

**A Critical Appraisal of the Federal Arbitration Act 1925
and of the Suitability of the Model Law as Its
Replacement for International Commercial Disputes**

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Abstract

ABSTRACT OF JACK J. COE's PhD THESIS

International Commercial Disputes are Distinctive and Often Exceedingly Intricate

The classic influences which make private international law and international business planning multifaceted render international business disputes challenging to dissect and resolve. Conflicts of regulation and putative mandatory laws coincide with multiple languages, cultures, currencies, and interests to generate disputes that pose special problems and implicate tremendous resources. Given these realities, arbitration has emerged as an important fixture in international business planning. States have an interest in being able to offer suitable mechanisms to promote the arbitral process.

The FAA Is Outmoded and Discourages Selection of the United States as A Neutral Situs

The main body of the work argues that the Federal Arbitration Act of 1925 should be replaced by the UNCITRAL Model Law for disputes characterized as "international." The present statutory regime is fragmentary and complex; there are many arcane intersections between federal and state law and no centralizing, unifying framework. Anecdotal accounts suggest that these negative attributes discourage selection of the United States as a neutral venue for international arbitration.

The UNCITRAL Model Law is the Apt Replacement for the FAA as to International Disputes

The Model Law was drafted by experts, is balanced in its accommodation of the common law and civil law traditions, is

becoming increasingly well tested, provides a framework which is familiar to non-Americans and not greatly at odds with existing U.S. doctrine. The arguments against it are, on balance, not compelling, especially given that the basic Model can be augmented to account for certain matters dictated by the U.S. Constitution and by recent developments.

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Mexico City Convention = Inter-American Convention on the Law Applicable to International Contracts, *reprinted in* 33 I.L.M. 732 (1994).

NAFTA = North American Free Trade Agreement, effective January 1, 1994, *reprinted in* 32 I.L.M. 289 (1993).

New York Convention = Convention of the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958.

Rome Convention = EEC Convention on the Law Applicable to Contractual Obligations of 19 June 1980, [1980] OJ C 282.

IV. Statutes, Model Laws and Uniform Laws

Arbitration Act 1996 = England and Wales, *reprinted in* 36 I.L.M. 165 (1997).

Table of Abbreviations

California's International Title (or Act) = California Title 9.3: Arbitration and Conciliation of International Commercial Disputes (1988), Cal. Civ. Proc. Code §§ 1297.11 *et seq.* (West 1992 & Supp. 1996) (sometimes also referred to as "California's 1988 Act").

FAA = The Federal Arbitration Act 1925, 9 U.S.C. §§1-16, 201-08, 301-307 (as periodically amended).

UAA = Uniform Arbitration Act, adopted National Conference of Commissioners on Uniform Laws 1955 (amended 1956, presently being revised).

Model Law = UNCITRAL Model Law, adopted by the U.N. Commission on International Trade Law on June 21, 1985.

RICO = Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C.S. § 1961 *et seq.* (Law Co-op. 1991 & Supp. 1995).

UCC = Uniform Commercial Code

V. Institutions

AAA = American Bar Association

ALI = American Law Institute

CPR = Center for Public Resources

IBA = International Bar Association

ICC = International Chamber of Commerce

ICCA = International Council for Commercial Arbitration

Table of Abbreviations

LCIA = London Court of International Arbitration

PCA = Permanent Court of Arbitration

SCC = Stockholm Chamber of Commerce

UNIDROIT = International Institute for the Unification of
Private Law

UNCITRAL = United Nations Commission on International
Trade Law

WIPO = World Intellectual Property Organization

VI. Rule Formulations and Miscellaneous Texts

AAA International Rules = AAA International Arbitration
Rules (April 1, 1997).

AAA Commercial Rules = AAA Commercial Arbitration
Rules (July 1, 1996).

IBA Ethics for Arbitrators = IBA Ethics for International
Arbitrators.

ICC Rules = ICC Arbitration Rules (Jan. 1, 1998).

LCIA Rules = LCIA Arbitration Rules (Jan. 1, 1998).

UNIDROIT *Principles* = UNIDROIT Principles of
International Commercial Contracts (1994).

WIPO Rules = WIPO Arbitration Rules (Oct. 1, 1994).

Table of Abbreviations

NOTE REGARDING CITATION STYLE

In general, this work follows THE BLUEBOOK A UNIFORM SYSTEM OF CITATION (5th ed.) (the “Harvard Bluebook”). Departures from this standard occur throughout, however, to accommodate the abbreviations noted above and to retain some of the conventions of the BLUEBOOK’s fourth edition. Certain apparent inconsistencies are purposeful, such as the use of “art.” in treaty references as distinct from “Art.” for all other sources. References are to pages unless otherwise indicated (*e.g.*, by use of “para.”). U.S Supreme Court cases are referred to either using the above abbreviations or—to identify exact pages—by providing the reporter, the case’s short name and the specific page (but no date). Other case citations follow the BLUEBOOK.

American spelling and punctuation are used except that quotations are presented in their original form.

AUTHOR'S FOREWORD

The year 2000 will mark—rather inconspicuously—the passage of roughly one decade since the question of reforming the Federal Arbitration Act (FAA) by reference to the UNCITRAL Model Law generated learned debate within the American arbitration community.¹ Ironically, the interim has been characterized by remarkable reform activity outside the United States and astonishing inertia within its borders; the debate continued abroad, leaving in the United States only apparent stalemate. The intervening years have only strengthened the author's belief that reform, while not a matter of dire emergency, is inevitable.² So too have they brought the recognition that the UNCITRAL Model Law is far more than a quick-fix for lesser-developed countries bereft of modern statutes and of expertise sufficient to remedy their plight; dozens of states—of all stripes—have now embraced it,³ accounting for “more than one quarter of the world's territory.”⁴ Other states, though not adopting the Model Law, have borrowed liberally from it.

This work explores modern characteristics of international commercial arbitration, time-honored and emerging issues associated therewith and the implications of the foregoing for

¹ The leading essayists were Kolkey, 1 *Amer. Rev. Int'l Arb.* 491 (1990)(favoring Model Law adoption) and Messrs. Rivkin and Kellner, *id.* at 535 (against adoption).

² As Kolkey wrote in 1990:

The world has changed dramatically since 1925 when the FAA was first enacted. The surprise is that the law has lasted as long as it has, not that it is in need of reform today.

1 *Amer. Rev. Int'l Arb.* at 534.

³ Model Law states are listed at Chapter 8, § 8.6 (notes).

⁴ Correspondence with Professor James E. Byrne, Commercial Law Association, May 24, 1998 (on file with author).

arbitral reform in the United States. It notes in particular the renewed promise of the UNCITRAL Model Law as a paradigm for modernizing the American regime applicable to international disputes.

Organizationally, this monograph proceeds from general to specific, endeavoring to create context and foreshadowing before engaging in detailed discussion. To achieve word economy, the abbreviations in the preceding table will be employed.⁵

⁵ Infrequently occurring authority, however, will be cited in full.

Chapter 1

BUSINESS PLANNING—SELECTED THEMES IN THE GLOBAL CONTEXT

Chapter Contents

- 1.1 Introduction**
- 1.2 Interdependence and the Global Marketplace**
- 1.3 The Transnational Planning Milieu**
- 1.4 Moderating Influences**
- 1.5 Traditional Mechanisms and Cyber-Commerce**
- 1.6 Transnational Business Disputes—Implications of the Foregoing**

1.1 Introduction

International business disputes originate and complete their course among forces that make them distinctive and often exceedingly complex. This chapter selectively introduces features of the international business environment that bear upon dispute settlement. Though merely an impressionistic outline, it provides a backdrop for the chapters that follow.

1.2 Interdependence and the Global Marketplace

1.2.1 IN GENERAL

Business perspectives and strategies have become transnational¹ to an unprecedented degree in response to the development of international markets and the infrastructures that serve

¹ The literature sometimes distinguishes among “global,” “international” and “transnational.” Unless otherwise indicated, however, those terms will be used interchangeably in this work.

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them. Even small investors are now regularly advised to consider their options in global terms,² as has long been done by their institutional counterparts.³ Stock exchanges are now widely dispersed⁴ and companies, large and small, plan their fund-raising accordingly.⁵ Computerization and advances in telecommunications,⁶ in turn, allow myriad transactions to occur on a 24-hour basis⁷ and with unprecedented speed.⁸ Concurrently, the world's financial and equity markets demon-

² See M. Sedit, *Why It's Time for Investors to Think Globally*, Wall St. J., Apr. 23, 1993, at C1, C14.

³ See generally B. Longstreth, *A Look at the SEC's Adaptation to Global Market Pressures*, 33 Colum. J. Transnat'l L. 319 (1995).

⁴ See Scott & P. Wellons (3d ed.) 32-52 (excerpting Report of the Staff of the SEC on the Internationalization of Securities Markets (1987)).

⁵ See D. Braverman, *U.S. Legal Considerations Affecting Global Offerings of Shares in Foreign Companies*, in Norton & Auerback, at 14.

⁶ E.g., J. Keller and M. Carnevale, *Clear Message: MCI-BT Tie Is Seen Setting Off a Battle In Communications*, Wall St. J., June 3, 1993, at A1 (international alliances among long distance carriers intended to "globalize" corporate communications); see also W. Sechrest, *Six Global Business and Financial Trends: A Lesson about Interconnectedness*, in Norton & Auerback at 20 (discussing the impact of a "global network of instantaneous information").

⁷ See generally S. Hunter, *The Status and Evolution of Twenty-Four Hour Trading: A Trader's View of International Transactions, Clearance, and Settlement*, 4 B.U. Int'l L.J. 15 (1986).

⁸ Cf. J. Norton and C. Olive, *Globalization of Financial Risks and International Supervision of Banks and Securities Firms: Lessons from the Barings Debacle*, 30 Int'l Law. 301 (1996).

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strate both remarkable interdependence⁹ and persistent innovativeness.¹⁰

Transnational approaches to market development and direct investment are now prevalent. Prompted by various factors and encouraged by receding trade barriers,¹¹ businesses large and small increasingly look beyond familiar territory and traditional arrangements; in the process, new forms of international collaboration and foreign presence have emerged as have new

⁹ See, e.g., *One World, One Market*, U.S. News & World Rep., Nov. 10, 1997, at 40 (“Three markets, three time zones, same concerns...”).

¹⁰ See Scott & Wellons (3d ed.) at 32-41.

¹¹ Multilateral and regional processes have been underway for decades. Of paramount importance is the process induced by the General Agreement on Tariffs and Trade (GATT), 55 U.N.T.S.187 (effective Jan. 1, 1948) through which have occurred substantial reductions in tariff and non-tariff barriers, understandings affecting non-tariff barriers and commitments on services, trade-related, aspects of intellectual property and numerous other subjects bearing on market entry. The above undertakings embrace 50-plus separate texts linked together by a single integrating document—The World Trade Organization (WTO) Charter. See Jackson *et al.*, at 316-17.

The fifteen-member European Union (EU) is the most sophisticated of the regional arrangements now functioning. It exists to enhance within the Union the flow of goods, services, capital, and persons. Its quasi-federal evolution has pursued legal and economic integration that is both geographically and politically “wide” and systemically “deep.” Its potential for expanded membership (perhaps to include many Eastern European states) and tightening affiliation with the remaining European Free Trade Association (EFTA) countries portend a process that will carry well into the next century. Standard references include: T. Hartley, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW* (3d ed. 1994); D. Lasok, *LAW AND INSTITUTIONS OF THE EUROPEAN COMMUNITIES* (6th ed. 1994).

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terms to describe them.¹² Nation states too are being counseled to “align their policies with the forces of globalization by embracing reforms [and] liberalizing markets. . . .”¹³

For its part, the multi-national corporation (MNC)—a fabled and variously defined player—continues to be a principal steward of wealth and technology, a potent force in currency markets,¹⁴ and a cardinal vehicle for global development.¹⁵

Given the foregoing, it was to be expected that lawyers and law firms would become “globalized;” and so they have. To cultivate new clients and serve existing ones in their operations abroad, many firms have established branch offices, formed alliances with distant firms and pursued similar initiatives.¹⁶

¹² “Strategic alliance,” and “outsourcing” are now part of standard business jargon. *See generally* M. Yoshino & U. Rangan, *STRATEGIC ALLIANCES* (1995).

¹³ *IMF Annual Report: 1997* 24 (discussing improved global prosperity linked to “rapid integration of national economies worldwide through trade, financial flows, technology spillovers, information networks and cross-cultural currents”).

¹⁴ *Multinationals as Mini-banks: Major Players in Their Own Right* (Survey), *Fin. Times*, May 27, 1986, at VII.

¹⁵ Recognizing these realities, developing states typically welcome affiliations with such enterprises. For some countries, this has required a repudiation of the anti-MNC rhetoric and disquieting policies of not long ago. *Cf. Guidelines on the Treatment of Foreign Direct Investment*, 7 ICSID Foreign Inv. L.J. 295, 297 (1992) and *Report to the Development Committee*, *id.* at 315-16 (World Bank project to educate host governments).

¹⁶ *See, e.g.,* S. Goldberg, *The British Go Global*, *A.B.A. J.*, Apr. 1993, at 51.

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1.2.2 CYBER-TRADE—THE EMERGING PHENOMENON

The advent of the internet and its immediate appeal among traders and consumers alike has spawned a phenomenon that has permanently altered the landscape of international trade.¹⁷ “Born global”, electronic commerce takes many forms, direct and indirect,¹⁸ and is remarkably dynamic. It is “now rapidly expanding into a complex web of commercial activities transacted on a global scale between an ever increasing number of participants, corporate and individual, known and unknown, on global open networks. . . .”¹⁹

The modalities of product promotion and delivery are integrally part of the sea change now underway. Fluidity, innovation and hybridization are the principal characteristics of the emerging mechanisms, which remain built largely but not exclusively upon the Internet.²⁰

¹⁷ See generally Adams; EC Commission, *A European Initiative in Electronic Commerce*, Communication of April 16, 1997 (hereinafter *European Initiative*).

¹⁸ In “direct” electronic commerce intangible goods and services are delivered on-line. “Indirect,” e-commerce by contrast, entails transactions in tangible goods and services, delivered. *European Initiative* at 4.

¹⁹ *Id.* at para. 6. Thus there has already developed “a wide array of innovative virtual businesses, markets and trading communities.” *Id.* at paras. 8-9. In many industries, outsourcing over the internet has become commonplace. *Id.*

²⁰ Promotion of electronic commerce includes activities and media other than the Internet which is “rapidly federating other forms of electronic commerce” and is generating new forms “by combining, for example, digital television infomercials with Internet response mechanisms (for immediate ordering), CD-ROM extensions (for memory intensive multimedia demonstrations).” *Id.* at para. 8.

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Predictions vary, but one forecast envisions web-generated sales alone to account for US \$300 billion in annual global revenues by the year 2000.²¹ Others place the number considerably higher.²² The obstacles that remain to exponential growth in on-line commercial relations are more technical than legal. In particular, the privacy and security that consumers and commercial entities desire will require greater accessibility to existing technologies—such as digital certification²³—and greater harmonization among existing protocols.²⁴

Not surprisingly, cyber-trade poses fundamental questions of trade policy.²⁵ Should it be free of all but public health and safety regulation? Should it be brought formally within the WTO (GATT) process? How is it to be reconciled among competing national tax systems? And, how can increasingly sophisticated encoding technologies best be subjugated to national and international security imperatives?²⁶

²¹ Chasia at 2.

²² One research firm predicts in the business-to-business market alone (excluding consumer sales) revenues of over \$700 billion will be generated from “web commerce.” Adams at 44.

²³ Digital certificates are software applications designed to prove one’s identity in cyber-space so as to qualify for a particular transaction. Adams at 42.

²⁴ Digital certificates are issued by certificate authorities (CAs). There is at present no international standard for such certificates. One CA may not verify another CA’s certificate; so, the vouching process may break down. *Id.*

²⁵ See generally *A Framework for Global Commerce* (White House: July 1, 1997) (arguing for a minimalist approach to regulation).

²⁶ See, e.g., O. Ullman, *The FBI vs Silicon Valley*, *Bus. Week*, Sept. 29, 1997, at 47 (exports of encryption technology problematic).

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1.3 The Transnational Planning Milieu

1.3.1 THE REGULATORY ENVIRONMENT

No single source dispenses “global” commercial law, either regulatory or judicial. Rather, national legal systems individually develop substantive rules aimed at such conduct as each deems to be within its prescriptive jurisdiction.²⁷ This lack of centralization means that, despite certain influences tending to unify national law, rights and duties may change as activities cross state boundaries. In addition, because jurisdictions such as the United States purport to give extraterritorial effect to certain laws affecting business,²⁸ regulatory overlap and conflict sometimes occur.²⁹ Thus, one commentator predicts:

[t]he future conflicts of laws will not so much be a problem of choice between contractually agreed rules and imperative rules

²⁷ Concerning prescriptive (or “legislative”) jurisdiction. See Born, LITIGATION at 493-544.

²⁸ Under the often discussed “effects” doctrine, activities occurring outside the U.S. territory can be subject to U.S. regulation if they affect U.S. interstate or foreign commerce. See *United States v. Aluminum Co. of Am. (Alcoa)*, 148 F.2d 416, 443 (2d Cir. 1945) (the seminal case; Sherman Act applied to conduct intentionally affecting U.S. commerce). EU authorities have also embraced the doctrine in administering EU Competition law, as have certain national authorities. See R. Weintraub, INTERNATIONAL LITIGATION AND ARBITRATION PRACTICE AND PLANNING 354 (1997).

²⁹ See § 1.4.2 *infra* and notes thereto, discussing *Hartford Ins.* (1993) (holding extraterritorial application of antitrust law permissible; no restraint imposed by comity).

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having binding character, but a problem of choice between two sets of rules both of which have a *loi de police* character.³⁰

U.S. antitrust and securities laws are but part of a distinctive regulatory patchwork addressing the morals of the international marketplace. Other well-known components are the Foreign Corrupt Practices Act (FCPA),³¹ certain antiboycott laws,³² the Export Administration Act and the highly controversial Helms Burton Act.³³

In Western Europe, the basic regulatory pattern constructed along national lines is augmented, and sometimes preempted, by European Union law,³⁴ which affects most aspects of commercial endeavor within the Member States. Competition Law, once a primary focus, is now but one source of concern; of

³⁰ S. Jarvin, *Arbitration of Antitrust and Competition Issues—An Overview of the Situation in Some Major Western Jurisdictions*, (1994) Y.B. Arb. Inst. Stockholm Ch. Comm. 55, at 86; cf. J. Baselow, *Conflicts of Economic Regulation*, 42 Amer. J. Compar. L. 423 (1994) (discussing need for refinements in conflicts doctrine given coexistence of national laws addressing international transactions).

³¹ The FCPA prohibits bribes and certain other payments to foreign officials. 15 U.S.C.A. §§ 78dd-1, 78dd-2, 78m, 78ff (1977) (amended 1988). See generally J. Impert, *A Program for Compliance with the Foreign Corrupt Practices Act and Foreign Law Restrictions on the Use of Sales Agents*, 24 Int'l Law. 1009 (1990).

³² The Internal Revenue Code (§ 999) and the Export Administration Act provide penalties for those who cooperate in boycotts against Israel. See, e.g., 50 U.S.C.A. app. §§ 2407, 2410 (1991) and 15 C.F.R. § 769.2(a) (1993) (Prohibitions against refusals to do business and against furnishing various types of information). See also T. Burton, *Caught in the Act*, Wall St. J., Mar. 26, 1993, at A1 (\$6.6 million in fines against U.S. company).

³³ See, e.g., M. Wilkey and C. Giesze, *Helms-Burton: Two Viewpoints* 26(2) ABA Int'l L. News (Spring 1997) at 1, 5.

³⁴ See generally Jackson *et al.* at 185-214.

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equal importance are EU environmental³⁵ and consumer protection measures³⁶ and numerous other areas treated in regulatory detail. The increasingly intricate labyrinth³⁷ requires full-time monitoring and specialist assistance.³⁸ Other regions, of course, present their own challenges.

1.3.2 TRAPS FOR THE UNWARY

A move from domestic to international operations exposes an enterprise to various new forms of regulatory, commercial and political risk. In anticipating these, domestic analogues take the business planner only so far. There are, for example, the special protections given by law to one class of participants *vis à vis* another; in a generic sense both the dealer protection laws known in Western Europe³⁹ and the partial immunity

³⁵ See, e.g., Council Regulation 1734/88, 1988, O.J. (L155) (on export and import of certain dangerous chemicals); Council Regulation 3322/88, 1988, O.J. (L297) (on certain chlorofluorocarbons and halogens that affect the ozone layer).

³⁶ For example, Member States' laws now contain provisions making product suppliers liable without proof of fault for personal injury resulting from defective products. See Council Directive 85/374, 1985 O.J. (L374).

³⁷ Several forms of EU legislation are used in the process. The principal modalities are Council Directives and Regulations. See Hartley, *supra* note 11, at 107-10.

³⁸ Cf. *A Guide: Solicitors of England and Wales* 9 (1994) ("to advise clients on European Union matters, about 40 English solicitors' firms have set up offices in Brussels while others have formed associations with lawyers in Belgium and other Member States").

³⁹ See A. Saltoun and B. Spudis, *International Distribution and Sales Agency Agreements: Practical Guidelines for U.S. Exporters*, 38 Bus. Law. 883, 914-916 (1983) (Table of Protective Legislation).

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given to sovereigns⁴⁰ fit under this heading. The standard list of potentially surprising elements also includes low the levels of protection still given to intellectual property in some jurisdictions,⁴¹ the loss of profit that may accompany a currency's fluctuation in value⁴² and numerous regulatory interventions such as exchange controls⁴³ and export prohibitions.⁴⁴

⁴⁰ See generally Restatement (Third) § 451 *et seq.*

⁴¹ In states where protection is available, treaties have facilitated access to it. The *Paris Convention for the Protection of Industrial Property*, March 20, 1883, revised Stockholm, Jul. 14, 1967, 21 U.S.T. 1583, 1629, 1631, T.I.A.S. No. 6923, 828 U.N.T.S. 305, is archetypical. It requires nondiscriminatory (or "national") treatment (*id.*, art. 2.) and establishes a priority rule, under which those who have duly filed an application (*e.g.*, for a patent) in one member country enjoy a period of priority during which to file in other Union countries (*id.*, art. 4). The TRIPs accord reached during the Uruguay Round of GATT built upon these first principles, improving the general level of protection on a global basis. In some countries, however, protection, remains weak. See J. Woo, *New Trademark Laws in Asia Are Less Effective Than Firms Hoped*, Wall St. J., Feb. 16, 1994, at B8.

⁴² See generally R. Weisweiler, INTRODUCTION TO FOREIGN EXCHANGE ch. 12 (1983). For the unprotected, a bargain once propitious may become onerous, making the temptation to breach nearly irresistible.

⁴³ See International Monetary Fund, *Exchange Arrangements and Exchange Restrictions*, IMF ANNUAL REPORT (1991) (listing over 120 countries which utilize some form of exchange control). To lessen investor apprehension, modern foreign investment codes and bilateral investment treaties often contain provisions guaranteeing liberal conversion and repatriation of initial investment and earnings. See, *e.g.*, the U.S.-Argentina Bilateral Investment Treaty of November 14, 1991, Article V, *reprinted in* 31 I.L.M. 124, 132 (1992).

⁴⁴ Business planners combine general risk assessment techniques with anticipatory contract drafting and insurance to hedge against the foreseeable. See W. Hannay, *Drafting Arbitration, Choice of Law, Force Majeure and Termination Clauses in International Transac-*

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1.3.3 CROSS-CULTURAL AND LINGUISTIC ELEMENTS

The lore of international business bristles with anecdotal accounts attesting to the impact of cultural dynamics on international business relations. Added to the above-mentioned regulatory elements are others that both prompt disputes and make them more difficult to resolve. Particularly prevalent are linguistic issues. In verbal modes, complexity and potential for dispute enlarge when parties do not share the same mother tongue, since the collaborative processes that form, administer and adjust an understanding are highly dependent on relative parity.⁴⁵ The written word may fair no better; nuanced but significant impediments such as false cognates, inaccurate translations, and disputes over the priority of texts may plague the relationship from the outset.⁴⁶

Non-linguistic cross-cultural influences can also be influential. Such elements are manifold.⁴⁷ Different conceptions of business ethics, negotiation style, gender roles, eye contact, gestures, personal space, the elderly, lawyers, alcohol, reli-

tions, in Battram & Goldsweig at 131. R. Allison, PROTECTING AGAINST THE EXPROPRIATION RISK IN INVESTING ABROAD ch. 3 (1988).

⁴⁵ See generally Salacuse at 28-33. At a minimum, disparities in linguistic abilities will slow negotiations. Poor enunciation and limited vocabulary impede discussion and can result in serious misunderstandings. *Id.* at 29. The use of interpreters may retard the process further, while changing significantly the dynamics of the negotiation. *Id.* at 28-30.

⁴⁶ For examples, see Fox at 129-30.

⁴⁷ See Foster (*passim*); The Economist, *Business Bribes*, in ESSENTIALS OF BUSINESS ETHICS 390 (P. Madsen & J. Shafritz eds., 1990); T. Griffin & W. Daggatt, THE GLOBAL NEGOTIATOR 171 (1990); Salacuse (*passim*).

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gion, personal hygiene, truth-telling, privacy, gift-giving, punctuality and profit often promote differing habits and sensibilities, enforced in some cases through government intervention.⁴⁸ Naturally, such diverse perspectives can lead to friction when potential partners try to forge and maintain a business relationship.⁴⁹

Legal cultures may also diverge when lawyers from varied backgrounds interact, producing both conflicts in style⁵⁰ and serious misunderstandings. The latter often result from oversimplification⁵¹ and *faux amis*.⁵²

⁴⁸ *Please Don't Show Your Lingerie in Iran, Even If It's For Sale*, Wall St. J., June 21, 1995, at 1.

⁴⁹ Often, it is the mundaneness of a given practice that ushers in controversy. The existence of different calendars or the way in which dates are communicated, for example, may prompt serious misunderstandings. Consider, for example, the international fax that states that the goods being requested must be delivered no later than 1-2-96. Does it refer to January 2 or February 1? Europeans will generally differ with Americans as to the answer.

⁵⁰ Contract drafting styles provide a well-known illustration. Foster at 292 (contrasting the "tomes" written by American attorneys with the brief "memorandums of understanding" issued by Chinese drafters). Matters of form may of course mask fundamental differences in methodology. In some legal systems a brief contract reflects the civil law conception that the relevant code's standard provisions augment the writing, thus obviating excessive detail.

⁵¹ The notion of "a sale," or due diligence, for example, may mean vastly different things to lawyers trained in different legal systems. W. Chu, *Cross-Border M & A*, Bus. L. Today, Jan./Feb. 1997, at 8, 9 (due diligence outside of the United States may be relatively abbreviated).

⁵² An American lawyer may assume (quite wrongly) that the civil law's notary is essentially a notary public. See S. Baker and T. Barassi, *The International Notarial Practitioner*, 24(4) ABA Int'l L. News (1995); K. Zweigert & H. Kötz, AN INTRODUCTION TO COMPARATIVE LAW (2d ed., T. Weir, trans., 1992).

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1.4 Moderating Influences

1.4.1 IN GENERAL

Although the transnational legal environment lacks perfect integration, making for an unsystematic patchwork of national legal regimes in occasional overlap and conflict with each other, several forces ameliorate what might otherwise be an international legal environment ruled predominantly by national idiosyncracies. First, systems sharing the same ancestry have a common core of substantive and procedural approaches that influence both statutory and nonstatutory sources of law.⁵³ Additionally, even among systems with different traditions, a measure of cross-pollination has produced some similarity.⁵⁴

1.4.2 JUDICIAL TEMPERING

Decades of diplomatic interchange and the influence of scholars have gradually led some American courts to develop thoughtful approaches to potentially exorbitant regulation, particularly in considering its application to the activities abroad

⁵³ A common 'tradition,' however, does not imply, necessarily, predictable uniformity in rules and procedures; rather the similarity is most apparent in the study of attitudes and methods. *See* J. Merryman, *THE CIVIL LAW TRADITION* 1-5 (2d ed. 1985).

⁵⁴ *See* R. Schlesinger, *COMPARATIVE LAW: CASES-TEXT-MATERIALS* 9-25 (4th ed. 1979). The author is informed that the team of comparative law specialists drafting Kazakstan's Commercial Code is being greatly influenced by the Commercial law of Louisiana! Conversation with Professor Christopher Osakwe, American team member, September 1997.

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of non-American entities. In construing legislation, for example, the U.S. Supreme Court has endorsed the presumption that, absent a clear indication to the contrary, statutes are intended not to be applied extraterritorially.⁵⁵ Among federal courts, a second method of subduing potential conflict has also been evident—the weighing of foreign and domestic interests. Especially in relation to antitrust law, the presence of foreign elements and the interests of other states have been judicially assessed in delimiting legislative reach.⁵⁶

Perhaps the tempering analysis that has received the most attention is the Ninth Circuit's *Timberlane*⁵⁷ formula. That three-step “jurisdictional rule of reason” requires a district court to consider not only the aims and magnitude of the conduct in question but also seven factors bearing upon comity.⁵⁸ At present, however, the extent to which such a comity analysis is available to federal courts is subject to

⁵⁵ *EEOC*, 499 U.S. at 247.

⁵⁶ See generally Hawk at 118-57.

⁵⁷ *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597 (9th Cir. 1976) (*Timberlane I*); 749 F.2d 1378 (9th Cir. 1984) (*Timberlane III*). For criticism, see Hawk at 122, 133-35.

⁵⁸ These are:

the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations of principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.

Timberlane I, 549 F.2d at 614 (footnote omitted); *Timberlane III*, 749 F.2d at 1384-86.

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question in light of the U.S. Supreme Court's *Hartford Insurance* decision, which held that a district court may not decline to exercise jurisdiction on comity grounds where the acts of the foreign defendants were not *compelled* by foreign law; it mattered not that the activities in question were lawful in the state in which they took place.⁵⁹

A third maxim promoting self-restraint has been endorsed by the U.S. Supreme Court in refining the law of *in personam* jurisdiction over foreign entities; it has instructed lower courts to assess the reasonableness of jurisdiction by balancing several factors—including the burdens on the defendant in defending in a distant foreign legal system and the “interstate judicial system’s interest in obtaining the most efficient resolution of controversies.”⁶⁰ The Court quoted with approval the language of Justice Harlan written two decades earlier: “Great

⁵⁹ *Hartford Ins.*, 509 U.S. at 798. It was not denied by the defendants that their joint policies on the provision of reinsurance would have substantial effects in the United States. Their conduct, however, was lawful in England where it took place. The four dissenting justices argued that a court construing the Sherman Act’s reach should consider the regulatory interests of foreign states. The opinions when compared illustrate the sharp divisions and conceptual thicket associated with extraterritorial jurisdiction. See A. Lowenfeld, *Conflict, Balancing of Interests and the Exercise of Jurisdiction to Prescribe*, 89 *Amer. J. Int’l L.* 42 (1995). *Hartford* has been relied upon by the First Circuit in condoning a criminal prosecution arising from acts “committed by foreign nationals [entirely] outside U.S. territory.” J. Gibeaut, *Sherman Goes Abroad*, *A.B.A. J.*, July 1997, at 42 (noting *U.S. v. Nippon Paper Indus.*, 109 F.3d 1 (1st Cir. 1997)).

⁶⁰ *Asahi*, 480 U.S. at 115 (quoting *Worldwide Volkswagen v. Woodson*, 444 U.S. 286, 292 (1980)).

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care and reserve should be exercised when extending our notions of personal jurisdiction into the international field.”⁶¹

1.4.3 UNIFICATION AND *RAPPROCHEMENT* THROUGH TREATIES

The interstate compact is another vehicle for minimizing conflict, both among regulatory authorities⁶² and in private international law generally. In the latter context, treaties have unified substantive rules and methods for their selection by following one of two basic approaches: the first constructs agreed-upon choice of law principles to be followed in prescribed situations so that a given set of facts will produce in all participating fora the same choice of law outcome;⁶³ the second method unifies the substantive rules themselves so that where applicable, the treaty supplies the rule of decision

⁶¹ *Id.* at 115 (quoting *United States v. First Nat'l City Bank*, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting)). One can legitimately question whether the Court's pronouncement in *Asahi*, a personal jurisdiction case, is consistent with its unwillingness in *Hartford* to incorporate comity into prescriptive jurisdiction analysis.

⁶² Information sharing and similar forms of cooperation among states have emerged. See M. Mann *et al.*, *International Agreements and Understandings for the Production of Information and Other Mutual Assistance*, 29 Int'l Law. 780 (1995); see also Competitions Laws Co-operation Agreement 1991 (EEC-USA) (EEC-USA) (Sept. 23, 1991), reprinted in 30 I.L.M. 1487 (1991).

⁶³ The 1980 Rome Convention is a leading example of this approach. For helpful essays, see CONTRACT CONFLICTS—THE EEC CONVENTION ON THE LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS: A COMPARATIVE STUDY (P. North ed., 1982); see generally North & Fawcett at 459-521; Hague Applicable Law Convention and A. von Mehren, *Explanatory Report, Hague Conference on Private International Law, Proceedings of the Extraordinary Session*, October 1985 (1987).

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common to the participating fora.⁶⁴ Under each approach, to the extent wide adherence is achieved, forum shopping loses much of its utility. As importantly, throughout the life of the commercial agreement the parties can assess their rights and duties by reference, directly or indirectly, to a common set of principles.

1.4.4 A-NATIONAL USAGES AND PRINCIPLES

A final unifying influence warrants mention—the adoption of common usages. According to some observers, the international business community has elevated many habitual practices and understandings to a species of contemporary *lex mercatoria*.⁶⁵ Modern usages taking on this character operate in certain international financing arrangements such as letters of credit and are seen in the customary understandings conveyed by particular trade terms such as “FOB” and “CIF.”⁶⁶ Pri-

⁶⁴ The 1980 Sales Convention, which the United States and approximately 50 other states have ratified, is an example of this technique. For literature, see P. Windship, *The U.N. Sales Convention: A Bibliography of English-Language Publications*, 21 Int'l Law. 585 (1987).

⁶⁵ As Professor Goode explains, the *original* law merchant: subsisted as a distinct source of law, administered by its own mercantile courts, before ultimately becoming absorbed in the common law itself. The maritime courts, the courts of Fairs and Boroughs and the Staple courts, in company with other commercial courts of the Middle Ages, determined disputes not by English domestic law but according to 'general law of nations' based on mercantile codes and customs. . . .

R. Goode, COMMERCIAL LAW 31-32 (1986) (footnote omitted). The doctrine is more fully discussed in Chapter 4.

⁶⁶ See generally H. Bermann, *The Law of International Commercial Transactions*, 2 Emory J. Int'l Disp. Resol. 235, 246-65 (1988).

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vately sponsored publications have captured and reinforced some of the more well established expectations. The text known as INCOTERMS, for instance, catalogs and fixes accepted meanings for frequently used trade terms.⁶⁷ Parties who wish to adopt an international standard and to clarify certain details while avoiding needless prolixity can simply employ the appropriate INCOTERM. When doing so, they agree in short-hand fashion upon a series of standard rights and duties.⁶⁸

Another formulation, though rather new, is proving to have a substantive impact on international commercial arbitration: *Principles of International Commercial Contracts*, a text sponsored by UNIDROIT for application, *inter alia*, when the contracting parties specifically so designate, or, optionally, when they stipulate the *lex mercatoria* or other a-national source to govern their rights and duties.⁶⁹ The UNIDROIT *Principles* are revisited in Chapters 4 (§ 4.9.4) and 11 (§ 11.2).

1.5 Traditional Mechanisms and Cyber-Commerce

The modern influence of technology upon commerce is pervasive and growing; traditional policy and legal paradigms

⁶⁷ INCOTERMS are published by the International Chamber of Commerce (ICC). ICC Publication No. 460 (1990).

⁶⁸ See Schmitthoff at 66-67. An analogous publication sets forth standard rules governing letter of credit operations. ICC Publication No. 500 (1993).

⁶⁹ UNIDROIT published the final text in 1994. It is reproduced with learned commentary in Bonell.

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are under constant pressure to adapt.⁷⁰ As noted earlier,⁷¹ the time-honored international sales model under which tangible goods are bargained for and received through exchanges of paper documents is being eclipsed by electronic practices. These raise a host of questions. Can the parties form a fully enforceable contract on the internet? What record of the transaction is required to preserve the rights and duties of the parties? The UNCITRAL Model Law on Electronic Commerce of 1996 bears testimony to the importance of these issues.⁷² In the same vein, the ICC has formulated “E-terms,” a text analogous to its highly successful INCOTERMS project, for use in electronic commerce.⁷³ These and related develop-

⁷⁰ Cf. J. Wilke and B. Gruley, *Is Antitrust Relevant in This Digital Age?* Wall St. J., Oct. 22, 1997, at 1 (noting challenges facing anti-trust enforcers in a digital age).

⁷¹ Section 1.2.2.

⁷² UNCITRAL Model Law on Electronic Commerce (1996) *reprinted* at 35 I.L.M. 202 (1997) (hereinafter UNMLEC); *see also* H. Burman, *Introductory Note, id.* at 197. Its seventeen articles treat a variety of matters including elements of offer and acceptance, (Art. 11) the method by which signature and writing requirements can be met by “data messages” (Arts. 6 and 7) and the admissibility and weight as evidence of such messages (Art. 9). In principle, the law is designed to apply “to any kind of information in the form of a data message used in the context of commercial activities” (Art. 1). Data message is defined as: “information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy” (Art. 2(a)). An EDI “means the electronic transfer computer to computer of information using an agreed standard to structure the information” (Art. 2(b)). The official notes recommend that “commercial” be given a broad interpretation “so as to cover all relationships of a commercial nature whether contractual or not.”

⁷³ Burman, *supra* note 72, at 199.

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ments⁷⁴ deserve monographs of their own. Nonetheless, little imagination is required to appreciate how a digital, increasingly-paperless commercial environment will dictate the types of disputes that arise and the persons and methods called upon to resolve them. Aspects of these questions are discussed in Chapter 6.

1.6 Transnational Business Disputes—Implications of the Foregoing

Almost by definition, international commercial disputes present manifold intricacies not found in domestic business quarrels, a distinctness often reflected in the mechanisms called upon to settle them. As will be seen, however, generally these mechanisms are not fundamentally different from those serving domestic commerce; rather, they have merely been tailored to the international milieu sketched above. These themes are more fully discussed in the next chapter.

⁷⁴ The race to legally structure the digitized world is further evidenced by the UCC's new draft Article, 2B. It will govern "licenses" *i.e.*, agreements granting access to information. *See* ALI, Discussion Draft on UCC Article 2B, April 14, 1997, § 2B-102. The draft (which contains nearly 100 sections) assumes that transactions involving the right to use intangibles, such digital information, are substantively and commercially distinct from those effecting a sale or lease of goods. *Id.* at 4. In particular, traditional notions of title and delivery are inapposite. Article 2B's proposed coverage extends beyond rights to computer programs to include various informational content transactions in "digital," "coded," "electronic" and print information. *Id.* at 43.

Chapter 2

PROCESSING BUSINESS DISPUTES

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2.1 Introduction

As the preceding chapter endeavored to suggest, the challenge facing international business planners is considerable. Several legal, commercial and cross-cultural factors affect the calculus. Only some of these can be fully anticipated. The legal framework alone is daunting: national and supranational regulation creates potential overlap and conflict while substantive commercial laws—despite the helpful influence of certain treaties—remain diverse. Consequently, even the most diligent specialist may entertain legitimate doubts about the applicable law and its content; the resulting confusion about rights and duties both complicates public law compliance and fuels private disputes.

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With the many other concerns facing planners, commercial disputes are often not thought of as a business risk and given the pre-dispute attention they warrant.¹ Nonetheless, a business disagreement over which the parties have lost control can be as detrimental to a business plan as an uninsured expropriation, a large regulatory fine, or an ill-conceived marketing campaign. Even in an apparently modest controversy, significant amounts of time, money and other resources may be expended in reacting to the dispute; during the interim the commercial objective underlying the disagreement comes no closer to realization. Experienced planners, therefore, anticipate disputes, just as they would any other foreseeable risk, by establishing mechanisms designed to process the contingency in predictable ways.² This chapter will survey

¹ Multijurisdictional business plans are sometimes formulated and implemented without the help of lawyers. The non-involvement of legal counsel may have no negative effect, for the project may enjoy a charmed life. If no regulatory problems arise, disputes may later be resolved informally as business matters. Indeed, an attorney is not an essential feature of most dispute settlement processes. Ordinarily, however, commercial entities enlist the help of legal advisers in planning their transnational activities because of the surfeit of regulations typically involved and the due care with which management is required to proceed.

² In a transaction of even modest complexity, the formative stages often entail a collaboration among corporate general counsel and one or more specialists familiar with the legal considerations that pertain to selected aspects of the business plan. *See generally* Gans and Stryker. Typically, during this preliminary stage, no dispute over rights and duties has arisen. It is thus an optimal time to agree upon dispute resolution, especially for the party who wants to ensure that arbitration will replace litigation. To the frustration of many business lawyers, however, it is also the juncture at which participants are often most unable to visualize disputes; jubilant and trusting, they eschew efforts to fix the means of resolving



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aspects of transnational litigation, will introduce mediation (the primary non-arbitral ADR³ technique) and will account for some of the considerations that influence choice of method.

2.2 Dispute Resolution Methods—The Options In Broad Concept

In general, the various commercial dispute resolution methods can be classified as adjudicative or collaborative. Adjudicative techniques are typified by litigation and arbitration, in which the parties submit the dispute to a neutral authority with the power to impose a binding result; typically, adjudication produces a winner and a corresponding loser. By contrast, the collaborative methods such as negotiation and mediation give the parties control of the process and the outcome.⁴ When

controversy.

³ The author includes arbitration within the term ADR.

⁴ Conciliation and mediation are distinguishable according to some writers, but as terms will be used interchangeably in this survey in which “mediation” will be more frequently used. As used in this work, both terms mean a process in which an independent person agreed upon by the parties promotes a settlement by employing various techniques designed to elicit essential facts, to ascertain the respective positions and concerns of the disputants and to fashion a mutually beneficial *modus vivendi*. The method’s central feature is the non-partisan, go-between role played by the mediator, whose detachment, expertise and familiarity with the parties’ concerns allows him or her to sponsor terms of settlement acceptable to both sides. The mediator therefore aims to reduce obstacles to communication, to define the issues and to explore alternatives. In many ways, the theory of mediation is not different from that of simple negotiation, except that a third party is interposed.

Several institutions including the AAA, the ICC and UNCITRAL, have promulgated mediation rules for commercial use. Several American states and other legal systems have devoted separate

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resolution occurs, neither party is defeated; the solution reached is one which the parties have imposed upon themselves. When successful, mediation is both cost-effective and promotes the underlying relationship; corporations, therefore, often prefer it as a method of first resort (at least in *domestic* commercial disputes), and many have integrated this preference into formal corporate policy.⁵ Studies suggest, however, that the choice of ADR method,⁶ and the method's preferability vis-a-vis litigation, often depend ultimately on the type of dispute involved.⁷

ADR in general, and arbitration in particular, is a response to a traditional court-centered model which by no means is defunct in the commercial world. To further develop this point, the following two sections survey selected features of the international litigation model, with an emphasis upon its relative strengths and weaknesses.

legislation to international commercial conciliation.

⁵ Cf. Gans and Stryker at 42-44 (outlining Siemens' pledge to ADR and corresponding instructions to company and retained lawyers).

⁶ Cf. Gans and Stryker at 40, 46 (consensual methods most often preferable "in terms of preservation of resources, good will and...business relationships").

⁷ Lipsky and Seeber (*passim*). It is not perfectly clear to what extent preference for non-arbitral ADR (among American entities or generally) declines when the dispute is international. Bühring-Uhle's survey of experts led him to conclude that while mediation was "gaining momentum" in the international sector, its significance remained "rather limited." Bühring-Uhle at 335 (reproducing results of a poll of specialists). Lipsley and Seeker report, in apparent contrast, that American corporations use mediation for commercial disputes perhaps as often as they use arbitration. The survey did not distinguish international disputes from other commercial matters and thus may be consistent with Bühring-Uhle's findings.

2.3 The Litigation Response—Forum Shopping and Related Notions

When disputes arise from multi-jurisdictional endeavor, parties often resort to national courts. Sometimes the choice of litigation is purposeful and strategic; other times it is purely a default procedure, necessitated by the lack of mutual will to process the dispute in another way.

Subject to notable exceptions,⁸ the rules of jurisdiction prevailing among states have not been ordered according to a supranational scheme or other common plan. A dispute will generally not be beyond the jurisdiction of a particular national court simply because it involves significant foreign elements; as a result, a plaintiff typically has a choice of venues. Indeed, often a plaintiff can file suits in multiple locations. The defendant in response may initiate actions in yet further courts. A single dispute may thus be characterized by parallel proceedings, and the competing fora may be largely unrestrained by a treaty or other regime allocating the courts' work in a rational, nonduplicative way.⁹

⁸ The Lugano Convention of 1988 sets forth rules of jurisdiction applicable in EC and ratifying EFTA States, in respect to commercial and civil matters. It extends to ratifying EFTA States the principles of the Brussels Convention of 1968 (as amended by accession conventions) which established direct rules of jurisdiction among the then 12 Member States of the EC. The two instruments establish *inter alia* bases of exclusive and concurrent jurisdiction applicable when the defendant in question is domiciled in a contracting state. *See generally* North & Fawcett, chs. 10, 14 .

⁹ *See, e.g.*, *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33 (2d Cir. 1987) (parallel proceedings in U.S. and Republic of Korea courts); *Laker Airways, Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984) (antisuit injunction sought

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While certain doctrines are available to courts to mitigate the potential for inconsistent judgments and duplication,¹⁰ they do not operate automatically or predictably. In addition, some of the unilateral tools available to centralize litigation are employed at the expense of comity.¹¹

For would-be plaintiffs, the relative advantages of certain fora are all too apparent.¹² Expansive notions of personal jurisdiction combined with pro-plaintiff rules of battle contribute to congestion in some systems. The general attractiveness of a particular venue, however, is only one element affecting selection; the location of the defendant's assets is also

to prevent defendants from requesting antisuit injunction from an English court); *Cargill, Inc. v. Hartford Accident & Indem. Co.*, 531 F. Supp. 710 (D. Minn. 1982) (parallel actions, U.S. court enjoined party from prosecuting English action).

¹⁰ *Lis alibi pendens* and *forum non conveniens* for example, are discretionary doctrines recognized in common law systems. See *infra* notes 27-29 and accompanying text.

¹¹ See generally A. Vollmer, *U.S. Federal Court Use of the Antisuit Injunction to Control International Forum Selection*, in Goldsmith 237 ("The rules developed by U.S. federal courts . . . [regarding] antisuit injunctions... permit U.S. interference with foreign proceedings too frequently"); T. Hartley, *Comity And The Use Of Antisuit Injunctions In International Litigation*, 35 Am. J. Comp. L. 487, 506-511 (1987). Furthermore, despite unification efforts in certain regions, choice of law outcomes may vary among the courts of different states, further inducing result-oriented forum shopping.

¹² Thus, "[a]s a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune; at no cost to himself, and at no risk of having to pay anything to the other side. The lawyers there will conduct the case 'on spec' as we say, or on a 'contingency fee' as they say." *Smith Kline & French Lab. Ltd. v. Block*, [1983] 2 All ER 72, 74 (Denning, J.). See generally R. Weintraub, *The United States as a Magnet Forum and What, If Anything to do About It*, in Goldsmith at 213.

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influential.¹³ Without having considered this factor, the victorious plaintiff presented with a resistant judgment debtor may face a prolonged delay. In the absence of a treaty requiring a different result,¹⁴ judgments may enjoy little preclusive effect when transported to the place where the defendant's holdings can be found; courts taking a restrictive approach to foreign judgments may undertake a substantial review of the "foreign" court's work product—starting with its jurisdictional findings—before awarding relief.¹⁵ If the defendant is a sovereign, an additional gauntlet may confront the judgment creditor.¹⁶

¹³ Cf. Born & Westin at 129, 231 n.47 (the availability of prejudgment attachment of assets outside the situs depends upon the law of the state where the assets are located). See generally O. Sandrock, *Prejudgment Attachments; Securing International Loans or Other Claims for Money*, 21 Int'l Law. 1 (1987).

¹⁴ E.g., the Lugano Convention.

¹⁵ A decade ago, Professor Juenger's survey of systems found that in some countries foreign judgments had no preclusive effect in the absence of a treaty requiring recognition. Juenger at 26-28. Though case law had softened some of these provisions, in Finland a complete retrial of the underlying dispute remained likely unless the original action was based upon a forum selection clause. *Id.* at 28. Even in less restrictive jurisdictions, several grounds for nonrecognition may exist. Lack of reciprocity, improper choice of law, and inconsistency with local protective legislation are among impediments to recognition found by Juenger. *Id.* at 31-36. See generally ENFORCEMENT OF FOREIGN JUDGMENTS WORLDWIDE (C. Platto ed., 1989) (a survey of 32 jurisdictions).

¹⁶ In many legal systems, state assets enjoy, *prima facie*, immunity from execution. To prevail, the foreign or domestic judgment creditor must demonstrate a waiver of immunity by the sovereign or the fulfillment of some other exception. Cf. H. Smit, *Foreign Sovereign Immunity—American Style*, in INTERNATIONAL CONTRACTS 245, 260-65, 268-69 (H. Smit *et al.*, eds., 1981) (noting the differing rules on suit and execution).

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Absent the influence of some especial allure, however, the plaintiff's instinctive preference for familiar surroundings often proves compelling. After all, as *defendants* often discover in even greater measure, litigation abroad may be expensive and clouded in vagaries.¹⁷ In addition to the expenses of maintaining key persons on site, fees for one or more local counsel will be incurred. In-house counsel, unless possessing comparative law background, will in turn be at a disadvantage in assisting local counsel. In a foreign forum, one's perception of the development, progression, and outcome of a trial may be inaccurate: the scope of pretrial discovery may be far different than imagined; the civil jury may be conspicuous by its presence or absence; the judge may be decidedly more active or passive than assumed; and costs may exceed expectations. Similarly, uncertainty as to the tasks available to counsel licensed only abroad may inhibit effective divisions of labor between local and foreign counsel.¹⁸

2.4 Mitigating Forces and Techniques

2.4.1 PARTY AUTONOMY

To varying degrees, the legal systems recognize that parties to a contract are permitted to shape their agreement to a considerable degree by setting forth in detail the specific rights and duties of each. An extension of this precept is that they

¹⁷ See Born & Westin at 221-22, 346-51; Fox at 24-33, 225-31.

¹⁸ Additionally, away from one's familiar environment, various otherwise collateral matters may loom large. For example, high quality translations, skillful interpreters, capable stenographers and suitable expert witnesses may be difficult to procure.

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may designate the substantive law that is to govern their agreement.¹⁹ Courts in many developed legal systems honor choice of law clauses. The party autonomy principle which is enshrined in many choice of law conventions,²⁰ is also codified in the UCC, which has been adopted to some extent in all fifty of the United States. It is a risk containment vehicle honored both in litigation and arbitration and makes the election to proceed in either manner far less improvident than would otherwise be true.²¹ In arbitration, however, the latitude given the parties is especially great, a fact more fully explored in Chapter 4.

¹⁹ See generally North & Fawcett at 476-87; North, *General Course* 152-84; S. Symeonides, *Choice of Law in the American Courts in 1988*, 37 Am. J. Comp. L. 457, 478-80 (1989).

²⁰ See, e.g., Rome Convention, art. 3; and the Hague Applicable Law Convention, art. 7.

²¹ The parties' power to designate the applicable law is not unbridled, at least under the formulae to which courts may be required to refer. For example, a nexus between the law chosen and the transaction may be essential. Under UCC §1-105, for instance, the parties are required to choose a law with which the transaction has a "reasonable relation"; see also Restatement (Second) § 187 (law chosen must have a "substantial relationship to the parties or the transaction" or be supported by some other "reasonable basis"). The Rome Convention, consonant with English law, does not require that the chosen law have a nexus with the parties or the transaction. See North & Fawcett at 481-82. Yet, traditional English law and the Rome Convention require that the law chosen be that of an existing legal system, thus apparently precluding the parties' choice of, e.g., the *lex mercatoria*. *Id.* at 482. One authority suggests, nonetheless, that where the parties explicitly refer to the *lex mercatoria* or "general principles of law," the choice may be given effect as contract terms rather than, strictly speaking, part of the applicable law. Goode at 1116. The same is true when they incorporate by reference a fixed text such as the UNIDROIT *Principles*. *Id.*

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Related to choice of law is choice of forum. Parties often designate, *ex ante*, a single forum or arbitral mechanism to which disputes related to the contract will be submitted.²² As with choice of law clauses, choice of forum provisions in international contracts are, to a great degree, honored by the courts, making them an essential feature of informed business planning.²³ The efficacy of pre-dispute forum selection clauses is such that a judgment rendered in disregard of an apparently valid one may be unenforceable in certain legal systems.²⁴ Consequently, although their enforcement is not axiomatic,²⁵

²² See generally Born & Westin at 221-32; Fox at 218-22; North & Fawcett at 234-40.

²³ T. Hartley, *The Validity of Forum-Selection Agreements: A Preliminary Sketch*, in CURRENT ISSUES IN EUROPEAN AND INTERNATIONAL LAW 156 (R. White & B. Smythe eds., 1990).

²⁴ Cf. Juenger at 19-20 ("several legal systems enforce forum-selection clauses indirectly by refusing to recognize judgments rendered in disregard of such provisions . . .").

Conventions applicable in much of Europe have codified and unified the rules applicable to forum selection clauses. The Brussels-Lugano approach which is to give exclusive jurisdiction to the adherent state court named in a properly documented forum designation clause, provided one of the parties is domiciled in an adherent state. If neither party is a contracting state domiciliary, courts not designated have jurisdiction only if the named court declines jurisdiction. Lugano Convention, art. 17.

²⁵ Under U.S. federal case law, the strong presumption of enforceability accorded forum selection clauses may be uprooted if the clause is obtained by fraud or overreaching or there exist other circumstances rendering the clause fundamentally unfair. Enforcement of the clause may also be declined where the chosen forum proves to be seriously inconvenient for the resisting party or inherently incapable of providing a fair trial; the presumption favoring enforcement of such clauses, however, is not easily supplanted. See *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972); *Carnival Cruise Line, Inc. v. Shute*, 111 S. Ct. 1522 (1991); *Scherk* 417 U.S. at 516 (a forum selection clause is "an almost indispens-

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such clauses are of substantial practical value when properly drafted and combined with a carefully drawn choice of law clause.

2.4.2 JUDICIAL SELF-RESTRAINT

As suggested earlier in this chapter, domestic bases of personal, subject matter and prescriptive jurisdiction are not designed necessarily to exclude suits that contain a predominance of foreign elements. The careful use of choice of forum clauses, mentioned above, is one influence countering the unpredictably caused by concurrent jurisdiction. Two other doctrinal checks on a plaintiff's discretion in choosing a forum are well-known to the common law, but offer only limited impediments to forum shopping. These are the doctrines of *forum non conveniens*²⁶ and *lis alibi pendens*. Under the former, pursuant to the defendant's request, the court determines whether the case should be dismissed in light of a preferable alternative forum. In the United States, the doctrine is discretionary, has evolved through case law²⁷ and is

able precondition to achieving the orderliness and predictability essential to any international business transaction"). *But see* W. Park, *Illusion and Reality in International Forum Selection*, 30 Tex. Int'l L. J. 135, 202 (1995) (considering U.S. enactment of a federal court selection statute to promote reliability when a federal court is designated).

²⁶ See generally Born & Westin at 275-318; North & Fawcett at 221-36.

²⁷ The seminal American decisions are *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981) and *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). For recent commentary, see D. Epstein, *An Examination of the "Adequacy of the Alternative Forum" Factor in Forum Non Conveniens Determinations*, in Goldsmith at 295.

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associated primarily with transnational litigation. In the European Union the doctrine does not operate where supplanted by the Brussels Convention.

Lis alibi pendens authorizes a court to stay an action in light of the existence of a parallel action in another jurisdiction.²⁸ American courts have employed the doctrine as a matter of discretion, but most have adopted a general rule that jurisdiction should be exercised absent exceptional justification favoring dismissal.²⁹ Within the European Union, a treaty-based rule has created predictability not found under the American variant of the doctrine.³⁰

²⁸ American Courts in exercising their discretion consider “principles of comity, the adequacy of relief available in the alternative forum, promotion of judicial efficiency, the identity of the parties and issues in the two actions, the likelihood of prompt disposition in the alternative forum, the convenience of the parties, counsel and witnesses and the possibility of prejudice if the stay is granted.” *I.J.A., Inc. v. Marine Holdings, Inc.*, 524 F. Supp. 197, 198 (E.D. Pa. 1981). Introductions to the English approach are Jaffey at 127-28 and North & Fawcett at 231-34.

“Related” actions, *i.e.*, those that are “closely connected” but do not involve the same cause of action, are treated in Article 22 of the Lugano Convention.

²⁹ See G. Born, *LITIGATION* at 461-70 (citing as the most influential case *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), followed also in international cases).

³⁰ Within much of Europe, the Brussels and Lugano Conventions remove discretion from contracting state courts by insisting upon a first-seised rule. According to Article 21 of the Lugano text:

[a]ny court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established [whereupon it shall decline jurisdiction in favor of the court first seised].

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2.5 International Litigation Revisited—Relative Deficiencies Cataloged and Compared

2.5.1 IN GENERAL

The potential for forum shopping, parallelism and duplication mentioned above in relation to international litigation results from the present lack of a global regime imposing rationality upon national legal systems. To litigation in general, however, may be attributed additional negative attributes; to underscore the role of arbitration in international trade, an abridged survey of several such traits is presented in the remainder of this section. Some arguably positive traits, in turn, are suggested in § 2.6. Comparisons to ADR punctuate both overviews.

2.5.2. COSTLINESS AND DURATION

Despite tax-subsidized features such as full-time judges and public court rooms, litigation is a costly enterprise. Lawyers' fees are perhaps the principal expense. The involvement of multiple jurisdictions usually implies the need for multiple lawyers because of the regulation of legal services and numerous practical considerations. Even for litigants with substantial in-house legal departments, outside counsel will generally be necessary. Much of the time billed by outside counsel will relate to "discovery"—at least in common law systems.³¹ The disruption that such pre-trial investigation causes is another form of "cost" suffered by both sides. Cost,

³¹ *Cf.* Marriott at 30 ("It is well recognized that discovery is one of the most expensive features of English litigation").

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of course, is closely related to longevity. The prolongation that often characterizes international litigation “American-style” translates into continuing financial commitment and burden; and, under the general “American Rule,” the victorious party cannot expect necessarily to recover its costs, as discussed in Chapters 7 (§ 7.13) and 11 (§ 11.19).

High direct costs are not the only result of protraction. In commercial disputes, the extended cloud over rights and duties implied by litigation often impairs the value of the underlying product or service; indeed, the passage of time may render the dispute itself largely moot. This is particularly so in “hi-tech” disputes because, given the rate of advancement in the field, the product life of many innovations is often as brief as a few months.³²

While non-arbitral ADR can claim to be almost invariably superior to litigation in terms of cost and speed, the same cannot be said of arbitration. Experienced practitioners tend to appreciate arbitration’s capacity for alacrity and cost savings, but generally concede its too-often-realized potential for being as ponderous and expensive as litigation.³³

³² Accordingly, much of the study undertaken to improve speed and efficiency in ADR has been sponsored or motivated by the hi-tech sector. “Technological perishability” is becoming ever more acute. This theme was recurrent among the speeches and interventions of practitioners and technical experts gathered, respectively, at the WIPO Arbitration and Mediation Conferences in New York (March 21, 1997) and San Francisco (September 15-16, 1997).

³³ Confirming this sense is Bühring-Uhle’s doctoral work which included a survey of international dispute resolution specialists designed to test supposed advantages of certain ADR techniques. Among the continental Europeans surveyed, excluding German respondents, almost 70 per cent held that arbitration typically offers no cost improvement over litigation; more optimistic were

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In pursuing arbitration, many factors impact cost and speed: these include the extent of discovery,³⁴ number of arbitrators,³⁵ legal culture³⁶ and amount in controversy.³⁷ A measure of delay, moreover, may be endemic to the arbitral process. In contrast to litigation systems which are staffed by full-time judges, the arbitral process depends on adjudicators who typically hold other full-time posts. Other sources of delay are not specific to arbitration. Both litigation and arbitration, for example, tend to encounter responding parties that embrace opportunities for delay. In arbitration, the available pretexts

Americans, almost half of whom thought that arbitration was “generally less expensive” than litigation and Germans, 64 per cent of whom selected that characterization. Bühring-Uhle at 141, 405-06. As to the relative speed of arbitration, the vast majority (75%) of the European replies selected “generally faster” than litigation while only 59 percent of the American sample so typified the method. *Id.* at 406-07.

³⁴ The majority of respondents in Bühring-Uhle’s study felt that arbitration’s limited discovery was a distinct advantage relative to litigation. Bühring-Uhle at 136. Gans and Stryker report that Siemens’ corporate policy prefers arbitration in which only “very limited discovery” takes place. Gans and Stryker at 45-46 (citing cost and delay).

³⁵ For cost and delay reasons, Siemens’ established policy is to prefer one arbitrator to three. Gans and Stryker at 43, 46.

³⁶ The adversarial system known to the common law in particular relies heavily on the parties’ counsel to advance the proceedings. Arbitrator non-activism may therefore be an accepted tendency. *Cf.* Mustill and Boyd at 17 (“[T]he procedural initiative lies entirely with the parties . . . Unless invited to decree what is to happen next, the arbitrator need not [and in most cases does not] do anything at all”).

³⁷ *Cf.* R. Bloore, *A Designer Cost Allocation System to Take Arbitration into the Next Millennium*, 63 *Arbitration* 194, 196 (study of 105 arbitrations demonstrated tendency for length of hearing to increase as amount in controversy increased).

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include the challenge of arbitrators,³⁸ attacks on the jurisdiction of the tribunal, and the episodic hiring and firing of counsel.³⁹

As a matter of arbitral reform, there are no simple solutions to the problem of delay, given the many variables involved. As in litigation, the judicious application of case management techniques is often cited as the key to eliminating unnecessary prolongation.⁴⁰ Increasingly, statutes and rule formulations have improved the tools available to arbitral tribunals; knowing

³⁸ Standard rules texts provide the pretext by setting forth the procedure and the test, authorizing a party to challenge an arbitrator “if circumstances exist that give rise to justifiable doubts as to the arbitrator’s impartiality or independence.” UNCITRAL Rules, Art. 10(1); *see also* UNCITRAL Model Law, Art. 12(2) (adding basis that the arbitrator “does not possess qualifications agreed to by the parties”). A party intent on thwarting the arbitration can be expected to raise a challenge during the proceedings. The challenge will be evaluated, in the case of the UNCITRAL Rules, by the appointing authority. If the parties have not designated one and are unable to agree to one at the time of the challenge, the appointing authority will be selected by the Secretary-General of the Permanent Court of Arbitration, in the Hague, thus occasioning further delay. In institutionally administered arbitrations, challenges are referred to the institution. Depending upon the situs, however, the challenging party may be able to bring the matter directly to a local court, although the UNCITRAL Model Law is to the contrary, requiring that the appointing authority first be given an opportunity to assess the challenge.

³⁹ Time is consumed while the party selects and briefs the replacement lawyers. In a complex case, the delay may be substantial.

⁴⁰ See B. Davis, *Laying Down A Gauntlet: The Thirty-Six Hour Chairman*, 3 *Amer. Rev. Int’l Arb.* 170 (1992); H. Holtzmann, *Streamlining Arbitral Proceedings: Some Techniques of the Iran-United States Claims Tribunal*, 11 *Arb. Int’l* 39 (1995).

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when and how to use them is not always self-evident, however.⁴¹

Institutions have also devised “fast-track” procedures with expedition in mind.⁴² Although arbitral tribunals lack contempt power, in many jurisdictions the arbitrators’ efforts can be augmented by judicial orders, procured at the urging of a party or upon the application of the tribunal.⁴³ The arbitrators’ authority to draw negative inferences can also stimulate timely action.⁴⁴

2.5.3 PRIVACY AND CONFIDENTIALITY

The public venues used in litigation often are open to non-litigants, including one’s competitors and the commercial press. While certain procedures can occur *in camera*, in general to air grievances in court is to do so in public. The decision of the court is often published as part of a system of precedent, especially in common law systems. Openly and robustly countering claims and asserting rights may be a useful strategy in building a reputation. Often, however, counter-vailing considerations will outweigh the deterrence gained through publicity.

⁴¹ Many procedural issues bring competing concerns into apparent conflict. Tribunal indulgence shelters a slothful or resistant party. Yet, to prevent charges of procedural unfairness (potentially imperiling the award) an arbitrator may be inclined to grant requests for more time to prepare and present a case.

⁴² See generally *Symposium*, 2 Amer. Rev. Int’l Arb. 138-62 (1991).

⁴³ These mechanisms are discussed more fully in Chapters 10 and 11. See, e.g., §§ 10.5.1, 10.5.4 and 11.11.

⁴⁴ See C. Brower, *Evidence Before International Tribunals: The Need for Some Standard Rules*, 28 Int’l Law. 47, 56-57 (1994).

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Arbitration and mediation proceed in private;⁴⁵ moreover, arbitrators, mediators and administering institutions are bound to protect confidences and are generally forbidden to reveal the contents of any award or settlement that results from the proceeding. Similarly, in part to preserve confidentiality, all three classes are discouraged from participating in subsequent court actions designed to explore the details of the proceedings since completed.⁴⁶

2.5.4 FORMALITY OF PROCEDURE AND REMEDY

Litigation unfolds according to rules of court designed to discourage deviations from standard procedure. The fact-finding process is subject to technical rules of evidence affecting admissibility; the availability of even the most flexible remedies, in turn, may be subject to myriad qualifications. These influences derive from laudable goals related to the integrity of the process. Nonetheless, in a given case they may be obstacles to effecting a just end to the dispute in question.

Adjudication by arbitration is characterized by procedural flexibility and (in general) remedial prerogatives untethered to

⁴⁵ Thus, “privacy alone is often a compelling basis for the use of arbitration. . .” Gans and Stryker at 46. The majority of Bühring-Uhle’s sample considered arbitration’s “confidential procedure” to be among the more important attributes commending its use in lieu of litigation. Bühring-Uhle at 395.

⁴⁶ The duty of the parties to refrain from making disclosures related to the dispute seems to be largely a matter of contract in many jurisdictions, though the requisite understanding can arise from joint adoption of rules that require such forbearance. *See* Chapter 11 (§§ 11.9 and 11.18) for further discussion.

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technicalities. Mediation in turn is even more free-form; though the process generally unfolds in somewhat predictable stages,⁴⁷ in general the parties are free to convert a legal dispute into a business marriage.

The malleability of ADR, and arbitration in particular, is the attribute that allows the procedural styles of the civil law and the common law to meet in relative harmony. This meshing is prefigured by standard rules which marry the common expectations from both families while reaching thoughtful compromises on otherwise divergent approaches. The parties ability to detach the proceedings from a specific body of remedial law allows private tribunals (or, in mediation, the parties themselves) to serve commercial justice whether or not to do so pays reverence to the sometimes vestigial procedural elements that bind the courts.

