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NOTE: Resolving Conflict in the 21st Century Global Workplace: The Role for Alternative Dispute Resolution

Elisa Westfield*

BIO:
*B.S., 1991, United States Military Academy, West Point; M.A.I.R., 1995, Boston University - Brussels; J.D. Candidate, May 2002, Rutgers University-Newark. Parts of this article were presented at the Yale Journal of International Law Young Scholars Conference, New Haven Connecticut, March 2001.

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SUMMARY: ... In the globalized economy, attention has focused on the key actors and their interests, such as the Multinational Enterprises ("MNEs"). ... Recognizing that workplace conflict arises from myriad sources, this Note intends to focus on one societal construct, sexual harassment - that is not unique to the United States, but rather, is a pervasive problem around the world that countries approach differently and that could potentially be resolved by an MNE's alternative dispute resolution processes. ... Flexibility in permitting mediator testimony could be regarded as a negative element to the mediation process because it may promote wariness of mediation integrity. ... In the United States, sexual harassment in the workplace constitutes unlawful sex discrimination in violation of Title VII. ... Thus, this section will examine local customs and cultural attitudes toward sexual discrimination, specifically sexual harassment in France, Japan, and Kenya to illustrate the global diversity in viewpoints around a prevalent catalyst of workplace conflict, sexual harassment. ... The roots of the Japanese culture can be traced to several traditions. ... Sexual harassment in the workplace is another aspect of discrimination that is endemic in Kenya. ... Looking forward, if MNEs are to be able to resolve the conflict that is inevitable in the global workplace, then MNEs must consider pragmatic approaches to sexual harassment and other employment complaints. ...

HIGHLIGHT: Change and movement have their times; safety and danger are in oneself. Calamity and fortune, gain and loss all start from oneself. Therefore, those who master change are those who address themselves to the time. For those who address themselves to time, even danger is safe; for those who master change, even disturbance is orderly.

I. Introduction

Globalization is a multifaceted process that is greatly shaping the world in which we exist and the conditions that individuals encounter in their daily lives. n1 Indeed, globalization has produced radical progress on the economic and political landscapes. n2 Moreover, globalization continues to bring about a convergence of other forces such as cultural, religious, legal, philosophical, and environmental --all which impact other areas that affect human activity. n3 However, while the globalization process has changed the significance of national boundaries, national customs and local identities still remain. n4 Thus, conflict in international society is an inevitable consequence among individuals because of the convergence of those who hold different values, interests, and cultures. n5

In the globalized economy, attention has focused on the key actors and their interests, such as the Multinational Enterprises ("MNEs"). n6 In fact, the international business community has been extremely resourceful in attempting to resolve commercial disputes through non-litigation methods, such as commercial arbitration, as a result of the complexities arising from conflict of legal issues in the global marketplace. n7 The purpose of this Note is to suggest that the international business community build on the procedural alternative dispute resolution n8 model used in commercial disputes and apply it to workplace disputes that will tend to occur in the MNEs' global operations as a result of the convergence of diverse laws, cultures, and values. n9

Consider this Scenario
Three women - one American, one French, and one Kenyan - highly skilled in very technical fields, are conducting research for an American-controlled MNE in Japan. Their efforts are part of a research and development project for a vaccination that is projected to produce a 100% return on the company's original investment if the research is delivered on schedule. Midway through the project, all three women allege complaints that their non-American boss sexually harassed them on numerous occasions. What legal action can these women take, if any, as a last resort before leaving the company? What happens to the company's financial return on the project? n10

The above issues indicate that while MNEs continue to expand internationally, their leadership face dilemmas that straddle the legal and ethical divide. n11 These new situations call for MNEs to recognize that conflict resolution in the global workplace must be addressed through realistic approaches that account for global diversity in legal norms, cultures and business practices. n12 Thus, this Note proposes that MNEs incorporate alternative dispute resolution systems ("ADR") to resolve workplace conflict, create a body of rules similar to the commercial arbitration lex mercatoria, and use principles derived from international governmental treaties and instruments, nation-state legislation, MNEs corporate codes of conduct, transnational NGOs and local private actors as the substantive jurisprudence. n13

[*1224] The underlying premise for MNEs to assume the conflict resolution responsibility is a pragmatic one that goes to the soul of the corporate entity: bottom-line profit, productivity, and the opportunity to create a mutually acceptable resolution for all of the parties involved in the conflict. n14 The value proposition for American-controlled MNEs to take parochial accountability for resolving workplace conflict using ADR methods is: the tangible cost savings from not having to engage in local litigation, settlements, and awards; not losing human capital which may be critical to a time-sensitive project or product deliverable to market; turnover and replacement costs for human capital as well as the intangible costs of employee morale and intellectual capital. n15

This Note is organized as follows. Part II examines the historical development of ADR in the corporate workplace and explores the use of ADR as a procedural device in American-controlled MNEs to address the changing face of employment disputes among its globally diverse workforce. Recognizing that workplace conflict arises from myriad sources, this Note intends to focus on one societal construct, sexual harassment - that is not unique to the United States, but rather, is a pervasive problem around the world that countries approach differently and that could potentially be resolved by an MNE's alternative dispute resolution processes. n16 Hence, Part III provides an overview of the United States sexual harassment law that American-controlled MNEs must understand regarding employee workplace protections. Part IV presents comparativist n17 illustrations of the business cultural attitudes around the status of [*1225] women's employment conditions in France, Japan, and Kenya. The purpose of these comparisons is to illustrate the differences around cultural attitudes toward employment discrimination, particularly sexual harassment, which offers a context for the need to incorporate ADR systems in the global workplace. Finally, Part V concludes by providing some final observations about the effectiveness of the use of ADR in the global marketplace.

II. The Pragmatic Approach: Alternative Dispute Resolution

The arrival of alternative dispute resolution ("ADR") onto the modern legal landscape has generated a subject of growing sophistication, particularly among major companies: the management of conflict. n18 Corporate managers have come to realize "that ADR, particularly mediative processes protects one of the most sacrosanct of all corporate objectives - retaining control of the decision-making process." n19 Thus, ADR affords MNEs and employees new opportunities to attempt to resolve workplace disputes and to preserve relationships in domestic and global settings. n20

A. The ADR Evolution in Corporate America

Twenty years ago, alternative dispute resolution was a relatively new concept that was extremely focused on developing alternatives to the costs connected with the litigation process. n21 Moreover, the growth of ADR in Corporate America can be attributed to the consequences of dispute management, cost control, and legal mandates. n22

[*1226] First, dispute management - a process to control conflict resolution - is an important objective of any corporation. n23 Consequently, companies began to experiment with ADR to try to proactively manage, rather than react, to their litigation portfolio. n24 Additionally, corporations discovered that ADR was a great process to preserve business relationships and avoid variable jury awards. n25

