Programme Statement
for
Corporate Governance
and
Arbitration of Company-Law Disputes ("ACLD")

Executive Summary

1. *OECD Corporate Governance Roundtables have called for improved enforcement of shareholders' rights.* OECD Regional Corporate Governance Roundtables have identified poor regulatory and judicial enforcement as a significant impediment to shareholder protection and foreign investment in emerging markets.

2. *Arbitration of company-law disputes ("ACLD") can help improve enforcement, but ACLD's potential is not being realized.* Deficiencies in emerging-market enforcement have helped make arbitration of company-law disputes ("ACLD") the preferred method of dispute resolution for private-equity investors in many key emerging markets, such as Russia and China.

Not all emerging-market jurisdictions have embraced ACLD, however. In addition, variations and uncertainties in rules and practices across countries not only limit ACLD's potential for promoting corporate governance, but raise doubts in the minds of investors, particularly foreign investors, about the extent to which their rights and property will be protected.

3. *ACLD policy work to promote enforcement requires a different approach than general dialogue on corporate governance.* Acceptance of the OECD Principles of Corporate Governance as a global standard permits the OECD's Corporate Affairs Division to organize and lead regional Roundtables, since rules and practices in each region may be held up to and compared with this global benchmark.

ACLD presents a different situation, however, as no worldwide standard for ACLD currently exists. Nor would such a standard necessarily be helpful since norms for ACLD continue to evolve rapidly. What is required, however, is a perspective on rules and practices so that: (i) decision-makers can be made aware of policy options (and their relative costs and benefits); and (ii) ACLD trends can be identified, assessed, and promoted or re-directed, as appropriate.

To be effective, this perspective must develop on a global level, since a regional view may fail to capture either the full scope of policy options or the full sweep of ACLD trends. Once this global perspective has been fashioned, though, the OECD's regional Corporate Governance Roundtables can disseminate this learning and permit dialogue and exchange of experience on implementation issues.

4. *The OECD's corporate-governance programme takes into account the specific needs of policy dialogue on ACLD.* In light of the above requirements, the OECD's Corporate Affairs Division has initiated an ACLD programme to: (i) generate policy dialogue on the role of ACLD in corporate governance; (ii) develop a global comparative understanding of how various OECD-member and non-member states approach ACLD; and (iii) develop and disseminate practical guidelines and other documentation on using ACLD to protect shareholders' rights.

In undertaking this work, the OECD has partnered with the United Nations Commission on International Trade Law (UNCITRAL), which co-hosted a senior experts meeting with OECD on ACLD in June 2003. Also participating in this meeting were numerous highly respected arbitration institutes and bar associations. (See the Synthesis Note attached as Exhibit A.)[1]

[1] Complete documentation for the meeting can be found at www.oecd.org/daf/corporate-affairs.

UNCITRAL and the institutes and associations offer expertise in the arbitration area. The OECD, meanwhile, brings experience and credibility in fostering multilateral policy dialogue and exchange of experience. In addition, through the OECD Principles of Corporate Governance and Regional Roundtables, the OECD provides knowledge and credibility in the field of corporate governance, as well as proven forums for engaging policy makers, business leaders and experts in the emerging-market countries where ALCD can most facilitate shareholder protection, investment and market integrity.

The next event in the OECD programme will be an International Roundtable on ACLD in mid-2004, co-hosted with UNCITRAL, focusing on comparative use of ACLD to promote corporate governance, as well as comparative interpretation of leading international treaties that govern recognition and enforcement of foreign ACLD awards.

Overview

A. Why ACLD Matters

1. Weak regulatory and judicial enforcement in emerging markets undermines shareholder rights and discourages investment.

Regional Corporate Governance Roundtables have underscored the central role that enforcement plays in the corporate-governance framework. Participants in Roundtable discussions have emphasized that although much has been achieved in raising awareness and in putting in place improved rules and procedures, real progress remains frustrated by poor regulatory and judicial enforcement. Of particular concern in these discussions is weak protection of minority-shareholder rights.

Improving regulatory (executive-branch) enforcement is an essential corporate-governance goal, but one that requires considerable time and resources. In the near and mid-term, many emerging-market countries will continue to lack both the human and monetary resources to provide expert, timely and even-handed enforcement. In addition, many such countries, transitioning from state-run to market economies, hesitate to create a sizable permanent bureaucracy for fear that it will revert to familiar command-and-control methods that strangle free enterprise and economic development.