2.5.5 DECISION-MAKER EXPERTISE

Generally, one cannot select the judge who is to decide his or her case. This limitation may be the cost of enjoying adjudication subsidized by public resources. In highly complex cases, the fact that the judge will not seek compensation directly from the parties is little comfort if the he or she is simply ill-equipped to master the important details of the dispute. In the United States and certain other systems, generally there are not commercial courts to which to turn. Although special masters and court-appointed experts mitigate the risk somewhat, most litigants would probably prefer the

⁴⁷ Fox at 194-95.

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option of jointly appointing the best judge for the assignment, a feature of arbitration often not replicated in the world's litigation systems.⁴⁸

2.5.6 GLOBAL ENFORCEABILITY

As noted above, the United States, is party to no multilateral treaty, such as the Brussels Convention, that would require courts in other countries to give preclusive effects to American judgments; accordingly, the post-adjudication phase of U.S. litigation may elongate while the judgment is subjected to scrutiny abroad. As noted earlier, the foreign court addressed may consider, among other factors, the first court's jurisdiction, its choice of law, and the excessiveness of the sums awarded. In the meantime, costs mount. Here again—at least where the alternative is U.S. litigation—arbitration offers a striking advantage. The New York Convention, dissected in

⁴⁸ Arbitration may be apt when the complexity of the dispute reduces the probability that a jury will function well, yet an adjudicative proceeding is preferred. Concerning mediation, specialists disagree as to whether it is preferable to employ a mediator with knowledge of the field in which the dispute has arisen. Some view the neutral's goal as merely facilitative. Others prefer the model in which the mediator is equipped to suggest legal strengths and weaknesses in the parties' respective cases, and perhaps to predict a range of outcomes if the matter were to proceed to adjudication; the goal is to induce accords by tempering expectations. Naturally, some mediators practice a hybrid mediation approach. *See, e.g., R. Lowry, To Evaluate or Not—That Is Not the Question!*, 2(1) Resolutions 2 (1997) (advocating a flexible approach to evaluative mediation).

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Chapter Three, makes for relative predictability of award enforcement internationally.⁴⁹

Empirical data confirm that in the perceptions of experts, international enforceability is a cardinal reason to prefer arbitration over other methods, equal in importance to its neutrality and more significant than a range of other arbitration attributes themselves thought to be influential.⁵⁰

2.5.7 BIAS AND CORRUPTION

Regrettably, not all legal systems offer unbiased judges. Existing national loyalties can be exacerbated by various influences impinging upon independence. The result is a court highly predisposed to favor one party. Such partiality combined with unfamiliar procedures and surroundings makes the task facing the visiting litigant substantially more difficult. Time and money are spent in futility and the formal result—the

⁴⁹ The New York Convention advantage is highly fact-dependant. Where enforcement is to occur in a Brussels-Lugano country, litigation in a Brussels-Lugano state may produce results as enforceable as arbitration. *See generally* Stone at 314-19, 344-51. Less predictable are the collaborative methods, which cannot promise any binding result nor a result that will enjoy global enforceability. Preliminary efforts to formulate a treaty that would afford mediated agreements international preclusive effect have not been fruitful. *See* O. Glossner, *Enforcement of Conciliation Agreements*, 11(4) Int'l Bus. Law. 151 (1983).

Another approach to the question is found in the 1988 California Act. It contains a provision allowing a conciliator, at the parties' request, to embody in an award a written compromise reached in conciliation. Whether such converted agreements would qualify for New York Convention treatment has not been tested to the author's knowledge. *See* Cal. Civ. Proc. Code § 1297.401.

⁵⁰ Bühring-Uhle at 403-05.

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court's judgment—will often be difficult to collaterally attack in the venue where enforcement is ultimately sought. For parties that have endured business litigation of that character, only modest reflection is necessary to appreciate arbitration, which allows the parties to select their own judges for a proceeding in a geographically, politically and juridically neutral place.

Despite the number of cases in which dissatisfied parties attack awards by asserting “evident partiality” (the FAA term of art), arbitration gives the parties substantial opportunity to assure that both the presiding and party-appointed arbitrators that form the tribunal are independent and impartial. This capacity combined with the power to select the situs allows the parties to greatly minimize predisposition in the process or the adjudicators.⁵¹ Not surprisingly, the well-informed regard neutrality of the forum as one of arbitration's principal virtues.⁵²

⁵¹ In mediation, the neutral acts for neither side and is bound ethically to remain impartial throughout the process. Because the mediator has no power to bind, neutrality is less often an issue in mediation than in arbitration and litigation. No party is favored in the resulting accord beyond the extent to which its counterpart has agreed. *See AAA, Standards for Conduct for Mediators*, 1995 (1) Disp. Resol. J. 78 (especially Canon 2: Impartiality).

⁵² In Bühring-Uhle's survey of experts, over 80 per cent deemed arbitration's capacity for neutrality to be either “highly relevant” or “significant” in the decision to choose arbitration. A much smaller percentage thought that it was merely one of many, roughly equal, factors. Bühring-Uhle at 136, 403.

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2.5.8. FINALITY THE ADVERSARIAL WAY

In litigation, the trading of allegations which begins with plaintiff's initial filing continues throughout the first-instance process, and may be replicated once or twice before the underlying dispute can be said to be settled. Appellate review brings delay and interim uncertainty about rights and duties and the longer the adversarial process, the less it is likely that the parties will salvage any synergism. If goodwill remains after a claim is filed and answered, it rarely survives the further proceedings; the public nature of litigation encourages reciprocal posturing, and as each party invests more time, money and energy in pursuit of the "right" result, each becomes less likely to view the endeavor as merely a business exercise.

After the initial result and the appeal, there will still be a winner and a loser, and the latter will likely be dissatisfied with the process. The winner in turn may have to pay its own costs, at least under the prevailing American rule.

Given the foregoing, a single, private proceeding that leads to a comparatively immutable result offers an attractive option if the potential for speed and finality are as important to the litigants as quality control. Indeed, because parties in arbitration may select their arbitrators, the governing law and the applicable rules of fact-finding, a one-step determination need not come at the expense of quality.

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2.6 Potential Benefits of Litigation

2.6.1 IN GENERAL

Despite the foregoing list of complaints, there are reasons for preferring litigation in some circumstances; many of these have been alluded to above. It will be noted also that many of the following assume access to an American court, as distinct from a foreign court in which these perceived advantages may not be available.

2.6.2 SUBSIDIZED PUBLICITY

An aggressive public response to conduct likely to recur may be an effective deterrent. Courts provide a vehicle for mounting such an attack. For example, a competitor contemplating even a relatively small appropriation of a trade mark or similar activity may reconsider if the owner of the mark has without fail enforced its rights, even where to do so in the individual case was not cost-effective. A *tour de force* marshaled in arbitration goes much less far than in litigation in warning potential malefactors. The deterrent benefit of course has to be weighed against the possible perception that the plaintiff is prone to bully its smaller rivals.

2.6.3 RIGHTS OF APPEAL REVISITED: PRECEDENT AND RELATED MATTERS

In certain circumstances litigation may be worth the time and money expended if helpful precedent is established thereby. It

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is often on appeal where the law is clarified in a final form. Even if a favorable rule does not emerge, there may be less confusion in the law as a result of the decision. That too would benefit business planners.

In arbitral adjudication the admonitory and educational functions of the result typically extend only to the immediate parties, and then only when the award is reasoned. Arbitral awards are not part of any ordered system of precedent, even in the diluted sense understood in the civil law. At present, only certain awards are published.⁵³ Principally, these are awards that are voluntarily provided to a service, journal or yearbook by the parties (or, more controversially, unilaterally by a party).⁵⁴ When published, awards are often redacted to obscure the parties identities.⁵⁵ Although the present,

⁵³ There is, however, a broad spectrum of views as to whether certain trappings of a precedent-based regime should be encouraged in international arbitration. See generally T. Carbonneau, *Rendering Arbitral Awards with Reasons: The Elaboration of a Common Law of International Transactions*, 23 Colum. J. Transnat'l L. 579 (1985); J. Lew, *The Case for Publication of Arbitration Awards*, in *The Art of Arbitration: Liber Amicorum for Pieter Sanders* 223 (J. Schultz & A. van den Berg eds., 1982); M. Hunter, *Publication of Awards and Lex Mercatoria*, 55(1) *Arbitration* 55 (1988).

⁵⁴ Sometimes, it is an arbitrator that makes the award available, ordinarily with the parties' permission.

⁵⁵ Even when completely successful in hiding the parties' identities, the present mechanisms for collecting and editing awards are imperfect. Many suggest that redaction (or "denaturing" as Lowenfeld has called it) leaves awards often unhelpful and sometimes misleading, *Arbitrator's View* at 38, n.65. First, an identification of the arbitrators—an all-important detail—is often omitted. It is a fact of life that some arbitrators carry more authority than others; at a minimum, knowing an arbitrator's background may illuminate his or her perspective. Second, the excerpts published may be so devoid of context as to make comparisons to an existing controversy

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haphazard, approach to replicating awards manages to offer a steady stream of arbitral authority for the specialists to consider, it is hardly systematic.⁵⁶ Further, even if publication of awards became the norm,⁵⁷ there would remain the fundamental matter of hierarchy; obviously *stare decisis* cannot operate without it. In the near term, its functional equivalent will continue to be the reputation of the arbitrators who rendered the award, to the extent that can be divined from the award in its revealed form.

difficult to make. Indeed, it is sometimes suggested that in the hands of motivated advocates great mischief can result from published award abstracts.

⁵⁶ Some in the international arbitration community endorse wider publication of awards; many arbitrators, lawyers and business persons would welcome ready access to as many awards as possible, perhaps in the law data bases already established. The advantages of such a system would be several according to its proponents: arbitrators and advocates could receive guidance from earlier cases; industries could reform trade practices and policies in light of past arbitrations; a more systematic elaboration of an international *lex mercatoria* would occur; and the existing system would improve because the relative availability of awards would prevent undue weight being given to the comparatively few awards presently published. *See generally* essays at *supra* note 53.

⁵⁷ Most parties to arbitration are unlikely to relinquish the expectation (sometimes unwarranted) of relative confidentiality that attends arbitration. Consequently, a comprehensive system of publication would have to continue the present practice of redaction, done to obscure the identities of the parties. Even then, despite skillful and knowledgeable editors, in small industries it may be nearly impossible to fully mask the entities involved.

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2.6.4 BROAD DISCOVERY

The American approach to discovery is designed to promote settlement, to reduce surprises in litigation and to provide the widest possible factual base from which to proceed to trial. American litigation attorneys are occasionally shocked and dismayed at the limited discovery allowed in arbitration.⁵⁸ As a strategic matter, it may be that wide discovery is the only way that one party will likely enjoy parity and a chance of prevailing. Where the circumstances are such that all of the essential documents are in the hands of one party or a non-litigant third party, and these cannot be identified with specificity, arbitral discovery orders are likely to either be unavailable or cast too narrowly. They are moreover fully discretionary.⁵⁹ Accordingly, where access to a U.S. or other common law court would have been available, the disadvantaged litigant may lament the choice of arbitration, even though occasionally, courts will assist an arbitrating party by ordering discovery for use in the arbitration.⁶⁰

⁵⁸ International arbitration generally employs “reliance” discovery. Each party supplies the proofs upon which it intends to rely and if need be the tribunal asks for additional materials. Marriott at 30.

⁵⁹ Under the English Arbitration Act 1996, for example, it is for the tribunal to determine, subject to the parties’ agreement to the contrary, “whether any and if so which documents or classes of documents should be disclosed between and produced by the parties and at what stage.” *Id.* § 34 (2)(d).

⁶⁰ For such an exceptional case, see *Oriental Commercial & Shipping Co. v. Rossell, N.V.*, 125 F.R.D. 398 (S.D.N.Y. 1989).

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2.6.5 COERCIVE JUDICIAL POWER

Unlike arbitral tribunals, courts are not inhibited by consent-based jurisdiction and competency. They may issue orders requiring actions by litigants and, as importantly, by non-litigants over whom they have personal jurisdiction. Arbitrators by contrast have very restricted sway over third parties, generally limited, in America, to subpoena power. Unlike arbitrators, courts enjoy contempt power and (assuming that jurisdiction exists) may enforce their orders against litigants and non-litigants alike.

2.7 An Interim Synthesis and Prospectus

Given the influences and variables over which private actors can exert little control, one can readily appreciate the value of private dispute resolution methods that afford the parties wide latitude and flexibility. It is not surprising that arbitration in particular has emerged as an important fixture. The global efficacy of a well-drafted arbitration clause greatly reduces the likelihood of parallel proceedings. The internationally preclusive effect generally accorded an arbitral award under the New York Convention discourages dissatisfied parties who might otherwise pursue a second chance before a national court.

The autonomy of the parties in selecting the situs of the arbitration, the arbitral procedure, the substantive law that will govern their contract, and the arbitrators who will determine their claims—added to their ability to craft a detailed contract

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to begin with—makes for relative peace of mind. Similarly, the trend toward relaxing practice restrictions within popular international arbitration venues improves efficiency by reducing dependency upon ‘local’ counsel.

Additionally, the inherent flexibility of arbitration and other alternatives to litigation allows the parties to minimize conflicts in legal culture, or at least to establish a neutral format, free of idiosyncracies familiar to one side only; the malleability of arbitration also makes it amenable to augmentation by collaborative approaches to dispute resolution, such as mediation, allowing the latter to be viewed as an accessory to arbitration, rather than a format in competition with it.⁶¹

⁶¹ See generally M. Hoellering, *Mediation and Arbitration: A Growing Interaction*, 52(2) J. Disp. Resol. 23 (1997). Consensus-based approaches not only preserve relationships but may be preferable when culturally based sensibilities so dictate. It is often reported, for instance, that Asian and certain other cultures deplore confrontation and, hence, adjudication. See, e.g., S. Donahey, *International Mediation and Conciliation*, in Roth *et al.*, Ch. 33, 3-5. While arbitration has a confrontational element, it seems to enjoy some acceptance within the commercial ranks of such societies. Nonetheless, mediation may be the strongly preferred first-instance procedure where collaboration is the ingrained tendency.

Non-arbitral ADR may be apt also if the amount in controversy is small compared to costs of processing the dispute in an adjudicative proceeding or if there is substantial merit in the positions of each side so that the win-lose formats of adjudication offer unappealing extremes.

The potential waste of human and monetary resources implied in the pursuit of non-binding procedures, while real, is easy to overstate; even unsuccessful proceedings may sharpen the issues and accomplish some discovery. Nonetheless, non-binding formats, which rely heavily upon mutual sincerity, can be abused by deleterious parties; where one party acts in bad faith, or has minimal motivation because of disparate bargaining power or a superior legal position, the exercise may only defer more fruitful activities.

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Consequently, non-adjudicative mechanisms are sometimes best pursued under the shadow of imminent adjudicative procedures. Where good faith abides, however, there is value in viewing the various techniques as together enabling a natural progression, with collaboration being exhausted before adjudication is fully employed.

Chapter 3

THE BINDING CHARACTER OF INTERNATIONAL ARBITRATION

Chapter Contents

3.1 Introduction

3.2 The Cardinal Role of the Agreement to Arbitrate

3.3 The Role and Content of The New York Convention

3.1 Introduction

Within international arbitral practice and law, there is great diversity. Differing national legal structures combined with adaptations made by the parties result in such variety that generalizations are particularly difficult to formulate; because arbitrations proceed in private and awards are often not published, a comprehensive study of the topic faces an inherent obstacle.¹ Nonetheless, certain rudiments characterize the field. One such element (or cluster of elements) relates to the internationally binding character of arbitration agreements and awards. This chapter's goal is to describe and briefly analyze several related anchoring concepts, which subsequent chapters take for granted.

¹ See P. Lalive, *On the Inevitable and Dangerous Character of Generalizations in the Field of Arbitration*, in *International Arbitration: 60 Years Of ICC Arbitration—A Look at the Future* 317, 324 (1984).

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3.2 The Cardinal Role of the Agreement to Arbitrate

3.2.1 IN GENERAL

Arbitrators derive their power from the arbitral agreement and the scope of their mandate is limited by its terms. In one sense, the agreement is that accord by which the parties waive access to judicial settlement of their dispute. The attitude of a particular legal system toward arbitration can often be linked to that fact. Modern systems acknowledge that agreements to arbitrate can be effective even if reached before the dispute arises. Indeed, predispute agreements are the norm in international trade. They constitute what the U.S. Supreme Court has called “a specialized kind of forum selection clause.”²

The notion that the arbitrator’s mandate is circumscribed by the arbitral agreement is among first principles.³ An award rendered in excess of the submission is ordinarily subject to attack both at the place of rendition⁴ and at the place where enforcement is sought.⁵

² *Scherk*, 417 U.S. at 507.

³ As the leading textbook on English arbitration explains:

The role of arbitrator is . . . entirely defined by the arbitration agreement. In order to ascertain the extent of the questions which he is empowered to investigate, the principles which he is to apply when deciding upon them, and the procedures which he is to adopt in the course of his investigation, recourse must be had solely to the express and implied terms of the private contract between the parties.

Mustill & Boyd at 641.

⁴ See, e.g., FAA, § 10(d)(vacatur available “[w]here the arbitrators exceeded their powers...”).

⁵ New York Convention, art. V(1)(c).

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It is not uncommon for the parties' respective views about the arbitration to change after the dispute arises. Where both parties agree that arbitration has become undesirable, they may simply ignore their agreement and process the dispute in another fashion. When, however, only one party wishes to disavow the agreement to arbitrate, its binding nature becomes evident. Subject to some exceptions, contemporary legal systems generally hold that arbitration agreements when properly invoked by a party preclude litigation of the issues covered by the agreement⁶ as discussed in the next section. The New York Convention has engendered and reinforced this tendency.⁷ An important supporting doctrine allows arbitrations to proceed even without a recalcitrant party present.⁸ The resulting award is no less enforceable for having been rendered after a 'limping' (*ex parte*) arbitration, provided the arbitrators have assessed the relevant facts and law, and have not merely adopted the views of the participant party.⁹

⁶ In the United States, stays of litigation are required by Federal Arbitration Act (FAA) §§ 2 and 3 for agreements not covered by a convention. Courts must cease court proceedings when it is shown that an agreement to arbitrate exists between the parties and that it covers the dispute in question. *See* *Finegold v. Setty & Assoc. Ltd.*, 81 F.3d 206 (D.C. Cir. 1996). In England, the same result is effected by § 9(4) of the Arbitration Act 1996.

⁷ Article II of the Convention requires a court to "refer the parties to arbitration" when the action before it is covered by a written arbitration agreement, relates to arbitrable subject matter and the court is so petitioned by a party to that agreement.

⁸ *See* *Redfern & Hunter* at 351-53, 381-82.

⁹ *Id.* Messrs. Redfern and Hunter at 381 observe that when a party has declined to participate, the tribunal "is compelled to take a more positive role." Thus:

[T]he tribunal must take upon itself the burden of testing the assertions made by the active party; and it must call for such

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Because the arbitral agreement is the legal foundation of the arbitration, its formation and interpretation occupy important places in the jurisprudence of international arbitration. A fundamental problem arises when the clause is unclear.¹⁰ Commercial drafters all too frequently—for reasons which are not always apparent—fail to choose language sufficient to preclude judicial determination of issues intended for arbitration. It is the commitment to arbitrate that the courts honor when refusing to entertain a dispute covered by the clause. They are on less solid ground when the parties have unartfully expressed their commitment, such as by using ambiguous, contradictory or precatory language or by naming a nonexistent institution.¹¹

3.2.2 SEVERABILITY AND COMPETENCE TO ASSESS JURISDICTION

The arbitration agreement's autonomy in relation to the parties' main agreement (*i.e.*, its severability) is an important question.¹² The issue arises when the validity or continuing

evidence and legal argument as it may require to this end.

The task of an arbitral tribunal is not to “rubber stamp” claims which are presented to it.

¹⁰ The standard references customarily devote attention to the problem of defective (sometimes called “pathological”) arbitration clauses. For vivid examples, see Craig *et al.* at 157-66; *see also* Redfern & Hunter at 177 (“The main defects found in arbitration clauses are those of inconsistency, uncertainty and inoperability”).

¹¹ *See, e.g.*, Republic of Nicar. v. Standard Fruit Co., 937 F.2d 469, 473 (9th Cir. 1991) (“London Arbitration Association”).

¹² *See* Holtzmann & Neuhaus at 478-82; Schwebel at 1-60.

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existence of the main agreement has been called into question. The modern trend is to treat the arbitration clause as constituting an autonomous agreement which may be governed by a law other than that applicable to the underlying agreement¹³ and which does not depend upon the validity of the main agreement for its own efficacy.¹⁴

The question of severability is closely linked to the question of arbitral competence. If the clause is deemed autonomous, the tribunal need look no further than the clause in determining its competency to proceed, provided that the subject matter in question is within arbitral competency. If the tribunal later determines that the contract in which the clause is embedded was frustrated, or induced by fraud, its jurisdiction to make a binding determination to that effect is not necessarily affected.¹⁵ As discussed in the next subsection, however, the relative conclusiveness of such findings and the role of the courts in reviewing them vary among jurisdictions.

Because severability arguably relies on a legal fiction, its doctrinal basis has been questioned by some. Nevertheless, other considered voices have endorsed it robustly.¹⁶ The

¹³ Schwebel at 6 n.4. Nevertheless, in practice the same law often governs both the arbitration clause and the contract in which it is embedded.

¹⁴ *Cf.* Sale of Goods Convention, art. 81(1) (avoidance of contract does not affect dispute settlement provision therein).

¹⁵ That is not to say that a court could not subsequently overrule the tribunal's determination that it was competent to conduct the arbitration. That raises a related but distinct question, the answer to which will likely vary with the governing law. *See* Park at 149-51.

¹⁶ Judge Stephen Schwebel has concluded, for example:

—As a matter of theory, the principle of the severability of an arbitration clause from the principal agreement which

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severability doctrine, while widely recognized, is not observed in the same manner throughout modern legal systems. In a given jurisdiction its application may vary with the nature of the aspersion cast upon the main agreement.¹⁷

3.3.3 *COMPÉTENCE DE LA COMPÉTENCE*—A CLOSER LOOK ¹⁸

As broached in the preceding subsection, the severability doctrine and questions of arbitral competency are intimately connected. Doctrinal catch-phrases, however, such as “*Kompetenz-Kompetenz*” or “severability” often obscure the borders among distinct, if related, issues. The following five questions, for example, are discrete:

1. Is the arbitration agreement analytically separate from the main agreement in which it is embedded such that legal disabilities affecting the latter do not *ipso facto* impact the agreement to arbitrate? This is the basic severability question. In general, modern legal systems hold that the arbitration agreement is autonomous.¹⁹

contains it is sound.

—As a matter of practice, that principle has been sustained by the terms and implications of arbitration conventions and rules, and by case law, whether of public international law, international commercial arbitration, or national arbitration.

—In the analyses of the commentators, support for the principle of severability is both broad and compelling.

Schwebel at 60.

¹⁷ See, e.g., Mustill & Boyd at 108-14 (discussing pre-1996 Act law).

¹⁸ See generally Park; J. Rosen, *Arbitration under Private International Law: The Doctrines of Separability and Compétence de la Compétence*, 17 Fordham Int'l L. J. 599 (1994).

¹⁹ See, e.g., Model Law, Art. 16(1)(3).

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2. Do arbitrators have the authority to assess the existence and scope of the agreement to arbitrate—that is, to determine their own jurisdiction? This is the *compétence de la compétence* (*Kompetenz-Kompetenz*) question. Again in modern systems, to varying degrees, the answer to this question is also yes.²⁰

3. If arbitrators have the authority referred to in question 2 above, to what extent are their findings subject to judicial review? This question makes the important point that the arbitrators' authority to determine tribunal competence may be both shared with the judiciary and subordinate to it. In general, it is safe to assume that the judiciary in most countries will not be wholly without power to review (and perhaps preempt) arbitral determinations on jurisdiction; the extent to which this is true, however, will depend in some systems upon what the parties have said in their agreement to arbitrate.

4. If the arbitrators' jurisdictional determinations can be reviewed or obviated by the judicial assessments of the agreement to arbitrate, when in the process does the judiciary perform its function? In other words, do the arbitrators have the first opportunity to decide whether they have jurisdiction and then to act upon that determination, or is there some form of judicial vetting that forestalls futile proceedings?²¹

²⁰ The English Arbitration Act of 1996, unlike the Model Law, sensibly treats severability and arbitral competence in separate clauses. Section 30 of the Act authorizes the tribunal to rule on arbitration agreement validity and the scope and on whether the tribunal is properly constituted. *See* Marriott at 97. Section 7 establishes the severability of the arbitration clause. *Id.* at 103.

²¹ Under French law, *compétence de la compétence* is supported by a code of civil procedure that gives the arbitrators the initial role in assessing the scope and existence of the agreement to arbitrate.

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5. To what degree do the answers to the above depend upon the wishes of the parties as expressed in the agreement to arbitrate? Do the parties enjoy sufficient autonomy to confer upon the arbitral tribunal the primary or exclusive role in assessing its own jurisdiction?²²

3.3 The Role and Content of Treaties

3.3.1. In General

As suggested in Chapter One, treaties exert an important influence upon the transnational legal environment. In relation to arbitration, they engender predictability by establishing common approaches to the enforcement of arbitral agreements and awards.

Even treaties not dealing directly with arbitration may affect the process. Conventions that facilitate *litigation*, for example (such as those enhancing the enforcement of judgments), may influence the choice between arbitration and litigation. In

Courts may entertain challenges to arbitral jurisdiction, but not until after an award is rendered. After the award is made, the courts are free to review the tribunal's decision on jurisdiction. The pre-award judicial abstention characterizing the French approach contrasts with the traditional English and American stances, which have afforded resisting parties access to the courts to test arbitral jurisdiction early in the process. Park at 152.

²² In Germany, prior to its adoption of the Model Law, if the parties so provided, the *Kompetenz-Kompetenz* doctrine allowed the arbitral tribunal to determine its own jurisdiction conclusively. Park at 151. The U.S. Supreme Court in *Kaplan* similarly held that the parties may by unambiguous agreement limit review of the arbitrators' jurisdictional findings. 115 S. Ct. 1923.

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addition, treaties effecting substantive unification, such as the Sales Convention, make choice of law analysis less determinative of outcomes, a benefit that would seem to be conferred equally upon arbitration and litigation. They also provide positive texts to which arbitrators in particular are apt to refer in establishing a sense of common principles.²³

Among treaties addressing arbitration directly are numerous Bilateral Investment Treaties²⁴ and the ICSID Convention²⁵ which play important roles in their specific settings. Without doubt, however, the most important instrument affecting international commercial arbitration is the “New York” Convention of 1958, discussed in the next sub-section.

²³ See *infra* Chapter 4 (*passim*).

²⁴ Approximately 1200 bilateral investment treaties exist. The number increases annually. For texts and commentary on the current generation of BITs sponsored by the United States see K. Vandeveld, *United States Investment Treaties Policy and Practice* (1992). The effect of BIT proliferation is “an increasingly dense network of treaty relationships between capital-exporting states and developing countries.” J. Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, 24 *Int’l Law*. 655, 656 (1990). BITs attempt to ensure that host states maintain predictable regimes in relation to foreign investment so as to inspire confidence. As part of a package of assurances, it has become commonplace for such treaties to contain dispute settlement provisions encouraging or requiring arbitration. The manifest trend is to specify ICSID arbitration, though variations are plentiful. See A. Parra, *Provisions on the Settlement of Investment Disputes in Modern Investment Laws Bilateral Investment Treaties and Multilateral Instruments on Investment*, 12 *ICSID Rev.* 287 (1997).

²⁵ The ICSID Convention enjoys wide participation (approximately 120 adherent states). It establishes a specialized and relatively comprehensive arbitral regime under which are decided *investment* disputes (as distinct from other commercial matters) between a state (or one of its agencies or subdivisions) and a non-state.

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3.3.2 AGREEMENTS TO ARBITRATE UNDER THE NEW YORK CONVENTION

Nearly 120 states are parties to the New York Convention,²⁶ ranking it as one of the more fruitful efforts of its type. As one standard reference has observed, “[the Convention] may be regarded as one of the major contributing factors to the rapid development of arbitration as a means of resolving international trade disputes.”²⁷ It has two main features. First, it requires the courts of contracting states to refrain from adjudicating disputes covered by a qualifying arbitration *agreement*, at least where a party invokes the agreement. By requiring courts to “refer the parties to arbitration,” the Convention greatly increases the chances that arbitration will take place. A party seeking to circumvent a written undertaking to arbitrate should meet with the same chilly reception in the courts of any Convention state, subject to the few qualifications within the Convention itself.

FAA Chapter 2, which implements the Convention, arguably exceeds the Convention’s mandate by authorizing U.S. courts to *compel* “that arbitration be held in accordance with the agreement...”²⁸ Under the Convention, federal courts may direct that the parties arbitrate abroad if their agreement so provides, a power not available to them under the FAA’s

²⁶ Professor van der Berg’s 1981 monograph remains an authoritative reference on the New York Convention. Cases analyzing the Convention are excerpted annually in the ICCA YEARBOOK OF COMMERCIAL ARBITRATION.

²⁷ Redfern & Hunter at 63.

²⁸ FAA, § 206. The section uses the phrase “*direct* that arbitration be held” which is stronger than the treaty’s “refer.” *Id.*

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first chapter.²⁹ After accounting for U.S. reservations, many federal courts have adduced a four-part test for determining when to compel arbitration under the Convention. These courts require that:

- 1) There is an agreement in writing to arbitrate the subject of the dispute;
- 2) The agreement provides for arbitration in the territory of a New York Convention country;
- 3) The agreement arises out of a legal relationship, whether contractual or not, which is considered commercial; and
- 4) At least one party to the contract is not an American citizen, or that the commercial relationship has some reasonable relation with one or more foreign states.³⁰

²⁹ When no convention applies, federal district courts may only compel arbitration to take place within their own districts. *See* § 4. The Convention broadens the judicial reach in another respect; arbitration agreements arising in purely foreign transactions are not excluded under the Convention, whereas they apparently are under FAA Chapter One. *Sumitomo Corp. v. Parakopi Compania Maritima, S.A.*, 477 F. Supp. 737 (S.D.N.Y. 1979), *aff'd*, 620 F.2d 286 (2d Cir. 1980).

³⁰ *See* *Sedco v. Petroleos Mexicanos Mexican Nat'l Oil Co.*, 767 F.2d 1140, 1145 (5th Cir. 1985); *Ledee v. Ceramiche Ragno*, 684 F.2d 184, 186-87 (1st Cir. 1982); *Filanto, S.p.A. v. Chilewich Int'l Corp.*, 789 F. Supp. 1229, 1236 (S.D.N.Y. 1992).

The first condition combines two requisites (existence and scope of the arbitral agreement). Treatment of these two issues under the Convention is not noticeably different to that evident under the FAA's first chapter. The same emphatic pro-arbitration policies and rules of construction apply, although they are sometimes said to have even greater vigor in relation to international contracts. Condition 2 imposes a species of reciprocity requirement not expressly authorized in the Convention (the treaty language refers only to awards); condition 3 reflects the U.S. reservation authorized

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3.3.3 CONVENTION AWARDS

The Convention obliges adherent states to “recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon.”³¹ Convention awards are those which are “made in the territory of a State other than the State where the recognition and enforcement of such awards are sought [or which are] not considered as domestic awards in the State where their recognition and enforcement are sought.”³² A contracting state may limit the application of the Convention. By insisting upon a form of reciprocity, *i.e.*, that it will accord Convention treatment only to awards “made . . . in the territory of another Contracting state”³³ and may declare that it will apply the Convention only to disputes arising from relationships

under the Convention’s Article I(3), allowing it to apply the Convention only to disputes arising from “commercial” relationships, as defined by U.S. law. *See infra* note 34. The American cases construing “commercial relationship” have generally given it a broad scope. *See Societe General de Surveillance v. Raytheon European Management and Sys. Co.*, 643 F.2d 863 (1st Cir.1981). So have many non-American decisions. Born, *ARBITRATION* at 288, n.189. The fourth condition derives from FAA § 202 and helps separate domestic from Convention agreements. Whether an arbitration clause meets the statute’s “reasonable relation” test merely by naming a non-American situs is subject to debate. *See* Born, *ARBITRATION* at 292; Rau at 249-51. The Restatement (Third) § 487, cmt. g, seems to posit that it does: “An agreement to arbitrate may come under this section . . . if the agreed place of arbitration is in a foreign state[.]”

³¹ New York Convention, art. III.

³² *Id.*, art. I(1).

³³ New York Convention, art. I(3).

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characterized as “commercial” under its national law.³⁴ The United States, for example, has adopted both qualifications.

The basic obligation to recognize and enforce is qualified by several exceptions. These have been narrowly construed and the burden of demonstrating an exception to enforcement is upon the resisting party.³⁵

³⁴ *Id.* The commercial relationship qualification of the Convention traditionally has been less widely adopted by Convention parties than the reciprocity requirement also found in Article I(3). *Cf.* Restatement (Third) § 487, cmt. b. (current as of 1986). Among parties to the treaty, another type of reciprocity rule operates. Article XIV provides that one State may only enforce the Convention against another State to the extent that the first has itself accepted obligations. This provision is subject to learned debate as to its exact meaning and in particular whether it has relevance apart from conditioning the treaty obligations of the state parties *inter se*. *See* Born, ARBITRATION at 488. In connection with private litigants, it is difficult to know what it adds to the reciprocity requirement of Article I. *Id.* Perhaps it authorizes U.S. courts to look behind the fact of Convention membership to assess whether U.S. awards analogous to the type presented are honored at the place where the award was rendered. Consider, for example, the differing meanings of “commercial” likely to exist among the 115-plus parties to the Convention. *Cf. Id.* (offering hypotheticals); *see also* Biotronik Mess-und Thereapiegeraete GmbH & Co. v. Medford Instrument Co., 415 F. Supp. 133, 139 (D.N. J. 1976) (“considerations of reciprocity . . . counsel courts to invoke the public policy defense with caution lest foreign courts frequently accept it as a defense to enforcement of arbitral awards rendered in the United States.” (quoting *Parsons and Whittemore*, 508 F.2d at 937)).

³⁵ The “refusal grounds” are found in Article V of the Convention. Shorn of certain subtitles, they include that:

- (a) a party lacked capacity or the arbitration agreement was invalid under, in default of party choice, the law of place where the award was made;
- (b) the resisting party was given improper notice or was otherwise unable to present its case;
- (c) the award exceeds the parties’ submission;

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The Convention's wide acceptance has standardized the general approach taken to foreign arbitral awards by contracting states. So familiar and well established is the text that it was adopted by the Model Law for treatment of all awards governed thereby.³⁶ So narrowly have its exceptions to its enforcement been generally construed that aberrant decisions are highly conspicuous.³⁷ It has also greatly influenced the

-
- (d) the tribunal's composition or the procedure leading to the award was inconsistent with the parties' agreement, or, absent an agreement, with the law of the place of the arbitration;
 - (e) the award is not binding, or has been set aside or suspended by a competent authority;
 - (f) the award purports to settle subject matter which is non-arbitral under the law of the country in which enforcement is sought;
 - (g) to enforce the award would violate the public policy of the country in which enforcement is sought.

³⁶ The UNCITRAL Secretariat's earlier study of over 100 decisions led it to conclude that, despite certain interpretive questions (especially related to applicable law under Article V), the Convention had functioned well. See Holtzmann & Neuhaus at 1172-73 (excerpting *Secretariat Study on the New York Convention*, A/CN.9/168 (20 April 1979)).

³⁷ A search for published U.S. decisions in which a refusal ground was successfully invoked under the Convention yielded fewer than ten instances in nearly three decades. The unfavorable odds have presumably promoted voluntary compliance with Convention awards. At least two cases were found in which a court adjourned enforcement proceedings under Convention Article VI. Less tenable is a recent decision applying *forum non conveniens* to a Convention award enforcement action. See *Melton v. Oy Nautor A.B.* 97-15395 (9th Cir. 1998), 13 Int'l Arb. Rep., Sept. 1998, at 9, H-1.

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structure of its younger regional counterpart, the Inter-American Convention of 1975.³⁸

³⁸ See C. Norberg, *U.S. Ratification and Implementation of the Inter-American Convention: A Commentary*, 1 *Amer. Rev. Int'l Arb.* 588 (1990). The Panama Convention is open for accession to any state but at present has only regional membership, which includes 16 states; it closely parallels the New York Convention though the two instruments vary somewhat. Among the primary differences is that the Panama Convention establishes an institution, the Inter-American Commercial Arbitration Commission, whose arbitral rules are to govern in the absence of contrary party choice. The New York Convention has no provision for applicable procedural rules or institutional involvement.

Chapter 4

Applicable Law—Its Designation and Content

Chapter Contents

- 4.1 Introduction**
- 4.2 Some Broad Distinctions**
- 4.3 Substantive Law and Party Autonomy**
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- 4.7 The Role of Mandatory Rules**
- 4.8 State Contracts and Applicable Law**
- 4.9 The *Lex Mercatoria***

4.1 Introduction

Applicable law questions frequently arise in international commercial arbitration. This chapter introduces the conflicts methods and substantive sources that typify international arbitral practice. What emerges is the sense that the arbitration alternative functions with great detachment from national procedural and substantive regimes and that the combination of party autonomy and wide arbitral discretion has facilitated inventiveness in conflicts methodology, but only a measure of uniformity. The interim conclusion reached is that reform will be out of step with prevailing practices if it confines either the parties' autonomy or, in default thereof, arbitral discretion in matters of applicable law. The chapter starts by noting some rudimentary analytical distinctions, before progressing through various related matters.

4.2 Some Broad Distinctions¹

In strict theory at least four applicable law analyses are distinct. The four address: the conduct of the arbitration; the parties' substantive rights and duties under their commercial relationship; the agreement to arbitrate—its existence, validity and manner of enforcement; and the ultimate award. The first of these is sometimes referred to as the “curial law” or the *lex arbitri*. It is usually the “arbitration” law of the situs chosen for arbitration, *i.e.*, the *lex loci arbitri*. Thus, in selecting a place for arbitration, the parties are in effect designating a curial law as well.² When an American city is designated as

¹ See generally Pyles.

² The curial governs a range of important issues, typically including most matters, substantive and procedural, affecting the conduct of arbitration. See *infra* Chapter 5 (§ 5.2) and authority cited therein. Theoretically, the parties could expressly adopt a law other than that of the situs. In jurisdictions in which this substitution is permitted, the mandatory laws of the *lex loci arbitri* would supplant those of the chosen curial law—at least in the courts of the situs. See Pyles at 206 (suggesting that this would be true of the Model Law). Selection of a curial law other than that of the situs might confront a rather high standard of explicitness. See *id.* at 205, relying on Justice Saville's approach in *Union of India v. McDonnell Douglas Corp.*, [1993] 2 Lloyd's Rep. 48, 50-51. He found insufficient the designation “the arbitration shall be conducted in accordance with the procedure provided in the Indian Arbitration Act 1940....” The choice of London as situs and the “highly unsatisfactory” situation which would result were the arbitration governed by two bodies of arbitral law were influential factors.

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the arbitral situs, the *lex arbitri* potentially comprises both state and federal arbitration laws.³

The second cluster of questions is at the heart of classical private international law and arises because international transactions touch more than one system; that is, two or more divergent laws may have a claim to application. The subset of procedural law developed to make such choices has played an important role in international arbitration, though not one fulfilled merely by replicating the practices of national courts.

The third governing law question, that raised by the agreement to arbitrate, in general is resolved predictably. Especially when that undertaking is imbedded in the main agreement, it is usually governed by the same law that governs the underlying contract, though it follows from the autonomy of the arbitration agreement that departures from this rule are theoretically possible.⁴

Under the New York and Panama Conventions and the Model Law, questions related to award enforcement—the fourth set of problems—are not invariably matters for the *lex*

³ In a sense, the curial law will also include the procedural rules chosen by the parties to the extent that they do not conflict with mandatory laws of the *lex arbitri*, or the *lex loci arbitri*.

⁴ See Pryles at 201-03. The arbitration agreement is, of course, more likely to be governed by a law other than that applicable to the main agreement when the two agreements are concluded at different times and places from each other, as is often true where the arbitration is founded upon a post-dispute “submission agreement.” Conceivably, the law applicable to the agreement to arbitrate will vary depending upon whether that determination is being made by an arbitral tribunal (*e.g.*, before whom a jurisdictional issue has been raised), a court asked to enforce the agreement to arbitrate, or a court asked to set aside or refuse enforcement to an award. *Id.*

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fori; sometimes the reference is to the *lex arbitri*, and sometimes to a third law.⁵

4.3 Substantive Law and Party Autonomy

4.3.1 AUTONOMY IN GENERAL

In international arbitration, the parties' ability to designate or soften the law or laws that will govern their relationship is part of a broader autonomy.⁶ Subject to certain general maxims,⁷ and mandatory rules of the situs, the parties may tailor the scope of their submission, may designate the place of arbitration, may determine the size of the tribunal and select its members, may employ non-local advocates, may fix the language of the proceeding, may dictate to a large degree the procedure to be followed by the tribunal, and in certain Model

⁵ See Pryles at 202; see also New York Convention, art. V (choice of law directives applicable to "refusal" grounds).

⁶ Cf. Holtzmann & Neuhaus at 564-65 (discussing party autonomy over the proceedings as being "critical to an effective system of commercial arbitration for international cases").

⁷ An example is that: "[t]he parties shall be treated with equality and each party shall be given a full opportunity of presenting his case." UNCITRAL Model Law, Art. 18. Similar guidelines are found, e.g., in Swiss and Dutch statutes. The equal treatment rule is addressed to *arbitrators*. Whether the parties could by agreement in effect waive the rule as to certain aspects of the proceedings is an interesting question. Holtzmann & Neuhaus at 583, conclude that, within the context of the Model Law, the parties may *not* deviate from the equal treatment rule.

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Law states, may secure its application by agreeing that the subject matter of their dispute is “international.”⁸

Partied often establish a procedural framework by adopting standard rules, such as those of a particular institution.⁹ Though such a text is designated, party autonomy remains robust; individual provisions ordinarily may be augmented or supplanted by agreement of the parties who may construct their own approach to myriad procedural issues. This aspect of party autonomy is revisited in Chapter 5.

4.3.2 PARTIES’ DESIGNATION OF SUBSTANTIVE LAW

In international trade, the latitude the parties have in designating applicable law is by no means restricted to arbitration.¹⁰ In arbitration, however, there may be even greater accommodation of the parties’ choice than in litigation. A large number of modern arbitration statutes and rules explicate rather unqualified freedom of choice provisions that do not necessarily have counterparts among the statutes

⁸ See Model Law, Art. 1(3)(c).

⁹ The designation of such rules would normally be implied by the choice of the institution itself, although the fact that institutions sometimes have several sets of rules can cause uncertainty. Well conceived rules are also available for *ad hoc* arbitrations (those not using an administering institution).

¹⁰ See generally P. North, *General Course* at 156-205; and see Y. Derains, *The ICC Arbitral Process Part VIII. Choice of Law Applicable to the Contract and International Arbitration*, 6(1) ICC Ct. Bull. 10 (1995) (“nowadays all legal systems allow the parties freedom to designate the law applicable to the contract, at least in so far as the substance is concerned”).

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governing court practice.¹¹ The Model Law, for example, upon which dozens of statutes are now based, provides that “[t]he arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute,”¹² a phrasing adopted, *e.g.*, in the corresponding Dutch provision.¹³

An important variant of party autonomy in relation to applicable law is that which enables the parties to override any undue harshness that the arbitrators may find within the governing law or within the contract’s strict terms. Empowering the tribunal to act as *amiable compositeurs* (as it is called in the French tradition) or to decide *ex aequo et bono* (the common law parallel) varies the usual form of arbitration, by inviting the tribunal to reach an equitable solution.¹⁴

¹¹ Thus, an unremarkable ICC award states “[W]hen a contractual clause indicates the applicable law ... The law chosen in this manner must be applied.” Award No. 5865 (1989) *excerpted in Extracts* at 23. Courts in the U.S. have seemed to endorse this sentiment when presented with awards. *See, e.g.*, *Northrop Corp. v. Triad Int’l Mktg.*, 811 F.2d 1265, 1270 (9th Cir, 1987)(mandatory Saudi law not applicable given parties’ choice of a different law).

¹² Model Law, Art. 28 (1).

¹³ Article 1054, Netherlands Arbitration Act of 1986, *reprinted in ICCA Handbook*, Vol. IV. The approach, while prevalent, is by no means an UNCITRAL invention; the antecedent French counterpart contains a similar directive (“the...tribunal rules...in conformity with the rules of law the parties have chosen”) Article 1496, Code of Civil Procedure, as amended by Decree of May 12, 1981 as do the ICSID Convention of 1965 (art. 42(1)) and the 1961 European (“Geneva”) Convention on International Commercial Arbitration, (art. VII).

¹⁴ *See Redfern & Hunter* at 35-38, noting “[i]n particular, *amiable compositeurs* may take a more flexible approach to the quantification of damages in order to reflect commercial fairness and reality, rather than regarding themselves as bound by the rules of law

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Parties more often than might be imagined give the tribunal this power, either on a general basis or with respect to certain issues only.¹⁵

The parties' ability to authorize awards *ex aequo et bono* is endorsed in rules, statutes and in at least one arbitration treaty.¹⁶ In those texts, which replicate the international standard, the option depends wholly upon joint authorization; it is not a prerogative conferred by only one party, by the tribunal *sua sponte*, or by an administering institution.¹⁷

governing the measure of compensation." *Id.* at 36; *see also* G. Delaume, "Amiable Composition" Is Device For Facilitating Just Awards, 5 News and Notes from the Inst. for Transnat'l Arb., No. 2, 1 (April 1990). Despite the latitude implied in an *amiable compositeur* authorization, a tribunal so empowered may not proceed arbitrarily. Equality of the parties must be observed as must any mandatory rules of the situs, Redfern & Hunter at 36-38 and perhaps of other states. Naón at 97 ("*amiable compositeurs* remain bound by international mandatory norms of national origin"). Moreover, arbitrators will be disinclined to wholly disregard the parties' contract, even when acting as *amiable compositeurs*. *See, e.g.*, ICC Award No. 3267 (1989) *excerpted in* Jarvin *et al.*, (eds.), II Collection of ICC Arbitral Awards 43, 49 (1993).

¹⁵ Blessing at 64.

¹⁶ *See* ICSID, art. 43(3).

¹⁷ Rather than the standard Latin phrases, parties may prefer a more prolix authorization. For example, the clause found in a certain reinsurance-management contract, after a standard reference to arbitration, states:

The arbitrators shall interpret this Agreement as an honorable engagement and not merely a legal obligation; they are relieved of all judicial formalities and may abstain from following the strict rules of law, and they shall make their award with a view to effecting the general purpose of this Agreement in a reasonable manner rather than in accordance with a literal interpretation of the language.

Pacific Reins. Mgmt. Corp. v. Ohio Reins. Corp., 935 F.2d 1019, 1025 (1991).

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Moreover, such authorizations have not always received a warm reception in certain legal systems. Under former English law, for example, *amiable compositeur* designations were controversial, as were purported choices of a-national systems of law; in principle, only references to a national legal system were recognized.¹⁸ With enactment of the Arbitration Act of 1996, however, the lingering questions should end; the Act sets forth a liberal party autonomy rule.¹⁹

4.4 Methodology Absent Parties' Choice²⁰

4.4.1 IN GENERAL

The parties' power to designate governing law derives its enormous significance in business planning from the state of affairs that obtains when they fail to so; predictably is

¹⁸ Craig *et al.* at 481. For learned discussion, see Mustill; F. Mann, *The Proper Law in the Conflict of Laws*, 36 Int'l Comp. L. Q. 437 (1987). Apparently, however, a Convention award produced by an *amiable compositeur* lawfully empowered at the arbitral seat would not be refused enforcement for want of a properly applicable law.

¹⁹ Under the 1996 Act, the parties may designate the *lex mercatoria* or empower a tribunal seated in England to act *ex aequo et bono*, though for reasons of accessibility neither Latin phrase has been used in the Act's text. See *Saville Report* at para. 223 (discussing § 46(1)(b)).

²⁰ In monograph form alone, a wealth of scholarly discussion is available concerning choice of law in international commercial arbitration. See, e.g., O. Chukwumerije, CHOICE OF LAW IN INTERNATIONAL COMMERCIAL ARBITRATION (1994); H. Naðn, CHOICE OF LAW PROBLEMS IN INTERNATIONAL COMMERCIAL ARBITRATION (1992); J. Lew, APPLICABLE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION (1978).

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appreciably diminished because modern laws of arbitration and institutional rules confer broad discretion upon the tribunal in designating applicable law. Of the two prevailing formulations, one entitles the tribunal to select whatever choice of law technique it deems appropriate²¹ and, under the second, it may choose the governing law or substantive principles without reference to any choice of law rule.²² Where a choice of law directive is provided, typically by an arbitration statute, the method designated is usually a flexible, multi-factored test

²¹ The former ICC Rules (revised January 1, 1998) replicated the two-step approach found in the Geneva Convention and in certain statutes. *See* European Convention on International Commercial Arbitration, Geneva, April 21, 1961, art. VII. They provided, “[i]n the absence of any indication by the parties as to the applicable law, the arbitrator shall apply the law designated as the proper law *by the rule of conflict which he deems appropriate.*” ICC Arbitration Rules, (1993), Art. 17(1) (emphasis added). The phrasing “*any indication* by the parties” has been replaced in the New ICC Rules by “*agreement.*” Under the former text, arbitrators arguably had to look for an implied choice of law. *Cf.* Merkin, para. 5.19. The two-step default approach removed from the ICC Rules remains in the UNCITRAL Rules (Art. 33(1)) and the Model Law (Art. 28(2)).

²² *See* AAA International Rules, Art. 29(1) (tribunal to apply, “such [substantive] law or rules of law as it determines to be appropriate”); *Accord* ICC Rules (1998), Art. 17(1). This one-step approach is essentially that found in the French Code of Civil Procedure, 1981, at Article 1496, and in the Netherlands Arbitration Act 1986, at Article 1054. The latitude conferred by these texts is readily apparent. As Professor Juenger writes:

[t]hey do not even require the pretext of pretending first to select some national choice-of-law rule; rather, with commendable forthrightness they eliminate this intermediate step and allow arbitrators to apply directly whatever substantive law suits them.

F. Juenger, *Contract Choice of Law in the Americas*, 45 *Amer. J. Compar. L.* 195, 202 (1997).

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which retains for the arbitrators considerable leeway in its implementation.²³

The lack of predictability that results from existing formulae, of course, does not imply that choice of law determinations by arbitrators are invariably unprincipled. Published awards and studies thereof suggest that arbitrators attend with care to choice of law. The following sections introduce a series of doctrines and practices that typify the handling of conflicts questions in cases in which the parties have failed to designate applicable law.

4.4.2 OBVIATING CHOICE OF LAW ANALYSIS.

Choice of law analysis may be unnecessary if the controlling issue is simply one of contract interpretation; the outcome may be determined by applying the agreement's terms, and perhaps applicable trade customs, to issues that are largely factual. Modern rules and statutes reinforce this approach by requiring arbitrators to apply the contract's provisions and to consider applicable usages in rendering an award. This is true, for example, of the ICC Rules,²⁴ the UNCITRAL Rules,²⁵ the

²³ See Swiss Private International Law Statute of 1987, Art. 187(1) ("The arbitral tribunal shall decide the dispute . . . according to the rules of law with which the case has the closest connection"); for commentary, see Blessing at 58-65 (1988). *Accord* Cal. Civ. Proc. Code § 1297.283 and Republic of India Arbitration and Conciliation Ordinance 1996, § 28(1)(b)(iii), *reprinted in* ICCA Handbook, Vol. II (both requiring closest connection to be determined in light of "all the circumstances surrounding the dispute").

²⁴ Art. 17(2).

²⁵ *Id.* Art. 33(3).

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AAA International Rules,²⁶ the UNCITRAL Model Law²⁷ and California's 1988 Act.²⁸ The English Act, by contrast, departs from the familiar UNCITRAL phrasing by not mandating that the tribunal "take into account usages of the trade applicable to the transaction."²⁹

Choice of law analysis also becomes unnecessary when reflection confirms that there is no outcome determinative conflict between laws because the potentially applicable laws have the same content or reach the same result. This might occur for example when the parties instinctive preference for a familiar law causes them to raise the issue, only to have it be subsequently determined that the ostensibly competing systems have been unified by treaty.

A third instance in which traditional choice of law analysis is of reduced importance occurs with the direct application of a-national commercial principles—some species of *lex mercatoria*. The broad grants of discretion to be found in the leading texts promote such circumvention of national substantive law,³⁰ although this methodology would seem to

²⁶ Art. 29(2).

²⁷ Art. 28(4).

²⁸ Cal. Civ. Proc. Code § 1297.285.

²⁹ *Saville Report* at para. 222 (quoting Model Law, Art. 28). The Advisory Committee that produced the Bill reasoned that "[i]f the applicable law allows [usages to be taken into account] then the provision is not necessary; while if it does not, then it could be said that such a directive overrides that law, which to our minds would be incorrect." *Id.*

³⁰ *See, e.g.*, ICC Rules, Art. 17(1) "the rules of law which the tribunal determines to be appropriate."

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require some form of subsidiary analysis to determine when application of the *lex mercatoria* is appropriate.³¹

4.4.3 PRIMITIVE METHOD TAXONOMY

The diversity of methods available to arbitrators has prompted scholars to devote entire monographs to the subject, perhaps without exhausting it. The technique selected is not merely of academic interest. In the United States alone several choice of law methods are in use. The governing law that results often varies with the approach used, as does the degree of predictability associated with the process. The considerable intricacies notwithstanding, broad similarities among method families have resulted from cross-fertilization and the interpenetration of legal systems.³² Thus, on a global basis, one finds both the traditional, single-factor rule selecting devices, with their mechanical security³³ and the more fluid

³¹ Cf. Mustill at 98 (“little has been done to identify criteria”).

³² Cf. Born, LITIGATION at 493-94 (discussing influence of European scholars upon Joseph Story).

³³ In the United States, the methods associated with the Restatement First, fit this general description. In the main they rely on initial characterization and applicable law choices dictated by single connecting factors. See generally L. Brilmayer, CONFLICT OF LAWS: CASES AND MATERIALS 124-25 (4th ed. 1995). Once it is determined that the matter should be treated, for example, as a contracts claim (as opposed, e.g., to a tort claim), a sub-characterization focusing on the type of contract or issue may be undertaken; this further classification may be necessary to identify among the several possibilities the controlling factor or event. A contract problem, for example, can often be further classified as relating primarily to formation (or validity) or to performance. After the subclassification is accomplished, the legal system supplying the rule of decision is identified by locating the *single* connecting factor

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modern approaches that tend to be issue specific, multi-factored and nuanced. Somewhere in between are approaches that attempt to draw the best from both families by combining rebuttable guides with factual balancing.

Typical of the several so-called modern approaches to which arbitrators often gravitate is that propounded in the Restatement (Second).³⁴ Numerous international awards refer to it,³⁵ and while notionally “American,” non-American lawyers and arbitrators readily understand its attempt to combine flexibility with explicit guidance.³⁶ Its centerpiece is the “most significant relationship” test under which the rights and duties of the parties with respect to an issue are determined by the local law of the state which, with respect to that issue, “has the most significant relationship to the transaction and the parties.”³⁷

In Restatement (Second) analysis no single consideration dictates the result. Rather, two collections of factors are identified to aid in the choice of law determination: one list

designated as controlling. Restatement (First) of Conflict of Laws §§ 332-34. Single factor approaches are far from unique to American jurisprudence. *See, e.g.*, Hober at 19 (“...under Soviet conflict of laws rules *lex loci contractus* is applied when the parties have not agreed on the applicable law”).

³⁴ ALI, (1971).

³⁵ *See, e.g.*, *Extracts* at 23 (Final Award No. 6268 (1990); ICC Interim Award, Case 5314 (1988) *excerpted in* 4(2) ICC Ct. Bull. 70 (1993).

³⁶ The Rome Convention fits this general pattern.

³⁷ Restatement (Second) § 188(1).

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identifies contacts specific to contract cases;³⁸ the other lists policies to be weighed generally.³⁹

Apparently to make the outcomes more predictable, however, the Restatement Second injects several specific presumption-like propositions. Among these directives is that of Section 188(3) which observes that “[i]f the place of negotiating the contract and the place of performance are the

³⁸ The contract-specific contacts are set forth in Section 188 as follows:

- (a) the place of contracting,
- (b) the place of negotiation of the contract,
- (c) the place of performance,
- (d) the location of the subject matter of the contract, and
- (e) the domicile, residence, nationality, place of incorporation and place of business of the parties.

They are, according to Section 188, “to be evaluated according to their relative importance with respect to the particular issue.” *Id.* § 188(2).

³⁹ The general considerations relate to broad systemic policies. These are set forth in Section 6 and include:

- (a) the needs of the interstate and international systems,
- (b) the relevant policies of the forum,
- (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
- (d) the protection of justified expectations,
- (e) the basic policies underlying the particular field of law,
- (f) certainty, predictability and uniformity of result, and
- (g) ease in the determination and application of the law to be applied.

The conception that a state other than the forum may have an “interest” in having its law applied is a theme found in many contemporary American approaches, including the Restatement Second, as indicated in the above-listed factors. In fact, a method known as “interest analysis” is in use in a few states, albeit in different forms. The seminal literature includes Currie, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963). Professor Currie’s theories have not been adopted in full by arbitrators or courts.

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same state, the local law of this state will usually be applied, except [in the case of land sale and certain other contracts or issues].”⁴⁰ Other predictive references are provided but are subject to the possibility that, exceptionally, the factors of sections 6 and 188 will lead to a different result.⁴¹

A review of the literature reveals that the American arbitrator may have little difficulty in discussing choice of law with, for example, his Swedish counterpart⁴² and that, indeed, calling the Restatement Second’s approach “modern” may be a misnomer. In his digest of Swedish awards, Hober describes the multi-factor “centre of gravity” method in which the judge or arbitrator allocates among the legal systems implicated various contacts and uses *in dubio* rules to recommend to the arbitrator applicable law when the centre fails to reveal itself. The method’s similarity to the American analogue is striking and according to Hober, it originated in a Swedish Supreme Court case decided three decades before the Restatement Second was published!⁴³

⁴⁰ Issues related to land-sale contracts are governed ordinarily by the law of the situs of the property. *Id.* § 5.

⁴¹ See R. Cramton *et al.*, CONFLICT OF LAWS: CASES-COMMENTS-QUESTIONS 117-20 (5th ed. 1993).

⁴² See generally Hober.

⁴³ *Id.* at 8. Hober’s summary of the technique could almost have appeared in an American primer on choice of law:

When applying the centre of gravity test *all* connecting factors relating to the contract in question must be taken into account... [T]he weighing of the various connecting factors [however] can never be a mechanical exercise.... Rather, a court must determine the relative weight and importance of the connecting factors in light of the individual case.

Id. at 9 (emphasis in original; footnote omitted).

Not unlike the presumptive references of the Restatement Second, the *in dubio* rules are non-binding “recommendations which may be

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Among the other standard conceptions is “proper law of contract” analysis developed by English courts,⁴⁴ and still observed to varying degrees in many common law systems.⁴⁵ In the absence of an express or implied choice by the parties, it too resembles in broad outline the multi-factor tests familiar to Americans. Its goal is to determine the law with which the contract has its “closest and most real connection.”⁴⁶ Among the relevant factors are: the place of performance, the place of formation, the places of business of the parties, and the type and subject-matter of the contract.⁴⁷ A similar multi-factor approach is apparently called for under the Swiss variant of the “closest connection” test, though differences between the English and Swiss methods can be detected.⁴⁸

relied upon if and when the centre of gravity test fails to give an unambiguous result.” *Id.* at 10.

⁴⁴ See generally J. McClean, MORRIS: THE CONFLICT OF LAWS 252-56 (4th ed. 1993) (hereinafter Morris); North & Fawcett at 458-59. In England, choice of contract law is now governed by the Contracts (Applicable Law) Act of 1990, which implements the Rome Convention. See North & Fawcett at 459 *et seq.* Choice of law, by arbitrators, however, is governed by the Arbitration Act 1996.

⁴⁵ See, e.g., G. Bamodu, *Jurisdiction and Applicable Law in Transnational Dispute Resolution before the Nigerian Courts*, 29 Int'l Law 555, 564-73 (1995) (Nigerian courts in theory employ the English proper law approach but often demonstrate a *lex fori* preference).

⁴⁶ Morris, *supra* note 44, at 255.

⁴⁷ *Id.* (citing *Re United Railways of the Havana and Regla Warehouses Ltd.* (1990) Ch. 52, 91).

⁴⁸ Dr. Blessing suggests that the Swiss formulation imposes few restrictions on the arbitrators, who may determine that selected “transnational” rules of law have the closest connection to “the case” (or as another translation has it, to the “dispute”). Blessing at 60-61. By contrast, traditional English law usually conceives of the search as leading to a particular *national* system of law, a restriction reflected in the Rome Convention’s Article 4(1)

4.5 Selecting Choice of Law Methods

Typically, the *lex arbitri* neither dictates the choice of law method nor requires an arbitral tribunal to employ the same choice of law rules as those used in the courts.⁴⁹ Nor do most rule formulations supply the method. Although some awards designate an applicable law without explicating a choice of law

(“contract...governed by the law of the *country* with which it is most closely connected”). Country is used “in the sense of a territory having its own legal rules on contracts.” Accordingly, “one cannot choose EC law, or public international law, or general principles of law recognized in civilized nations, since these do not contain a set of detailed rules of contract law.” Stone at 235. Additionally, the Rome Convention refers to a country’s connection with the *contract*, whereas the Swiss formulation refers to the connection to “the dispute” (or case). Cf. North & Fawcett at 490.

⁴⁹ Cf. ICC Interim Award, Case No. 5314 (1988) excerpted at 4(2) ICC Ct. Bull. 70 (1993) (“[t]he ICC Rules do not oblige an arbitrator to follow the choice of law rules of the seat of the arbitration...”). Prior to the enactment of the Arbitration Act 1996, it was unclear whether arbitrators proceeding in England were required to apply the Rome Convention. See, e.g., Jaffee at 240-41; Merkin, § 5.27 (1991). Under § 46(3) of the 1996 Act, the tribunal may, in the absence of party choice, apply “the conflict of laws rules which it considers applicable,” the solution found in the Model Law, Article 28(2).

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analysis, thus leaving one to speculate,⁵⁰ others confirm that arbitrators fill the vacuum in numerous ways.⁵¹

Not surprisingly, one approach in evidence is to borrow conflicts rules of one or more national system. Within this broad category, the possibilities are several. An obvious expedient is to refer to the choice of law rules used by the courts of the seat of arbitration.⁵² This may seem particularly attractive where the parties have designated the situs, since one might conclude that a tacit choice of the local law (including its choice of law rules) was also intended.⁵³ It is, nevertheless, doubtful that the parties in an international case will have designated the arbitral situs for the conflicts rules used by the courts there.⁵⁴ Rather, such a designation is better

⁵⁰ It may happen that all the potentially applicable conflicts rules lead to the same substantive law or that all the potentially applicable substantive laws would lead to the same result. Alternatively, the arbitrator may have determined, *sub rosa*, that one substantive law, is simply most appropriate, more well-developed, more modern or more clear than the others. This practice is encouraged by institutional rules, such as those of the AAA and the ICC, that instruct the arbitrator to apply, in *voie directe* fashion, the substantive rules he or she considers "appropriate." AAA International Rules Art. 28(1); ICC Rules, Art. 17(1).

⁵¹ See generally O. Lando, *Applicable Law; Extracts*; A. Lowenfeld, *The Two-Way Mirror: International Arbitration as Comparative Procedure*, (1985) Mich. Y.B. Int'l Legal Stud. 163, 177-84 (1985).

⁵² Lando, *Applicable Law* at 108.

⁵³ Cf. Redfern & Hunter at 123 (though a diminishing practice, arbitrators have inferred a choice of substantive law from a choice of situs).

⁵⁴ Parties often choose a locale for its linguistic and geographic neutrality and for myriad other reasons unrelated to the substantive law likely to be applied by the courts there. See also ICC Award No. 5717 (1988) excerpted in *Extracts* at 22 ("The choice of London as the place of arbitration and English as the language of the contract does not, in itself, indicate an intention of the parties that

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viewed as only one factor, to be weighed with the intrinsic merit of the rules themselves, in selecting a method.⁵⁵

The *ad seriatim* (“cumulative”) use of municipal conflicts rules can also be found among the awards. The approach is to utilize, in series, the respective conflicts rules of several states connected to the transaction. Although the choice of law rules themselves may differ, when applied they may produce a total or partial concurrence in the identification of the proper substantive law.⁵⁶

Arbitrators sometimes apply some type of *a-national* conflicts rule—that is, one not tied to any single national system. Thus, “general principles of private international law” have been invoked by some tribunals.⁵⁷ Choice of law approaches found in international conventions are also often employed, sometimes irrespective of whether the states

English law should govern the validity of the agreement to arbitrate”). *Accord*, ICC Interim Award No. 5717 (1988), *excerpted in Extracts* at 22-23 (choice of London as place of arbitration did not preclude arbitrator from considering choice of law rules in addition to those used by English courts).

⁵⁵ Though the implied choice rationale seems fictional, the parties ought not to be surprised if their choice of a situs is deemed by the tribunal to make the local conflicts rules at least *prima facie* relevant.

⁵⁶ Award No. 5717, *supra* note 54 (listing this ‘cumulative application’ method as one ‘frequently used’). A variation of this method involves comparing the conflicts rules of the states connected to the transaction to ascertain if there is a common choice of law rule or approach among two or more of those states; the predominantly occurring rule (*e.g.*, place of formation, or closest connection) is then applied. *Id.* at 22 (“In complex international relationships such as that under review, a widely accepted choice of law principle in most jurisdictions, including England, Liechtenstein and France is the center of gravity, or the closest connection test”).

⁵⁷ *Id.*

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connected to the disputes are convention adherents.⁵⁸ A conventional formula may have many virtues, including ease of application, neutrality and accessibility. For example, in a sale of goods dispute, the “seller’s place” rule of the 1985 Hague Convention seems inviting in its simplicity,⁵⁹ and may be confirmed in a given case by application of the Rome Convention, which itself will often lead to a seller’s place reference.

A more recent entrant was signed in 1994 and awaits ratification. The Inter-American Convention on the Law Applicable to International Contracts,⁶⁰ which is sponsored by the Organization of American States (OAS), adopts a “closest ties” test.⁶¹ It seems rather more liberal than the Rome⁶² and

⁵⁸ See generally *Extracts from ICC Awards on the Application of International Conventions: Part II - Conventions on the Applicable Law*; 7(1) ICC Ct. Bull. 82 (1996) (hereinafter *Applicable Law Conventions*).

⁵⁹ 24 I.L.M. 1574 (1985) (art. 8(2)): “the contract is governed by the law of the State where the seller has his place of business at the time of conclusion of the contract”). For authoritative commentary, see A. von Mehren, *Explanatory Report, Convention On the Law Applicable to Contracts for the International Sale of Goods* (1987) (published by the Hague Conference on Private International Law). Cf. *Applicable Law Conventions*, supra note 58 at 82 (listing both Rome and Hague Conventions as among those “most often referred to in ICC awards”).