Second, cost control is a fundamental principle that propels corporations to seek alternative conflict resolution strategies. n26 As the expense of subsequent
litigation awards grows even more oppressive, companies continue to consider and implement internal techniques for resolving employee disputes as an attractive solution. In fact, in a 1997 survey of 1000 of the largest U.S. corporations conducted jointly by Cornell University, the Foundation for the Prevention and Early Resolution of Conflict (PERC), and Pricewaterhouse LLP, 528 survey respondents believed that "ADR is "a more satisfactory process" than litigation when it comes to resolving disputes." Furthermore, "of the survey respondents, 90 percent viewed ADR as a critical cost-control technique and more [\textsuperscript{1227}] than half (54 percent) said cost pressures directly affected their decisions to use ADR." \n
Finally, legal mandates for the use of ADR are a significant factor to encourage the rise in corporate use of ADR procedures. Congress legally mandated the use of ADR in Section 118 of the Civil Rights Act of 1991 and the American with Disabilities Act. Moreover, "more than half the states now encourage, or even mandate, the use of ADR to reduce case backlogs and expedite the resolution of disputes." Furthermore, the Supreme Court, in Gilmer v. Johnson Lane, presented its preference for ADR when it upheld an employer's provision in an employment agreement that required the employee to use arbitration to resolve a matter that might otherwise be heard by the courts. \n
As we proceed into the future, corporate use of ADR seems to be at a stage focused on "the integration of ADR into overall business strategy." For those corporations that are at this level of development, their focus "emphasizes: (1) greater synthesis between the attorneys and business managers; (2) greater involvement of corporate dispute participants in prevention, as well as resolution, of disputes; (3) more effective ADR incentives with outside counsel and claimants; (4) fine tuning an earlier use of interest-based ADR procedures; and (5) industry-wide collaboration in ADR [\textsuperscript{1228}] encouragement." \n
B. ADR Methods Practiced In Corporate America \n
Presently, a number of ADR techniques are available for a company to use. A government report shows that of the private firms that used ADR in 1994, "about 80 percent used mediation, about 39 percent used peer review panels, and about 19 percent used arbitration." \n
Mediation is a continuation of the negotiation process whereby the third-party mediator usually assumes a facilitative or evaluative role. The mediator facilitates communication between the parties to encourage a settlement based on the interests of the parties. The mediator, a neutral third-party participant, has no authority to impose a decision on the parties. Although the mediator has no authority to impose a settlement, the mediation technique usually becomes a binding agreement because the terms of the agreement are likely reduced to a writing and signed by the parties, thus becoming an enforceable contract. \n
In 1998, the Cornell PERC study, one of the most extensive surveys of corporate ADR use, showed, among other things, that "nearly all respondents reported having used some form of ADR, and that 97 percent of respondents felt mediation saved time and money. Further, mediation was said to provide a more satisfactory process than litigation, even among larger companies." A recent U.S. General Accounting Office report, for example, indicated ... more than [a] 70 percent growth in mediation use within employment disputes studied between 1995 and 1997. \n
Arbitration is an adjudicatory process whereby a third-party hears the issues in dispute and renders a decision based on the merits. Unlike mediation, both parties to the dispute, the employer and the employee, voluntarily agree in advance to accept the arbitrator's decision, which is based on the merits of the case, as final and binding. Peer review is another frequently used adjudicatory ADR technique. Rather than relying on an external party to hear the issues, a panel of managers and employees is utilized. \n
C. Alternative Dispute Resolution Approaches in International Settings \n
The international character of today's workplace is creating a profound effect on the legal rules required to regulate and guide employment activities. Multinational employers with foreign operations need to recognize that ADR programs can offer a reasonable and efficient alternative process that may overcome cultural barriers while contending with employment disputes. An ADR approach, which is applied in the parochial jurisdiction of the MNE, will not be deterred if a local government does not have protective legislation for employee rights, nor will an employee be automatically ineligible for program usage if she is not a U.S. citizen. Consequently, a conflict management systems approach that provides ADR options is a pragmatic candidate for success in addressing the issue of employment disputes in a multicultural business environment. Indeed, at a fundamental level, MNEs will need to develop strategies that accommodate cultural
Flexibility in permitting mediator testimony could be opinion of the mediation or of the parties. n69 The appearance of neutrality is substantively damaged if the mediator can be called to testify, either formally or informally, about the mediator's role in the process. n65 "The breadth of a participant's revelations of such information and thus the success of the mediation in addressing them, clearly depends upon the degree of protection that participants have against disclosure." n66

Second, confidentiality is critical to the effectiveness of the mediator. n67 Mediators must be perceived as and act as neutrals, actors whose personal opinions are irrelevant to the process. n68 The appearance of neutrality is substantively damaged if the mediator can be called to testify, either formally or informally, about the substance of the mediation, or about her opinion of the mediation or of the parties. n69

In an international setting where the disputing parties may come from countless cultural backgrounds, a mediator's observations about the parties' interactions and discussions may be the only reliable source to resolve the dispute. n59 In fact, as mediation has become a more widely practiced method of dispute resolution, many jurisdictions have enacted rules forbidding participants to divulge information discussed during the mediation. n62 Thus, in a global setting, should a mediator be compelled to testify regarding circumstances of the mediation session due to cultural differences? n63

There are at least two ways in which confidentiality plays a critical role in the mediation process. First, confidentiality affords the parties the freedom to participate fully by protecting both general communications and specific settlement offers from disclosure to either the courts or third parties. n64 Confidentiality also protects the integrity of the mediator's role in the process. n65 "The breadth of a participant's revelations of such information and thus the success of the mediation in addressing them, clearly depends upon the degree of protection that participants have against disclosure." n66

Second, confidentiality is critical to the effectiveness of the mediator. n67 Mediators must be perceived as and act as neutrals, actors whose personal opinions are irrelevant to the process. n68 The appearance of neutrality is substantively damaged if the mediator can be called to testify, either formally or informally, about the substance of the mediation, or about her opinion of the mediation or of the parties. n69 Flexibility in permitting mediator testimony could be regarded as a negative element to the mediation process because it may promote wariness of mediation integrity. n70

In sum, from a global business perspective, transcending the mediator privilege potentially could offer positive benefits such as cost savings and interpreting ambiguities in the mediation process due to cultural differences. n71 "Confidentiality is a mediation benefit worthy of vigorous defense [ ], but [ ] , when it stands in the way of the all important need for resolution - the "R' in ADR - confidentiality may become the proverbial tail wagging the dog." n72

ADR encompasses a host of approaches, instruments, and techniques. n73 Overall, companies have established programs that incorporate a number of phases, thereby offering the employee a number of opportunities to address and resolve a complaint. n74 At the outset, an MNE should acknowledge that a critical goal for a conflict resolution program is to encourage the employees to address workplace issues and seek solutions that could benefit both the employee and the company. n75 Thus, an essential ingredient is to gain buy-in of all parties, most importantly, managers and employees, around the program's design, implementation and communication process to ensure the program's success. n76