In addition to regulatory enforcement, of course, corporate-governance frameworks employ judicial enforcement in the form of civil litigation. Mechanisms such as derivative/class-action lawsuits and lawyer-contingency fees can facilitate shareholders' ability to protect their own rights by lowering the cost of collective action. This said, civil litigation does not figure prominently in most corporate-governance frameworks. Such litigation is often viewed as costly, time consuming and frivolous. Moreover, in emerging markets, the same resource constraints that affect executive-branch enforcement apply equally to judicial enforcement. Finally, many cultures view open and adversarial proceedings as destructive of a company's reputation and goodwill, as well as of its internal governance.

2. ACLD can offer investors an alternative to regulatory and judicial enforcement.

As a result of investor uncertainty and dissatisfaction with regulatory judicial enforcement, ACLD has become the preferred method of dispute resolution for private-equity investors in many emerging markets. In this regard, ACLD is viewed as more timely, cost-effective, expert, impartial and confidential than national-court adjudication. Typically, investors in a closely held company contractually agree to submit disputes arising under the company's charter or shareholders agreement to binding arbitration pursuant to the rules of an established arbitration institute (such as the International Chamber of Commerce, London Court of International Commercial Arbitration, Stockholm Chamber of Commerce, etc.)

ACLD procedures can be streamlined compared to national-court proceedings, thereby promoting timeliness and cost effectiveness. Also, under standard ACLD clauses, parties to a dispute participate in the selection of mediators/arbitrators (henceforth "arbitrators"). These arbitrators may usually be chosen from a broad pool of candidates, thereby eliminating the human-resource constraints from which national courts often suffer. By having a hand in the selection of arbitrators, the parties also better ensure even-handed resolution of the dispute. Finally, ACLD proceedings and awards can be confidential, preserving the company's reputation and goodwill and making it easier for parties to a dispute to work together afterwards.

B. Improving and Promoting ACLD as a Policy Option

1. There is need for the OECD to foster policy dialogue and exchange of experience.

Many well-established and highly capable organizations have already greatly advanced learning on, and implementation of, ACLD. UNCITRAL has promulgated model legislation to help countries incorporate arbitration into their national legal systems. Well-recognized commentary exists for both the New York Convention (the principal international agreement supporting recognition and enforcement of foreign arbitral awards) and the UNCITRAL Model Law. Numerous highly respected arbitration institutes sponsor ACLD in developed and emerging economies. Bar associations and other private-sector organizations actively promote ACLD and conduct training for public officials and arbitrators. Professional and academic publications disseminate information on effective practices and recent developments.

What has been lacking in the current environment is multilateral policy dialogue and exchange of experience that will: (i) disseminate knowledge of effective ACLD practices from developed markets to emerging markets; (ii) deal thoughtfully with difficulties involved in "transplanting" practices from one jurisdiction to another; and (iii) use constructive peer pressure to promote ACLD and good-faith application of international treaties concerning arbitration.

The OECD is uniquely situated to carry out the above tasks. Through its Corporate Governance Roundtables, the OECD has initiated dialogue and exchange of experience with key public officials, business leaders and experts in emerging markets. These relationships not only permit dissemination of information on effective ACLD practices, but focus particularly on transplantation issues – how to adapt a practice effective in one jurisdiction so that it is effective elsewhere. UNCITRAL has joined with the OECD in order to benefit from OECD-style policy dialogue and constructive peer pressure for advancing understanding and effective use of ALCD. By engaging emerging-economy representatives as equals, the Roundtables also employ assessment by regional "neighbors" to generate support for reform.

Like other aspects of corporate governance, the extent to which countries currently embrace ACLD varies considerably. So, for example, while most countries permit it, a number of emerging-market legal systems continue to resist final and binding resolution of company-law matters outside of national courts. Moreover, variations in ACLD law and practice become greater as one focuses on specific issues central to corporate governance. Such issues include: (i) the arbitrability of shareholder appraisal rights, derivative actions and class actions; (ii) the authority of arbitrators to apply interim measures (such as an order to produce documents or to pay a preliminary award); and (iii) and the ability of claimants to join officers and directors in arbitral proceedings.

National approaches to ACLD will of course vary. Given differences in legal traditions and horizontal policy concerns, in fact, diversity should be expected. But, such diversity should arise from a thorough understanding of relative costs, benefits and viable policy alternatives. OECD-style policy

dialogue represents a proven method for exploring these matters and fine-tuning policy options in light of national capabilities, preferences and needs.

