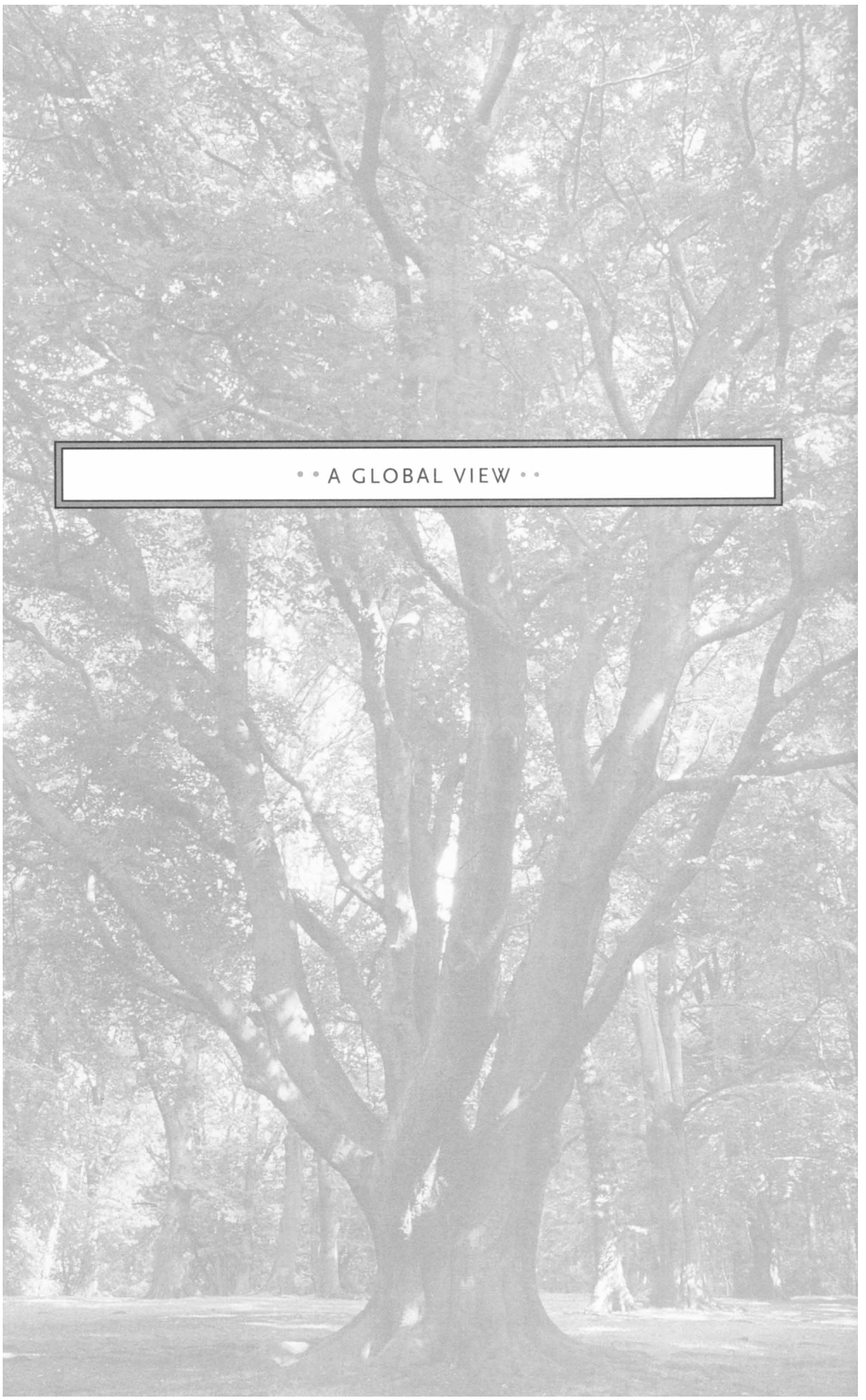

A GLOBAL VIEW

ADR: *A Global Necessity*

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It should come as no great surprise that our foreign trading partners regard commercial litigation in the U.S. courts as a traumatic experience to be avoided and that our leverage on foreign parties to submit to the jurisdiction of our law and courts is waning. It is not simply parochial foreign distaste for resolving a dispute in an unfamiliar forum under substantive law and procedure that may be totally alien to their own domestic jurisprudence which drives them from our courtrooms. Even U.S. interests are looking for alternative dispute modalities that avoid the costs, time delays and, in the jury context, the uncertainties of civil litigation.