A myriad of ADR techniques are available to an MNE to incorporate into its ADR system. n77 Usually an informal resolution method is used, such as an open-door policy with management and/or human resources or a more formal documented process. n78 Mediation and arbitration usually are reserved to address legally protected rights and initiated after the other methods have been exhausted. n79 Companies typically will cover the costs of the neutral third party services hired to conduct the mediation and arbitration proceedings. n80 If the employee decides to obtain legal counsel and representation during the mediation and, or arbitration, they will normally cover the legal fees. n81

In sum, the form the ADR program takes may be less important than the fact that it exists. n82 Whether a company chooses an internal grievance procedure only, or a combination of designs that include mediation, peer review or arbitration among other ADR techniques, a properly designed, communicated and utilized dispute system makes a statement that the company values its employees, both U.S. and non-U.S. citizens, equitably. n83
III. The United States Workplace: A Breeding Ground for Conflict

A. Title VII

Employee disputes pervade the workplace and are protected by federal legislation in the areas of discrimination based on age, race, sex, religion, national origin, disability or sexual harassment. n84 Title VII of the Civil Rights Act of 1964 n85 is the main United States federal law that applies to allegations of discrimination in the workplace as it addresses the issue of equal employment opportunities for women and minorities. n86 To file a discrimination suit against an employer, an employee must first file a complaint with the Equal Employment Opportunity Commission ("EEOC"), the body charged with policing Title VII, or with a state or local agency that is authorized to handle such matters. n87

B. Sexual Harassment

In the United States, sexual harassment in the workplace constitutes unlawful sex discrimination in violation of Title VII. n88 Two forms of sexual harassment exist that constitute discrimination [*1235] based on one's sex: quid pro quo and hostile work environment. n89 Quid pro quo harassment describes a type of blatant harassment where the harasser demands sexual favors in exchange for tangible employer-related benefits, such as promotions, pay increases, hiring, and firing. n90 For a plaintiff to prevail on a quid pro quo harassment cause of action, the plaintiff must demonstrate that her refusal to submit to the demands for sexual favors resulted in a tangible job detriment. n91

Alternatively, hostile work environment harassment is specified by the EEOC as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature ... [that] has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." n92 Accordingly, a violation of the law occurs even if the employee suffers no tangible loss or economic job detriment. n93

C. Remedies

First, in 1991, the Civil Rights Act of 1991 n94 amended various anti-discrimination statutes, including Title VII. Prior to 1991, a successful plaintiff with a claim under Title VII would obtain injunctive relief, as well as back pay, front pay, attorney's fees and costs. n95 After the amendments, sex discrimination plaintiffs had the right to a jury trial and to recovery of compensatory and punitive damages. n96 Moreover, Congress recognized the benefits of ADR and included a clause in the Civil Rights Act of 1991 to encourage the use of ADR, "including settlement negotiations, mediation, factfinding, [*1236] minitrials, and arbitration." n97

A second significant development that arose out of the Civil Rights Act of 1991 directly affected American employees in a global workplace. n98 Congress' amendment of Title VII with the 1991 Civil Rights Act, was an unequivocal rejection of the Supreme Court decision in E.E.O.C. v. Arabian American Oil Co. n99 ("ARAMCO"), which had denied Title VII protections to United States citizens who were employed outside of the United States jurisdiction. n100 Thus, Congress' action amended Title VII of the Civil Rights Act of 1964 to apply extraterritorially n101 to United States citizens employed overseas by "American-controlled" employers. n102

The Civil Rights Act of 1991, however, did not include amendments to Title VII to cover non-United States citizens employed by an American-controlled company operating outside of the United States. n103 Consequently, there remains a global work environment that permits inconsistent results in conflict resolution due to the different protections for U.S. and non-U.S. employees working for the same MNE. n104

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D. Employer Defenses to Title VII Claims

1. Historical Employer Defenses

There are defenses to employment discrimination claims that provide tools to an employer for avoiding liability under the statute. n105 American companies operating abroad may engage in discrimination outlined in Title VII when the failure to "discriminate" would "compel" the United States company to violate the law of the host foreign country, which is known as the "foreign compulsion defense." n106 Additionally, when it is "reasonably necessary to the normal operation of the particular business, or [enterprise]," an employer may use a Bona Fide Occupational Qualifications ("BFOQ") to discriminate on the basis of religion, sex, national origin or age at its foreign location. n107

2. Recent Acceptable Affirmative Defenses in Sexual Harassment Cases

In June 1998, the United States Supreme Court handed down two landmark decisions, Faragher v. City
of Boca Raton n108 and Burlington Indus., Inc. v. Ellerth, n109 that clarified employer liability under Title VII of the federal 1964 Civil Rights Act. n110 In both decisions, the Court decided that if the sexual harassment victim did [*1238] not suffer the loss of tangible job benefits, i.e., firing, demotion, loss of monetary benefits, etc., the employer had an affirmative defense. n111

The employer could avoid liability by proving, through an affirmative defense, that: (1) the "employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior [by the supervisor.]" n112 and (2) the victimized "employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise" from unwanted harassment. n113 However, if the sexual harassment victim suffered a tangible job action such as being fired, demoted, ordered to take an undesirable transfer, etc., then the employer would not be entitled to any affirmative defense and the supervisor's unwanted harassment would automatically hold the supervisor liable. n114

The Ellerth and Faragher decisions are important to American-controlled MNEs doing business in overseas locations because they establish jurisprudence about when MNEs are liable to their employees for sexual harassment cases arising in the workplace and acceptable affirmative defenses. n115 Thus, the cases warrant the twenty-first century MNE to take measures to ensure that their global operations provide reasonable methods for employees to raise concerns and resolve workplace conflict.