For emerging-market countries with developing regulatory and judicial enforcement, structured dialogue will likely encourage adoption and effective implementation of a base level of ACLD which helps attract and retain foreign investment. For countries with more developed enforcement systems, structured dialogue can raise awareness of policy options that improve ACLD. Additionally, such dialogue also enables policy makers to identify and assess important ACLD trends. Depending on the circumstances, policy makers may wish to accelerate or broaden these trends, or to re-direct or curtail them.

2. An ACLD trend involving public companies and their shareholders deserves particular attention.

In some jurisdictions, a number of company-law issues involving listed companies have been held suitable for arbitration. These issues include: executive employment agreements, valuation of shares for appraisal-rights purposes, derivative actions, and permissive indemnification of directors. Recently, in Green Tree Financial Corp. v. Bazzle, 2003 WL 21433403 (U.S.), the United States Supreme Court upheld the arbitrability under U.S. law of a class-action against a commercial lender, and the American Arbitration Association has experience certifying claimant classes for the purposes of multi-party arbitration. Currently, the Sao Paolo Stock Exchange’s Novo Mercado listing rules provide for the arbitration of shareholders disputes, although no ACLD has as yet taken place. Finally, Sweden is among several countries that statutorily provides for arbitration of share value in connection with appraisal rights.

In the listed-company context, the consensual/contractual nature of arbitration can require that a potentially vast and geographically dispersed group of shareholders give binding consent to ACLD. This group must also receive sufficient notice when ACLD has begun. Typically, public shareholders in developed markets prefer to litigate company-law disputes in national courts rather than to arbitrate such disputes privately. In many emerging markets, on the other hand, public shareholders often prefer arbitral proceedings to national courts for reasons of capacity, competence and even-handedness.

A second set of ACLD issues concerns policy matters. Some policy makers may see a particular value in the judicial enforcement of standards for listed companies. Also, because all public-company shareholders are unlikely to join an arbitral proceeding, questions may arise about the lawfulness of awards, particularly injunctive orders which affect non-parties. Lastly, the liquidity enjoyed by shareholders of public companies, may represent an alternative to enforcing legal rights unavailable in the private-company context that makes the case for ACLD less compelling.

Finally, on a practical level, there may be questions about the adequacy of arbitration for complex cases, as well the sufficiency of incentives for plaintiffs’ attorneys to pursue claims before an arbitral tribunal.

3. Horizontal policy issues arising from ACLD call for co-ordinated and holistic analysis.

Structured dialogue can also address in a co-ordinated, holistic way a number of horizontal policy questions raised by ACLD. In many countries, for example, the arbitrability of matters involving officers and directors raises issues under labour law. Arbitration of appraisal rights, derivative claims and class actions can affect takeover and investment policy. How national courts are set up to interpret and apply the New York Convention (see below) has implications for governance and investment flows. Such issues require co-ordinated and holistic consideration by relevant policy communities.

4. The principal international instrument promoting ACLD, the United Nations Convention on the Recognition and Enforcement of Arbitral Awards (the "New York Convention"), requires strengthening through greater international policy convergence.

An ACLD award has little value unless it can be enforced. In this regard, the New York Convention (with over 100 signatories) provides for recognition and enforcement of foreign arbitral awards by national courts unless at least one of a few very limited exceptions applies. How national courts interpret these exceptions, however, varies widely. Expansive interpretations arising from ignorance, bias or corruption on the part of national courts often result in the setting aside of ACLD awards and the effective gutting of treaty and shareholder rights. This situation is particularly acute in emerging markets and has a spill-over effect on market integrity and investment.

5. Policy dialogue should begin with a comparative overview of ACLD and development of an analytical framework for assessing interpretation and application of the New York Convention.

Developing policy options and, as appropriate, promoting policy convergence, begin with an understanding of current rules and practices. From this understanding, policy options can be classified and their relative costs and benefits explored. Instruments, such as a common analytical framework for assessing implementation and enforcement, can also be devised and tested. The OECD's existing program of work provides for such efforts. As discussed below, the program contemplates an international conference to be organized in partnership with UNCITRAL in mid 2004 to present research on current rules and practices, to develop analytical frameworks, and to discuss policy implications.

C. Program Structure

1. The OECD has established partnerships with leaders in the ACLD field to foster policy dialogue and exchange of experience.