⁶⁰ Done at Mexico City, March 17, 1994, reprinted in 33 I.L.M. 732 (1994). See generally H. Burman, *International Conflict of Laws, The 1994 Inter-American Convention on the Law Applicable to International Contracts and Trends for the 1990’s*, 28 Vand. J. Transnat’l L. 367 (1995).

⁶¹ According to Article 9:

The Court will take into account all objective and subjective elements of the contract to determine the law of the State with which it has the closest ties. It shall also take into account the general principles of international commercial law recognized by

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Hague Convention Rules and thus may have special appeal to arbitrators.⁶³

4.6 Negative Choice of Law and the *Tronc Commun*⁶⁴

A variant of the party autonomy rule that is gaining some recognition in practice allows the tribunal to infer from silence a negative choice—that is, that certain laws were intended by the parties *not* to be applied. Under the *tronc commun* doctrine, when an otherwise detailed agreement fails to select either of the laws most closely associated with the parties, arbitrators should consider whether that silence implies a joint decision to reciprocally avoid the respective unknowns of the two national laws that would otherwise be obvious choices.

If silence does betoken an aversion by each party to the other's legal system, logically this only applies to those principles which are not common to both systems. Thus, according to the doctrine, it is most in keeping with the parties' real intentions to apply those substantive rules upon which their respective systems agree—the *tronc commun*, instead of a national law selected by standard choice of law

international organizations.

⁶² Article 4 (2) of the Rome Convention holds that, rebuttably, “it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence . . .”

⁶³ Cf. Juenger, *supra* note 22 at 205-05 (arbitrators free under Article 9 to avoid undesirable national law in preference for substantive text developed by international experts).

⁶⁴ See generally Rubino-Sammartano at 274-80.

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analysis.⁶⁵ And what of the matters not covered by the *tronc commun*?⁶⁶

Like the *lex mercatoria* (discussed below), the *tronc commun* doctrine is an attempt to substitute for standard conflicts analysis a method designed to implement more fully the parties' probable intentions. As such, it has relative appeal. Nonetheless, to be greatly preferred is a contract clause that removes the need for negative inferences or legal fictions. Such a provision emerged in the Channel Tunnel arbitration. The disputed contract provided:

The construction, validity and performance of the contract shall be governed by and interpreted in accordance with the principles common to both English law and French law, and in the absence of such common principles by such general principles of international trade law as have been applied by national and international tribunals. Subject in all cases, with respect to the works to be respectively performed in the French and in the English part of the site, to the respective French or English public policy (*ordre public*) provisions.⁶⁷

⁶⁵ *Id.* at 274-75.

⁶⁶ Professor Rubino-Sammartano answers:

[I]n this situation the arbitrator will take inspiration from the principles of the legal systems of the parties and from the usages of the parties in their previous relationships and, in their absence, from the current usages in the countries to which the contracting parties belong, letting himself be guided by the principle of looking for a solution which is as near as possible to the expectations of both parties. If this were not achievable, the arbitrator might tend [to] apply, as to each contractual duty, the national law of the party which is under such a duty.

Id. at 275.

⁶⁷ As excerpted by Rubino-Sammartano in *The Channel Tunnel and the Tronc Commun Doctrine*, 10(3) J. Int'l Arb. 58 (1993) (discussing Channel Tunnel Group Ltd. v. Balfour Beatty Constr. Ltd. [1993] A.C. 334 (H.L.)).

4.7 The Role of Mandatory Rules

An essential, but complex,⁶⁸ subtopic related to choice of law is the identification and observance of mandatory rules (species of which are variously referred to as *loi de police*, imperative rules, or rules of immediate application).⁶⁹ Rules deemed to have this character are thought to reflect a public policy so substantial that ordinary choice of law canons must move aside. It is their preemptive character that sets mandatory rules apart.⁷⁰

The literature is in general agreement concerning the types of laws that potentially are “mandatory.” Much debate can be found at the margins, however, in relation to the exact application of the general doctrine in particular situations. Laws governing competition, currency control, environmental protection, trade restrictions, and those protecting particular

⁶⁸ “One can hardly avoid the conclusion that this topic is replete with issues comporting an unfortunate degree of complexity.” Mayer at 322.

⁶⁹ Mandatory rules are those which must be applied in a given situation notwithstanding the law chosen by the parties or that otherwise applicable. *See generally id.*; North, *General Course* at 184. Lawyers trained in America will most likely view the question as being whether a potentially applicable substantive rule should be denied application because it offends the fundamental policies of another state, typically the forum, whose nexus with the transaction entitles its policies to prevail. The mandatory rule concept prevalent in the civil law is slightly different in that it implies an affirmative duty to apply a particular substantive rule, rather than a prohibition against the application of an offensive rule.

⁷⁰ *Cf.* North & Fawcett at 137.

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classes of persons such as employees, consumers, and commercial agents all raise the issue.⁷¹

In general, arbitrators are regarded as having the authority, and in appropriate circumstances the duty, to apply mandatory rules.⁷² The problem facing the tribunal is to determine which supposed imperative rules qualify for application; the question is multifaceted. According to some authorities, it involves considering the rule's nexus with the transaction and, arguably, its legitimacy.⁷³

The conflicts rules in use in the courts at the arbitral seat, or other national conflicts rules connected to the transaction, may have a well developed approach to mandatory rules. If adopted by the arbitrator, these may provide a coherent theory upon which to proceed. Moreover, the applicable conflicts rule may be the product of a multilateral convention; the consensus represented by such an agreed-upon text would tend to legitimize the arbitrator's analysis. The several recent conventions that attempt to treat the mandatory rules, however, adopt different stances on certain aspects of the mandatory rules

⁷¹ *See id.*; Mayer at 275.

⁷² Mayer at 280-86.

⁷³ *Id.* at 291-93. A Dutch court performed a similar analysis in *Compagnie Europeenne des Petroles S.A. v. Sensor Nederland, B.V.* (Dist. Ct., The Hague, Sept. 17, 1982), reprinted in 22 I.L.M. 66 (1983). The court declined to give effect to an American trade embargo which it regarded as being inconsistent with international law when applied extraterritorially in the case at bar. *Id.* at 71-74.

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problem.⁷⁴ The diversity attests to the complexity that surrounds the area in general.

Of course, when faced with supposed mandatory rules, often the arbitrator faces competing considerations: the desire to render an enforceable award⁷⁵ versus the desire to honor the intent of the parties and the contract.⁷⁶ Mandatory rules themselves may be in conflict⁷⁷ further complicating the tribunal's task. Moreover, there is room to argue that highly idiosyncratic or offensive rules, though imperative within their own system, should not be applied in an international arbitration. In such a case the arbitrator may reason that the rule embodies no *international* public policy and indeed may offend it.⁷⁸

⁷⁴ It remains controversial, for example, whether effect should be given to mandatory rules of a state having some connection, but not the preeminent connection, with the transaction in question. *See* North & Fawcett at 503.

⁷⁵ A failure to apply an imperative rule of a particular state, of course, will imperil enforcement of the award in that state. There is thus a potential cost in ignoring mandatory rules. If that state is not the arbitral situs and enforcement can be accomplished at the situs or in another state, the risks involved are greatly reduced.

⁷⁶ Mayer at 289.

⁷⁷ Jarvin at 86.

⁷⁸ Boycott laws that establish restrictions based upon race or religion would provide a classic example. Mayer at 291. As Professor Mayer suggests, in such a case, there being no *lex fori*, "the arbitrator finds the public policy in his conscience, or, as some might have it, in the fundamental tenets of a transnational *lex mercatoria*." *Id.*

4.8 State Contracts and Applicable Law

Questions of applicable law arising in arbitrations between a state (or state-owned entity) and a private enterprise have generated much scholarly commentary.⁷⁹ In general, the question which arises is whether the fact that a state is a party should alter the process or outcome in choice of law matters. The studies of arbitral practice seem to warrant the following generalizations: First, there is no presumption that the law of the state party should supply the *lex arbitri*; quite the opposite, that a state is a party may enhance the wisdom of adopting an a-national procedural framework.⁸⁰ Second, the methods

⁷⁹ See generally Böckstiegel; R. Lillich, *The Law Governing Disputes Under Economic Development Agreements: Reexamining the Concept of "Internationalization,"* in INTERNATIONAL ARBITRATION IN THE 21ST CENTURY: TOWARDS "JUDICIALIZATION" AND UNIFORMITY? 61 (R. Lillich & C. Brower eds., 1993) (hereinafter *Internationalization*); K. Lipstein, *International Arbitration Between Individuals and Governments and the Conflict of Laws*, in CONTEMPORARY PROBLEMS OF INTERNATIONAL LAW 177 (B. Cheng & E. Duncan eds., 1988); Toope at 55-97.

⁸⁰ Böckstiegel at 23-25. In keeping with the standard analysis, the arbitration law of the state would apply if the arbitration were seated in that state and the procedural rule in question was mandatory. See *id.* at 24-25. The non-imperative character of the state party's procedural law in cases where the arbitration is not seated in that state would seem to hold even where its law prohibits it from subjecting contracts to a law other than its own (a position traditionally attributed *e.g.*, to Saudi Arabian law); such a limitation presumably would only be deemed to extend to the *substantive* rules governing the contract. *Id.* at 23-25; see *Texas Overseas Petroleum Co. v. The Govt. of the Libyan Arab Republic (Libya)* (Award of Jan. 19, 1977), 53 Int'l L. Rep. 389 (1978) (hereinafter *TOPCO*).

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employed for selecting substantive law have not been greatly influenced by the fact that a state is a party.⁸¹

Though in general the approaches to selecting applicable law in mixed arbitrations assimilate those used in other contexts, the range of *substantive* possibilities is enlarged when one of the parties is a state. Particularly noteworthy is the potential applicability of international law.⁸² The practice is specifically sanctioned in the ICSID treaty⁸³ and has been adopted in important non-ICSID arbitrations as well.⁸⁴ Under the prevailing nomenclature, contracts to which international law

⁸¹ Böckstiegel at 26 (surveying 40 jurisdictions). In apparent accord are the PCA Optional Rules for Arbitrating Disputes Between Two Parties of Which Only One is A State (eff. July 6, 1993). The learned drafters apparently found no attribute of mixed arbitration that warranted a departure from the standard UNCITRAL Rules formulation. Absent a contractual designation, the tribunal may proceed using “the conflict of laws rules which it considers applicable.” *Id.*, Art. 33.1.

⁸² Cf. R. Higgins, *International Law and the Avoidance, Containment and Resolution of Disputes: General Course on Public International Law*, 230 RECUEIL DES COURS 188-89 (1991) (“undeniable that international arbitrators, as a species, are disposed to finding that international law is indeed relevant to such matters, even when faced by a domestic governing law clause”).

⁸³ The ICSID Convention, Article 42(1) provides that in the absence of a law designated by the parties, the tribunal must apply the law of the state party to the dispute “(including its rules on the conflict of laws) and such rules of international law as may be applicable.” The reference to the conflicts rules of the disputant state is unusual; thought it seems to authorize *renvoi*, more tenably it refers to the state’s mandatory rules. The reference to international law provides a check on idiosyncratic state laws that are out of step with international standards. See A. Broches. *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States of 1965: Explanatory Notes and Survey of Its Application*, 18 Y.B. Com. Arb. 627, 668-69 (1993).

⁸⁴ See, e.g., *TOPCO*, *supra* note 80.

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is deemed to apply are said to have been “internationalized.” The natural by-product of internationalization is that the municipal law of the state involved carries less influence.⁸⁵

Reference to international law for a rule of decision is only one avenue evident in practice. Numerous combinations of national and supranational principles have been applied.⁸⁶ The parties may, of course, also authorize the tribunal to conduct the arbitration as *amiables compositeurs* or to act *ex aequo et bono*.⁸⁷

4.9 The *Lex Mercatoria*

4.9.1 IN GENERAL

The topic of *lex mercatoria* has engendered a robust and wide ranging, if esoteric, debate.⁸⁸ The subject has some parallels to the question of delocalization of arbitral proceedings in general. The central issue is whether there exists an autonomous mercantile norm structure comprised of a-national

⁸⁵ Often cited dictum concerning the theory of internationalized contracts is that of Professor Dupuy in the *TOPCO* award, *supra* note 80. According to Dupuy, the fact that the contract provides for international arbitration itself suffices to allow the application of international law, at least in the context of a long-term development agreement. *Id.* at 454-55. Less controversially, he posits that the parties may secure its application by expressly choosing it.

⁸⁶ Toope at 62; Böckstiegel at 29 (listing twelve types of choice of law reference).

⁸⁷ See generally C. Schreuer, *Decisions Ex Aequo et Bono Under the ICSID Convention*, 11 ICSID Rev. 37 (1996).

⁸⁸ See, e.g., essays collected in Carbonneau.

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substantive principles sufficiently well developed and ascertainable to supply rules of decision in international commercial disputes. The problem arises when the parties have failed effectively to choose an applicable municipal law or have expressly designated the *lex mercatoria* or an equivalent supposed norm system⁸⁹ to govern their rights and duties.

4.9.2 ARGUMENTS FOR AND AGAINST

Strong opinions exist on both sides of the debate. Professor Berthold Goldman is a leading proponent of the *lex mercatoria* theory. For Goldman, “*lex mercatoria* is, at the least, a set of general principles and customary rules spontaneously referred to or elaborated in the framework of international trade, without reference to a particular national system of law.”⁹⁰ At the other extreme are various skeptics, including the late Dr. F.A. Mann, who agreed with the assessment that the *lex mercatoria* is no more than “a fig leaf to hide an unauthorized substitution of [the arbitrators’] own private normative preferences for . . . the properly applicable law.”⁹¹ Occupy-

⁸⁹ In contracts between state entities and foreign private parties, one sometimes finds references to “principles of law recognized by civilized nations,” an apparent adaptation of the Statute of the International Court of Justice, Article 38. Böckstiegel at 29. For criticism, see Toope at 68-75. Sometimes in purely private contracts the parties refer to “general principles of international commercial law.” Whether this is synonymous with the *lex mercatoria* is debatable. Goldman at 113.

⁹⁰ Goldman at 113, 116.

⁹¹ F.A. Mann’s introduction to Carbonneau at xxi (quoting W. Park, in Carbonneau at 109); see F. Mann, *England Rejects “Delocalised” Contracts and Arbitration*, 33 Int’l & Comp. L.Q. 193 (1984).

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ing a middle ground is the sensibly restrained accommodation of the doctrine offered by Craig, Park and Paulsson. In their second edition, they suggest that one way of viewing the *lex mercatoria* is merely as a collection of established international trade usages which bind certain international traders.⁹²

The *lex mercatoria* is said to offer substance which better matches the parties' expectations than does a law chosen through normal conflicts rules, which themselves can boast only of moderate uniformity and predictability in application.⁹³ Proponents also point to the law merchant's augmentative qualities; where proof of the content of the apparently governing law proves elusive or incomplete, reference to *e.g.*, general principles of commercial law (regarded by many as part of the *lex mercatoria*) may prove helpful in confirming substance and filling gaps.⁹⁴

⁹² That is, *lex mercatoria* is "an expansion of the notion of usages to encompass particular contracts whose specificity is that they are international." Craig, *et al.*, at 614-15. Professor Andreas Lowenfeld suggests that *lex mercatoria* is:

not a self-contained system covering all aspects of international commercial law to the exclusion of national law, but rather . . . a source of law made up of custom, practice, convention, precedent—and many national laws—[which] can furnish an alternative to a conflict of laws search which is often artificial and inconclusive, and a way out of applying rules that are inconsistent with the needs and usages of international commerce and which were adopted by individual states with internal, not international transactions in mind.

Arbitrator's View at 50.

⁹³ *Id.*

⁹⁴ See ICC Proceedings No. 4761 (1984), *excerpted in* Rubino-Sammartano, at 272 (citing Y. Derains & S. Jarvin, *Chronique des sentences arbitrales*, Clunet 1984, at 1137).

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A number of conceptual and practical problems lead some to conclude that the *lex mercatoria*, if it does exist, is not a desirable invention.⁹⁵ A few examples illustrate the questions raised by the doctrine's detractors. First, ascertaining the *lex mercatoria* requires the arbitrator to canvas the diverse and numerous national laws of the trading nations to distill the essential and universal principles. Such a task may be arduous, even for an accomplished comparative law specialist.⁹⁶ Second, the use of standard form contracts as a source of *lex mercatoria*, a widely endorsed notion among mercatorists, is questioned because in practice there is not the requisite homogeneity among such forms.⁹⁷ Third, it is doubted by the skeptics that the *lex mercatoria* has established sufficient global legitimacy to form the basis of an award. Thus, purported application of the *lex mercatoria*, particularly where the parties did not designate it as governing, would subject the award to attack.⁹⁸ Fourth, the doctrine's theoretical underpinnings are not sufficiently well articulated to enable a principled approach to its application. Determining to which transactions it applies, and under what conditions, remains a matter of some speculation.⁹⁹ Finally, there is the intensely practical consideration of

⁹⁵ See K. Hight, *The Enigma of the Lex Mercatoria*, 63 Tul. L. Rev. 613, 627-28 (1989); C. Stoecker, *The Lex Mercatoria: To What Extent Does It Exist?*, 7(1) J. Int'l Arb. 101 (1990).

⁹⁶ Mustill at 92-93.

⁹⁷ Moreover, "the mechanism whereby the use of standard forms becomes a source of law is nowhere clearly explained." *Id.* at 95.

⁹⁸ *Id.* at 118.

⁹⁹ As Lord Mustill has observed: "Given the weight of analysis to which the *lex mercatoria* has been subjected, it is surprising how little has been done to identify the criteria which distinguish those transactions which are governed by it from those which are not." *Id.*

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business feasibility. Given that the contours and content of *lex mercatoria* are not well-defined, how can commercial entities assess their rights and duties while administering the contract?¹⁰⁰ There is no identifiable, agreed upon, corpus of principles sufficiently accessible to the parties to create legal certainty; the substantive rules most likely to be widely agreed upon are few and often are unmanageably abstract.

According to the skeptics, the same ethereal qualities make the new law merchant slippery at best when in the hands of the arbitrators; the lack of precision with which the content of *lex mercatoria* is defined ultimately provides an arbitrator with only blurry rules of decision. The inevitable result is the exercise of broad arbitrator discretion, which brings the arbitral exercise “perilously close to a crap-shoot.”¹⁰¹

4.9.3 ITS CONTENT AND USE

Perhaps the most convincing proponents of the *lex mercatoria* are those who have had practical experience with its application; in general, these authorities give the doctrine its most pragmatic gloss. Professor Lowenfeld, for example, responded to Lord Mustill’s leading critique of the *lex mercatoria* by attributing to the doctrine a modest but functional role:

Lord Justice Mustill asks with some justification what are the rules of *lex mercatoria*. He proposes a sample of twenty such rules, drawn directly or indirectly from past

at 98.

¹⁰⁰ *Id.* at 93, 117.

¹⁰¹ M. Reisman, Book Review: *International Chamber of Commerce Arbitration*, 80 Am. J. Int’l L. 268, 271 (1986).

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arbitral awards. I have not read most of the awards he builds on. . . I think, however, the statement of principles is fair, and I cannot do better than to reproduce some excerpts (slightly edited) from Justice Mustill's abstracts.¹⁰²

1. Contracts should prima facie be enforced according to their terms (*pacta sunt servanda*).

5. A contract should be performed in good faith.

7. A State entity cannot be permitted to evade the enforcement of its obligations by denying its own capacity to make a binding agreement to arbitrate, or by asserting that the agreement is unenforceable for want of procedural formalities to which the entity is subject.

9. If unforeseen difficulties intervene in the performance of a contract, the parties should negotiate in good faith to overcome them, even if the contract contains no revision clause.

11. One party is entitled to treat itself as discharged from its obligations if the other has committed a breach, but only if the breach is substantial.

12. No party can be allowed by its own act to bring about a nonperformance of a condition precedent to its own obligation.

15. A party that has suffered a breach of contract must take reasonable steps to mitigate its loss.

17. A party must act promptly to enforce its rights, on pain of losing them by waiver.

19. Contracts should be construed according to the principle *ut res magis valeat quam pereat*.

20. Failure by one party to respond to a letter written

¹⁰² *Arbitrator's View* at 37 (citing Mustill at 174-77).

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to it by the other is regarded as evidence of assent to its terms.

Justice Mustill regards his list of twenty principles, of which I have here produced ten, as a rather modest haul. I suppose that could be said of the Ten Commandments or of the American Bill of Rights as well. To me, just the excerpts here quoted give a quite clear picture of the thrust of a modern international commercial law.¹⁰³

Lex mercatoria is not, in other words, supposed to be revolutionary. What it does do, if properly used, is to clarify, to fill gaps, and to reduce the impact of peculiarities of individual countries' laws, often not designed for international transactions at all.¹⁰⁴

The concept of *lex mercatoria* as a default methodology has received a modicum of acceptance in practice. In one often-cited award, *Norsolor*,¹⁰⁵ the learned arbitrators apparently endorsed a species of *lex mercatoria*, reasoning as follows:

Recourse to the general principles of the laws is the most frequent attitude of arbitrators in international trade. It is to be found in awards whether they base themselves or not on international law; this is sometimes expressed and more frequently tacit. The general principles are deduced by comparative analysis of various legal systems by starting from an abstract reasoning where the legal culture of the arbitrator obviously plays an important role. The formation of a common law of the nations directly arises from this arbitral method.¹⁰⁶

The arbitrators were motivated to look beyond normal choice of law analysis by “. . . difficulty [in] choosing a national law

¹⁰³ *Id.* at 55-56.

¹⁰⁴ *Id.*

¹⁰⁵ ICC Arbitration No. 3327 (1981).

¹⁰⁶ Rubino-Sammartano at 271-72 (citing *Norsolor*, ICC Proceedings No. 3327 (1981)).

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the application of which is sufficiently compelling.”¹⁰⁷ The tribunal deduced that a general principle required both parties to act in good faith in the execution of the contract; accordingly, one party, having abused its superior position of strength, was obliged to pay damages.¹⁰⁸ Demonstrating the difficulty the doctrine faces in practice, however, the Court of Appeal in Vienna partially set the award aside for the arbitrators’ failure to determine the applicable *national* law. The Court reasoned that the tribunal had in effect acted as *amiable compositeur*, a function that the parties had not authorized. While, ultimately, the Austrian Supreme Court reversed the Court of Appeal, the case illustrates the risks attendant awards based upon the *lex mercatoria* particularly where it is not expressly chosen by the parties.¹⁰⁹

For parties to a non-state contract, the relative wisdom of dedicating the contract to the *lex mercatoria*, “general principles of commercial law” or a similar “a-national” collection of rules depends upon the circumstances. A party with weak bargaining power, facing the application of an unfamiliar or inhospitable domestic law, may regard a reference to the *lex mercatoria* as preferable. However, if both parties are comfortable with a body of law more closely associated with one of them, and that law is well-developed and honors party autonomy, the appeal of the *lex mercatoria*

¹⁰⁷ As excerpted in 8 ICCA Y.B. Comm. Arb. 362 (1983).

¹⁰⁸ *Id.*

¹⁰⁹ Rubino-Sammartano at 2271-72. That the application of the *lex mercatoria* should be reserved to cases in which the parties have expressly chosen it was the position of three arbitrators in ICC Award No. 4650 (1985) (Briner (chair), Merkt and Morison), 12 Y.B. Comm. Arb. 111 (1987).

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seems relatively slight. The party who acquiesces in the naming of such a national law has little to fear where time is taken to craft a balanced agreement.¹¹⁰

4.9.4 THE UNIDROIT PRINCIPLES¹¹¹

As recounted above, while attractive in some respects, the strategy of naming the *lex mercatoria* (or other a-national source) as a governing law—like the practice of consulting it for a rule of decision—affords a rather imperfect method for avoiding the risks and vagaries of traditional conflicts analysis. *Lex mercatoria*'s elusive content invites controversy, at least once one leaves the realm of general maxims and abstract principles in trying to resolve concrete disputes. The associated method challenges even adept and objective comparative law specialists. Consequently, security of contract arguably is lost to a great extent once a supra-national norm structure, such as

¹¹⁰ Where an “a-national” formulation such as the *lex mercatoria* seems the lesser of the evils, a reference to it can be amplified by incorporation of existing texts to assist the tribunal and enhance predictability. *E.g.*, “the parties deem the *lex mercatoria* to include in particular The Vienna Convention on the International Sale of Goods (CISG) (1980), INCOTERMS (ICC 1990), and the Uniform Customs and Practices for Documentary Credits (ICC 1993).” Similarly, after careful study, adoption of the UNIDROIT *Principles* may supply the needed detail and structure, as discussed in the following sub-section.

¹¹¹ See generally A. Garro, *The Contribution of the UNIDROIT Principles to the Advancement of International Commercial Arbitration*, 3 Tul. J. Int'l & Comp. L. 93 (1995); O. Lando, *Assessing the Role of the UNIDROIT Principles in the Harmonization of Arbitration Law*, 3 Tul. J. Int'l & Comp. L. 129 (1995).

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the *lex mercatoria* or general principles of commercial law, is designated without further detail.

In response to the uncertainties just mentioned have come the UNIDROIT *Principles*. Arranged in seven chapters containing well over 100 articles, the *Principles* present in some detail a law of international contracts developed to treat common issues in recognized or acceptable ways. They are not purely a model law, although they may serve that function.¹¹² They are not a convention and thus require no international assent or domestic implementation to achieve utility. Rather, they are analogous to certain ICC formulations such as the INCOTERMS, although the subject matter addressed in the *Principles* is much broader, indeed, surpassing that of the Sale of Goods Convention.

The *Principles* fill an appreciable void. Early signs suggest that they are already becoming an important fixture.¹¹³ The U.N. Claims Commission has drawn upon them and several arbitral awards have applied them in various contexts.¹¹⁴

¹¹² The *Principles*' preambular text explains that (to paraphrase) they shall be applied when the parties have contractually designated them and may obtain when the parties have agreed that their contract is governed by "general principles of law," the "lex mercatoria" or similar norms. The *Principles* may provide a solution also when the relevant rule of the applicable law cannot be established and may be used to interpret or supplement international uniform law instruments. They may also serve as a model for national and international legislators.

¹¹³ See UNIDROIT, *The Use of the UNIDROIT Principles in Practice* (Results of the first Secretariat survey; on file with the author).

¹¹⁴ See Bonell at 240-54. See also White & Case, 10(1) Int'l Disp. Resol. 3 (1997) (ICC partial award applied both New York law and the UNIDROIT *Principles*).

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Their application is also impliedly authorized in the Mexico City Convention.¹¹⁵

¹¹⁵ See Juenger, *supra* note 22, at 205-06. Indeed, the American delegation unsuccessfully proposed that the Convention's default rule refer expressly to the UNIDROIT *Principles*. *Id.* at 206.

Chapter 5

THE SITUS OF ARBITRATION AND THE TRADITIONAL PARADIGM

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- 5.9 The Place's Geographical Dimension: Tribunal Powers To Limit Physical Inconvenience**

5.1 Introduction

In relation to traditional doctrine, it is difficult to overstate the importance—both legal and practical—of the situs of arbitration.¹ After setting forth in summary fashion the still-valid

¹ The situs is also sometimes referred to as the “place” or “seat” of arbitration. Semantical problems may arise because of the possible dual meanings given in particular to “place.” It has both geographical and juridical connotations. The English Arbitration Act, for example, adopts “seat” instead of the Model Law’s “place” when detailing elements to be registered in the award. *Saville Report* at para. 250. It was considered that the Model Law used the phrase to mean seat and that “there [is] no obvious legal reason to stipulate the geographical place where the award was made.” *Id.* This chapter refers both to the juridical and practical impacts of the place of

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conventional wisdom associated with the place of arbitration, this chapter identifies various factors and trends that have reduced its influence and made its selection less critical than it once was. Chapter 6, in turn, explores the impact that technology will have upon the traditional paradigm.

5.2 Legal Importance—The *Lex Arbitri*²

That the place of arbitration ordinarily dictates the legal regime to which the arbitration is deemed to belong,³ has been noted in Chapter 4.⁴ The significance of this general rule is that when the parties, or some entity on their behalf, designate the place of arbitration, they are identifying the legal system that will govern a range of important issues including:⁵ the inter-

arbitration. It is hoped that the context supplied will prevent confusion.

² See generally H. Holtzmann, *The Importance of Choosing the Right Place to Arbitrate an International Case*, in PRIVATE INVESTORS ABROAD 183 (1977); J. Paulsson, *International Commercial Arbitrations*, in HANDBOOK OF ARBITRATION PRACTICE 425, 445-48 (R. Bernstein & D. Wood eds., 2d ed. 1993).

³ See generally Redfern & Hunter at 70-95. English authorities, in particular, have recognized that the parties may choose a procedural law other than that of the situs. See Collins at 126; Pryles at 206. This possibility is even more clearly sanctioned under the English Arbitration Act of 1996.

⁴ Stated another way, the *lex loci arbitri* (arbitration law of the situs) is generally also the *lex arbitri*. Common law lawyers often use the term 'curial law' as synonymous with *lex arbitri*. Redfern & Hunter at 72 n.3.

⁵ For lists of these issues see *id.* at 79; Craig *et al.* at 447-49; Pryles at 200, 204 (quoting the enumeration provided in L. Collins (ed.), DICEY AND MORRIS, THE CONFLICT OF LAWS 582-83 (12th ed., 1993)). To deter departures from the general rule, the WIPO Rules (Art.

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pretation and validity of the arbitration agreement; the availability of interim measures; the grounds upon which an arbitrator or his award can be challenged; and the various forms of judicial supervision that may be imposed.

The law of the place of arbitration also influences who may serve as advocates and arbitrators and affects the global enforceability of the eventual award, by virtue of any enforcement convention to which the situs state may be a party. As noted in Chapter 3, typically the award is affiliated for convention purposes with the place where the award is made, which is usually also the arbitration's juridical seat.⁶ Moreover, in matters of award enforcement, the law of the situs provides an important default standard.⁷

59(b)) and the LCIA Rules (Art. 16.3) expressly establish the default proposition that the law governing the arbitration, absent an effective parties' designation to the contrary, shall be the law of the place (seat) of arbitration.

⁶ An award rendered in a non-convention state may nonetheless be enforceable abroad by virtue of "comity," subject to the kinds of defenses applicable to foreign judgments. *Cf.* Restatement (Third) § 487 n.8 (awards not enforced by Convention generally enforced on other grounds).

⁷ The New York and Panama Conventions and the UNCITRAL Model Law all condone refusals to enforce when:

[t]he composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, *was not in accordance with the law of the country where the arbitration took place.*

New York Convention, art. V(1)(d)(emphasis added); *see* Panama Convention, art. 5(1)(d); UNCITRAL Model Law, Art. 36 (1)(b)(iv).

5.3 Practical Importance

Myriad non-jurisprudential factors related to the place of arbitration may influence the proceedings, so that in practice several practical criteria should affect situs selection. First, the place chosen should be linguistically neutral in relation to the parties' abilities. Second, the place ought not to be so remote or otherwise undesirable as to discourage prospective arbitrators from serving nor limit the accessibility of persons and subject matter central to the proceedings.⁸ Third, various aspects of infrastructure and similarly prosaic matters deserve attention: reliable telecommunications facilities—including readily available FAX machines and electronic data bases—should be in place; hours of operation for essential purveyors of goods and services should be convenient given that hearings may fill normal business hours; suitable meeting rooms and duplication services should be available as should competent and neutral translators, interpreters, and stenographers.⁹

⁸ Aksen at 67. When choosing a situs, some thought should also be given, albeit secondarily, to the relative distances to be traveled by each side and the time differences between the situs and the home offices of the parties. Over the course of a several-day hearing, the sleep deprivation implied in communicating with a main office via phone can impact the quality of one's participation in the proceedings. Fax and e-mail have become important substitutes for telephonic dialogue, which, nonetheless, remains preferable when immediacy and spontaneity are essential.

⁹ Many of the foregoing concerns, of course, can be addressed through affiliating with an appropriate local law firm, the selection of which is itself an art form. See D. Wilson, *International Business Transactions: A Primer for the Selection of Assisting Foreign Counsel*, 10 Int'l Law. 325 (1976). That firm may be instrumental

5.4 Party Autonomy, Default Mechanisms and Planning

The ability of parties (or more correctly, their lawyers) to fix the situs of arbitration is an essential aspect of business planning. That they may do so before the dispute arises allows them to confine a cluster of known risks *viz.*, that time and money will be wasted in negotiating the situs issue after dispute has arisen and that the mechanisms that function in the absence of party choice will serve the parties less well than a placement of their own design.¹⁰ Where the parties fail to name a situs, it will be determined by the institution, if any, or by the arbitrators.¹¹ Though neither entity would make a frivolous choice of situs,¹² many drafters prefer to identify

in procuring the facilities and expertise mentioned above, perhaps with the cooperation of a local arbitral institution, and in alerting the principals to matters affecting scheduling, such as local holidays. A vivid example of the impact of holidays is found at the Iran-U.S. Claims Tribunal at the Hague. The docket advances little there during *Ramadan* and the Christmas holidays. Added to these and similar celebrations specific to the parties are a range of Dutch holidays.

¹⁰ Institutional rules brochures often invite the parties to designate the situs for the arbitration. As one experienced practitioner notes, however, "one of the most common prearbitral disputes is over the situs of the hearing itself." Aksen at 66.

¹¹ Article 13(1) of the AAA International Rules provides, for example: If the parties disagree as to the place of arbitration, the administrator may initially determine the place of arbitration, subject to the power of the tribunal to determine finally the place of arbitration within sixty days after its constitution. All such determinations shall be made having regard for the contentions of the parties and the circumstances of the arbitration.

¹² See S. Jarvin, *The Place of Arbitration* 7(2)ICC Ct. Bull. 54 (1996). *But see* *Aerjet-General Corp. v. American Arbitration Assn.*, 478 F.2d 248 (9th Cir. 1973) (upholding AAA's controversial choice of New York as situs for arbitration between California and Israeli

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suitable places and to establish one clearly in the clause. Under American law, to do so promotes access to the FAA provisions which implement the New York Convention, while to fail to name a situs places in doubt orders mandating specific performance of the arbitration agreement.¹³

The parties' wide latitude in avoiding certain venues and flocking to others naturally promotes on the parts of lawmakers a consumer-friendly attitude toward formulation of arbitration law. Thus, much of the arbitration legislation emerging over the last two decades has been designed to liberalize the regime applicable to "international" arbitration, either as part of a general modernization affecting commercial arbitration or on a more surgical basis aimed expressly at transnational disputes.

Anecdotal accounts and a survey of the literature leave few mysteries as to what practitioners typically look for in an arbitral situs, at least in terms of legal climate. New York Convention membership is nearly an absolute prerequisite; for, enforcement of an award will often take place in a country other than the situs.¹⁴ Beyond that, the regime governing commercial arbitration at the situs should be characterized by self-restraint on the part of the local judiciary, save as is

entities).

¹³ FAA, § 206 authorizes courts to compel arbitration at the place named in the clause; where none is named, at most, a court can order arbitration to occur within its own district, which may be geographically less desirable than a situs chosen by the parties.

¹⁴ The place of arbitration is often chosen for its neutrality and legal regime, and thus may have no connection to the recalcitrant party or his assets.

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necessary to make arbitration more effective.¹⁵ One generally welcomes, for example, the availability of provisional remedies to preserve the *status quo*, speedy judicial mechanisms for replacing arbitrators, court assistance in enforcing arbitral subpoenas and similar features that facilitate rather than interfere with the proceedings.

By contrast, venues are to be avoided where the judiciaries enthusiastically entertain direct interim challenges to arbitrators, perform interlocutory review of arbitral orders (or of the proceedings in general) or practice wide-ranging review of the tribunals' substantive decisions.¹⁶ Places where the local law precludes all but local lawyers from serving as advocates or arbitrators are also dubious choices.¹⁷

5.5 Detachment From, and Liberalization at, the Arbitral Situs—Theories, Policies and Approaches

5.5.1 IN GENERAL

There exists in the literature a rich debate about the extent to which international commercial arbitration can and should be

¹⁵ See generally M. Ball, *Structuring the Arbitration in Advance—the Arbitration Clause in an International Development Agreement*, in Lew at 297, 304-06.

¹⁶ For a description of the pre-1979 English law and associated judicial intervention (or, as some would have it, “interference”) see J. Parris, *ARBITRATION PRINCIPLES AND PRACTICE* 161-170 (1983).

¹⁷ See generally D. Rivkin, *Keeping Lawyers Out of International Arbitration*, *Int'l Fin. L. Rev.*, Feb. 1990, at 11.

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free from the legal regime otherwise applicable at the situs.¹⁸ Approaches to the topic are multifaceted and diverse, and have been overtaken to some extent by unification among arbitration laws and other developments over the last two decades. Simplified and framed in practical terms, the discussion is typified (but not exhausted) by two principal questions: to what extent should international arbitration be free of pre-award and post-award intervention by the courts of the situs and should a failure to comply with local arbitration law restrict the resulting award's international enforceability?¹⁹

At the heart of pro-detachment policy is the premise that international arbitration is distinguishable from its domestic cousin and that its international character ought to free it of

¹⁸ See generally Craig, *et al.*, at 273-74, 441-43, 449-59; Redfern & Hunter, at 81-95; F. Mann, *Lex Facit Arbitrum* in INTERNATIONAL ARBITRATION: LIBER AMICORUM FOR MARTIN DOMKE 157 (P. Sanders ed., 1967); M. Mustill, *Transnational Arbitration in English Law*, in INTERNATIONAL COMMERCIAL AND MARITIME ARBITRATION 15 (F. Rose ed., 1988); J. Paulsson, *Arbitration Unbound: Award Detached From the Law of Its Country of Origin*, 30 Int'l & Comp. L.Q. 358 (1981); J. Paulsson, *Delocalisation of International Commercial Arbitration: When and Why It Matters*, 32 Int'l & Comp. L.Q. 53 (1983) (hereinafter *Delocalisation*); J. Paulsson, *Arbitration Unbound in Belgium*, 2 Arb. Int'l 68 (1986) (hereinafter *Unbound in Belgium*).

¹⁹ Among the questions mooted in the learned writings are: Should awards resulting from proceedings not in total compliance with mandatory rules peculiar to the situs nonetheless be given effect in states other than the situs, and perhaps in the courts of the situs too? More heretically, should an award produced from an international arbitration be enforceable abroad even though it has been affirmatively nullified by a court at the situs for failure to follow local procedures?

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parochial control mechanisms.²⁰ That is, for truly international arbitration, choice of situs ought not to be dictated by the need to avoid the diverse peculiarities and provincial requirements in the various national systems.²¹

Even the most ardent proponents of detaching international arbitration from the regulation of the situs, however, do not contend that a complete disassociation is possible or desirable. In many contexts, as noted above, local court assistance is beneficial: compliance with arbitral agreements may need to be compelled, arbitrators may need to be appointed or replaced and awards may need to be confirmed or enforced. Accordingly, arbitral reform over the last decade has been concerned with establishing the apt blend of supervision, facilitation and non-intervention.

For law and policy makers, ensuring solicitous treatment for international arbitration can be accomplished in various ways; legislation is the vehicle most often employed. In the absence of a system-wide legislative approach to reform, the United States has nonetheless moved forward, albeit largely through

²⁰ Often referring to an arbitration as “international” is simply another way of saying that the situs is being selected for reasons of geographic and political neutrality rather than to assure the application of the indigenous laws of the situs affecting commerce and arbitration. *Cf. Explanatory Note* at para. 46 (territorial approach to awards “inappropriate in view of the limited importance of the place of arbitration in international cases [which is] often chosen for reasons of convenience of the parties the dispute may have little or no connection with the State where the arbitration takes place”).

²¹ See J. Paulsson, *The Extent of Independence of International Arbitration from the Law of the Situs*, in Lew at 141, 141-42 (hereinafter *Independence*); *cf. Craig et al.*, at 10-15 (“The ICC does not want the result of ICC arbitration to differ depending on the situs”).

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the rather blunt instrument of decisional law affecting commercial arbitration in general, as outlined in the next sub-section.

5.5.2 THE UNITED STATES—WIDE ACCOMMODATION FOR COMMERCIAL ARBITRATION THROUGH CASE LAW

In the United States, Supreme Court doctrine has promoted commercial arbitration in general by expanding subject matter arbitrability,²² by mandating that courts approach arbitration clauses using pro-arbitration rules of construction,²³ by dramatically restricting states' ability to impose consumer-related

²² U.S. Supreme Court case law has expanded subject matter arbitrability to include: federal antitrust [*Mitsubishi*(1985)]; securities regulation under the 1933 and 1934 Acts [*Scherk* (1974)(1934 Act claims arbitrable in international cases); [*McMahon* (1987)(1934 Act claims arbitrable in domestic cases)]; federal racketeering claims [*McMahon* (1987)]; Age Discrimination Act claims [*Gilmer* (1991)] and disputes governed by the Carriage of Goods by Sea Act (COGSA), a treaty-based statute codifying the "Hague Rules," [*Vimar Seguros* (1995)].

²³ See *Moses Cone* (1983). An unbroken chain of Supreme Court decisions has reiterated *Moses Cone*, admonishing courts that "in applying state-law principles of contract interpretation to the interpretation of an arbitration agreement within the scope of the [FAA] . . . ambiguities as to scope of the arbitration clause itself must be resolved in favor of arbitration." *Volt*, 489 U.S. at 475-76. (Citation omitted). The pro-arbitration gloss is to apply "whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay or a like defense to arbitrability." *Moses Cone*, 460 U.S. at 24-25. It does not apply to the question whether the parties have authorized the tribunal to determine preclusively the existence of the arbitration clause or its scope. *Kaplan* (1995).

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and other restrictions on arbitrability,²⁴ and by identifying facilitation of party autonomy as the FAA's *raison d'être*.²⁵ Taken together these decisions establish a robustly pro-arbitration, pro-party-autonomy federal common law of arbitration, largely built upon a single FAA provision.²⁶ The Court has also nurtured arbitration by endorsing an approach to arbitral awards (foreign and domestic) that makes them very difficult to successfully attack, as more fully discussed in § 5.6 below. Interestingly, while the rationales of the seminal cases in this train of authority depended heavily upon the special needs of disputants in international trade,²⁷ ultimately the need to honor party autonomy emerged as the controlling concern; consequently, the benefits of liberalization have flowed to commercial arbitration in general.

Even without the help of Supreme Court authority directly on point, federal courts have added to the pro-arbitration case law edifice by, *e.g.*, refusing to entertain challenges to arbitrator's fitness to serve until after an award has been rendered²⁸ and, in some jurisdictions, by refusing to consider requests for

²⁴ *See, e.g., Casarotto* (1996) (Montana's first page notice of arbitration requirement preempted by FAA); *Terminix* (1995) (involving commerce predicate to FAA application intended to be broadly construed); *Perry* (1987) (state limitation on wage collection arbitration preempted by FAA).

²⁵ *See Volt*, 489 U.S. at 477-78.

²⁶ Section 2 of the FAA provides that arbitral agreements covered by Chapter 1 "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

²⁷ *See, e.g., Scherk* (1974).

²⁸ *See, e.g., Morelite Constr. Corp. v. New York City Dist. Council Carpenters*, 748 F.2d 79 (2d Cir. 1984)(no power to review pre-award partiality).

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interim relief affecting arbitration, reasoning that parties to an arbitration agreement have bargained for a lack of judicial intervention.²⁹

5.5.3 ACCOMMODATING INTERNATIONAL ARBITRATION AS PART OF A BROADER STATUTORY REFORM

Many arbitral venues are enhancing their attractiveness to international arbitration as a by-product of general statutory modernization.³⁰ Bulgaria, Canada (federal level and Quebec)³¹ Egypt,³² Germany, India, Mexico, New Zealand and Sweden, for example, have enacted (or soon will enact) the UNCITRAL Model Law in a form not confined to international disputes.³³ In the case of Germany, the new law applies even to non-commercial arbitration.³⁴

The English Arbitration Act, is applicable to commercial arbitration generally. The underlying Bill initially distinguished between domestic and non-domestic arbitration (allowing greater party autonomy as to the latter) but, in deference to

²⁹ See, e.g., *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. De Caro*, 577 F. Supp. 616, 624-25 (W.P. Mo. 1983)(court's role limited to enforcing agreements to arbitrate).

³⁰ See generally Sanders.

³¹ Sanders at 5; Paterson at 160-61.

³² M. Aboul-Enein, *Reflections on the New Egyptian Law on Arbitration*, 11 Arb. Int'l 75, 77(1995).

³³ Weigand at 399-401. F. Nariman, *India's New Arbitration Law*, 8(1) ICC Ct. of Arb. Bull. 37 (1997); J. Verma, *The Relationship Between the Courts and the Arbitral Process*, Paper presented by Chief Justice of India, Oct. 24, 1997 (IFCAI Conference, Geneva; on file with author); M. Richardson, *Arbitration Law Reform: The New Zealand Experience*, 12 Arb. Int'l 57, 60 (1996).

³⁴ Weigand at 400.

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European Law, the distinction was ultimately not implemented.³⁵ Accordingly, the more restrictive rules that would otherwise have governed domestic arbitration do not obtain.³⁶

³⁵ See Landau, at 161; Marriott at 35 (1997). The distinction was thought not tenable given Article 6 of the Treaty of Rome (Art. 7 Treaty of Union) which prohibits “any discrimination on grounds of nationality.”

³⁶ Landau at 161. Consequently, parties may enter into effective exclusion agreements (discussed below in § 5.6.1) *before* dispute arises whether or not the arbitration would have been considered domestic under the former statute; additionally, courts no longer have discretion in staying proceedings covered by a valid arbitration agreement, even if by the former standards the agreement contemplates a domestic arbitration. *Id.*

Additionally, for all arbitrations covered by the Act, only the tribunal is empowered to require security for costs of a party; there is no longer power in the courts to do so. The provision, found in § 38, in effect reverses the controversial House of Lords decision in *Coppée-Lavalin S.A. v. Ken-Ren Chem. & Fert., Ltd.*, [1995] 1 App. Cases 38. In *Ken-Ren*, the Law Lords in a 3:2 decision held that English courts may order security for costs in aid of a party to an international arbitration in which neither party is English, [1995] 1 App. Cas. 38 (H.L., appeal taken from England). On the side of the dissenters, one English authority commented:

[T]he Law Lords have placed a disincentive to parties to come to arbitration in England. Why should parties who come to England due to its neutrality, and local legal expertise be subject to the inconvenience, and sometimes idiosyncracies, of certain English procedures?

J. Lew, *A Question of Costs*, *Fin. Times*, June 28, 1994, at 14 (paraphrasing abridged, punctuation added). See also R. Coulson, *Security for Costs, Transnationalism and Institutional Arbitration in U.K.*, 9(3) *News & Notes Inst. Transnational Arb.* 1 (1994)(decision remarkable because “neither party [was] English, the arbitration clause specific[d] ICC rules and foreign substantive law, and the clause state[d] there shall be “no recourse to local courts”).

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5.5.4 SEPARATE REGIMES FOR INTERNATIONAL COMMERCIAL ARBITRATION

For lawmakers, the decision to not treat international arbitration separately often results from the sense that the distinction between international and domestic arbitration is difficult to implement textually, difficult to apply in practice and leads, undesirably, to the development of two bodies of law when as a matter of policy one should be adequate.³⁷ Nonetheless, a number of states have opted for discrete treatment of international arbitration in keeping with the Model Law's original premise. States representing the common law,³⁸ the civil law³⁹ and a blend of traditions⁴⁰ have used the Model for this purpose. In Mexico, the Model law has been used to consolidate what were previously separate regimes for international and domestic arbitrations.⁴¹ In certain other countries, modern enactments treat domestic arbitration and international arbitra-

³⁷ Weigand at 399-400.

³⁸ These include, *e.g.*: Bermuda, Bermuda International Conciliation and Arbitration Act 1993, *reprinted in* ICCA Handbook, Vol. I; British Columbia, International Commercial Arbitration Act, S.B.C. 1986 Ch. 14, *reprinted in* ICCA Handbook, Vol. 1; Hong Kong (R. Morgan, *The Arbitration Act 1996 and Arbitration Law Reform in Hong Kong and Singapore: A Brave New World?*, [1997] Arb. Disp. Res. L.J. 177); Nigeria, (Sanders at 5); and Singapore (Morgan, *supra*, at 177).

³⁹ *E.g.*, Tunisia. *See* Code of Arbitration Ch. III (eff. 27 October 1993), *reprinted in* ICCA Handbook, Vol. IV.

⁴⁰ *E.g.*, Scotland. *See* W. Semple, *The UNCITRAL Model Law is Enacted in Scotland*, LCIA Briefing Note No. 5, April 1991, at 5 (discussing § 66 and Sched. 7 of Law Reform (Scotland) Act 1990) *excerpted in* ICCA Handbook, Vol. IV.

⁴¹ J. Siqueiros, *Mexican Arbitration—the New Statute*, 30 Tex. Int'l L. J. 227, 230-31 (1995).

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tion in separate acts or chapters, both of which have been influenced by the Model Law.⁴² In some cases, however, these otherwise separate parts refer to each other for supplementation, a technique which at least one expert cautions against.⁴³

5.6 Elements Freeing Awards From Situs Influence

5.6.1 NARROWED RECOURSE AGAINST AWARDS BY STATUTE AND EXPANDED PARTY AUTONOMY

Various statutory formulae contemplate lessened review for awards produced in an international proceeding. For example, for over a decade, disputants with no connection to Belgium have been promised relative award finality. According to the Belgian Judicial Code as amended in March 1985, “[t]he courts of Belgium may be seized of a request for annulment only if at least one of the parties to the dispute decided by the arbitral award is either a physical person having Belgian nationality or residence, or a legal entity created in Belgium or having a branch or any other establishment in Belgium.”⁴⁴ In

⁴² *E.g.*, British Columbia. *See* Paterson at 161.

⁴³ Sanders at 6-7. The FAA presently employs similar cross-incorporation.

⁴⁴ Belgian Code *Judiciare*, Art. 1717, ‘Law Relating to the Annulment of Arbitral Awards’ (enacted March 27, 1985). *See* Berger at 636-37. The aim, of course, is to encourage selection of Belgium as a neutral situs, leading Paulsson soon after to comment: “Belgium has now instantly emerged as a major contender in the arbitration venue sweepstakes, and has overtaken everyone in its efforts to please those who want arbitration without court interference.” *Unbound In*

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some jurisdictions, the parties may limit judicial review of the final award by agreement.⁴⁵ Since 1979, the arbitration laws of England have exemplified this approach. Under the 1979 Act parties could curtail court review of an award, subject to certain qualifications, by entering into an 'exclusion agreement,' a policy continued and edified under the 1996 Act.⁴⁶ Further examples are provided by such important venues as France⁴⁷ and Switzerland.⁴⁸

Belgium, supra note 18 at 68.

⁴⁵ See generally Berger, INTERNATIONAL ARBITRATION 709-12, 724-25 (table of jurisdictions).

⁴⁶ Under the 1979 Act, only 'non-domestic' arbitration agreements could contain exclusion agreements reached *before* the dispute arose. Valid exclusion agreements ordinarily precluded the exercise of certain supervisory functions by English courts. See Mustill & Boyd at 373-74, 631-37. Under the 1996 Act as implemented, the domestic/non-domestic distinction no longer applies. Otherwise valid exclusion agreements will be given effect generally. See note 36 *supra* and authorities cited therein. Notwithstanding a valid exclusion agreement, an award may be set aside if there has occurred a "serious irregularity affecting the tribunal, the proceedings, or the award" but only "if the court finds that it would be inappropriate to remit the matters in question to the tribunal for reconsideration." Arbitration Act 1996 § 68(1),(3). The serious irregularity provision is meant to apply only in extreme cases. To succeed the applicant must demonstrate an irregularity from among those on an exclusive list, and the court must be convinced that it will or has led to "substantial injustice." See *Saville Report* at 58-59.

In some jurisdictions, such as England and the United States, the parties may agree to forego a reasoned award, making judicial review for errors of fact or law difficult. In other jurisdictions, however, reasoned awards may be obligatory.

⁴⁷ The French Code of Civil Procedure provides in Article 1482 that the parties may "in the arbitration agreement, waive their right to appeal." French Civ. Proc. Code, Art. 1482. Under the same Article, appeal is precluded if the parties have empowered the arbitrator to act as *amiable compositeur*, unless the parties expressly

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The Model Law, arguably the emerging international standard, also demonstrates a tendency to limit substantive review of awards, even in the absence of some form of exclusion agreement.⁴⁹ The Model Law grounds for the setting aside and non-recognition of awards, borrowed from the New York Convention, are largely procedural, not unlike the prevailing American approach; tribunal misapplication or misdesignation of the applicable substantive law are not among the express bases upon which an award can be attacked.⁵⁰

Among the Model Law's innovations is that it unifies the grounds for setting aside and nonrecognition of awards. Thus,

retain the right to make an appeal. Article 1484, qualifies the ability to waive appeal, however, in respect of certain procedure-related complaints exclusively listed therein; the list while exclusive does include that "the arbitral tribunal violated a rule of public policy."

⁴⁸ See Blessing at 75-77, 88. Article 192(1) of the Swiss Statute provides in pertinent part:

[W]here none of the parties has its domicile, its habitual residence, or a business establishment in Switzerland, they may by an express statement in the arbitration agreement or by a subsequent agreement in writing, exclude all setting aside proceedings, or they may limit such proceedings to one or several of the grounds listed [elsewhere in the Act for setting aside awards].

⁴⁹ The Model Law does not authorize exclusion agreements.

⁵⁰ Courts, of course, retain latitude under the public policy heading provided in Article 34(2)(b)(ii)(setting aside) and Article 36(1)(b)(ii)-(non-recognition). Limitations upon subject-matter arbitrability within the *lex loci arbitri* may also be given effect. Additionally, local rules of construction could conceivably narrow the range of issues deemed submitted to the tribunal; awards would, therefore, more readily be ruled excessive and subject to setting aside on that basis, at least in part, under Article 36(1)(a)(iii). Restrictive domestic rules governing capacity to enter into arbitration clauses or other invalidating causes might also imperil an award under Article 34(2)(a)(i).

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“[b]y treating awards rendered in international commercial arbitration in a uniform manner irrespective of where they were made, the Model law draws a new demarcation line between ‘international’ and ‘non-international’ awards instead of the traditional line between ‘foreign’ and ‘domestic’ awards.”⁵¹ By setting forth as the common grounds the time-honored bases to be found in Article V of the New York Convention, the Model Law has ensured that awards will be subjected to tests already familiar to most courts.

5.6.2 UNPREDICTABLE DEFERENCE ABROAD TO THE CURIAL LAW AND TO SITUS COURT PRONOUNCEMENTS

Mandatory rules of the place of arbitration, *de facto*, have a territorial character; especially in the absence of treaty guidance, they are vindicated abroad only episodically. Usually, the physical situs of an international arbitration is not chosen for its connection to a party but for geographic and juristic suitability. In that setting, neither party may expect to enforce the award at the situs in the event enforcement is necessary; rather there will be a search for the resisting party’s assets and a corresponding proceeding where they are found. Whatever the curial law might have been, the courts of the state of enforcement may give it a muted effect, both because of the narrowness of the New York Convention grounds and, possibly, because of a “homing instinct” that relegates

⁵¹ *Explanatory Note* at para. 46. Accordingly, under the Model Law, an international award (the only kind covered by the Law) can be set aside or refused recognition only if the grounds borrowed from Article V of the New York Convention have been established.

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restrictions of the situs to a secondary status. The courts of the United States, for example, in those cases in which foreign law has been invoked, generally have been unmoved by assertions that an arbitral agreement or award was not fully in keeping with the requirements of the place of arbitration.⁵² U.S. courts have been particularly willing to deemphasize the *lex loci arbitri* if to do so helped vindicate the prevailing pro-

⁵² American courts have invoked a supposed international standard to avoid giving undue effect to foreign law in the enforcement of agreements covered by the New York Convention, Article II (3) of which allows a court to decline enforcement when the agreement to arbitrate is “null and void, inoperative or incapable of being performed.” Thus, in *Rhone Mediterranee Compagnia v. Lauro*, 712 F.2d 50 (3d Cir. 1983), the party resisting arbitration relied on Italian law, alleging that an arbitration clause calling for an even number of arbitrators and an Italian situs was null and void. Noting the absence in Article II of guidance as to the applicable law, the court concluded that the policies behind it were best implemented by not deferring to parochial rules. 712 F.2d at 53-54. It concluded that since “[t]he rule of one state as to the required number of arbitrators does not implicate the fundamental concerns of either the international system or forum, the agreement is not void.” *Id.* at 54.

Similarly, in *Meadows Indem. Co. v. Baccala & Shoop Ins. Servs., Inc. et al.*, 760 F. Supp. 1036 (E.D.N.Y. 1991), the district addressed whether subject matter arbitrability under the Convention should be judged by the law of the place where enforcement is likely to be sought. It was argued that enforcement of the clause should be declined because the law of Guernsey purportedly deemed fraud to be non-arbitrable subject matter. The court declined to be influenced by the law of only one country. Not unlike the *Rhone* court, it reasoned that the Article II(1) determination “must be made on an international scale, with reference to the laws of the countries party to the Convention.” *Id.* at 1042. The court noted that fraud claims are arbitrable under American law, and the party resisting arbitration had failed to establish that Guernsey’s law represented the international standard. *Id.* at 1043. The court did not explain, however, why American law should be assumed to represent the international standard.

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arbitration, pro-enforcement bias evident in the modern cases.⁵³ At least one U.S. court has held, for example, that an award may be enforced under the Convention though it was not subject to any national law⁵⁴ relying in part upon a Dutch decision⁵⁵ and distinguishing an English one.⁵⁶ It observed that “allowing the parties to untether themselves from a pre-existing ‘national law’ still leaves certain safeguards in place to guard against an otherwise unfair arbitration award.”⁵⁷

Perhaps more stunning is a recent district court decision enforcing an award that had been affirmatively set aside by an Egyptian court. *Matter of Chromalloy Aeroservices v. Arab*

⁵³ Cf. *Al Haddad Bros*, *infra* note 57 (foreign law relied upon if helpful to enforcement).

⁵⁴ *Ministry of Defense of Iran v. Gould, Inc.*, 887 F.2d. 1357 (9th Cir. 1989).

⁵⁵ *Societe Europeen D' Etudes et D' Enterprises v. Socialist Fed. Rep. of Yugoslavia*, HR (Hoge Raad der Nederlanden) NJ 74, 361 (1974).

⁵⁶ *Dallal v. Bank Mellat*, 1 All E.R. 239 (Q.B. 1986).

⁵⁷ 887 F.2d at 1365. The dictum and implications of *Gould* stand in marked contrast to the traditional and still-in-effect English position, typified by the *Saville Report* at para. 27: “English law does not at present recognize the concept of an arbitration which has no seat, and we do not recommend that it should do so.”

Despite *Gould's* deemphasis of Dutch law, U.S. courts sometimes invoke the law of the situs in support of enforcement, suggesting that the prevailing pro-enforcement bias is more determinative of U.S. courts' analysis than any coherent theory addressing the role of the *lex arbitri*. See, e.g., *Al Haddad Bros. Enterprises v. M/S Agapi*, 635 F. Supp. 205 (D. Del. 1986), *aff'd*, 813 F.2d 396 (3d Cir. 1987) (English award by claimant's appointed arbitrator turned umpire enforceable despite Article V(1)(d) of the Convention and provision in the parties' agreement calling for three arbitrators, given that default appointment procedure was lawful under English law).

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Republic of Egypt,⁵⁸ arose out of a military procurement contract. The arbitration in question took place in Egypt; the award according to the court “was made in Egypt, under the laws of Egypt and [was] nullified by the court designated [for that function].”⁵⁹ The court also conceded that the reviewing court was correct in determining that the tribunal had misapplied Egyptian law, *i.e.* “that the decision of the Court of Appeal at Cairo is proper under applicable Egyptian law.”⁶⁰ Nonetheless, noting the permissive phrasing of Article V of the Convention (it states “*may* refuse” not “*must* refuse”), the court reasoned that the Convention allows awards that would otherwise be enforced under the FAA to be confirmed though set aside by the courts at the place of arbitration. Because the grounds upon which the award was set aside amounted merely to a mistake of law, the award would not have been vacated in a U.S. court.⁶¹ The court characterized as “specious” Egypt’s reliance on the parties’ choice of both Egyptian law and Egypt as the situs.⁶² For the parties had also expressly bargained for a “final and binding” arbitration the result of which was not to “be made subject to any appeal or other recourse.”⁶³ The

⁵⁸ 939 F. Supp. 907 (D.D.C. 1996).

⁵⁹ 939 F. Supp. at 909.

⁶⁰ *Id.* at n.6.

⁶¹ *Id.* at 911.

⁶² *Id.* at 914.

⁶³ *Id.* at 914 (quoting contract).

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decision, which has attracted negative comment,⁶⁴ has not been appealed.

5.6.3 VOLUNTARY COMPLIANCE

Mandatory rules of situs are unlikely to have an effect unless invoked by a party in attacking the award, either at the situs or latter when the award is presented for enforcement. If certain reports are to be credited, parties voluntarily comply with awards in the majority of cases. This capitulation presumably has prevailed even in cases in which rules of the situs have been transgressed. Whether this has occurred due to satisfaction with the process or merely to avoid further costs, the by-product is a diminished role for rules that might have been treated as imperative within the courts of the situs.

5.7 The Proceedings—Lex Arbitri Unification Built Upon A Liberal Model

5.7.1 IN GENERAL

In a sense the shrinking access to appeal and narrowing bases of attack upon awards is merely part of a broader evolution—one tending toward unification and liberalization. The

⁶⁴ See R. Hulbert, *Further Observations on Chromalloy: A Contract Misconstrued, a Law Misapplied, and an Opportunity Foregone*, paper presented to the Fourteenth Joint Colloquium on International Arbitration, Nov. 21, 1997, (Washington, D.C) (on file with author).

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hallmarks of this process have been a reduction in the number and rigor of mandatory rules and a corresponding increase in the autonomy given to the parties. Modern statutes, in many cases influenced by the Model Law, endeavor to strictly limit opportunities for judicial interference with the arbitral process. The Model Law itself devotes Article 5 to the admonition: “In matters governed by this Law, no court shall intervene except where so provided in this law.”⁶⁵ The Model’s specific provisions detailing local court interaction with arbitration, on balance, establish a supportive role for the judiciary.⁶⁶ Generally, courts are not to be the first resort where a party has a complaint about an arbitrator or his or her interim rulings.⁶⁷

⁶⁵ The provision is designed in part to assure the reader—“especially foreign readers and users, who constitute the majority of potential users and may be viewed as the primary addressees of any special law on international commercial arbitration”—that there is no need to look outside the Model Law for other possible sources of judicial interference. *Explanatory Note* at para. 16; *cf.* Arbitration Act of 1996 (England); Part 1, § 1(c) (“in matters governed by this Part the court should not intervene except as provided by this Part”).

⁶⁶ For example, when other mechanisms for appointment or replacement of arbitrators have broken down, a court designated under the law may appoint arbitrators. Model Law, Arts. 11 and 14. Moreover, the appointment or replacement, once made, is not subject to further appeal. *Id.* at Arts. 11(5) and 14(1). *See also id.*, Article 13 (challenge procedures follow the same pattern).

⁶⁷ Direct access to the courts is allowed, however, to pursue interim measures of protection, a provision which is generally regarded as complementary to the arbitral process. Some, however, rightly regard certain kinds of intervention as undesirable. Concerning court-mandated security for costs, see *supra* note 36 (noting *Ken-Ren* and response thereto in the 1996 Act).

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5.7.2 DELIBERATE REDUCTIONS IN MANDATORY RULES

The waning influence of the situs in international arbitration is also reflected in the decreasing numbers of mandatory rules within the various national laws of arbitration and the corresponding ability of the parties to shape the proceedings at will.

The Model Law's *travaux* suggests that such liberality was deemed essential from the outset. During the formative stages of the Model Law project, the UNCITRAL Secretariat recommended that especial account be taken of oft-heard criticisms leveled against international commercial arbitration.⁶⁸ The catalog of complaints included unwelcomed supervision and control by courts of the situs, especially in relation to the merits of the case,⁶⁹ and mandatory restrictions on: the submission of future disputes to arbitration, the appointment of arbitrators, *kompetenz-kompetenz*, arbitral powers to fashion the proceedings in light of the parties' wishes and choice of law analysis affecting substance and procedure.⁷⁰ True to that early vision, the Model Law's mandatory provisions are neither comprehensive nor invasive.⁷¹ The same tendency is seen in recent enactments not fully based on the Model Law.

⁶⁸ *First Secretariat Note: Possible Features of a Model Law A/CN.9/207* (14 May 1981), excerpted in Holtzmann & Neuhaus at 1193.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ See Holtzmann & Neuhaus at 583, suggesting that the following Articles or parts thereof are mandatory: 18 (party equality); 23(1) (statements of claim and defense); 24(2)-(3) (notice of hearings and meetings and related matters); 27 (court assistance in taking evidence at request of party or tribunal); 30(2); 31(1),(3),(4) (award formalities); 32 (termination of proceedings) and 33(1)(a),(2),(4),(5) (post-award correction; additional awards).

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Under the English Act 1996, for instance, most provisions may be varied by agreement.⁷² As one commentary explains:

It is fundamental to the whole approach of the Act that, so far as is consistent with the requirements of public policy, parties to arbitration agreements should have the maximum possible freedom to choose how their tribunals are to be structured, how their cases are to be run, what their awards are to contain, and so on. Therefore, most of the Act's provisions are non-mandatory.... The mandatory provisions, which must apply whatever the parties may choose to agree, have been kept to a minimum.⁷³

The 1987 Swiss enactment, seems similarly bereft of obligatory provisions. Section 182 (1) of that Law allows the parties to determine the arbitral procedure and to submit the arbitration "to a procedural law of their choice." The only apparent limitation is found in Section 182(3) which requires the tribunal, whatever the chosen procedural law or rules, to "assure equal treatment of the parties and the right of the parties to be heard in an adversarial procedure."⁷⁴

⁷² The English Arbitration Act of 1996 lists, in a 21-entry schedule attached to the Act, the Act's mandatory provisions.

⁷³ Harris, *et al.* at 5. The dominion given to the parties seems so broad that, in theory a Canadian claimant and a Mexican respondent arbitrating in London could under the 1996 Act agree that their arbitration was to proceed according to the international arbitration law of California. In such a case, the curial law would be that of California (an UNCITRAL-based system) subject to the limited mandatory provisions to be found in the Act.

⁷⁴ Blessing at 85. Dr. Blessing notes that Section 182 was much debated; ultimately a default rule referring to local procedural law in the absence of an affirmative designation by the arbitrators or parties was omitted. *Id.* at 47.

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5.8 Party Autonomy, Standard Rules and the Customized Situs

5.8.1 UNIFICATION THROUGH STANDARD RULES

To the extent wide party autonomy prevails at the situs, the standard formulations authored by the various administering or advisory institutions become an important source of rules specific to the disputing parties. These rules guide the proceedings to a great extent whether the parties are in London, New York or Paris. While national arbitration laws have evolved, so have the various rule formulations. Increasingly, the leading rules adopt a unified conception of international arbitration; open and shameless borrowing and cross-fertilization among sponsoring institutions have conduced to a corpus of common approaches, or at least to a collection of well known alternatives. The increasing unity of approach, when combined with the continuing subsidence of imperative arbitration law, will lead quite naturally to proceedings free of national markings.⁷⁵

5.8.2 CHOICE OF ARBITRATORS, COUNSEL AND LANGUAGE

Much of the utility and desirability of international arbitration would be lost if parties were required to employ only counsel, and appoint only arbitrators, licensed at the situs of arbitration.