IV. Comparative Illustrations: Business Cultural Attitudes Concerning Male/Female Relations and Sexual Harassment Legislation

The twenty-first century brings with it a global economy where geography is fast becoming less relevant than culture. n116 "Culture has become the "hidden dimension,' unseen, yet exerting a pervasive influence on the behavior of individuals, groups, and societies." n117 From a comparativist perspective, it is important to understand that [*1239] while American-controlled MNEs may view their employment protections as sacred, other nation-states and their citizens may or may not embrace the same philosophies. n118 Thus, this section will examine local customs and cultural attitudes toward sexual discrimination, specifically sexual harassment in France, Japan, and Kenya to illustrate the global diversity in viewpoints around a prevalent catalyst of workplace conflict, sexual harassment. n119

A. France

The business culture in France holds different social expectations for women than in the United States. n120 Women tend to embrace their femininity more than American women do. n121 In France there is definitely more "respectful interaction" that could be construed by Americans as "flirting" in the workplace, which either men or women can initiate. n122 From an American perspective, this activity would likely be construed as sexual harassment. n123 In the nineties, researchers found few French women in top management positions despite the fact that most urban French women work outside the home. n124 Nonetheless, inroads continue to be made on the French corporate landscape and women are making strides in the business community, especially in the areas of retail and service industries. n125

France has incorporated global principles to guarantee equality to all of its workers. n126 In France, there are laws in place under the [*1240] penal and labor codes that expressly prohibit sexual harassment. n127 The French Penal Code states: "The action of harassing another by using orders or positions by threats or duress to obtain sexual favors by a person who abuses the authority granted by his position may be punished by a year in prison and a 100,000 Franc fine." n128

Given the changes in the global workplace, some of the French provisions have disappeared and others have been modified with exceptions. n129 For example, as a result of the 1992 changes enacted to the French Labor Code, the revised law states:

Any wage earner should not be sanctioned or laid off for having to submit or refusing to submit to actions of sexual harassment by an employer or by his representative or by all persons who abuse the authority given to them by their position through giving orders or pressure uttering threats or imposing will or exercising pressure on the worker for the purpose of obtaining sexual favors or for the benefit of a third party. No workers shall lose salary or a job because of the previous actions. n130

As a member of the European Union ("EU"), France also has had to address additional legal requirements pertaining to sexual harassment. n131 In the past, "most Member States [of the European [*1241] Union] did not consider sexual harassment to be within the scope of sex-based discrimination under the Equal Treatment Directive." n132 In June 2000, a European Union initiative to establish a Europe-wide policy on sexual harassment was proposed. n133 France, along with Belgium, were the only two EU countries that
maintained a full set of sexual harassment laws prior to the EU initiative. n134 Looking toward the future, the EU Directive, once adopted, will send an important message to businesses and individuals since "it will be incorporated into the EU's equal opportunities directive, which has not been altered for nearly 25 years." n135

B. Japan

The roots of the Japanese culture can be traced to several traditions. Shinto, the only indigenous religion of Japan, provided the base. n136 Confucianism, from China, provided concepts on the values of hierarchy, society and family. n137 The Confucian influence brought the presence of a clearly delineated social hierarchy that has become a necessary and central element to achieving harmony in the Japanese culture. n138 Retaining the Confucian vision, the focus on harmony in personal relationships and business dealings has become society's highest goal. n139 Thus, "Japanese women's historical exclusion from career employment reflects their society's reluctance to alter its deeply rooted cultural norms." n140

In 1985, landmark anti-discrimination law, the Equal Employment Opportunity Law ("EEOL"), was passed as Japan's pledge to the international community to achieve equal rights for women. n141 The EEOL:

Does not provide for enforcement by means of a private right of action. Instead, its provisions are to be carried into effect primarily by three mechanisms: the voluntary resolution of employee complaints utilizing dispute resolution mechanisms established by the employer itself; assistance in the resolution of disputes to be given by the ... Ministry of Labor [MOL] offices ... when the two parties cannot reach a resolution; and mediation by an Equal Opportunity Mediation Commission ... if both parties agree to the mediation. n142

While creating the EEOL, Japanese leaders realized that including discrimination in employment on the basis of sex "would require change so basic and far-reaching as to shake society to its very roots, and it determined to effectuate this change through evolution rather than revolution, through voluntary compliance rather than coercion." n143 Thus, the Japanese approach was "based upon the twin pillars of voluntarism and gradualism," meaning both parties, employer and employee, had to agree to settle the dispute. n144

Since 1989, a Japanese plaintiff has an actionable sexual harassment case pursuant to the Japanese Civil Code when there exists "unwelcome remarks and conduct in the workplace which influences a worker's job performance and causes a hostile work environment." n145 Despite the stepped-up measures to address sexual harassment, Japanese women find that sexual harassment still pervades the workplace. n146 Nonetheless, due to labor shortages stemming from the aging population and low birth rate, "the demand for labor has resulted in Japan having one of the highest female workforce participation rates of any G-7 country." n147 Thus, customary female employment patterns have experienced a change due to two major developments: "the passage of the Equal Employment Opportunity Law ("EEOL"), and the recognition of sexual harassment as a form of sexual employment discrimination." n148

In 1997, the Japanese government amended the EEOL, providing employees with additional sexual harassment workplace protections. n149 Thus, in 2001, a 33-year old Japanese women commented, "In Japan, women hardly ever indicate, in words or through actions, that they want to advance to higher positions even if that is their goal, for fear of criticism." n150 However, women in their thirties and forties, who are on the verge of entering mid-level management positions, are tacitly beginning to make holes in the "glass ceiling," the invisible barrier that results from cultural stereotypes and prevents women from advancing beyond a certain level in the workforce. n151 Consequently, female participation in the modern Japanese workplace is on the rise. n152

C. Kenya

The Kenyan constitution of 1991 opened a new era for women in Kenya to demand equal participation in the new democratization process. n153 A young British director of a theater group that responds to pressing local issues in countries commented while in Kenya that "there are very few women we've met who don't feel that a change is fundamental if progress is to occur." n154 He further commented that "it's every level: hereditary rights, access to land, education, jobs, and voting women into parliament. Women are calling out for a change." n155 Among their demands, Kenyan women seek: "equality of women and men, that women must be equal participants with men at all levels of the government, the elimination of practices that discriminate and oppress women, and they are also demanding economic reforms." n156

However, statutes currently in force "single out women for disparate treatment" in the workforce. n157 One commentator described the Employment Act in Kenya as:
Prohibiting the employment of women in an industrial undertaking between 6:30 p.m. and 6:30 a.m. Section 30 of the same Act prohibits the employment of women in mining unless she holds a managerial position, which would be highly unusual, or is engaged in health or welfare services connected with the mine. Section 56 (j) of the Act authorizes the Minister For Labor to prohibit the employment of women in any specified trade. n158

Sexual harassment in the workplace is another aspect of discrimination that is endemic in Kenya. n159 Kenya has made strides to eliminate sexual harassment as a form of discrimination, but the country has yet to fully embrace its societal impact. n160 Disturbingly, "according to many Kenyans, including members of the legislature, there is no such thing as sexual harassment in the 'African' context as there is no name for it in the African languages." n161

The overall economic situation for women in Kenya is bleak.

The marginalization of women in the economy has increased since [the] 1980s. Only 20% of the Kenyan women work in the formal economy, the rest of the women population [sic] unemployed or turning to the informal economy. Since Kenya began a period of economic liberalization, women have become more impoverished and marginalized in employment. n162

As a result of the economic marginalization, few Kenyan women have managed to enter the paid workforce. n163

D. Consequences of the Global Variations

The purpose of the comparative examples was to illustrate that "in spite of good intentions for broad protections, law reform does not mean equality is a reality for most women - the mere enactment of progressive sexual harassment legislation does not guarantee that it will be effectively used or that women will fully benefit from it." n164 Thus, women who are employed in MNEs with diverse cultures and laws represented will undoubtedly have to contend with issues of sexual harassment.