As noted previously, many well-established and highly capable organizations have already greatly advanced learning on, and implementation of, ACLD. The OECD has established a partnership with UNCITRAL, which served as co-host of a recent OECD-led senior experts meeting on ACLD. The OECD has also reached out to numerous highly respected arbitration institutes and bar associations, which participated in the senior experts' meeting and expressed a desire for continuing collaboration in this area. These organizations include:

- The International Chamber of Commerce ("ICC");
- The London Court of International Commercial Arbitration ("LCIA");
- The American Arbitration Association ("AAA");
- The Stockholm Chamber of Commerce;
- The Arbitration Court of the Mexican Chamber of Commerce;
- The Moscow Court of International Commercial Arbitration attached to the Russian Federation Chamber of Commerce and Industry;
- The China International Economic and Trade Commission ("CIETAC");
- The Sao Paolo Stock Exchange;
- The International Bar Association ("IBA"); and
- The American Bar Association ("ABA").

In addition, corporate-governance and arbitration experts participated from:

- The World Bank;

- The Global Corporate Governance Forum Research Network; and
- The International Centre for Settlement of Investment Disputes ("ICSID").

2. The OECD has successfully tested its partnerships and exchange-of-experience format through an OECD-led senior experts meeting co-hosted by UNCITRAL in Vienna, Austria, in June 2002.

As noted previously, the organizations and experts mentioned above recently took part in a senior experts meeting organized by the OECD and co-hosted by UNCITRAL. The principal conclusions of the meeting were as follows:

ACLD and Corporate Governance

- ACLD is commonplace in many jurisdictions.
- Procedural and technical requirements can represent a trap for the unwary.
- Despite a clear trend favouring ACLD, its acceptance varies across countries
- ACLD involving publicly traded companies faces many more hurdles than ACLD involving privately held companies.
- Notwithstanding the legal, policy and practical difficulties, a nascent trend supports wider ACLD involving public companies and their shareholders.

ACLD Process and Recognition and Enforcement of ACLD Awards

- Inadequacy in the national legal infrastructure for arbitration often results more from poor judicial interpretation of laws than problems with the laws themselves.
- Training and education of judges, particularly in emerging-market countries, is required to realize the potential of the New York Convention in promoting ACLD.
- Further research on law and practice in the area of corporate governance and arbitration is required.

Meeting participants expressed interest in, and support for, an international conference in mid-2004 that would more fully explore the theory of, and current experience with, ACLD, particularly involving public companies. Participants also called for development and pilot testing of an analytical framework to compare interpretation and application of the New York Convention across countries. Since an ACLD award is valueless unless it can be enforced, participants agreed that such comparative work would be crucial to understanding ACLD's practical potential for improving corporate governance.

3. Consistent with the OECD's current work program, the Corporate Affairs Division will, in partnership with UNCITRAL, organize an International Roundtable on ACLD and corporate governance in mid 2004.

In organizing an International Roundtable on ACLD, the OECD will seek to: (i) raise awareness of the promise of, and current challenges for, ACLD in the corporate governance area; (ii) develop constructive peer pressure for a base level of ACLD that helps protect shareholder rights; (iii) develop support for policy convergence on key language of the New York Convention; (iv) produce practical information and guidelines for furthering ACLD; and (v) create an ongoing information network for policy dialogue and exchange of experience between and among developed and emerging-market countries.

Subject to discussions with relevant partners and participants, the Conference will discuss and generate the following outputs:

⇒ use of exchange- and association-sponsored arbitration in resolving corporate-governance disputes

- case studies (e.g.,. Brazil, Russia)
- practical issues (injunctive relief, multi-party arbitration, assignment of costs);

⇒ use, recognition and enforcement of arbitral awards
- comparative interpretation and enforcement of the New York Convention
- enforcement and sanction powers of stock exchanges
- training and education of judges

⇒ model legislation and guidelines
- incorporation of ACLD into national legal systems
- rules of conciliation and arbitration
- submission to arbitration by companies, directors, officers and insiders
- guidelines for arbitrators
- issues checklist for exchanges and arbitrators

Conference materials papers will be posted on the Internet and possibly published.

Subsequent conferences to follow up developments can also take place. In this regard, a Russia/Eurasia conference is currently contemplated for late 2004 at the OECD's Istanbul Centre.