⁷⁵ Hence, it is increasingly apt to be true that hypothetical ICC arbitrations in Vancouver, New York and London (involving the same hypothetical dispute, lawyers and parties) will greatly resemble each other.

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Fortunately, the prevailing position among leading arbitration host states is that the parties may appoint whomever they wish to represent them⁷⁶ in arbitration and may compose the tribunal with similar flexibility. When added to the parties' ability to select the language or languages of the arbitration and structure the proceedings largely at will, this accommodation allows the parties to surround themselves with the familiar, though arbitrating far from home.

5.9 The Place's Geographical Dimension: Tribunal Powers To Limit Physical Inconvenience

Rules and statutes often give an arbitral tribunal the power to convene hearings, inspections and deliberations away from the arbitration's official seat. Choice of situs therefore does not modernly imply a territorial circumscription *per se*, although an arbitration which carries on proceedings wholly outside of the arbitration's putative situs may encounter an identity crisis of sorts, one which may affect access to the courts of the situs and the resulting award's nationality for enforcement purposes.⁷⁷ The next chapter returns to this point while pursuing the impact of technology on both the physical and the jurisprudential aspects of arbitral situs.

⁷⁶ *But see* discussion at Chapter 11 (§ 11.20).

⁷⁷ *Cf.* Blessing at 22 (contrasting the more liberal Swiss position with the German one, as of 1988).

Chapter 6

ARBITRAL METHOD AND TECHNOLOGICAL ADVANCEMENT

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- 6.2 On-Line Dispute Resolution—The Present**
- 6.3 Legal Culture Meets Technological Culture**
- 6.4 The Traditional Model and the 21st Century—The Need to Anticipate**
- 6.5 Technology and Arbitration—The Emerging New Paradigm (The S and D Arbitration Revisited).**

6.1 Introduction

Arbitration in the next century will be greatly influenced by technological advancement. The 1990s have already ushered in telecommunication modes that have affected the professions in subtle and dramatic ways. FAX and e-mail have added speed, spontaneity and economy to business correspondence. Data storage and retrieval systems offer unprecedented access to information, which in conjunction with existing global networks, offer virtually limitless possibilities for distributing data. With these new ways of gathering and dispensing information have come new issues of security, privacy and authentication. Lawyers and business persons increasingly are being introduced to encryption techniques and nomenclature previously reserved for spy novel enthusiasts.¹

¹ Encryption is the putting of a message into code. *See generally* Baker.

6.2 On-Line Dispute Resolution—The Present

An intriguing glimpse of the near future is provided by a recent AAA initiative. Created in late-1995, the Virtual Magistrate Project contemplates the resolution of disputes by reference to a panel of arbitrators who, on an expedited basis, settle disputes arising on global networks from on-line communications, postings and files.² The AAA's fully on-line administration of the proceedings will use the World Wide Web as a "gateway."³ Thus, for instance, if party A in an on-line posting maligns party B's products, party B may (if party A has agreed) submit a claim to a panel member of the Project with expertise in trade libel and on-line operations. The complaint is submitted by computer and the award will ordinarily be communicated by e-mail or similar means. The award could, for example, instruct A to cease any inaccurate commentary found to exist and perhaps to post a correction. The system operator in turn would be expected to take such measures as are recommended by the arbitrator to help the parties implement the award.⁴ During the course of the

² See generally G. Friedman, *Alternative Dispute Resolution and the Emerging Online Technologies: Challenges and Opportunities*, 19 *Hast. Comm. & Ent. L. J.* 695 (1997). The Project is a venture shared among the Cyberspace Law Institute, the Villanova Center for Information Law and Policy and the American Arbitration Association. *Id.* at 701. It was formally inaugurated on March 4, 1996. *Id.*

³ *Id.*

⁴ The Project's first case, *Tierney v. America On-line*, was prompted by an AOL subscriber's request that an allegedly deceptive adver-

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proceedings, none of the central players will have convened in the same physical place.⁵

In a similar vein, the World Intellectual Property Organization (WIPO) will soon inaugurate a regime devoted to the resolution of domain name disputes.⁶ The system would operate in conjunction with a domain name registration scheme and the disputes would be decided by a WIPO panel member in a summary fashion, using on-line proceedings.⁷

tisement be removed as an AOL posting. The award was rendered, *ex parte*, within four days from submission. AOL was instructed to remove the posting, which instruction it followed. *Id.* at 705.

⁵ The brief introduction offered in this paragraph does not convey many details of importance. The long-term potential for conducting international commercial arbitration based on a model similar to the Virtual Magistrate is apparent. Conventional modes of analysis, however, may require substantial retooling. Consider, for example, questions of applicable law. *See Note, Conflicts on the Net: Choice of Law in Transnational Cyberspace*, 29 *Vand. J. Transnat'l L.* 75 (1996).

⁶ A domain name is an identification, functioning not unlike an address, that enables one computer to access another. The domain name of particular enterprises naturally takes on utility as an identifier of goods and services, yet, as with trade marks and service marks there is potential for duplication and confusion when similar or identical names are chosen by multiple concerns. Consider for instance the example given at a recent conference hosted by WIPO: the domain name "SBC.com." Conceivably, the Swiss Bank Corporation, Southern Bell Corporation and the Swiss Broadcasting Corporation might each adopt, or wish to adopt the "SBC" formulation. Presentation of Chris Gibson, Esq., Senior Legal Advisor, WIPO, Geneva Conference, *infra* note 7.

⁷ Presentation by Francis Gurry, Director WIPO Arbitration and Mediation Center, at Biennial Conference of the International Federation of Commercial Arbitration Institutions (IFCAI), Geneva, October 24, 1997; *see also* C. Gibson, *Arbitration in Intellectual Property Disputes*, 8(1) *Cal. Int'l Practitioner* 2, 9 (1997).

6.3 Legal Culture Meets Technological Culture

It takes little imagination to conceive of myriad ways in which arbitral proceedings may be altered by seemingly commonplace technology. Yet, the supplanting of traditional arbitral procedures, while inevitable, will not occur overnight, for at least two reasons. First, the practice world embraces two to three generations of specialists. While the emerging generation of lawyers may demonstrate predictable affinity for on-line operations, the same cannot be said about advocates and arbitrators at every level of seniority; doubtless, many distinguished arbitrators remain perfectly comfortable to proceed, at least to some extent, in the manner in which they have proceeded for decades. Second, lawyers, including those forming the arbitration elite, are—by and large—a conservative lot who favor convention and proven methods.

Technical problems large and small may also discourage the adoption of the most current methods. Consider, for example, the party who supposes that he may file his demand for arbitration or a prehearing memorandum by supplying the relevant document in disk form.⁸ After all, is it not true that the tribunal and opposing party need only insert the disk in any computer-printer combination to print the document? In fact, despite great strides in systems compatibility, it cannot be assumed in the international context that a disk prepared on America's most popular software can be easily read or printed

⁸ *Cf. Yukiyo, Ltd. v. Shiro Watanabe*, 111 F.3d. 883 (Fed. Cir. 1997) (an apparent case of first impression in which a party filed a brief in CD-ROM form).

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by the equipment available to one's counterpart or the tribunal. Nor is every arbitrator willing or able to perform even the rudimentary reformatting necessary to achieve a hardcopy.

Moreover, it may be debatable under the governing rules whether providing a disk even in a compatible format would satisfy the requirement that, for example, statements of claim and defense be "in writing."⁹ In certain settings, of course, this may call into question a party's compliance with time limits set by the governing rules or the tribunal. Certainly, by explicit agreement or an appropriate rule coverage¹⁰ the parties can settle the matter; absent that clarification, however, controversy may ensue.

The use of video-conferencing is another example of a technology which, while taken for granted by some, will nonetheless be slow to gain universal acceptance within arbitration. Though ostensibly there is great appeal to any mechanism that curtails travel costs and time consumption on the parts of parties, their counsel and the arbitrators, its use might be resisted (even assuming that such technology were

⁹ See, e.g., the UNCITRAL Rules (1976), Art. 18 ("within a period of time to be determined by the tribunal, the claimant shall communicate his statement of claim in writing...").

¹⁰ The AAA International Rules provide at Article 18 (1), for example: Unless otherwise agreed by the parties or ordered by the tribunal, all notices, statements and written communications may be served on a party by air mail, air courier, facsimile transmission, telex, telegram or other written forms of electronic communication addressed to the party or its representative at its last known address or by personal service. *Accord* LCIA Rules (effective January 1, 1998), Art. 4.1 ("...shall be delivered by ... or transmitted by facsimile, telex, e-mail or any other means of telecommunications that provide a record of its transmission").

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available to all involved).¹¹ Several concerns arise. First, the lack of on-site tribunal supervision inherent in video conferencing may encourage misconduct; how, for example, does one enforce witness sequestration or prevent witness coaching during a video hearing? Second, there will be additional intricacies involved; in light of the misunderstandings that can already easily occur, it will ordinarily be prudent for the tribunal to formulate and publish—perhaps at the prehearing conference—detailed rules for conducting the video conference. The required further tribunal work may counsel against forgoing the traditional hearing.

Third, advocates and arbitrators sometimes also express concern about the quality of interaction available through video proceedings. Non-verbal cues account for much human communication. Video formats mute or eliminate much of this information, making some advocates and arbitrators highly uncomfortable. These dynamics also would affect the deliberation process undertaken by tribunal members *inter se* in the event live video exchanges are substituted for the traditional mustering of arbitrators. Apart from communications among counsel and tribunal members, there is the testimony of witnesses to consider. Arguably, many of the elements affected by use of video are important in accurately assessing demeanor. The comportment of the parties themselves would be similarly difficult to study through the camera's lens.

¹¹ *Cf. Yukiyo*, 111 F.3d at 886 (motion to strike CD-Rom pleading granted in part because opposing party would be required to procure additional computer equipment in order to view the brief).

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From the foregoing there may result a continuing preference for face-to-face hearings. Perhaps, the incremental approach to be anticipated over the next decade is use of video conferencing limited to preliminary meetings and the like.¹² Full video hearings, by contrast, will probably continue to be the exception in the near term; so presumably will be total reliance on conference-call or video deliberations. In the longer term, however, on-line and other technology-assisted proceedings are likely to become commonplace. The next section explores the new paradigm.

6.4 The Traditional Model and the 21st Century—The Need to Anticipate

6.4.1 BASIC FACTS—THE S AND D DISTRIBUTION AGREEMENT

The year is 2000. A dispute arising from a distribution agreement between Supplier (S) and Distributor (D) has led to arbitration per the following further facts.

S is incorporated in Delaware. Members of its management team live respectively in Palo Alto, California, Honolulu, Hawaii, New Orleans, Louisiana and Seattle Washington. S's

¹² In an arbitration administered by ICSID in which the sole arbitrator presided from Sydney, the tribunal's secretary (an ICSID staff lawyer) participated in the proceedings from Washington, D.C. via satellite-assisted video link. The secretary could see, and was seen by, the others in attendance. The necessary equipment was made available through the good offices of the World Bank and an Australian court. Phone conversation with Antonio Para, ICSID legal staff, Feb. 6, 1998.

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monthly physical meetings of management alternate hotel venues among the four cities mentioned above. During the interim, the team members interact electronically.

S was attracted to D in late 1998 by D's web site, which S's management "visited" in trying to identify European outlets with sufficient substance to offer prestige, sales know-how and technical services to the target market (large multinational corporations). D is an English company notionally headquartered in London, but, like S, is managed as a virtual enterprise;¹³ management rarely convenes together physically.

The product in question is based upon patented software designed to perform myriad bookkeeping and inventory control tasks. Specifically, it is intended to solve problems caused by multiple European currencies and the introduction of the Euro.¹⁴ It also addresses in an effective way date and programming irregularities caused within computers by the year 2000.¹⁵ It can be delivered on-line, though occasionally on-site debugging is required.

¹³ The "virtual office" concept has already been adopted by many enterprises, albeit to varying degrees. *See generally* S. Hennink, *Working it Out*, *Holland Herald*, Oct. 1997, at 69 (describing various formats and the emerging American practice of setting up "hotel offices").

¹⁴ Cf. European Commission, *EMU and the Euro: How Enterprises Could Approach the Changeover* (1997) (booklet).

¹⁵ The problem is that most software is written using two digits (instead of four) and is thus unable to distinguish the year 2000 from the year 1900. *See* H. Gutman, *The Year 2000 Date Change*, paper presented Dec. 4, 1997 at Seminar on Computer Law, Seattle, WA (on file with the author). One study suggests that it could cost \$600 billion to remedy the pervasive problem. *Id.* at 1.

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S and D are both relatively young companies; neither is publicly traded, but both have aspirations that include an eventual on-line offering of shares.¹⁶

In preparing to negotiate, each downloaded from the other's site various promotional documents. As negotiations progressed, other, confidential exchanges were made by encrypted e-mail. To enhance the personal aspect to the budding relationship, the final stages of the contract discussions occurred by a live video conference (none of the principals traveled away from their virtual offices); the final details were refined through e-mail exchanges and internet-assisted "real-time" phone calls between the two management teams.¹⁷ In the interest of keeping costs minimal, neither had legal advice during the negotiation and closing of the deal.¹⁸ During negotiations, applicable law and dispute resolution were not discussed and no documentation surrounding the agreement deals with those issues. The contract is evidenced only by a synoptic e-mail printout, authored by D, but bearing no handwritten signature.

¹⁶ Cf., e.g., R. Hudson, *British Start-up to Trade Stocks on the Internet*, Wall St. J., Feb. 3, 1995, at A7A (planned creation of stock exchange on the Internet).

¹⁷ See Chasia at 2 ("[A]dvances in technology are making it possible for subscribers equipped with ordinary handsets connected to the public switched telephone network, to make long distance calls to each other via the Internet . . . for a fraction of the price of a traditional phone call").

¹⁸ One by-product of the enabling power of on-line commerce for small, novice companies is market entry undertaken on the thinnest of funding and with no appreciation for the domestic law, and *a fortiori*, the foreign law implications of instant global market reach. This was a recurrent theme among the presenters at the Seattle Computer Law Seminar, *supra* note 15.

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Part of the software package made available to D was secret know-how developed by S but not covered by its patent.

6.4.2 THE DISPUTE

D now seeks several million pounds in compensation for damages which it alleges will result from S's breach of the distribution agreement. It is common ground that six months after formation of the S-D agreement, S forged a similar pact with another European concern to distribute what it refers to as the "Generation II Program." D contends that it alone is entitled to distribute the latter program. S in turn maintains that Generation II is a different product from that covered by the S-D agreement.¹⁹

S wishes to resolve the matter as quickly as possible, aware that its competition is rapidly developing rival software, which it may not be able to block using its patent.²⁰ S speculates that the competitor may have benefitted from discovering certain of S's know how via unauthorized access, promoted, S believes, by D's willful or negligent failure to observe reasonable security measures. Like S, D has much to gain from a speedy determination of rights and duties.

¹⁹ Another common form of dispute is somewhat the reverse of that portrayed here; a licensee develops a product that is similar to that licensed and asserts the right to market it free of royalty obligations. The licensor, of course, contends that royalties are still payable because the product derives directly or indirectly from the licensed material.

²⁰ Under current law, not all aspects of the software are protected, in all relevant countries, by a copyright or a patent.

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6.4.3 THE ARBITRATION

The two sides have agreed to arbitrate. Their submission agreement (negotiated by e-mail exchanges) authorizes a three-person tribunal²¹ to conduct the proceeding as an *ad hoc*, “fast-track” arbitration under the UNCITRAL Rules and to employ (and to allow to be employed) existing time and money-saving technology.

After an internet-assisted conference call, serving as a first pre-hearing meeting, the tribunal issued an electronic procedural order, which authorized each side to conduct limited discovery including video depositions of each other and of certain non-parties, to be taken under an oath administered from afar by the presiding arbitrator.²²

Simultaneous pleadings were exchanged by CD-ROM. Each tribunal member received a copy.²³ After the tribunal had

²¹ D appointed a commercial QC with a background in computers; S appointed a litigation partner at a major California law firm. The two party-appointed arbitrators appointed a Canadian law professor, based in Toronto, to preside as third arbitrator.

²² The use of sworn depositions was suggested by D’s representative, who called the tribunal’s attention to Section 38 (5) of the English Arbitration Act of 1996, which provides in pertinent part:

The tribunal may direct that a party or witness shall be examined on oath or affirmation, and may for that purpose administer any necessary oath or take any necessary affirmation.

The tribunal did not expressly conclude that the English Act governed the proceedings but said that it was “informed” by the above-referenced provision in conjunction with FAA § 7, which it regarded as conveying “a similar, complementary power.”

²³ The CD-ROM pleadings contained not only the text of the argument presented in traditional form, with references to supporting materials, but also a system of “hypertext.” The hypertext, which the arbitrators could access via the “hyper-links” in the basic text

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studied the parties' "written" submissions for two days,²⁴ a second preliminary meeting was held by digital telephone conference call; the tribunal's subsequent procedural order set the hearing schedule and was communicated by encrypted e-mail in French.²⁵ It limited each side to two, 5-hour, hearing days; days two and three were separated by a non-hearing day.

contained all supporting documents in full (statutes, cases and expert reports etc.) as well as complete copies of the video taped depositions authorized by the tribunal. *See Yukido*, 111 F.3d at 885.

²⁴ D contended that S violated the exclusivity understanding alleged to exist between the two concerns by distributing related technology through the distributor's competitor. S responded that any agreement reached between the two did not cover the "second generation" product supplied to the competitor. (S's expert, in her video affidavit, attempted to distinguish the two applications in question on various technical grounds). S also alleged that any contract between the two disputants would have come to an end in any case due to D's willful or negligent failure to protect S's secret know-how. S also alleged fraud in the inducement based on purported inaccuracies found in the distributor's web site. For good measure, S invoked the Statute of Frauds, asserted that the alleged contract was unenforceable under EU Competition Law and that D had violated the federal RICO statute.

D replied that, despite a lack of formality in the deal's documentation, the contract was enforceable, that any proliferation in the data resulted from S's failure to follow agreed upon e-mail encryption procedures and that the agreement was either not caught by Article 85(1) or would fall under a block exemption. For his part, D's expert maintained that the "second generation" software was fundamentally the same as that contemplated in the contract description.

²⁵ The order was drafted by the tribunal chair, who preferred on occasion to compose orders and draft awards in French. All concerned, however, have e-mail programs that translate messages sent in one language into one of three other languages. *See P. Elstrom, This E-Mail Manager is Multilingual*, *Bus. Week*, Sept. 8, 1997, at p. 130c.

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The hearing was conducted in a live video conference format in which neither the tribunal nor the parties traveled to a central venue. However, to facilitate the video hearing and greater spontaneity, uncharacteristically, the management team of each party congregated in person with their respective teams of counsel. D's group was in London; S's team was in California. The arbitrators participated from their respective studies. Each day of hearing began at 7:00 a.m. PST (4:00 p.m. London time) and ended at 1 p.m. PST (10 p.m. London time) including four 15-minute coffee breaks). The parties were allowed limited cross-examination of witnesses and both made use of text retrieval technology to show inconsistencies between deposition testimony and that offered at hearing.²⁶ Both sides employed during their oral presentations "air mouse" prompts to coordinate charts and other demonstrative evidence with the advocate's oral presentation and "laser pointers"²⁷ to direct the attention of the tribunal as needed. Both sides offered expert witness testimony, which had been prefigured by the expert reports contained in the parties' CD-ROM submissions. At set junctures during the hearing, the tribunal asked questions of the parties and witnesses.

When declaring the video hearing closed, the tribunal authorized each side to submit by encrypted e-mail a post-hearing memorial recapitulating their positions and addressing in particular specific governing law issues, the content of any

²⁶ Present retrieval systems use a pen-shaped scanner to activate by swiping a bar code in a "trial notebook" to conjure specific deposition text, a chart, document or picture, etc. McElhaney at 74.

²⁷ A laser pointer is the size of a fountain pen, is battery powered, and can place a bright red dot of light on a surface from across a room. McElhaney at 74.

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applicable trade usage and the quantum of damages to which D would be entitled in the event breach was established.

6.4.5 THE AWARD

Within the 14 day deadline established by the parties' submission agreement, the tribunal distributed its award by encrypted e-mail. The award came into being through digital phone deliberations²⁸ among the arbitrators, after which the presiding arbitrator dictated an initial draft using voice recognition word processing.²⁹ The award was in favor of D; it ordered S to pay D pounds sterling 1000,000 (one million) and certain of D's costs.

S sought to vacate the award in the federal district court for the northern district of California.³⁰ D presented the award

²⁸ Digital phones communicate using a non-analogue signal which at present cannot be intercepted by scanners or other eavesdropping devices. Conversation between the author and Bruce Bowman, representative C. Crane Company, on November 2, 1997.

²⁹ Voice recognition technology allows a computer to turn the spoken word into digital text. D. Beckman and D. Hirsch, *In Re Technology*, A.B.A. J., Nov. 1997, at 84.

³⁰ Personal jurisdiction over D, and subject matter jurisdiction over the dispute, would have to be established for the district court to proceed. Unless the submission agreement was construed to be an implied consent to jurisdiction, or the arbitration was deemed to have taken place in California, personal jurisdiction would require an analysis of D's contacts with California and the reasonableness of making D defend there. The fact that the dispute arguably arises out of D's contact with the state (albeit on-line contact) may lessen plaintiff's burden in establishing jurisdiction *in personam*. For a discussion of traditional analysis in relation to on-line operations, see Note, *Personal Jurisdiction and the World-Wide Web: Bits (and Bytes) of Minimum Contacts*, 23 Rutgers Comput. L. J. 143 (1997).

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for enforcement in a London court, invoking the statutory provisions implementing the New York Convention.³¹

6.5 Technology and Arbitration—The Emerging New Paradigm (The S and D Arbitration Revisited).

6.5.1 IN GENERAL

In general, technology outstrips quite appreciably the evolution of legal doctrine. The arbitration between S and D summarized above is designed to demonstrate the use of fast-approaching technologies and to some degree the pressure these advances will inevitably place upon the traditional model of international arbitration. The selected questions posed under the following two headings are by no means the only ones raised by the S and D scenario, to which an entire book could be devoted.

Subject matter jurisdiction would depend in part on whether the award was deemed to be a convention award or merely one governed by Chapter One of the FAA.

³¹ See Arbitration Act of 1996, §§ 100-103. Note that for purposes of the Act, a “New York Convention award” is one “made, in pursuance of an arbitration agreement, *in the territory of a state (other than the United Kingdom)* which is a party to the New York Convention.” *Id.* § 100(1) (emphasis added). Subsection 100 (2)(b) provides that “an award shall be treated as made at the seat of the arbitration regardless of where it was signed, dispatched or delivered to any of the parties.”

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6.5.2 WHERE IS THE SITUS OF ARBITRATION?

Traditional doctrine depends heavily upon the notion that an arbitration has a juridical seat. The “seat” or “situs” or “place” of arbitration is an essential anchor. It supplies the curial law (or at a minimum certain mandatory rules) and it ordinarily gives the award its national affiliation for purposes of administering the New York Convention’s recognition and enforcement obligations. Moreover, it is typically to the courts of the situs that one looks for assistance in furthering the arbitration. In the S and D arbitration, which state was the situs?

Under the UNCITRAL Rules, if the parties have not designated a situs, the tribunal is supposed to do so “having regard to the circumstances of the arbitration,”³² though no time parameters are imposed by the Rules.³³ Under the traditional conception, the designation of a place would suggest that certain of the arbitral proceedings would occur there. In

³² UNCITRAL Rules, Art. 16(1). The requirement is reenforced by Article 32 (4) which requires that the award “contain ...the place where the award is made” and by Article 16(4), which mandates that the award be “made at the place of arbitration.” The UNCITRAL Model Law, unlike the UNCITRAL Rules, introduces expressly the concept of the deemed situs, providing in Article 31(3) [in conjunction with Article 20(1)] that the award is *deemed* rendered at the place designated for the arbitral proceedings. The place of drafting or signing the award therefore is not controlling. The Model Law, however, does not provide for all purposes that a wholly deemed situs will suffice to place an arbitration within it’s ambit.

³³ Until the tribunal does so, the arbitration *ex hypothesi* carries no geographic or national affiliation—a floating arbitration.

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the case portrayed above, any situs chosen will be largely a “deemed” situs, designated primarily to supply a juridical seat. Given that, what state should be selected by the tribunal (assuming the parties have not identified one) and when should that designation occur? Traditional dogma, of course, makes no room for multiple seats and the chosen rules appear to preclude allowing the arbitration to float for its entire duration.

Perhaps the answer is to designate the presiding arbitrator’s habitual residence (Toronto, Ontario). Under the modern trend, this designation would not require him to have actually conducted a majority of the proceedings there,³⁴ but it would provide a territorial affiliation supported by an actual connection to the proceedings. It has the notional advantage of being both juridically and geographically neutral.³⁵ Alternatively, the tribunal might designate as the situs that New York Convention state connected to the proceedings having the least restrictive arbitration law.

The notion that a deemed situs (whether accomplished by the parties or the tribunal) may suffice when the arbitration has no clear center of gravity is consistent with the general trend toward deemphasizing situs importance developed in Chapter 5. Nonetheless, to remove from the traditional seat theory any

³⁴ Thus, the award, by virtue of its deemed situs, would be a Canadian award deserving of New York Convention treatment; the curial law would be that of Ontario, which is based upon the UNCITRAL Model Law. Would an Ontario court, however, consider itself the situs for purposes of assisting the proceedings?

³⁵ “Notional” in the sense that the parties would be influenced only indirectly by Ontario’s relative convenience and legal environment. For them, Canada’s adherence to the New York Convention is Ontario’s defining characteristic given that no resort was had to local courts.

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implication of physicality may stretch the existing paradigm beyond the limits envisioned by some law-makers.

Consider, for instance, the many national laws now based upon the UNCITRAL Model Law. Article 1 of that instrument provides that with some exceptions, the provisions of the Model apply “only if the place of arbitration is in the territory of this State.” Is this broad enough to include a deemed place designated, almost clerically, to facilitate a virtual arbitration?³⁶

And what of non-Model Law jurisdictions? Suppose for example, the S-D tribunal designated Geneva; should English courts characterize as “Swiss” the award presented by D? Further, would the courts of that or another deemed situs welcome petitions for interim measures, replacement of arbitrators, determinations of arbitral jurisdiction and the setting aside of the award? In the absence of more unifying influences than presently exist, courts are likely to treat such issues unpredictably, and in a manner that will vary from state to state.³⁷

³⁶ “In the territory” arguably suggests a geographic nexus.

³⁷ Doubtless, until a coherent doctrine of cyber-arbitration develops, judicial assistance to an arbitration having only deemed connection to the court in question will remain problematic. Distinct but equally engaging questions will arise before courts asked to enforce awards carrying a deemed territorial affiliation. In courts accustomed to the New York Convention’s territorial orientation (*see* art. I: “awards made in the territory of [another State]”) there may be a sense that a national designation unsupported by *any* physical nexus ought not to be honored. Other more liberal courts, such as those of the United States will accept the deemed affiliation, characterize the award as not “domestic” (*see id.*, art. I), or enforce it as a matter of comity, extra-conventionally. Complementary to the likely U.S.

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6.5.3 APPLICABLE LAW

The applicable curial law is a function of the *lex loci arbitri* and the parties' jointly expressed wishes (if any). The law governing the substance of the dispute depends, however, in the absence of party choice, upon the tribunal's own choice of law analysis. The diffuseness of virtual arbitration and the evasiveness of connecting factors in that setting may also challenge time-honored approaches. In the S and D arbitration, suppose the tribunal adopts as its choice of law guide the seller's-place rule, subject to any mandatory rules to be found at the places of performance. Such an approach would roughly assimilate both the Rome and Hague Conventions. In a world of virtual offices, however, where is the seller's place of business? In the minds of those imbued in technological culture, the answer is wherever the seller's computer is. In the case of S and D, both parties are juridical entities; so perhaps the simplest approach is to use seller's place of incorporation (Delaware) even though its real seat is no single place.³⁸

position (developed above in Chapter 5 (§ 5.6.2) is the Model Law's deemphasis upon award nationality. *See* Model Law, Art. 35(1) ("international" awards enforceable regardless of country in which made).

³⁸ If one changes the hypothetical, certain other connecting factors may become slippery. Suppose that the seller's product is the creation and implementation, on-line, of commercial web sites, a service she renders using a laptop unit from wherever convenience dictates. A tribunal might well consider in a breach of warranty dispute that the place of performance is an important factor in implementing a traditional proper law analysis. But, in this variation where is the place of performance? Arguably, somewhere in cyberspace. The stage is already set for this not-so-hypothetical situation. *Cf. West Group Will Make Your Law Firm Home Page*, A.B.A. J., Nov.

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6.5.4 THE TIME ZONE PROBLEM

When the parties are physically distant, as in the S and D arbitration, telecommunications advances do little to bridge the time zone disparity. Even under the facts as given, one team had to start relatively early and the other to stay relatively late. That was so even though an effort was made to limit the length of each hearing day. The problem would be exacerbated if S's team had convened in, for example, Honolulu.

A more clerical and perhaps easier question relates to which time zone should be used to judge compliance with deadlines set by the tribunal. If a respondent's reply is to be communicated by e-mail within thirty days of its receipt, is the deadline linked to the time at claimant's place or that at respondent's place or that relevant to the presiding arbitrator or perhaps, in lieu of the forgoing, that existing at some neutral mid-Atlantic place?

6.5.5 CONFIDENTIALITY REVISITED

The references in the D and S fact pattern to encryption and certain other unstated premises take for granted a cluster of significant cyberspace concerns which great minds continue to

1997, at 5. According to a West Group Internet Marketing Consultant, the web sights on offer may, after creation, be housed either in the West mainframe or transferred online to a remote host computer, presumably anywhere in the world. Telephone conversation with Mr. Al Fiene, West Group, November 4, 1997.

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study. The initiated debate the merits of “encryption,”³⁹ “fire walls,”⁴⁰ “anonymous remailers,”⁴¹ and “digital certificates.”⁴²

High-tech disputes in particular often require selective revelation of secret information that may be the basis of a competitive advantage; such information has commercial value because, but only to the extent that, it is secret. Issues of authentication also arise; when the parties communicate with each other and the tribunal, and when the tribunal issues orders and awards, some means of assuring integrity and genuineness will often be essential. Security issues trouble the business world in general and a detailed exploration is beyond the scope of this work. Suffice it to note that, given the rate at which

³⁹ One of the issues associated with encryption technology and its ready availability arises from national security concerns. Governments are presently attempting to develop suitable policies given the industrial need for powerful encryption and the countervailing desire to keep such cloaking capability out of the hands of criminals and enemies of state. *See Baker at 745-50* (discussing “lawful access” principle in OECD Cryptography Guidelines).

⁴⁰ A “fire wall,” is a measure that isolates certain data and systems (those to be protected) from other data and systems intended to be made available. *See C. Crumlish, THE INTERNET DICTIONARY 70 (1995); and see Howard at 249* (“... a set of software and hardware tools, programs and diagnostics that allow and organization to scan all incoming (and outgoing) messages to ensure that they are from authorized parties who have permission to use the system”).

⁴¹ Anonymous remailers (or untraceable mail services) are businesses that exist to promote confidentiality. They forward messages after taking measures to obscure the identification of the addressee and sender. *See Howard at 216-17.*

⁴² Digital certificates are software mechanisms that prove the user’s identity and hence his or her entitlement to enter into a particular transaction on-line. They are issues by a Certificate Authority (*e.g.*, a government agency). They are said to be an essential element in securing avenues for online commerce. *See Adams at 42.*

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developments occur, the “cutting-edge” technology being applied today to address these problems will be *passé* by the year 2000.⁴³

6.5.6 MATTERS OF FORM

Important questions of form also surface when traditional conceptions are applied to electronic interaction. When is an on-line arbitration agreement or award “in writing” as required by the New York Convention and myriad statutes? Is it a written award only when it is apprehended in a fixed medium? Similarly, what constitutes the requisite signature upon an electronic award?⁴⁴

⁴³ Howard at 216-19; Adams at 42.

⁴⁴ See Chapter 9 (§ 9.2.7). Article 31 (1) of the Model Law requires awards to be signed. *Accord* Article 48 of the ICSID Convention. Under the New York Convention (art. IV), the award recipient must present the “duly authenticated original award or a duly certified copy thereof.” Under American commercial law, “signature” has a broad meaning and ready accommodation of reasonable means of authentication will likely occur. *Cf* U.C.C. § 1-201(39) (“‘Signed’ includes any symbol executed or adopted by a party with present intention to authenticate a writing”).

Chapter 7

SELECTED FEATURES OF THE AMERICAN SYSTEM

Chapter Contents

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7.1 Introduction

When conducted in the United States, international commercial arbitration is influenced by several factors that the non-American lawyer may find unusual in concept or application. This chapter offers a brief survey of elements that are distinctive when viewed in comparative context. The selective coverage

Chapter 7: Selected Features of the American System

presented is designed to foreshadow the recommendations to be made in this work's final chapters.

7.2 The U.S. Constitution

The American legal regime affecting commercial arbitration is contoured by the U.S. Constitution in subtle and dramatic ways. Congress' power to regulate the majority of commercial arbitrations—its Commerce Power—derives from that document as does the limited jurisdiction of the federal courts.¹ Restrictions on the exercise of personal jurisdiction by American courts also emanate from the Constitution's Due Process Clauses.² Notions developed under those same clauses guide courts in performing their occasional and limited review of domestic and foreign arbitral awards. In addition, the U.S. Constitution provides part of the framework within which the sometimes uncertain relationship between state and federal law is reconciled, a topic dealt with in the following section.

¹ U.S. Const. art. III, § 2, cl. 1.

² The Fifth Amendment, which is directed towards the federal government, provides in pertinent part: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . ." U.S. Const. amend. V.

In parallel phrasing, the Fourteenth Amendment guarantees due process in relation to *state* activities. The modern approach to testing due process in the exercise of personal jurisdiction derives from *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), in which the Supreme Court enunciated the "minimum contacts" test. *Id.* at 319. This test focuses primarily on the defendant's connection with plaintiff's chosen forum to determine if it is fair to the defendant and reasonable to proceed. *See generally* Born & Westin, ch. 2.

7.3 American Federalism: The FAA, Intra-State Choice of Law, *Volt* and Limited Preemption

In the United States, state and federal courts co-exist and enjoy concurrent jurisdiction as to many matters affecting international commercial arbitration; arbitral agreements and awards can be enforced in both systems, and remedies designed to protect the rights of an arbitrating party can, in general, be pursued in either one. Co-existing federal and state laws (both statutory and decisional) have necessitated internal rules designed to determine choice and priority of laws. To summarize the essential maxims: preemptive federal law applies in state and federal courts;³ but state courts may apply state law in the absence of controlling federal law. For procedural law, federal courts apply the Federal Rules of Civil and Appellate Procedure, regardless of the branch of subject matter jurisdiction that obtains.⁴ Under the *Erie* doctrine,⁵ however, when

³ U.S. Const. art. VI, § 2 provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Congress must act pursuant to a constitutionally enumerated power, the most embracive of which is that contained in Article I, Section 8, Clause 2 authorizing it “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”

⁴ 28 U.S.C. § 1332 (1988). Section 1332 implements the subject matter jurisdictional base established in Article III of the Constitution known as diversity jurisdiction. Access to federal courts can also be obtained via federal question jurisdiction, governed by 28 USC § 1331 and present when the dispute contains a pivotal question of federal law. The somewhat anomalous “diversity” basis requires an

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jurisdiction is founded upon “diversity” they are not free to prefer a federal *substantive* rule to an applicable state principle,⁶ unless the federal rule is of preemptive character (a question of legislative intent). When the federal rule is preemptive, or jurisdiction is founded upon a federal claim, *Erie* does not apply; in those circumstances, federal courts may look to federal law for a rule of decision.⁷

amount in controversy exceeding \$75,000.00 (exclusive of interest and costs) and a dispute between *inter alia*:

- (1) citizens of different American states; and
- (2) citizens of a state and citizens or subjects of a foreign state;

For statutory purposes, resident aliens are citizens of their domiciliary state, while corporations are citizens of both the state of incorporation and the state where the corporation has its principal place of business.

⁵ See *Erie* (1938), wherein Justice Brandeis wrote for the majority, in relation to federal diversity cases:

Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern.

Id. at 78. See generally I. Younger, *What Happened in Erie?*, 56 Tex. L. Rev. 1011 (1978). Several subsequent Supreme Court decisions have elaborated the *Erie* Doctrine, e.g., *Hanna v. Plumer*, 380 U.S. 460 (1965); *Byrd v. Blue Ridge Rural Elect. Coop., Inc.*, 356 U.S. 525 (1958).

⁶ The distinction between “substantive” and “procedural” is not always self-evident when no federal rule of procedure applies. See, e.g., *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980) (In the absence of a Federal Rule of Civil Procedure directly on point, state law governs what constitutes commencement of action for purposes of applying state limitations period).

⁷ Sometimes, however, federal courts will borrow from state law in fashioning a federal rule.

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The seminal cases confirming the above rudiments are decades old. The application of *Erie* in matters governed by the FAA nonetheless is somewhat murky. One recurrent question has been the degree to which state law should influence the implementation of FAA Section 2, a preemptive provision.⁸ The latter insists that arbitration clauses are valid but sets forth neither rules of formation nor guidance as to applicable law. Under FAA Chapter One, jurisdiction is ordinarily founded upon diversity. Therefore, when operating under that Chapter, federal courts would seem bound under *Erie* to apply state rules of mutual assent in determining the existence of an agreement to arbitrate.⁹

In practice, most federal and state courts have adopted a blended approach; it is customary to apply state law to the rudiments of formation while interpreting the arbitration clause in light of federal policies favoring arbitration. The Supreme Court seems to have endorsed this tendency. It noted in May of 1995, that “when deciding whether the parties agreed to arbitrate a certain matter . . . courts generally . . . should apply

⁸ Section 2 of the FAA provides:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

⁹ The alternative, federal law, would be based upon generic rules of offer and acceptance that might vary from a specific state’s contract law. *Filanto, S.P.A. v. Chilewich Int’l Corp.*, 984 F.2d 58, 60-61 (2d Cir. 1993). *Cf. Van Ness Townhouses v. Mar Indus. Corp.*, 862 F.2d 754 (9th Cir. 1989) (determining law of waiver).

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ordinary state-law principles that govern the formation of contracts.”¹⁰ Whether the general rule offered by the Court extends to arbitration agreements covered by the New York or Inter-American Conventions, however, remains debatable.¹¹

Under supremacy principles, legitimately enacted federal law may occupy an entire field, thus displacing state law in both state and federal courts.¹² The scope of preemption, however, turns upon Congressional intent and the FAA has been held to not completely preclude state involvement in the arbitration field. In *Volt* (1989),¹³ the Court confirmed that state law is preempted only “to the extent that it actually conflicts with federal law—that is, to the extent that it ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’”¹⁴ The determinative question, said the Court, was whether the state court’s application of the state rule “would undermine the goals and policies of the FAA.”¹⁵

The particular state rule in question in *Volt* subordinated arbitration to litigation in certain cases of related proceedings.

¹⁰ *Kaplan* 115 S. Ct. at 1924.

¹¹ The applicable law question is complicated by the fact that diversity of citizenship is a basis for subject matter jurisdiction only under Chapter 1 of the FAA. Chapters 2 and 3, which implement the New York and Panama Conventions, respectively, afford independent bases of federal question jurisdiction. Thus, *Erie* (which applies only in diversity cases) would seem not to control when either convention chapter applies. Nor does *Erie* apply under Chapter 1 as to issues which the FAA clearly preempts, such as those covered by Section 2.

¹² See generally J. Novak & R. Rotunda, CONSTITUTIONAL LAW 311-15 (4th ed. 1991).

¹³ 489 U.S. 468 (1989).

¹⁴ *Id.* at 477 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

¹⁵ *Id.* at 477-78.

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The Court held that the state provision in question—*at least where the parties had designated its application*—would not detract from the goals and policies embodied in the FAA. The FAA, it reasoned, only requires that an arbitration agreement be enforced according to its terms, which terms included qualifications found in the state law designated by the parties.¹⁶

Volt, though a departure from a train of decisions establishing an unmistakably pro-arbitration slant, underscores the autonomy enjoyed by the parties in designating the conditions and procedures that are to govern their agreement to arbitrate. Regrettably, the latitude it appears to grant state courts in construing parties' intent, ensures that federal policies and the parties' actual intent will be thwarted upon occasion.¹⁷

Volt notwithstanding, in cases in which no arguable choice of state arbitration law has occurred, FAA Section 2 remains a significant constraint upon state laws limiting arbitration. When combined with the Supreme Court's expansive interpretation of the "involving commerce" prerequisite to FAA application,¹⁸ Section 2 nullifies a number of state conditions

¹⁶ *Id.* at 478-79.

¹⁷ The choice of law clause in the parties' contract, which obliquely referred to a California law, had been construed to include the state's arbitration and related procedural law. California law required *arbitration* to be stayed in deference to related litigation under certain conditions. The Supreme Court refused to pass on the California courts' questionable choice of law analysis, a failing which prompted a well-reasoned dissent. 489 U.S. at 479 (Justices Brennan and Marshall dissenting).

¹⁸ The test is whether the underlying transaction "in fact" involved interstate commerce. The parties' intent is not controlling. *Terminix*, 115 S. Ct. at 843. Moreover, "involving" is given an expansive reading, on the premise that Congress intended "to provide for the

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and qualifications that might otherwise be imposed upon arbitration agreements by state courts—such as consumer-related formality requirements and subject matter arbitrability limitations. Manifest Supreme Court and appellate court pronouncements reiterate the strong policies driving Section 2 and Congress' corresponding desire to “foreclose state legislative attempts to undercut the enforceability of arbitration agreements.”¹⁹

7.4 State International Arbitration Law

The ability of state laws to address international commercial arbitration is significant because the FAA's coverage is fragmentary and of limited application in state courts. Many states have rather comprehensive arbitration laws and several

enforcement of arbitration agreements within the full reach of the Commerce Clause.” *Id.* (quoting *Perry*, 482 U.S. at 490).

¹⁹ *Perry*, 482 U.S. at 489 (quoting *Southland*, 465 U.S. at 11-12). A recent addition to this “preemption” chain of authority is *Casarotto* (1996), in which the Supreme Court held that Montana's first-page notice requirement for arbitration clauses was preempted by the FAA. Justice Ginsberg applied the established doctrine, explaining:

By enacting § 2 . . . Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed “upon the same footing as other contracts.” Montana's [notice requirement] directly conflicts with § 2 of the FAA because the State's law conditions the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally.

Casarotto, 1996 WL 262287 at 4-5 (some footnotes omitted); see also *Perry*, 482 U.S. at 489-90 (California code purporting to insulate wage collection actions from arbitration agreements preempted by FAA Section 2).

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states have recently passed specific legislation intended to accommodate international commercial arbitration. These include California,²⁰ Colorado,²¹ Connecticut, Florida,²² Georgia,²³ Hawaii,²⁴ Maryland,²⁵ North Carolina,²⁶ Ohio,²⁷ and Texas.²⁸ Some of these are openly based upon the UNCITRAL Model Law;²⁹ others have merely been influenced by it. Accordingly, in an area traditionally associated with federal law and policy, the Model Law has given certain states a claim to relative currency.

²⁰ Title 9.3 Arbitration and Conciliation of International Commercial Disputes, Cal. Civ. Proc. Code §§ 1297.11 *et. seq.* (West 1982 & Supp. 1996) (eff. Mar. 7, 1988).

²¹ Colo. International Dispute Resolution Act, Colo. Rev. Stat. §§ 13-22-501 *et. seq.* (1987) (eff. Apr. 12, 1993).

²² Fla. International Arbitration Act, Fla. Stat. Ann. §§ 684.01 *et. seq.* (West 1990 & Supp. 1996) (eff. 1986).

²³ Ga. Code Ann. §§ 9-9-30 *et. seq.* (1982 & Supp. 1995) (eff. July 1, 1988).

²⁴ Haw. Rev. Stat. §§ 658-1 *et. seq.* (1985 & Supp. 1994) (eff. 1988).

²⁵ Md. Code Ann., Cts. & Jud. Proc. §§ 3-2B-01 *et. seq.* (1995) (eff. July 1, 1990).

²⁶ N.C. Gen. Stat. §§ 1-567, 30-1-567.68 (1996).

²⁷ International Commercial Arbitration, Ohio Rev. Code Ann. §§ 2712.01 *et. seq.* (Anderson 1992) (eff. Oct. 23, 1991).

²⁸ Uniform Arbitration Act, Tex. Civ. Prac. & Rem. Code Ann. §§ 171.001 *et seq.* (West 1986 & Supp. 1996) (eff. Sept. 1, 1995).

²⁹ Notably: California, Connecticut, Oregon and Texas. Concerning American states' enactment of the Model Law see J. McClendon, *State International Arbitration Laws: Are They Needed or Desirable?* 1 Amer. Rev. Int'l Arb. 245 (1990).

7.5 Courts of General Jurisdiction and The Litigation Avalanche

In recent decades, several factors have led to severe and sustained overcrowding in American courts. Tort theories of recovery have evolved in a pro-plaintiff direction, and many attorneys are willing to take promising cases on a contingency basis, thus encouraging litigation by reducing the financial risks to the plaintiff. Those risks are further reduced in American courts because the losing litigant is not ordinarily required to pay the prevailing parties' costs. Amplified criminal dockets have also contributed to delay of civil court cases. Criminal cases take precedence over the civil docket in American courts, and because the number of drug-related cases is especially overwhelming, they have taxed the American court system.

Not surprisingly, many among the commercial bar would welcome a separate court system or docket limited to commercial disputes. Despite the apparent success of the recently inaugurated commercial division in New York,³⁰ and the well-

³⁰ New York's commercial division began as an experiment in January of 1993; four of the forty-five judges then serving were assigned to the "Commercial Parts." See A. Field, *New York's Business Courts: A Successful Experiment*, paper presented to the Business Law Sec., ABA Annual Mtg. (Aug. 9, 1994)(hereinafter *Successful Experiment*). At that time, their dockets became devoted entirely to business disputes. Proceedings before the four judges were handled with uncommon dispatch through flexible procedures and aggressive case management. In late 1995, the concept was formalized as the Commercial Division. See R. Haig, *New York Creates Business Courts*, 6(1) Bus. L. Today 32 (Sept.-Oct. 1996). Several thousand pending cases were transferred from the Commercial Parts to the new division. Among the Division's modern features is a network of

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known English example³¹ few states seem poised to initiate separate venues limited to commercial cases and staffed by experts in commercial law.³² Nor are the federal courts likely to establish general commercial courts, despite the logic of doing so.³³

Delays resulting from burgeoning caseloads, unpredictable juries, excessive costs and jurists whose expertise may not extend to commercial matters are cited by proponents of a commercial court system.³⁴ They conclude that business litigants are at present induced to employ private dispute resolution as the lesser of the evils. In doing so, however, they

personal computers linking the chambers and employing uniform case-management software. *Id.*

³¹ See R. Goode, *COMMERCIAL LAW* 1170-72 (2d ed. 1995). As Professor Goode succinctly explains:

A part of the Queen's Bench Division, the Commercial Court is designated to provide a speedy, specialist service to the commercial world in the trial of commercial actions. The court has now been in existence for 100 years. It is manned by judges . . . with particular experience in commercial work. . . .

Id. at 1170 (footnotes omitted).

³² Proposed initiatives in other states have encountered greater difficulty—primarily from sectors of the bar that would not substantially benefit from such a reform. The California Trial Lawyers Association, for example, has opposed the creation of a business court in that state. D. Devries, *Point Counter Point*, Cal. St. B.J. 12 (July 1994) (commentary by President of California Trial Lawyers Assn. opposing the establishment of business courts).

³³ The federal system, however, does contain various specialized courts. These are the Bankruptcy Court, the Patents Court, the United States Claims Court, and the Court of International Trade. Further, ordinary state and federal courts may appoint special masters, with expertise appropriate to an issue or issues in the case. See, e.g., 28 U.S.C. § 636(b)(2); Fed. R. Civ. Proc. 53.

³⁴ See T. Ambro, *Business Courts: Litigation Reform in Delaware*, paper presented to the Business Law Sec., ABA Annual Mtg. (Aug. 9, 1994) (hereinafter *Business Courts*).

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must forego such desirable litigation attributes as wide discovery, precedent-based outcomes, and substantive appeal.³⁵

Those opposed to segregating commercial cases contend that already scarce judicial resources would be weakened by the gleaning of talent implied in the composition of commercial courts; flexibility in staffing the bench, it is argued, would be reduced accordingly.³⁶ Opponents hold, moreover, that a disparity in judicial quality would result, creating a caste system among judges and litigants alike in which the commercial disputants and judges form the elite.³⁷

Two other concerns are sometimes expressed. The first is that judges should be generalists, not specialists, so that their decisions can be informed by developments in all areas of the law. A second, related fear is that the law emerging from specialized commercial courts may depart from principles developed in analogous subject areas by the general courts.³⁸

7.6 American Private International Law and Distinctions Based Upon International Character

The United States has no systematic codification of the rules generally associated with private international law. While

³⁵ *Id.* at 1-2.

³⁶ *Id.* at 2; R. Brandel, *Increasing Cost Effective Justice: Are Business Courts the Answer?* 6-9, paper presented to the Business Law Sec., ABA Annual Mtg. (Aug. 9, 1994) (hereinafter *Cost Effective Justice*).

³⁷ *Id.* at 6-7.

³⁸ See *A Specialized Business Court for the State of California* 33-38 (Preliminary Report of the Business Court Comm. of the Business Law Section of the State Bar of California (July 20, 1991)).

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various state and federal provisions address selected aspects of international litigation and arbitration, many important topics are treated primarily by judge-made law. In general, the relevant rules are not exclusive to international conflicts problems; often the rules developed in the sister-state context are pressed into service to address analogous international matters. In addition, except where federal law has unified the approach,³⁹ the prevailing multi-jurisdictional model produces wide differences in the choice of law outcomes.

The failure to treat international cases as discrete in choice of law matters is only a general tendency. The FAA, for example, distinguishes domestic from non-domestic arbitral agreements and awards for purposes of implementing the New York and Panama Conventions. Moreover, the U.S. Supreme Court has relied heavily on the supposed special needs of international commerce in expanding traders' ability to select arbitral and judicial fora abroad. According to the Court, the ability of business entities to eliminate the uncertainties of potential litigation by fixing the site in advance "is an indispensable element in international trade, commerce, and contracting."⁴⁰ This and related rationales have signaled enhanced party autonomy and expanded subject matter

³⁹ Issues of foreign state immunity, for example, are governed by the Foreign Sovereign Immunities Act of 1976. 28 U.S.C. §§ 1330, 1441(d), 1602 *et seq.* (1988)(FSIA). Preemptive federal law, the FSIA is applicable in state and federal courts. Supreme Court case law has also brought partial unification to American private international law; the law of personal jurisdiction is an example.

⁴⁰ *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 13-14 (1972); *see also Mitsubishi* (1985); *Scherk* (1974); *Asahi* (1987).

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arbitrability; the result has been unprecedented legitimacy and vitality for international and domestic commercial arbitration.

The distinction between international disputes and others has not been the centerpiece of the Court's more recent jurisprudence, however. Rather, it is merely one theme. The pro-arbitration inclination briefly reserved for international cases is now part of a broader endorsement of party autonomy given effect equally in domestic settings.⁴¹

As noted above, "international" disputes are also set apart in some states by special enactments addressed to international commercial disputes.⁴²

7.7 Public Policy, Public Laws and Party Autonomy

Over two decades ago the Supreme Court began to speak ill of parochial restraints on party autonomy. It observed: "We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws and resolved in our courts."⁴³ By then the federal antitrust

⁴¹ See, e.g., *McMahon* (1987) (claims under Securities Exchange Act of 1934 (SEA), 15 U.S.C.S. §§ 78a *et seq.* and under RICO arbitrable because no contrary expression of Congressional intent found). The *McMahon* Court extended *Scherk* (1974), which had held SEA claims to be arbitrable when arising in an international transaction. It reasoned that "[a]lthough the holding in [*Scherk*] was limited to international agreements, the competence of arbitral tribunals to resolve § 10(b) [SEA] claims is the same in both settings." *McMahon*, 482 U.S. at 232.

⁴² For example, California's 1988 Model Law enactment naturally adopts the Model Law definition of "international." Cal. Civ. Proc. Code § 1297.13 (West 1982 & Supp. 1996).

⁴³ *M/S Bremen*, 407 U.S. at 9.

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and securities laws had become well-established emblems of strong regulatory policy. Since then, federal regulation of commerce has remained vigorous, arguably increasing. Traditional market policy bulwarks such as the antitrust laws have been joined by newer statutes that similarly encourage private enforcement by authorizing claims for multiple damages and attorney's fees.⁴⁴ It can be legitimately questioned whether vigorous policing of trade can be reconciled with commercial actors' increasing ability to dedicate all facets of their disputes to private adjudication. Expanded subject matter arbitrability, combined with the parties' ability to choose their arbitrators and the governing law, may invite attempts to evade federal regulations. The obvious tension between party autonomy and regulatory interests persists, and courts have not fully reconciled these competing aims. Neither has the Supreme Court attempted to harmonize what it has termed the "indispensable" practice of fixing fora in advance and the parties' ability to choose applicable law with the need to enforce vigorously antitrust, anti-racketeering, and other such laws. The decisional centerpiece affecting the topic is *Mitsubishi* (1985).⁴⁵

In *Mitsubishi*, the Court held that antitrust claims arising from an international contract could be submitted to arbitration. The case arose from a distributorship agreement between a Puerto Rican distributor and a Japanese supplier. The contract called for arbitration in Japan under the Rules of the Japan Commercial Arbitration Association and designated

⁴⁴ RICO, for example, authorizes plaintiffs in a civil suit to recover attorneys' fees. See 18 U.S.C.S. § 1964 (Law. Co-op. 1991 & Supp. 1995).

⁴⁵ 473 U.S. 614.

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Swiss substantive law.⁴⁶ Though the supplier's policies allegedly violated U.S. antitrust law, the Court declined to assume that U.S. law would not be vindicated, despite the choice of Swiss law. In dictum, however, it advised:

[I]n the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy.⁴⁷

Lower courts apparently have not viewed that language as a mandate to decline enforcement of otherwise valid arbitration clauses that designate foreign seats and foreign law, even where it is questionable whether federal statutory rights will be fully addressed. The expansive holding of *Mitsubishi* seemingly has been far more influential than some of the dicta that appears to qualify it.⁴⁸ Indeed, opponents of comprehensive FAA reform cite the loss of *Mitsubishi* and other progressive cases as one of the costs of reform, as discussed in Chapter 9 (§9.3.2).

In *Mitsubishi*, the Court also stated that “[h]aving permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed.”⁴⁹ Elaborating upon that

⁴⁶ *Id.* at 637, n.19.

⁴⁷ *Id.*

⁴⁸ *Cf. Roby v. Corporation of Lloyd's*, 996 F.2d 1353, 1360-61 (2d Cir. 1993) (“In the absence of other considerations, the agreement to submit to arbitration or the jurisdiction of English courts must be enforced even if that agreement tacitly includes the forfeiture of some claims that could have been brought in a different forum”) *cert. denied*, 114 S. Ct. 385 (1993). *But see McCarthy v. Azure*, 22 F.3d 351 (1st Cir. 1994).

⁴⁹ *Mitsubishi*, 473 U.S. at 638.

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reference to the New York Convention's "public policy" exception, the Court observed that "it would not require intrusive inquiry to ascertain that the tribunal took cognizance of the antitrust claims and actually decided them."⁵⁰ The "second look" concept implied in the foregoing language has attracted considerable academic commentary.⁵¹ It appears, however, that no awards involving statutory claims have been denied enforcement under it, although such a ruling is conceivable.⁵²

⁵⁰ *Id.* at 638.

⁵¹ See, e.g., T. Carbonneau, *The Exuberant Pathway to Quixotic Internationalism: Assessing the Folly of Mitsubishi*, 19 Vand. J. Transnat'l L. 263, 297-98 (1986); W. Park, *Private Adjudicators and the Public Interest: The Expanding Scope of International Arbitration*, 12 Brook. J. Int'l L. 629 (1986).

⁵² Some courts are prone to couch implementation of *Mitsubishi* in admonitory terms. Consider, for example, the remarkable language of one district court in compelling London arbitration; the plaintiff had alleged that the defendant was using the disputed licensing agreement as anti-competitive device:

At oral argument, [defendant's] counsel expressly represented that [plaintiff's] claims will be arbitrated pursuant to the substantive antitrust laws of the United States and that defendant consents to arbitration on that basis...The Court expressly refers [plaintiff's] claims to arbitration [on that basis]...As noted by [defendant's] counsel at oral argument, the Court may, and certainly will, withdraw the reference to arbitration if U.S. antitrust law does not govern the substantive resolution of [plaintiff's] claims. In addition, the Court directs that any damages determination, or arbitral award, made by the arbitrators shall be determined according to the U.S. antitrust law irrespective of any conflict that may exist between those laws and the laws of England. Finally, the Court will retain jurisdiction over this matter in order to ensure that the arbitration directed by this Order is conducted in accordance with this Order.

PPG Indus. v. Pilkington, PLC, 825 F. Supp. 1465, 1483 (D. Ariz. 1993). One may properly question whether the court exceeded its authority in deciding for a tribunal, not yet appointed, the law that would govern the merits of the dispute to be decided by that tribunal

7.8 Multi-Jurisdictionalism

It is sometimes very inaccurate to speak of the “American position” on a particular issue related to commercial arbitration. As might be expected, substantive approaches to various issues differ from state to state. What may be surprising is the extent to which *federal* courts differ. There are thirteen “circuits” within the federal court system. Most circuits have appellate jurisdiction over several districts and draw appeals from districts in several states.⁵³ U.S. Supreme Court decisions bind

in London. *Cf.* First Commercial Fin. Group, Inc. v. Baghdoian, 812 F. Supp. 837 (N.D. Ill. 1993) (suggesting that a tribunal’s failure to apply the Commodity Exchange Act would permit vacatur of the resulting award).

⁵³ The following table lists the states and other units encompassed by each of the thirteen circuits.

First Circuit:	Maine, Massachusetts, New Hampshire, Rhode Island, and Puerto Rico
Second Circuit:	Connecticut, New York, and Vermont
Third Circuit:	Delaware, New Jersey, Pennsylvania, and the Virgin Islands
Fourth Circuit:	North Carolina, South Carolina, Virginia, and West Virginia
Fifth Circuit:	Louisiana, Mississippi, and Texas
Sixth Circuit:	Kentucky, Michigan, Ohio, and Tennessee
Seventh Circuit:	Illinois, Indiana, and Wisconsin
Eight Circuit:	Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota
Ninth Circuit:	Alaska, Arizona, California, Guam, Hawaii, Idaho, Nevada, Oregon, Washington, and the Northern Mariana Islands.
Tenth Circuit:	Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming
Eleventh Circuit:	Alabama, Florida, and Georgia
D.C. Circuit:	Washington, D. C.
Federal Circuit:	Washington, D. C.

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all inferior courts. Circuits are of equal authority, and absent Supreme Court guidance can adopt their own approaches to particular issues.

The Circuits have developed differing positions on the elements necessary to demonstrate waiver of the arbitration agreement, the availability of interim relief in aid of arbitration, the propriety of consolidating related arbitrations, the rate of interest to be borne by awards and, prior to the Supreme Court's recent clarification of the matter, the power of arbitrators to award punitive damages.⁵⁴ Some of these splits are long-standing; the Supreme Court is not always quick to attempt unification of the law.⁵⁵

Certain districts, and hence the circuits that serve them, encounter more commercial arbitration cases than other districts. Consequently, a particular circuit may have developed a clear position on a range of issues not dealt with elsewhere. For example, much litigation related to international commercial arbitration is initiated within the district serving New York City. As a result, the Second Circuit has become a prodigious source of appellate decisional law related to commercial arbitration. The trend has been reinforced by the increasing

⁵⁴ *Mastrobuono* (1995).

⁵⁵ *See, e.g., J. Alexander Sec., Inc. v. Mendez*, 114 S. Ct. 2182, 2183 (1994)(O'Connor, J., and Rehnquist, J., dissenting):

[C]ourts in different jurisdictions reach contrary results with respect to the availability of punitive damages in cases involving similarly situated parties and identical arbitration agreements. The Federal Arbitration Act was passed, in part, to prevent this kind of disarray. [T]he ability of arbitrators to award punitive damages in these circumstances is an important and recurring question of federal law. The state and federal courts have divided as to how this question should be answered; I would therefore grant the petition for a writ of certiorari.

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number of securities-related disputes being submitted to arbitration. Similarly, New York commercial law has become highly developed through the hundreds of state and federal cases expounding it.⁵⁶

7.9 The Civil Jury

Another characteristic feature of the American system is the civil jury.⁵⁷ In federal courts the right to a jury trial is assured “in actions at law” (as distinguished from those in equity) by the Seventh Amendment of the U.S. Constitution.⁵⁸ State constitutions contain analogous provisions applicable in state courts. One can reasonably doubt the wisdom of delegating to a lay jury factual questions arising in intricate and perplexing commercial matters.⁵⁹ Indeed, some federal courts have found qualifications to the guarantee in highly technical cases and

⁵⁶ Delaware occupies a similar position with respect to corporate law because of the high number of public entities incorporated there. The Delaware Chancery Court is therefore a leading exponent of principles governing the majority of larger U.S. companies.

⁵⁷ In other legal systems, even those based upon the common law, the civil jury is little known in commercial cases.

⁵⁸ U.S. Const. amend. VII, provides:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

⁵⁹ See generally P. Lansing and N. Miley, *The Right to a Jury Trial in Complex Commercial Litigation: A Comparative Law Perspective*, 14 Loy. L.A. Int'l & Comp. L.J. 121 (1991).

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have refused to impanel a jury in such cases.⁶⁰ Others remain convinced that the right to jury trial is not conditioned upon a requisite level of simplicity, believing—for better or worse—that even the most esoteric case must be submitted to the jury.⁶¹

The jury has a role under the FAA when a party seeks an order compelling arbitration. Generally, however, the issue dedicated to the jury, *viz.*, whether or not the requisite agreement to arbitrate exists, is not complex. According to Section 4, the right to demand jury trial belongs to “the party alleged to be in default” under the agreement to arbitrate.⁶² However, if the jury process could be initiated by demand alone, a convenient and effective method of delaying enforcement of an arbitration clause would be available to every party resisting arbitration. Consequently, courts have declined to respond to “naked” demands for a jury trial.⁶³ Rather, the burden is upon the party requesting a jury trial to establish that the arbitration agreement is “in issue,”⁶⁴ that is, to make “at least some showing that under prevailing law, [the resisting party] would be relieved of his contractual obligation to arbitrate if his allegations proved to be true [and] must produce at least some

⁶⁰ *See, e.g.*, *Japanese Elec. Prods. Antitrust Litig. v. Zenith Radio Corp.*, 631 F.2d 1069, 1079 (3d Cir. 1980) (holding that jury trials may be denied in cases that are so exceptionally complex as to preclude rational decision-making by a jury with a reasonable understanding of the evidence and controlling law).

⁶¹ *See, e.g.*, *United States Fin. Securities Litig. v. Bache and Co.*, 609 F.2d 411, 418 (9th Cir. 1979) (stating that the Seventh Amendment right is not dependent upon the abilities and limitations of juries).

⁶² FAA, § 4.

⁶³ *Par-Knit Mills, Inc., v. Stockbridge Fabrics Co.*, 636 F.2d 51, 55 (3d Cir. 1980).

⁶⁴ *Bhatia v. Johnson*, 818 F.2d 418, 422 (5th Cir. 1987).

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evidence to substantiate his factual allegations.”⁶⁵

Jury trial is not available in admiralty cases;⁶⁶ nor are the jury trial provisions of the FAA preemptive.⁶⁷

7.10 Advocacy Style and Other Elements of Legal Culture

Arbitral proceedings are invariably affected by the legal culture of the lawyers involved—those representing the parties and those forming the tribunal. The flexibility that characterizes arbitration allows participants in the process to replicate the familiar. This may explain why arbitration is sometimes criticized for being too much like litigation. Such criticism aside, the *melange* of styles that may be evident in a particular international arbitration makes for innumerable variations and intriguing comparisons.⁶⁸

To the extent that proceedings are shaped by American

⁶⁵ *Dillard v. Merrill Lynch et al.*, 961 F.2d 1148, 1154 (5th Cir. 1992). *Id.* At least one court has found that jury trial is available where the demanding party seeks a stay of *arbitration*. *PMC, Inc. v. Atomergic Chemetals Corp.*, 844 F. Supp. 177, 182-83 (S.D.N.Y. 1994). Where a request for a jury trial is denied, that decision may be the subject of appeal after the arbitration is completed. *In re American Marine Holding Co.*, 14 F.3d 276, 277 (5th Cir. 1994); *see also* *Republic of Nicar. v. Standard Fruit Co.*, 937 F.2d 469 (9th Cir. 1991), *cert. denied*, 503 U.S. 919 (1992); *Saturday Evening Post Co. v. Rumbleseat Press, Inc.*, 816 F.2d 1191, 1196 (7th Cir. 1987).

⁶⁶ FAA, § 4.

⁶⁷ *See, e.g.*, *Rosenthal v. Great Western Financial Securities Corp.*, No. S050952 (Cal. S. Ct., Dec. 12, 1996) (FAA jury provisions not applicable in California courts).

⁶⁸ *See* A. Lowenfeld, *The Two-Way Mirror: International Arbitration as Comparative Procedure*, (1985) Mich. Y.B. Int'l Legal Stud. 163.

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lawyers, several attitudes and preferences may be manifest. The oral tradition, for example, transmitted through English roots, is well ingrained in the American legal culture. It is thus a rare American lawyer who would comfortably waive the hearing and rely solely upon documentary submissions. The preference no doubt results from notions of what zealous advocacy entails, from habit and from a sense that “due process” requires a hearing.⁶⁹

Aspects of pre-hearing proceedings also occasionally bear a distinctive American mark. Arbitrators trained outside of the United States sometimes are taken aback by an American advocate’s summary judgment motion, a maneuver borrowed from litigation and designed to dispose of all or part of the claim, often at a preliminary juncture.⁷⁰

A feature of American litigation that typically is absent in arbitration is wide-ranging discovery. Few legal systems—even those based upon the common law—confer upon the parties such broad rights of *pre-trial* investigation in the furtherance of a pending lawsuit. In general, using various methods,⁷¹ the parties may pursue discovery with each other as to any matter

⁶⁹ Nonetheless, parties to an arbitration agreement are entitled to waive an oral hearing. Indeed, vacatur is not axiomatic where the tribunal conducts aspects of the proceeding on a documents-only basis over the objection of a party. *See Intercarbon Ltd. v. Caldex Trading*, 146 F.R.D. 64 (S.D.N.Y. 1993) (arbitrator’s determination of certain contract issues without live testimony, over the protest of a party, reasonable under the circumstances).

⁷⁰ *See generally*, M. Hoellering, *Dispositive Motions in Arbitration* 1(1) ADR Currents 1 (1996) (recent American case law confirms arbitral discretion to entertain such motions, provided a fair opportunity is given for the responding party to present its case).

⁷¹ *E.g.*, written interrogatories among parties, depositions, and requests for production of documents.