As a result of these global variations, MNEs continue to "lag[] behind in developing the [employment] policies, structures and services that support globalization." n165 Since MNEs have to cope with innumerable global variations such as differences in employment laws, culture, and government regulations, the critical objective in developing global employment strategy objectives becomes to reinforce the reality of a globally diverse corporate culture. n166 Nonetheless, MNEs must be realistic by knowing that creating and enforcing a common corporate culture will be challenging because of the convergence of diverse customs and values. n167

V. Conclusion

The workplace today continues to evolve as MNEs locate operations around the world in nation-states whose employment laws differ from their own ethical practices and employ non-United States citizens with countless cultural backgrounds. Consequently, conflict is an inevitable prospect and will have to be addressed. Admittedly, although no panacea exists, ADR increasingly becomes a viable and pragmatic alternative to contend with vagaries that globalization triggers. n168

Initially, this Note presented the context of the global situation for discussing MNE's challenge to resolve conflict in the global workplace. The subsequent discussion examined the development of ADR as a procedural device to resolve conflict in the American corporate community as well as the viability of the use of ADR in a global setting.

Next, the legal framework within which American-controlled MNEs must function, both domestically and internationally, to address workplace conflict was presented to show that employees, while working side-by-side outside of the United States, are afforded different levels of workplace protections based on whether they are United States citizens. One might have been persuaded to consider the simple prospect of applying American labor and employment laws to companies incorporated in the United States, regardless of where their actions take place. n169 However, this option was shown not to be feasible because of the United States' strong presumption of extraterritoriality. n170 Thus, this section proposed that a flexible and globally diverse solution is required. Moreover, a comparative approach was used in an effort to illustrate the diversity in the global workplace. n171 Despite the fact that the issues confronting employees in the global workforce are similar, the national legal responses of each country differ. Moreover, a country may have legislation in place to provide equality in the workplace, but cultural norms tend to preclude the effective application of the law. Thus, through examination of male and female business relations and sexual harassment legislation in several countries, the potential conflict between cultures became apparent as a real and critical consideration for MNEs.
Consequently, as the twenty-first century continues, MNEs must think pragmatically and creatively about reconciling the conflict created by globalization realities. n172 Indeed, the reality of international competition creates pressures for continuing workplace changes that heretofore were either not considered or dismissed as superfluous. Looking forward, if MNEs are to be able to resolve the conflict that is inevitable in the global workplace, then MNEs must consider pragmatic approaches to sexual harassment and other employment complaints. n173 Thus, ADR mechanisms, if properly designed, could play an invaluable role in the management of conflict in the twenty-first century.

**FOOTNOTE-1:**

n1. See William Twining, Globalisation and Legal Theory 4-5 (2000). "'Globalization' refers to those processes which tend to create and consolidate a unified world economy, a single ecological system, and a complex network of communications that covers the whole globe, even if it does not penetrate to every part of it." Id.


n3. See Alex Y. Seita, Globalization and the Convergence of Values, 30 Cornell Int'l L.J. 429, 429-30 (1997) (discussing the meaning and effect of globalization); see also Converging on the Future, HRI's Trendwatcher 56, Mar. 16, 2001, available at http://hri.eckerd.edu. Futurists Alvin and Heidi Toffler claim that "culture, religion, politics, environment, [sic] ethics, are all going to interpenetrate one another to an extent never before seen and they will in turn, penetrate business in all sorts of strange new ways." Id.

n4. See Twining, supra note 1, at 5.


n6. See Twining, supra note 1, at 5 (discussing the relative importance of particular kinds of actors in global governance); see also Detlev F. Vagts, Transnational Business Problems 113 (2d ed. 1998).


n8. ADR is often used to describe dispute resolution methods that are non-binding in nature; used in this limited sense, ADR would apply only to non-adjudicatory processes such as mediation, as compared to arbitration. This note, however, will use ADR in the broader sense, meaning any dispute resolution method other than a court proceeding before a judge or jury.

n9. See Wai, supra note 7, at 212 n.2. Wai notes:

At the procedural level, these writers focus on the increase in dispute resolution by means of international commercial arbitration rather than state-based litigation. At the substantive level, these studies emphasized "the importance of the growth of lex mercatoria, a delocalized private law based on the customs of international trade, and other forms of non-traditional rules in the regulation of transnational business conduct and dispute-resolution."

Id. at 212. (internal citations omitted).


Sexual harassment has high economic costs for the company that fails to prevent it... . Sexual harassment is inefficient for the company which allows it, most obviously because it can lead to expensive litigation, but also because companies will bear the economic costs of job turnover, sick leave, and decreased productivity.

Id.


n13. Due to the exhaustive nature of this topic, this Note will not delve into a detailed discussion on the substantive normative issues. It is recognized, however, that flexibility is required in the conflict resolution system because the application of United States laws in a transnational environment is not necessarily the panacea for all global situations based on the principles of cultural relativism. Thus, a procedural approach encompassing ADR could accommodate a globally diverse workforce and should help the MNE maneuver through the quagmire when an answer can be correct locally, while simultaneously violating the MNE's ethical and employee relations code of conduct.


n16. See Beverly H. Earle & Gerald A. Madek, An International Perspective on Sexual Harassment Law, 12 Law & Ineq. J. 43, 44-45 (1993) (finding sexual harassment is not a distinctive problem to the United States, rather it is prevalent throughout the world); see also AAA National Rules for the Resolution of Employment Disputes (including Mediation and Arbitration Rules (2001) (on file with author). The American Arbitration Association (AAA) is the nation's largest private provider of ADR services and is based in New York, N.Y.

n17. See David Kennedy, New Approaches to Comparative Law: Comparativism and International Governance, 1997 Utah L. Rev. 545, 546. Comparativists are those who "study and relate to other legal traditions." Id. at 547.

n18. The belief that conflict is essentially a problem that can be constructively resolved to the mutual satisfaction of all of the involved parties is at the core of the work of many conflict theorists. See generally Roger Fisher & William Ury, Getting to Yes: Negotiating Agreement Without Giving In (2d. ed. 1991); Carrie Menkel-Meadow, Toward Another View of Legal Negotiation: The Structure of Problem-Solving, 31 UCLA L. Rev. 754 (1984).


