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The Binding Force of International Arbitral Awards†

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A party that submits a controversy to arbitration may later regret having abandoned recourse to the courts. Once the award is rendered, the chosen arbitrator may no longer seem so wise to the losing party, who may refuse to comply with his decision. A legal system must therefore legitimize the arbitrator's authority if the award is to be more than an unenforceable attempt at conciliation.

The country where the award is rendered traditionally has legitimized arbitral authority subject to conditions in the form of mandatory procedural rules imposed on the arbitral proceedings. The proper scope of these local norms—commonly referred to as the *lex loci arbitri*—remains unsettled. Proponents of “denationalized” arbitration assert that arbitral awards may be detached from the law of the country of the proceedings and yet remain enforceable.

Courts may supervise arbitral proceedings to ensure legally correct results. Under an alternate approach, however, arbitration is subject to judicial control only to safeguard its fundamental fairness. A third view would free arbitration from any constraints im-

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posed by the legal system of the place where the award is rendered. These alternative patterns for judicial intervention involve competing values that are not easily reconciled. The commercial community desires finality in private dispute resolution. But national judicial systems may wish to protect other values, such as the integrity of the adjudicatory process and respect for the rights of third parties.

The first part of this Article explores the various approaches to the control normally exercised over international commercial arbitration by the place of the proceedings. The second part examines the recent history of English arbitration law as an illustration of how a nation's legislators and judges may struggle to reconcile the rival goals of justice and finality in the private resolution of international business disputes.

I. THE LEX LOCI ARBITRI

A. *Territoriality of the Lex Arbitri*

In the traditional view, arbitration inevitably is controlled by some national law, a *lex arbitri*.¹ The *lex arbitri* is not necessarily the law governing the substance of the dispute, nor the procedural rules applied by the arbitrators. Rather, the *lex arbitri* governs the validity of the arbitral process itself. Furthermore, the law of the arbitration is the law of the place of the proceedings: the *lex arbitri* is the *lex loci arbitri*. Thus an arbitrator must bow to the mandatory norms of the country in which he sits.² Parties may choose the law governing the contract as well as some of the procedural rules applied by the arbitrator, such as whether or not the cross examination of witnesses will be allowed. The parties cannot, however, choose the law governing the arbitration, except indirectly through choice of its situs.

The rules imposed by the *lex loci arbitri* are not easily classified. Many legal systems prohibit arbitration of disputes involving sen-

1. As one commentator put it, "[e]very right or power a private person enjoys is inexorably conferred by or derived from a system of municipal law which may conveniently and in accordance with tradition be called *lex fori*, though it would be more exact (but also less familiar) to speak of the *lex arbitri*." Mann, *Lex Facit Arbitrum*, in *International Arbitration: Liber Amicorum for Martin Domke* 157, 159 (P. Sanders ed. 1967).

2. For the present discussion, the place of the arbitral proceedings is assumed to be the place where the award is rendered. The parties may choose the place explicitly or delegate the choice to an arbitral institution.

sitive public interests, such as the protection of investors in corporate securities³ or contracts with state agencies.⁴ Some require arbitrators to state the reasons for their awards,⁵ or provide for the removal of arbitrators who are inept⁶ or unfair.⁷ A few legal systems have provided for appeal from arbitrator error on matters of law.⁸

Scholars and practitioners have questioned the traditional role of the *lex loci arbitri*, and have suggested that an international commercial arbitral award may "float" free from the constraints of the national law of the place of the proceedings.⁹ In this view, "the binding force of an international award may be derived . . . without a specific national legal system serving as its foundation."¹⁰ One of the authors has argued that an international arbitral award is enforceable regardless of whether it is subject to the same appellate procedures as domestic ones.¹¹ Such denationalized arbitration is consistent not only with the finality sought by parties active in international commerce, but also with the desire of many countries to increase their attractiveness as a site for arbitration, which in part underlies the trend toward greater arbitral autonomy in modern arbitration law.¹² Denationalized arbitration also allows courts to avoid involvement in disputes that do not involve domestic interests, and accommodates international business transactions in

3. See, e.g., *Wilko v. Swann*, 346 U.S. 427, 438 (1953).

4. See, e.g., Carbonneau, *The Elaboration of a French Doctrine on International Commercial Arbitration: A Study in Liberal Civilian Creativity*, 55 *Tul. L. Rev.* 1, 29-30 (1980).

5. See, e.g., Bülow, Glossner & Laschet, *Federal Republic of Germany*, in *Arbitration Law in Europe* 83, 90 (International Chamber of Commerce 1981).

6. See, e.g., *English Arbitration Act, 1950*, 14 *Geo. 6*, ch. 27, § 23 (concerning arbitrator "misconduct").

7. See, e.g., *Nouveau code de procédure civile* [C. pr. civ. nouveau] art. 1502(4) (Supp. 1981) (Fr.).

8. See *infra* notes 48-61 and accompanying text for a discussion of the English "case stated" procedure.

9. See generally Lalive, *Les règles de conflit de lois appliquées au fond du litige par l'arbitre international siégeant en Suisse*, 1976 *Revue de l'Arbitrage* 155; Paulsson, *Arbitration Unbound: Award Detached from the Law of Its Country of Origin*, 30 *Int'l & Comp. L.Q.* 358 (1981). Denationalized arbitration produces what some have termed an "a-national award." See A. van den Berg, *The New York Arbitration Convention of 1958*, at 28-51 (1981).

10. Paulsson, *supra* note 9, at 368. The legal system of the place of arbitration does not necessarily have the "authority to rule on the validity of the proceedings as such—and thus on the binding effect of its result: the award." *Id.* See also Paulsson, *France and the Arbitral Process in 1980: A New Law and a Major Court Decision*, 1981 *Skiljedom* 40, 42.

11. See Paulsson, *supra* note 9, at 368-70.

12. See *infra* text accompanying notes 77-83.

which the parties' nationalities create a special need for a neutral and private forum.¹³

Denationalized arbitration, however, has come to imply more than self-restraint by the country of the proceedings in the imposition of local procedural law. Under certain conditions, awards rendered in the context of international trade may be enforceable outside the country of proceedings despite annulment where rendered. For example, suppose an arbitral award rendered in country *A* is set aside there on the ground that the parties did not validly consent to arbitration. Should a court in country *B*, where the loser has assets, nevertheless enforce the award if it takes a contrary view of the validity of the arbitration agreement? What should *B*'s court do if *A*'s court sets aside the award for error of law, a ground for annulment unknown in *B*'s law?

Varying degrees of detached arbitration are possible. For instance, *B* might take the position that annulment in *A* is never relevant to enforcement in *B*. Or, annulment of an award in *A* might constitute an impediment to enforcement in *B* only if the annulment was made for reasons considered appropriate under *B*'s law. For example, *B* might accept annulment for arbitrator corruption, but not for arbitrator error of law.

Both traditionalists and proponents of denationalized arbitration acknowledge that *B*'s courts could always deny recognition to an arbitration defective under their own standards, presuming of course that they are consistent with treaty obligations. The divisive issue is whether *B*'s courts should also defer to *A*'s nullification for violation of *A*'s procedural law.

At least until the enactment of the Arbitration Act of 1979, English judges traditionally have given the *lex loci arbitri* greater significance than their French or U.S. counterparts. In one extreme decision, the Court of Appeal held that the selection of London as a situs for arbitration implied that English law governed the issue of contract damages.¹⁴

French courts have at least toyed with a markedly different approach. In the *Gotaverken* case,¹⁵ for example, a French court de-

13. See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516 (1974).

14. *Tzortzis v. Monark Line A/B*, [1968] 1 W.L.R. 406, 411-12 (C.A.) (Lord Denning, M.R.).

15. Judgment of Feb. 21, 1980, Cour d'appel, Paris, 1980 Recueil Dalloz-Sirey, Jurisprudence [D.S. Jur.] 568. The arbitration in *Gotaverken* involved three tankers constructed by a Swedish shipyard for a Libyan government agency. The Libyans refused delivery on the

clined to hear a Libyan challenge to an arbitral award that arguably violated French public policy. The court's refusal was based on the conclusion that the arbitral award was not French.¹⁶

grounds that the ship components had been made in Israel in violation of Libyan boycott law. The arbitrators ordered the Libyans to take delivery of the vessels and to pay the outstanding portion of the price. Paulsson, *supra* note 9, at 364. For an English translation of part of *Gotaverken*, see *id.* at 385-87. For a discussion of the *Gotaverken* case in Sweden, see *infra* note 49.

16. 1980 D.S. Jur. at 569. *Gotaverken* caused speculation that an arbitral award may be free from control by the country of origin, and precipitated the French Decree of May 12, 1981 on arbitration. Decree No. 81-500, May 12, 1981, 1981 Journal Officiel de la République Française [J.O.] 1380, 1981 Dalloz-Sirey, *Législation* [D.S.L.] 222. The prospect of denationalized arbitration raised concerns that an award rendered in France might not receive enthusiastic recognition outside France. See Craig, Park & Paulsson, *French Codification of a Legal Framework for International Commercial Arbitration: The Decree of May 12, 1981*, 13 L. & Pol'y Int'l Bus. 727, 733-34 (1981). The enforcement forum, mindful of the lack of control over the arbitration's fairness in the place of the proceedings, might subject French awards to stricter scrutiny. In addition, grounds for refusing recognition under the New York Convention might be construed broadly when awards are rendered under a reign of arbitral anarchy.