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which pertains to the lawsuit, provided it is relevant and non-privileged. American litigators, accustomed to a discovery process that may entail years for a single case, sometimes question whether the restricted inquiry of arbitration is able to capture a true sense of either party's case. This and related apprehensions sometimes give rise to unexpected opposition to arbitration clauses during contract negotiation. The same sentiments may subsequently fuel attempts to disavow a clause once a dispute has arisen.

The degree to which tribunal members are inclined to pursue various aspects of inquiry is also derived from legal culture. The division of labor established in American litigation places the burden of developing the evidence and legal theories upon the parties. The American bench is thus generally less involved in these activities than its civil law counterpart and anecdotal accounts suggest that this is often true in arbitral settings as well.

Given the deep attachment to litigation maintained by some members of the American bar, it is ironic that familiarity with ADR is itself coming to distinguish American legal culture. It is no longer a novel law firm that maintains an ADR department or specializes in ADR. Legal education contributes to this trend as most U.S. law schools offer ADR courses⁷² and regularly feature related topics in the journals they publish.⁷³

Similarly, some form of court-annexed arbitration or mediation is now a standard feature of first instance courts. The allure of ADR has been widely felt; federal agencies and the

⁷² C. Fazzi, *Schools Awaken to ADR*, *Disp. Resol. Times*, Summer 1994, at 1.

⁷³ *E.g.*, *J. Disp. Resol.*; *Ohio St. J. on Disp. Resol.*

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Department of Justice have recently embraced it.⁷⁴ In sum, the American legal profession increasingly is comprised of members who have had regular exposure to alternatives to litigation. Whether these influences translate into predictable adroitness in international commercial dispute resolution is, of course, a separate question.⁷⁵

If pervasive exposure to “ADR” is one influence on American legal culture, technology is another. The on-line world is second nature to most persons called to an American bar during the last five years. Law students today expect to communicate with their professors via e-mail and receive assignments on the professor’s web page. They perform research using compre-

⁷⁴ R. McMillion, *Growing Acceptance for ADR*, A.B.A. J. 106 (May 1996).

⁷⁵ Moreover, while ADR users often voice satisfaction, the ADR movement has by no means persuaded everyone. See, e.g., S. Paltrow, *An Arbitrary Process? Most Disputes Between Investors and Brokerages Go to Arbitration. But Skeptics See Signs That the Arbitrator’s Links to Wall Street—Not the Evidence—Are Dictating the Results*, L.A. Times, July 16, 1995, at D1; cf. R. Reuben, *The Lawyer Turns Peacemaker*, A.B.A. J., August 1996, 55, 57 (arbitration losing favor as mediation becomes more popular).

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hensive law data bases and the internet. They take lecture notes and answer exam questions using computers.⁷⁶

It follows that American counsel will increasingly carry into the international dispute resolution arena reasonable comfort with high-tech proceedings, and perhaps unwarranted enthusiasm for high-tech trappings.⁷⁷ There may also be a sense of disquiet on their parts when either the client, their learned adversary, or the tribunal, wishes to proceed in more traditional, less technology-intensive ways.

7.11 Arbitrator Independence and Partiality

It is common for international arbitrations to proceed using a three-person tribunal. Often, each party chooses one arbitrator; the two party-appointed arbitrators, or sometimes an institution, in turn choose the third. Whether party-appointed arbitrators should be subject to different standards of conduct than the presiding (third) arbitrator has been the subject of ongoing discussion. The international standard, typified by the UNCITRAL Rules, is in general quite clear. “[A]ny arbitrator

⁷⁶ For their parts, law schools struggle to keep pace. For those leading the way, this means not only curricula additions such “Computer Law” and “Electronic Commercial Law” but also infrastructure development designed to accommodate advances barely visible on the horizon. *See generally Building the High-Tech Law School*, *The Law Sch. Mag.* 121 (Autumn 1997).

In a similar fashion (and subject to the same kinds of financial considerations) the American justice system is incorporating technology into the courtroom. *See M. Rosenbaum, Courting Technology*, *A.B.A. J.*, Nov. 1997, at 112.

⁷⁷ *Cf. McElhaney* at 74 (cautioning against undue use of technology).

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may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence."⁷⁸ Yet, the AAA-ABA Code of Ethics for Arbitrators in Commercial Disputes (1977) recognizes "non-neutral" party-appointed arbitrators as a discrete category; they are expected to adhere to some, but not all, of the standards applicable to "neutral" arbitrators.

The AAA-ABA approach reflects the practice developed in the United States for some domestic commercial arbitrations.⁷⁹ Adding to the confusion, treatment of the issue within the FAA is indirect, subject to differing interpretations, and arguably diverges from state statutes on the question.⁸⁰ Because Ameri-

⁷⁸ UNCITRAL Rules, Art. 10.1. *Accord* IBA, Ethics for International Arbitrators, Arts. 2.1, 3.1. Similarly, an ICC arbitrator at the time of appointment signs a declaration that he or she "is independent of each of the parties and intends to remain so." E. Schwartz, *The Rights and Duties of ICC Arbitrators*, in *The Status of the Arbitrator* 67 (ICC Special Supp. 1995) (quoting Standard Form of Arbitrator's Declaration of Acceptance and Statement of Independence).

⁷⁹ Robert Coulson, then-President of the American Arbitration Association, explained the position as follows:

The AAA-ABA Code reflects a pragmatic approach. It is known that in the United States some party-appointed arbitrators are expected to favor their appointing party's point of view. They are not strictly neutral. . . . Some systems of arbitration in the United States assume that party appointed arbitrators serve as advocates during the arbitrators' deliberations, making certain that their party's point of view is fairly understood by the neutral arbitrator.

Coulson at 107. *See generally* Carter.

⁸⁰ FAA § 10(b) allows an award to be vacated "[w]here there was evident partiality . . . in the arbitrators or either of them." The Uniform Arbitration Act (UAA) upon which many state arbitration laws are based refers to evident partiality "by an arbitrator appointed as a neutral" thus acknowledging a non-neutral status; UAA § 12; *accord* N.Y. Civ. Practice L & R § 7511(b)(1)(ii).

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can commercial arbitration practices are not uniform, pre-arbitration clarification of the applicable standard is essential. Neither the arbitrators nor the parties should labor under a misunderstanding; the AAA-ABA Code stresses as much.⁸¹

Of course, the perceived risk that arbitrators will embrace inappropriate roles and attitudes ought not to be exaggerated. Among mitigating elements is a decisional trend toward heightening the standard applicable to party-appointed arbitrators in domestic cases; the expected posture is “a more neutral and less partisan position that is more closely aligned to the international standard.”⁸² Additionally, multiple texts now incorporate the international standard; unwitting transgression by appointees is therefore less likely to occur,⁸³ especially given that institutions often call attention to the standard at the time an appointee is nominated. Indeed, even the AAA-ABA Code, a 1977 formulation, is not without caveats. It cautions:

It should be noted that in cases where the arbitration is conducted outside the United States, the applicable law may require that all arbitrators be neutral. Accordingly, in such cases the governing law should be considered before applying any of the following provisions relating

⁸¹ Introductory note to Canon VII, *AAA-ABA Code of Ethics for Arbitrators in Commercial Disputes* (1977).

⁸² M. Hoellering, *The Independence of Party Appointees*, in *ARBITRATION AND THE LAW* 1992-93, at 26, 28 (1993).

⁸³ The American Bar Association House of Delegates in November of 1989 adopted a resolution calling for an amendment to the AAA-ABA Code which provides that “*unless otherwise agreed* party-appointed arbitrators in *international* commercial arbitrations should, to the extent practicable in the circumstances, serve as neutrals.” In addition, the AAA International Rules (eff. April 11, 1997) replicate the UNCITRAL standard by allowing an arbitrator to be challenged “whenever circumstances exist that give rise to justifiable doubts as to the arbitrator’s impartiality or independence.” *Id.* at Art. 8.1.

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to non-neutral party-appointed arbitrators.⁸⁴

Related questions are raised by the practice of interviewing potential arbitrators. In the United States, it is considered acceptable to conduct a pre-appointment conversation to determine whether the candidate has the qualifications necessary to fulfill his or her mission. Thus, it would not be inappropriate to ask about, for example, the number and type of prior arbitrations undertaken by the person, his or her experience in particular areas of law and commerce and whether any existing obligations will prevent concentrated attention being devoted to the proceeding. On the other hand, under the international standard it would be improper to discuss the merits of the case beyond perhaps describing its general nature. It would thus be wholly unacceptable for a party to attempt to secure any understanding that would call into question the arbitrator's independence.⁸⁵

As will be discussed in Chapter 5, 10 and 11 below, any new statute devoted to international disputes should address pre-appointment interviews and other forms of *ex parte*

⁸⁴ Yet, by negative inference, this language implies there is a dual standard for *intra*-U.S. arbitration.

⁸⁵ The details of such a meeting vary widely in practice. It is usual, but not essential, that the meeting be held face-to-face, at the candidate's office. The interviewing lawyer, who may be accompanied by the party, expects to gain a better sense of the candidate's demeanor, abilities in the languages relevant to the arbitration, and of whether the candidate possesses special qualifications germane to the dispute. Concurrently, the prospective arbitrator usually attempts to assess the time commitment involved in the assignment, his or her competency given the subject matter and any conflicts of interest that are readily apparent. Some arbitrators decline to be interviewed beyond, perhaps, referring interested parties to a source for securing the candidate's resume.

interaction.

7.12 Punitive Damages

American law recognizes an aggrieved party's right in some circumstances to receive a measure of damages in addition to that designed to compensate.⁸⁶ Although generally confined to tort cases, punitive damages are sometimes awarded in commercial cases to recognize particularly reprehensible conduct by the defendant.⁸⁷ The amount awarded is often a multiple of the compensatory measure. Another species of punitive damages is that authorized by statute in an effort to strengthen enforcement of certain federal public laws, such as those addressing antitrust, racketeering, and securities fraud. Certain state statutes may also instruct courts to award multiple damag-

⁸⁶ See generally R. Blatt *et al.*, PUNITIVE DAMAGES: A STATE-BY-STATE GUIDE TO LAW AND PRACTICE (1991).

⁸⁷ See *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 20 F.3d 713, 715 (7th Cir. 1994), *rev'd*, 115 S. Ct. 1212 (1995) (arbitrators awarded \$400,000 in punitive damages in addition to approximately \$150,000 in compensation; plaintiffs had alleged unauthorized trading, margin exposure and churning, activities which allegedly violated state and federal consumer protection laws).

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es.⁸⁸ Neither form of punitive measure is prevalent in other countries in commercial cases.⁸⁹

Whether arbitrators proceeding in an American jurisdiction have the authority to award punitive damages of either variety depends upon the arbitration clause and whether the FAA governs the arbitration.⁹⁰ Prior to *Mastrobuono* (1995),⁹¹ American courts were dramatically split on whether an arbitrator conducting a proceeding governed by the FAA could award such damages. New York law prohibited the remedy in arbitration, reflecting the view that punitive damages are assessed to advance a public concern and as such are only for the judiciary to mete out.⁹² Many federal courts were enforcing that limitation where the parties had chosen New York or an equivalent law to govern the *underlying* contract.⁹³

⁸⁸ See, e.g., *Valley Datsun v. Martinez*, 578 S.W.2d 485 (Tex. Civ. App. 1979) (applying Texas Deceptive Trade Practice - Consumer Protection Act, Tex. Bus. & Com. Code Ann. § 17.50(a) (West 1991)).

⁸⁹ Cf. J. Gotanda, *Awarding Punitive Damages in International Commercial Arbitrations in the Wake of Mastrobuono v. Shearson Lehman Hutton, Inc.*, 38 Harv. Int'l Law J. 59, 61-64 (1997) (While known in common law jurisdictions, typically punitive damages are awarded in tort actions). In the United States, it is recognized that there are constitutional limits on a court's ability to award punitive damages. The limits, which derive primarily from the due process clauses of the U.S. Constitution, have only been sketched by the Court. See *BMW of N. Am. v. Gore*, 64 U.S.L.W. 4335 (U.S. May 20, 1996) (Punitive award that was 500 times greater than the compensatory amount was grossly excessive when viewed in context; Court outlined a three-part test).

⁹⁰ See generally A. Farnsworth, *Punitive Damages in Arbitration*, 20 Stetson L. Rev. 395 (1991).

⁹¹ 115 S. Ct. at 1212.

⁹² See *Garrity v. Lyle Stuart, Inc.*, 353 N.E.2d 793 (N.Y. 1976).

⁹³ See, e.g., *Mastrobuono*, 20 F.3d at 716-17, *rev'd*, 115 S. Ct. 1212.

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In *Mastrobuono*, the underlying contract contained separate choice-of-law and arbitration provisions stating respectively that the entire agreement “shall be governed by the laws of the state of New York,” and that “any controversy” arising out of the parties’ transactions “shall be settled by arbitration.” It designated procedural rules that did not preclude an award of punitive damages. The Court held that choice of New York law to govern the parties’ rights and duties under the contract did not unambiguously imply that the parties also desired New York’s limitation on punitive damages to govern. It reiterated that the FAA’s main aim is to ensure enforcement of the parties’ agreement to arbitrate according to its terms, a theme developed in the Court’s *Volt* decision.⁹⁴ The arbitration provision was free-standing and contained no limitation on remedies. Thus, the award of punitive damages giving rise to the appeal should have been confirmed below.

The Court by implication established that under the FAA, arbitrators may award punitive damages where the parties have not precluded them from doing so. As such, the decision is consistent with the courts several earlier rulings recognizing arbitrator competency and declining to confer upon arbitration a secondary status relative to judicial dispute settlement. Whether as a matter of policy punitive damages should be readily available in *international* arbitration is a question treated in Chapter 11 (§11.13).

⁹⁴ In contradistinction to *Volt*, however, the Court was assertive in construing the pivotal contract language.

7.13 The Costs of Settling Disputes—Attorneys' Fees

The total cost of conducting an arbitration in the United States and whether that compares favorably with another jurisdiction will depend upon a number of variables. The venue of the arbitration is one important factor; room and board and similar costs vary greatly among American cities. The strength of the dollar against other currencies naturally will play a role, as will the number of arbitrators, lawyers and specialists involved.

Attorneys' fees often form the bulk of the tangible costs incurred in bringing an end to a commercial dispute. Given the cost of succeeding in American litigation, some non-American observers find it surprising that ordinarily each party pays its own legal fees. That rule is often adopted by arbitrators as well as judges. It is therefore not every award that grants the victorious party a sum representing its attorneys fees.

The U.S. practice stands in marked contrast to the traditional English rule under which, generally, "costs follow the event."⁹⁵ The American Rule, of course, does carry exceptions. Attorneys' fees may be recovered, for example, where a statute so authorizes,⁹⁶ or where the parties have so agreed in the underlying contact,⁹⁷ or where the losing party has been

⁹⁵ See Mustill & Boyd at 25-26; H. Kritzer, *Legal Fees* A.B.A. J., Nov. 1992, at 55; M. Coffino and M. Wolff, *The "English Rule": Alive and Well in the U.S.A.*, 6(2) Cal. Int'l Pract. 26 (1995).

⁹⁶ Many such enactments exist. Examples are the antitrust laws, 15 U.S.C. § 15 (1988); the Fair Labor Standards Act, 29 U.S.C. § 216(b) (1988); and the Truth-In-Lending Act, 15 U.S.C. § 1640(a) (1988). See D. Laycock, *MODERN AMERICAN REMEDIES* 849 (2d ed. 1994) (hereinafter Laycock).

⁹⁷ Laycock, *supra* note 96 at 847.

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demonstrably deleterious or has otherwise acted in bad faith.⁹⁸ This latter exception may be fulfilled through a request for sanctions under Federal Rule 11,⁹⁹ or a state analogue.¹⁰⁰

Chapter 11 (§ 11.19), suggests that arbitral discretion, not the American Rule, should by statute govern awards of costs in international arbitrations seated in the United States.

⁹⁸ *Alyeska Pipeline Serv. v. Wilderness Soc’y*, 421 U.S. 240, 257-59 (1975).

⁹⁹ Under Rule 11, federal courts may penalize parties for submissions that are ill-founded or motivated by an improper purpose, including unwarranted resistance to an arbitration clause or award. See *Widell v. Wolf and Wolf Indus.*, 43 F.3d 1150, 1151-52 (7th Cir. 1994) (“a thinly disguised attempt to reargue the merits of the claim” by invoking, despite contrary precedent, the ‘public policy’ defense to enforcement of the award); See generally *AAA Sanctions for Frivolous Arbitration—Related Actions*, in *LAWYERS’ ARBITRATION LETTERS 1980-1989* 243 (1990).

¹⁰⁰ See, e.g., W. Rylaarsdam, *Discouraging Frivolous Claims*, Cal. Bar J. 26 (March 1996) (discussing Cal. Code Civ. Pro. § 128.7, eff. Jan. 1, 1995).

Chapter 8

A NON-EXHAUSTIVE CATALOG OF FAA DEFICIENCIES

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8.1 Introduction

As a preface to the remainder of this monograph, and drawing upon Chapter 7 above, this chapter collects a series of deficiencies associated with the FAA, especially as it serves in relation to international commercial disputes. A selective cataloging, the chapter aims to present illustrative FAA shortcomings under general and inevitably overlapping headings, to illuminate characteristics a more suitable statutory framework might display. The examples given are attributable primarily to the FAA's non-comprehensive and minimally preemptive

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character, the resulting disintegration of governing law and associated influence of state law. Tables 1 and 2 supplement the discussion. Chapter 9 (Perspectives and Goals) in turn will shed further light (indirectly) upon how, in the abstract, the FAA departs from the ideal.

8.2 A Brief History of the FAA¹

With President Calvin Coolidge's signature, on February 1, 1926, the United States Arbitration Act passed into law;² it later came to be known as the Federal Arbitration Act and was codified as Title 9 of the United States Code.³ The text enacted in 1926 varied little from the 1923 Bill sponsored by the American Bar Association (ABA), thus causing Macneil to refer to Congress' function as that of "rubber stamping" the ABA's proffer.⁴ The ABA's efforts in turn can be traced to 1920, when its Commerce, Trade, Commercial Law Committee began to explore the feasibility of replicating on a national basis statutory

¹ See generally J. Cohen and K. Dayton, *The New Federal Arbitration Act*, 12 Virg. L. Rev. 265 (1926)(hereinafter Cohen & Dayton); L. Hirshman, *The Second Arbitration Trilogy: the Federalization of Arbitration Law*, 71 Virg. L. Rev. 1305 (1985) (hereinafter Hirshman); Macneil (passim).

² Pub. L. 401, 68th Congress.

³ 9 USC §§ 1-14.

⁴ Macneil at 107-08.

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coverage of arbitration of the kind inaugurated by New York a few months earlier.⁵ By 1926, the ABA draft had evolved somewhat, and its sponsors could point not only to new statutes in New Jersey, Massachusetts and Oregon⁶ but to the support of dozens of private organizations and the Department of Commerce,⁷ offset by no serious opposition.⁸

The FAA's main feature was that it reversed the rule of revocability which at common law sometimes allowed pre-dispute promises to arbitrate to go unenforced. Because it treated also judicial appointment of arbitrators, specific enforcement of agreements to arbitrate, arbitral subpoena power, and the enforcement and vacatur of awards, it was considered—as of 1926—to be a virtually complete statute.⁹ It was also, however, well understood to be “procedural” and thus applicable only in federal courts;¹⁰ accordingly, based upon the FAA's legislative history, subsequent Supreme Court cases¹¹ giving it a substantive, preemptive character could not have been readily predicted in 1926.¹² As noted in Chapters 5 and 7, additional Supreme Court

⁵ Macneil at 85-91.

⁶ Cohen and Dayton, *supra*, at 266.

⁷ Cohen and Dayton at 285.

⁸ Macneil at 92-97 and note 6 (Ch. 8).

⁹ Macneil at 102.

¹⁰ Macneil at 97-98, 111-114.

¹¹ Notably, *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

¹² See Chapter 7, § 7.3.

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decisions interpreting the FAA amplified greatly subject matter arbitrability,¹³ nurtured the parties' autonomy¹⁴ and propounded rules of construction for arbitration clauses which ensured (with one important exception)¹⁵ the broadest of arbitral submissions (thus promoting relatively complete docket clearing when an arbitration agreement was found to exist).¹⁶

In 1970¹⁷ and 1990¹⁸ respectively, Congress added to the FAA Chapters Two and Three, each designed to induct conventions into American law. Chapter Two implemented the New York Convention, Chapter Three—the Panama (Inter-American) Convention. Two piecemeal amendments were made in 1988, one to limit the Act of State Doctrine (§15) and the other to allow appeals in actions to enforce arbitration agreements (§16).

8.3 Tell-Tale Signs Of Age

It perhaps begs a fundamental question to suggest that because the FAA is old, it is deficient; after all, the same can be said in even greater measure of the U.S. Constitution and the Ten

¹³ See § 7.6 and note 41 therein.

¹⁴ See §§ 5.5.2.; 7.7.

¹⁵ Concerning the Court's *Kaplan* decision, see § 5.5.2, note 23.

¹⁶ See § 5.5.2.

¹⁷ 84 Stat. 692.

¹⁸ 104 Stat. 448.

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Commandments. Nonetheless, it seems plausible to suggest that choice of arbitral forum may be influenced by such cosmetic matters as age. Moreover, from a purely academic or comparative standpoint, the FAA's age has become one of its defining traits, distinguishing it, for example, from the leading arbitral venues in Europe, the arbitral statutes of which have been fundamentally reworked within the last two decades.

The FAA's pre-World War II vintage is evident from a perusal of its first chapter in which one encounters an exclusion for contracts made prior to January 1, 1926,¹⁹ a choice of law directive referring to federal contempt procedures existing "on February 12, 1925" and an insistence upon jury trial,²⁰ a constitutionally unnecessary procedure²¹ reminiscent of an era when courts were relatively uncrowded. In addition, a measure of archaic phrasing punctuates FAA Chapter One throughout.

8.4 The FAA's Fragmentary Character

Perhaps the predominant factor that contributes to the FAA's

¹⁹ FAA § 14.

²⁰ FAA § 4.

²¹ See J. Becker, *Fixing the Federal Arbitration Act by Millennium*, 8 *Am. Rev. Int'l Arb.* 75, 80 (1997) (relying on *Chauffeurs & Teamsters Local No.391 v. Terry*, 494 U.S. 558, 566 (1990)).

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unsuitability as a curial law is its failure to address many of the questions that arise regularly in international arbitration. That failing is particularly apparent when the FAA's coverage is compared to that of statutes to be found in other jurisdictions or even to the UNCITRAL Model Law,²² which itself is far from exhaustive.²³ In particular, one looks in vain within the FAA for express confirmation of various arbitrator powers²⁴ and duties. The present FAA touches these questions only indirectly and imperfectly, by setting forth a general list of grounds upon which a court can vacate an award.²⁵ It also leaves unaddressed certain questions about court assistance to arbitration.²⁶

²² Table One compares the FAA's express treatment of subjects to that of the Model Law. It demonstrates numerous topics and doctrines concerning which the FAA is silent. Many of the questions not addressed by the FAA, however, are considered by case law and often are settled by modern rules texts; the latter are important substitutes for a comprehensive statute and are viable as such because of the generous party autonomy that prevails under the FAA.

²³ Table Two presents a schedule of topics considered by certain recently adopted statutes or texts but not by the Model Law, demonstrating more fully the chasm between FAA guidance and that given by other formulations. An introduction to the Table explains its purpose more fully.

²⁴ There is one notable exception. FAA §7 gives arbitrators subpoena power.

²⁵ FAA §10.

²⁶ These include to what extent may a court render provisional relief in aid of international arbitration and upon what basis may a court consolidate related arbitrations. To its credit, the FAA does empower courts to make appointments of arbitrators when needed. *See* FAA § 5.

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The FAA's selectivity makes it unhelpful in numerous contexts. Consider, for example, the plight of a non-American candidate for party-appointment respecting an ad hoc arbitration in which no agreement has been reached concerning arbitrator impartiality. If in advance of an interview to discuss the appointment the candidate consults the FAA, no positive statement of principle will be found; she is informed only that an award may be vacated “[w]here there was evident partiality or corruption in the arbitrators, or either of them.”²⁷

If the potential appointment contemplates, *e.g.*, New York arbitration, the candidate—in a further effort to confirm the expectations of all concerned—might also consult the New York state arbitration statute, which again contains no direct statement of the controlling standard, but allows vacatur for “partiality of an arbitrator appointed as a neutral;”²⁸ that, of course, begs the essential question. Under such circumstances, prudence will counsel that the interviewee structure her contact with the party so as to preserve neutrality, though the textual reason for doing so is far more murky and subtle than it ought to be given the importance of the question.²⁹ In other countries, moreover, one

²⁷ FAA § 10(b).

²⁸ N.Y. Civ. Prac. L. & R., art. 7511(b)(1)(ii).

²⁹ The attenuated chain of deductions seems to be as follows: As the arbitration will have a nexus with interstate commerce, the FAA will apply. The latter makes no distinction among arbitrators when

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can readily ascertain that independence and impartiality are required of all arbitrators.³⁰ This problem was broached in § 7.11 and is addressed again below in § 8.10[1].

Once appointed, that same arbitrator may encounter numerous other FAA lacunae. The FAA fails, for instance, to confirm the tribunal's power to assess its own jurisdiction, to grant interim measures, to render partial awards, to depart from the *lex fori*'s conflicts rules and rules of evidence, to appoint experts, to deviate from legal rates of interest, to award costs, and to make awards in multiple currencies. Similarly, despite what that arbitrator may have assumed from her familiarity with other jurisdictions, there may occur good faith questions about the limits upon the tribunal's remedial creativity—that is, the tribunal's power to act *ex aequo et bono*.³¹

A byproduct of the FAA's present lack of ambition is a natural dependence upon federal and state case law and state arbitration

authorizing vacatur for evident partiality, apparently holding all arbitrators to the same high standard. Therefore, either because the FAA pre-empts the New York statute in the absence of a contrary party agreement or because the stricter standard is the safer one to follow, one should test fitness to serve and comportment in general against impartiality.

³⁰ See, e.g., Arbitration Act 1996 (England & Wales) § 33(1) (a) (tribunal to “act fairly and impartially”) and *id.* § 24 (1) (a) (court may be petitioned to remove arbitrator where circumstances raise are “justifiable doubts as to his impartiality”).

³¹ For further discussion, see § 12.12.4.

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statutes. These supplemental sources, however, have not been unified, presenting, rather, a diffuse array of sometimes-conflicting approaches. The next section revisits this theme.

8.5 The Diffuseness of American Lex Arbitri

Given the complications engendered by state law and the multi-jurisdictionalism noted in Chapter 7 (§ 7.8), an attempt to ascertain the arbitration law that applies to a proceeding seated in the United States requires a sifting of federal case law (which differs among the circuits), a preemption analysis (because the issue in question may be addressed exclusively by federal law), and, perhaps, a study of state statutes and state case law. These complications were elaborated upon in Chapter 7 (§§ 7.3, 7.7.4). If it can be said that consolidated presentation is one ingredient of a desirable legal framework—a suggestion made again in Chapter 9 (§ 9. 4.2)—it is abundantly clear that the American regime is missing something.

The regime's diffuseness is evident even within basic FAA application, as one discovers in pursuing the essential question of arbitration agreement existence and enforcement. The studious lawyer will find that the Supreme Court has advised lower federal courts to apply *state* rules of contract formation but that this dictum has not prevented federal courts from composing

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differing federal rules of waiver and from episodically applying “federal common law of formation” to putative *international* arbitration agreements.³²

Similarly, for want of a clearly controlling single text, counsel often must consider both state and federal law in relation not only to those FAA lacunae mentioned in § 8.4 but also to such matters as the propriety of consolidating related arbitrations,³³ whether statute of limitation questions affecting an arbitral claim are for a court or the arbitrators to determine, the appropriate rate of compensatory and moratory interest, when attorneys’ fees can be allocated, and (in some jurisdictions) the question of whether the tribunal has manifestly disregarded the law.³⁴ As to the aforementioned, state and federal approaches may differ widely.

Collateral but potentially distracting matters may also give participants pause. In particular, a lawyer not licensed to practice in the state where the arbitration takes place may legitimately

³² Cf. *Filanto S.P.A v. Chilewich Int’l Corp.*, 789 F. Supp. 1229, 1237 (S.D. N.Y. 1992). Despite a one-time invocation of the *contra proferentem* doctrine by the Court, on the question of the scope of the agreement to arbitrate the general rule reiterated by the Court is that doubts are to be resolved in favor of broad submissions (except for questions of jurisdiction).

³³ See *New England Energy Inc. v. Keystone Shipping Co.*, 855 F.2d 1, 39 (1st Cir. 1988) (applying Massachusetts law in contrast to the prevailing view).

³⁴ Manifest disregard is a federal common law concept but its application often involves an assessment of a state law alleged to have been disregarded.

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wonder if he is in violation of local practice limitations; so too may the arbitrators for that proceeding ponder if they will be immune from suit, should their award meet with displeasure.³⁵

Where there is a colorable argument that the parties have designated state law of arbitration, the range of potential state law influences upon the process would be expanded, but not to a precisely definable extent. This notion is further developed in the next section.

8.6 The FAA's Uncertain Relationship to State Law and State Procedure

As more fully discussed in Chapter 7 (§§ 7.3-7.4), the FAA and case law developed under it co-exists with one or more state statutory regimes covering commercial arbitration. Even for specialists, the identification of the governing arbitration provision may be challenging. FAA § 2 (which validates written arbitration agreements) is clearly preemptive. As to other FAA provisions, one is left to speculate³⁶ or depend upon lower court

³⁵ For a discussion of practice restrictions, see § 12.20 and concerning immunity see § 12.17. It will be recalled than in *Volt* a standard choice of law reference in a construction contract—viz, that the law of the place of the project should govern the contract—was interpreted to be a choice of the state arbitration law of that place, which differed materially from the FAA.

³⁶ Although the Supreme Court has not addressed the question, it is, for example, difficult to imagine that FAA §10 (grounds for vacatur) is not

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decisions;³⁷ such precedent remains disorderly concerning seemingly fundamental issues, such as whether the New York Convention must be observed in state courts.³⁸ In addition, *Volt* (1989), though perhaps narrowed by *Mastrobuono* (1995), allows state courts to interpret standard choice of law designations to include state arbitration law. Under the Court's present view, any preemptiveness in the FAA is subject to the parties' will, so that a deemed designation of state law can expose the arbitration to a regime that may be somewhat less solicitous to arbitration than the FAA or—in those states having international arbitration statutes—possibly to a regime replicating the prevailing international standard. In either case, unpredictability reigns, in

preemptive. A state statute that made awards subject to vacatur on non-FAA grounds including that the agreement to arbitrate lacked certain non-FAA formalities could not withstand scrutiny (*see* Chapter 7, §§ 7.3). It is less clear that a state court's every expanding of the basic FAA grounds would be precluded by preemption; additionally, much would depend upon whether the parties had indicated a willingness to allow expanded review or the application of state arbitration law.

³⁷ The FAA's jury provisions, for example, are not preemptive according to at least one court. *Rosenthal v. Great Western Financial Securities Corp.*, 58 Cal. Rptr. 875 (Cal. 1996).

³⁸ *See McDermott Int'l v. Lloyds Underwriters of London*, 944 F.2d 1199 (5th Cir.), *reh'g en banc denied*, 947 F.2d 1489 (5th Cir. 1991) (state courts do not necessarily have to stay litigation or compel arbitration under the Convention"). The better view is that expressed in decisions such as *David L. Threlkeld & Co., Inc v. Metallgesellschaft Ltd.*, 923 F.2d 245, 250 (2d Cir. 1991) (Convention and FAA preempt Vermont statute requiring that each party sign arbitration agreement).

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part because the Court has not unified the construction of choice of law clauses.

Given the foregoing, counsel and arbitrators alike may entertain serious doubts about the role of state law in the arbitration in which they are jointly involved. So too may the courts called upon to resolve the doubts raised.

8.7 The FAA's Failure To Treat International Disputes and Consumer Contracts Discretely

From the standpoint of the international practitioner, much of the ambiguity in precedent which besets American arbitration law and practice results from arbitration's wide appeal throughout diverse commercial sectors. Securities arbitration follows one pattern, construction arbitration another and labor arbitration still another. By contrast, arguably, less variation typifies international commercial arbitration. Indeed, as the 21st Century dawns, the available rule texts would suggest considerable homogeneity; these familiar international patterns are in some ways quite distinct from many of those evident in domestic commercial practice.

Among American domestic practices which depart from their international analogs are the presumption that arbitrators may act

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ex aequo et bono without express authorization,³⁹ the preference for unreasoned awards,⁴⁰ the expectation in some industries that party-appointed arbitrators may have *ex parte* contact with a party and may act as advocates during deliberations, the notion that counsel of record can issue subpoenas; the relative infrequency with which arbitrators must confront foreign law (and potential conflicts therein), foreign currencies, divergent legal cultures, and testimony and documents in multiple languages also distinguishes domestic from international arbitration practice.

In their specific contexts—given the uniformity of expectation among the participants—these diverse domestic elements function well. Their perceived potential for spill-over application in international settings, however, arguably engenders confusion and frustrates dispute resolution planning.

The FAA at present only treats international arbitration separately for purposes of applying the two convention chapters. In the main, those chapters merely delineate the federal courts' role in enforcing awards and agreements to arbitrate covered by a convention. The lack of a free-standing chapter devoted to international arbitration prevents non-specialists and non-

³⁹ See § 11.4.10.

⁴⁰ See § 11.4.7.

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American lawyers from isolating the relevant doctrines applicable to their proceeding.⁴¹

This same universalism arguably has retarded salutary tinkering with the bargaining process. In particular, doctrine developed by the Supreme Court has not been deferential to consumer protection concerns related to arbitration. Rather, objective theory of contract and presumptions favoring commercial arbitration have dominated the Court's decisions, as has robust support for party autonomy.⁴² The present FAA makes no distinction between an arbitration clause said to be part of a consumer transaction and that which binds experienced international traders, and the Court will not likely create one.⁴³ The FAA has been repeatedly interpreted to nullify state law attempts to impose special notice requirements and subject matter limitations, however well-intentioned.⁴⁴ The same pro-arbitration policies which some would argue have eclipsed standard contract analysis apply equally to any contract that has a nexus with interstate commerce.

⁴¹ The related problem of supplemental application of FAA Chapter One is introduced in the next section.

⁴² See §§ 3.3.2, 7.6, 7.7, 11.3.

⁴³ Cf. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (forum selection in cruise ticket enforceable against consumer).

⁴⁴ See Chapter 7, *supra*, at 185-86 nn. 18-19 and associated text.

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8.8 The Ambiguous Role of FAA Chapter One in Arbitrations Covered by a Convention

Chapters Two and Three of the FAA implement respectively, the New York and the Panama Conventions. Chapters Two and Three, in parallel provisions, state that Chapter One “applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the [relevant underlying convention] as ratified by the United States.”⁴⁵

The provisions’ helpfulness is clear when one notices that, for example, nothing in Chapter Two requires a court to stay proceedings when brought in contravention of a properly invoked arbitration agreement covered by the New York Convention. In such a case, § 3 FAA is properly pressed into service, for a stay would be minimally necessary to give effect to the Convention.

Yet, because the FAA’s drafters opted for a general residual application clause rather than more surgical incorporation by reference, there is room for mischief and unnecessary debate. The most troubling invocations of Chapter One in convention proceedings have come when a party resists an award.⁴⁶ Often, in having to traverse this maneuver the convention award holder

⁴⁵ FAA §§ 208, 307.

⁴⁶ Discussion of this problem is revived in § 12.2.3, where, after examples, it is recommended that non-specific residual application be avoided in the “New Act.”

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faces an added step that is of doubtful legitimacy under either convention.

8.9 Artificial and Unhelpful Limits Upon District Court Powers to Compel Arbitration

The FAA's convention chapters, allow a party to a convention arbitration agreement to procure an order from a federal district court compelling arbitration at a place named in that agreement, whether that place is within or without the United States.⁴⁷ If a convention does not apply, or the parties have not named a place in their clause, the powers of the courts are unclear.⁴⁸ In general, it is supposed that a federal district court must honor the clause by a stay, but that it lacks the power to designate as the seat a natural situs outside the court's district.⁴⁹

A related problem occurs when the arbitration clause is not covered by a convention, but names a place outside the district in which the motion to compel is lodged. Because of the phrasing

⁴⁷ See FAA § 206.

⁴⁸ For further discussion, see Chapter 12, *infra*, at 327-29 nn. 18-20 and associated text.

⁴⁹ A district is the smallest federal court system unit. Typically circuits encompass several districts. For a table demonstrating the geographic ambit of circuits, see § 7.8. Often a state will encompass many districts, but will itself be included with other states in one circuit.

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of FAA § 4,⁵⁰ despite the parties' express agreement, the court is restricted to issuing stays; it has no power to compel arbitration outside of its district and, somewhat bizarrely, cannot compel the parties to arbitrate within its district because to do so would contravene their express agreement.⁵¹ Thus, only when the parties have expressly named a New York or Panama Convention state does the existing regime allow a court to send the parties beyond its own district.

At present, a party relying upon an arbitration agreement in defense to a lawsuit may have to invoke it twice: once in plaintiff's chosen litigation forum (to achieve a stay) and a second time, before a court in the district in which (in that party's view) the arbitration ought to go forward based upon all the circumstances. This incapacity exacerbates the failure of the FAA to empower *arbitrators* to designate a place of arbitration, a default power that is now a standard feature of modern

⁵⁰ It states in relevant part: "The hearing and proceedings...shall be within the district in which the petition for an order directing such arbitration is filed." Petitions under both §§ 3 and 4 are often involved when an arbitration clause is invoked in response to litigation of a dispute caught by the clause; Section 3 requires the court to stay proceedings and § 4 authorizes it to compel the parties to carry out the clause. Only if the agreement falls within a convention *and* names as the situs a Party to that convention is the federal courts power enlarged.

⁵¹ See *Couleur Int'l Ltd. v. Saint-Tropez W.*, 547 F. Supp. 176, 177 (S.D.N.Y. 1982); *cf.* § 11.3, note 20.

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arbitration statutes and many rules texts. Though rule formulae typically give arbitrators such a prerogative in the absence of a designation by the parties, there remain situations in which the parties have managed only a bare commitment to arbitrate, with no agreement as to place and no designated rules. The result may be that the arbitration goes forward in an irrational place.

Significantly, the FAA does not contain any authorization for the tribunal to meet away from the place of arbitration in furtherance of the proceedings. In the absence of standard rules, experienced American arbitrators may feel at liberty to exercise this power by implication; others may entertain doubts. Accordingly, when arbitration is relegated to an inconvenient place by the above-referenced “intra-district” rule, the flexibility and efficiency sought to be achieved in arbitration may be impaired.

8.10 Divergent and Contradictory Positions Have Filled the Void

8.10[1] In General

As intimated above, the fragmentary character of the FAA has left state and federal courts relative freedom to expound divergent rules. As the following survey suggests, some of the questions are substantial and bear upon the degree to which the

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United States can be categorized as an attractive venue for arbitration. The following items largely address matters that can be clarified by statute. The list presented, however, is far from exhaustive.

8.10[2] Can Arbitrators Be Challenged for Partiality and, If So, When?

As noted in Chapter 7 (§7.13), the AAA / ABA Ethics for Arbitrators (1977) codify what is accepted in certain domestic systems for commercial arbitration—that party-appointed arbitrators may be non-neutral. Indeed, that text sponsors the presumption that in a tripartite arbitration, the party-appointed arbitrators should be considered “non-neutral,” unless the parties have agreed otherwise. An ABA resolution reverses the presumption,⁵² but the change is not widely published and appears nowhere in Ethics Text, which continues to be circulated. While there is little doubt that the third arbitrator must be “neutral” (to use the American domestic characterization), the

⁵² Resolution of November 1989 of the House of Delegates of the ABA Calling for Amendment to the AAA / ABA Code of Ethics of Arbitrators (“unless otherwise agreed, party appointed arbitrators in international arbitration should, to the extent practicable in the circumstances, serve as neutrals”).

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case law generated by alleged partiality on the part of a party-appointed arbitrator is “muddled.”⁵³ As noted above (§ 7A.4), among the questions that arise are: 1] must a party-appointed arbitrator functioning under the FAA begin and remain impartial, and 2] if so, may a suspicious party with reason petition the courts to remove the arbitrator in question? As to the first question courts have produced holdings and reasoning in dramatic disagreement.⁵⁴ As to the second question, the prevailing answer is that the challenging party must wait until the award is rendered and seek vacatur of it for “evident partiality,”⁵⁵ a difficult ground to establish.

8.10 [3] Is it Consistent With the Agreement to Arbitrate for a Court to Provide Interim Relief?

The UNCITRAL Model Law maxim that it is not inconsistent

⁵³ Washburn v. Mc Manus, 895 F. Supp. 392, 396 (D. Conn. 1994).

⁵⁴ Contrast Standard Tankers (Bahamas) Co. v. Motor Tank Vessel, AKTI, 438 F. Supp. 153 (E.D.N.C. 1977) (FAA makes no mention of non-neutral arbitrators; each presumed to be impartial) with to Sunkist Soft Drinks v. Sunkist Growers, Inc., 10 F.3d. 753, 758-60 (11th Cir. 1990) (party-appointed arbitrator did not engaged in misconduct when conferring with appointing party before appointment on matters of substance).

⁵⁵ See, e.g., Sun Ref. & Mktg. v. Stratheros Shipping, 761 F. Supp. 293, 296 n.2 (S.D. N. Y. 1991).

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with the agreement to arbitrate for a court to entertain and grant interim measures in aid of the arbitration posits a simple solution to hopelessly conflicted case law to be found in the United States, as more fully discussed in Chapter 11 (§ 11.5.1). The range of judicial views occupies a full spectrum, from holdings that such relief is available whenever necessary to preserve the *status quo ante* to—at the other extreme—an absolute prohibition when a convention applies. In between are cases that make availability depend upon whether a tribunal has been appointed or whether the relief is sought by a party seeking to support the arbitration as opposed to one thwarting it. The restrictive positions are so tightly held that they apparently do not give way to contrary party agreement.

8.10 [4] What Choice of Law Principles Govern the Agreement to Arbitrate In Federal Courts?

In exerting a robust pro-arbitration tendency, American courts have evinced a tendency to apply American principles of contract formation, even to agreements to arbitrate embedded in international contracts.⁵⁶ The *lex fori* bias, however, is only one tendency; more adventurous courts have applied foreign law,

⁵⁶ See *Filanto*, 789 F. Supp. at 1236-38.

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though the underlying choice of law directive is often not clear.⁵⁷ Although this latter group probably can be said to have come closer to meeting the parties' expectations, a *lex fori* rule is predictable and administratively efficient. In any event, the lack of guidance in the FAA on the applicable law (and resulting *lex fori* inference) seems conspicuously provincial when an international contract is under consideration.⁵⁸

8.10 [5] On What Basis May a Party Mount an Interim Attack upon the Tribunal's Competence and to What Extent Does a Tribunal Enjoy Competence to Determine Its Own Competence?

Traditionally, American courts have played an important role in assessing the existence and scope of arbitration clauses, though not a legally indispensable one. As noted above, the FAA is silent upon the *tribunal's* power to determine its own jurisdiction

⁵⁷ See *Frydman v. Cosmair, Inc.*, 1995 WL 404841 (applying French law because the contract was allegedly formed between French citizens in France).

⁵⁸ Perhaps the appropriate middle ground would be a statutory directive to apply to the agreement to arbitrate the law chosen by the parties in relation to the underlying contract (assuming an "embedded" arbitration clause), failing which designation the court could adopt the generic, federal rules of formation—that is, a *lex fori* default rule. See also § 4.2 at 94, note 4.

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and only indirectly indicates a court's role in reviewing a tribunal's findings concerning jurisdiction, by making excesses of authority a ground for vacatur. Until recently there was some doubt as to whether arbitral findings of jurisdiction should be treated with the deference with which courts approach awards in general (the non-deferential approach being review *de novo*).

Related to this, a series of questions have arisen. First, does the arbitral tribunal have any power to assess its own jurisdiction (a qualified yes after *Kaplan*);⁵⁹ second, if so, should it observe the severability principle (also not addressed in the FAA, but treated in rules formulae); and third, does the exercise of that power influence a courts' power to review the tribunal's findings—either in some form of interlocutory review (under the guise of considering a request for extraordinary relief)⁶⁰ or subsequently in the context of a vacatur action?

That these are questions common to most legal systems was broached in Chapter 3 (§ 3.3.3). The failure of the FAA to anticipate these issues allows additional issues to arise in both

⁵⁹ See generally §§ 3.3.3 and *infra* note 62.

⁶⁰ Some courts have been willing to enjoin arbitrations where they determine that no agreement to arbitrate exists or that the arbitration is in contravention of the clause, such as by being pursued at a place other than that agreed upon. See, e.g., *Societe Generale de Surveillance, S.A. v. Raytheon European Management and Systems Co.*, 643 F.2d. 863, 868 (1st Cir. 1981) (Massachusetts arbitration enjoined; parties had agreed to Swiss arbitration).

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state and federal courts because many of the state “international” statutes attempt to regulate arbitral competency to assess jurisdiction. Are these state provisions rendered moot by Supreme Court holdings, such as *Kaplan* (1995) and does it matter whether the parties have designated state arbitration law?⁶¹

8.10 [6] Are the Grounds Stated in FAA § 10 Exclusive?

The vacatur grounds set forth in FAA § 10 are not expressly exhaustive. Courts have differed upon the applicability of

⁶¹ *Kaplan* holds that the FAA allows the parties to dedicate to arbitral determination the questions of existence and scope of the agreement to arbitrate; where the parties have done so “unmistakably,” the arbitrators’ determination will receive especial deference. Nonetheless, where the intention to submit the jurisdictional question to the tribunal is not sufficiently unambiguous, federal courts are to perform *de novo* review when vacatur is sought. As is typical, *Kaplan* was an elaboration of doctrine under the penumbras of FAA § 2, there being no FAA provision dealing with *Kompetenz-Kompetenz*. California, Florida and other states, by contrast, purport to grant to arbitrators competence to determine competence and do so with qualifications which are arguably more permissive than those set out in *Kaplan*. Moreover, *Kaplan*—a domestic case—is of uncertain application when the agreement in question (or the resulting award) is covered by a convention. Even if *Kaplan* applies, vagaries within the case itself make outcomes unpredictable. For example, where a putative contract clause seems clearly to give the issue of jurisdiction to the tribunal, should a court petitioned to enjoin (or to compel) arbitration limit its consideration to the *prima facie* existence of the submission, so as to give the tribunal primacy in the determination of jurisdiction; or does that beg the essential question? See *Apollo Computer, Inc. v. Berg*, 886 F.2d 469 (1st Cir. 1989).

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common law bases for vacatur under the FAA. Many have admitted pleas based upon theories with a substantive character, contrary to the FAA's tenor.⁶² A related question upon which the courts have split is whether the parties may by agreement expand the level of substantive review so as to authorize vacatur for errors of law.⁶³ The extent to which these issues are relevant to convention awards also is unclear.⁶⁴

⁶² Among the non-statutory bases some courts have applied are public policy and "manifest disregard of the law." Concerning the latter, see §§11.4.7, note 72; 10.5.6, note 141.

⁶³As to expanded review by party agreement, see §12.2.2 at 342.

⁶⁴ *See supra* § 8.8.

Chapter 9

ARBITRAL REFORM: PERSPECTIVES, ABSTRACT GOALS AND PRELIMINARY QUESTIONS

Chapter Contents

- 9.1 Introduction**
- 9.2 How Urgent the Need?**
- 9.3 Constituencies**
- 9.4 Abstract Goals and Characteristics With Practical Consequences**
- 9.5 Whether to Treat International Commercial Arbitration Separately?**
- 9.6 Why Consider the UNCITRAL Model Law?**

9.1 Introduction

This project makes certain assumptions about vantage points other than the author's own. The first portion of this chapter, after addressing the relative urgency (or lack thereof) associated with arbitral reform in the United States, identifies the constituencies with which the author is more concerned in assessing the need for a new statute; the roles and presumed perspectives of each are outlined. In part built upon these assumptions, concluding paragraphs introduce the abstract goals and characteristics that ought to guide lawmakers in the event reform is undertaken. The chapter concludes by enter-

taining two preliminary questions: should international disputes be treated by a separate, autonomous regime and to what degree should the UNCITRAL Model Law attract early consideration by the drafters?

9.2 How Urgent the Need?

9.2.1 IN GENERAL

This work does not argue that reform is desperately and urgently needed but, rather, that it is inevitable and worthy of detailed study. Several factors make the urgency argument particularly untenable.

9.2.2 PARTY AUTONOMY SUPPORTED BY PRO-ARBITRATION DOCTRINE

For those who endorse a *laissez-faire* approach to the privatization of international disputes, the American law of arbitration might be regarded as exemplary in many respects. There is under the FAA's influence wide party autonomy mirrored by a relative paucity in mandatory rules affecting the arbitral process.

As interpreted by the Supreme Court, the FAA exists primarily to exalt the parties' right to submit their dispute to arbitration and to dictate the details of the arbitral process.¹ While certain traps for the unwary or ill-informed remain, in general parties are not required to adopt technical incantations to achieve enforcement of their arbitral agreement; indeed, the

¹ See *Volt*, 489 U.S. at 478.

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presumptions adopted by most courts, especially those in the federal system, are designed to salvage even poorly drafted agreements to arbitrate.² Similarly, it is difficult to set aside awards; analogous presumptions to those favoring agreements to arbitrate promote award enforceability.

9.2.3 JUDICIAL SELF-RESTRAINT

Complementary to wide party autonomy is the “hands-off” approach taken by the American judiciary in key respects when supervising arbitrations occurring within the United States. The FAA itself contemplates few express functions for courts to perform and judges have not been quick to expand their powers of interference. Under the FAA there is, for example, little basis for a party to seek interim review of an arbitral determination, whether substantive or procedural. Nor will courts readily entertain pre-award petitions that a tribunal member does not possess the required impartiality. The difficulty in setting aside awards mentioned above flows in part from the lack of substantive grounds for vacating an award. The judge-made doctrine that once arguably provided a basis for reviewing the arbitrators’ application of the law—“manifest disregard of the law”—has fallen into grave disrepute; most jurisdictions have narrowed it substantially or dismissed it outright.³

² See *Republic of Nicar. v. Standard Fruit Co.*, 937 F.2d 469 (9th Cir. 1991), *cert. denied*, 503 U.S. 919 (1992).

³ See, e.g., *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 706 (7th Cir. 1994) (“if [the manifest disregard doctrine] is meant to smuggle review for clear error in the back door, it is inconsistent with the whole modern law of arbitration.... The grounds for setting

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9.2.4 STANDARD RULE FORMULATIONS

The quasi-legislative function undertaken by the various institutions affecting international arbitration has already been mentioned. The gapfilling importance of standard rule formulations is difficult to overstate given parties' unquestioned power to adopt such texts to address the procedural details of arbitration and to guide the tribunal. The many formulations available have in common generally well-tested default procedures which make for relatively fool-proof arbitrations and largely unassailable awards. The absence of a comprehensive statute to provide similar default rules thus is unlikely to be a critical factor in the smooth functioning of arbitrations seated in the United States, especially with the administrative expertise available through organizations such as the AAA. In fact, the existing skeletal frame of the FAA arguably makes for relative predictability because it contains fewer intersections with prevailing rules texts; fewer conflicts and arguable conflicts between statutory and rules texts probably occur as a result.

9.2.5 URGENCY AND INEVITABILITY DISTINGUISHED

If as posited in the preceding paragraphs, the situation is not dire, why should reform be undertaken? (Or as one finds it in the vernacular: "if it ain't broke, why fix it?") The principal reasons include that reform would afford an opportunity to make the system more accessible to American and non-American disputants alike and would enable a consolidation of

aside arbitration awards are exhaustively stated in the statute").

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arbitral law in a preemptive federal vehicle. Generally greater predictability would result by reducing the supplemental role played by the diverse state laws. These benefits, which are to be elaborated upon in subsequent chapters, do not depend on particular timing; nonetheless, given the potential for such a project to suffer an “elephantine gestation”⁴ it is well to not procrastinate.⁵

⁴ Cf. Landau at 155 (The 1996 Act: “...a long and sometimes tortuous history—a gestation that has been often termed ‘elephantine’”).

⁵ Presently being revised is the Uniform Arbitration Act (UAA) upon which the majority of state arbitration laws are based. It is designed for individual state adoption. The latest draft of the “Revised” UAA (RUAA) does not distinguish international arbitration from domestic varieties. The broad interpretation of the FAA’s jurisdictional predicate (“involving commerce”) will ensure FAA dominance in the enforcement of commercial agreements to arbitrate. There is a danger, nonetheless, that the RUAA project will diminish any immediate incentive for federal reform. In particular, it may be assumed that delaying a federal initiative may allow that project to emulate the RUAA final draft so as to foster uniformity. In reality, even at the state level, uniformity is unlikely. Some states will retain the old UAA; others will retain their existing non-UAA-based regime. The result will be even greater diversity in the augmentative arbitration law provided by the states. Non-American lawyers will face even greater challenge in determining how arbitration in New York is likely to be different from arbitration in, *e.g.*, Los Angeles or Chicago. Further, because the present RUAA does not cater to international practice, its utility as a model in relation to international disputes is dubious.

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9.3 Constituencies

9.3.1 IN GENERAL

The perceived merits of a given proposed reform tend to be a matter of perspective; in relation to international commercial arbitration there is not one constituency but several whose views bear on the project under discussion in this work. Indeed, even within a semantically useful grouping such as “the international business community” there may be sub-groupings among which wide variation in attitude and receptiveness to change may be found.⁶ This section identifies sectors of practice and other groupings that will ostensibly be affected by reform. Speculation (or perhaps educated guesses) about the attitudes of each will be weaved into the discussion.

9.3.2 PRIVATE TRADERS—THE INTERNATIONAL BUSINESS COMMUNITY

International business has embraced alternative’s to litigation, arbitration being only one such avenue for circumventing national courts.⁷ In general, experienced business planners

⁶ Consider, for example, the different orientations one might find in canvassing the maritime trades, the international financial and securities markets and, the international technology field.

⁷ Arbitration though an established fixture, is under increasing pressure from mediation and other non-arbitral methods which promise greater speed and savings while offering the disputants control over the outcome of the process from start to finish.

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view disputes as inevitable.⁸ Other important considerations being equal,⁹ there is a preference for processes that save time and money, that bring finality to disputes, and that minimize loss of rapport among the disputants.

Entities involved in transnational business are generally thought to benefit from unification of the regimes that affect them. This would seem to be as true when the regime in question governs arbitration as when it dictates other commercial rights and duties. To the extent that business planners are offered a range of suitable places to arbitrate, each with a largely similar arbitration law, *ad hoc* planning is reduced. Resort can be had more often to standard forms. Moreover, because each party can afford to be flexible as to the place of arbitration, the terms of the arbitration agreement are less likely to be a stumbling block to concluding the bargain; with juridical concerns aside, the parties can concentrate upon issues of situs convenience.

As to the kind of regime that ought to become the norm, it can be assumed that one which honors party autonomy to a great extent and has a minimum of mandatory rules would be preferred by international business. Were these among the chief characteristics of the common legislative pattern, enterprises would be able to tailor the proceedings to the dispute by addressing cost, speed, confidentiality, potential

⁸ Perhaps one tell-tale trait of an *inexperienced* business person is the rather naive reluctance to discuss disputes before they arise. Experienced business persons and counsel tend to realize that once there is a dispute between the parties, the all-important dispute resolution accord may be impossible to reach.

⁹ That is, assuming there is not an undesirable impact upon substantive outcomes.

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cross-cultural disparities, choice-of-law outcomes and disruption to the relationship.¹⁰

9.3.3 THE LEGAL PROFESSIONS

In General

Counsel in the United States and abroad play several roles in relation to arbitration. Lawyers are instrumental in seeing that their clients' agreement anticipates disputes (the drafting/planning function), in preparing to arbitrate and in appearing as advocates before arbitrators. Owing to specialization and other factors, these roles are sometimes performed by different counsel, often of different firms; occasionally, they fall to the same lawyer, typically a member of the client's in-house legal department. Given the foregoing, several segments of the American bar and foreign bars have a stake in arbitral reform; because their respective views are potentially divergent, it makes sense to try to distinguish among them.

Corporate Counsel

In-house counsel, at least under the American model, though a member of a bar, is an employee of the private company for whom he or she works. His or her salary represents a fixed cost to the corporation; it does not fluctuate with the workload counsel is able to accomplish and typically, an entire range of responsibilities is carried on by such lawyers.

¹⁰ See generally Gans and Stryker.

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Often, the company legal department is bound by an inflexible budget; legal department heads are accountable for the economic consequences of the choices they make in ordering the company's legal affairs and in fighting its battles.¹¹ There is thus pressure upon in-house counsel to contain not only the consequences of dispute resolution but its costs. A victory won at enormous processing costs may not resemble a victory "on the books." Conversely, a loss (or any obligation arising in resolving the dispute) may seem to be a net gain if it "comes in under budget."

It is often budget-consciousness, and to some extent considerations of efficiency, that establish the division of labor between corporate counsel and retained (outside) counsel. To the extent that a particular drafting job, court appearance or other matter does not require specialist help, the in-house lawyer is free to undertake the task alone, or with minimal outside help.¹² For corporate counsel facing increasing demands on his or her time, it would seem to follow that a legal setting is to preferred which is not specialist-dependent, and which minimizes the consequences of inaction or less-than-perfect action. The arbitration regime presently in place—and hence the one with which a proposed reform must be compared—has elements of this latter forgiveness; most imperfectly

¹¹ Cf. P. Allen, *Bottom-Line Lawyers*, 37 Cal. Law. 37, 41 (1989) (citing Arthur Young survey of 300 corporate legal departments: 91% required itemized bills from outside firms and approximately 65% required detailed, per lawyer, information concerning hours billed).

¹² Cf. *id.* at 38 (1988 Arthur Young study showed dramatic increase over preceding five years in corporations handling litigation in-house).

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drafted arbitration clauses are enforced. Moreover, there is little need to draft from scratch. Time-honored models are readily available and include many concise, reliable standard institutional clauses.¹³

For in-house counsel, contemplation of the active stages of an arbitration may undergo a similar analysis—a search for those aspects of it requiring specialist help. The initial questions may relate to the law’s accessibility: That is, are the relevant cases, statutes and rules understandable to a non-specialist? If the answer is yes, corporate counsel is more likely to elect to play a significant role in the proceedings, whether in assisting outside counsel or in handling the matter using exclusively the company’s legal department. As a general proposition, therefore, laws which are accessible to a generalist because of good drafting and non-esoteric subject matter are—other things being equal—naturally preferred by corporate counsel.¹⁴

¹³ Standard arbitration clauses developed long ago suffice; the essential elements of a simple but clear clause have not changed much in recent decades. One advantage to the static text of the FAA is that only case-law developments have to be taken account of by the practitioner in keeping current; and, ultimately, that case-law has only strengthened the efficacy of even the most primitive arbitration clause. Moreover, such state law as would otherwise burden arbitration clauses with special requirements is preempted where the underlying transaction touches interstate commerce. As would be true in most systems, however, the consequences of *inaction* remain great: if no written arbitration agreement is reached, the courts will not create one in order to be rid of the case.

¹⁴ Moreover, when outside help is enlisted, an intelligible regime may result in a lower absolute fee because of help that in-house counsel and junior outside counsel will be able to provide the specialist leading the effort. It is also arguably true that when the arcaneness of practice is reduced, more lawyers are encouraged to specialize in

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Another factor influencing corporate counsel's reaction to a new law (however well drafted) is the extent to which its substance requires a redrafting of existing contracts and standard forms, a disruptive exercise in the main.¹⁵

Law Firm Practice

Almost by definition, the many firms that counsel international business are genuinely concerned with the American regime governing arbitration, whether or not they are one of those that have carved out a prominent arbitration specialty.¹⁶ In one sense there is a reciprocal relationship between law firms and company legal departments, as suggested above. Putting aside the potential influence of profit motive implied in the preceding section, it is possible to suggest that a regime that would optimize the complementary relationship between the firm lawyer and in-house counsel should be welcomed within the law firm ranks.

Foreign Counsel

Whether the issue is the relative merits of naming a U.S city as an arbitral seat or how to prepare for the arbitration that eventually occurs there, the perspective of foreign counsel are to some extent distinguishable from their American counterparts, who for better or worse, may be reasonably comfortable

that practice. In theory (supply and demand) number of specialists should result in price competition.

¹⁵ See *infra* § 8.4.6.

¹⁶ E.g., Freshfields, White and Case, *et al.*

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with the blend of legal sources potentially affecting American arbitration.¹⁷ When a lawyer reasonably familiar with the UNCITRAL Model law surveys a statute based there upon, he or she immediately has a good insight into the arbitration law of that place; the same is true for one reading the new English Act, which is largely intelligible to the lay person. By contrast, there is nothing particularly illuminating about the American statutory and case law patchwork that greets the uninitiated. Its obscure intersections no doubt promote increased dependency upon American counsel and perhaps a disinclination to arbitrate in the United States.¹⁸ It can be assumed therefore that like novice American lawyers, non-American counsel would welcome a centralized, relatively comprehensive source to which to refer that is presented in accessible or familiar language, shorn of Americanisms and clear on issues of particular interest such as court intervention, the independence of arbitrators and the availability of punitive damages.

¹⁷ American counsel would benefit from an American arbitral regime that is acceptable to foreign counsel. Less bargaining power would be required to fix an American situs and options presented to all concerned would be enlarged.

¹⁸ More than once the author has encountered colleagues practicing abroad who confess to steering clients away from American venues and toward the traditional European places for arbitration; unpredictability is often given as the reason. Statistics published by the ICC demonstrate, for whatever reason, that the United States is rarely designated by the Court as the apt situs. Of the 19 ICC arbitrations conducted in the United States in 1995, only 2 were placed there by the ICC. The remaining 17 were party-designated seats. *Statistical Report*, 7(1) ICC Int'l Ct. Arb. Bull. 3, 7 (1996).

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9.3.4 THE JUDICIARY

Litigation systems in many countries are overcrowded. Few judges consider themselves under-worked. In America, potential deterrents such as Rule 11 have not fully dissuaded those who would press frivolous claims. Any statutory reform, whatever its subject, holds the potential for increased litigation, because even well-drafted laws leave room to argue about scope and meaning. The present regime, built upon the FAA, for all its shortcomings gives the appearance of being relatively static; despite the regular emergence of new questions, most interpretive issues to be teased from the 1925 text have by now been mooted. Also in favor of the *status quo* is its relatively predictable operation: in general, arbitration agreements are invoked and enforced in a manner leaving little residual work for the court addressed; similarly, most awards brought to the judiciary are enforced and not vacated. Hundreds of cases make these generalities easy to offer. Accordingly, even the most enlightened new statute may prompt the assessment that it attempts “to fix what wasn’t broken,” an indictment recently leveled by an American judge at the Convention on the International Sale of Goods.¹⁹

The impact upon the judiciary of a new law thus will be multifaceted. First, caseloads may be affected, for, new forms of access to the courts may be explicitly authorized by the new law.²⁰ In addition, there will be myriad cases that are brought

¹⁹ *Filanto, S.P.A. v. Chilewich Int’l Corp.*, 789 F. Supp. 1229, 1238 (S.D. N.Y. 1992).

²⁰ The Model Law, for instance, contemplates judicial assistance for international arbitration not presently recognized in some federal and state courts.

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or prolonged because reasonable minds have differed about the new text. These interpretive issues will require that the context of the law as a whole be assessed, thus requiring the courts to digest yet another statute.²¹ Apart from the obvious point that clear drafting is to be preferred, it can be surmised that there would be value in having ample *travaux* available and perhaps an authoritative guide such as that accompanying the Arbitration Act 1996.²² Ideally, if uncharacteristically, it would serve the process if leading American commercial judges contributed to the effort long before it reached a supposed final draft, thus borrowing a salutary practice from the English.²³

9.3.5 ARBITRATION INSTITUTIONS

The privatization of dispute resolution has occurred at least in part through the persistent efforts of a few organizations which exist to provide services of various kinds in support of arbitration. Perhaps the best known of the many institutions is the

²¹ There will be the usual questions about the extent to which the new law intends to codify existing approaches rather than to adopt new ones. To the extent the new regime is based upon a non-indigenous model, such as the UNCITRAL Model Law, additional questions may arise in trying to mesh new terms of art with existing legal phrasings.

²² *See Saville Report.*

²³ *Cf. Mustill Report.*

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ICC.²⁴ Other well established organizations include the AAA, the LCIA, and the SCC.²⁵

Institutions play many roles. First, there is the quasi-legislative function these institutions have come to serve as sponsors of detailed rules, designed for global use by parties representing diverse legal cultures. Some of these texts have become so well accepted that lawmakers have selectively borrowed from them in formulating statutory arbitration law.²⁶ There is also the quasi-judicial role institutions play in the appointment and replacement of arbitrators, in the evaluation of challenges thereto and in the often registrar-like caretaking and supervision they exert over the proceedings.²⁷ Leading arbitral

²⁴ Cf. J. Paulsson, *Arbitration Institutions Adapt*, 6(6) Int'l Arb. Rep. (June 1991).

The Court of the International Chamber of Commerce has an unparalleled dominance. It receives over 300 cases per year, almost half of them involving amounts exceeding \$1 million. In the single year 1989, these cases implicated parties of over 100 nationalities and arbitrators of 41 nationalities.

In 1996, the ICC received its 9000th case. See 1995 Statistical Report 7(1) ICC Int'l Ct. Arb. Bull. 3 (1996).

²⁵ With the emerging prominence of arbitration in international trade have come tens of new entrants. The list, which continues to expand, now represents all regions of the world. See *Arbitral Institutions Active in International Commercial Arbitration*, in THE INTERNATIONAL ARBITRATION KIT 387-95 (L. Brown ed., 1993).

²⁶ India's recently promulgated arbitration statute, for example, is said to incorporate elements of the UNCITRAL Rules. See F. Nariman, *India's New Arbitration Law*, 8(1) ICC Int'l Ct. Arb. Bull. 37 (1997).

²⁷ The ICC's role in scrutinizing awards, for example, is well-known. See ICC Rules, Art. 27. Institutional styles vary somewhat. In recent symposia, the ICSID and the ICC have referred to the arbitrations they oversee as "highly administered." The AAA emphasizes its flexibility to meet the needs of the case at hand.

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institutions also endeavor to educate²⁸ and to influence policy.²⁹ Increasingly, arbitration statutes expressly acknowledge the functions performed by institutions, reflecting the reality that a significant percentage of arbitrations are administered³⁰ or contemplate the use of an appointing authority (typically but not invariably an institution).³¹ Naturally, the views of such

²⁸ The 1996 Annual Report of the AAA refers to the organization as “education driven.” There are conferences sponsored on a monthly basis by at least one of the now dozens of organizations established to administer arbitration or to further its advancement.

²⁹ See, e.g., AAA Amicus Brief in *Terminix* (1995).

³⁰ The parties are not required to enlist the services of an institution. An award produced from an *ad hoc* proceeding is entitled to the same treatment as one carrying an institutional affiliation. The relative merits of *ad hoc* arbitration continue to be debated. See generally G. Aksen, *Ad Hoc Versus Institutional Arbitration*, 2(1) ICC Int’l Ct. Arb. Bull. 8 (1991). Possibly, unwanted fees are the principal reason disputants limit institutional involvement. The UNCITRAL Rules were specifically designed for use with limited institutional support. Their introduction filled an appreciable void and they are now illuminated by the precedent produced by the Iran-U.S. Claims Tribunal, which has operated under them for well over a decade.