4. Learning and materials from the International Roundtable on ACLD will be disseminated through the OECD's existing regional Corporate Governance Roundtables in order to further shareholder rights, investment protection and economic development.

The OECD-led regional Corporate Governance Roundtables in Asia, Eurasia, Latin America, Russia and Southeast Europe have proven themselves highly effective forums for promoting the OECD Principles of Corporate Governance and for facilitating policy dialogue and exchange of experience between and among OECD member and non-member countries.

Pursuant to the regional White Papers prepared and released by the Roundtables, their focus will shift from general examination of the OECD Principles to issues of implementation and enforcement policy. The Roundtables therefore represent effective venues for disseminating global learning on ACLD and investigating implementation and extension of ACLD in furtherance of shareholder rights, investment protection and economic development.

EXHIBIT A

Synthesis Note:
OECD/UNCITRAL Senior Experts Meeting
on
Corporate Governance
and
Arbitration of Company-Law Disputes
(Vienna Austria, 25 June 2003)

On 25 June 2003, the OECD and UNCITRAL convened a senior experts group to discuss corporate governance and arbitration of company-law disputes.

Executive Summary – Implications from the Experts Meeting

1. ***Arbitration of Company-Law Disputes (" ACLD") keenly interests investors in emerging markets.*** OECD Regional Corporate Governance Roundtables have consistently identified poor judicial enforcement as a significant impediment to shareholder protection and foreign direct investment in emerging markets. As a result, ACLD as become the preferred method of dispute resolution for OECD member-country equity investors in many emerging markets, such as Russia and China.

2. ***Structured dialogue on ACLD will promote investment and economic development.*** National approaches differ on the extent to which they permit ACLD. While most countries permit it, a number of emerging-market countries continue to resist final and binding resolution of company-law matters outside of national courts. At the same time, there is considerable international divergence on specific issues central to corporate governance. Such issues include: (i) the arbitrability of shareholder appraisal rights, derivative actions and class actions; (ii) the authority of arbitrators to apply interim measures (such as an order to produce documents or to pay a preliminary award); and (iii) and the ability of claimants to join officers and directors in arbitral proceedings.

For emerging-market countries with weak court enforcement, structured dialogue can encourage adoption of a base level of ACLD that helps attract and retain foreign investment. For countries with effective court systems, structured dialogue can raise awareness of policy options that improve ALCD. Additionally, such dialogue also enables policy makers to identify and assess important ACLD trends. In some cases, policy makers may wish to accelerate or broaden these trends. In other cases, horizontal policy issues (see below) may suggest that such trends are potentially harmful and should therefore be re-directed or curtailed.

3. ACLD raises a number of horizontal policy questions. In many countries, the arbitrability of matters involving officers and directors raises issues under labour law. Arbitration of appraisal rights, derivative claims and class actions can affect takeover and investment policy. How national courts are set up to interpret and apply the New York Convention has implications for governance and investment flows. Such issues require co-ordinated and holistic consideration by relevant policy communities.

4. ***The principal international instrument promoting ACLD, the United Nations Convention on the Recognition and Enforcement of Arbitral Awards (the "New York Convention"), needs strengthening through greater international policy convergence.*** An ACLD award has little value unless it can be enforced. In this regard, the New York Convention (with over 100 signatories) provides for recognition and enforcement of foreign arbitral awards by national courts unless certain

very limited exceptions apply. How these exceptions are interpreted and applied, however, varies widely. Expansive interpretations arising from ignorance, bias, or corruption on the part of national courts often result in the setting aside of ACLD awards and the effective gutting of treaty and shareholder rights. This situation is particularly acute in emerging markets and has a spill-over effect on market integrity and investment.

5. Policy dialogue should begin with a comparative overview of ACLD and development of an analytical framework for assessing interpretation and application of the New York Convention. Developing policy options and, as appropriate, promoting policy convergence, begin with an understanding of current practices. From this understanding, policy options can be classified and their relative costs and benefits explored. Instruments, such as a common analytical framework for assessing implementation and enforcement, can also be devised and tested. The OECD's existing program of work provides for such efforts. The program contemplates an international conference to be organized in partnership with UNCITRAL in mid 2004 to present research on current practice and analytical frameworks, and to discuss policy implications.