In the United States, we compound this problem for our foreign partners by varying the applicability of substantive law to that which exists in 50 states, as we cannot offer the uniformity of one body of substantive commercial law, which is usually the case in most other nations. The allowability or denial of punitive damages and the standards, or lack thereof, for assessing same under the laws of our various states is creating a common bond of avoidance of U.S. civil litigation by both domestic and foreign interests. It is obvious that the global economy is in search of a common denominator which might reduce itself to some algorithmic concept so as to provide a universality for resolving disputes amongst parties from different nations and, more important, from different cultures. I suspect that search will never end, but there are modalities which at least offer both guidance and hope for that which may eventually evolve as "commercial justice."

Asian and European judicial systems for commercial dispute resolution are as different from each other as is the U.S. system from either of them. Japan continues in a cultural denial that commercial disputes should degenerate to the point where some form of intervention should even be considered by the parties. All of the above cries out for a common denominator for dispute resolution to assure maximum productivity within a global economy.

The most broadly recognized ADR on the international scene has been, and will probably continue to be, arbitration. Arbitration, being a creature of contract, compels the parties to address the procedures which will control the resolution of a dispute and will usually address the question of what substantive law, if any, should govern the dispute. Forum selection is also the choice of the parties. Parochial interests may be represented and balanced in the makeup of a panel, while the president or chair of the panel should reflect as much neutrality as the parties wish to provide. There is no question, however, that binding arbitration has raised concern as to finality where the losing party in almost all arbitration formats has a limited right of appeal. Both the American Arbitration Association and the CPR Institute for Dispute Resolution have provided escape valves from award finality by recognizing contractual provisions calling for arbitration appeal panels. In the United States, the courts have recently given judicial recognition to enhanced judicial review by contract, and our courts have gone beyond the strictures of the Federal Arbitration Act and the Uniform Arbitration Act where circumstances compel, such as a judicial review of

awards where the arbitration exhibited a "manifest disregard of the law." See *Lapine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884 (9th Cir. 1997); *Siegel v. Titan Indus. Corp.*, 779 F.2d 891 (2d Cir. 1985). That sudden death finality of traditional arbitration is being modified, both domestically and on the international scene, would at least acknowledge the option to the parties to contractually provide for private appellate review and, in some instances, convince the courts to provide enhanced judicial review.

It should be noted, however, that arbitration bears the hallmarks of an adversary system of dispute resolution which is not compatible with Asian cultures, particularly that of Japan, and is somewhat at odds with the civil systems of Continental Europe. A methodology for bridging between adversarially anchored arbitration and an ADR procedure that is nonconfrontational is of course the various protocols for conciliation and/or mediation. What we now know as facilitated mediation is obviously the most flexible methodology for "getting to yes," as Roger Fisher would have us do.

Mediation and conciliation can look to the broader interests of the parties, address the objective of post-dispute business relationships, and blunt the emotional needles that underlie the parties' immediate dispute. Cultural values can be recognized or rejected as the parties move through the mediation process, and the only requirement is that the parties maintain a desire to resolve the underlying dispute.

There is much literature dealing with the nature of mediation, recommended procedures, and the usual lists of do's and do not's. From one who has read much of it and practiced some, the most valuable teachings are those that focus on the training of mediators and the tools available to the mediator. Beyond that, ironclad modalities become constraints which compromise the lasting virtue of mediation, which is the ability of the parties to fashion the procedures of the mediation with the assistance of the mediator and the ability of the mediator to guide the parties in procedures which recognize the particularities of the dispute, the environment in which it arose, and the distinctive characteristics of the parties themselves. This is where an ironclad mold defeats the underlying purpose and worth of the concept.

For a global ADR mechanism to provide precedent authority in the hope of avoiding, as well as settling, disputes of course would be a desirable goal. The end game should be a common body of law to which international commerce could turn. That desire has become expressed in the evolution of lex mercatoria or "law merchant." See *Eagle Star Ins. Co. v. Yuval Ins. Co.*, 1 Lloyd's Rep. 357 (CC.A. 1977). This body of law, if it in fact exists, is less than clear as it is currently derived from a hodgepodge of international treaties, model laws, and the work of private organizations specializing in codifying international trade norms. There is, however, some hope which is encouraged by the European Common Market that perhaps a uniform international commercial code might emerge and bear some of the attributes of the UCC as found in the United States.

> *Asian, European, and U.S. judicial systems all cry out for a common denominator for dispute resolution to assure maximum productivity within a global economy.*

If "commercial justice" is to be the goal of global ADR, the international norms, at least suggested by the concept of lex mercatoria, should be developed. In the absence of international norms, it is hard to envision the achievement of "commercial justice" through any form of ADR.