n20. See David B. Lipsky & Ronald L. Seeber, The Use of ADR in U.S. Corporations: Executive Summary (2001), at http://www.ilr.cornell.edu/depts/ICR/NEW/execsum.html (finding that corporations prefer to use ADR techniques to obtain greater control over dispute resolution than resort to "the risk and uncertainty of litigation"). This executive summary is survey of the 1000 largest U.S. based corporations conducted as a joint initiative of Cornell University, The Foundation of the Prevention and Early Resolution of Conflict (PERC) and Pricewaterhouse L.L.P. See generally Catherine Cronin-Harris, Mainstreaming: Systematizing Corporate Use of ADR, 59 Alb. L. Rev. 847 (1996) (tracing the expanded use of ADR within the business world).


n24. See Nixon Peabody LLP, Judges, Not Juries, Are the Employer's Best Friends, Emp. L. Alert, Feb. 2000, at 7. The author remarks that a statistical study that illustrates jury and judge punitive damage awards "could guide also employers to adopt alternative resolution strategies and/or settlement authorizations to avoid putting their corporate treasuries on the line with four corners of a jury room." Id. There is actually "a September 1999 report of Bureau of Justice Statistics (Civil Trial Cases and Verdicts in Large Counties, 1996) [that] ... covers, as a separate category, employment discrimination trials. The survey also tracks separate trials involving "'other employment disputes,' which are wrongful termination and breach of contract issues." Id.

n25. See id. at 7-8.

n26. See Gourlay & Soderquist, supra note 23, at 263 (stating that "'lost hours spent by employees and managers embroiled in conflict or supporting the litigation process further decreases productivity and profitability")).


n29. Id.

n30. Id.

n31. See U.S.G.A.O. I, supra note 27, at 8 (finding legal mandates as a reason for companies to develop ADR processes).

n32. 42 U.S.C. 1981 (Supp. 1994); see also discussion infra Part III.C.


n35. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 27-35 (1991) (deciding that an employee had to arbitrate his age discrimination case because he had signed a securities industry registration Form U-4 in which he agreed to arbitration in employment disputes).

n36. Cf. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991), and Great W. Mortgage Corp. v. Peacock, 110 F.3d 122 (3d Cir. 1997) (compelling arbitration in a sexual harassment case) with Prudential Ins. Co. of Am. v. Lai, 42 F.3d 1299, 1304-05 (9th Cir. 1994) (limiting the Gilmer decision by ruling that there must "be at least a knowing agreement to arbitrate employment disputes before an employee may be deemed to have waived the ... rights" to a judicial remedy). The focus of this Note is not around the issues of mandatory arbitration of employment disputes. However, individuals that are opposed to mandatory arbitration do concur that voluntary arbitration of employment disputes can be an efficient and effective means to reach a decision.

n37. See Catherine Cronin-Harris, Mainstreaming: Systematizing Corporate Use of ADR, 59 Alb. L. Rev. 847, 873 (1996) (tracing the uses of ADR within the business world and discussing the integration and propulsion of ADR).
n38. Id.


n42. See id.

n43. See The Anatomy of Mediation, supra note 39, at 185-86.

n44. Private Justice, supra note 41, at 33.

n45. Mazadoorian, supra note 19, at 5. "The 1999 Price Waterhouse Survey reported that 13 percent of respondents said they saved more than $1 million by using ADR, up 11 percent from the previous year." Id. at 7, n. 2 (citing 18 Alternatives to the High Cost of Litigation 23-24 (2000)).

n46. Id. at 5 (referencing statistics from U.S.G.A.O. l).

n47. See Private Justice, supra note 41, at 303.

n48. See supra note 36.


n50. See id.

n51. See Labor Law Developments: Lectures Presented at the Institute on Labor Law, Dallas, Texas, October 5-6, 1995 (Carol J. Holgren ed. 1996) Section 3.03 [hereinafter Labor Law Developments] (discussing global economies' impact on workers of all kinds and all levels); see also Sandra Orihuela & Abigail Montjoy, The Evolution of Latin America's Sexual Harassment Law: A Look at Mini-Skirts and Multinationals in Peru, 30 Cal. W. Int'l L.J. 323, 342 (2000) "More and more individuals are nowadays exposed to international trends and customs and are no longer isolated by distance, culture, or gender... Consequently, the increased interaction of diverse groups of people has lead to unresolved issues over how and which regulations should apply in solving critical employment matters, such as discrimination relating to sex." Id. at 342-43.

n52. See Henry, supra note 21, at 64. In "a fast moving business economy with global dimensions ... the ADR movement has made impressive inroads into the teaching and use of improved methods for resolving interpersonal ... and other conflicts arising from the disputes of an increasingly complex society." Id.

n53. See Orihuela & Montjoy, supra note 51, at 342-44 (suggesting that alternative dispute resolution mechanisms could be required for local workers, especially women, in Latin America working for American-controlled MNEs).


n55. Labor Law Developments, supra note 51, at 5-6 (discussing the need for "flexibility in the management of enterprises" in the global economy).

n56. Employees, men and women, still have to educate themselves about the cultural norms that exist in the country of their employment to know the rules that govern their particular situations.

n57. Interview with Steve Mele, Vice President, Human Resources International, Prudential Insurance Company of America and Oliver Quinn, Vice President, RESOLVE Office, Prudential Insurance Company of America, in Newark, N.J. (Nov. 16, 2000); see also Facilitating Early Dispute Resolution: Prudential's Approach, The Metropolitan Corporate Counsel, at 32 (Aug. 2000).
n58. See Carol A. Wittenberg, Susan T. Mackenzie, & Margaret L. Shaw, ADR Flexibility in Employment Disputes, 26 J. Collective Negot. in the Pub. Sector, No. 26-2, at 156 (1997). For example, in a global workplace, the parties may have completely different renditions of the events based on cultural paradigms, which may require that a fact-finding process precede a mediation process.


n60. The Anatomy of Mediation, supra note 39, at 109. To foster such discussion requires that information revealed during a mediation session be shielded against subsequent disclosure both in and out of court.

n61. See Private Justice, supra note 41, at 59-60 (finding that "without full disclosure, the mediator cannot hope to be successful in helping the parties find a satisfactory settlement).


n63. For example, in a global environment, two parties have a conflict and both language and cultural differences exist between the parties. Suppose both parties participated in a mediation session in an attempt to resolve a conflict and an agreement is reached which is memorialized in a memorandum of understanding agreed to by both sides. However, one party decides that they no longer want to abide by the agreement by alleging duress or fraud. See, e.g., Olam v. Congress Mortgage Co., 68 F. Supp. 2d 1110 (N.D. Cal. 1999). The Olam opinion is an intellectually noteworthy decision for potential applicability to mediations handled by MNEs in international settings involving situations that may require a mediator to be compelled to testify in order to determine the enforceability of a mediation settlement agreement. See also Rinaker v. Superior Court, 62 Cal. App. 4th 155, 163, n.2 (Cal. App. Dep't Super. Ct. 1998) (holding confidentiality provided by statute as to things said during mediation may be waived).


n65. Id.

n66. Id. at 290.

n67. Id. at 291.

n68. Id.