The Decree of May 12, 1981 provided for limited judicial control over the integrity of international arbitration conducted in France. The *Nouveau Code de Procédure Civile* now contains the following specific grounds for challenge to an international award rendered in France:

1. If there was no valid arbitration agreement or the arbitrator decided on the basis of a void or expired agreement;
2. If there were irregularities in the composition of the arbitral tribunal or in the designation of the sole arbitrator;
3. If the arbitrator has decided in a manner incompatible with the mission conferred upon him;
4. Whenever due process [literally: the principle of adversarial process] has not been respected;
5. If the recognition or enforcement is contrary to international public policy.

C. pr. civ. nouveau art. 1502 (Supp. 1981). The fifth ground for challenge refers to the public policy of France, rather than to an international norm. Mandatory French public policy will impose itself less extensively when the dispute has an international character. See 1 H. Batiffol & P. Lagarde, *Droit international privé* ¶ 366 (6th ed. 1974). On the requirement that an international award respect French *ordre public international*, see P. Fouchard, *L'Arbitrage commercial international* §§ 515-528 (1965). With the exception of the public policy, or *ordre public*, ground, the French measure is strikingly similar to section 10 of the U.S. Arbitration Act. See *infra* note 41.

Control of an arbitral proceeding according to these standards provides the loser in an unfair proceeding with the opportunity to have the award set aside where rendered. Without such norms imposed by the *lex loci arbitri*, the losing party would be required to defend against the enforcement of the award wherever he had assets. Moreover, the country where the award debtor's property is may be an even more fortuitous and less acceptable forum than the country of the proceedings. An award rendered by a corrupt arbitrator in London should be susceptible to annulment in London. Fairness dictates that the losing party not be required to defend against an award in another country, where the local judge may be even less concerned with the dispute than his English counterpart.

Several months after *Gotaverken*, however, the Paris *Cour d'appel* reaffirmed the continuing role of the *lex loci arbitri* in France. In *Berardi v. Clair*,¹⁷ following arbitration in Switzerland of a dispute between French and Canadian parties, the Paris *Tribunal de grand instance* granted leave to enforce the award in France.¹⁸ Three months later, the cantonal *Cour de justice* in Geneva annulled the award as "arbitrary."¹⁹ The Paris *Cour d'appel* then quashed the lower court decision, refusing recognition in France to an award set aside under the law of the place where rendered.²⁰

Under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards,²¹ commonly referred to as the New York Convention, the forum in which enforcement is sought may refuse recognition of an award set aside in the country where rendered.²² The Convention's language, however is permissive and not mandatory.²³ The French court's belief that the Convention required refusal was clearly erroneous.

A possible explanation for the variance in the court's behavior is that *Berardi v. Clair* was decided under the 1955 version of the International Chamber of Commerce (ICC) arbitration rules, which provided that the law of the country in which the arbitrator holds the proceedings (the *lex loci arbitri*) fill any gaps in the procedural rules.²⁴ In contrast, the 1975 version provides for the arbitrator

17. Judgment of June 20, 1980, No. 11542, *Cour d'appel*, Paris (unpublished opinion), summarized in 7 Y.B. Com. Arb. 319-21 (International Council for Commercial Arbitration 1982).

18. 7 Y.B. Com. Arb. at 320.

19. *Id.*

20. *Id.*

21. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 [hereinafter cited as New York Convention]. See generally A. van den Berg, *supra* note 9.

France, the United Kingdom, and the United States are all parties to the New York Convention; the 59 countries that have ratified the Convention are listed in Multilateral Treaties Deposited with the Secretary-General, U.N. Doc. ST/LEG/Ser.E/1 (1981), and in 7 Y.B. Com. Arb., *supra* note 17, at 288-89.

22. New York Convention, *supra* note 21, art. V(1)(e)

23. The Convention provides that recognition of a foreign award "may be refused" on proof that it has been set aside by "a competent authority of the country in which, or under the law of which, that award was made." *Id.* art. V(1). Annulment by an authority of the country "under the law of which" an award is made suggests the possibility that the *lex arbitri* may not be the law of the place of proceedings.

24. See International Chamber of Commerce, Rules of Conciliation and Arbitration (2d ed. 1959).

himself to fill such gaps²⁵

Post-annulment recognition of an award rendered abroad may be appropriate in three circumstances. The first would require that the arbitration arise under the European Convention on International Commercial Arbitration,²⁶ known as the Geneva Convention of 1961, covering disputes between nationals of different contracting States. Annulment of an award in its country of origin constitutes a ground for refusal of recognition under the Geneva Convention only when annulment is for specifically enumerated reasons, such as the invalidity of the arbitral agreement or lack of proper notice to the parties.²⁷ Thus, if Canada had adhered to the Geneva Convention, the award in *Berardi v. Clair* would apparently have been enforceable in France, since "arbitrariness" is not a ground for annulment under the Convention.

Secondly, enforcement of an award annulled in its country of origin might be expected where the local judiciary is corrupt or biased. For example, a judge in a country lacking a tradition of judicial independence might set aside an award rendered against his own government merely to please the bureaucracy, without regard to the fairness of the proceedings. Enforcement of such an award by a country where the debtor government has assets would seem appropriate.

Thirdly, post-annulment recognition might also be justified where the award was set aside for reasons so peculiar to the local law of the place of the proceedings that non-recognition of it would defeat the goals of the New York Convention. This third set of circumstances is discussed more fully in the next section.

B. *The Lex Arbitri in Contemporary Practice*

1. *The Principle of Denationalization*

Proponents of detachment²⁸ do not advocate a complete escape

25. Rules for the International Chamber of Commerce Court of Arbitration art. 11, reprinted in 1 *International Commercial Arbitration*, doc. IV.A.3, at 42 (C. Schmitthoff ed. 1982) [hereinafter cited as 1975 ICC Rules].

26. European Convention on International Commercial Arbitration, Apr. 21, 1961, 484 U.N.T.S. 349.

27. *Id.* art. 9, 384 U.N.T.S. at 374, 376.

28. On detachment, see generally Paulsson, *supra* note 9, at 358-64, 375-87; Paulsson, *Arbitre et juge en Suède: Exposé général et réflexions sur la délocalisation des sentences arbitrales*, 1980 *Revue de l'Arbitrage* 441, 483-87; Paulsson, *The Role of Swedish Courts in Transnational Arbitration*, 21 *Va. J. Int'l L.* 211, 240-43 (1981) [hereinafter cited as Paul-

from national jurisdiction; this would clearly be misguided. Indeed, the international arbitral system would ultimately break down if the parties could not rely on national jurisdictions to recognize and enforce awards. The real question is whether international arbitration may be liberated from the local peculiarities of a place of arbitration chosen either by chance or because of its neutrality, and not because of the parties' attachment to the local rules of arbitration.

If the international validity of awards depended ineluctably on their treatment in the hands of local magistrates in their countries of origin, the goal of establishing a more flexible and universal system of international arbitration would be frustrated. With the parties' attention riveted on the attitude of local courts, their focus would be on procedural niceties rather than on fairness, convenience, and neutrality. Institutions selecting sites for arbitrations would inevitably feel constrained to choose those countries where they had previously conducted proceedings.

Significantly, the situs for an ICC arbitration is selected not on the basis of the local legal system's relative compatibility with the ICC Rules of Arbitration, but rather on the factual context of the case and the domiciles of the parties.²⁹ International arbitral mechanisms, such as that of the ICC, aspire to be universal and are characterized by their flexibility. The parties may name arbitrators in whom they have confidence without being obliged to choose from a narrow list of possibilities. They may represent themselves in any way they wish, generally using their ordinary legal advisers, without being forced to call on a local or institutional bar that alone understands the relevant procedures. Businesses involved in international commerce value this freedom, and it is reasonable to assume that they are capable of deciding that they want such an open mechanism for the resolution of their disputes.

A denationalized award may be accepted by the legal order of an enforcement jurisdiction although it is independent from the legal order of its country of origin. A contract signed at the Munich airport between a Japanese consortium and a U.S. subcontractor selected to perform engineering services in the Middle East illustrates this point. Legal consequences may flow from this contract

sson, *The Role of Swedish Courts*].

29. For a discussion of the sinites chosen for ICC arbitrations, see W. Craig, W. Park & J. Paulsson, *International Chamber of Commerce Arbitration* (to be published in 1983).

because of the importance attributed to it by the legal orders represented by the municipal courts of San Francisco, Tokyo, or Cairo, depending on a multitude of potentially relevant jurisdictional criteria. The significance of the agreement presumably is not affected by the fact that it was signed in Germany; it is "independent" of the German legal order.

This feature of international arbitration probably has little impact in practice because counsel will inevitably seek to conform the process to local rules as a matter of prudence. Sensitivity to the local law will solve most problems, and in any case the parties and arbitrators probably will not violate fundamental legal principles or norms.³⁰

2. *The Practicality of Denationalization*

Conforming an arbitration to the local rules of the situs may lead to severe practical problems. For example, the local law might provide that all arbitrators must sign the arbitral award and that any contractual stipulation to the contrary is invalid. Although the local rule may be quite reasonable when applied in that jurisdiction, its application to an international arbitration would be unfortunate, especially when the parties presume that international rules, and not local ones, will apply.