The UNCITRAL Rules notwithstanding, the arguments favoring institutional arbitration remain considerable. First, an institution’s know-how helps ensure that the arbitration can go forward without interruption. Most disabling contingencies have been anticipated either in the institution’s rules of procedure or in its internal policies. Second, the involvement of an institution may promote finality and enforcement of the award. In particular, the impression of institutional supervision may cloak the award with an aura of regularity likely to receive deference in a reviewing court. This remains true even though institutions generally perform no substantive review of the awards they sponsor. Third, institutions often assist in the setting and collecting the arbitrators’ fees. For many arbitrators and parties, this intercession is welcomed.

³¹ Minimal institutional involvement occurs in arbitrations in which the parties have designated an institution only as an appointing authori-

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organizations should play a role in reforming and consolidating arbitration law; the experience many of them bring to the discussion is considerable based in some instances upon decades of international and commercial case administration.³² Annually, these institutions, taken together, oversee hundreds of international cases seated in the U.S.³³ At least in some cases, the American situs was chosen by the institution in question.

In general, it can be surmised that arbitral institutions favor pro-arbitration laws that support rather than restrict party autonomy. As a rule, they also favor uniformity in arbitration law, since the rules and model clauses they craft are designed to function in multiple jurisdictions.³⁴ They no doubt also welcome a measure of self-restraint on the part of courts.³⁵

ty. If needed, it appoints arbitrators, decides challenges to arbitrators and replaces arbitrators. The availability of institutions to perform this limited role addresses the primary weakness of “pure” *ad hoc* proceedings, viz., the possibility that lethargy or disagreements in staffing the tribunal will derail the process.

³² The LCIA is over a century old; the ICC Court and the AAA are over six decades old.

³³ In the less than two years since the AAA inaugurated its new International Center in New York, approximately 500 international cases have been filed with the AAA. Remarks of William Slate, Pres. AAA, Joint Colloquium, Washington D.C., November 21, 1998. The AAA’s non-international commercial docket, in California and New York alone, typically approximates 5000 cases. See Appendix to AAA Amicus Brief in *Terminix* (1995) (statistics for 1993 filings).

³⁴ Special problems that emerge in leading arbitral venues are often reflected in rule revisions or adjustments in the institution’s internal policies. The French *Dutco* and the American *Mastrobuono* decisions are good examples.

³⁵ Accord S. Jarvin, *The Place of Arbitration*, 7(2) ICC Int. Ct. Arb. Bull. 54, 56 (1996) (“where [the] courts tend to intervene unneces-

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9.3.6 THE COLLEGE OF ARBITRATORS

Commercial arbitrators form a diverse group whose views are nonetheless highly relevant to the project under discussion. Many (and perhaps most) in international arbitral service are law-trained. Though there is thus some overlap with at least one other category in this survey, it can be assumed that arbitrators *qua* arbitrators entertain concerns and predispositions independent of whatever other professional identities characterize them. Despite the diversity and subcategories one finds within the larger group, one is tempted to adopt the following speculations about the features an ideal statute might possess.

Guidance

The present FAA gives little instruction to arbitrators as to what their specific powers are, which rules, if any, are mandatory, which remedies are available to them, and whether the parties or the tribunal have the final word regarding how to proceed. The tribunal is relegated to depending upon the institutional rules chosen by the parties,³⁶ to seeking the

sarily in the arbitration process and offer a party in bad faith an opportunity to obstruct the arbitration, the ICC Court is likely to go elsewhere when fixing the place of arbitration”).

³⁶ The leading rules vary greatly in the amount of specificity they offer. The LCIA Rules offer a list of specific “additional” powers available to the tribunal. *See* LCIA Rules, Art. 22. The UNCITRAL Rules distribute various authorizations throughout the text (*e.g.*, Art. 26: interim measures; Art. 24.3: production of documents) but give a default authorization (also found in the Model Law, Art. 19) that subject to the more specific rules therein, “the arbitral tribunal may

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assistance of the administering institution (if there is one) and to divining from FAA's section on vacatur whatever guidance resides in its opaque terms of art.

The non-American arbitrator is particularly likely to feel insecure when proceeding in an American jurisdiction, not least because the FAA interacts with the 50 state laws of arbitration in seemingly mysterious ways. The arbitrator ranks presumably would welcome, therefore, the kinds of yardsticks that modern statutes offer,³⁷ provided, of course, that the net result is not undue impedance of the arbitral process.

Flexibility, Restraints Upon Courts and Finality

It is difficult to see why arbitrators, whether trained in the U.S. or abroad, would not welcome a statute built around the permissive policies reflected, for example, in modern rules, the Model Law and certain recent enactments. Consensus among these texts appears to support judicial intervention limited to that designed to assist (rather than to impose upon) the process, wide tribunal discretion to advance the proceedings in

conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case." The LCIA's general tribunal mandate is found in Article 14.2 which provides that subject to a contrary agreement by the parties "the Tribunal shall have the widest possible discretion allowed under such law as may be applicable to discharge its general duties..."

³⁷ One finds in the English Arbitration Act (1996), for example, a substantially clear indication of which rules are mandatory (via separate schedule) and numerous explicit grants of arbitral power including a list of specific procedural and evidential powers (*Id.* at § 34).

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an efficient and fair manner³⁸ and restricted bases upon which awards may be set aside.³⁹

9.3.7 THE INTERNATIONAL LEGAL COMMUNITY AND SYSTEM

Somewhat more abstract than the preceding groups is a category, which for analytical purposes includes the shared interests of national legal systems in the smooth and rational functioning of private international dispute resolution. To this constituency can plausibly be attributed pro-unification ideals and a-national policies, a desire to minimize the importance of national boundaries and national irregularities. For this group, almost *ex hypothesi*, reform of the FAA offers an opportunity to minimize idiosyncratic national traits while bringing the U.S.—at least as to international disputes—in line with the international standard (or range of standards as the case may be). Unification built upon an international standard will engender predictability. At the same time, the natural law protections built into the modern paradigm (equality of the parties and fair opportunity to be heard) establish a minimum standard, especially when combined with the universal requirement that only a party to an arbitral agreement is bound by the eventual award.

³⁸ See, e.g., AAA International Rules, Art. 16 (Tribunal shall use discretion in expediting resolution of the dispute); LCIA Rules, Art. 14.1 (Tribunal's general duty to "adopt procedures suitable to the circumstances...so as to provide fair and efficient means..." [adopting the language of the Arbitration Act 1986, § 33(1)(b)]).

³⁹ Additionally, measures ensuring arbitral immunity would be applauded by most arbitrators. Some Model Law states have added such a provision. See Sanders at 34-35; Chapter 12 (§ 12.17) discusses the issue more fully.

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9.4 Abstract Goals and Characteristics With Practical Consequences

9.4.1 IN GENERAL

Arbitration legislation designed to govern, in whole or in part, “international” disputes ought to account for the myriad ways in which such disputes tend to differ from domestic commercial matters.⁴⁰ Whether or not the statute is singular in purpose or meant to govern international arbitration as part of a broader enactment, certain considerations or guiding principles seem relevant in establishing a preferred model. The following sub-sections set forth a survey of sometimes-interdependent characteristics that attractive legislation covering international arbitration would, at least *prima facie*, possess.⁴¹

⁴⁰ The author uses “*tend to differ*” with precision in mind. International disputes are not always readily distinguishable from domestic ones, which in a given federation may contain numerous multi-jurisdictional facets. Thus, an arbitration between a buyer incorporated in Louisiana and a seller of Mexican descent based in California may bear many of the markings of an international arbitration: an inter-state fact-pattern, applicable law questions, the bringing together of different legal cultures, and the involvement of multiple languages and documentation rendered therein. Shared by contractual arbitrations in general is also an element of voluntariness; that is, the parties choose it from among other possibilities and thus become subject to its regime as a matter of preference, not compunction.

⁴¹ As will be seen, the characteristics included on the list are not analytically discrete; because there is overlap, and the attributes promoted are mutually supportive, the categories are somewhat artificial. Nonetheless, they offer a way of introducing a range of important ideas.

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9.4.2 CENTRALIZATION

Ideal legislation consolidates the governing rules in a single text such that with assurance the reader can refer to it, knowing that as to the subjects covered, one need not hunt for preemptive contrary rules or amendments brought into being but never integrated in the main text. At present, the American regime is a model of diffusion, not integration and centralization. As discussed in Chapter 7, state statutes are partially preempted by federal statutes, but only as a result of case law; nothing to be found in any of the governing statutory texts alerts the reader to the intricate relationship that obtains.⁴²

Especially in a common law jurisdiction, of course, perfect centralization is not possible. Cases remain an important source of the law; they are often the last word on a subject ostensibly treated fully in the text.

⁴² The United States is not alone in erecting a labyrinth. Consider Bermuda's situation prior to its recent enactment of the UNCITRAL Model Law. According to one lawyer practicing in Bermuda:

To an international user of arbitration, English Arbitration Law and Bermudian arbitration law is difficult to comprehend....A simple point of arbitration law may require looking at a section of the Bermudian Arbitration Act, 1986, comparing it with the corresponding English provision....and then studying a number of decisions of the English courts...

N. Hargun, *International Arbitration Reform and the Bermuda Response*, paper presented at LCIA Conference, Hamilton, Bermuda, (26-28 June, 1996), at 3.

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9.4.3 COMPREHENSIVENESS

Related to centralization is comprehensiveness, the attribute of being relatively thorough in the selection of issues to be covered. The existing Federal Arbitration Act (FAA) is truly fragmentary; though it covers the three pillars of court involvement in the process—enforcement of arbitration agreements, court appointment of arbitrators, and enforcement of awards—the vast majority of issues typically covered in arbitration statutes are unaddressed. As a result, arbitrators and counsel are given little guidance about the proceedings themselves. The existence of state statutes, which tend to be more comprehensive than the FAA, improve the situation only to a degree because of uncertainty as to when they apply and their own deficiencies when pressed into service in the international setting.⁴³

⁴³ See Chapter 7 *supra* (§§ 7.3, 7.4). Disputes having a nexus with interstate commerce, whether those disputes have foreign facets or not, will be governed in federal court by all sections of FAA Chapter One, but in state courts, by only one or perhaps two sections of that chapter. If the New York Convention or Panama Convention applies, it must be given effect in state courts, but not in a fashion identical to that of the federal courts. State arbitration statutes fill gaps in state proceedings and to a lesser extent in federal proceedings. Important cases are copious and vary among state and federal jurisdictions. Special legislation is devoted to international arbitration only in a minority of states and for the non-specialist it may be unclear when they apply in light of the FAA's selective preemption of state law.

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9.4.4 ACCESSIBILITY (“USER FRIENDLINESS”)

It is all too often true of legislation, and legal drafting in general, that only a specialist can readily decode the intended meaning. Typically, prolix and complex drafting is to blame along with technical nomenclature employed more out of reverence for the time-honored than for its clarity. In legislation attempting to address an international audience, all of the forgoing obstacles are magnified because the reader (perhaps a foreign lawyer) may not be of a legal culture that provides any context for penetrating the text in question.⁴⁴ If that is true of a reader with legal training, how much more difficult must be the task of the non-lawyer trying to take direction from the text.⁴⁵

It is not impossible to draft “user friendly” legislation in the arbitration field, even if not starting with a model text. The English Arbitration Act of 1996, for example, combines clear drafting with an admirable absence of Latin phrases to offer an

⁴⁴ One is reminded of Professor Lowenfeld’s exegesis of the former English Arbitration Act of 1979, which he qualified by explaining:

I say I think because s. 3(7), which contains the definition of ‘domestic arbitration agreement,’ contains five consecutive negatives and defies confident interpretation.

Arbitrator’s View at 38, n.4 (parens omitted).

⁴⁵ In arbitration, the non-lawyer’s perspective is relevant because arbitrators and those representing parties in theory do not have to be persons with legal training, though typically they are. Moreover, arbitration is something to which one often commits in advance of any dispute. In the business planning stage, non-lawyers are often actively involved in the decision to choose arbitration and in deciding where such a proceeding should take place.

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intelligible text.⁴⁶ American lawmakers would do well to emulate this and other standards.

9.4.5 A DISARMING EFFECT

Where possible, a reform statute should take account of prevailing concerns and perceptions as registered in the literature, the views of specialists and other relevant sources. Many features of the American system have caused misgivings and apprehension among potential users abroad; the more apparent problem areas include the award of punitive damages by arbitrators in commercial cases, the perceived potential for party-appointed arbitrators to act with partiality, and the American system of discovery which some fear may find its way into U.S.-based arbitrations. Similarly, there are no provisions which clearly delineate limits upon court intervention in the arbitration process.

The problem of limiting apprehension is not one of substance alone. Reform along lines attractive to potential users abroad is nullified if it is unknown, misrepresented or otherwise poorly understood by those potential users.⁴⁷ Here again familiar texts have an advantage, especially when illuminated

⁴⁶ Accordingly, it vastly improves upon the byzantine array of statutes which formed its predecessor.

⁴⁷ *Cf. Saville Report* at para. 287:

Many...who do not have access to our case law were unaware that the Arbitration Act 1979 had been construed by the House of Lords in a way that very much limited the right of appeal, and which was not evident from words of the Act themselves.

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by helpful *travaux*, learned commentaries, and perhaps an official guide.⁴⁸

9.4.6 MINIMALLY DISRUPTIVE (A LOW REDRAFT FACTOR).

To the extent possible, new legislation should not require the redrafting of existing agreements *en masse*. The ideal is difficult to achieve in full, of course; new avenues of party autonomy may be conferred requiring potential disputants to opt-in or opt-out as the case may be.⁴⁹ Nevertheless, such problems as can be anticipated should be given special attention lest the courts be called upon to resolve problems that need not have arisen.⁵⁰

⁴⁸ See, e.g., *id.*

⁴⁹ If some form of exclusion agreement were to be authorized, for example, such as those available under the English and Swiss statutes, widespread redrafting would be a likely result. In general, any kind of “opt-out” or “opt-in” feature raises the redraft factor.

⁵⁰ For instance, the enactment of the Model Law-based Indian statute raised doubts about existing contracts which called for two person-tribunals, an accepted practice under the 1940 Act but ostensibly impermissible under Article 10 of the Model Law (as adopted in India, it calls for an uneven number of arbitrators). See *Indian Supreme Court Upholds New Act*, 8(1) ICC Int’l Ct. Arb. Bull. 39 (1997) (noting *MMTC v. Sterlite Indus. (India) Ltd.*, Supreme Court judgment of Nov. 18, 1996). The Court ruled that clauses calling for two-person tribunals, which ordinarily implied an inchoate role for an umpire, fell within the meaning of “uneven.” Such clauses were thus permitted under the new Act; no redrafting would be required. *Id.*

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9.5 Whether to Treat International Commercial Arbitration Separately?

The FAA treats international disputes separately only to a limited degree. No special regime governs such controversies, which are distinguishable only to the extent either falls under the two treaties implemented in chapters two and three of the FAA. In developing a path for reform one initial question is whether international disputes should continue to be merely part of a single regime devoted to commercial arbitration, subject only to variations dictated by U.S. treaty obligations, or should international arbitration be treated separately in a more comprehensive way, perhaps in a separate chapter?⁵¹ For several reasons—some pragmatic, some doctrinal—and despite some state practice to the contrary,⁵² this work assumes that separate treatment for international arbitration is preferable to a monolithic approach.

First, discrete treatment will allow work to advance as a separate initiative independent of the political will and resources available or necessary to reform all of commercial arbitration, with its many manifestations and diverse constituency. Second, separate treatment is warranted because the law and practice of international arbitration is distinctive and the default

⁵¹ The alternative to a separate chapter is to weave the rules applicable to international disputes into the main text. Such an integration is not desirable because the ease of access will suffer and because an integrative approach would seem to assume that the entire FAA will be revised at the same time.

⁵² The English Arbitration Act of 1996, though influenced by the UNCITRAL Model Law, does not base applicability upon international character.

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regime treating them ought to reflect these facts.⁵³ Third, separate treatment will enable potential subjects of the statute, at home and abroad, to more readily isolate and appreciate the doctrine that pertains to them; more efficient planning and reduced dependence upon American counsel should result.

There are, admittedly, potential detriments in separate treatment. First, it may encourage divergent development in the law of arbitration—one body of doctrine for international cases and another for domestic commercial cases. Second, such incrementalism may also slow reform of the remaining (domestic) parts of the FAA, to the extent that the two projects cannot move forward simultaneously.

9.6 Why Consider the UNCITRAL Model Law?

The bulk of the analysis which follows relates to the UNCITRAL Model Law. It may seem that by looking first to it, an essential question is being begged: why should a docu-

⁵³ If the argument for a separate treatment had to depend only upon the special characteristics of international commercial disputes, it would be far weaker than proves to be the case. First, commercial disputes in their essence do not dramatically change with the introduction of multiple languages, cultures, currencies and legal systems. They remain, for the most part, arguments about rights and duties that are perceived to have economic implications by the disputants. The various international aspects of the dispute bear more on the process for resolving them than on the disputes themselves. The process in turn, whether sanctioned by a separate chapter or not, can be manipulated by the participants with relative ease (through, *e.g.* the adoption of appropriate standard rules and suitable arbitrators).

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ment produced by a UN Commission *prima facie* occupy center stage in a discussion about reforming *American* arbitration law? That is, doesn't such an undertaking assume that the Model Law must be reckoned with along the way and is that assumption irresistible? These questions in a sense are thematic throughout the chapters that follows. The answers to them, which may not be acceptable to some American lawmakers, are to an extent prefigured by the answers to the question of separate treatment broached above.

Specifically, once it is determined that separate treatment is warranted, it would be foolish to overlook the Model Law, a free-standing, comprehensive codification crafted with expert American participation. It is a text which has greatly influenced recent enactments in developed and aspiring arbitral venues alike.⁵⁴ Its preeminence in the discussion therefore is justified because the UNCITRAL Model Law comes bearing an *imprimatur* honestly earned. Moreover, a failure to recognize the Model Law as the emerging standard would conduce to mixed results when the ultimate draft product is examined by the experts. A failure to at least consider well the increasingly familiar solutions and approaches to be found in the Model Law may ultimately lead to substantial "redrafting the

⁵⁴ The list of UNCITRAL Model Law jurisdictions includes: Australia, Bahrain, Bermuda, Brazil (apparently), Bulgaria, Canada, (Federal Parliament and all Provinces), Cyprus, Egypt, Finland, Germany, Guatemala, Hong Kong, Hungary, India, Kenya, Malta, Mexico, Nigeria, Peru, Russian Federation, Scotland, Singapore, Sri Lanka, Sweden (perhaps still under study), Tunisia, Ukraine and four American states. Source: Status List supplied by UNCITRAL as updated by author.

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draft” in light of perceived ambivalence among potential users.⁵⁵ Further, even if lawmakers ultimately adopt a different model, there is much to learn from a study of the UNCTRAL project.⁵⁶

⁵⁵ *Cf. Saville Report* at para. 2.

Although undoubtedly a highly skilful piece of work, it now appears that [the draft Bill circulated in February 1994] did not carry into effect what most users wanted [based upon reactions to the draft]...[R]einterpreted, what is called for is much more along the lines of a restatement of the law, in clear and ‘user-friendly’ language, following, as far as possible, the structure and spirit of the Model Law....(quoting interim DAC Report of April 1995).

See also A. Hermann, *Bill Pulls the Wrong Punches* *Fin. Times*, Feb. 15, 1994, at 12 (“a document likely to disappoint lawyers and businessmen”).

⁵⁶ *Cf. Saville Report* at para. 4. Despite not adopting the Model Law wholesale:

at every stage in preparing a new draft Bill, very close regard was paid to the Model Law, and it will be seen that both the structure and the content of the . . . final draft, owe much to this model.

Chapter 10

DEBATING THE CONCEPT

Chapter Contents

- 10.1 Introduction**
- 10.2 The Arguments for Adoption of the UNCITRAL Model Law**
- 10.3 Potential Arguments Against Adopting the UNCITRAL Model Law**

10.1 Introduction

It is by no means certain that after initial study the Model Law will become more than one influence in an eclectic mix of texts informing lawmakers. Even before the details of the Law's substance are debated preliminary questions will arise. It no doubt will have strong backers as well as detractors. What follows are lists of arguments or propositions to be anticipated in relation to the Model Law. The first series support adoption, the second might be offered to militate against its enactment. Each proposition and an elaboration of it are first set forth followed by a critique and further discussion. Chapters 10 and 11 in turn analyze the specific content of the Model Law in relation to existing law to determine the potential impact of the former upon the latter.

10.2 The Arguments for Adoption of the UNCITRAL Model Law

10.2.1 IT OBTVIATES DRAFTING FROM SCRATCH

The Argument: One purpose of the Model Law is to provide a modern statute sufficiently free of idiosyncratic provisions to be adopted, more or less as is, by law-makers who would otherwise have to begin with a blank slate. While its sponsors tend to discourage departures from the canonized text, nothing prevents a state from adapting the Model Law, augmenting and modifying it as necessary.¹ Given that legislative resources are limited and that priorities may otherwise argue for delaying reform, the Model Law's immediate availability is of considerable importance, even if the text is viewed as a first draft.

Critique and Further Discussion: The Model Law's instant availability cannot be disputed. While not entirely beside the point, its readiness ought to be a factor only if the substance it offers is suitable. "Suitable" in this context ought to mean that it offers provisions which—after modest adjustments—are as good as those which would emerge from an act requiring much more work, whether engineered *de novo* or assembled from influences other than the Model Law.² There is, after all,

¹ Of course, one disadvantage of altering the official text is that the adopting state has less latitude in promoting itself as "a Model Law state."

² *E.g.*, such as by borrowing ideas from the English Arbitration Act 1996, the Swiss counterpart and other recent enactments not fully based upon the Model Law.

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no dearth of able drafters within the American legal community.³

10.2.2 IT IS ACCEPTED AND INCREASINGLY WELL-TESTED

The Argument: If a goal of reform is to enhance predictability in the law by making its content clear, the Model Law offers a distinct advantage. Few recent international documents have been so greatly scrutinized by experts in the relevant field. The literature is copious. Moreover, given that several American states have adopted the Model law, federal adoption will have benefitted from, in effect, a local test period during which any problems in the Model will have emerged; adjustments could be made accordingly. The experience of the numerous adopting states outside the U.S can therefore be assessed in crafting appropriate implementation. The substantial and increasing number of states adhering to the Model also means that the approaches of courts abroad could be consulted in seeking to give the new Act a suitably international interpretation.

Critique and Further Discussion: All of the above ought to be influential. In particular, the situation has changed considerably since 1990 when Messrs. Rivkin and Kellner wrote in opposition to the Model Law, “it has been adopted by only seven countries, none of which [is a] major arbitration center[.]”⁴ The safety-in-numbers argument seems to assume, however, that the gestation period for problems is relatively

³ One need only consider the teams assembled by the CPR in producing its International Rules for ad hoc use (1992), by the AAA in improving upon its International Rules (1997) and by the LCIA in its 1998 revisions.

⁴ Rivkin and Kellner at 558.

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short such that most of them would have been evident by the time drafting commences. It also seems to take for granted that there is an efficient mechanism by which problems with the Model Law are reported and dissected in sufficient context to be helpful to other states.⁵ Additionally, salubrious operations in the many other adopting countries are only partially predicative because legal systems are to some extent unique. Probably, the most reliable information will come from the common law adopting states (which are numerous); even as to those, account will have to be taken of any judicial attitudes affecting the Model Law's operations.

Perhaps the sense that enough trial time may not have elapsed suggests that (especially since the existing system functions reasonable well) an especially deliberate approach to reform is in order. In anticipating the course that any proposed new chapter will follow, ample time should be allowed for circulation of and comment upon the proposed draft within the various private sectors to be affected by the New Act act; this canvassing would presumably include the many arbitration experts to be found both in practice and academia, within and without the U.S., with considerable analysis from the AAA and other institutions who by virtue of their decades of experience have become keenly aware of specific flaws in the

⁵ Context would include general information about the legal system in question, such as whether it is a civil law system, whether it is well developed or fledgling, and whether its arbitration-related caseloads are relatively heavy or light. Also essential would be specific details about the extent to which the problem (or absence of problems) relates to changes in the Model Law made by the state in question or other peculiarities not endemic to the Model Law itself.

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existing system.⁶ At the same time, the misgivings of certain quarters ought not to be talismanic.⁷

10.2.3 IT DOES NOT DRAMATICALLY ALTER AMERICAN LAW BUT WOULD CONFIRM AND CLARIFY THE LAW

The Argument: Because of the variation caused by the federal system and the hybrid application of state and federal law, consolidation and unification is needed. The Model Law treats explicitly, and thus would codify, myriad rules presently not found in statute including some of the more arcane doctrines (such as severability and *compétence de la compétence*).

Critique and Further Discussion: The next two chapters compare in some detail the Model Law and existing American Law. The conclusions reached there agree with the sense that in the main the Model Law does not revolutionize existing law but would bring noticeable changes. The changes would nonetheless largely be in keeping with an international standard, a standard which presumably the New Act should emulate.

⁶ *Cf. Saville Report* at paras. 5-6 (referring to the positive influence of “the extraordinary quantity and quality of responses received [to the draft Bills]...[including from] a large number of institutions...”).

⁷ There are anecdotal accounts suggesting that some among the litigation bar would instinctively press for modifications to the arbitration model that would give it litigation attributes, such as by widening discovery and allowing recourse for errors of law. The author holds that both tendencies should be resisted.

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10.2.4 BY CONFIRMING AND CLARIFYING IT WILL ENGENDER CONFIDENCE ABROAD

The Argument: Because the domestic commercial arbitration system that has developed in America departs from the established international norm, there may remain understandable apprehension on the parts of business planners and counsel abroad contemplating arbitration in the U.S. There is, at present, no clear statutory dividing line between the two domains—no positive treatment calling attention to what in fact are distinguishable regimes. The outside observer trying to piece together a clear picture of “American” curial law also faces the variation to be found both among state regimes and federal circuits, each important sources of the *lex arbitri*. The resulting lack of complete information may lead one to form an erroneous impression of the American system.

For example, consulting the standard references and random decisions might lead one to conclude that the American arbitral model relevant to international disputes: 1] allows arbitrators to discuss the merits of a dispute with the appointing party prior to the appointment and to have further *ex parte* conduct with the appointing party during the proceedings;⁸ 2] allows a party-appointed arbitrator to take a partisan approach—at least to some extent—during the deliberations among the arbitrators,⁹ and 3] leads ordinarily to an award rendered

⁸ See, e.g., *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 20 F.3d 753 (11th Cir. 1993).

⁹ Cf. Coulson at 107 (“Some systems of arbitration in the [U.S.] assume that party-appointed arbitrators serve as advocates during arbitrators’ deliberations”).

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without reasons,¹⁰ which 4] may reflect the arbitrators' sense of what justice and equity require rather than a remedy selected after a searching inquiry of the applicable law¹¹—four common elements of domestic commercial arbitration.

Critique and Further Discussion: The above four characteristics, which are *uncharacteristic* of international dispute processing in the United States, are nonetheless supported by ample authority among the commercial cases. Little in the FAA encourages courts to qualify their holdings by reference to a dispute's domestic or international character. In practice, any distinctiveness that international proceedings have enjoyed has resulted from the rules chosen by the parties. Confusion and misunderstanding awaits the non-specialist called upon to structure or participate in arbitral proceedings; this is true to some extent whether or not that person was trained in America.

While specialists may enjoy their rather exclusive franchise, the present regime falls woefully short if accessibility is a trait sought to be accomplished by it. Although standard rule formulations are clearly written, and cover, for example, the four issues mentioned above, there ought to be a default regime¹² that matches the parties' likely expectations; in

¹⁰ AAA, A GUIDE TO ARBITRATION FOR BUSINESS PEOPLE 22 (1997) ("As a general rule, AAA commercial awards consist of a brief direction to the parties on a single sheet of paper").

¹¹ *See, e.g.,* Advanced Micro Devices, Inc. v. Intel Corp., 36 Cal. Rptr. 2d 581, 588 (1994) (absent choice of law designation, arbitrators may act *ex aequo et bono*).

¹² The number of arbitrations that are not governed by standard rules chosen by the parties is probably very low. The function of a statutory regime, however, is not merely to provide guidance to that handful of proceedings. Rather, it is to circumscribe judicial

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relation to international disputes, those expectations are presumably best met by the international standard.

10.2.5 ON BALANCE IT WILL ATTRACT ARBITRATION BUSINESS TO THE UNITED STATES

The Argument: If it can be admitted that international arbitration has implications for invisible earnings and that promoting same is a legitimate goal of law-makers,¹³ the UNCITRAL Model Law (even with whatever flaws it might have) promises better returns than an unknown statute, however expertly drafted. This follows from the notion that there is comfort in the familiar and that which is immediately familiar enjoys an advantage over that which, to be accepted, must for the requisite period be touted, explained and, ultimately, compared favorably to the Model Law itself.¹⁴

Critique and Further Discussion: It is difficult to measure the impact that particular legislation has or will have on levels of

involvement in the process, ensure basic fairness and quality control and do so with sufficient transparency that the parties and their advisors proceed with confidence as to their procedural rights and duties.

¹³ Cf. DTI, GUIDE TO THE ARBITRATION BILL (April 1996) at 2:

The Bill should help...safeguard the future of...London as a world centre for arbitration and so strengthen the competitiveness of our arbitration community. Such international arbitration business is highly mobile. When deciding where to arbitrate companies need to know quickly and easily what rights and obligations they have under the arbitration law of a given country.

¹⁴ The *Saville Report*, for example, takes care to confirm that the Model Law influenced the final product considerably. *Id.* at 5-6. Even the *Washington Report*, which in 1988 declined to recommend wholesale adoption, favored incorporation of certain Model Law ideas. See *Washington Report* at 312-16.

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specific private activity; the variables are many and the data are largely anecdotal. It is similarly questionable whether one can meaningfully compare the supposed results of the regime chosen against an alternative considered but not adopted.¹⁵ Nonetheless, it is plausible that adoption of a known text will lessen apprehension on the parts of non-Americans asked to consider arbitrating in the United States. It is less probable that a non-UNCITRAL-based enactment would have the same effect.

Even if the Model Law forms the basis of the New Act, ultimately much will depend upon the changes that drafters make to the familiar text in implementing it; at some point it may become so “Americanized” that the advantages of familiarity will have been diminished or lost entirely.

10.2.6 CLARIFYING THE APPLICATION OF THE FAA IN STATE COURTS.

The Argument: The present FAA’s phrasing indicates that it was intended for use only by federal courts. By U.S. Supreme Court case law the FAA has been given both a substantive component and preemptive character (but only as to some of its provisions). In doing so the Court has had to rely somewhat unconvincingly upon the supposed intentions of Congress. Some members of the Court have openly admitted that the

¹⁵ Those considering NAFTA continue to disagree about what its net effects have been.

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FAA has been pressed into service in state courts, not because of Congress' intent, but in spite of it.¹⁶

Critique and Further Discussion: Many states have established pro-arbitration regimes that are highly consistent with the substantive goals now identified with the FAA. Indeed, the FAA was intended to replicate the statute already in place in New York;¹⁷ that state continues to be a leading venue for commercial arbitration. The highest court of New York, for example, has recently reiterated that "it is the policy in New York to encourage resolution of disputes through arbitration, particularly conflicts arising in the context of international commercial transactions."¹⁸

State statutes devoted to arbitration generally provide for the enforcement of pre-dispute agreements to arbitrate by acknowledging their validity and providing machinery for their enforcement.¹⁹ The Uniform Arbitration Act (UAA) adopted in more than thirty states adopts this standard pattern,²⁰ as does New York's Civil Practice and Rules.²¹ As would be

¹⁶ *Terminix*, 115 S. Ct. at 844 (O'Connor, J., concurring); see *infra* notes 23-25 and accompanying text.

¹⁷ I. Macneil, AMERICAN ARBITRATION LAW 41-42 (1992).

¹⁸ *Corcoran v. Ardra Ins.*, 567 N.E.2d 969, 973 (N.Y. 1991) (citing *Cooper v. Ateliers de la Motobecane*, 442 N.E.2d 1239, 1240 (N.Y. 1982)).

¹⁹ Alabama is among the few states that have resisted arbitration. Alabama Code, § 8-1-41(3) makes written dispute arbitration agreements invalid and unenforceable. See *Terminix* (1995). When the FAA applies, an inconsistent state statute is preempted and state courts must at least stay the circumscribed litigation in situations paralleling those giving rise to stays in federal courts, and arguably should do so "in a summary and speedy disposition of the motion or petition." *Moses Cone*, 460 U.S. at 29.

²⁰ UAA Sections 1 and 2.

²¹ N.Y. Civ. Prac. L. & R. §§ 7501-7503 (McKinney Supp. 1996).

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expected, state statutes designed to accommodate international dispute resolution contemplate few obstacles to enforcement of commercial arbitration clauses falling within their ambit.²²

Although, Section 2's preemptive power has been established for well over a decade, the FAA nowhere contains language preempting state law. Section 2's viability in state courts is purely of judicial origin. As Justice O'Connor has conceded:

I have no doubt that Congress could enact, in the first instance, a federal arbitration statute that displaces most state arbitration laws. But I also have no doubt that, in 1925, Congress enacted no such statute.²³

Tell-tale signs in the statute itself bear this out. Sections 3, 4 and 10, critical parts of the original chapter, refer to courts "of the United States," a time-honored reference to federal courts. Few would dispute that the FAA's role in state courts, the product of judicial elaboration, is not apparent to the uninitiated observer.²⁴ It would thus be of advantage to secure a clearer picture through statute.²⁵

²² California's international title, for example, defines the requisite agreement broadly, and mandates that state courts, if timely petitioned, stay judicial proceedings covered by the agreement. Cal. Civ. Proc. Code §§ 1297.72-1297.82 (West 1982 & Supp. 1996).

²³ *Terminix*, 115 S. Ct. at 844 (O'Connor, J., concurring).

²⁴ For example, does FAA § 10 (grounds for vacatur) apply in state courts? Lawyers at present must answer that it depends upon whether the otherwise applicable state provision unduly interferes with the objectives of the FAA. Thus, the answer, and in effect the FAA's applicability, could vary from state to state. *See supra* Chapter 7 (§ 7.3).

²⁵ The New York Convention does not expressly mandate state court enforcement of arbitration agreements falling under the Convention. The better view, however, is that to parallel the well-established preemptive character of § 2, state courts also should be bound to enforce agreements to arbitrate under the Convention. *See generally Washington Report*. Much contract-based litigation is filed in state

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10.2.7 IT WILL ACCOMMODATE ADVANCES IN TECHNOLOGY

The Argument: Because it is flexible and broadly phrased in crucial respects, the Model Law will not quickly be overtaken by practices promoted by innovations in telecommunications.

Critique and Further Discussion: Because of the rapidity of advancements in computer and satellite-assisted communication, it is difficult to state with confidence that a document conceived in 1985 will meet the needs of the 21st century. Nonetheless, those few formal requirements to be found in the Model Law seem not to preclude alternatives made possible by telecommunications. For example, although the arbitration agreement must be in writing, that requirement is met if the agreement is contained in “means of telecommunication which provide a record of the agreement.”²⁶ Although no similar definition accompanies the rule for awards, which are to be “in

courts. Even if the Convention did not apply in state courts, Chapter 2's removal provision would reduce the potential for state court emasculation of the Convention's Article II. State courts, particularly those of New York, have acknowledged duties under the Convention. In *Cooper v. Atelier de la Motobecane*, 442 N.E.2d 1239 (N.Y. 1982), the highest court of that state interpreted the Convention to preclude pre-award attachment in state courts, relying on a line of federal cases to the same effect. That court has confirmed the applicability of the Convention on other occasions: “[w]e recognize strong policy concerns of international comity which enjoin us to enforce arbitration agreements when the Convention requires it.” *Corcoran*, 567 N.E.2d at 973 (citations omitted).

²⁶ See also Article 3 which provides that a written communication is deemed received if it is “sent to the addressee's last known...mailing address...by any...means which provides a record of the attempt to deliver it.” This presumably would include an e-mail sent to the addressee's last known e-mail address.

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writing” and “signed” by the arbitrators,²⁷ the anomaly is not insurmountable. Even without legislative rectification, it is likely that American courts will give “writing” a parallel meaning to that applicable to agreements to arbitrate; consequently, awards dispatched by e-mail should suffice unless the parties have imposed a different requirement.²⁸

Also consistent with the likelihood that commercial disputes will become increasingly technical are the Model Law’s provisions allowing the tribunal to appoint experts. This represents no change in comparison to the practice that has developed under the FAA, especially when the parties have selected standard rules that contain elaborate provisions concerning tribunal experts, such as those sponsored by the AAA (International Rules), WIPO,²⁹ and UNCITRAL.³⁰ The express authorization in the Model Law³¹ does remove any

²⁷ Model Law, Art. 31(1).

²⁸ It may be well to define “signature” within the New Act to include any commercially reasonable means of source authentication.

²⁹ Article 55.

³⁰ Article 27.

³¹ Article 26 of the UNCITRAL Model Law provides:

- (1) Unless otherwise agreed by the parties, the arbitral tribunal
 - (a) may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;
 - (b) may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.
- (2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.

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doubt that may have remained in situations in which the parties have not adopted rules covering tribunal experts.³²

Moreover, the pliable, non-mandatory nature of the Model and its ability to be supplemented by the parties, would allow them to superimpose upon the Model's default regime detailed confidentiality and secrecy procedures, such as those introduced by the WIPO Rules.³³

As suggested in Chapter 6, in the near future, international arbitrations may run their course without the parties or arbitrators physically assembling, such as by using video conferences

³² The AAA Commercial Rules appear not to contain an express authorization regarding tribunal experts. However, given the consistency with which international texts (including NAFTA, art. 1113) have authorized the use of tribunal experts, the reservations expressed one decade ago by the *Washington Report* seem provincial, myopic and built upon misconception. The *Report* at 317 questions: Would the tribunal be able and willing to select truly qualified, independent experts? Would some tribunals be tempted to abuse this privilege by appointing experts even when they are not truly needed? Would the use of such experts unnecessarily prolong the hearing and increase the costs by increase in expert's fees and the extra hearing days? Additionally, such a provision would be unlikely to win the support of the legal profession. United States trial lawyers are accustomed to selecting and working with their own experts. They would be wary of a tribunal's active participation in this process (paragraphs merged).

These criticisms tend to reflect a generally dim, parental view of arbitrators and to assume that appointment of experts will be favored by arbitrators in a significant percentage of cases (costs notwithstanding). In the author's experience, arbitrators are not quick to appoint experts and are generally sensitive to the cost and delay implications of the decisions they take. Regardless, the tribunal expert provisions of the Model Law are subject to contrary agreement of the parties (*Id.*, Art. 26 (1), reprinted at *supra* note 31). Consequently, the potential for abuse cited in the *Report* appears exaggerated.

³³ See WIPO Rules, Arts. 52, 71-73.

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and e-mail. Intriguing issues arise because the Model Law depends in part upon territorial delimitations. For example, Article 1(2) states that all but a few of the Model's provisions "apply only if the place of arbitration is in the territory of this state." Covered by this limitation are such important supporting functions as the appointment of arbitrators (Articles 11(3) and 15) and the grant of interim measures (Article 17). Elsewhere, in Article 20 (1), the Model provides that "the parties are free to agree on the place of arbitration" failing which, "the place of arbitration shall be determined by the arbitral tribunal." That place in turn is to be mentioned in the award, which "shall be deemed to have been made at that place."³⁴ The Model Law places no strictures, physical or other, upon the parties or the tribunal in designating the place, except that, the tribunal shall have "regard to the circumstances of the case, including the convenience of the parties."

The deemed place of the award is important because, under the Model, petitions to set aside an award allowed under Article 34 are to be accepted only by designated courts of the state in whose territory the arbitration has its place.³⁵ The hypothetical arbitration set forth in Chapter 6 attempted to introduce some of the issues that might arise from arbitrations having no physical nexus to the seat designated by the parties or the tribunal. In anticipation of the "seats-of-convenience" question, lawmakers would be well to consider the physical nexus that shall suffice to earn the assistance and establish the

³⁴ Model Law, Art. 31(3).

³⁵ *Id.*, Art. 1(2). By contrast, the Model Law does not preclude a court in an adopting state from entertaining requests for interim relief in relation to an arbitration the "place" of which is abroad. *Id.*, Arts. 1(2) and 9.

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award set-aside jurisdiction of the local courts. After all, one can read the Model Law so that “place” of arbitration is purely a juridical construct—a legal fiction.³⁶

Noncentralized proceedings are also facilitated by Model Law Article 20(2) which provides that:

Notwithstanding the provisions of paragraph (1) of this article [requiring that a place be designated] the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.

Another Model Law provision that is consistent with the “on-line” future relates to applicable law. Article 28 allows the tribunal to employ such choice of law rules as it deems applicable. Accordingly, learned disagreement notwithstanding,³⁷ to the extent traditional, statist conflicts analysis seems inappropriate, the tribunal presumably could develop, by analogy to existing rules, its own approach tailored to the fact *e.g.*, that the sale in question was concluded over the internet.³⁸ Similarly, the Model Law’s instruction that the tribunal “take into account the usages of the trade applicable

³⁶ One might expect an amendment to Article 1(2) which adds, for example:

For purposes of this Act ‘in the territory’ of this State includes circumstances in which this State has both been designated as the place of arbitration under Article 20 and has a reasonable relation to the proceedings, any party or arbitrator, or to the subject matter in dispute.

³⁷ *Saville Report* at para. 225 (“tribunal cannot simply make up [conflicts] rules”).

³⁸ This may require a reconsideration of the traditional connecting factors such that the place of performance and the place of formation will take on specialized definitions when the transaction is on-line.

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to the transaction” allows the tribunal to consider mercantile customs peculiar to on-line transactions. Possible amendments to the Model Law’s choice of law provisions are discussed in Chapter 12 (§ 12.12).

10.2.8 THE MODEL LAW ALLOWS FOR NON-ARBITRAL TECHNIQUES TO FUNCTION AND DEVELOP

The Argument: Arbitration is only one alternative to litigation embraced by the international business community. Mediation and Med-Arb are also commonly used. There is nothing in the Model law to preclude continued resort to collaborative techniques and the innovation that has characterized commercial ADR.

Critique and Further Discussion: International disputes frequently, if not by definition, involve different business and legal cultures. Some of these value collaboration over confrontation. Such sensibilities may combine with simple economics to make mediation preferable to the more adversarial and usually more costly arbitration. There has been increasing recognition of the virtues of mediation and med-arb in particular, as evidenced by the plentiful model clauses to be found among institutionally sponsored materials.³⁹

Rather than regard the Model Law’s silence as a strength, lawmakers should consider including affirmative endorsement of non-arbitral dispute processing. California’s implementation of the Model, for example, adds to the standard text a chapter on conciliation. To the Model’s standard provisions, moreover,

³⁹ See, e.g., WIPO Booklet 446(E) (1995), at 74.

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is added one encouraging the tribunal to promote settlement and with the parties permission to use non-arbitral methods to that end “at any time during the arbitral proceedings.”⁴⁰

10.3 Potential Arguments Against Adopting the UNCITRAL Model Law

10.3.1 IT IS TOO COMPREHENSIVE

The Argument: One arguable virtue attributable to the FAA’s fragmentary character is that it leaves ample room for judicial law-making.⁴¹ Of necessity, courts have developed an indigenous (if not uniform) case law to deal with the many issues to which the statute does not speak. Indeed, it may be supposed that the FAA’s skeletal form has promoted longevity, there being relatively little in it to betray antiquation. Those partial to the common law model in its purest form may hesitate to depart from the FAA’s bare bones edifice, and the resulting case-by-case methodology.

Critique and Further Discussion: The argument assumes that there is some inherent advantage to incremental judge-made law. That position would be more compelling if judicial law making were centralized, rather than diffuse and unpredictable; Supreme Court review is exceptional and left to their own predilections, appellate courts have regularly diverged on important issues. Thus, another, perhaps more realistic, way to view the judiciary’s role in relation to the FAA is that by failing to address myriad questions, the FAA has forced the

⁴⁰ Cal. Civ. Proc. §§ 1297.301.

⁴¹ Cf. Rivkin and Kellner at 548-49.

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courts to enter the fray, occasioning divergent opinions which could have been avoided by more comprehensive legislative action.

10.3.2 IT IS UNFAMILIAR (FOREIGN), AND WILL STIMULATE LITIGATION

The Argument: Change comes at an obvious cost—the learning curve. Even judges and lawyers operating in the utmost good faith will spend time assimilating the new text; initially, the result may be additional litigation, undertaken for the purpose of testing the law’s vagaries.⁴² Appeals will rise as well, in part because lower court judges will be inclined to borrow from the familiar, regardless of whether the Model Law in fact is amenable to an FAA-like approach on the particular issue in question. Those familiar with the Model Law will enjoy a natural advantage; accordingly, one elite cadre of specialists (Model law aficionados) in the short term will replace another (those presently comfortable with the present hybrid curial law).⁴³

And what of the well thought-through solutions to be found in the FAA cases amassed since 1925? Certainly, a wholesale abandonment of this jurisprudence, which in the main continues to serve well, could not be the way forward. Since party autonomy has been well-enshrined in the FAA, the preferable approach may be to let the disputants fix the various details of the reference to arbitration by adopting one of the readily

⁴² *See id.* at 554-55.

⁴³ *Cf. id.* at 554 (temporary loss of expertise would engender uncertainty).

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available rules formulations drafted and regularly updated by experts. In fact, it might be said that the Model Law would be largely redundant in most international arbitrations because parties ordinarily incorporate such rules texts into their agreement to arbitrate (either directly or indirectly by designating an institution the rules of which will apply).

Critique and Further Discussion: Much of the forgoing, which in the main argues that “it ain’t broke or at least not *that* broke,” is true. It would, however, be true of any enactment designed to consolidate and modernize the law addressing international arbitration.

Legislative inertia, fed by all of the above factors, is particularly difficult to counteract when the present system seems to be far from the brink. Nonetheless, a few points are germane. First, the ability of the relevant communities to assimilate a Model Law-based statute ought to be relatively great because of the data to be found in other jurisdictions, the commentaries and *travaux* that are available and the experience of California and other states in functioning under the Law. Second, as more fully discussed in the next chapter, various solutions reached under the FAA may inform the courts’ construction of the Model. The same kinds of issues arise under both regimes. Moreover, in the absence of contemporary statutory phrasing, U.S. courts have not been slavishly attentive to the FAA’s text, but rather have developed many generic principles that will travel well into the next regime.⁴⁴ Significantly, the pro-arbitration policies characterizing American jurisprudence have

⁴⁴ *E.g.*, canons of construction for arbitration agreements which favor broad submissions, rules of subject matter arbitrability, and the law of evident partiality.

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not depended heavily upon the FAA's text. Third, the Model Law would be in many respects a default regime; in the main it has a bearing only to the extent that the parties have not chosen a different approach, such as by adopting particular institutional rules. Fourth, the Model Law's "foreign" character ought not to enter into the discussion, except in pointing to its strengths. Why a statute dealing with *international* disputes should be distinctively "American" is perplexing; moreover, given the influence of Americans in its drafting, it is hardly hostile to American legal culture. Fifth, any prediction that *abnormal* levels litigation will greet the new statute assumes a poorly drafted text, a predicate which need not be fulfilled.

10.3.3 IT DOES NOT GO FAR ENOUGH

The Argument: If a more elaborate code is to be adopted should it not be one that responds to existing deficiencies in the law? The more serious issues—those creating the jurisdictional splits—are not addressed by the Model Law: When can a court consolidate related arbitrations? When has a party waived the agreement to arbitrate?⁴⁵ May an arbitrator award interest and at what rate and for how long may it be decreed by the tribunal to run? To what extent may an arbitrator have *ex parte* contact with the party appointing him or her, such as to further the possible appointment through a pre-appointment interview? To what extent may witnesses be interviewed (or otherwise prepared) before making an appearance or submitting a written

⁴⁵ *But see* Model Law, Art. 8(1) (invocation of agreement to arbitrate not to occur later than requesting party's first substantive statement).

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statement to the arbitrators? On what basis may an award be returned to tribunal on the ground of newly discovered evidence? May a court enforce awards in the currencies in which they are denominated? To what extent may an arbitrator or a court order security for costs or for the satisfaction of an ultimate award? To what degree may the parties expand the bases upon which the award can be reviewed, such as by including an errors of law clause in their agreement? To what extent may parties limit judicial review of the award by agreement?

Critique and Further Discussion: The above-mentioned weaknesses are merely the result the Model Law's silence on certain questions; they do not occur because of a contrary provision in the Law. Thus, these are matters that can be dealt with in the implementation of the Law, as addressed below in Chapters 11 and 12. Ultimately, in the interest of simplification and to leave the courts appropriate discretion, certain issues may remain unaddressed by design.

10.3.4 UNIFICATION IS ILLUSIVE AND ILLUSORY

The Argument: The supposed virtue of adopting the international approach for the sake of familiarity abroad and uniformity among arbitral venues in fact has already been thwarted by the variations to be found within the existing national laws said to be based upon the UNCITRAL Model Law. Tinkering by domestic lawmakers has made for appreciable deviations from the standard text.

Critique and Further Discussion: It is true that some variation characterizes the arbitration laws said to be inspired

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by the Model Law. That is a natural consequence of the distinctive needs and legal traditions influencing law-makers in those states; the Model Law's enactment in the United States will be no different in that sense. Even if contributing to unification of transnational law were a principal aim of lawmakers in the United States (a dubious proposition) certainly an enactment resembling the Model Law accomplishes the goal far more effectively than the present regime, or one crafted *de novo*.

10.3.5 IT WILL INCREASE COURT INVOLVEMENT IN THE ARBITRATION PROCESS

The Argument: In its official form, the Model Law authorizes the parties to petition courts to decide challenges to arbitrators (Article 13(3)), to remove arbitrators for failure to act (Article 14 (1)) and to grant interim measures of protection (Article 9), three entitlements which portend increased reliance on the courts and a consequent draining of judicial resources. Additionally, the provisions will be used by deleterious parties to cause delay.

Critique and Further Discussion: The roles expressly given to the federal courts under the FAA do not contemplate the three avenues of court access mentioned above. As more fully discussed in the next chapter, however, two of these judicial functions are dependent upon a failure of other mechanisms of first resort; these pre-conditions for court involvement should limit greatly the number of petitions that are properly before the court. The third category—interim measures—is authorized only by negative inference and the substantive grounds for the

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award of such remedies are not set forth in the Model. Therefore, injunctive relief and related measures will become no more available than at present, except in those jurisdictions that currently refuse to give any injunctive relief in aid of arbitration, citing its inconsistency with the parties' choice of arbitration; subject to legislative or Supreme Court clarification, under the Model Law those jurisdictions will presumably remain entitled to impose rigorous standards for injunctive relief. These matters are revisited in Chapters 10 and 11.

10.3.6 UNIFICATION WOULD COME AT THE EXPENSE OF STATE INDIVIDUALITY AND WASTE

The Argument: Though federal law-makers possess the power under the Commerce Clause to promulgate preemptive laws affecting international trade, they are not required to do so. To date, federal law has not supplanted state law in a comprehensive way in the arbitration field, in effect allowing states to elaborate a law of arbitration consistent with their respective goals and policies. This species of "subsidiarity," whether by default or design, is appropriate in a union in which state attitudes toward arbitration vary widely—indeed from highly solicitous to openly hostile.

Leaving aside momentarily the anti-arbitration states, adoption of the Model Law will work an egregious waste by relegating to episodic application the several statutes designed to attract international disputes through modernization. Given the recent vintage of such laws, federal adoption in the near term would occur just when such codifications were likely being assimilated, no doubt causing confusion both in the states

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that have replicated the Model Law in their own way (such as California) and those that have elected to depart appreciably from it.

As for the few states that have resisted the ascendancy of arbitration, the Model Law will involve the courts in those states, perhaps both state and federal, in a range of arbitration-related matters presently not invited directly by statute, such as the determination of challenges and petitions for interim measures. The reallocation of judicial resources will come at the cost of existing state priorities.

Critique and Further Discussion: The foregoing argument is not specific to the Model Law but seems directed at any federal attempt to treat international arbitration in a comprehensive way. The “distinctiveness” of the respective states’ arbitration laws (when combined with the splits among federal courts) is what makes for 51 curial laws when, constitutionally, there could be one. The question is in large part a philosophical one, for it is not unreasonable to suggest that arbitration, a contract-based proceeding, ought to be covered by state law, just as contracts generally are.

Whatever the merits of this position may be in relation to non-international commercial arbitration, the international trade domain is one traditionally associated with federal policies and initiatives; to bring unity to an important aspect of that domain could hardly be said to be inconsistent with tenets of American federalism as ordinarily understood.

Chapter 11

THE MODEL LAW'S IMPACT UPON AMERICAN JURISPRUDENCE

Chapter Contents

- 11.1 Introduction**
- 11.2 The Model Law in Overview**
- 11.3 Areas of Broad Agreement**
- 11.4 Tribunal Powers and Duties**
- 11.5 The Model Law's Impact Upon Judicial Machinery**

11.1 Introduction

This chapter provides a brief synopsis of the Model Law's structure and content, followed by more detailed discussion of the Model Law in comparison to the American position, with emphasis upon tribunal powers and duties and the role of the courts. Only in passing this chapter identifies changes or clarifications necessary in the Model Law before its implementation within the United States (the New Act), a topic pursued with emphasis in Chapter 12.

11.2 The Model Law in Brief Overview

11.2.1 INTRODUCTION

The Model Law comprises thirty-six articles organized in eight chapters. The first chapter sets forth general provisions. Chapters Two through Eight govern in turn: (2) the Arbitration Agreement, (3) Composition of the Tribunal, (4) Jurisdiction

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of the Tribunal, (5) Conduct of the Proceedings (6) Making of the Award and Termination of Proceedings, (7) Recourse Against the Award, and (8) Recognition and Enforcement of Awards.

By its scope it is limited to arbitrations which are both "international" and "commercial." The former term is defined within the Model Law itself.¹ The meaning of "commercial" by contrast is the subject of an official footnote giving a non-exhaustive list of transactions thought to qualify and urging that the term should be given a wide interpretation.² The Model's first chapter also contains a territorial delimitation which governs many of its provisions; most of them are

¹ Under Article 1(3), an arbitration is "international" if:

- (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or
- (b) one of the following places is situated outside the State in which the parties have their places of business:
 - (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;
 - (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or
- (c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

Article 1(4) provides subsidiary rules for applying Article 1(3)(a).

² A definition of "commercial" could not be agreed upon; the footnote is a compromise. K. Chueng, *The Meaning of "Commercial" and "International" in the UNCITRAL Model Law: The Status in Ontario*, [1998](3) Arb. & Disp. Resol. L.J., 224, 225-28. California has incorporated the official footnote, with some modifications, into the statutory framework, placing it on an equal footing with the definition of "international." See Cal. Civ. Pro. Code § 1297.16. Presumably, the New Act would follow this sensible example.

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intended to apply only when the place of arbitration is within the state enacting the Model Law.

11.2.2 THE MODEL LAW IN BRIEF

The Arbitration Agreement

The Model Law defines arbitration agreements in a familiar way³ to include arbitration clauses and separate agreements; it requires that arbitration agreements be in writing. The writing requirement is satisfied by exchanges in various means of telecommunications that provide a record of the agreement or by exchanges of pleadings in which one party asserts (and the other fails to deny) the existence of the agreement.⁴ Unless

³ Article 7(1) defines "arbitration agreement" as:
an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

The phrasing is similar to that found in the New York Convention in Article II. Omitted from the above text, however, is the Convention's apparent qualification that the agreement to arbitrate concern "a subject-matter capable of settlement by arbitration." Yet, the Model Law makes lack of subject-matter arbitrability a ground for setting aside awards, and presumably, a court asked to give effect to an arbitral agreement may consider subject matter arbitrability before staying its proceedings under Article 8 (1), which allows courts to find that the agreement to arbitrate is "null and void, inoperative or incapable of being performed."

⁴ Model Law, Art. 7(2). The same paragraph also allows an arbitration agreement to be incorporated by reference provided both the incorporating and incorporated documents are in writing. *Id.* The English Arbitration Act 1996 is more liberal than the Model. Section 5(2)(c) thereof appears broad enough to include *verbal* agreements which incorporate a written text containing an arbitration clause.

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a court finds that the arbitration agreement is “null and void, inoperative or incapable of being performed” it must “refer the parties to arbitration,” provided the dispute is covered by the agreement.⁵

The Arbitral Tribunal

If the parties do not agree upon a different number, the tribunal shall comprise three members, who are to be independent and impartial.⁶ The members may be of any nationality unless the parties agree otherwise⁷ and the parties may agree upon the procedure by which they are to be appointed.⁸ If another procedure is not agreed upon, the tribunal is constituted by each party selecting one arbitrator; the two arbitrators so appointed jointly designate the third.⁹

⁵ Model Law, Art. 8(1). The quoted language mirrors that found in the New York Convention, in Article II(3). It is likely that American courts will consider the “null and void” clause broad enough to include situations in which the arbitration clause has been waived, a fact-dependent issue concerning which there is much federal case law. It would not be a dramatic alteration in the Model's text to add an express mention of waiver in the null and void clause, for the sake of clarity.

⁶ Model Law, Art. 12.

⁷ *Id.*, Art. 11(1).

⁸ *Id.*, Art. 11(2).

⁹ *Id.*, Art. 11(3). In contrast to the UNCITRAL Rules (Art. 7(1)) the Model Law does not provide that the third arbitrator “will act as presiding arbitrator of the tribunal.” Article 29 of the Model, however, assumes that there will be, among multiple arbitrators, a presiding arbitrator, who can be empowered by the parties or the tribunal to decide questions of procedure alone.

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The arbitral tribunal expressly has the power to determine its own jurisdiction,¹⁰ to take interim measures as it deems necessary in relation to the subject-matter in dispute,¹¹ to meet away from the arbitral situs as it considers appropriate,¹² to terminate the proceedings for a claimant's failure to file a claim,¹³ to proceed despite a respondent's non-participation,¹⁴ to appoint experts¹⁵ and to "determine the admissibility, relevance, materiality and weight of any evidence."¹⁶ It may also request court assistance in taking evidence.¹⁷

Under certain conditions the tribunal may determine the place of arbitration,¹⁸ the language or languages of the arbitration,¹⁹ whether to hold a hearing,²⁰ and the law applicable to the substance of the dispute.²¹ In general, the tribunal may "conduct the arbitration in such manner as it considers appropriate," provided that the parties are "treated with equality" and that "each is given a full opportunity of presenting his case."²² Awards and other decisions of the tribunal may be made by a majority of tribunal members.²³

¹⁰ Model Law, Art. 16.

¹¹ *Id.*, Art. 17.

¹² *Id.*, Art. 20(2).

¹³ *Id.*, Art. 25(a).

¹⁴ *Id.*, Art. 25(b).

¹⁵ *Id.*, Art. 26.

¹⁶ *Id.*, Art. 19(2).

¹⁷ *Id.*, Art. 27.

¹⁸ *Id.*, Art. 20.

¹⁹ *Id.*, Art. 22(1). The tribunal may require that documentary evidence be translated into the language or languages designated.

²⁰ *Id.*, Art. 24(1).

²¹ *Id.*, Art. 28(2).

²² *Id.*, Arts. 18, 19(2).

²³ *Id.*, Art. 29. Procedural questions can be delegated to the presiding arbitrator if all members of the tribunal or the parties agree.

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The Role of the Judiciary

The Model Law attempts to strike the balance between judicial interference and judicial indifference; in the result, courts are called upon to perform several functions, but only those to be found in the Law.²⁴ First, they are to enforce arbitration clauses indirectly by refusing to proceed with matters governed by an arbitration agreement.²⁵ Second, they may entertain requests for interim relief.²⁶ Third, under certain circumstances, they are to decide challenges to arbitrators²⁷ and to arbitral jurisdiction.²⁸ Fourth, under specific conditions, they must appoint or replace arbitrators.²⁹ Fifth, courts are to entertain petitions to set aside awards on grounds enumerated in the Law³⁰ and to recognize and enforce awards subject to the resisting party establishing one of the grounds for non-recognition set forth in the Law.³¹

11.3 Areas of Broad Agreement

Concordant with the general theory of arbitration observed in developed legal systems, American law and the Model Law agree that the arbitral agreement, whether reached before or

²⁴ *Id.*, Art. 5.

²⁵ *Id.*, Art. 8.

²⁶ *Id.*, Art. 9.

²⁷ *Id.*, Art. 13.

²⁸ *Id.*, Art. 16(3).

²⁹ *Id.*, Arts. 14, 15.

³⁰ *Id.*, Art. 34.

³¹ *Id.*, Art. 35.

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after dispute arises, is the vehicle by which disputants waive judicial processing of the dispute and is the foundation of arbitral jurisdiction. Accordingly, under either regime an award rendered when there is no arbitral agreement or an award that exceeds the scope of the mandate given by the agreement to arbitrate is subject to nullification in a judicial proceeding.³² Both regimes also recognize that for the arbitration agreement to have real significance, it must be recognized by courts when invoked by a party to it; stays are not discretionary under either scheme.

Each of the two systems gives meaning to the process in a further way—by limiting judicial review of the award to non-substantive matters, thus in general giving preclusive effect to the findings of fact and law made by the arbitral tribunal.³³ Under either framework, the arbitration clause is autonomous from the commercial contract in which it is embedded³⁴ and an arbitral tribunal has the competence to determine its own competence, *i.e.*, to assess *inter alia* the existence of the agreement to arbitrate and its scope.³⁵

³² Compare FAA § 10(d) with Model Law, Art. 34(2)(a)(iii).

³³ Neither the FAA nor the Model Law provides for nullification of awards for errors of law. The grounds for attacking awards are related more to the integrity of the process and to the jurisdiction of the tribunal. Some federal jurisdictions have recognized a limited non-statutory basis for vacating awards—"manifest disregard of the law." Even courts that still entertain arguments on that basis have given it an exceedingly narrow construction.

³⁴ See Model Law, Art. 16(1) and, *e.g.*, *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967). *But see* § 11.4.3 *infra*, distinguishing court practice and arbitral practice in relation to severability.

³⁵ See Model Law, Art. 16(1); *Kaplan* (1995).

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Both the Model Law and existing American law recognize a role for the judiciary beyond the enforcement of arbitration agreements and awards; the appointment and replacement of arbitrators, for example, is expressly mentioned in the FAA³⁶ and in the Model Law.³⁷ Each, however, has also adopted a policy of limiting judicial intervention, though not to an identical extent.

11.4 Tribunal Powers and Duties

11.4.1 IN GENERAL

The FAA addresses the functioning of the arbitral tribunal only indirectly, through vacatur provisions. The Model Law would thus bring an enlargement in statutory coverage. Because the majority of provisions to be found in the Model Law have been prefigured by rule formulations already operating within the United States, it is not correct to suppose that the Model would introduce a panoply of new ideas and unfamiliar concepts to American practice. It is more accurate to suggest that upon the Model Law's adoption, the quasi-legislative authority of rules chosen by the parties will be supported by a consonant statutory framework that operates in the presumably rare event in which no rules have been adopted. The following selective survey is designed to demonstrate this notion while also giving a sense of the jurisprudence of international arbitration.

³⁶ FAA, § 5.

³⁷ Model Law, Art. 11(3)(a).

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11.4.2 INDEPENDENCE AND IMPARTIALITY

Tribunal members whether presiding or party-appointed must remain independent of all parties and impartial throughout the proceedings; an arbitrator is under a continuing duty to disclose circumstances likely to give rise to justifiable doubts about his or her independence or impartiality, which duty begins when a prospective arbitrator is first approached about a possible appointment.³⁸ Equivalent duties are found in the several state laws addressing international disputes³⁹ and in virtually all international rule formulations.⁴⁰ Though the dual standard sometimes recognized in domestic American arbitration remains a source of confusion and apprehension, professionals will hardly be unaware that the expectation in international arbitration is that arbitrators are neither agents nor advocates for the parties appointing them.

11.4.3 *COMPÉTENCE DE LA COMPÉTENCE* AND SEVERABILITY

Under the Model Law, the tribunal may determine its own jurisdiction and for that purpose the arbitral agreement is to be treated as being separate from the agreement in which it may be embedded, such that an eventual finding that the latter was null and void does not imply that the tribunal acted without

³⁸ *Id.*, Art. 12.

³⁹ *See, e.g.*, Cal. Civ. Proc. Code § 1297.124. The California statute curtails a prospective arbitrator's discretion by setting forth the kinds of facts which must be disclosed. *Id.* § 1297.121.

⁴⁰ *See, e.g.*, ICC Rules, Art. 7(1)(2); AAA International Rules, Art. 7; UNCITRAL Rules, Arts. 9 and 10.

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jurisdiction.⁴¹ That the tribunal need not refer jurisdictional questions to a local court before proceeding is accepted in American law; that also seems to be the premise adopted by most international rule formulations, although any such formulation will be subject to the mandatory procedures of the situs of arbitration. As discussed above in Chapter Three, in the United States, as in certain other systems, the preclusive effect of the tribunal's jurisdictional determination (as reflected in the level of judicial review) will depend upon whether the parties unambiguously dedicated the jurisdictional issue to the tribunal.⁴²

The severability principle—which establishes the clause's autonomy—is recognized in many modern statutes and in various rule texts.⁴³ For arbitration as an institution it solves an age-old problem that would otherwise unravel many an arbitration. In American jurisprudence, it has been an important part of court practice under the FAA.⁴⁴ Only those

⁴¹ Model Law, Art. 16(1).

⁴² *Kaplan* (1995). The Model Law by contrast does not address the preclusive effect of the arbitrators' jurisdictional findings, but contemplates that court review of those finding can be had before the award is rendered, provided the tribunal chooses to decide the question as a preliminary matter (Art. 16(3)). Conceivably, even under the Model Law, the level of review employed by the court will depend upon whether the parties set the jurisdictional issue squarely before the arbitrators; thus the *Kaplan* doctrine, in some form, will likely be employed to answer the question left unanswered under the Model Law. The level of review issue would also arise when a court is asked to set aside an award under Article 34(2)(a)(i).

⁴³ See Chapter 3, § 3.2.2.

⁴⁴ The American variant of the severability doctrine holds that for purposes of determining enforceability, arbitration agreements governed by the FAA are conceptually independent of the contract

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American statutes devoted to international disputes have made it a part of the *tribunal's* jurisdictional self-assessment.⁴⁵

11.4.4 INTERIM MEASURES BY THE TRIBUNAL

Under the Model Law, a tribunal may order any interim measures it deems necessary "in respect of the subject matter of the dispute."⁴⁶ Most international rule formulations authorize the arbitrators to take interim measures, in some form,

in which they are contained. Courts must look no further than the agreement to arbitrate when asked to grant a stay or to enforce the arbitration clause directly; they may not assess the validity, meaning, or enforceability of the contract in which the clause is embedded. A court's determination is confined to whether the clause, when considered alone, exists, covers the dispute in question and is free of invalidating defects.

