediator or formalistically apply "the" law. Merhige, of course, played both roles, but even his efforts to define the law of commercial impracticability are subject to criticism because of his admittedly intuitive approach. Professor John Jefferies, Jr. supervised Merhige's graduate legal work at the University of Virginia and found that Merhige preferred to rely upon intuitive and practical-minded dispute resolution rather than take a technocratic approach. According to Jefferies, Merhige "has a very large share of common sense and great confidence in it."[118] The danger is that such common sense may achieve beneficial results in the microcosm of a

115. "[T]he premise behind managerial judgment is that costs to clients can be decreased by increasing certain costs to lawyers." Elliott, *supra* note 5, at 312 n.22.

116. Fiss, *Out of Eden,* 94 YALE L.J. 1669, 1670 (1985).

117. Wall St. J., Nov. 5, 1987, at 2, col. 1.

118. Wall St. J., Nov. 16, 1987, at 36, col. 3.

single case, but may fail to set a general standard to guide future decisions. Does a grandfatherly maxim—"He who sells what isn't his'n. . . ."—intuitively capture great wisdom, or is it a clever phrase which obscures rational analysis?[119]

The additional questions raised by Judge Merhige's approach and any proposed answers are left for the reader's consideration. I merely raise some of the questions and observe that Judge Merhige's approach is innovative and controversial. Perhaps that is as it should be, and perhaps it is best to leave the last word to Judge Merhige—"My cases have been controversial, I thought that's what courts are for."[120]

119. "Managerial judges frequently work beyond the public view, off the record, with no obligation to provide written, reasoned opinions, and out of reach of appellate review." Resnik, *supra* note 8.

120. *See supra* note 19.