If the award is not recognized in the situs country, however, another nation may arguably recognize the award by holding that under its law the result of the arbitration is valid, and the effect of annulment must be limited to the situs country. Nevertheless, no court has yet held that an award, annulled for a procedural error under the law of the situs country, may be enforced abroad. It may still happen that international businessmen may therefore select an arbitral site based on its convenience, without regard for the local legal procedures, and find that the ensuing award is unenforceable because of a purely local policy consideration.

The absence of a legal precedent allowing enforcement of such a

30. Over the past decade, the various national legal systems have, whether by judicial initiative or specific legislation, attenuated the impact of local rules on international arbitration. This may be accomplished in two ways: by declining to apply local rules to an international case, or simply by reforming the entire body of domestic arbitration law so that it corresponds to generally accepted international norms. With regard to the latter, a notable development is the current effort by the United Nations Commission on International Trade Law to draft a model law for the consideration of national legislatures. See 16 U.N. L. Rep. 40 (1982).

"defective" award, however, is hardly surprising. In a majority of cases, a defect sufficient to render the award challengeable in its country of origin will also be sufficient to cause the forum of execution to decline recognition.

The frontiers of delocalization may soon be tested in the context of the U.S.-Iranian Claims Tribunal at The Hague, which was established by an international agreement.³¹ Many claimants in those proceedings no doubt thought the losing parties' obligation to respect awards was not subject to any determination by the Dutch legal system, whose sole connection with the matter was that The Hague was chosen as an attractive neutral locale. Nevertheless, one of the initial awards rendered in these proceedings included a dissenting opinion by an Iranian arbitrator who argued that while the tribunal could record the parties' settlement, it wrongly "condemned one of the arbitrating parties, declared it obligated to pay claimant . . . a sum of money and requested the President of the Tribunal to order the escrow agent to make that payment to claimant,"³² even though the amount was that agreed to in the settlement. According to the dissenting arbitrator, the tribunal should have eschewed any reference to the manner in which the award should be enforced. This would require that the parties apply for a declaration of executory effect by the Dutch courts in the absence of voluntary compliance.³³

C. *Scope of Application of the Lex Loci Arbitri*

A legal system that subjects international arbitration to its judicial control must decide which procedural norms to apply. Judicial intervention might be limited to ascertaining the award's basic integrity—whether, for example, the arbitrator displayed partiality or decided matters that the parties did not entrust to his adjudication. On the other hand, the courts also might concern themselves with the legal merits of the dispute. The appropriate extent of judicial control depends upon whether it is more important than an

31. The tribunal was established by the Algiers Accords. Declaration of Algeria Concerning the Settlement of Claims by the United States and Iran, Jan. 19, 1981, 20 I.L.M. 230.

32. *NCR Corp. v. Iran*, 1982 Iranian Assets Litigation Rep. (Andrews) 5615 (Nov. 17, 1982) (Kashani, Arbitrator, concurring and dissenting). The decision is to be reprinted in 8 *Y.B. Com. Arb.* (1983), *supra* note 17.

33. *Id.* In early 1983, Iran confirmed that it would indeed use the Dutch courts to request that they set aside the award. See 1983 Iranian Assets Litigation Rep. (Andrews) 5939 (Jan. 21, 1983).

arbitral award be correct, or that it be final.

Before 1979, English law had come down on the side of legal certainty, and attempted to subject all disputes decided within the borders of England and Wales to a uniform application of legal principles.³⁴ Although parties to a business dispute had agreed to give the responsibility for its resolution to an arbitrator, the arbitral process still could be vitiated whenever one party, fearful of losing, decided to break its agreement to settle the dispute privately, and to take its chance instead before a judge.³⁵ Frequently, the parties to the arbitration were entangled in complicated judicial proceedings understood only by high-priced Q.C.s.

This tension between legality and finality represents a rivalry between two types of certainty: one related to the uniform application of legal norms, the other concerned with the adjudicatory forum. The value of a uniform application of legal principles perhaps is strongest when there is a danger that private dispute resolution may become a means for the strong to oppress the weak through unequal bargaining power, or when the interests of third parties may be affected by the dispute. In such cases, courts arguably may have a duty to examine the legal substance of the dispute and other matters that bear on the award's basic integrity, such as arbitrator fraud, partiality, or abuse of authority.

To put it another way, the judiciary need not concern itself with the correctness of an arbitrator's conclusions merely to ensure a proper interpretation of the parties' contract. Judicial intervention in the merits of a dispute voluntarily submitted to arbitration is required only if an arbitrator's decision may directly implicate national or third-party interests. Intervention may be justified, for example, if an arbitrator's misinterpretation of an oil supply contract would result in injury to the consumers of the fuel, or when an arbitrator's interpretation of company law frustrates a national policy of protecting the integrity of the securities market. If national policies are not affected, courts should limit their role to ensuring that the award is not obtained through violation of fundamental norms of procedural fairness.

A national legal system also may accommodate the needs of international trade and investment by refraining from exercising super-

34. For a discussion of pre-1979 English law and proposals to reform it, see *infra* notes 48-75 and accompanying text.

35. See *infra* notes 48-61 and accompanying text.

vision over the legal merits of the arbitration. The U.S. Supreme Court adopted such an approach in *Scherk v. Alberto-Culver Co.*,³⁶ a case involving allegedly fraudulent misrepresentations in the sale of stock, normally an issue not subject to arbitration in the United States.³⁷ The policy in favor of permitting a neutral private forum to settle international business disputes outweighed the competing consideration of protecting investors from fraud in the sale of securities.³⁸

*Mobil Oil Indonesia v. Asamera Oil (Indonesia)*³⁹ further illustrates the reluctance of U.S. federal courts to set aside arbitral awards. Following a New York state-court opinion holding that the arbitrators rather than the courts should decide the applicable procedural rules,⁴⁰ a federal district court declined to vacate the arbitral award under the provisions of the 1925 U.S. Arbitration Act.⁴¹ Under the parties' agreement, Mobil was to pay royalties on crude oil; despite the common meaning of this term, the arbitrators in-

36. 417 U.S. 506 (1974).

37. See *id.* at 509, 512-13.

38. See *id.* at 515-20.

39. 487 F. Supp. 63 (S.D.N.Y. 1980).

40. *Mobil Oil Indonesia v. Asamera Oil (Indonesia)*, 56 A.D.2d 339, 341-42, 392 N.Y.S.2d 614, 616 (N.Y. App. Div. 1977), *rev'd* on other grounds, 43 N.Y.2d 276, 372 N.E.2d 21, 401 N.Y.S.2d 186 (1977). The New York Appellate Division reasoned that:

The issue at bar is whether the courts or the arbitrators should glean from the contract the applicable procedural rules. . . .

. . . .

That the parties agreed to arbitrate is undisputed as is the fact that the issues raised on arbitration bear a reasonable relationship to the contract. Furthermore, that the arbitrators' result is rational, although it may not have been the result others would have reached is beyond peradventure. The parties agreed to be bound by the Rules of the ICC and it was for the arbitrators to determine which Rules of the ICC were intended.

56 A.D.2d at 341-42, 392 N.Y.S.2d at 616.

41. 487 F. Supp. at 66-67. The 1925 Arbitration Act provides that a federal district court may set aside an award rendered within its district on the following grounds:

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10 (1976).

terpreted it to include natural gas and other liquid hydrocarbons as well.⁴² The court nonetheless refused to vacate the award, and instead found it sufficient that the arbitrators' statement of reasons contained a "barely colorable" justification for the outcome.⁴³

Judicial control over the substantive legal issues of an international arbitration should be minimal. Parties to the dispute have a right to the privacy they bargained for. In addition, arbitrators should be free from the threat of being overruled because of errors in their analysis, so that reasoned awards will be rendered more frequently, thereby contributing to the development of a modern "law merchant."⁴⁴

A complete lack of judicial control, however, is undesirable. Even if the arbitration involves neither citizens nor interests of the forum State, national courts should ensure the integrity of awards rendered within national borders. Such awards may benefit from recognition and enforcement under the New York Convention. Some parties to the Convention, including the United States, limit its application to awards rendered in the territory of another contracting State.⁴⁵ By allowing an award rendered in its territory to become binding, a State facilitates its enforcement and thus should provide a mechanism for challenging the award's procedural deficiencies.

The legal system of the place of the arbitral proceedings should correct deficiencies in the award's integrity. Otherwise, the losing party would be forced to attack an invalid award in each of the many States where the award might be enforced against its property.⁴⁶ Simply on grounds of equity, the contesting party should therefore have an opportunity to expose procedural irregularities at the place of the arbitration, which will normally have as great a

42. 487 F. Supp. at 65-66.

43. *Id.* at 66.

44. On the new law merchant, see Goldman, *La Lex Mercatoria dans les contrats et l'arbitrage internationaux: réalité et perspectives*, 106 *Journal du Droit International* 475 (1979).

45. New York Convention, *supra* note 21, 21 U.S.T. at 2566. The right of contracting parties to restrict enforcement on the basis of reciprocity is provided in article I(3) of the Convention.

46. A.J. van den Berg seems to suggest this problem in his discussion of the applicability of the Convention to denationalized awards: "[I]f, in a 'de-nationalized' arbitration, serious procedural violations have been committed, the aggrieved party must have the right to have such award set aside." A. van den Berg, *supra* note 9, at 30.

claim as any other forum to being mutually convenient for the parties.