n69. Id.

n70. See e.g., Lyons v. Booker, 982 P.2d 1142, 1144 (Utah Ct. App. 1999) (holding confidentiality is essential to the correct functioning of a court appellate-driven mediation program to enforce settlement agreements); Willis v. McGraw, 177 F.R.D. 632, 632 (S.D. W. Va. 1998) (finding the benefits of confidentiality outweighed the interests of the parties in resolving a settlement dispute).

n71. See Josefina Muniz Rendon, When You Can't Get Through to Them: Cultural Diversity in Mediation, available at http://www.mediate.com/articles.rendon.cf m. (finding "other researchers have discovered that a person's cultural background is a strong, though sometimes invisible, factor that permeates the whole process of mediation and that should be explored and addressed in order to effectively communicate with the parties in mediation").


n73. See generally "Best" Practices Presented by Companies in Alternative Dispute Resolution, available at http://ilr.cornell.edu/alliance/Best%20Pract ices-EEOC.htm. Common design techniques for ADR programs have been identified through best practice research among a myriad of companies in this report. Best practice research was analyzed
by the author many companies including: Cigna Healthcare, General Electric, Prudential Financial, Shell Corporation, Texaco Corporation, and United Postal Service.

n74. See Bill Minnick, Ensuring that the Program Succeeds: Employment ADR How To's, Disp. Resol. J., 58-61 (Aug. 1998). "An effective ADR program will include both internal procedures - those which take place within the company itself - and external procedures, such as arbitration." Id. at 58.


n76. See id. (discussing the development of an effective complaint procedure).

n77. See, e.g., AAA National Rules for the Resolution of Employment Disputes (on file with author) (2001) (identifying numerous ADR options which include: Ombuds; Peer Review; Internal Mediation; Fact-finding; Arbitration; Pre-dispute, voluntary final and binding arbitration; Pre-dispute, mandatory nonbinding arbitration; Pre-dispute, mandatory final and binding arbitration; and Post-dispute, voluntary final and binding arbitration).

n78. See generally "Best" Practices Presented by Companies in Alternative Dispute Resolution, available at http://ilr.cornell.edu/depts/ICR/best.html (last visited March 20, 2001) (describing ADR techniques in use and specifically highlighting those that the Commission found to be innovative).

n79. Id.

n80. Id.

n81. Id.


n83. See id. at 6-8.


n86. Title VII provides:

It shall be an unlawful employment practice for an employer - (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate or classify his employee or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.


n89. See EEOC Guidelines, 29 CFR 1604.11(a) (2002); see also Earle & Madek, supra note 16, at 49-50 (finding that the EEOC Guidelines were amended in 1980 to include a definition of sexual harassment that included quid pro quo
harassment and hostile work environment harassment).

n90. See Guidelines on Discrimination Because of Sex, 29 C.F.R. 1604 (2002).


n92. 29 C.F.R. 1604.11(a) (2002).


n95. 42 U.S.C. 2000-5(g) (1988) (stating that equitable relief was available, while compensatory and punitive damages were not).

n96. Civil Rights Act of 1991, 102(c) (making jury trials available if plaintiffs seek compensatory or punitive damages).


n100. This was a case involving termination of a naturalized U.S. citizen, the issue of extraterritoriality reached the United States Supreme Court on appeal from an en banc 9-5 decision of the Fifth Circuit declining to apply Title VII extraterritorially to the Arabian American Oil Company ["ARAMCO"] in Saudi Arabia. See id. at 246.

n101. See Jonathan Turley, "When In Rome": Multinational Misconduct and the Presumption Against Extraterritoriality, 84 Nw. U. L. Rev. 598, 603-38 (Winter, 1990) (discussing the development and divergence of extraterritorial cases from 1900 to 1990).


n103. 42 U.S.C. 2000e(f)(1994). "The term "employee' ... means an individual who is a citizen of the United States." Id.; see, e.g., Orihuela & Montjoy, supra note 51, at 336-37 (stating that aliens were explicitly excluded from protection based upon Title VII establishing that "with respect to employment in a foreign country, such term includes an individual who is a citizen of the United States") (quoting Section 109 of the Civil Rights Act of 1991).

n104. "Congress limited the extended law to only cover employees who are U.S. citizens. Thus, while a McDonald's operation in, say, Zimbabwe, cannot discriminate against employees who are U.S. citizens, there is nothing (at least according to U.S. law) to prohibit the franchise from discrimination against its foreign workers. This leads to inconsistent results... ." Mark Gibney, Treat Overseas Workers Fairly - By Law Not Whim, L.A. Times, May 25, 1998, at B5.


n106. See restatement (third) of the foreign relations law of the united states 441 (1987) [hereinafter "restatement (third)"];
see also Restatement (Third) 441, cmt. reporters n.5 (applying the notion of territorial preference in Interamericana Refining Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291, 1296 (D. Del. 1970)). "The foreign compulsion defense, developed in the context of antitrust litigation, shields from liability the acts of parties carried out in obedience to the mandate of a foreign government." The foreign compulsion defense that may on its face seem to be a simple solution to a challenging situation; but in the end this tactic can severely tarnish an MNE's global reputation and market share.


n110. Employers can be relieved of sexual harassment liability if they instill effective policies. Justice Souter, writing for the majority, explained that Title VII's primary objective "is not to provide redress but to avoid harm." Faragher, 524 U.S. at 805-06. Ellerth, 524 U.S. at 765; Faragher, 524 U.S. at 807.

n112. Ellerth, 524 U.S. at 765; Faragher, 524 U.S. at 807.

n113. Ellerth, 524 U.S. at 765; Faragher, 524 U.S. at 807.

n114. See Ellerth, 524 U.S. at 761-64; Faragher, 524 U.S. at 804-07 (propounding that an employer will be allowed, however, to demonstrate "an affirmative defense to liability" to potentially avoid automatic liability).

n115. See Zalesne, supra note 10, at 174. "The [two] cases provide incentives for preventing harassment and dealing promptly with problems. The likely result is that more workplaces will adopt sexual harassment policies, thereby discouraging sexual harassment in the first place. Ultimately, more victims should feel safe reporting sexual harassment to their supervisors, and more cases will be resolved without resort to litigation." Id.


n117. Id.


n119. See Earle & Madek, supra note 16, at 45 (finding sexual harassment is not distinct in the United States, but that it is a prevalent problem throughout the world).

n120. See Edward T. Hall & Mildred Reed Hall, Understanding Cultural Differences: German, French and Americans 114 (1990) (hereinafter Hall & Hall).

n121. See Zalesne, supra note 10, at 211 n.417 (citing, inter alia, Abigal Caope Saguy, Puritanism and Promiscuity? Sexual Attitudes in France and the United States (1997) (unpublished paper presented at the Eastern Sociological Society, on file with author) (contrasting the "puritan United States" with the "Gallic or promiscuous French").