The severability principle was established by the Supreme Court in *Prima Paint* (1967); the Court held that under the FAA, allegations of fraud in the inducement of the underlying contract were for the arbitrator to assess, not for the judge before whom the clause was invoked. The Court's reasoning depended heavily upon the analytical distinctness of the arbitration agreement. 388 U.S. at 403-404. Federal courts have honored the severability principle in analogous settings not involving fraud in the inducement. A general rule has thus emerged: assuming a broad arbitration clause, "[a] federal court must not remove from the arbitrators consideration of a substantial challenge to a contract unless there has been an independent challenge to the making of the arbitration clause itself." *Union Mutual Stock Life Ins. Co. v. Beneficial Life Ins. Co.*, 774 F.2d 524, 529 (1st Cir. 1985).

⁴⁵ *See, e.g.*, Cal. Civ. Proc. Code § 1297.161.

⁴⁶ Model Law, Art. 17.

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and the Model Law's text on the subject was obviously influenced by the corresponding UNCITRAL Rules provision.⁴⁷

The UNCITRAL phrasing implies that the measures must relate to the subject matter in dispute; it therefore leaves some doubt as to provisional remedies designed to secure the award or a party's costs. The Model Law's *travaux* appears to indicate that the power granted to the tribunal was a liberal one.⁴⁸ Yet, cautious arbitrators might be reluctant to ignore

⁴⁷ Article 26(1) of those Rules in pertinent part provides:

At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.

Similarly, the AAA Commercial Rules (1996) provide at Article 34:

The Arbitrator may issue such orders for interim relief as may be deemed necessary to safeguard the property that is the subject matter of the arbitration, without prejudice to the rights of the parties or to the final determination of the dispute.

⁴⁸ In their study, Holtzmann and Neuhaus illuminate the thinking behind the authorization given arbitrators under Article 17.

At various times during the legislative history the following such measures were mentioned as possibly within the scope of [the arbitrators'] power: measures to preserve goods such as by depositing them with a third person or selling perishable items; opening bank letters of credit; using or maintaining machines or completing phases of construction where necessary to prevent irreparable harm; preserving evidence until a later stage of the proceedings; and measures to protect trade secrets and proprietary information. At no time, though, was it suggested that this list was exclusive or even that it covered the most common forms of interim relief.

Holtzmann & Neuhaus at 531 (citations omitted).

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the apparent disputed-subject-matter requirement.⁴⁹ Given the foregoing, the disappearance of that qualification in the AAA's recently revised International Rules was no doubt quite deliberate.⁵⁰ The New Act should also jettison the confusing and unnecessary limitation that the measures be "in respect of the subject matter in dispute."

In general, the American cases support the power of arbitrators to order provisional measures as demonstrated by *Sperry International Trade v. Government of Israel*,⁵¹ in which the Second Circuit affirmed a lower court determination that arbitrators seated in New York had acted within their powers in ordering a sovereign state to pay a disputed letter of credit disbursement into an escrow account. The decision technically addresses the situation in which the tribunal has placed its provisional measure in an interim award, but *a fortiori* supports tribunal powers to issue the underlying order.⁵²

⁴⁹ Cf. *Charles Constr. Co. v. Derderian*, 586 N.E. 2d 992 (Mass. Sup. Jud. Ct. 1992) (construing AAA Construction Industry Rules as not authorizing arbitral orders to provide security for costs; arbitrators' interim award vacated). The WIPO Rules do not leave the tribunal's powers regarding security for costs in doubt. Article 46(b) states:

At the request of a party, the Tribunal may, if it considers it to be required by exceptional circumstances, order the other party to provide security, in a form to be determined by the Tribunal, for the claim or counterclaim, as well as for costs [of the proceeding, including legal fees].

Such an order may, under the same article take the form of an interim award.

⁵⁰ Article 21(1) of that text provides: "At the request of a party, the tribunal may take whatever measures it deems necessary, including injunctive relief and measures for the conservation of property."

⁵¹ 532 F. Supp. 901 (S.D.N.Y.), *aff'd*, 689 F.2d 301 (2d Cir. 1982).

⁵² *Sperry* was to design and build a communications system for the Government of Israel (GI). *Sperry* obtained a letter of credit for the GI for approximately \$15 million, 532 F. Supp. at 901. It demanded

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Under several rules texts, including the UNCITRAL and the AAA International formulations, interim measures can take the form of an award,⁵³ as occurred in *Sperry* above.⁵⁴ The Model Law does not address partial or interim awards. Since rule formulations often give the tribunal that prerogative, the absence of a Model Law provision ought not to be a limitation

arbitration alleging that the GI had prevented it from performing. The GI intended to draw on the letter of credit for transfer to its own account. In an unreasoned partial award, the arbitrators ordered that the proceeds be paid into a joint escrow account. The district court confirmed the award; the GI appealed. In affirming, the Second Circuit reasoned that arbitral awards receive very narrow review under the FAA and enjoy presumptions of validity under New York law and that arbitrators may grant forms of relief not available from a court. 689 F.2d at 306 (citing *Rochester City Sch. Dist. v. Rochester Teachers Ass'n*, 394 N.Y.S.2d 179 (1977)). See M. Hoellering, *Conservatory and Provisional Measures in International Arbitration*, in *ARBITRATION AND THE LAW 1992-93*, at 114 (1993).

⁵³ UNCITRAL Rules, Art. 26.2; AAA International Rules, Art. 22.2. Rules typically also provide that the tribunal may require security for the costs of such measures, a standard authorization also found in California's International Act. See Cal. Civ. Proc. Code § 1297.-172 (West 1982 & Supp. 1996).

⁵⁴ Whether such an award would be enforceable would depend upon the nature of the measures embodied in the award. In general, partial or interim awards will be confirmed by American courts if they determine with finality a discrete issue among those within the tribunal's mandate. *Metalgesellschaft A.G. v. M/V Capitan Constante*, 790 F.2d 280 (2d Cir. 1986); *Island Creek Coal Sales Co. v. City of Gainesville*, 729 F.2d 1046 (6th Cir. 1984). The CPR International Rules encourage the arbitrators to assist the court petitioned for enforcement by providing that "[w]ith respect to any interim, interlocutory, or partial award, the Tribunal may state in its award whether or not it views the award as final for purposes of any judicial proceedings in connection therewith." CPR International Rules, Rule 14.1. Similar language would be of benefit in the New Act.

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on a tribunal operating under the Model Law. Nonetheless, to include such a provision, as lawmakers in California did,⁵⁵ would codify more fully American law and remove any doubt created by the Model Law's silence on the issue.

11.4.5 DISCRETION TO CONDUCT THE PROCEEDINGS AS APPROPRIATE

Under the Model Law, the tribunal must give each party a "full opportunity" to present its case and must treat each "with equality," but otherwise may conduct the proceedings as it deems appropriate. Both the maxim-like restraints and the broad grant of discretion are pillars of various procedural rules⁵⁶ and numerous statutes. Experienced international arbitrators proceeding in the United States will therefore find the Model Law's formula unexceptional.

There is, however, a natural tension between the full opportunity requirement and the discretion given to arbitrators to advance the proceedings. Can the full opportunity obligation be met only by acceding to a party's every request to present argument and evidence? Recent texts give the tribunal specific authority with which to counter a party's extravagant wishes.⁵⁷ Not by accident some formulae have also recast the

⁵⁵ Cal. Civ. Proc. Code § 1297.316 provides that the tribunal may:
[a]t any time during the proceedings, make an interim award on any matter with respect to which it may make a final arbitral award. The interim award may be enforced as a final award.

⁵⁶ See, e.g., UNCITRAL Rules, Art. 15.1; CAMCA Rules, Art. 17(1).

⁵⁷ See, e.g., AAA International Rules, Art 16(3):

The tribunal may in its discretion direct the order of proof, bifurcate proceedings, exclude cumulative or irrelevant testimony or other

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familiar phrase as “*fair opportunity to present...*”⁵⁸ That would be a friendly amendment to the Model Law’s official text, when enacted in the United States.

The liberal grant of discretion given to arbitrators under the Model Law is comparable to that well-recognized under American law. Courts have not been quick to second-guess tribunal decisions taken to facilitate the proceedings.⁵⁹ Only where serious unfairness marked the process will vacatur be had.⁶⁰

evidence, and direct the parties to focus their presentations on issues the decision of which could dispose of all or a part of the case.

⁵⁸ See, e.g., CAMCA Rules, Art. 17(1); AAA International Rules, Art. 16.1.

⁵⁹ See, e.g., *Owen-Williams v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 907 F. Supp 134, 138 (D. Md. 1995)(matters of “credibility of witnesses and conflicts in testimony . . . are for the arbitrators to resolve, not the reviewing court”); *Cearfoss Constr. Corp. v. Sabre Constr. Corp.*, 1989 WL 516375 at *4 (D.D.C. 1989)(tribunal’s curtailment of cross-examination does not warrant vacatur, for “arbitrators must be expected to take actions which will expedite the proceedings”); *Gateway Technologies, Inc. v. MCI Telecommunications Corp.*, 64 F.3d 993, 997 n.4 (5th Cir. 1995)(“arbitrators’ evidentiary decisions should be reviewed with unusual deference”); *Hunt v. Mobil Oil Corp.*, 654 F. Supp. 1487, 1512 (S.D.N.Y. 1987) (“Only the most egregious error which resulted in adversely affecting the rights of a party would . . . require vacatur”); see also cases cited at *infra* note 146.

⁶⁰ For example, when a party is led by the tribunal to believe that certain evidence, or a form of it, will not be required or has already been established, it is prejudicial misconduct to fault that party’s case for a failure to produce that evidence. *Gulf Coast Indus. Workers Union v. Exxon Co, USA*, 70 F.3d 847 (5th Cir.1995) (employer’s failure to present report induced by arbitrators); cf. *Iran Aircraft Indus. v. Avco Corp.*, 980 F.2d 141, 145-46 (2d Cir. 1992) (analogous decision under the New York Convention).

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The explicit tribunal power given in Model Law Article 25 to respond to deleterious parties is to be welcomed, but merely serves to reinforce the power already found in the more recently promulgated rule texts. Such statutory backing is especially appropriate given that the sanctions available in that Article (*e.g.* default awards and termination of proceedings) are those most likely to raise due process concerns at home, and analogous questions abroad.

11.4.6 TRIBUNAL APPOINTED EXPERTS

Under the Model Law, the arbitrators may enlist the help of one or more experts; either party, in turn, may require the expert to participate in a hearing at which he or she can be questioned and at which the parties' own experts can be heard. The FAA does not provide for tribunal experts. Numerous rule texts do so provide, however.

11.4.7 AWARD FORM AND FORMALITIES

Under the Model Law, awards must contain a majority of the arbitrators' signatures,⁶¹ a date and a place of arbitration (which is deemed to be the place of the award's rendition) and the reasons motivating the award.⁶² With the exception of the reasons requirement, these stipulations are probably not subject to contrary party agreement.⁶³ They, nevertheless, present

⁶¹ If the award does not bear all the arbitrators' signatures, the reason for any omitted signature must be stated in the award. Model Law, Art. 31(1).

⁶² Model Law, Art. 3(2).

⁶³ See Holtzmann & Neuhaus at 583.

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nothing which is particularly novel in relation to existing American practice. Many rules and certain statutory formulations have the same or similar requirements.⁶⁴ If, as the authorities suggest, the award formality provisions of the Model Law are mandatory, the New Act would provide an invariable yardstick on these issues.⁶⁵

Under the Model, the parties may agree that no reasons are to be given.⁶⁶ In existing American practice, unreasoned awards are common in domestic commercial proceedings and are actually encouraged by the AAA in non-international cases.⁶⁷ Thus, a tribunal's factual findings and legal conclusions often are never disclosed. An award need not even set forth separate components of recovery. Consequently, lump-sum awards are enforceable⁶⁸ and rather than creating suspi-

⁶⁴ See, e.g., UAA § 8(a) (award to be "in writing and signed by the arbitrators joining the award"); cf. AAA International Rules, Art. 27 (award to be written, reasoned, and must contain date and place where award was made, but no mention of signature; unlike AAA Commercial Rules, Art. 42 (signature of majority required)).

⁶⁵ The requirements are of practical value, of course. The place indicated will facilitate New York Convention treatment; the signature requirement meets obvious authentication concerns but is flexible enough to prevent a discontented arbitrator from thwarting the process.

⁶⁶ They may do so to ensure relative finality, to expedite the deliberative process or to save costs.

⁶⁷ See AAA *A Guide to Arbitration for Business People* 10 (1996):

As a general rule, AAA commercial awards consist of a brief direction to the parties on a single sheet of paper. Written opinions can generate attacks on the award because they identify targets for the losing party.

⁶⁸ See, e.g., *Federated Dep't Stores, Inc. v. J.V.B. Indus., Inc.*, 894 F.2d 862, 867-68 & n.5 (6th Cir. 1990) (award for nearly \$1.8 million need not separately indicate amounts attributable to overhead and interest, but sufficed in stating merely: "1) the claim of Federat-

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cion, are, according to one court, "presumed to be correct."⁶⁹ The cases allowing unreasoned awards posit that requiring reasons would only "'perpetuate the delay and expense' which arbitration is designed to prevent."⁷⁰ Naturally, an unreasoned award is difficult to review substantively;⁷¹ as colorful judicial dictum has observed, attempting to do so amounts to a "judicial snipe hunt."⁷²

Though reversing the expectation that obtains in domestic commercial cases, the Model Law's insistence upon reasons

ed is denied, 2) Federated shall pay TAB and JVD \$1,789,957.89, and 3) Federated shall pay all administrative costs of the hearing, all attorney fees, and the arbitrators' compensation and expenses").

⁶⁹ Hayne, Miller & Farni, Inc. v. Flume, 888 F. Supp. 949, 958 (E.D. Wis. 1995).

⁷⁰ *Id.* (quoting Eljer Mfg., Inc. v. Kowin Dev. Corp., 14 F.3d 1250, 1254 (7th Cir.), *cert. denied*, 114 S. Ct. 2675 (1994)).

⁷¹ *See Federated*, 894 F.2d at 871. When considering unreasoned awards, courts must rely upon inference and information garnered from other parts of the record, which itself may consist of very little; transcripts are not required and are often dispensed with in arbitration. Occasionally, in an effort to inform the parties, arbitrators jointly or separately provide a commentary indicating their impressions; however, their observations form no part of the award. *See, e.g.*, Todd Shipyards Corp. v. Cunard Line Ltd., 735 F. Supp. 1463, 1465 (N.D. Cal. 1989) (arbitrators did not provide detailed findings, but supplied individual commentaries, which the court described as having "no authoritative or evidentiary significance"). American judges generally have no statutory authority to require arbitrators to provide reasons to facilitate review. They do, however, sometimes remand awards for clarification; the practice, nonetheless, seems not to have impaired the arbitrator's power to give unreasoned awards where the parties have not required otherwise.

⁷² *Federated*, 894 F.2d at 871 (Martin, J., concurring)(a "snipe hunt" characterized by "counsel for the parties arguing about contract law analysis that may or may not have been manifestly disregarded by the arbitrator").

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for international awards is consistent with the international practice reflected in most rules familiar to American arbitrators and lawyers.⁷³ The ability of the parties under the Model Law to authorize unreasoned awards makes its general rule less consequential. Its default rule is nonetheless salutary. Despite what the AAA often suggests, participants often *do* wish to be privy to the arbitrators' reasoning; the exercise also imports a sobering influence among the arbitrators by obliging them to support their conclusions in writing.⁷⁴

11.4.8 POST-AWARD TRIBUNAL POWERS

The Model Law provides that for a period of 30 days following the award's receipt, a party may request the tribunal to interpret, augment (by rendering an additional award) or clerically correct the award. The tribunal may do so if it considers the request justified, within 30 days of receiving the request (or within 60 days in the case of an additional award). New York's arbitration statute and the UAA have similar provisions.⁷⁵ The FAA contains no direct analogue, howev-

⁷³ *E.g.*, AAA International Rules, Art. 27.3; UNCITRAL Rules, Art. 32.3; UNCITRAL Model Law, Art. 31(2).

⁷⁴ Under American practice, separate opinions—whether concurring or dissenting—are generally permitted but not required. *Cf.* *Sun Ref. & Mktg. Co. v. Statheros Shipping Corp. of Monrovia, Liber.*, 761 F. Supp. 29. (S.D.N.Y. 1991) (dissenting opinion issued in admiralty dispute; fact of dissent not an issue). The Model Law, like the FAA, is silent on the questions of separate and dissenting opinions. It seems unnecessary to authorize the practice through an amendment to the Model Law; the pre-New Act practices will presumably continue absent an express prohibition.

⁷⁵ N.Y. Civ. Prac. L. & R., § 7509; UAA, § 9.

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er.⁷⁶ Enacting this provision of the Model Law would support the grant of post-award authority given under many rule texts and would be consistent with the practice of remand developed by courts, as more fully discussed below (§ 10.5.6).

11.4.9 APPLICABLE LAW

According to the Model Law, if the parties have not designated the law to be applied, the tribunal has broad discretion in the selection of conflicts methodology and ultimately, therefore, in the choice of substantive law.⁷⁷ The structure of Article 28(2) and the Secretariat's commentary suggest that the application of a municipal law is contemplated.⁷⁸ In precluding tribunal selection of a-national principles, such as the *lex mercatoria*, the Model Law adopts a conservative default rule,⁷⁹ one more restrictive than the apparent American position.

⁷⁶ The FAA, § 13, does authorize a *court* to modify or correct an award as to clerical matters or to correct an excessive award, provided the exorbitant portion can be culled without affecting the merits of the decision as to other matters covered in the award.

⁷⁷ Article 28(2) states:

Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

⁷⁸ See *Explanatory Note* at para. 35 (in default of party choice, "tribunal shall apply the law, i.e., the national law, determined by the conflict of laws rules which it considers applicable").

⁷⁹ Holtzmann & Neuhaus, at 789, observe:

Paragraph (2) reflects a more cautious approach in that it does not provide, as would be in line with paragraph (1), that the arbitral tribunal shall apply the rules of law it considers appropriate. Instead, it requires the arbitral tribunal to apply a conflict of laws rule . . . in order to determine the law applicable

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American authority addressing a tribunal's application of the *lex mercatoria* or similar a-national formulation is sparse. The FAA does not treat applicable law directly. Certainly, where the parties have clearly chosen the law of a particular, single, legal system, an application of the *lex mercatoria* would exceed arbitral authority. If, by contrast, the parties have designated the *lex mercatoria* as governing their contract, it seems equally clear that the arbitrators may follow their instructions. After all, enforcement of the parties' agreement to arbitrate has been identified as the driving force behind the FAA.⁸⁰

Under American law, tribunal application of the *lex mercatoria* in the absence of a choice of law provision, while not supportable by the party autonomy doctrine, seems likewise to be defensible. Although American domestic arbitration statutes are generally silent concerning choice of law, rules texts confer wide discretion. The spirit of even the more restrictive formulae (found *e.g.*, in the UNCITRAL texts) would likely be read by an American court in light of the tradition favoring

⁸⁰ Additionally, courts themselves have acknowledged the *lex mercatoria*. *See, e.g.*, *Alaska Textile Co. v. Chase Manhattan Bank, N.A.*, 982 F.2d 813, 816 (2d Cir. 1992) ("Letters of credit are governed by the *lex mercatoria*, and, in applying this body of law we are appropriately solicitous of the necessities of commerce and of developments in other jurisdictions"). Why should arbitrators be precluded from doing likewise, especially if acting under the parties' express mandate? Further, the basis upon which vacatur would occur is not readily apparent: a party having agreed to the *lex mercatoria* as the governing law cannot successfully argue that the tribunal exceeded its mandate by following the parties' choice of law instructions. Similarly, neither the vestigial traces of the manifest-disregard-of-the-law doctrine nor the narrowly drawn public policy exception is a likely obstacle to enforcement of an award based upon the international law merchant, at least generally.

tribunal discretion to fashion remedies (discussed in § 10.4.10 immediately following). If, as is often posited, absent a contractual designation, “arbitrators are not bound by rules of law in determining issues submitted to them,”⁸¹ *a fortiori*, the application of legal principles thought by the arbitrators to match the parties’ expectations better than a given national law would seem to be within the tribunal’s mandate.⁸² If in order to accomplish this task the tribunal has to refer (however disingenuously) first to some *a-national* conflicts rule leading to the *lex mercatoria*, an American court is unlikely to carefully reverse-engineer the tribunal’s reasoning. Moreover, there is nothing in the methods of *lex mercatoria* or its supra-national character that runs counter to American mercantile and legal traditions.⁸³

⁸¹ S.A. Wenger & Co. v. Proper Silk Hosiery Mills, Inc., 146 N.E. 203 (1924). See also G. Wilner, DOMKE ON COMMERCIAL ARBITRATION 391 (Rev. ed. 1993) (“[t]he practice of commercial arbitration in the United States is ... that the arbitrator has the freedom of determining the disputed questions according to his sense of the justice of the case on the basis of his fair and just appreciation”); cf. S. Mentschikoff, *Commercial Arbitration*, 61 Colum. L. Rev. 846, 860 (1961) (majority of arbitrators in sample preferred applying substantive law but would deviate from formal law if a more just decision could be reached thereby).

⁸² Given the domestic arbitral practice of rendering unreasoned awards, it is likely that international mercantile custom and common notions of good faith and fairness have often been the unspoken bases of decision.

⁸³ The Uniform Commercial Code (U.C.C.) and the Sale of Goods Convention (CISG), both fixtures in American law, list supplementary sources of law bordering on, or overlapping with, the *lex mercatoria*. See U.C.C. § 1-103 (code augmented by “the principles of law and equity, including the law merchant . . .” and is to be construed so as “to permit the continued expansion of commercial practices through custom, usage and agreement of the parties.” *Id.*,

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The two-step UNCITRAL approach will be re-examined in Chapter 12 (§12.12) where it will be suggested that it be replaced with a provision posing few obstacles to the application of general commercial principles and the like.⁸⁴

11.4.10 REMEDIAL CHOICES

Under the Model Law, the tribunal may only act *ex aequo et bono* with the express approval of the parties. Even though this restriction has been present in the AAA International Rules since their inception, its impact has not been fully examined by the courts and commentators; it is after all, not indigenous jurisprudence. The limitation poses interesting questions in its

§ 1-102(2)(b)); *cf.* U.N. Convention on Contracts for the International Sale of Goods, art. 7 (interpretation of the Convention should account for its “international character” and the need to promote the “observance of good faith in international trade”) and art. 9 (parties, unless otherwise agreed, bound by widely known and regularly observed international trade usages applicable to their contract).

Technically, the foregoing references apply solely to the sale of goods context, and then only for gap-filling or establishing implied terms. Nonetheless, they demonstrate an established affinity for such sources of law. Perhaps more to the point are applicable law provisions in the state international arbitration statutes and in the Mexico City Convention (signed but yet to be ratified by the U.S.), which clearly condone the application of a-national substantive law. *See, e.g.*, Cal. Civ. Proc. Code § 1297.283 (West 1982 & Supp. 1996) (failing a designation of applicable law by the parties, “the arbitral tribunal shall apply the *rules of law* it considers to be appropriate given all the circumstances surrounding the dispute”) (emphasis added); *cf.* Mexico City Convention, art. 9, (law of the *state* with which contract has closest ties, consideration however to be given also to “general principles of international commercial law recognized by international organizations”).

⁸⁴ *See, e.g.*, ICC Rules, Art. 17(1) (“Tribunal shall apply the rules of law which it determines to be appropriate”).

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relationship to prevailing American law and practice, which recognizes in the arbitral tribunal rather broad remedial powers. Article 43 of the AAA Commercial Rules, for example, gives a nearly plenary mandate, providing in pertinent part:

The arbitrator may grant any remedy or relief the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract.⁸⁵

The same rules have neither a party autonomy provision nor a default directive for selecting governing law.⁸⁶

American arbitrators commonly carry out in domestic cases an *amiable compositeur*-like function, perhaps owing to the vibrant role played by the law of equity within the American legal system. This quasi-legislative role is facilitated by the apparently well-settled maxim, noted earlier, that arbitrators need not apply strict rules of law in reaching a result, at least where the parties' agreement places no applicable law strictures on the tribunal.⁸⁷ Apparently, therefore, the wide remedial grant of the AAA Commercial Rules, quoted above, merely codifies established tradition.⁸⁸

⁸⁵ AAA Commercial Arbitration Rules, Art. 43.

⁸⁶ Though curious for rules intended to operate in an inter-state setting, the failure to include any direction ought not to allow tribunal indifference to an express choice of law provision. Absent an express designation, however, the arbitrators presumably may look to Article 43 unaffected by a governing law.

⁸⁷ See, e.g., *Advanced Micro Devices, Inc. v. Intel Corp.*, 36 Cal. Rptr. 2d 581, 588 (1994) (power to act *ex aequo et bono* in absence of contrary parties' agreement recognized in 1852 decision of California Supreme Court).

⁸⁸ The sense that those rules intend not to bind the tribunal to strict legal prescriptions is enhanced by the absence of any choice of law directive such as that found in the prevailing texts for international

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The foregoing language and time-honored practice also seem to support arbitral gap-filling—that is, an equitable augmentation of the parties' agreement to account for situations not contemplated therein or the elaboration of details necessary to apply the contract to the dispute at hand.⁸⁹ Indeed, several cases have affirmed tribunal powers to equitably adjust a commercial relationship, unencumbered by what strict construction of the contract or traditional contract remedies would require. In one case, the California Supreme Court observed that in commercial arbitration the parties have bargained for “relatively free exercise” of the arbitrators’ “flexibility, creativity and sense of fairness.”⁹⁰ Thus, in that case the arbitrators were within their powers when decreeing that one of parties was entitled to a permanent, royalty-free, non-exclusive license to certain intellectual property of the other party to address the latter’s breach in various respects of the covenant of good faith.⁹¹

use.

⁸⁹ See *W. Craig, et al.* 141-42; *Fox* at 184-85.

⁹⁰ *Advanced Micro*, 36 Cal. Rptr. 2d at 588.

⁹¹ *Id.*, 586. According to the court, the remedy chosen need not replicate the position that the aggrieved party would enjoy from correct performance. Rather, it need only, under California law, be rationally derived from the contract and its breach. *Id.* at 593; see also *Nordell International Resources, Ltd. v. Triton Indonesia, Inc.*, 999 F.2d 544, 1993 WL 280169 (9th Cir. 1993) (*Triton I*) (arbitrators’ restructuring of the parties’ respective venture interests not subject to vacatur where parties had indicated that they could no longer work together and tribunal tried “to strike a compromise that would permit both parties to maintain an interest in the project without unduly hindering its further administration.” *Id.*, *7-8); see also *Anderman/Smith Operating Co. v. Tennessee Gas Pipeline Co.*, 918 F.2d 1215, 1217-18 (5th Cir. 1990) (vacatur not warranted though tribunal in gas supply dispute set price, decreed that price

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Given the foregoing, to require the parties' approval for legitimate *ex aequo et bono* proceedings modifies the existing domestic American presumption under which tribunal remedial powers are largely unfettered. Though the tribunal could safely apply principles of equity found in the governing law,⁹² courts will have to assess which departures from the contract and governing law fall into the realm of unauthorized remedial activity. Even if the Model Law is not adopted, the same questions will inevitably arise because the "new" restriction is pervasive among international rule formulations. Lamentably, the line-drawing to be associated with restrictions upon *amiable compositeur* activity may join with understandable confusion about the *lex mercatoria* to obscure matters further. If one assumes that the *lex mercatoria* may be applied without express authorization, how does a court of general jurisdiction, petitioned for vacatur, distinguish between awards based upon the *lex mercatoria* and those which are motivated *ex aequo et*

remain static for one year, and stipulated that any future price changes be supported by need demonstrated "by a preponderance of the evidence").

⁹² See UCC § 1-103 (principles of equity augment the Code). An arbitrator applying the UCC could—at a minimum—adjust the parties' relationship to the extent warranted under applicable principles of waiver, estoppel and the like. See also *id.* § 2-302 (court may adjust unconscionable contracts) and §§ 1-203, 2-103(1)(b) (requiring merchants to observe canons of fair dealing recognized by their trade).

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bono?⁹³ The problem, and some partial solutions are examined further in Chapter 12 (§ 12.12.4).

11.5 The Model Law's Impact Upon Judicial Machinery

11.5.1 COURT-ORDERED INTERIM MEASURES

Under the Model Law, a court may grant interim remedies in respect of an on-going arbitration whether the request is made before or after the tribunal has been constituted, although that text understandably provides no details as to what types of remedy ought to be available and under what conditions. In the United States, as in other developed legal systems, a court's remedial arsenal contains various orders (cast as negative or affirmative injunctions) designed to preserve the status quo. Ordinarily, both federal and state courts may be petitioned for such relief. The FAA however, only expressly authorizes a narrow range of interim remedy and limits it to admiralty arbitration.⁹⁴ As would be expected given the lack of guid-

⁹³ The Austrian courts have had to resolve this matter on appeal. See Rubino-Sammartano at 271 (reviewing the *Norsolor* award's trek to the Austrian Supreme Court). See also Chapter 4, § 4.9 (quoting *Norsolor*). A studious judge attempting to distinguish the two doctrines will be told that both doctrines evade traditional choice of law analysis and by at least one distinguished commentator that: "[i]t is generally assumed that [*amiable compositeur*] authority implies above all to base the decision...on general principles of law and trade practices." K. Berger, *International Arbitral Practice and the UNIDROIT Principles of International Commercial Contracts*, 46 *Amer. J. Compar. L.* 129, 147 (1998). Berger's description might lead one to conclude that the two doctrines and associated methodologies are functionally indistinguishable.

⁹⁴ FAA, § 8.

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ance, American courts have differed regarding the extent to which injunctive relief in aid of arbitration should be granted.⁹⁵ The divergence in approach is marked and reflects fundamental differences of opinion as to what best serves the arbitral process.⁹⁶

Some jurisdictions have concluded that the arbitral agreement reflects the parties' intention to exclude court involvement beyond that necessary to enforce the clause.⁹⁷ From these courts injunctive relief in aid of arbitration is not available. Courts so disinclined have been particularly steadfast in relation to international disputes to which the New York Convention applies;⁹⁸ even where a state arbitration statute appears to

⁹⁵ These are details that vary from state to state.

⁹⁶ See generally C. Brower and W. M. Tupman, *Court-Ordered Provisional Measures Under the New York Convention*, 80 Am. J. Int'l Law 24 (1986); D. Reichert, *Provisional Remedies in the Context of International Commercial Arbitration*, 3 Int'l Tax & Bus. Law. 368 (1986).

⁹⁷ See *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. De Caro* 577 F. Supp. 616 (W.D. Mo. 1983). In *De Caro*, the court concluded that upon staying litigation pursuant to an arbitration clause covered by the Federal Arbitration Act (FAA), the court must cease further proceedings, lest there occur an undesirable incursion into the merits and delay. *Id.* at 624-25. The court suggested that preliminary injunctions may be issued by the arbitrators, if necessary. *Id.*; accord *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hovey*, 726 F.2d 1286 (8th Cir. 1984).

⁹⁸ One leading case—now well over two decades old—is *McCreary Tire & Rubber Co. v. CEAT S.P.A.* 501 F.2d 1032 (3d Cir. 1974). In *McCreary*, the Third Circuit vacated an attachment ordered by the district court. It reasoned that the relief granted violated both the parties' arbitral agreement and the New York Convention's mandate to recognize and enforce agreements to arbitrate. *Id.* at 1038; accord *I.T.A.D. Assoc. v. Podar Bros.*, 636 F.2d 75 (4th Cir. 1981). A second, oft-cited case is *Cooper v. Ateliers de la Motobecane S.A.* 442 N.E.2d 1239 (N.Y. 1982). In *Cooper*, New York's highest

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authorize interim relief in aid of arbitration,⁹⁹ it may not be available in deference to the supposed mandate of the Convention.¹⁰⁰

court held that pre-award attachment was inconsistent with the New York Convention because the latter sought to encourage arbitration; thus, to subject the parties to the entanglement of foreign law and procedures would negate international arbitration's principal virtues: relative certainty and the avoidance of national adjudicative methods. *Id.* at 1240. The court also noted that the benefits of construing the Convention to preclude attachment would accrue to U.S. businesses when arbitrating abroad, assuming the Convention is reciprocally interpreted. *Id.* at 414. Subsequent New York decisions have observed *Cooper*, "notwithstanding that petitioner would ordinarily have been entitled to an order of attachment." *Drexel Burnham Lambert v. Ruebsamen*, 531 N.Y.S.2d 547, 550 (N.Y. App. Div. 1988).

⁹⁹ See, e.g., N.Y. Civ. Prac. L. & R. § 7502(c):

The Supreme Court may entertain an application for an order of attachment or for a preliminary injunction in connection with an arbitrable controversy, but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief.

For construction, see *Drexel Burham Lambert v. Ruebsamen*, 531 N.Y.S.2d 547 (N.Y. App. Div. 1988).

¹⁰⁰ See *Ruebsamen*, 531 N.Y.S. 2d 547, *appeal denied*, 534 N.E. 2d 328 (N.Y. 1988). Where the parties have expressly agreed that pre-award attachment and similar measures should be permitted, courts presumably have less reason to deny interim injunctive relief. Nonetheless, courts rigorously following *McCreary Tire and Rubber Co. v. CEAT* 501 F.2d 1032 (3d Cir. 1974) may still be reluctant to render this type of assistance. In *McCreary*, the Third Circuit declined to issue an order of attachment even though the rules chosen by the parties authorized them to seek interim measures from a court. *Id.* at 1038.

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Other authority, both statutory¹⁰¹ and decisional, holds that making courts available for provisional remedies in aid of arbitration is desirable and permissible. After all, before the tribunal has formed, there is usually nowhere else but to the courts to turn for emergency measures;¹⁰² once established, moreover, the tribunal has very limited influence over third parties.

Many American courts conceive of the power to preserve the status quo very broadly.¹⁰³ For these, the New York Convention is no bar to provisional relief; either they find it to be largely irrelevant¹⁰⁴ or its implications to be fully influenced

¹⁰¹ California has edified the basic Model Law text, Cal. Civ. Proc. Code § 1297.91, by providing at § 1297.93:

Measures which the court may grant in connection with a pending arbitration include, but are not limited to:

(a) An order of attachment to assure that the award to which applicant may be entitled is not rendered ineffectual by the dissipation of party assets.

(b) A preliminary injunction in order to protect trade secrets or to conserve goods which are the subject matter of the arbitral dispute.

¹⁰² The WIPO emergency relief program remains under study. *See Proposed Emergency Relief Rules* (WIPO consultation document of 19 April 1996; on file with the author).

¹⁰³ *Teradyne, Inc. v. Mostek Corp.*, 797 F.2d 43, 47-48 (1st Cir. 1986) (citing *Roso-Lino Beverage Distrib., Inc. v. The Coca-Cola Bottling Co. of New York*, 749 F.2d 124 (2d Cir. 1984); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley*, 756 F.2d 1048 (4th Cir. 1985); *Sauer Getriebe KG v. White Hydraulics, Inc.*, 715 F.2d 348 (7th Cir. 1983), *cert. denied*, 464 U.S. 1070 (1984)); *see also Peabody Coalsales Co. v. Tampa Elec. Co.*, 36 F.3d 46 (8th Cir. 1994) (enforcing performance-to-continue clause). *Murray Oil Prod. Co. v. Mutsui & Co.*, 146 F.2d 381 (2d Cir. 1944) (attachment to facilitate effective awards wholly consistent with goals of arbitration).

¹⁰⁴ *See Carolina Power and Light Co. v. Uranex*, 451 F. Supp. 1044 (N.D. Cal. 1977) (rejecting reasoning of *McCreary* and *Cooper*).

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by the facts.¹⁰⁵ Other courts willing to grant interim relief adopt a middle position, viewing their role as primarily to fill the void until a the tribunal is constituted.¹⁰⁶ The Model Law's grant of access "before *or during* arbitral proceedings" would require these latter courts to adjust somewhat,¹⁰⁷ and would in effect overrule those cases which issue a blanket prohibition on provisional measures in aid of arbitration. Nevertheless, significantly, noninterventionist courts would remain free to develop conservative positions under the Model Law, unless lawmakers or the Supreme Court harmonize the grounds upon which relief will be granted. That is, the Model Law authorizes access; it does not guarantee that relief will be given.

¹⁰⁵ See *Borden, Inc. v. Meiji Milk Products Co.*, 919 F.2d 822, 826 (2d Cir. 1990), *cert. denied*, 500 U.S. 953 (1991) (FAA does not preclude preliminary injunction against rights-infringing conduct; *McCreary* distinguishable as requesting party not trying to thwart arbitration).

¹⁰⁶ See *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Salvano*, 999 F.2d 211, 215 (7th Cir. 1992) (extension of TRO inappropriate once the tribunal has formed). Injunctive relief is sometimes granted to prevent misuse of the arbitral process. See also *Action Air Freight, Inc. v. Pilot Air Freight Corp.*, 769 F. Supp. 899, 901 (E.D. Pa. 1991) (court may properly entertain request for injunctive relief pending arbitration to forestall action imperiling integrity of the arbitration process).

¹⁰⁷ Another way courts support arbitration is by enforcing *arbitral* awards of interim relief. See, e.g., Cal. Civ. Pro. Code § 1297.92 (any party may request state court to enforce an arbitral award of interim measures and "[e]nforcement shall be granted pursuant to the law applicable to the granting of the type of interim relief requested"). This provision was added by California lawmakers when adopting the UNCITRAL Model Law.

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11.5.2 PRE-AWARD CHALLENGES TO TRIBUNAL JURISDICTION

The Model Law also gives courts interlocutory review of preliminary tribunal jurisdictional findings, if the tribunal determines its jurisdiction as a preliminary matter and if it finds that it has jurisdiction.¹⁰⁸

The merit of the Model Law provision is twofold: it honors the notion that a party ought not to be put through an arbitration without having agreed to be a participant; second, it serves an anti-waste function in those cases in which, despite the arbitrators' finding of competence, the award would be vacated because the tribunal lacked jurisdiction.

Potentially, its negative attributes are that it offers a deleterious party an opportunity to cause delay and that such petitions will burden the courts. As a delay tactic, however, a jurisdictional challenge need not inevitably be effective; the Model Law expressly allows the tribunal to proceed while the court is considering the matter.

As to the docket burden, the potential for added docket pressure seems not compelling; it will sometimes be the case that the tribunal chooses not to assess jurisdiction as a preliminary matter, and when it does so choose it will occasionally agree that it is not competent to proceed. Moreover, the net position may not be affected appreciably. Anti-arbitration

¹⁰⁸ Article 16(3). Some American courts will enjoin arbitrations found to be unsupported by an agreement to arbitrate. *See, e.g., Société Générale de Surveillance, S.A. v. Raytheon European Management and Systems Co.*, 643 F.2d 863, 868 (1st Cir. 1981) (affirming injunction against Massachusetts arbitration as inconsistent with arbitration agreement's named situs abroad).

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injunctions can already be sought in relation to arbitral jurisdiction, and this prerogative is not limited to the narrow situation contemplated in the Model Law. Thus, depending upon how one interprets Article 5's limitation on extra-statutory intervention, the Model Law may result in a net reduction in docket activity.¹⁰⁹

11.5.3 PRE-AWARD ARBITRATOR DISQUALIFICATION

Under the Model Law, each arbitrator within a three-person tribunal may be challenged for a lack of impartiality or independence.¹¹⁰ The statutory standard of independence and impartiality will come before the courts in two contexts: first, when they are called upon to decide challenges; and, second when a party seeks to have an award set aside by alleging that one of the arbitrators was partial to a party. After raising two preliminary questions, this subsection considers how the courts' obligation to entertain these petitions will alter existing law.

¹⁰⁹ Given Article 5's admonition that "no court shall intervene except where so provided in this Law," may courts still consider the arbitral jurisdiction in other pre-award contexts? For example, if the tribunal decides to join the jurisdiction issue to the merits, as it is entitled to do under the Model Law (so that the court's Article 16(3) power does not obtain), may a party still petition a court to enjoin the arbitration on the basis that no arbitration agreement exists? Presumably, it may do so when the putative arbitral agreement is invoked to stay litigation. In other contexts, the answer should remain fact-dependent.

¹¹⁰ Model Law, Art. 12(2).

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Preliminary Questions

The preliminary questions that arise relate to party autonomy and would be less problematic if the New Act's mandatory provisions were clearly identified, perhaps in a single roster. The first is to what extent may the parties do away with the pre-award challenge procedures altogether, as part of a fast-track procedure designed to eliminate sources of delay. Article 13(1) states that the parties may agree on a challenge procedure, but makes that prerogative "subject to" paragraph 3 of the same article, which contains within it several provisions, including one giving court access in the event the challenge is unsuccessful. Is pre-award court access the mandatory portion of paragraph 3, or is the immutable element only that part of paragraph 3 that disallows appeal of the court's assessment?

Regardless of what the Model Law drafters may have intended in 1985, the New Act should allow the parties to so configure their proceedings; challenges are time-consuming and disruptive and can make a misnomer of a "fast-track" proceeding. Especially because the disadvantaged party will be able to raise arbitrator bias in a setting aside action, the benefits of streamlined proceedings would seem to outweigh any harm the moving party may suffer by having to adhere to a procedure to which it has agreed.

Even where no expediting agreement has been reached, arguably, giving immediate court access after an appointing authority has denied a challenge is unnecessary. Retaining in that situation the existing American approach, which allows the issue to be raised before a court for the first time in a vacatur proceeding, would be less disruptive than the Model Law's

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format; to reiterate, the aggrieved party's access to review would merely be delayed, not denied. By contrast, in the situation in which it is the *tribunal* that has decided the challenge, pre-award access to the courts seems more desirable and should be retained, but only if the parties' arbitration agreement has not precluded pre-award challenges.

The second question, broached earlier, is whether the parties may alter the challengeability of party-appointed arbitrators by adopting a rule formulation which recognizes the dual standard¹¹¹ known to American domestic commercial practice.¹¹²

¹¹¹ Even non-neutral arbitrators are under certain duties the breach of which may imperil the award. In particular, they must practice due diligence and good faith throughout the proceedings. *Metropolitan Property & Casualty Ins. Co. v. J. C. Penney Casualty Ins. Co.*, 780 F. Supp. 885, 892 (D. Conn. 1991); *see also* AAA-ABA Code of Ethics, Canon IV. Accordingly, a party-appointed arbitrator permitted to be partisan (non-neutral) by the governing rules could not, for example, purposely delay the proceedings to protect a party. Nor could he or she relinquish to the appointing party independence in the assessment of evidence and applicable law. *See Metropolitan Property and Casualty Ins. Co. v. J.C. Penny Casualty Ins. Co.*, 780 F. Supp. 885, 893 (D. Conn. 1991).

¹¹² *See, e.g.*, AAA Commercial Rules, Rule 15. As a matter of first principles, the Model Law standard would prevail only if that provision were mandatory; otherwise party autonomy would govern and only the presiding arbitrator would be required to be neutral. Holtzmann & Neuhaus seem to suggest that the parties may not adopt the dual standard, though the matter is not directly addressed. *Id.* at 83, 1152. This problem will not often arise for several reasons: first international rule formulations, which by their terms are likely to apply in lieu of certain domestic rules, clearly apply the unified standard; second, even some rules designed for domestic use adopt the international standard, *see, e.g.*, CPR Rules for Non-Administered Arbitration of Business Disputes (1989), Rule 7.1; third, the parties are not likely to tinker with the standard rules they designate before dispute arises

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Again, because it would require an affirmative opting out of the norm by the parties, little genuine mischief seems likely to occur, provided that the parties' agreement to opt for the dual standard is not easily inferred by courts accustomed to domestic arbitration.¹¹³ Concurrently, one must admit that an outright preclusion of the dual standard would be simpler to understand and administer and would ensure an arbitral model more closely resembling the international standard attractive to potential users abroad.

Judicial Processing of Arbitrator Fitness Before the Award

The Model Law would allow a party to receive a judicial determination *before the award is rendered* as to an arbitrator's competence prompted by alleged doubts as to his independence or impartiality. To some extent, Article 13(3) would alter the prevailing federal view, under which courts refrain from testing arbitrator impartiality before the award is rendered.¹¹⁴ This self-restraint is supported by experience, which teaches that alleged partiality may not be reflected in the arbitration's outcome; indeed, the award may favor the once-suspicious

and may be unable agree to alter the international standard once dispute has materialized.

¹¹³ Even if the option were available to the parties, the author does not believe, however, that they should be encouraged to opt for the dual standard. He merely acknowledges that a broad conception of party autonomy might allow them to do so without imperiling the ultimate award; to the extent the Model Law is unclear on the point, it should be adopted with suitable amendments.

¹¹⁴ See, e.g., *Sun Ref. & Mktg. v. Statheros Shipping*, 761 F. Supp. 293, 296 n.2 (S.D.N.Y. 1991).

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party. Moreover, once the award is rendered, courts have something concrete to focus upon in determining whether the complaining party has in fact been prejudiced.

The change proposed by the Model Law nonetheless would alter the existing pattern very little. Under the Model, the court's function engages ordinarily only after any appointing authority named by the parties has acted and only if that authority has not sustained the challenge.¹¹⁵ Further, the matter may not necessarily advance to the appointing authority; the appointing party or the arbitrator himself may agree to the challenge.¹¹⁶

It might be supposed that the new role for the courts would require also the elaboration, from a *tabula rasa*, of standards with which to decide the challenge. In fact, the corpus of evident partiality law discussed in the next section offers existing principles upon which to draw. Naturally some adjustment will have to be made because at the juncture at which most challenges will arise, there will have been no arbitral award or other conduct upon which to focus; the analysis rather will concentrate upon inferences arising from disclosed interests and relationships.

Under the Model Law formula, generally the question of whether to apply relatively relaxed standards of impartiality to party-appointed arbitrators ought not to arise. Unlike the

¹¹⁵ If no appointing authority or similar procedure has been fixed by the parties, the tribunal decides the challenge. Model Law, Art. 13(2); if the tribunal does not sustain the challenge, only then is the court seized.

¹¹⁶ See Model Law, Art. 12.

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FAA,¹¹⁷ the Model Law is express in applying an identically rigorous standard to all arbitrators; no legitimate confusion

¹¹⁷ Under the FAA, questions persist among the courts called upon to apply FAA § 10(b)(vacatur for “evident partiality”) to tripartite arbitrations in which the parties have not dictated the standard. Does a three-arbitrator structure impliedly sanction “non-neutrality” for party-appointed arbitrators? The FAA makes no distinction between neutral and non-neutral and refers to evident partiality in “either” of the arbitrators. From these facts it followed for one district court that equal impartiality was required of each tribunal member. *See Standard Tankers (Bahamas) Co. v. MotorTank Vessel, AKTI*, 438 F.Supp 153 (E.D N.C. 1977) (international transaction). By contrast, a more recent decision—with no international facet—acknowledged a variable standard. In *Metropolitan Property*, after noting that helpful case law was “scant,” the court referred to “a common acceptance of the fact that the party-designated arbitrators are not and cannot be ‘neutral,’ . . . at least in the sense that the third arbitrator or a judge is.” *Metropolitan Property*, 780 F. Supp. at 891 (quoting *Astoria Medical Group v. Health Ins. Plan of Greater N.Y.*, 182 N.E.2d 85, 87 (N.Y. Ct. App. 1962)). The court relied in part upon the AAA-ABA Code of Ethics which provides that party appointed arbitrators, “should be considered non-neutrals . . . unless the contract, the applicable arbitration rules, or any governing law requires that all three arbitrators be neutral.” *Id.* at 891-92 (quoting Canon VII).

More distant still from the international standard is *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753 (11th Cir. 1993). In *Sunkist*, a party-appointed arbitrator allegedly helped the nominating party prepare its case by participating in meetings with witnesses and party representatives. The court regarded the conduct as “not only unobjectionable, but commonplace.” *Id.* at 759. The court stressed the conventional wisdom that party-appointed arbitrators may be “pre-disposed or sympathetic” toward the party appointing them and that no evidence suggested that he “discussed any information that he received during the pre-hearing interviews with the other arbitrators, or that any of the arbitrators . . . based their deliberations and award on anything other than the evidence of record.” *Id.*

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should arise, even if under the New Act parties are in principle allowed to adopt the dual standard by express adoption.

Vacatur Of Awards For Bias

The Model Law's adoption of the New York Convention's non-recognition grounds for use in testing set-aside petitions will give American courts precedent to consult by analogy. Probably, as in the challenge context, courts will borrow from standards developed to assess "evident partiality," as they have done in handling claims of bias under the New York Convention. The Convention, like the Model Law,¹¹⁸ refers to the improper composition of the tribunal as judged against the parties' agreement to arbitrate,¹¹⁹ though there is an established tendency by advocates to raise bias under the public policy ground.¹²⁰

Because the existing vacatur provision speaks only of evident partiality (and not of lack of independence) these arguably separate impediments to neutrality have been treated as aspects of "partiality," concerning which different tests have emerged. Though the law of evident partiality is "muddled,"¹²¹ there is apparent agreement that the test is objective and to be applied on a case-by-case basis. Some circuits express this by positing

¹¹⁸ Model Law, Art. 34(2)(iv).

¹¹⁹ The latter will often incorporate a rules text requiring independence and impartiality of party-appointed arbitrators.

¹²⁰ See van den Berg at 377-80; Rau at 237, n.99. Bias arguably also bears upon whether a party was able to present its case under Articles 34(2)(a)(ii) and 36(1)(a)(ii).

¹²¹ *Washburn*, 895 F. Supp. at 396; see also Carter (noting "judicial confusion").

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a reasonable person formula: given the facts, would a reasonable person "have to conclude" that the arbitrator was partial to a party?¹²² Typically, an alleged relationship between the arbitrator and a party or an alleged interest in the outcome is in question.¹²³ Naturally, few bright lines have emerged.¹²⁴

The burden upon the party seeking vacatur is generally onerous,¹²⁵ and speculative allegations of bias will not suffice;¹²⁶ federal courts often admonish that trivial or nebulous connec-

¹²² See *Consolidated Coal Co. v. UMW, Local 1643*, 48 F.3d 125, 129 (4th Cir. 1995); *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 991 F.2d 141, 146 (4th Cir. 1993); *Sun Ref. & Mktg. Co. v. Statheros Shipping Corp. of Monrovia, Liber.*, 761 F. Supp. 293, 301 (S.D.N.Y. 1991); *Morelite*, 748 F.2d at 84.

¹²³ The Fourth Circuit has cataloged the main factors bearing on evident partiality as follows:

- (1) any personal interest, pecuniary or otherwise, the arbitrator has in the proceeding;
- (2) the directness of the relationship between the arbitrator and the party he is alleged to favor;
- (3) the connection of the relationship to the arbitration; and
- (4) the proximity in time between the relationship and the arbitration proceeding.

Consolidated Coal Co. v. UMW, Local 1643, 48 F.3d 125, 130 (4th Cir. 1995).

¹²⁴ See *Washburn* at 395-96 ("infinite number of possibilities of claims for some connective basis for disqualification") (quoting *United States Wrestling Fed'n v. Wrestling Div. of the AAU, Inc.*, 605 F.2d 313, 318 (7th Cir. 1979)); see also *Andros Compania Maritima, S.A. v. Marc Rich & Co., A.G.*, 579 F.2d 691, 700 (2d Cir. 1978) (explaining that courts eschew "dogmatic rigidity" in assessing partiality).

¹²⁵ *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 681 (11th Cir. 1983)(only facts "powerfully suggestive" of bias).

¹²⁶ See *Washburn*, 895 F. Supp. at 399-400; *UCO Terminals, Inc. v. Apex Oil Co.*, 583 F. Supp. 1213, 1214-16 (S.D.N.Y.), *aff'd*, 751 F.2d 371 (2d Cir. 1984); cf. *Sofia Shipping Co. v. Amoco Transp. Co.*, 628 F. Supp. 116, 119 (S.D.N.Y. 1986) (vacatur requires evidence of "direct or definite partiality").

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tions between an arbitrator and the awarded party are not received with sympathy.¹²⁷

There is under American law a relationship between disclosure and the impression of partiality, though, the relationship is not always clearly articulated in the cases. The Ninth Circuit, however, has recently developed an approach that employs two, discrete tests; which of the two applies depends upon whether the matter giving rise to the charge of partiality was disclosed by the arbitrator.¹²⁸ That a failure to disclose certain matters should influence vacatur under the New Act deserves further study. Under the Model Law, there is arguably room to link its disclosure requirement more closely with its setting aside provi-

¹²⁷ *Morelite*, 748 F.2d at 85 (unsuccessful party to arbitration not to be rewarded for "seeking out and finding tenuous relationships between the arbitrator and the successful party"); *Sun Ref.*, 761 F. Supp. at 304 (relying upon *Commonwealth Coatings Corp. v. Continent Casualty Co.*, 393 U.S. 145, 151 (1968) (White, J., concurring)).

¹²⁸ *Woods v. Saturn Distrib. Corp.*, 78 F.3d 424, 427-28 (9th Cir. 1996); *Schmitz v. Zilveti*, 20 F.3d 1043, 1048 (9th Cir. 1994). "In nondisclosure cases, vacatur is appropriate where the arbitrator's failure to disclose information gives the impression of bias in favor of one party." *Woods*, 78 F.3d at 427. The required impression is presumably a function of the gravity of the relationship or interest that the arbitrator failed to disclose. Where the party seeking vacatur invokes something disclosed by the arbitrator, the requisite showing is heightened. "Actual bias must be proven;" vacatur will be allowed only where there are established specific facts that demonstrate that the award was the result of the interest or relationship. *Woods*, 78 F.3d at 427.

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sions,¹²⁹ a notion examined in Chapter 12 (§ 12.8). The courts' role in setting aside awards is revisited below in § 11.5.6.

11.5.4 ASSISTANCE IN TAKING EVIDENCE

Discovery matters often loom large in international arbitration. Documentary discovery normally consists of each party producing documents upon which it intends to rely. Depositions of opposing parties and witnesses may occur, but not as a matter of course; much depends upon the regime constructed by the parties with the help of the tribunal. Clashes arising from divergent legal cultures and conflicting expectations are not unusual. Because a party may disagree with a tribunal about the proper extent of disclosure, and because tribunals do not have contempt power, the courts of the situs can play an important role in securing desired information. Nevertheless, if the courts were available to consider every request to produce, and the corresponding views of the tribunal, undue interference with the arbitral process and added pressure on already crowded dockets would result.

Consistent with the international standard, the Model Law does not authorize the parties to make and enforce demands upon each other for documents and other information, though

¹²⁹ The Model Law's challenge procedures depend heavily upon arbitrator disclosure; though a challenging party may rely on facts garnered other than through arbitrator disclosure, as a practical matter these may not become known, if at all, until after the proceedings are closed. Thus, it is appropriate that setting aside grounds include dependence and partiality and that a failure to disclose obviously suggestive relationships or interests give rise to special suspicion.

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by mutual agreement comprehensive exchanges may occur. On the question of court assistance, the Model Law strikes a balance between providing no assistance and an open door policy; it allows courts to assist in the taking of evidence when requested by the tribunal or by a party *with the tribunal's permission*.¹³⁰

Much existing federal law has developed around the FAA's arbitral subpoena power, which allows the tribunal (but not a party) to summon persons to give evidence.¹³¹ If a summons is disregarded, a court duly petitioned may compel compliance.¹³² Though the Model Law's provision seems to be broader than the FAA's subpoena provision—it refers to assistance for evidence-taking generally—some American courts will likely develop strictures that discourage requests for non-specific discovery orders, just as they have done under the FAA subpoena context.¹³³

¹³⁰ Model Law, Art. 27. The provision only applies to requests related to an arbitration within the enacting state. U.S. law makers might consider on what basis assistance for foreign arbitrators may be covered within the New Act. This might be accomplished by incorporating by reference 8 USC § 1782, which provides for court assistance in acquiring material “for use in a proceeding in a foreign or international tribunal.”

¹³¹ FAA, § 7, empowers the arbitrators to:
summon in writing any person to attend before them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case.

¹³² Some courts have held that the power extends to causing pre-hearing appearances. *Stanton v. Paine Webber Jackson & Curtis, Inc.*, 685 F. Supp. 1241 (S.D. Fla. 1988).

¹³³ A subpoena may be quashed on the ground that it is over-broad or otherwise inappropriate. Some federal courts have been disinclined to nullify arbitral subpoenas, deferring rather to the arbitrators' sense of what materials are relevant and beneficial to the

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Though authorized under the New Act and petitioned with the tribunal's blessing, in keeping with existing practice some courts may also be inclined to limit assistance to "extraordinary circumstances," such as by insisting upon showings, *e.g.*, that irreparable harm will result if discovery is not had.¹³⁴

11.5.5 REMAND (REMISSION) OF AWARDS

Under the Model Law, a court asked to set aside and award may instead remand it to the arbitrators "in order to give the arbitrators an opportunity to resume the arbitral proceedings or to take such other action as in the tribunal's opinion will eliminate the grounds for setting aside." The practice of remission is known in American jurisprudence although no mention of it appears in the FAA.¹³⁵ Courts have found

proceeding. *See, e.g.*, *Commercial Metals Co. v. International Union Marine Corp.*, 318 F. Supp. 1334 (S.D.N.Y. 1970) (arbitrator's subpoena *duces tecum* not quashed because records requested arguably relevant to the proceedings); *Complaint of Koala Shipping & Trading Inc.*, 587 F. Supp. 140 (S.D.N.Y. 1984) (tribunal had authority to issue discovery order and subpoena *duces tecum* of certain relevant documents). Others have been exacting; *see generally* Born, *ARBITRATION* at 843-45 (some courts consider the "materiality" of the evidence sought).

¹³⁴ *See Oriental Commercial & Shipping Co. v. Rossel, N.V.*, 125 F.R.D. 398, 399 (S.D.N.Y. 1989).

¹³⁵ Sometimes awards are ambiguous, vague or suffer from a similar imperfection. When poorly crafted arbitral work-product is presented to a court for enforcement, a court could vacate the award; but such waste seems inappropriate when an award is the product of a principled proceeding. Alternatively, the court could attribute a reasonable meaning to the award and enter judgment upon it accordingly; to do so, however, may depart from the tribunal's intended result and involve the court in speculation and an undesirable study of the merits. It is the tribunal that is usually

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remand appropriate in a variety of circumstances.¹³⁶ Where remands occurs, it prolongs or revives the mandate of the tribunal on a limited basis; it thus may be said to be a partial exception to the *functus officio* doctrine, though, under American law remand does not undermine finality; what the arbitrators have already decided may not be disturbed under the guise of rendering the requested clarification or elaboration. Assuming the same qualification is attributed to its text, the Model Law's remission provision should abide comfortably in the United States.¹³⁷

in the best position to clarify what it meant.

¹³⁶ The remand of awards has occurred where the tribunal gave reasons that were unclear in a material respect thus making, for instance, the application of claim and issue preclusion principles difficult. *See, e.g.*, *Glass, Molders, Pottery, Plastics & Allied Workers Int'l Union, Local 182B v. Excelsior Foundry Co.*, 56 F.3d 844, 849 (7th Cir.1995) (reasoned award failed to anticipate a contingency arising after award issued); *Galt v. Libbey-Owens-Ford Glass Co.*, 397 F.2d 439, 442 (7th Cir.), *cert. denied*, 393 U.S. 925 (1968) (asking arbitrators whether particular issues were decided); *Boston Cattle Group v. ADM Investors Servs., Inc.*, 1995 WL 723781, at *7 (N.D. Ill. 1995) (to facilitate issue preclusion, award would be remanded where "[the] court cannot discern from the arbitrators' [reasoned] decision whether the issue was resolved on its merits"); *Domino Group, Inc. v. Charlie Parker Memorial Found.*, 985 F.2d 417, 418-19 (8th Cir. 1992) (award remanded because grant of specific performance too vague to be enforced).

¹³⁷ *See Domino Group*, 985 F.2d at 420. That remission requires a party to request the procedure should not too greatly encumber courts. If the alternative is vacatur, presumably one party will be motivated to ask for remission. By amendment to Article 34(4), however, courts can be authorized to remand *sua sponte*, in keeping with existing practice.

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11.5.6 UNIFIED ATTACKS ON AWARDS

As broached above in outlining the courts' role in policing bias among arbitrators, if implemented as is, the Model Law would apply nearly the same¹³⁸ standards to vacatur (setting aside) petitions as it applies to determine whether an international award (wherever rendered) is to be enforced or recognized. Contrary to the existing framework, enforcement would not depend upon territoriality or reciprocity. This unification of grounds would constitute a marked departure from the main branch of existing American practice, which distinguishes Convention awards based upon where an award was made. It would, however, find a rough parallel in those U.S cases that have applied a convention to awards rendered in the United States, based upon the presence of certain non-domestic elements.¹³⁹

¹³⁸ The setting aside grounds do not include that the award has not yet become binding; the absence follows apparently from the belief that it is illogical to set aside an award which is not yet final, *i.e.*, is not yet an award. A second difference is that, while both Model Law articles refer to an invalid agreement, in the setting aside context (Article 34), the court is directed in default of party choice to the *lex fori*, whereas the non-recognition provisions refer to the law of the place where the award was rendered (Article 35(a)(i)). Given the structure of Article 35, that may—or may not be—a *lex fori* reference; the provision applies to international awards, wherever rendered.

¹³⁹ *See Bergesen v. Joseph Muller Corp.*, 710 F.2d 928 (2d Cir. 1983)(New York Convention); *Productos Mercantiles E Industriales, SA v. Faberge USA, Inc.*, 23 F.3d 41 (2d Cir. 1994)(Inter-American Convention); *see also* New York Convention, art. I (applicable also to awards not considered domestic).

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The new, common standards of attack would also be familiar to U.S. jurisprudence, and that of approximately 120 other systems; they are the grounds of the New York Convention.

As a matter of substance, does the Model Law change the rigor (or lack thereof) with which awards are scrutinized? As to those awards currently regarded as "domestic," certainly, the positive text addressed to "setting aside" is different from the grounds found in FAA § 10.¹⁴⁰ Neither that section nor the convention chapters, however, encourage scrutiny of an award's merits; misapplication of the law does not generally imperil an award in either context.¹⁴¹ Moreover, it is difficult to think of a colorable attack available under § 10 that is also not available under the Convention and hence under Model Law's text.¹⁴² Most of these have already been studied by courts under the conventions' non-recognition or the FAA's vacatur provisions. It is unlikely that the pro-enforcement bias of the courts will

¹⁴⁰ The new test for vacatur would not render existing case law irrelevant. American courts are already familiar with the text in question and are already accustomed to borrowing, cross-fertilization and unification of approach among the FAA's three chapters.

¹⁴¹ In practice this is true even in jurisdictions still observing the manifest-disregard-of-law standard.

¹⁴² One possible difference exists in FAA § 10(d), which refers to imperfectly executed arbitral powers resulting in the lack of "a mutual, final and definite award upon the subject matter submitted." Probably, many of cases falling under this provision could be brought on the basis that the "arbitral procedure was not in accordance with the agreement of the parties" since it is at least implied in standard rule formulations that the tribunal is to render an enforceable award free of dysfunctional vagueness or equivocation. *Cf.* Rau at 237, n.97 (differing language between FAA § 10 and Convention, art. V of "minimal significance"). *But see* MacNeil *et al.*, § 44.40.1.4 ("misleading" to posit substantial equivalence).

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change with the enactment of a law offering no new grounds for unraveling arbitral work-product, though the exclusivity of the Model Law grounds should be made unmistakably clear in the New Act, given the willingness of some courts to embrace extra-statutory grounds for vacatur.¹⁴³

Further, it is difficult to imagine that either the Model Law's public policy¹⁴⁴ or subject matter arbitrability¹⁴⁵ grounds

¹⁴³ See generally S. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 Ga. L. Rev. 731, 778 (1996)(manifest disregard doctrine).

¹⁴⁴ See, e.g., *Nordell Int'l Resources v. Triton Indonesia*, 999 F.2d 544 (9th Cir. 1993), *cert. denied*, 62 U.S.L.W. 3551 (U.S. 1994) (confirmation affirmed despite allegations that award was based on fraudulently prepared data); see also *Northrop Corp. v. Triad International Marketing S.A.*, 811 F.2d 1265 (9th Cir. 1987) (“[t]o justify refusal to enforce . . . the policy “must be well defined and dominant”) quoting *W.R. Grace & Co. v. Local Union 749, Int'l Union of the United Paper Workers*, 461 U.S. 757, 766 (1983); *Fotochrome Inc. v. Copal Co.*, 517 F.2d 512, 526 (2d Cir. 1975) (public policy implicated only when enforcement “would violate the most basic notions of morality and justice”). But see *Victrix S. S. Co., S. A. v. Salem Dry Cargo A. B.*, 825 F.2d 709, 714 (2d Cir. 1987)(English award based upon breach of a charter party could not be confirmed because of strong countervailing policies favoring deference to foreign bankruptcy proceedings).

¹⁴⁵ In the United States, broad arbitrability has become the norm. One civil subject matter that may be protected by U.S. courts from foreign awards concerns state insurance law. At least two cases have ruled that the New York Convention does not require enforcement of an agreement to arbitrate where the dispute was covered by a state scheme overseeing the orderly disposition of a troubled insurance company's affairs. *Stephens v. American Int'l Ins., Co.*, 66 F.3d 41 (2d Cir. 1995); *Corcoran v. Andra Ins. Co.*, 567 N.E.2d 696, 972 (N.Y. 1991), *cert. denied*, 500 U.S. 953 (1991). As to the breadth of arbitral subject matter under U.S law see, Chapter 7 §§ 7.6 (and notes) and 7.7.

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will often be successfully invoked. American courts will be similarly reluctant to find that the resisting party was deprived of proper notice (or was otherwise unable to present his case)¹⁴⁶ or was subjected to a procedure at odds with that agreed by the parties.¹⁴⁷

By contrast, rather more scrutiny may attach to claims that no arbitration agreement was reached¹⁴⁸ though once estab-

¹⁴⁶ In approaching this ground for non-enforcement, American courts borrow from the law of "due process." with an emphasis upon notice and the opportunity to be heard. *See* *Biotronik Mess-und Thereapiegeraete GmbH & Co. v. Medford Instrument Co.*, 415 F. Supp. 133, 140 (D.N. J. 1976). A pro-enforcement, narrow construction usually prevails. *See, e.g.*, *Parsons and Whittemore*, 508 F.2d 969, 975-76 (2d Cir. 1974) (arbitrators' refusal to delay proceedings to accommodate the speaking schedule of a witness does not prevent enforcement); *Lamoinoirs-Trefileries-Cableries de Lens, S. A. (LTCL) v. Southwire Co.*, 484 F. Supp. 1063 (N. D. Ga. 1980) (Convention award enforced despite limits placed upon cross examination by the arbitrators). *National Dev. Co. v. Khashoggi*, 781 F. Supp. 959, 960 (S.D.N.Y. 1992)(default award enforced; appropriate notice of the arbitration had been given).

¹⁴⁷ *See* *Al Haddad Bros. Enterprises v. M/S Agapi*, 635 F. Supp. 205 (D. Del. 1986), *aff'd*, 813 F.2d 396 (3d Cir. 1987).

¹⁴⁸ Under the separability doctrine, a court should examine only the arbitration agreement itself, not the underlying contract; the latter's existence (at least under a nonrestrictive arbitration clause) is for the arbitrator to have evaluated. Given *Kaplan* (1995)(tribunal's jurisdictional findings—absent parties' agreement to the contrary—subject to *de novo* review), arguably courts should ordinarily conduct a *de novo* review of the clause's existence and scope before confirming an award. At present, it is unclear how *Kaplan*, a domestic commercial case, affects convention awards. Even if *Kaplan* signals heightened scrutiny for international awards on these issues, and that doctrine remains operational under the New Act, *de novo* review should be undertaken only if the resisting party makes a *prima facie* showing that a jurisdictional problem exists and that it was properly preserved. *See* New

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lished the agreement to arbitrate will likely be held to extend to the claims embodied in the award.¹⁴⁹ In the process, choice of law analysis relevant to international arbitration agreements may evolve from its present, relatively embryonic state; regardless, a *lex fori* preference probably will retain favor.¹⁵⁰ From existing interpretations of the Convention it can be further expected that pending judicial proceedings abroad¹⁵¹ will not necessarily prevent award enforcement, provided the

York Convention, art. V(1) (burden upon the attacking party to furnish proof); *accord* Model Law, Art. 36 (1)(a).