II. ENGLISH ARBITRATION LAW

The recent history of English arbitration law, and in particular of the 1979 Arbitration Act,⁴⁷ provides the occasion for a more profound case study of the interaction between judge and arbitrator. Like a prism, discussion of these developments serves to separate the themes that inhere in the competing desiderata of justice and finality in private dispute resolution.

A. *The Special Case Procedure*

Before 1979, commercial arbitration in London was subject to the "special case" or "case stated" procedure by which a party could compel an arbitrator to submit a point of law to the High Court.⁴⁸ Submission of the legal issue during the proceedings was called a "consultative case"; the judge would decide the question and then remit the case to the arbitrator. Submission after the arbitration was called stating a case in the form of "alternate awards," and the court had to choose between one or the other. Until the High Court had answered the legal question stated by the arbitrator, there was no final award in a legal sense, even

47. Arbitration Act, 1979, ch. 42. For the legislative and historical background of the Act, see 392 Parl. Deb., H.L. (5th ser.) 89 (1978); 397 Parl. Deb., H.L. (5th ser.) 434-64 (1978-1979); 398 Parl. Deb., H.L. (5th ser.) 529-74, 1465-82 (1979); Commercial Court Committee, Report on Arbitration, Cmd. No. 7284 (1978); Address by Lord Diplock, The Fourth Alexander Lecture, Chartered Institute of Arbitrators, London (Feb. 28, 1978), reprinted in 44 Arb. 107 (1978); Park, Judicial Supervision of Transnational Commercial Arbitration: The English Arbitration Act of 1979, 21 Harv. Int'l L.J. 87, 87-104 (1980). See generally M. Mustill & S. Boyd, *The Law and Practice of Commercial Arbitration in England* (1982).

48. Arbitration Act, 1950, 14 Geo. 6, ch. 27, § 21.

The Common Law Procedure Act, 1854, 17 & 18 Vict., ch. 125, first applied a voluntary special case procedure to commercial arbitration. Courts were later given power to order a statement of the case. See Arbitration Act, 1889, 52 & 53 Vict., ch. 49.

Questions of fact were outside the scope of the court's authority, but the line between fact and law was thin. The courts possessed sufficient discretion to find legal elements in most issues. See *Bunge S.A. v. Kruse*, [1977] 1 Lloyd's L.R. 492 (C.A. 1976). In *Bunge*, the sale of soybean meal to a Belgian buyer by a German seller was frustrated by the 1973 U.S. grain export embargo. The Grain and Feed Trade Association's (GAFTA) finding of "accord and satisfaction" in the settlement agreement was held to be a matter of law, and not fact, on the case stated by the GAFTA Board of Appeal. *Id.* at 495.

Statement of the case might prove to be detrimental to the requesting party. See *Ismail v. Polish Ocean Lines*, 1976 Q.B. 893, 905, 909 (C.A.).

though courts in practice might refer to the arbitrator's preference or informal decision as his award. The uniqueness of English law lay not in the right to appeal the arbitrator's conclusions on matters of law, but rather in allowing the appeal before formal delivery of his award. As a result, his decision might be refused enforcement in a country in which the debtor had assets because the award might not be deemed "binding" under the New York Convention.⁴⁹

In 1922, when the Court of Appeal held that the supervisory jurisdiction of English courts could not be abrogated by contract, any escape from judicial review was foreclosed.⁵⁰ The Court of Appeal considered it contrary to English public policy to condone an "erroneous administration of the law."⁵¹

The high water mark of judicial intervention came in a 1973 case, *Halfdan Grieg & Co. A/S v. Sterling Coal & Navigation Corp.*,⁵² frequently called the *Lysland* for the ship involved. The Court of Appeal reasoned that agreements to arbitrate disputes in London were made under the assumption that legal issues could be referred to judicial determination.⁵³ Lord Denning ordered the case stated over the arbitrator's objection, and set forth a tripartite test for determining when a court should force arbitrators to state a special case in the future.⁵⁴ The point of law concerned should be:

real and substantial and such as to be open to serious argument and appropriate for decision by a court of law

. . . .

. . . clear cut and capable of being accurately stated as a point of law

. . . [and] of such importance that the resolution of it

49. See New York Convention, *supra* note 21, art. V(1)(e). The Convention does not make clear whether an award is "binding" before appellate review has taken place. In *General Nat'l Maritime Transp. Co. v. Gotaverken*, Judgment of Aug. 13, 1979, Sup. Ct., Swed. (slip op.), the court held that a pending challenge to the award in France did not constitute a ground for refusing to enforce the award in Sweden. See Paulsson, *The Role of Swedish Courts*, *supra* note 28, at 236-40. For a translation of the Swedish decision, see *id.* at 244-48. For a discussion of *Gotaverken* in France, see *infra* notes 15-16 and accompanying text.

50. *Czarnikow & Co. v. Roth, Schmidt & Co.*, [1922] 2 K.B. 478 (C.A.).

51. *Id.* at 489. Referring to a part of London near Fleet Street that had been a sanctuary for criminals, Lord Justice Scrutton declared that "[t]here must be no Alsatia in England where the King's writ does not run." *Id.* at 488.

52. [1973] 1 Q.B. 843 (C.A.).

53. *Id.* at 862.

54. *Id.* at 861-63.

is necessary for the proper determination of the case

. . . .⁵⁵

Thereafter, arbitrators apparently feared that denial of an application made by a party to state a case, apart from the most frivolous requests, could be considered arbitrator "misconduct," a basis for setting aside an award.⁵⁶

One result of the special case procedure was that it prevented an arbitrator in England from making such decisions according to his own concept of equity and fairness⁵⁷ as an *amiable compositeur*.⁵⁸ The arbitrator was required to apply a "fixed and recognizable system of law."⁵⁹

B. *The Call for Reform*

Scholars, legislators, and judges criticized the case-stated procedure for allowing parties who feared they were about to lose an arbitration to delay enforcement of an award.⁶⁰ Under the procedure, the arbitrator was required to prepare the consultative questions; the High Court had to hold a hearing that might involve full argument; and appeal might be taken to the Court of Appeal, and thence to the House of Lords. Meanwhile, by virtue of the delay, the undeserving party received the equivalent of an interest-free loan in the amount of the unpaid award.⁶¹

Lord Diplock's 1978 Alexander Lecture to the Institute of Arbitrators lamented the use of the case-stated procedure for delay.⁶² Five months later, a Commercial Court Committee,⁶³ chaired by

55. *Id.* at 861-62.

56. See Commercial Court Committee, *supra* note 47, at 6.

57. See Schmitthof, *The Supervisory Jurisdiction of English Courts*, in *International Arbitration: Liber Amicorum for Martin Domke* 289, 298 (P. Sanders ed. 1967).

58. On *amiable composition*, see generally E. Loquin, *L'amiable composition en droit comparé et international* (1980).

59. *Orion Compania Espanola de Seguros v. Belfort Maatschappij Voor Algemene Verzekering*, [1962] 2 Lloyd's List L.R. 257, 264.

60. See 392 Parl. Deb., *supra* note 47, at 91 (remarks of Lord Hacking); 397 Parl. Deb., *supra* note 47, at 437 (remarks of Lord Elwyn-Jones, Lord Chancellor); Commercial Court Committee, *supra* note 47, at 8; Diplock, *supra* note 47, 44 Arb. at 109-10.

61. For examples of the types of cases stated, see Park, *supra* note 47, at 95, 125-27 (1980).

62. Diplock, *supra* note 47, 44 Arb. at 109-10.

63. The Administration of Justice Act, 1970, ch. 31, § 3, established the Commercial Court and recognized a practice inaugurated in 1895 by resolution of the Queen's Bench Division of the High Court whereby cases on a "commercial list" were assigned to High Court judges with special expertise in commercial matters.

then High Court Justice John Donaldson, recommended the abolition of the special case procedure.⁶⁴ The Commercial Court Committee also urged the abolition of another High Court procedure—the power to set aside an award for “error of law on its face.”⁶⁵ This procedure had made arbitrators hesitant to deliver reasoned awards for fear they would be quashed.⁶⁶

The Committee proposed a more restricted review procedure. Awards would be final when rendered, and the right of appeal to the High Court would be limited to legal questions that might substantially affect the rights of the parties. The Court was to be given the power to impose conditions, such as a deposit, on the right to appeal, in order to reduce frivolous appeals. A procedure that roughly approximated the old “consultative case” would continue, but only when it would save the parties a considerable amount of money.⁶⁷ Moreover, the Committee recommended that the right to appeal from the High Court to the Court of Appeal be limited to questions of general importance to the particular industry.⁶⁸

The Committee also considered what it called the “entrenchment” of judicial review—in other words, the prohibition of contractual exclusion of court supervision.⁶⁹ The Committee identified four kinds of arbitration: domestic disputes, in which both parties were British and the contract was governed by British law;⁷⁰ international disputes, in which at least one party was foreign; disputes governed by foreign law; and the so-called “special category dis-

64. In 1977 a Commercial Court Committee was created to link the users of the Court and the Court itself. Committee members include representatives of London's merchants, bankers, and arbitrators, as well as the six Commercial Court judges who serve *ex officio*.

65. See Commercial Court Committee, *supra* note 47, at 5, 8-9; see also Arbitration Act, 1950, 14 Geo. 6, ch. 27, § 22.

66. See Commercial Court Committee, *supra* note 47, at 8-9.

67. *Id.* at 9-10.