Overview of Expert Discussions:

The conclusions of discussions were as follows:

A. Corporate Governance

1. ACLD is commonplace in many jurisdictions.
2. Procedural and technical requirements can represent a trap for the unwary.
3. Notwithstanding a clear trend favouring ACLD, its acceptance varies across countries.
4. ACLD involving publicly traded companies faces many more hurdles than ACLD involving privately held companies.
5. Notwithstanding the legal, policy and practical difficulties, a nascent trend supports wider ACLD involving public companies and their shareholders.

B. Arbitral Process and Recognition and Enforcement of ACLD Awards

6. Inadequacy in the national legal infrastructure for arbitration often results more from poor judicial interpretation of laws than problems with the laws themselves.
7. Training and education of judges, particularly in emerging-market countries, is required to realize the potential of the New York Convention in promoting ACLD.
8. Further research on law and practice in the area of corporate governance and arbitration is required.

Expert Discussions

A. Corporate Governance

1. **Arbitration of company-law disputes ("ACLD") is commonplace in many jurisdictions.**

ACLD has become commonplace in a large number of countries. This situation reflects a 20-30 year trend of increasing acceptability and use of arbitration to resolve disputes involving companies, their shareholders and, in some matters, officers and directors. The trend results from both changes in law and changes in the interpretation of law and international conventions.

Where permitted, ACLD is not all or nothing. Some issues, such as valuation of shares for appraisal-rights purposes, interpretation and application of the subscription agreement, shareholders' rights to information, dividends, and participation in decision-making, better lend themselves to resolution

through arbitration than matters such as derivative actions or revival of a company. With respect to remedies, prayers for money damages present fewer complications that requests for injunctive relief. Finally, the inability to join necessary and proper parties, such as officers or directors, or creditors or suppliers, can make ACLD inappropriate or ineffective in particular circumstances.

Where national law permits arbitration of some, but not all, company-law disputes, arbitration rules and procedural law should be integrated so that claimants/plaintiffs do not find themselves trying to sit between two chairs.

2. **Procedural and technical requirements can represent a trap for the unwary.**

In those jurisdictions permitting ACLD, there may remain technical issues that can hinder or prevent arbitration unless certain specific and non-obvious procedures are followed. For example, some arbitrators and courts have held that an arbitration clause within the founding documents of a company does not bind the company because it is not a party to the founding documents. But, this and other "traps for the unwary" should not obscure the larger point that shareholders wishing to have their disputes with each other and the company settled by arbitration may do so, even if these shareholders must be alert to esoteric procedural requirements.

3. **Notwithstanding the clear trend favouring ACLD, its acceptance varies across countries.**

While ACLD may be well-established in certain countries, many others continue to prohibit or to limit it. In some cases, national law either prohibits ACLD or gives national courts substantive review powers over arbitral awards that eliminate the finality of ACLD awards and therefore make ACLD impractical. In other cases, national courts hold that all or many types of company-law disputes are not arbitrable. Such holdings rest, for example, upon: (i) the perceived inherent state interest in interpretation and application of a state's own company law; (ii) the likely intersection of company-law issues with issues arising in areas such as employment, insolvency and tax law, which have a high public-interest component; and/or (iii) concerns over accessibility and due process for natural persons who are parties to the dispute.

4. **ACLD involving publicly traded companies faces many more hurdles than ACLD involving privately held companies.**

ACLD involving publicly traded companies raises legal, policy and practical concerns that do not obtain with private companies.

With respect to legal concerns, the consensual/contractual basis for arbitration can require that a potentially vast and geographically dispersed group of shareholders give binding consent to ACLD. This group must also receive sufficient notice when ACLD has begun. Typically, public shareholders in developed markets prefer to litigate company-law disputes in national courts rather than to arbitrate such disputes privately. For company managers in developed markets, this situation is usually reversed; the managers would prefer to arbitrate. This preference on the part of company managers for arbitration can result in consent procedures that may be considered unconscionable because they: (i) are coercive; (ii) represent contracts of adhesion; and/or (iii) entail costs and inconvenience for retail investors or consumer that effectively deny them access to a dispute-resolution forum. In many emerging markets, on the other hand, public shareholders may prefer arbitral proceedings to national courts for reasons of capacity, competence and even-handedness. In such event, it may be sufficient for the company to commit itself to arbitration unilaterally, while providing shareholders with the option of choosing court adjudication of ACLD.

A second set of ACLD issues concerns policy matters. Some policy makers may see a particular value in the judicial enforcement of standards for listed companies. Also, because all public-company shareholders are unlikely to join an arbitral proceeding, questions may arise about the lawfulness of awards, particularly injunctive orders which affect non-parties. Lastly, the liquidity enjoyed by shareholders of public companies may represent an alternative to enforcing legal rights unavailable in the private-company context that makes the case for ACLD less compelling.