n122. Interview with Laurence Harari, Attorney, International Law Firm, in Paris, Fr. (July 20, 2001); see also Zalesne, supra note 10, at 212 ("Understanding a country's social climate and its attitudes and customs about sex and flirtation is deeply critical to the evaluation and understanding of the effect of sexual harassment laws regulating conduct in the workplace.").

n123. See Zalesne, supra note 10, at 212.

n124. See Hall & Hall, supra note 120, at 114.


n126. The Preamble of the French Constitution of 1946, as well as the Constitution of October 4, 1958, states the principle of equality of rights between men
and women. See Dictionnaire Permanent Social, Feuillets 195 (7 Juin 1999) 2347-2352; see also Rene David, French Law: Its Structure, Sources, and Methodology 11-142 (Michael Kindred trans. 1972) In addition, France has signed and ratified many of the conventions that have been proposed to the International Labor Organization.

n127. The French sexual harassment law provides for fines and, or one-year imprisonment under the Penal Code. See Code Penal [C.Pen.] art. L. 222-33 (Fr.); see also Code du Travail [C. Trav.] art. L. 122-46. (Fr.).

n128. C.Pen. art. L. 222-33 (Fr.). In French: "Le fait de harceler autri en usant d'ordres, de menaces ou de contraintes, dans le obtenir des faveurs de nature sexuelle, par une personne abusant de l'autorite que lui conferent ses fonctions, est puni d'un an d'emprisonnement et de 100,000 F d'amende." Id.

n129. Jacques Rojot, France, in Non-Standard Work and Industrial Relations 81 (R. Blanpain ed., 1999). Prominent among these features were the following provisions: "strict regulation by statutes, primacy of the provisions of the individual contract of employment, strict framing and interpretation of the statutes by the courts, application of penal law to labor law, and a public policy on labor law of a protective public order." Id.

n130. C. trav. art. L. 122-46. In French:

Aucun salarie ne peut etre sanctionne ni licencie pour avoir subi or refuse de subir les agissements de harclement d'un employer, de son representant ou de toute persone qui, abusant de l'autorite qui lui conferent ses functions a donne des orders, profere des menaces, impose des contraintes ou exerce des pressions de toute nature sur ce salarie dans le but d'obtenir des faveurs de nature sexuelle a son profit ou au profit d'un tiers. Aucun salarie ne peut etre sanctionnee ni licencie pour avoir temoigne des agissements definis a l'alinea precedent ou pour avoir relates.


n132. Id. at 266-67.

n133. See Andrew Osborn, EU to Help Sexually Harassed Women, London Guardian, June 8, 2000, at 19; see also Mike Smith, EU Sexual Harassment Plans Under Fire, London Financial Times, June 8, 2000, at 2. Some countries, including the UK, will feel only a limited impact. Whereas others, such as Greece and Portugal, where no laws existed against sexual harassment, will undergo a major transition. Id. In spite of the criticism against the initiative, "the Commission said establishing a community framework would create momentum among employers to stamp out harassment. "A clear and predictable working environment free of sexual harassment is also in the interest of businesses."" Id.

n134. Cf. Smith, supra note 133, at 2 (arguing France is a leader in sexual harassment laws and policy) with Paul Webster, Drive for Equality "Failing" in France, London Guardian, Aug. 14, 1999, at 17. In 1999, despite, the legislation being in place and "according to a seven-month inquiry, to be submitted to the Prime Minister, Lionel Jospin, ... France has one of the worse records in the EU on women's employment." Id.

n135. Osborn, supra note 133, at 19.

The EU recommendation, however, does not appear to expose employers to greater liability to sexual harassment claims than U.S. law. The major practical difference may be in the standard used. In EU law it is a subjective perspective; the effect of the harasser's conduct would not be evaluated using the reasonable person standard but rather by examining how the conduct affected that particular person. U.S. sexual harassment law, in contrast, utilizes a
combination of both an objective and subjective standard. Consequently, if a directive is implemented, employers may be exposed to greater liability for sexual harassment claims in the EU than in the U.S.

Kubal, supra note 131, at 268.


n139. See id.

n140. Id. at 193.


n143. Id. at 604.

n144. Id.

n145. Efron, supra note 141, at 139, 155 (discussing the Japanese court's reliance on Japan Civil Code sections 709 and 715 as the legal basis for a sexual harassment cause of action) (internal quotations omitted).

n146. See id. at 142 (discussing "continued ambivalence toward sexual harassment by the Japanese media, legal system, businessmen and corporations).


n149. See Parkinson, supra note 142, at 605-07, 628 n.85. "Even some Japanese feminists ... are willing to recognize that the EEOL as adopted was an exercise in the possible - a realistic reflection of the potential environment in Japan at the time of its passage and of the degree of rapidity of change that could be hoped for." Id. at 628 n.85.


n151. In recent years, women have been slowly making their way into the professional ranks in Japan, but their numbers are still small and many women in Japan complain "that everything from social mores to the lack of day care to the tax code conspire to keep things that way." Howard W. French, Women Win a Battle, but Job Bias Still Rules in Japan, N.Y. Times, Feb. 26, 2000, at A3. In 1998, according to statistics put out by the Ministry of Labor, "only 1.2 percent of corporate department chiefs in Japan were women, which represents a slight decline from the previous survey in 1995. In addition, "women only earned 64 percent as much as men among salaried workers." Id. Even in 2000, "despite the passage of a landmark anti-discrimination law in 1985 and its reinforcements in 1999 that include sanctions against sexual harassment, many Japanese companies still maintain, what [a] lawyer called "a separate track personnel management system,' for men and women." Id.

n153. See Mark Fisher, Change Comes Slowly, Glasgow Herald, Jan. 8, 2000, at 12.

n154. Id.

n155. Id.


n158. Id. at 355 (footnotes omitted).

n159. Fisher, supra note 153, at 12.


n161. See Dwasi, supra note 157, at 357.

n162. See Cancel, supra note 156.


n164. See Zalesne, supra note 10, at 196 (discussing unequal access to the law: socio-economic and cultural limits to the full implementation of sexual harassment legislation in the United States and South Africa).


n166. See id. "Reinforcing corporate culture is one of the most critical goals among firms developing global [employment] strategies." Id.

n167. Id. Thus, women employed by the same MNE, but employed in these different countries, may encounter similar workplace issues yet will likely experience a different resolution to their case based on local legislation and procedures.

n168. See Henry, supra note 21, at 68 (discussing the global prospects for ADR).

n169. In EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991), the Supreme Court determined that Title VII did not apply overseas to protect U.S. nationals in cases of discrimination abroad perpetrated by U.S. corporations.

n170. See Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909); see also Turley, supra note 101, at 603-04 (discussing the development and divergence of extraterritoriality cases from 1900 to 1990).