68. *Id.* at 10.

69. For a discussion of the traditional English view of entrenchment, see Czarnikow & Co. v. Roth, Schmidt & Co., [1922] 2 K.B. 478 (C.A.).

70. All United Kingdom residents—including those in Scotland and Northern Ireland—were included, although the Act applies only to arbitrations conducted in England and Wales. See Arbitration Act, 1979, ch. 42, §§ 3(6)-(7), 8(4). Entrenchment of review for domestic contracts, which the Committee favored retaining, rests on a concern for parties with limited bargaining power or sophistication. As a preventive rule, it is intended to prevent the unwilling renunciation of recourse to the courts because of a stronger party's threat of refusal to deal with a weaker party who did not want arbitration. See Commercial Court Committee, *supra* note 47, at 12. The 1979 Act followed this approach. See Arbitration Act, 1979, § 3(6).

putes," arising out of insurance, maritime, and commodities contracts. The Committee recommended that parties always have the right to exclude judicial review after a dispute has arisen, but that contractual exclusion of judicial review of future disputes be permitted only for international contracts and contracts governed by foreign law.⁷¹ For the latter, exclusion would be automatic, and also rather academic, since proof of foreign law is treated in England not as a legal issue, but as proof of a fact and not subject to judicial review.⁷²

Because English law arguably had been the world's pre-eminent and preferred law for disputes arising from maritime, insurance and commodities agreements, the Committee believed that judicial review would foster the continued legal development of these areas.

Finally, the Committee recommended a cosmetic change in the term "misconduct," for which an arbitrator might be removed, or his award set aside.⁷³ Such an opprobrious term was considered objectionable to describe procedural errors. The Committee did not favor abolition of the High Court's right to remove an arbitrator or set aside an award for such errors, but merely found the terminology offensive.⁷⁴

The Committee did not recommend curtailment of the High Court's general right to remit awards to the arbitrators.⁷⁵ This is surprising in light of the design of the Act. The power to send an award back to the arbitrator can be a weapon for judicial intervention as formidable as the power to force the arbitrator to state a case.

Eight months after the Committee's Report, Parliament enacted the Arbitration Act of 1979, which became effective for all arbitrations commencing after July 31 of that year.⁷⁶ Parliament ap-

71. See Commercial Court Committee, *supra* note 47, at 10-12, 13-14.

72. See A. Dicey, *Conflict of Laws* 1124-33 (J. Morris 9th ed. 1973) (citing *Ottoman Bank v. Chakarian*, 1938 A.C. 260, 279 (P.C.)).

73. See Commercial Court Committee, *supra* note 47, at 17. See also Arbitration Act, 1950, § 23.

74. Commercial Court Committee, *supra* note 47, at 17.

75. Arbitration Act, 1950, § 22.

76. Arbitration Act, 1979, ch. 42. Parties to an arbitration commencing before August 1, 1979, may agree in writing that the provisions of the Act shall apply to an arbitration already in force.

The Act modifies, but does not supersede, the Arbitration Act of 1950. The Bill originally had been introduced into the House of Lords, where extensive debate went on during late 1978 and early 1979. Following announcement of the May General Election, the Bill was

peared motivated by commercial as well as legal concerns, since many viewed the Act as a means by which to increase London's importance as a situs for international arbitration.⁷⁷ During the Parliamentary debates, Lord Hacking noted that parties to international contracts were discouraged from choosing London as the situs for arbitration because of the case-stated procedure.⁷⁸ Lord Cullen of Ashborne estimated that a new arbitration law might attract to England as much as £500 million per year in "invisible exports" in the form of fees for arbitrators, barristers, solicitors, and expert witnesses.⁷⁹

Parliament particularly wanted parties to use London more extensively as a situs for the resolution of so-called "supra-national" disputes, especially those arising from contracts entered into by governments of developing nations for public works, or for the exploitation of natural resources.⁸⁰ Developing nations are particularly sensitive to the publicity, and to the perceived affront to their sovereignty, in submitting their disputes to the courts of another country. Although there is no consensus as to whether arbitration involving a sovereign State may be removed from the control of the *lex loci arbitri*,⁸¹ a more autonomous arbitral process presumably would be an attractive alternative to litigation before foreign courts. But because of the hostility to arbitration of a number of Third World nations,⁸² particularly those in Latin America,⁸³ the

rushed through the House of Commons on the night of April 2, and received Royal Assent on April 4, 1979.

77. Lord Lloyd of Kilgerran, a patent barrister, declared that "the main object of this Bill is to attract arbitration to London." 398 Parl. Deb., supra note 47, at 536. See also the remarks of the Lord Chancellor in 397 Parl. Deb., supra note 47, at 441: "It is important that the City of London . . . not be hampered in the maintenance and expansion of [its] important and historical role in arbitration matters."

78. 392 Parl. Deb., supra note 47, at 89-95.

79. 392 Parl. Deb., supra note 47, at 99.

80. See 392 Parl. Deb., supra note 47, at 89 (remarks of Lord Hacking); Diplock, supra note 47, at 112; Commercial Court Committee, supra note 47, at 12.

81. Compare the award in *BP Exploration Co. (Libya) v. Libya*, 53 I.L.R. 297, 308-11 (1979) (award rendered under national law of place of arbitration), with the awards in *Texaco Overseas Petroleum Co. v. Libya*, 53 I.L.R. 389, 431-36 (1979), and *Saudi Arabia v. Arabian American Oil Co.*, 27 I.L.R. 117, 153-56 (1963) (arbitrators held that jurisdictional immunity of State precludes subjecting proceeding to *lex loci arbitri*).

82. The governments of many developing nations, particularly those of Latin America and the OPEC countries, have manifested some mistrust of arbitration taking place outside their borders. See generally Delvolvé, *Arbitration and Public Policy in Developing Countries*, in *Arbitration and the Licensing Process* 6-103 (R. Goldscheider & M. de Haas eds. 1981); McLaughlin, *Arbitration and Developing Countries*, 13 Int'l Law. 211, 211-21 (1979).

The "Group of 77" at the United Nations Conference on Trade and Development

extent to which the Act will have this effect is questionable.

C. *The 1979 English Arbitration Act*

In large part implementing the recommendations of the Commercial Court Committee, the 1979 Act abolished the special case, along with the common law jurisdiction of the High Court to set aside or remit an arbitral award for error of law on its face;⁸⁴ it replaced these procedures with a more limited right of appeal to

(UNCTAD) articulated its aversion to arbitration in article 2(2)(c) of the Charter of Economic Rights and Duties of States, which provides that controversies arising out of nationalization of foreign property shall be settled by tribunals of the nationalizing State. G.A. Res. 3281, 29 U.N. GAOR Supp. (No. 31) at 50, U.N. Doc. A/9559 (1974). See generally Park, *Legal Issues in the Third World's Economic Development* (Book Review), 61 B.U.L. Rev. 1321, 1326-30 (1981). The UNCTAD Draft Code of Conduct on Technology Transfer, as initially drafted by the Group of 77, contained similar language. UNCTAD Draft Code of Conduct on the Transfer of Technology, May 6, 1980, app. D., U.N. Doc. TD/CODE TOT/25 (1980), reprinted in 19 I.L.M. 773, 807 (1980).

On the other hand, African nations appear to have a more positive view of arbitration. See Tiewul & Tsegah, *Arbitration and the Settlement of Commercial Disputes: A Selective Survey of African Practice*, 24 Int'l & Comp. L.Q. 393 (1975). Moreover, in recent years, the number of arbitrations initiated by Third World parties has increased greatly, and Third World claimants have had considerable success. See Paulsson, *Le Tiers Monde dans l'arbitrage commercial international*, 1983 *Revue de l'Arbitrage* No. 1 (to be published).

83. The so-called "Calvo Doctrine," intended as a Latin American antidote to abuses of international arbitration, requires that foreigners submit disputes arising out of government contracts to resolution by local courts. This doctrine arose at a time when the United States and the Western European nations were perceived as exploiting weaker trading partners that were unable to meet their international financial obligations. Intervention by industrialized nations on behalf of their nationals frequently resulted in arbitration that was viewed as partial to the economically dominant countries. Carlos Calvo urged Latin American governments to avoid foreign diplomatic intervention by requiring foreign companies to agree to adjudication within the host State of any dispute arising out of an investment contract. Under such an agreement, an alien waives the right to diplomatic intervention by his government, thereby cutting off international arbitration. D. Shen, *The Calvo Clause* 5-6, 9-21 (1955).

The constitutions of a number of Latin American States, Wesley, *The Procedural Malaise of Foreign Investment Disputes in Latin America: From Local Tribunals to Factfinding*, 7 *Law & Pol'y Int'l Bus.* 813, 820-24 (1975), as well as the Andean Common Market, *Andean Foreign Investment Code* art. 51, reprinted in 16 I.L.M. 138, 153 (1977), have prohibited foreign arbitration of state contracts. Latin American countries generally have not ratified the New York Convention. See *Multilateral Treaties Deposited with the Secretary General*, supra note 21, at 611, and 7 Y.B. Com. Arb., supra note 17, at 288-89. A number of Latin American States have, however, ratified the Inter-American Convention on International Commercial Arbitration, adopted Jan. 30, 1975, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3. See Comment, *The Inter-American Convention on International Commercial Arbitration*, 75 *Am. J. Int'l L.* 982 (1981).