Finally, on a practical level, there may be questions about the adequacy of arbitration for complex cases, as well the sufficiency of incentives for plaintiffs' attorneys to pursue claims before an arbitral tribunal.

5. **Notwithstanding the legal, policy and practical difficulties, a nascent trend supports wider ACLD involving public companies and their shareholders.**

A number of company-law issues involving listed companies have been held suitable for arbitration. These issues include: executive employment agreements, valuation of shares for appraisal-rights purposes, derivative actions, and permissive indemnification of directors. Recently, in Green Tree Financial Corp. v. Bazzle, 2003 WL 21433403 (U.S.), the United States Supreme Court upheld the arbitrability under U.S. law of a class-action against a commercial lender, and the American Arbitration Association has experience certifying claimant classes for the purposes of multi-party arbitration.

Currently, the Sao Paolo Stock Exchange's Novo Mercado listing rules provide for the arbitration of shareholders disputes, although no ACLD has as yet taken place.

Sweden is among several countries that statutorily provides for arbitration of share value in connection with appraisal rights.

The depth of the trend favouring ACLD involving public companies should not be overstated, though. At present, the United States appears to be at the forefront of ACLD for listed companies. But, aside from Brazil, it is unclear how many other countries permit ACLD to any great degree with respect to listed companies.

B. Arbitral Process and Recognition and Enforcement of ACLD Awards

6. **Inadequacy in the national legal infrastructure for arbitration often results more from poor judicial interpretation of laws than problems with the laws themselves.**

The UNCITRAL Model Law on Arbitration forms the basis for the national arbitration law of approximately 40 countries. In some countries, such as Sweden, the Model Law has been paraphrased, rather than incorporated verbatim, into national law. This situation can generate confusion over the meaning of particular language, as well as result in discrepancies in law and practice among countries that have used the Model Law as a guide.

A larger problem, particularly in emerging-market countries, is a tendency to interpret Model-Law-based provisions of national laws in ways that diverge from established interpretations in developed legal systems. Sometimes these divergences arise from lack of knowledge on the part of local judges regarding such established interpretation. Sometimes divergences arise from a sense of greater obligation to extend court protection to potentially vulnerable persons, and sometimes divergences arise from a desire on the part of the judiciary to preserve its hold on the dispute resolution process.

7. **Training and education of judges, particularly in emerging-market countries, is required to realize the potential of the New York Convention in promoting ACLD.**

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards has been ratified by over 100 countries. The Convention is structured to provide for national courts to recognize and enforce foreign arbitral awards except in very limited circumstances.

In practice, the judiciaries of several emerging-market countries have interpreted and applied the Convention in ways that greatly expand the circumstances under which recognition and enforcement of a foreign arbitral award may be refused. The result has been frustration of the arbitral process and lack of reciprocity in fulfilment of international obligations under the Convention.

Key issues in deciding to deny recognition and enforcement include: (i) whether a court may review the merits of an arbitral decision if it is based on the substantive law of the country where the court is situated (developed jurisprudence on this point says not); (ii) whether all parties to the arbitration agreement are competent to arbitrate (e.g., in some jurisdictions, companies in bankruptcy may not agree to arbitrate); (iii) whether, under the law of the seat of arbitration and of the place where enforcement is sought, the subject matter of the dispute may be arbitrated (e.g., until 2001, Italian law prohibited arbitration of share-transfer disputes); and (iv) whether enforcement of the award would violate public policy of the place where enforcement is sought (e.g., an award of guardianship over an infant).

As with questions of interpreting national arbitral laws, variances interpretation and application of the Convention can arise from: (i) ignorance of established international jurisprudence; (ii) differing views of the proper roles of the courts vis-à-vis arbitral tribunals; (iii) unwillingness on the part of judges to cede power; and (iv) favouritism due to misplaced patriotism or corruption.

8. Further research on law and practice in the area of corporate governance and arbitration is required.

With respect to corporate-governance issues, specific comparative research should be undertaken on topics such as arbitration of appraisal-rights valuations, the joining of officers and directors, derivative-action arbitration and certification of class-action arbitrations.

In addition, an analytical framework should be developed to determine the worldwide spectrum of interpretation and application of the New York Convention.