84. Arbitration Act, 1979, § 1(1).

the High Court.⁸⁵ Awards are now final and enforceable immediately, even if appeal is possible later. Appeal may be made only with the consent of the opposing party⁸⁶ or with leave of the court,⁸⁷ which will not be granted unless determination of the legal question "could substantially affect the rights of one or more of the parties."⁸⁸ The court has discretion to attach conditions to its leave to appeal; for example, it may require security for enforcement of the award.⁸⁹ The High Court decision may be taken to the Court of Appeal only if the High Court has certified that the matter is of "general public importance" or for some other "special reason."⁹⁰

In addition, the High Court may order an arbitrator to state the reasons for his decision⁹¹ if a party so requests before the decision, or if there are "special reasons" why such a request was not made.⁹² A question of law arising during the proceedings can be referred to the Court for interlocutory clarification in a manner similar to the old consultative case at the request of the arbitrator or of all the parties.⁹³

The Act's most significant provision for international arbitration is its authorization of "exclusion agreements,"⁹⁴ which strip the High Court of some of its supervisory functions, but not of its powers to remit an award to the arbitrator⁹⁵ or to set aside an award for arbitrator "misconduct."⁹⁶ Agreement to exclude judicial intervention may always be made once arbitration has begun. Parties to international agreements have the additional right to contract out of judicial review of future disputes by a clause in the principal contract itself.⁹⁷ In what the Act calls "non-domestic" contracts,⁹⁸ parties may agree in writing to preclude the courts from hearing

85. *Id.* § 1(2).

86. *Id.* § 1(3)(a).

87. *Id.* § 1(3)(b).

88. *Id.* § 1(4).

89. *Id.* § 1(4). See, e.g., *Mondial Trading Co. G.m.b.H. v. Gill & Duffus Zuckerhandels-gesellschaft m.b.H.*, [1980] 2 Lloyd's L.R. 376, 380 (Q.B.).

90. Arbitration Act, 1979, § 1(7).

91. *Id.* § 1(5).

92. *Id.* § 1(6). These "special reasons" are not defined by the Act.

93. *Id.* § 2(1).

94. *Id.* § 3.

95. See Arbitration Act, 1950, 14 Geo. 6, ch. 27, § 22(1).

96. *Id.* § 23(2).

97. Arbitration Act, 1979, § 3(6).

98. *Id.* § 3(6)-(7).

appeals,⁹⁹ requiring reasoned awards,¹⁰⁰ or providing interlocutory clarification of questions of law.¹⁰¹ All of these procedures are still open to the parties through joint action,¹⁰² but cannot be required where one of the parties resists and a valid exclusion agreement is in force.¹⁰³

The Act expressly makes exclusion agreements effective as a bar to court intervention in "non-domestic" cases when there are allegations of fraud between the parties.¹⁰⁴ Absent such an agreement, the High Court would be able to stay these arbitrations¹⁰⁵ in order to give criminal courts the opportunity to deal with the fraud.¹⁰⁶ Application of exclusion agreements prevents a party from hindering the arbitration by an allegation of fraud.

Dishonesty or corruption on the part of an arbitrator, of course, remains within the courts' jurisdiction. Courts may deal with arbitrator misconduct by setting aside the award,¹⁰⁷ remitting the award for reconsideration,¹⁰⁸ or revoking the authority of the arbitrator.¹⁰⁹ Moreover, the Act expressly limits the right to oust the courts' jurisdiction to specified areas.¹¹⁰ Thus, English judges might exercise their former interventionist habits by breathing new life into residual powers under the 1950 Arbitration Act. The prevailing judicial attitude thus may be more important than the text of the statute.

Exclusion agreements are intended for what Lord Diplock referred to as "one-off" contracts, that is, agreements negotiated on an ad hoc basis for a single transaction.¹¹¹ The "one-off" contract

99. Id. § 3(1)(a).

100. Id. § 3(1)(b).

101. Id. § 3(1)(c).

102. Id. §§ 1(3)(a), 1(5)(a), 2(1)(b). These sections are unaffected by exclusion agreements.

103. The validity of the exclusion agreement will depend on whether the contract is "domestic" or "non-domestic." Id. § 3(6).

104. Id. § 3(3).

105. Arbitration Act, 1950, § 24(2).

106. On inter-party fraud, see R. Gibson-Jarvie & G. Hawker, *A Guide to Commercial Arbitration Under the 1979 Act* 28-29 (1980).

107. See Arbitration Act, 1950, § 23(2).

108. Id. § 22.

109. Id. § 23(1). For a description of the ways in which English judges deal with prejudice by the arbitrator, see Shenton, *Arbitral Impartiality: The Attitude of the English Courts*, 8 *Int'l Bus. Law.* 76 (1980).

110. Arbitration Act, 1979, § 3(4).

111. See the Lord Chancellor's statements in 397 *Parl. Deb.*, *supra* note 47, at 438-39; Commercial Court Committee, *supra* note 47, at 11-12. The term "one-off" was used by

presumably is negotiated at arm's length by parties with relatively equal bargaining power, making it unnecessary to provide a non-waivable right of judicial review to protect the weak or unsophisticated against unconscionable demands for relinquishment of their legal rights.

The pre-arbitration exclusion agreement is possible only for international, or "non-domestic," arbitrations.¹¹² Compared to the French concept of an international arbitration, the English definition of a non-domestic agreement appears mechanical. The English inquiry confines itself to the parties' residence and nationality. The more sophisticated Gallic approach, however, considers the economic character of the entire controverted transaction. The 1981 French Arbitration Decree¹¹³ defines an international arbitration as one that "implicates international commercial interests"¹¹⁴ and permits the courts to decide what this means.¹¹⁵ The U.S. notion of an international arbitral agreement or award falls somewhere between the French and English concepts. The U.S. statute implementing the New York Convention excludes from the Convention's coverage an agreement or award arising out of a relationship entirely between U.S. citizens, but the statute includes within its scope commercial relationships between them if the contract involves foreign property, requires performance abroad, or has a reasonable relationship with a foreign country.¹¹⁶

Lord Diplock in the Alexander Lecture, *supra* note 47, at 112, to refer to an agreement negotiated ad hoc, as opposed to a standard form agreement.

112. An international arbitration agreement is defined in the negative as one that is not "domestic." A "domestic" agreement is also defined in negative terms as an agreement to which neither

(a) an individual who is a national of, or habitually resident in, any State other than the United Kingdom, nor

(b) a body corporate which is incorporated in, or whose central management and control is exercised in, any State other than the United Kingdom,

is a party at the time the arbitration agreement is entered into.

Arbitration Act, 1979, § 3(7). An arbitration is thus non-domestic if at least one of the parties, or the situs of the proceedings, is foreign. An arbitration agreement, however, might be domestic even if the contract is governed by foreign law.

113. Decree No. 81-500, May 12, 1981, 1981 J.O. 1380, 1981 D.S.L. 222.

114. *Id.* art. 1492, 1981 J.O. at 1402, 1981 D.S.L. at 240.

115. The concept of international arbitration that evolved in French case law before the 1981 decree includes considerations such as execution and performance of the contract and the residence and nationality of the parties. See Delaume, *What Is an International Contract? An American and a Gallic Dilemma*, 28 *Int'l & Comp. L.Q.* 258 (1979).

116. 9 U.S.C. § 202 (1976).

Under the 1979 English Act, pre-dispute exclusion agreements are void as to the so-called "special category" contracts identified by the Commercial Court Committee in the areas of shipping,¹¹⁷ insurance,¹¹⁸ and commodities.¹¹⁹ Special category international contracts may include pre-dispute exclusion agreements only if governed by foreign law,¹²⁰ which is normally considered a factual issue anyway,¹²¹ and thus not subject to judicial review. This concept of a "foreign" agreement relates to the proper law of the contract rather than to the parties' residence or nationality.

A Dutch commentator, who considers himself a consumer of commodity arbitration services in London, has sharply criticized the general prohibition of exclusion agreements pertaining to disputes over commodity contracts:

[T]he members of a trade should know what is to be their trading rule, which may differ from one trade to another. And I do not see why such decisions should not be left to the trade and its arbitrators. At least I can see no public importance in uniformity in this respect. Moreover, uniformity is not guaranteed, because if a particular trade would not be pleased by decisions of the courts it will, in most places, be free to explicitly provide otherwise in its contracts.¹²²

In Hong Kong, the 1982 reform to eliminate the use of the case-stated approach did indeed go further than the 1979 English Act, extending the right to enter into pre-dispute exclusion agreements to "special category" disputes.¹²³

The 1979 Act is silent on incorporation of exclusion agreements by reference to institutional arbitration rules. Thus, the effect of a reference to the ICC Arbitration Rules is problematic. Article 24(2) of the Rules provides that "[b]y submitting the dispute to arbitra-

117. Arbitration Act, 1979, § 4(1)(a).

118. *Id.* § 4(1)(b).

119. *Id.* § 4(1)(c).

120. *Id.* § 4(1)(ii).

121. See *supra* note 72 and accompanying text. Section 4(1)(ii) of the 1979 Act thus seems merely cosmetic, perhaps the result of a fear that outsiders would not understand English law.

122. van Delden, *English Commodity Arbitration: A Foreigner Looking Around in London*, in *The Art of Arbitration* 95, 101 (1982).

123. Leung, *The Arbitration (Amendment) Ordinance (1982) of Hong Kong*, 48 *Arb.* 92, 94 (1982).

tion by the International Chamber of Commerce, the parties shall be deemed to have undertaken to carry out the resulting award without delay and to have waived their right to any form of appeal insofar as such waiver can validly be made."¹²⁴ Although the intent is clear, the language does not fit neatly into the terms of section 3 of the 1979 Act. While Mr. Justice Kerr has taken the view that reference to the ICC Rules should be sufficient for the purposes of establishing an exclusion agreement under the 1979 Act,¹²⁵ the London Court of Arbitration suggests in the preface to its International Arbitration Rules that parties wishing to exclude judicial review should explicitly "agree to exclude any right of application or appeal to the English Courts in connexion with any question of law arising in the course of the arbitration or with respect to any award made."¹²⁶

In an opinion rendered in the first case to reach the House of Lords under the 1979 Act,¹²⁷ Lord Diplock stated that prohibition on pre-dispute exclusion of judicial review of special category disputes was intended to encourage the fertilization of English law by the commercial community through judicially reviewable arbitrations. In his words, it was:

to facilitate the continued performance by the courts of their useful function of preserving, in the light of changes in technology and commercial practices adopted in various trades, the comprehensiveness and certainty of English law as to the legal obligations assumed by the parties to commercial contracts of the classes listed, particularly those expressed in standard terms¹²⁸

The benefits of English *lex loci arbitri* include the power of the High Court to compel obedience to interlocutory orders, as well as to empower arbitrators to do so. This assistance may not be abrogated by an exclusion agreement. The High Court or the arbitrator may order the examination of witnesses, enforce discovery of documents, or extend the time for filing a claim.¹²⁹

124. 1975 ICC Rules, *supra* note 25, at 45.

125. Kerr, *The Arbitration Act 1979*, 43 *Mod. L. Rev.* 45, 53-54 (1980).

126. London Court of Arbitration, *International Arbitration Rules* (preface 1981).

127. *Pioneer Shipping v. B.T.P. Tioxide Ltd.*, 1982 A.C. 724 (1981).

128. *Id.* at 741.

129. See *Arbitration Act, 1979*, § 5; *Arbitration Act, 1950*, §§ 12, 13. For a recent example, see *Consolidated Inv. & Contracting Co. v. Saponaria Shipping Co.*, [1978] 1 W.L.R. 986, 993 (C.A.) (cargo owners soothed into inactivity by shipowner's insurers allowed an exten-

D. *Judicial Attitudes Toward Arbitrator Autonomy*

The text of the 1979 statute may be less important than the content of its application. Old habits die hard; in one recent case, Lord Denning argued that an award should be remitted to an arbitrator who had not understood that "the strict rules of the common law courts [concerning interest on late demurrage] . . . do not govern the practice of arbitrators."¹³⁰ The contradiction startles: a local judge tries to intervene in an arbitration to force its detachment from local procedure.

Two recent decisions of the House of Lords, however, indicate a developing judicial respect for arbitral autonomy. In *Bremer Vulkan Schiffbau Und Maschinenfabrik v. South India Shipping Corp.*,¹³¹ a dispute arose over several vessels built by a German shipyard for an Indian shipowner.¹³² The 1979 Act did not apply in *Bremer Vulkan* since the arbitration began before August 1, 1979, the effective date of the Act. Nevertheless, the approach of the House of Lords in *Bremer Vulkan* comports with the laissez-faire spirit of the Act.

In *Bremer Vulkan*, West German law applied to the merits, but the parties submitted the dispute, which involved alleged defects in the vessels' construction, to a London arbitrator.¹³³ Five years after the arbitrator's appointment, the German shipyard finally requested—and was granted—an injunction against further arbitral proceedings, on the ground that the Indian shipowner's dilatory conduct had made it impossible to marshal evidence for a proper hearing.¹³⁴ In affirming the injunction, the Court of Appeal construed the arbitration agreement to contain an implied covenant to proceed with dispatch, and deemed the High Court to have inherent power to restrain arbitration where the claimant's delay was such as would have allowed dismissal of an action at law for "want of prosecution."¹³⁵

sion of time to commence the arbitration).

130. *Tehno-Impex v. Gebr van Weelde Scheepvaartkantoor BV*, [1981] 2 W.L.R. 821, 832 (C.A.) (dissenting opinion). The arbitrator held that he was without jurisdiction to consider the issue. Lord Denning took issue with this finding and argued that he was not bound by the common law. *Id.* at 827, 832, 846-47.

131. 1981 A.C. 909.

132. *Id.* at 925.

133. *Id.*

134. *Id.* at 928-33.

135. [1980] 2 W.L.R. 905, 916-17, 931-34 (C.A.).

In a three-to-two decision, the House of Lords held that delay was an issue for the arbitrator, not a judge.¹³⁶ The High Court thus lacked the authority to restrain the proceedings. Ironically, arbitral autonomy was protected in an instance in which the High Court was attempting to prevent the parties from dragging their feet, one of the most common complaints voiced about international commercial arbitration.

In his opinion for the majority, Lord Diplock was careful to distinguish the High Court's limited powers in a private consensual arbitration from its possibly more extensive powers in reviewing arbitration conducted pursuant to statute.¹³⁷ This distinction is significant, because of the predisposition of English judges to intervene in statutory arbitral proceedings under the guise of correcting excess of authority despite an express Parliamentary prohibition of judicial review.¹³⁸ One authority also has emphasized the less extensive judicial power to review consensual as opposed to statutory arbitrations.¹³⁹

Pioneer Shipping v. B.T.P. Tioxide Ltd.,¹⁴⁰ the first case under the 1979 Act to reach the House of Lords, involved the *Nema*, a vessel chartered for seven voyages. Strikes in Quebec prevented loading after the first trip, and the shipowner asked to cancel the charter and to take possession of the vessel.¹⁴¹ Agreeing with the owner, the arbitrator found that the charter party and its several addenda had been "frustrated"; the dissatisfied charterer then appealed under the new review procedure.¹⁴² The High Court found the charter party was not frustrated and ordered the *Nema* to return to Canada to pick up another load.¹⁴³ The matter then went to the Court of Appeal and the House of Lords, both of which held that the arbitrator's conclusion should have been accepted—even though, as Lord Denning put it, "in strict law the *Nema* should

136. 1981 A.C. at 986.

137. *Id.* at 977-79.

138. For a discussion of arbitrator excess of authority, see *infra* notes 152-79 and accompanying text.

139. See Donaldson, *Judicial Review of Awards (Arbitration Act 1979)*, 1981 *Forum London Proc.* 47, 52 (*Int'l Bar Ass'n Sec. Bus. L. sponsor*).

140. 1982 A.C. 724 (1981). The guidelines for granting leave to appeal set forth by Lord Diplock in this case have been considered recently in *Italmare Shipping Co. v. Ocean Tanker Co.*, [1982] 1 W.L.R. 158 (C.A.), and in *B.V.S. v. Kerman Shipping*, [1982] 1 W.L.R. 166 (Q.B.).

141. *The Nema*, 1980 Q.B. 547, 560 (C.A.).

142. *Id.* at 563-64.

143. *Id.* at 551, 566-67.

have waited [in Quebec]—queuing up there—until the strike ended.”¹⁴⁴ According to Lord Denning, the arbitrator’s decision should be disturbed only if it is one “such that no reasonable arbitrator could reach,” or the arbitrator “misdirected himself in point of law.”¹⁴⁵ The arbitrator must have looked to the wrong legal standard and not merely misapplied appropriate principles.

In the *Nema* decision, Lord Diplock examined the 1979 Act’s legislative history, and in particular its preoccupation with London’s attractiveness as a situs for the resolution of disputes arising from the “one-off” contract.¹⁴⁶ He stressed the Parliamentary intent to accord laissez-faire treatment to “one-off” contracts, and said that review should be granted only when it appears “upon a mere perusal of the reasoned award itself without the benefit of adversarial argument, that the meaning ascribed to the clause by the arbitrator is obviously wrong . . . [and that] there was [not] more than one possible view as to [its] meaning.”¹⁴⁷ Lord Diplock further remarked that “to exemplify what is meant by the convenient neologism ‘a one-off case’ it would be hard to find a better exemplar [than the *Nema* case].”¹⁴⁸ Surprisingly, the charter party for the *Nema* was on a standard form. The clause to be construed was “one-off,” however, because it was negotiated to amend a contract for a single voyage to accommodate seven.¹⁴⁹

The 1979 statute circumscribes the High Court’s discretion to grant non-consensual leave to appeal from an arbitrator’s award to questions of law that “could substantially affect the rights of one or more of the parties” to the arbitration.¹⁵⁰ According to Lord Denning, this means it must be “a point of practical importance—not an academic point.”¹⁵¹ He did not say how judges should distinguish “practical” from “academic” legal issues—if such can be done. Presumably, this would require a *de minimis* amount to be set, depending on the controversy. For example, a legal question affecting £1000 might be purely academic in a dispute involving £1,000,000.

144. *Id.* at 561.

145. *Id.* at 566.

146. 1982 A.C. at 734-43. See *supra* note 111 and accompanying text.

147. *Id.* at 742-43.

148. *Id.* at 735. Lord Diplock stated: “If ever there were a case which . . . ought never to have been allowed to get any further than the arbitrator’s award, this was one.” *Id.* at 734.

149. *Id.* at 746 (Roskill, L.J.).

150. Arbitration Act, 1979, ch. 27, § 1(4).

151. 1980 Q.B. at 564.

E. *Excess of Authority*

The distinction between the judge who corrects fundamental procedural unfairness, and the judge who imposes his own conclusions on the merits of the dispute, stubbornly resists intellectually satisfactory articulation. As mentioned above, the 1979 Act did not repeal the High Court's statutory power to remit awards for reconsideration by the arbitrator¹⁵² and to set aside an award for arbitrator "misconduct."¹⁵³ According to the Commercial Court Committee, the term "misconduct" covers "procedural errors and omissions by arbitrators who are doing their best to uphold the highest standards of their profession."¹⁵⁴

One type of "misconduct" is the rendering of an award in excess of the arbitrator's authority. Commercial arbitration is a consensual process, and thus an arbitrator has only the power granted him by the parties.¹⁵⁵ An award that exceeds the arbitrator's authority may be no different than one rendered in the absence of a valid arbitration agreement as to the controverted issue. Two merchants may agree that an arbitrator will settle disputes arising out of the sale of apples, but they have not thereby accepted arbitration for a later contract to sell walnuts. If the arbitration agreement vaguely refers to sales of "fruit," however, the proper scope of the arbitration will depend on whether "fruit" includes only apples, or whether the word is used in its botanical sense to include the contents of any seed plant's developed ovary, including walnuts.

Judges in other countries have had to struggle with the thin line between error of law and excess of authority.¹⁵⁶ English courts before 1979 paid less attention to this difficult issue in the context of commercial arbitration, since all questions of law could be reviewed by the special case procedure.

Lord Denning has stated that "whenever a tribunal goes wrong in law, it goes outside the jurisdiction conferred on it and its decision is void."¹⁵⁷ Thus, the future of commercial arbitration in England may depend on how English judges face the elusive distinc-

152. Arbitration Act, 1950, 14 Geo. 6, ch. 27, § 22.

153. *Id.* § 23.

154. Commercial Court Committee, *supra* note 47, at 17.

155. For a general discussion of excess of authority, see W. Reisman, *Nullity and Revision* (1971).

156. See Park, *supra* note 47, at 101.

157. A. Denning, *The Discipline of the Law* 74 (1979).

tion between an error of law, which may be removed from judicial scrutiny, and arbitrator excess of authority, which presumably may not be removed from review.

As an illustration, assume that a license provides for the payment of royalties on the first of the year, that in the event of default the licensor may revoke the license, and that the license in fact is cancelled for late payment. Assume further that the cancellation gives rise to an arbitration, and that the licensor is found liable for wrongful termination of the license. If no justification for the late royalty payment exists under the applicable law, the arbitrator has interpreted the contract erroneously. It is equally arguable, however, that the arbitrator has done more: he has modified the contract's payment date. Unless the submission agreement gave the arbitrator this power,¹⁵⁸ he has acted improperly. It remains to be seen whether High Court judges will use the power to remit an award¹⁵⁹ or the catch-all prohibition of arbitrator "misconduct"¹⁶⁰ to review such an award because the arbitrator exceeded his authority.

Two cases lead one to wonder whether English judges may ignore exclusion agreements, just as they have ignored unequivocal Parliamentary prohibitions on review of statutory arbitration and lower court decisions. These so-called "ouster clauses" have been vitiated under the court's view that error of law constituted excess of authority.

One ouster clause received short shrift by the House of Lords in *Anisminic Ltd. v. Foreign Compensation Commission*,¹⁶¹ a case involving a compensation claim for manganese mines lost during the 1956 Suez crisis. Proof that the claimant and any successors in title were British nationals was a prerequisite for compensation, and the Foreign Compensation Commission found that the plaintiffs failed to satisfy this requirement.¹⁶² The relevant statute stated that "[t]he determination by the [Foreign Compensation] Commission of any application made to them . . . shall not be called in question in any court of law."¹⁶³ Despite this clear statutory prohi-

158. For example, the arbitrator may have been given the power of amiable composition. See *supra* text accompanying note 58.

159. Arbitration Act, 1950, § 22.

160. *Id.* § 23.

161. [1969] 2 A.C. 147.

162. *Id.* at 201-05.

163. Foreign Compensation Act, 1950, 14 Geo. 6, ch. 12, § 4(4).

bition on judicial review of the Commission's decisions, the House of Lords reversed the Commission. Lord Pearce declared the Commission's decision a nullity, saying that "[w]hile engaged on a proper inquiry, the tribunal . . . may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction [and] would cause its purported decision to be a nullity."¹⁶⁴

In *Pearlman v. Keepers & Governors of Harrow School*,¹⁶⁵ Lord Denning refused to give effect to an ouster clause providing that "no judgment [of the county courts] shall be removed by appeal, motion, certiorari or otherwise into any other court whatever."¹⁶⁶ In this case, a tenant had sought the right to purchase his house under the Leasehold Reform Act of 1967.¹⁶⁷ The right to purchase existed only for dwellings with a taxable value falling below a statutory ceiling, which could be increased to take into account "structural alterations" made by the tenant.¹⁶⁸ The tenant in question claimed that a new central heating system was just such an alteration, and thus raised the value ceiling.¹⁶⁹ The county court, however, disagreed.¹⁷⁰ The Court of Appeal reversed, holding that the erroneous determination about the heating system was also an error as to the lower court's jurisdiction.¹⁷¹ Lord Denning gave the following explanation:

[T]he distinction between an error which entails absence of jurisdiction—and an error made within the jurisdiction—is very fine. So fine indeed that it is rapidly being eroded. . . . By holding that [the heating system] was not a 'structural alteration . . . or addition' [the judge] deprived himself of jurisdiction to determine [other] matters.¹⁷²

These two cases must be considered with great caution, since they dealt with the review of statutory arbitration and lower court decisions, which admittedly rest on a different foundation than review

164. [1969] 2 A.C. at 195.

165. [1978] 3 W.L.R. 736 (C.A.).

166. County Courts Act, 1959, 7 & 8 Eliz. 2, ch. 22, § 107.

167. [1978] 3 W.L.R. at 739-40.

168. *Id.* at 739-41.

169. *Id.* at 739-40.

170. *Id.*

171. *Id.* at 743-44.

172. *Id.*

of private consensual dispute resolution.¹⁷³ The *Anisminic* and *Harrow School* cases, however, show a judicial boldness that may carry over to a review of commercial arbitration. Judges straining for the "right result" in a case may find a broad definition of excess of authority a convenient way to justify intervention.

English appellate court resistance to such back door methods of judicial intervention may be indicated by the recent Court of Appeal decision in *Moran v. Lloyd's*.¹⁷⁴ The case involved an award finding an underwriter of the Lloyd's insurance syndicate guilty of discreditable conduct for which he was suspended. The underwriter challenged the award for alleged arbitrator "misconduct," consisting of a finding on a basis not put forward by Lloyd's. The judgment given by the Master of the Rolls, Sir John Donaldson, stressed that inconsistency in an arbitrator's reasoning might constitute error of fact or law, but not "misconduct."

III. CONCLUSION

F. Scott Fitzgerald wrote that "the test of a first-rate intelligence is the ability to hold two opposed ideas in the mind at the same time, and still retain the ability to function."¹⁷⁵ Elaboration of an appropriate standard of interaction between judge and arbitrator requires a similar capacity to accept seemingly inconsistent principles: although the law must be applied correctly, arbitration must be binding. The commercial community's need for finality in the resolution of private disputes inevitably competes with the desirability of uniform application of law.

English arbitration law, which has been examined as an example of *lex loci arbitri*, still leaves the high court with sufficient power to justify almost any intervention in an arbitration despite an "exclusion agreement." The arbitrator is left between the Scylla of ill-defined autonomy and the Charybdis of unknown judicial supervision. Therefore, the High Court's power to set aside awards on the vague ground of arbitrator "misconduct" should be replaced by a provision allowing awards to be challenged only for clearly enumer-

173. *Bremer Vulkan Schiffbau Und Maschinenfabrik v. South India Shipping Corp.*, [1981] 1 All E.R. 289, 295-96 (Diplock, L.J.).

174. *The Times* (London), Mar. 3, 1983, at 10, col. 1.

175. F. Fitzgerald, *The Crack-Up* 69 (E. Wilson ed. 1945).

ated procedural deficiencies,¹⁷⁶ or for a fundamental discord between what or how the arbitrator decided and what or how the parties authorized him to decide. Admittedly, rules flexible enough to be useful may not deter an aggressive judge straining to impose what he sees as the right result in a controversy. Nonetheless, guidelines would provide arbitration lawyers with a greater measure of predictability.

Wisdom dictates that the State of arbitration exercise some control over the integrity of the proceedings and the interests of third parties. *Prima facie* validity is accorded foreign arbitral awards under the New York Convention. Arbitral law clearly should not permit the loser to litigate issues such as arbitrator corruption in every jurisdiction in which he holds assets. But rather than focus on unusual local rules that foreign parties are unlikely to have foreseen in choosing the seat of arbitration, courts should confine themselves to ensuring respect for traditional standards of fairness, limits on the arbitrator's authority, and rights of third parties.

176. Similar grounds for challenging awards are now contained in French and U.S. law. See *supra* notes 16 & 41.