¹⁴⁹ See, e.g., *Management and Technical Consultants S.A. v. Parsons Jurdin International Corp.*, 820 F.2d 1531 (9th Cir. 1987) (“[f]ederal law has established a presumption that an arbitral body has acted within its powers”); see also *National Oil Corp. v. Libyan Sun Oil*, 733 F. Supp. 800, 818-819 (D. Del. 1990) (tribunal’s damages award confirmed under Convention because not completely irrational).

¹⁵⁰ Absent an express choice of law, the choice of law instructions given by the Model Law differ depending upon whether the action is to set aside or to enforce. In the enforcement context, the New York Convention formula is carried forward largely unchanged. Thus, courts are to apply the law of the place where the award is made (which under the Model Law may, or may not, be the enacting state); in set-aside actions the reference to the place of arbitration is replaced by a direct *lex fori* rule (see Article 34 (2)(a)(1)). In both contexts the Convention’s personal law reference applicable to capacity issues (“the law applicable to [the parties]”) has been omitted. No choice of law directive has replaced it and American courts will likely reach different applicable law conclusions depending upon which choice of law theory they favor. Quite likely, however, a *lex fori* inclination will often be influential.

¹⁵¹ It is not a ground under the Model Law’s set-aside provisions that an award “has not yet become binding,” though that basis has been retained as an exception to enforcement of awards, wherever rendered.

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tribunal has finished with the award,¹⁵² though there is a counter-trend within U.S. courts to defer enforcement pending set-aside proceedings at the place of arbitration.¹⁵³ That adjournment practice is authorized under both the New York Convention¹⁵⁴ and the Model Law.¹⁵⁵

¹⁵² *See, e.g.*, *Fertilizer Corp. v. IDI Mgmt., Inc.*, 517 F. Supp. 948 (S.D. Ohio 1981).

¹⁵³ *See* *Europar Italia SpA v. Maiellano Tours, Inc.*, Docket No. 97-7224, (2d Cir. Sept. 1, 1998). *Cf.* *Hewlett-Packard v. Berg*, 61 F.3d 101 (1st Cir. 1995) (deferred pending related arbitration).

¹⁵⁴ Convention, art. VI.

¹⁵⁵ Art. 36(2).

Chapter 12

ADAPTING THE MODEL LAW TO THE AMERICAN SYSTEM

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12.1 Introduction

Fashioned to be widely acceptable, the UNCITRAL Model Law does not attempt to address every issue that might arise in a given legal system. Nevertheless, its relatively streamline frame makes it amenable to augmentation. If the Model Law is to serve as the basis of a new FAA chapter devoted to international commercial disputes (the “New Act”), certain modifications may be desirable in adapting the official text to the American scene and to account for recent trends and issues. This chapter addresses a number of supplemental provisions that ought to be studied in formulating the New Act.

Model Law purists will not endorse the appreciable tinkering proposed below. Minimalism, of course, cannot be dismissed lightly; it is consistent with the goal of harmonization and would arguably engender fewer interpretive questions than an augmentative approach. Additionally, departures from the Model Law may dilute the benefits of having a ready *travaux* and the experiences of other jurisdictions to aid interpretation and implementation. Nonetheless, most of the changes suggested below address issues well-known to the American and international arbitration communities and the solutions consid-

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ered draw chiefly upon international paradigms, not indigenous, idiosyncratic ones.

12.2 Scope of Application

12.2.1 IN GENERAL

Currently, the FAA's application in state courts is clear only to the extent that the Supreme Court has revealed on a case-by-case basis how that statute (seemingly addressed to federal courts only) carries policies which must be vindicated in all American courts. The simplest approach is for New Act to make plain that a dispute which is both "commercial" and "international" within the meaning of the statute is, unless otherwise expressly indicated, governed by the New Act in both state and federal courts. Certain related issues also arise, however; these are treated in the following two subsections.

12.2.2 ASPECTS OF PARTY AUTONOMY

Delineating Mandatory Rules

Presently, parties to an arbitration agreement otherwise governed by the FAA may designate a state law of arbitration to govern their agreement. Presumably, this will remain so under the New Act; the Model Law itself is largely non-mandatory. It may be useful, however, to borrow from the English example the device of listing in one place the Act's mandatory provisions, to be applied irrespective of the parties'

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designation of state law or a foreign curial law.¹ Although the Model Law's drafters considered and rejected that technique,² attaching such a schedule to the Act would greatly advance interpretation;³ litigation over meaning would be reduced accordingly. The required listing would be rather brief given the latitude built into the Model and equally present in the American system.⁴ *Prima facie*, it should include: award formalities, such as signatures and written form requirements (but not the reasoned award requirement), the party equality doctrine, the fair-opportunity-to-present rule, and the immunity rules to be recommended below. Arguably, as developed in Chapter 11, the impartiality and independence obligation should also be insulated from party autonomy, though one can imagine that robust debate may surround this question. Whether or not a list is used, confusion may be lessened by

¹ By definition, these would apply even when the parties had chosen a state or foreign arbitration law to govern the proceedings.

² Holtzmann & Neuhaus at 1119-20.

³ Several provisions in the Model Law make reference to the distinction between mandatory and non-mandatory rules, as if the classification of the provisions as one or the other was self-evident. *See, e.g.*, Article 19(1)(Parties may by agreement set arbitral procedure "[s]ubject to the provisions of this law"). Some provisions are clearly non-mandatory; others are ambiguous. For example, may the parties by agreement alter the party equality principle? Or, may they determine that only the tribunal chair must be impartial, leaving the party-appointed arbitrators to act as advocates to some degree? As to the first, Holtzmann & Neuhaus are certain that Article 18—"the Magna Carta of Arbitral Procedure"—binds both the tribunal and the parties. *See id.* at 550-51. As to the partisanship of arbitrators, the answer seems less clear. *Cf. id.* at 388-91.

⁴ It is possible, of course, that U.S. lawmakers may allow derogation from provisions that the Model Law's drafters fully intended to be mandatory.

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systematic use of the qualifying phrase, “unless otherwise agreed by the parties,” a convention used by the Model Law, but not with consistency.

The Gateway / Kyocera Question

If the parties may designate state or foreign law to govern, may they also expand a court’s jurisdiction to review awards? Courts have diverged in considering arbitration clauses that purport to make awards reviewable for “errors of law.” In *Gateway Technologies, Inc. v. MCI Telecommunications Corp.*,⁵ the Fifth Circuit held that such a clause required a court to conduct *de novo* review of an award, and that to do so when authorized by the parties is consistent with Supreme Court precedents which have emphasized party autonomy. A searching review followed and the award was partially nullified.⁶ Faced with a similar clause, a district court in California, fully aware of *Gateway*, went the opposite direction,⁷ only to be reversed by the Ninth Circuit.⁸ The latter thus aligned itself with the Fifth Circuit and against the Seventh

⁵ 64 F.3d 993 (5th Cir. 1995).

⁶ *Id.* at 995. The lower court had confirmed the award against MCI, which contained actual damages, attorneys’ fees and punitive damages. The latter were assessed by the arbitrator to account for MCI’s failure to negotiate in good faith. Performing its review on the merits, the Fifth Circuit determined that the resisting party had waived its objection to the award of attorneys’ fees but that the award of punitive damages was incorrect under the governing state law, which required a basis in tort for the award of such damages.

⁷ *Lapine Technology Corp. v. Kyocera Corp.*, 909 F. Supp. 697, 703 (N.D. Cal. 1995).

⁸ 130 F.3d 884 (9th Cir. 1997).

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Circuit's 1991 assessment that "[the parties] cannot contract for *judicial* review of [the] award; federal jurisdiction cannot be created by contract."⁹

The level of review clearly matters. The result in *Gateway*, for example, would no doubt have been different under FAA § 10 and under the Model Law, neither of which invites substantive review. The clarification invited by the decisional discord would best be addressed by language amplifying the exclusive character of the Model Law grounds for setting aside, perhaps in conjunction with the listing of obligatory provisions mentioned above. To disallow substantive review by contract would promote finality and speed.¹⁰ By contrast, if such clauses became the norm, arbitration would be merely a form of first instance proceeding; few losing parties would let the arbitrators' award stand where the arbitration clause held the hope of a second chance to prevail. The costs of achieving a final result would naturally increase as well.¹¹

⁹ *Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc.*, 935 F.2d 1501, 1505 (7th Cir. 1991).

¹⁰ *Accord* A. Lowenfeld, *Can Arbitration Coexist with Judicial Review?*, ADR Currents, Sept. 1998, at 1, 14-15.

¹¹ Supporting this form of party autonomy is the sense of security promoted by an errors-of-law clause, which may make arbitration more acceptable to an apprehensive participant. Where one or more of the parties approach arbitration clauses with substantial skepticism, the promise of *de novo* review may be the price of keeping disputes (at least initially) out of the courts. On balance, however the policies favoring alacrity, finality, economy, and the need to portray the United States as a situs free of judicial interference outweigh the above-mentioned arguments in favor of allowing plenary review of international awards.

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12.2.3 CHAPTER INTERDEPENDENCE

At present, Chapters Two and Three of the FAA (the convention chapters) are supplemented by Chapter One to the extent that it “is not in conflict with” them or their underlying treaties.¹² Several countries have subjected the Model Law to similar augmentation.¹³ In the United States, the “residual application” provisions have spawned judicial confusion, as skillful advocates have upon occasion pressed for application of Chapter One in dubious settings under the conventions. The issues that have arisen include whether § 9’s consent-to-judgment requirement,¹⁴ or the manifest-disregard-of-the-law standard applies to Convention awards.¹⁵ Similarly, some courts have applied FAA’s statutory vacatur grounds—typically reserved for domestic awards—to Convention awards.¹⁶

The New Act should simplify matters by declaring its autonomy,¹⁷ *vis-à-vis* FAA Chapter One. There would remain room for borrowing by analogy, but not under the guise of

¹²See FAA, §§ 208, 307.

¹³ Sanders at 6 (discussing statutes in Nigeria, Peru, Tunisia and Georgia, (U.S.A.)).

¹⁴ Cf. G. Aksen and W. Dorman, *Applications of the New York Convention by U.S. Courts: A Twenty-Year Review (1970-1990)*, 2 Am. Rev. Int’l Arb. 65, 80 (1991) (courts readily find the requirement, derived from FAA § 9, satisfied).

¹⁵ See, e.g., *Lander Co. v. MMP Investments, Inc.*, 1997 W.L. 66094 (7th Cir Ill.) (leaving question open).

¹⁶ See *Matter of Chromalloy Aeroservices and the Arab Republic of Egypt*, 939 F. Supp. 90 (D.D.C. 1996); cf. *Biotronik Mess-und Therapiegeraete & Co. v. Medford Med Instrument, Co.*, 415 F. Supp. 133 (1976)(applying § 10(a) FAA—award procured by fraud—to a Swiss Award).

¹⁷ *Accord* Sanders at 6-7.

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applying other chapters of the FAA directly. Because the Model Law as supplemented below will be relatively complete, excursions to other chapters ought not ordinarily to occur.

12.3 Compelling Arbitration and Limited Interlocutory Appeal

The Model Law adopts the New York Convention notion that to give effect to arbitration agreements a court seised of a matter covered by an arbitration agreement should stay its own proceedings and refer the parties to arbitration. Both in its implementation of the Convention and in enforcing agreements not governed by a treaty, the FAA allows a party to seek an order compelling a recalcitrant party to arbitrate. In the case of an agreement to which the Convention applies the federal courts may do so whether or not the named situs is within the United States.¹⁸ There is little reason to retreat from this important feature of American law, which could be added

¹⁸ FAA, § 206.

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without fundamentally changing the UNCITRAL text.¹⁹ In fact, adopting the Model Law would clarify the rule of FAA § 206 in a material respect.²⁰

Interlocutory appeals from denials of requests to compel arbitration were added to the FAA by amendments to the FAA. They allow interim appeal only from a district court's decision *not* to recognize an arbitration agreement covered by the Act,²¹ precluding it as to orders favoring arbitration.²²

¹⁹ If the New Act carries forward the FAA's machinery for ordering parties to arbitrate abroad, this function might be given exclusively to federal district courts; uniformity of application would be improved and any doubts about state court powers to order operations abroad would be obviated. State courts would still of course be required to stay proceedings and "refer" the parties to arbitration. They would not be precluded from ordering the parties to arbitrate within the state, if the parties' agreement so provides.

²⁰ Strictly speaking, FAA § 206 only authorizes courts to enforce the parties' choice of situs, leaving the courts no express power to designate an appropriate place of arbitration when the parties have been silent. One decision holds that a federal court may in such circumstances compel arbitration within its district. *See Bauhinia Corp. v China Nat'l Mach. & Equip. Import and Export Corp.*, 819 F.2d 247 (9th Cir. 1987). Under the Model Law, Art. 21(1), failing a designation by the parties, the tribunal fixes the situs "having regard to the circumstances of the case." Retaining the Model Law formula upon adoption is consistent with existing § 206 and would preclude the questionable solution reached in *Bauhinia*. Thus, where the parties have designated the place, they would be ordered to arbitrate there; where they have not, they would be ordered to arbitrate, and to initiate their agreed procedure for the appointment of arbitrators, who, in default of intervening party choice, would designate the situs.

²¹ *See generally* K. Wolf, *Appeals from District Court Determinations Involving Arbitration*, in *COMMERCIAL ARBITRATION FOR THE 1990's* (R. Medalie ed., 1991) at 105.

²² FAA, § 16(b) provides:

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order-

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Appeal, on the same asymmetrical basis, should be retained; the law of arbitrability has been largely formed on appeal, often in cases in which a lower court declined to enforce an agreement to arbitrate.

12.4 Jury Trial

A feature of the FAA which seems greatly out of place in an international arbitration statute is jury trial, even in the limited fashion described in Chapter 7. Because the Constitution guarantees a jury trial in actions at law in federal courts, an attempt to do away with it altogether would be subject to constitutional attack. Under the New Act's jury provision, presumably, federal courts could continue to require the party alleged to be in default to demonstrate—before a jury will be empaneled—a colorable basis upon which a reasonable jury could find that no arbitral agreement exists.²³

12.5 Act of State

The Act of State doctrine requires American courts to abstain from adjudicating the validity of the acts of a foreign state

-
- (1) granting a stay of any action under section 3 of this title;
 - (2) directing arbitration to proceed under section 4 of this title;
 - (3) compelling arbitration under section 206 of this title; or
 - (4) refusing to enjoin an arbitration that is subject to this title.

²³ The constitutional requirement of a civil jury does not extend to state courts; the jury provision would be drafted accordingly.

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undertaken with respect to property and other activities in that state's own territory.²⁴

The FAA, in one of its few modern amendments, limits the doctrine's application to arbitration:

“Enforcement of arbitral agreements, confirmation of arbitral awards, and execution upon judgments based on orders confirming such awards shall not be refused on the basis of the Act of State doctrine.”²⁵

Prior to the above amendment, a district court declined to enforce a Swiss award against a Libya, citing the doctrine. *LIAMCO*²⁶ grew out of Libya's nationalization of its oil industry. The court's reasoning remains subject to interpretation; the court's apparent premise, however, was that because Libya purported to nullify the arbitration agreement, given the doctrine, it would not have been able in the first instance to enforce the agreement to arbitrate. By a questionable extension, it concluded that it ought not enforce the ultimate award either.²⁷ Appeal on the decision was not consummated, but the decision was vacated.²⁸

The above amendments effectively overrule *LIAMCO*, and should be replicated in the New Act, lest confusion recur. To it might be added the complementary rule found in the Swiss International Arbitration Law, which states:

A state, or an enterprise owned by, or an organization controlled by a state, which is party to an arbitration agreement, cannot invoke its own law in order to contest its capacity to

²⁴ See Restatement (Third) § 433.

²⁵ FAA, § 15.

²⁶ *Libyan Am. Oil Co. (LIAMCO) v. Socialist Peoples' Arab Jamahira*, 482 F. Supp. 1175 (D.D.C. 1980).

²⁷ *Id.* at 1178-79.

²⁸ 684 F.2d 1032 (D.C. Cir. 1981).

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arbitrate or the arbitrability of a dispute covered by the arbitration agreement.²⁹

While there may be overlap in the two provisions, taken together they forestall most inappropriate sovereign defenses to arbitration agreements.

12.6 Multiparty Disputes

12.6.1 IN GENERAL

Multiparty disputes present especial challenges to the arbitral mechanism. Neither the FAA nor the Model Law treats the various aspects of the problem to be addressed in this section. Yet, the addition of a provision treating multiparty issues—or at least some of them—ought to be contemplated because of the divergent American authority, the importance of the issues to users of arbitration and the concerns facing courts asked to recognize awards produced from multi-party proceedings. Ostensibly, two areas can be addressed by statute: judicial consolidation of related arbitrations and appointment of arbitrators.

12.6.2 COURT CONSOLIDATION—THE CONSENT QUESTION

In the United States, whether unanimous party consent is essential to consolidation has generated two distinct approaches. One is typified by certain state statutes that give courts the power to consolidate related proceedings even though one of

²⁹ Swiss International Arbitration Law, Article 177(2).

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the three parties resists consolidation and has not otherwise consented to combined proceedings. The prevailing federal view, by contrast, holds that the parties' agreement to consolidation must be found, in the parties' respective contracts or elsewhere.³⁰ Similarly, unanimous party assent is a prerequisite within consolidation provisions found in the international arbitration laws of California, Florida, North Carolina, Ohio, Oregon, Texas, and the common law provinces of Canada.³¹

Though at least one prominent non-American venue allows court consolidation of related arbitrations without complete consent,³² to enhance award enforceability³³ the New Act should embrace the more conservative trend.³⁴ Consent should suffice, however, even if ante-dating the dispute.³⁵

Once the consent question is settled, the remaining questions are important but comparatively mechanical: who may petition

³⁰ See *United Kingdom v. Boeing*, 998 F.2d 68 (2d Cir. 1993).

³¹ Sanders at 29-31.

³² See Article 1046, Netherlands Arbitration Act 1996, Code Civ. Proc., Bk. IV, reprinted in ICCA Handbook, Vol. III. ("The [named court] may wholly or partially grant or refuse the request, after [it] has given all parties and the arbitrators an opportunity to be heard").

³³ Both the Model Law and the New York Convention allow for non-recognition when "[t]he composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties." New York Convention, art. V.1(d). Model Law, Art. 34(1)(a)(iii). "Parties" presumably implies *all* of the parties.

³⁴ The provision envisioned would not *stricto sensu* require the consent of the arbitrators (if any had been appointed) but the views of any tribunal member would be data for the court to consider in exercising its discretion.

³⁵ See, e.g., *Maxum Foundations v. Salus Corp. and United Pacific Insurance*, 817 F.2d 1086, 1086-1087, (4th Cir. 1987).

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for consolidation,³⁶ which factors should guide the court once consent is established,³⁷ which collateral powers should the court be given to facilitate the consolidated proceedings and which procedures if any should be exhausted before the court may be petitioned.³⁸ Of these, the collateral powers of the courts in forming a multiparty tribunal are perhaps most significant, as discussed in the next sub-section.

12.6.3 APPOINTMENT OF ARBITRATORS—BY WHOM AND HOW MANY

Parties to a multi-party dispute, though they have consented to combined proceedings, may disagree as to the method by which the arbitral tribunal will be constituted, its composition, or its size. Disputants who are classed as respondents (or claimants as the case may be) may nonetheless have differing interests and priorities, leading them to entertain divergent conceptions of prospective appointees. Deadlock or unsettling compromise may thus occur if they are forced by an institution or a domestic court to jointly appoint one arbitrator. If, as would be beneficial under the New Act, courts are empowered to make appointments for multiparty disputes, a challenge

³⁶ Presumably, any party to one of the arbitration agreements involved can so petition.

³⁷ Among the factors which might be enumerated within the provision are the similarity of the factual and legal issues in dispute, the respective arbitration stages at which the petition to consolidate is made, and the views of any arbitrators that have been appointed at the time of the petition.

³⁸ *E.g.*, procedures contemplated in the parties' agreements to arbitrate or entrusted to an administering institution.

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arises for lawmakers: to promote equality while avoiding inefficiency.³⁹

For institutions faced with appointing arbitrators in multiparty cases, navigating the *Cour de Cassation* decision in the *Dutco* case has been a principal concern.⁴⁰ In *Dutco*, an award of the three arbitrators was nullified because the parties objecting to the consolidation (the defendants) were not treated with equality during the appointment process. They had been required to make a joint appointment based upon an ICC clause in the three-party consortium agreement calling for a three-person tribunal. The Court reasoned that a prospective waiver of equality in the appointment procedure was inconsistent with French public policy.⁴¹ The claimant had been allowed to appoint an arbitrator; absent their *post-dispute* agreement to the contrary, *each* of the defendants apparently should have been allowed to do likewise.⁴²

At first impression, the simple answer to the *Dutco* problem⁴³ is to let each party appoint one arbitrator; no equality

³⁹ In meeting the challenge, strategies developed by administering institutions deserve especial attention.

⁴⁰ Siemens AG and BKMI Industriean Lagen GmbH v. Dutco Construction Co., 1^{re} Ch. Civ., Jan. 7, 1992. See generally Note from the ICC at 6; E. Schwartz, *Multi-Party Arbitration and the ICC—In the Wake of Dutco*, 10(3) J. Int'l Arb. 5 (1993).

⁴¹ Note from the ICC.

⁴² *Id.*

⁴³ Whether and how elaborately to respond in the New Act to the *Dutco* issue are thought-provoking questions. Ostensibly, it is an idiosyncratic, French problem. Nonetheless, one cannot predict how influential the case will be in countries that have received the French system. If the authorities are correct that the case does not require *post-dispute* consent to appointments by an institution or a court on behalf of each party, responding to *Dutco* seems not unduly disruptive. If *Dutco*, nevertheless, were later construed to require post-

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problem arises in that situation. This approach—which results in five-person tribunals—makes nevertheless for unwieldy⁴⁴ and expensive arbitrations,⁴⁵ hardly an apt statutory norm.

An alternative is to invite multiple claimants or respondents to make a *joint* appointment of *one* arbitrator, so as to compose a traditional three-person tribunal.⁴⁶ In light of *Dutco*, upon the request of any party, the court (or an institution) would appoint the two arbitrators that would otherwise be party-appointed.⁴⁷ The premise is that equality of the parties

dispute consent to consolidation, U.S. lawmakers ought not to be fully deferential, despite the negative potential defiance may hold for enforcement of American awards presented in France. As a business planning matter, the value of parties being able to ensure combined proceedings by a pre-dispute agreement outweighs the marginal prospect of non-recognition abroad. As a general policy matter, sufficient protection to the parties is provided if specific, explicit consent to consolidation is required.

⁴⁴ In the standard three arbitrator tribunal, the two parties each appoint an arbitrator; the third arbitrator is jointly appointed by the two party-appointed arbitrators. If each of three parties were allowed an appointment, that would complete the tribunal only if the parties are willing to depart from the standard of having non-party appointed arbitrators join the tribunal (usually as chair-person and to give an odd number). If they are not, two additional non-party appointed arbitrators would be required. The fifth is necessary to prevent deadlock, so that the award can be formed with a majority. The fourth and fifth would be appointed by the three party-appointed arbitrators or by an institution.

⁴⁵ Nonetheless, at least one court has adopted this approach. *Compania Espanola de Petroleos, S.A. v. Nereus Shipping, S.A.*, 527 F.2d 966 (2d Cir. 1975) (court consolidating related arbitrations required fourth and fifth arbitrators to be jointly and unanimously appointed by other three).

⁴⁶ *See, e.g.*, WIPO Rules, Art. 18.

⁴⁷ *Id; cf. ICC Note from the ICC* (defendants in *Dutco* could not have claimed lack of equality if claimant had asked ICC to appoint an arbitrator on its behalf).

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is only violated if one side is allowed to appoint while the multiple parties on the adverse side are forced to make a joint appointment.⁴⁸

A third possibility would be to partially override the parties' agreement to arbitrate in cases of consolidation by allowing a court to make an appointment of a single arbitrator when any party protests to collaboration in making an appointment. Because three-party tribunals have arguably become the international norm—reflected in the Model Law itself—party forfeiture of the expected format may deter parties from arbitrating in the United States and might jeopardize enforcement abroad of the resulting award, especially when the rules chosen by the parties or their arbitration clauses call for multiple-person tribunals. Therefore, though attractive in its simplicity, this solution ought not to obtain unless the parties agreements have provided nothing in relation to the size of tribunal or all parties (typically numbering three) have agreed that their joint arbitration shall have a single arbitrator. This agreement could, however, be contained in the rules adopted by the parties.⁴⁹

The desire for predictability notwithstanding, designating by statute a single approach seems unwise. Courts ordinarily

⁴⁸ Where the parties' agreement does not require a three-person tribunal, an institutional appointment of a sole arbitrator may be the simplest answer to the multi-party equality puzzle. If consolidation does not occur, but the relevant parties are subject to substantially similar arbitration clauses, the risks of inconsistent awards may be reduced by conducting parallel arbitrations served by the same arbitrators.

⁴⁹ *See, e.g.*, UNCITRAL Rules, Art. 5. The default rule in other formulations nevertheless is that three arbitrators form the tribunal. *See, e.g.*, AAA International Rules, Art. 5; ICC Rules, Art. 8(2).

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prefer flexibility to rigid statutory solutions that inhibit fact-sensitive judicial engineering. Moreover, the intricacies of multiparty disputes would seem to defy detailed statutory prefiguring, since they arise from a broad spectrum of troubled relationships, both horizontal and vertical.

In general, the apt combination of flexibility and guidance to all concerned may come from a statute that shifts the responsibility for outcomes to the parties by assuring that where they have agreed upon a method for forming the tribunal, the court addressed will to the extent possible take instructions from the parties' agreement,⁵⁰ including any delegation to an institution.⁵¹ Where the parties have agreed to consolidated arbitrations but have not provided any mechanism for staffing the tribunal, the courts discretion will be relatively wide, subject to certain parameters. In keeping with the Model Law, the provision would instruct courts to appoint only independent and impartial arbitrators, that an uneven number of arbitrators, ordinarily three, must serve⁵² and that sole arbitrators and presiding arbitrators must not be of the same nationality or habitual residence of any party.⁵³ Single arbitrator appointments would be within judicial discretion, but only in the circumstances outlined above.

⁵⁰ *Cf.* Model Law, Art. 11(2).

⁵¹ *Cf. Id.*

⁵² *Cf.* Model Law, Art. 10(2) as revised in Indian Arbitration and Conciliation Act of 1996, *reprinted in* ICCA Handbook, Vol.II.

⁵³ British Columbia's original Model Law enactment required amendment to ensure that court appointments of presiding arbitrators be of persons having state affiliations neutral to the parties. *See* Paterson at 162.

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12.6.4 SUMMARY OF THE RECOMMENDED PROVISION

In general the following should be the basis upon which drafting proceeds. Courts may consolidate related arbitrations only when all the parties have clearly expressed agreement; consent however may be given in advance of dispute. The court should be empowered to make appointments to facilitate the consolidated arbitrations, but only in a manner that takes account of any requirements common to the parties' agreements and the Act itself (impartiality, etc.) and only if any appointing authority mechanism agreed by the parties has been exhausted or waived by all the parties. The consolidation provision adopted in California for international disputes might provide a suitable starting place, though not a final text.⁵⁴

⁵⁴ Cal. Civ. Pro. Code § 1297.272 provides:

Where the parties to two or more arbitration agreements have agreed, in their respective arbitration agreements or otherwise, to consolidate the arbitrations arising out of those arbitration agreements, the superior court may, on application by one party *with the consent of all the other parties to those arbitration agreements*, do one or more of the following:

- (a) Order the arbitrations to be consolidated on terms the court considers just and necessary.
- (b) Where all parties cannot agree on an arbitral tribunal for the consolidated arbitration, appoint an arbitral tribunal in accordance with [the relevant section].
- (c) Where all the parties cannot agree on any other matter necessary to conduct the consolidated arbitration, make any other order it considers necessary.

The text (emphasis added) appears to require unanimous consent also *after* the dispute has arisen. While this is the most conservative position, if the parties have bargained *ex ante* for the advantages of a joint proceeding, they ought not to be able to renege even if their interests appear to have changed. The italicized words should not therefore appear in the New Act.

12.7 Ex Parte Contact and Communications

Some arbitrations in America still proceed on the premise that party-appointed arbitrators need not be strictly neutral. The integrity of the process to be sponsored by the New Law will depend in part on appearances. Even though international rule formulations typically require that all arbitrators be independent and impartial, not all rule formulations deal with the related problem of *ex parte* contact. Addressing the issue directly will assuage the apprehensive and deter the mischievous better than a generic due process test,⁵⁵ which leaves far too much latitude for infraction.⁵⁶

The relative scope and strictness of the default rule under consideration will require study. It should address both the pre-appointment and post-appointment settings, since inappropriate contact is equally troubling during both segments. In arriving at an appropriate draft provision, recent institutional formulations—notably those of the AAA and WIPO⁵⁷ may be helpful.

⁵⁵ Cf. *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753 (11th Cir. 1993).

⁵⁶ While parties could depart from the rule, they should be required to do so expressly and unambiguously.

⁵⁷ Article 21 of the WIPO Arbitration Rules provides:

No party or anyone acting on its behalf shall have any *ex parte* communication with any candidate for appointment as arbitrator except to discuss the candidate's qualifications, availability or independence in relation to the parties.

The AAA provision expressly allows the appointing party to also apprise the candidate of the general nature of the controversy and to discuss the suitability of potential third arbitrators in some circumstances.

WIPO Article 45 is complementary to Article 21 addressing the post-

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Though they are not identical, taken together the two formulations produce relatively complete guidance.

After some adaptation, the melding produces the following draft provision, which seems to comport with accepted U.S. practice:

No party or anyone acting on its behalf shall have any *ex parte* communication relating to the case with any arbitrator, or with any candidate for the appointment as party-appointed arbitrator except to advise the candidate of the general nature of the controversy and of the anticipated proceedings and to discuss the candidates's availability or independence in relation to the parties, or to discuss the suitability of candidates for selection as a third arbitrator where the parties or party designated arbitrators are to participate in that selection, **it being understood that nothing in this paragraph shall prohibit *ex parte* communications which concern matters of a purely organizational nature, such as the physical facilities, place, date or time of the hearings.**

No party or anyone acting on its behalf shall have *ex parte* communication relating to the case with any candidate for presiding arbitrator.⁵⁸

appointment setting:

Except as otherwise provided in these Rules or permitted by the Tribunal, no party or anyone acting on its behalf may have any *ex parte* communication with any arbitrator with respect to any manner of substance relating to the arbitration, it being understood that nothing in this paragraph shall prohibit *ex parte* communications which concern matters of a purely organizational nature, such as the physical facilities, place, date or time of the hearings.

⁵⁸ AAA International Rules, Art. 7 (1). The underlined portion (from the AAA text) is not found in the WIPO counterpart. The bold text is taken from the WIPO Rules, Article 45. The provision does not address the post-arbitration setting. In important respects that context is treated by a provision proposed under *infra* § 12.18.

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12.8 Arbitrator Disclosure

12.8.1 IN GENERAL

The Model Law requires a prospective arbitrator when approached about a possible appointment to disclose “circumstances likely to give rise to justifiable doubts as to his impartiality or independence.”⁵⁹ When California enacted the Model Law, it elaborated on the basic rule by giving a list of facts and relationships that must be disclosed. The goal was to add predictability and integrity to the process by removing subjectivity. The result is a non-exhaustive but relatively comprehensive checklist that is instructive to prospective arbitrators and parties alike.⁶⁰ The statute omits to suggest, however, what consequences should flow from an arbitrator’s failure to disclose the kinds of facts enumerated, a failing common to the Model Law.

American courts have differed concerning the consequences of non-disclosure; most would agree, however, that non-disclosure bears upon the question of independence and impartiality. Some decisions appear to treat non-disclosure of

⁵⁹ Model Law, Art. 12(1).

⁶⁰ Cal. Civ. Proc. Code, § 1297.121 is elaborate—some would argue *too* elaborate. It requires that arbitrators disclose within 15 days of appointment any information which might cause their impartiality to be questioned including, but not limited to, any of the items (relationships and interests) set forth in the six paragraphs and subparagraphs provided.

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a material consideration as requiring vacatur;⁶¹ others regard a failure to divulge troubling information as lessening the dissatisfied party's burden in seeking vacatur.⁶²

Under the Model Law, lack of independence and impartiality is not an express basis for setting aside an award. Lawmakers should seize the opportunity to clarify the linkage between non-disclosure and vacatur, perhaps by slightly amending Article 34(2)(a)(iv). The object would be to identify independence and impartiality as an element in proper tribunal composition, *e.g.*, as follows: “the composition of the arbitral tribunal, *including but not limited to the impartiality and independence of its members*. . .was not in accordance with the agreement of the parties. . .or failing such agreement, was not in accordance with this Law.”⁶³ To Article 12(1)(disclosure requirement) would be added: “*An arbitrator's failure to comply with this Article shall be a factor in determining whether the tribunal was properly constituted within the meaning of Articles 34 and 35.*”

12.8.2 A DUTY TO SEARCH FOR CONFLICTS

A related question may also be addressed by modifying the standard Model Law text—to what degree must arbitrators

⁶¹ Cf. *Graphic Arts Int'l Union, Local 97-B v. Haddon Craftsman, Inc.*, 489 F. Supp. 1088, 1093 (M.D.Pa. 1979).

⁶² See, *e.g.*, *Woods v. Saturn Distrib. Corp.*, 78 F.3d 924, 427-28 (9th Cir. 1996).

⁶³ The italicized material is new; the bracket indicates a purposefully omitted alternative ground better treated separately (nonconforming procedure). The ellipses denote material that would remain but which doesn't affect the point offered here.

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search for conflicts? Like the FAA and most state arbitration statutes, the Model Law does not treat the question of conflict searches. Although the ABA-AAA Ethics for Arbitrators do require such a search,⁶⁴ some American courts have concluded in effect that the required disclosure is only of facts actually known to the arbitrator; thus an award is not imperiled by disturbing facts which an extensive inquiry would have uncovered but which remained unknown to the arbitrator.⁶⁵ The position has a logic with which it is difficult to argue, *viz.* if *ex hypothesi* the arbitrator was unaware, *e.g.*, that his former firm represented one of the parties, it could not have

⁶⁴ Canon II B states:

Persons who are requested to accept appointment as arbitrators should make a reasonable effort to inform themselves of any interests or relationships described in the preceding paragraph [which lists various categories of interest or relationship].

⁶⁵ The questions of what an arbitrator must disclose and what he or she is chargeable with knowing for purposes of disclosure are linked. Should an award be subject to vacatur for interests in the arbitrator or relationships to a party of which the arbitrator was unaware during the arbitration? If the arbitrator was subjectively unaware of facts that might otherwise give rise to doubts, what harm has been done? By hypothesis, they could not have influenced the outcome. The counter argument is that requiring an arbitrator to perform a conflicts check adds to the integrity of the process by making for more complete disclosure, thus reducing doubts about a system that allows parties to appoint their own arbitrators.

When the rules or regime chosen by the parties require a prospective arbitrator to search for possible conflicts, certainly failure to do so ought to be a factor—perhaps a compelling one—in looking for impermissible partiality. Absent an agreed search requirement, courts are often forgiving. *See* *Al-Harbi v. Citibank, N. A.*, 85 F.3d 680, 684 (D.C.Cir. 1996)(no vacatur though arbitrator's former law firm had represented the prevailing party; arbitrator unaware of the former connection); *accord*, *Betz v. Pankow*, 38 Cal. Rptr. 2d 107 (Cal. App. 1 Dist. 1995).

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affected his or her handling of the case. The problem with making the question turn on what an arbitrator actually knew is that an arbitrator is discouraged by such a rule from making a search.⁶⁶ To some extent the legitimacy and longevity of arbitration as an institution depends upon the confidence it inspires in its users. Under a regime that does not require a reasonable search, there will always be room for the losing party to sense (rightly or wrongly) that certain facts later discovered by it could not have been unknown to the arbitrator. Not requiring a search for conflicts, however, arguably enhances finality; a party will not be rewarded by elaborate post-award excursions into the arbitrators' professional and business life for relationships or facts that could have, and thus should have, been discovered and disclosed by the arbitrator. Rather, the effort would bear fruit only if it could be demonstrated that the fact left undisclosed was actually known to the arbitrator.

Striking a statutory balance between the extremes by requiring a reasonable search is consistent with the prevailing American sense of the issue. On the one hand: "an arbitrator cannot be expected to provide the parties with his complete and unexpurgated business biography;"⁶⁷ on the other, notions of

⁶⁶ As to known facts, the arbitrator must make disclosure, perhaps precipitating a challenge; once facts are known to the arbitrator, an election not to disclose them adds to an impression of bias. If the facts are never ascertained, however, disclosure is replaced by blissful ignorance. Thus, with no statutory obligation requiring a different attitude, an arbitrator may be inclined to limit disclosure to those matters of which he or she is already aware, rather than to amplify the disclosure burden by further investigation.

⁶⁷ *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 151-52 (1968) (Concurring Opinion).

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professionalism and good practice counsel that some inquiry be undertaken, as per the AAA-ABA Canons mentioned above. Accordingly, the language crafted might refer to “*an inquiry reasonable in the circumstances and calculated to ascertain any of the facts set forth in [the checklist referred to above].*” While there will still be argument about what was “reasonable in the circumstances,” the disclosure checklist should give some structure to the search; moreover, making reasonableness depend on the circumstances should forestall after-the-fact scrutiny of the arbitrators’ disclosures that unfairly raise the standard and discourage qualified persons from serving.

12.9 Confidentiality

12.9.1 IN GENERAL

“Confidentiality” is often touted as one of the virtues of alternative dispute resolution in general and of arbitration in particular. The degree to which this is an accurate portrayal depends upon to which of a series of related problems and contexts one is referring. Among the questions that arise under this general heading are: (1) may persons not involved in the arbitration as a party, counsel, arbitrator, or the like (such as a member of the press) attend hearings, pre-hearing conferences, or other proceedings? (2) may the administering institution, the tribunal, or one of the parties disclose (such as to the press) details about the dispute, the proceedings, or the award? (3) are documents, testimony, and other evidence used in an

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arbitration available for use in subsequent or contemporaneous litigation?

The first question is sometimes referred to as the “privacy” issue; comparatively little controversy arises as to it.⁶⁸ Nor are the duties of institutions and arbitrators subject to much doubt.⁶⁹ By contrast, in the absence of contractual arrangements to the contrary, are parties free to discuss with outsiders the details of the arbitration? As to this latter question, expectations vary widely, suggesting that it deserves especial

⁶⁸ Standard rule texts often address the “privacy” (exclusion of the public at large) to be accorded the hearing. The UNCITRAL Rules state that “[h]earings shall be held *in camera* unless the parties agree otherwise.” UNCITRAL Rules, Art. 25.4. *Accord* AAA International Rules Art.20.4 (“private,” except when “the law provides to the contrary”).

⁶⁹ Rules and canons are strict in this respect. For example, the AAA International Rules, Article 34, provides in pertinent part:

Confidential information disclosed during the proceedings by the parties or by witnesses shall not be divulged by an arbitrator or by the administrator. Unless otherwise agreed by the parties, or required by applicable law, the members of the tribunal and the administrator shall keep confidential all matters relating to the arbitration or the award.

The last sentence of the foregoing rule appears broad enough to guide an arbitrator’s conduct both during and after the proceedings. As to arbitrators, essentially the same rule is found in the AAA/ABA *Code of Ethics for Arbitrators in Commercial Disputes*, Canon VI (B). Similarly, the ICC’s form letter of appointment to arbitrators urges arbitrators to observe the “utmost respect for the confidential nature of the proceedings.” J. Paulsson and N. Rawding, *The Trouble with Confidentiality*, 11 *Arb. Int’l* 303, 319 (1995).

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attention.⁷⁰ The next subsection offers related further discussion.

12.9.2 PARTY DISCLOSURES—STATUTORY REFORM OR STATUS QUO?

Because the potential for confidentiality is often perceived to be an attribute of arbitration;⁷¹ the existing absence of a statutory or case law duty seems curious.⁷² Most potential participants in the arbitration process probably regard confidentiality as something to be encouraged.⁷³ Yet, should the New

⁷⁰ Despite the ambiguous adage that “arbitration is confidential,” absent a confidentiality agreement, there is under American law no well-settled prohibition on party disclosures of information related to an ongoing arbitration. H. Smit, *Expert Report (in Esso/BHP v. Plowman)*, reprinted in 11 Arb. Int’l 227 (1995).

⁷¹ The majority of Bühring-Uhle’s sample (64%) deemed confidentiality of procedure to be more influential than numerous other factors in preferring arbitration. The phrasing of the question however suggests that the respondents had in mind privacy of the proceedings (*i.e.*, their *in camera* format) and not the reduced chances of disclosures related to the dispute. *See* Bühring-Uhle at 395.

⁷² The few relevant decisions do not establish an implied duty requiring the parties to hold the proceedings and information produced therein confidential. In *United States v. Panhandle Eastern Corp.*, 118 F.R.D. 346 (D. Del. 1988), Panhandle unsuccessfully sought to block discovery of materials related to an ICC proceeding in Switzerland participated in by Panhandle’s subsidiary. It relied in part upon an informal confidentiality understanding alleged to exist with the other party (the Algerian National Oil and Gas Company). The court doubted that any such agreement had formed; accordingly, Panhandle failed, under Rule 26(c) of the Federal Rules of Civil Procedure, to demonstrate that “disclosure will work a clearly defined and serious injury.”

⁷³ *Cf. Saville Report* at para. 12:

In practice there is no doubt whatever that users of commercial

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Act encumber the parties (and perhaps others) with duties analogous to those applicable to the tribunal and administering institutions under leading rule formulations?⁷⁴ Some international rule texts, such as the WIPO formulation, have already adopted a clear proscription. The WIPO rule states:

(a) Except to the extent necessary in connection with a court challenge to the arbitration or an action for enforcement of an award, no information concerning the existence of an arbitration may be unilaterally disclosed by a party to any third party unless it is required to do so by law or by a competent regulatory body, and then only:

- (i) by disclosing no more than what is legally required, and
- (ii) by furnishing to the Tribunal and to the other party, if the disclosure takes place during the arbitration, or to the other party alone, if the disclosure takes place after the termination of the arbitration, details of the disclosure and an explanation of the reason for it.

(b) Notwithstanding paragraph (a), a party may disclose to a third party the names of the parties to the arbitration and the relief requested for the purpose of satisfying any obligation of good faith or candor owed to that third party.⁷⁵

A less parental approach would be to retain the existing position while encouraging the parties to plan ahead. A provision built upon this premise would ensure that if parties reached a written confidentiality agreement in conjunction with

arbitration in England place much importance on privacy and confidentiality as essential features of English arbitration...Indeed ...it would be difficult to conceive of any greater threat to the success of English arbitration than the removal of the general principles of confidentiality and privacy [citing Sir Patrick Neil's Bernstein Lecture, 1995].

⁷⁴ See, e.g., AAA International Rules, Art. 34 (tribunal members and the AAA "shall keep confidential all matters related to the arbitration or the award").

⁷⁵ WIPO Rules, Art. 73.

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their agreement to arbitrate, the tribunal—and the courts—would enforce it in such manner as the circumstances require, subject to any constitutional constraints that obtain.⁷⁶ The underlying position would represent little change from existing law except that the tribunal's power to do so would become express⁷⁷ and court access would become more

⁷⁶ The First Amendment doctrine against “prior restraints” discourages courts from prohibiting speech in advance of its utterance, but is most clearly applicable when the expression involved is politically or religiously motivated; “commercial speech” (which presumably would include some but not all disclosures about an arbitration), by contrast, receives a reduced level of protection. *See* R. Leavell *et al.*, *EQUITABLE REMEDIES, RESTITUTION AND DAMAGES* 36-38 (1994). Courts themselves sometimes order litigants not to discuss a pending case and this practice survives attack when supported by compelling circumstances. Moreover, when the parties have entered into a confidentiality agreement, precedent supports broader injunctive power. A court, however, still must draw its order with exceeding specificity to avoid undue interference with protected speech. It is doubtful that First Amendment constraints apply to a privately composed arbitral tribunal; an express concurrent power can be given to the tribunal to remedy breach of confidentiality agreements, such as by awarding costs, a measure of damages, or a default award in extreme circumstances.

⁷⁷ A tribunal arguably already has such power under a broadly worded arbitration clause and leading rules, to protect the *status quo* and the integrity of the process. After all, carefully leaked information, even if accurate, can undermine the proceedings in myriad ways. Consider, for instance, a dispute about a company's worth or the potential of its major asset. Party-induced fluctuations in the market guides available to the tribunal would be, at a minimum, unhelpful. Tribunals should be able to discourage attempts to manipulate the external data, provided that a party is not precluded from making disclosures required by law.

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predictable. The requisite agreement could, of course, be found in the rules chosen by the parties.⁷⁸

At the other extreme would be a regime that attempted to regulate all aspects of the confidentiality question, extending obligations to witnesses, experts (party and tribunal-appointed), stenographers and others who at present may only be covered by separate confidentiality agreements.

While a blanket prohibition may be comforting to those for whom confidentiality is paramount, crafting a workable statutory rule which is intelligible to all concerned and not too prolix is difficult. It has to account for disclosures required by law, the time period during which the forbearance must be exercised and so on. Moreover, what matters are to be deemed confidential: the parties, the award, the fact of arbitration itself, any matters not already of public record disclosed during the proceedings? While rules texts provide a basis for further

⁷⁸ *See, e.g.*, CPR International Rules, Art. 17 (“The parties and the arbitrator shall treat the proceedings, any related disclosure and the decisions of the Tribunal, as confidential, except in connection with a judicial challenge to, or enforcement of, an award, and unless otherwise required by law”); LCIA Rules, Art. 30(1)(Subject to express contrary written agreement “the parties undertake as a general principle to keep all awards confidential (together with all other materials introduced by another party into the proceedings not otherwise in the public domain), save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right or to enforce or challenge an award in legal proceedings before a state court or other judicial authority”).

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study,⁷⁹ there is also ample reason to shrink from an abstract drafting exercise so fraught with complexity.⁸⁰

12.10 Observance of Privileges

Arbitration statutes often do not address the extent to which the tribunal must apply attorney-client and other privileges that protect from disclosure certain kinds of communications and attorney work-product.⁸¹ The applicability of privileges in international arbitration has recently become controversial; reportedly, certain arbitrators have adopted the startling position that privileges do not obtain in arbitration.⁸² In regulating international proceedings, the privilege question can be particularly complex; given differences in legal systems and

⁷⁹ See, e.g., the LCIA and CPR Rules (immediately preceding footnote). Cf. WIPO Rules, Arts. 73-75.

⁸⁰ The Departmental Advisory Committee propounding the draft Arbitration Act 1996 ultimately advised against attempting “to codify English law on the privacy and confidentiality.” It noted that “grave difficulties arose over the myriad exceptions to these principles—which [exceptions] are necessarily required for such a statutory provision.” *Saville Report* at paras. 15, 17 (noting the absence of guidance in the UNCITRAL Model Law) Cf. *In re D [Adoption Reports: Confidentiality]* [1995] 3 WLR 483, 496D: “To give an accurate exposition of confidentiality at large....cannot in my opinion safely be attempted in the abstract” (Lord Mustill as excerpted in *Saville Report* at para. 15).

⁸¹ The Arbitration Act 1996 addresses the matter in part, in relation to witnesses secured by a party to present testimony and documents before a tribunal. Section 43(4) extends to such witnesses the privileges they would enjoy in legal proceedings.

⁸² See J. Carter, *The Attorney-Client Privilege and Arbitration*, ADR Currents, Winter 1996/1997, at 1.

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legal cultures, the non-application of a privilege can result not from utter disregard of procedural safeguards, but from a diligent choice of law analysis.⁸³

Though in deference to the policies behind American law privileges, lawmakers might be inclined to designate certain of them as mandatory, the better approach is to require respect for “applicable” privileges, the phrasing adopted by an amendment to the AAA International Rules.⁸⁴ Parties would remain free to insist upon specific privileges as part of their arbitration agreement, absent which the tribunal could treat the issue as a conflicts matter, but could not wholly disregard privilege when properly invoked.⁸⁵

⁸³ For example, is in-house corporate counsel an attorney for purposes of the above mentioned privileges? The author is informed that in some civil law countries the salaried corporate lawyer is generally not licensed to practice law; thus protections for attorney-client communications may not attach to intra-corporate legal advice.

⁸⁴ The 1997 amendments to the AAA International Rules added at Article 20(6) that: “[t]he tribunal shall take into account applicable principles of legal privilege such as those involving the confidentiality of communications between a lawyer and client.”

⁸⁵ Indeed, it would make little sense to apply the American work-product doctrine in an arbitration between Mexican and Canadian enterprises involving no American lawyers.

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12.11 International Discovery In Aid of Arbitration and Subpoena Power

12.11.1 IN GENERAL

Model Law Article 27 allows a party or a tribunal to seek court assistance in the taking of evidence in aid of an arbitration taking place within the adopting state. The Model Law's drafters decided not to deal with the question of international discovery.⁸⁶ The enactment of the New Act would nevertheless provide an opportunity to clarify in several respects the law governing this area. First, it should set forth the basis upon which a tribunal seated in the United States can seek court assistance in obtaining discovery abroad, either under the Hague Evidence Convention or through standard letters rogatory; Second, it should settle the questions that have arisen in relation to requests for assistance under 28 U.S.C.A. § 1782, which authorizes federal courts to aid a "foreign or international tribunal" in the taking of evidence within the district where the court sits. These are treated in turn in the following subsections. The last subsection discusses the related question of arbitral subpoena power.

⁸⁶ The UNCITRAL Secretariat explains:

[U]nlike earlier draft provisions [Article 27] envisages neither assistance to foreign arbitrations nor requests to foreign courts in arbitral proceedings held under the model law. This limitation is the result of a compromise between those in favor of international assistance and those opposed to any provision on court assistance.

Seventh Secretariat Note: Analytical Commentary on Draft Text (25 March 1985) as excerpted by Holtzmann & Neuhaus at 755 (footnotes omitted).

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12.11.2 DISCOVERY ABROAD FOR U.S. ARBITRATIONS

The Hague Evidence Convention does not clearly contemplate that an arbitral tribunal seated, *e.g.*, in Convention Party A may directly issue a letter of request to the designated Central Authority for Convention Party B. It is more likely to be consistent with the Convention to accomplish the same result by interposing a court in country A; the letter of request would issue from it.⁸⁷ Because arbitration ought not to be converted into international litigation, the provision should require the request to come from the tribunal, and not directly from a party. To so provide would be consistent with existing Model Law Article 27 (Court Assistance in Taking Evidence), which requires the approval of the tribunal before a party requests discovery assistance from a court. Indeed, the clarification here under discussion could be accomplished by merely slightly amending Article 27.⁸⁸ Consistent with Hague Convention practice, the provision should set forth the need for specificity and should allow the court addressed to return overly broad

⁸⁷ See Hague Conference on Private International Law, *Special Report on the Operation of the Hague Service Convention and the Hague Evidence Convention*, 28 I.L.M. 1556, 1566-67 (1989)(noting this practice in some countries and the broad language of the Convention's French version); and see Holtzmann & Neuhaus at 757 (Judge Holtzmann withdrew the United States' request for a Model Law provision authorizing courts to convey tribunal requests for assistance in evidence gathering because there was "little practical need for such provisions...").

⁸⁸ Though not discussing the contrary *travaux*, Harris *et al.* suggest that Article 27 "also contemplates assistance in taking evidence from witnesses overseas by 'Letters of Request' addressed to a foreign court." *Id.* at 177. At least facially, Article 27 allows that view.

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requests to the tribunal for better particulars.⁸⁹ The same provision should also accommodate requests for letters rogatory, an alternative to proceeding under the Convention.⁹⁰

12.11.3 SECTION 1782—APPLICABILITY TO ARBITRATION

From which entities may come requests for assistance under § 1782? Until recently, commentators and courts⁹¹ have been in general agreement that the phrase “foreign or international tribunal” ought to include an arbitral tribunal seated abroad.⁹²

⁸⁹ Many Hague Convention parties have qualified their obligation to execute letters of request by insisting that the documents sought be listed with specificity. *See* Born, *LITIGATION* at 898 (listing the U.K., Denmark, Finland, Sweden, and Singapore); *see also* Newman & Zaslowsky at 144 (excerpting France’s 1986 modification to its Article 23 reservation insisting that documents be “limitatively enumerated and have a direct and clear nexus with the subject matter of litigation”).

⁹⁰ Letters rogatory may be dispatched by a federal district court under FRCP 28(b). Concerning letters rogatory, *see* Born, *LITIGATION* at 893-94; Newman & Zaslowsky at 147-49 (letters rogatory used when witness uncooperative, beyond U.S. subpoena power, or not resident in a Hague Convention state).

Some might suggest that the New Act should overrule the Supreme Court’s decision in *Soci t  Nationale Industrielle Aerospatiale v. United States Dist. Court* 482 U.S. 522 (1987) (holding that case-by-case analysis should determine whether to employ Hague Evidence Convention). Overruling *Aerospatiale* by statute, however, would more appropriately occur as part of a comprehensive study not limited to the arbitral setting.

⁹¹ *See Quijada v. Unifrutti of America, Inc.*, 12 Pa. D. & C. 4th 225 (1991) (under state analogue to § 1782, Chilean arbitrator likely the “functional equivalent” of a foreign tribunal).

⁹² *Accord* H. Smit, *International Litigation under the U.S. Code*, 65 Colum. L. Rev. 1015, 1027, n.73. The operative portion of § 1782,

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Recently, however, there has emerged a split of authority.⁹³ It would take little statutory space to clarify the law, but to what substantive effect? Perhaps the answer is to strike a balance among competing views while elucidating the central terms of art. First, the relevant section would codify the prerequisite of tribunal approval (thus precluding direct, unilateral party requests).⁹⁴ Second, under the New Act, only requests made with specificity would be honored, a reasonable concession to those who question why parties who have selected arbitration abroad (with its generally narrow discovery) should nevertheless have access to U.S. federal discovery, unsurpassed in its scope. Third, a definition of “foreign or international tribunal” should be provided; it should clearly encompass a private arbitral tribunal seated abroad, whether *ad hoc* or institutionally sanctioned. With these New Act provisions amending § 1782, much of the debate surrounding its murky intent would subside.⁹⁵

paragraph (a), states that “district courts of the district in which a person resides or is found may order him to give testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal.”

⁹³ See D. Rivkin and B. Legum, *Attempts to Use Section 1782 to Obtain U.S. Discovery in Aid of Arbitration*, 14 Arb. Int'l 213, 218-26 (1998).

⁹⁴ Though ostensibly the request need not come directly from the arbitral tribunal or with its authorization—the statute refers to ‘any interested person’—courts have added this requirement. See *In re Application of Technostroyexport*, 853 F. Supp. 695 (S.D. N.Y. 1994).

⁹⁵ The provision recommended here would not alone answer the concern recently raised by Judge Duffy, of the Southern District of New York, that § 1782 assistance extends throughout the United States, whereas court support for arbitral subpoenas in domestic arbitrations is limited, under FAA § 7, to the district in which the

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12.11.4 SUBPOENA POWER

By adopting a standard rules text without modification, parties authorize the tribunal to order disclosure of them, *e.g.*, of “documents, exhibits, or other evidence it deems necessary or appropriate.”⁹⁶ As to non-parties, however, rules can confer upon the tribunal no authority. Accordingly, some states, including New York⁹⁷ and California,⁹⁸ like the FAA, have given arbitrators subpoena power. Non-parties can thus be compelled to appear before the tribunal to present evidence in various forms. As noted in Chapter 10, the FAA empowers the arbitrators to “summon in writing any person to attend before them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case.”⁹⁹

The Model Law contains no subpoena provision. Yet, to omit such a provision in the New Act would create a disparity; arbitrators operating outside the New Act would have greater powers than those within its ambit, an anomalous result given that the need for documents and testimony of third persons are often essential in both settings.

arbitration is being conducted. *See In re Medway Power Ltd.*, 985 F. Supp. 403, 404-405 (S.D.N.Y. 1997).

⁹⁶ AAA International Rules, Art. 20.3. *See also* UNCITRAL Rules, Art. 24.4. (substantially similar); CPR International Rules, Art. 12.3 (“[t]he Tribunal, in its discretion, may require the parties to produce evidence in addition to that initially offered”).

⁹⁷ N.Y. Civ. Prac. L. & R. § 7505.

⁹⁸ Cal. Civ. Proc. Code §§ 1282.6, 1297.271.

⁹⁹ FAA, 9 U.S.C. § 7. *See generally* S. Koda, *Subpoena Issues in Arbitration*, 2 ADR Currents, Spring 1997, at 20.

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There is, of course, facial appeal to the argument that a subpoena provision should be omitted because of the disapproval with which American discovery (infamous for its breadth) is viewed abroad. If, however, (following the FAA model) only a *tribunal* may issue subpoenas (leaving to the parties' counsel only the power to *recommend* a subpoena),¹⁰⁰ litigation-style discovery will not result. The tribunal would stand as the check against fishing expeditions, while the courts would remain available to quash improvident subpoenas.¹⁰¹ Additionally, a subpoena provision presumably would not purport to extend beyond the territorial boundaries of the United States,¹⁰² at least not without invocation of one of the

¹⁰⁰ Thus, a New York style provision, which allows counsel of record to issue subpoenas, would not be adopted.

¹⁰¹ See, e.g., *Commercial Metals Co. v. International Union Marine Corp.*, 318 F. Supp. 1334 (S.D.N.Y. 1970) (arbitrator's subpoena *duces tecum* would not be quashed where records requested might be relevant to the proceedings); *Complaint of Koala Shipping & Trading Inc.*, 587 F. Supp. 140 (S.D.N.Y. 1984) (tribunal had authority to issue discovery order and subpoena *duces tecum* of certain relevant documents); *Wilkes-Barre Publishing Co. v. Newspaper Guild of Wilkes-Barre, Local 120*, 559 F. Supp. 875 (M.D. Pa. 1982) (tribunal should consider materiality of evidence sought before issuing subpoena); *but see* *Oceanic Transport Corp. v. Alcoa Steamship Co.*, 129 F. Supp. 160 (S.D.N.Y. 1954) (subpoena vacated; motion to punish for contempt denied).

¹⁰² FAA § 7 does not, however, expressly establish a territorial limit on an arbitrator's subpoena power; only the courts' enforcement thereof is geographically circumscribed. See *Amgen, Inc. v. Kidney Center of Del. County, Ltd.*, 879 F. Supp. 878, 881 (N.D. Ill. 1995).

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court-aided mechanisms outlined above in relation to international discovery.¹⁰³

Because an arbitral tribunal does not have contempt power or jurisdiction over third parties, the New Act should retain with variations FAA Section 7's federal district court power to punish for contempt persons refusing to comply with arbitral subpoenas. Though such support for the tribunal would be helpful to the process,¹⁰⁴ in contrast to the present wording of § 7, contempt findings should only follow a court order to comply with an arbitral subpoena.¹⁰⁵

The power of tribunals to require non-parties to attend *pre-hearing* depositions should also be clarified; that question has

¹⁰³ Though not a direct analogue, compare § 43 of the English Arbitration Act, which allows a party to an arbitration taking place in the United Kingdom, with the agreement of the other party or the permission of the tribunal, to use court procedures to "secure the attendance" of a witness situated in the United Kingdom. The latter can be required to give oral testimony or to produce documents. While not arbitral subpoena power *per se* (because of the interposing of a court), it accomplishes the same disclosure from third parties.

¹⁰⁴ The assistance is limited, however, to the federal district in which the arbitration is seated; therefore, to be truly meaningful and to align judicial support for arbitral subpoena power more fully with the assistance to be granted tribunals seated abroad under § 1782, methods for relaxing the intra-district limitation should be explored. That would create another disparity, however. If international arbitrations as defined in the New Act were able to call on judicial support throughout the United States, domestic arbitration (not covered by the New Act) would remain subject to the existing limitation.

¹⁰⁵ The present section states that contempt may lie for failure to comply with the tribunal's subpoena, even though it is not backed by a court order. Courts apparently have been reluctant to so find.

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divided the courts.¹⁰⁶ Additionally, the same provision should confirm that arbitrators conducting proceedings seated abroad may issue subpoenas when convened in the United States.¹⁰⁷

12.12 Applicable Law and Remedial Authorizations¹⁰⁸

12.12.1 IN GENERAL

Article 28 of the Model Law (Rules Applicable to Substance of Dispute) contains largely unobjectionable content. Nevertheless, recent developments as well as American law and practice justify two friendly amendments to the basic text: one relates to the parties' autonomy and the other to the tribunal's ability to forego traditional conflicts analysis.

¹⁰⁶ See, e.g., *Meadows Indemnity Co. Ltd v. Nutmeg Ins.*, 157 F.R.D. 42 (M.D. Tenn. 1994) and, by contrast, *Integrity Ins. Co. v. American Centennial Insurance*, 885 F. Supp. 69 (S.D. N.Y. 1995)(subpoena modified by court).

¹⁰⁷ The author is unaware of a case treating this question but has encountered experienced practitioners who consider the practice to be not controversial under the present FAA. To make subpoena power available even when arbitrations are seated abroad would facilitate meaningful American site inspections, hearings and the like. Access to the courts to quash arbitral subpoenas which are overly broad would be retained; the seat of the arbitration should not be controlling where the tribunal purports to be pursuing activities authorized under the New Act. The same evidence may in a given case also be available under § 1782, as amended in the New Act.

¹⁰⁸ For background, see also Chapter 4.

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12.12.2 PARTY AUTONOMY

In the New Act, the parties' ability to designate a collection of principles not derived from a single national legal system should be assured. The Model Law's drafters are likely to believe that they have already accomplished this by referring to the "rules of law designated by the parties." Nonetheless, in an abundance of caution¹⁰⁹ it may be well to remove all doubt by substituting for the official text phrasing such as "*rules of law, mercantile norms or other substantive principles designated by the parties whether or not contained in a standard text.*" That phrasing would include express references to the UNIDROIT *Principles* and more generic designations of the *lex mercatoria*.

12.12.3 PERMITTING THE *VOIE DIRECTE*

The second point relates to Article 28's two-step default rule. While familiar, it seems to contemplate that the tribunal when faced with a conflict and no choice of law clause should first select the appropriate choice of law rule and then apply it to designate the governing law. If that is interpreted to require resort to an established conflicts rule (designed to select among *national* systems) it may prefigure application of municipal law to the exclusion of a *supra*-national norm structure, or the *tronc commun*, even though either of the latter may be more

¹⁰⁹ Karrer & Arnold at 162 suggest that in Article 187 of the Swiss International Arbitration Act, the phrase *règles de droit* ("rules of law") does not clearly include "alleged rules of law such as 'lex mercatoria'."

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consistent with the parties' expectations than national law.¹¹⁰ This concern would explain the preferable phrasing of California statute which substitutes for the Model Law formula the following:

Failing any designation of the law [by the parties] the arbitral tribunal shall apply the rules of law it considers to be appropriate given all circumstances surrounding the dispute.¹¹⁰

¹¹⁰ The author's premise—that the tribunal need not have the parties' express agreement to apply the *lex mercatoria*—is not shared by all authorities, though arbitral practice supports it. See, e.g., O. Chuckwumerije, CHOICE OF LAW IN INTERNATIONAL COMMERCIAL ARBITRATION 131 (1994) (“discernable trend” towards accepting application of so called *lex mercatoria* absent parties' designation). The author admits that such discretion may create an anomaly in practice since despite the analytical differences between the application of the *lex mercatoria* and amiable composition, one may be hard-pressed (apart from the labels employed) to distinguish awards purporting to reflect one process but not the other. That means that if an award creatively departs from a national rule of decision in the name of the *lex mercatoria* it will survive attack whereas if it is perceived to be the product of an *ex aequo et bono* proceeding, the parties' authorization will be essential to its survival. A less liberal and problematic middle ground may be to limit application of a-national commercial principles to those “recognized by international organizations,” phrasing used in Article 9 of the Mexico City Convention. That still allows reference to the UNIDROIT *Principles* and to much of the work of UNCITRAL.

¹¹⁰ Apparently to clarify the range of substantive possibilities, Article 28(1) of the recently revised AAA International Rules added the phrase *or rules of law* to the party autonomy provision and retained the one-step default procedure which allows the tribunal to apply “such law(s) as it determines to be appropriate.” The failure to use the “or rules of law” formula in the default provision, however, arguably suggests that the tribunal's power to adopt, e.g., the UNIDROIT *Principles* or the *lex mercatoria* is limited to those situations in which the parties have designated either.

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12.12.4 DEFINING REMEDIAL PREROGATIVES

Article 28(3) of the Model Law also contains the now standard authorization allowing the tribunal to decide *ex aequo et bono* or as *amiable compositor* if (but only if) the parties have expressly so authorized. Here at least two considerations arise: should drafters eschew the Latin phrases when adopting this paragraph (as done in the English Arbitration Act of 1996) and, if so, what phrasing should replace them?

The argument for replacing the Latin terms of art is that neither has taken a secure place within American legal parlance; when presented without definition neither therefore provides the intended shorthand, except perhaps among those already familiar with these notions.¹¹¹ Yet, given that the New Act should be attractive to disputants abroad, it is precisely the immediate understanding that these terms convey *outside* the United States that argues for their retention.

If the standard Model text is retained, perhaps the need for giving practical meaning to the traditional terms can be addressed in the provisions related to the award. This is the method adopted in the CPR International Rules, which give the standard formulation in addressing applicable law but in the provision devoted to the award explain “if the parties have authorized the tribunal to decide as *amiable compositor* or *ex aequo et bono*, [the tribunal may grant] any remedy or relief which the tribunal deems just and equitable.”¹¹²

¹¹¹ Among the general American legal community, *ex aequo et bono* is probably the more familiar term.

¹¹² CPR International Rules, Art. 14.1.

12.13 Punitive Damages

12.13.1 IN GENERAL

Punitive damages are not unique to the American legal system, but the awarding of such damages by commercial arbitrators seems distinctively associated with arbitrations governed by American curial or substantive law. Policy makers and commentators view the phenomenon with ambivalence, aware that it adds risk and unpredictability to private dispute resolution, while being out of step with certain other legal systems. For several reasons it can be argued that punitive damages ought not be an ordinary part of a tribunal's remedial repertoire when the dispute arises out of an international relationship, at least where the parties' agreement does not expressly contemplate such a remedy. First, giving to commercial arbitrators the power to administer quasi-criminal relief is hardly a mainstream international approach. Second, the uncertainty this prerogative causes may dissuade non-Americans from choosing the United States as the arbitral situs.¹¹³ Third, awards of punitive damages will not predictably receive a warm reception when presented abroad for enforcement.¹¹⁴ The New York Convention's public policy ground would allow the state

¹¹³ To the author's knowledge only anecdotal support can be found for this concern, however.

¹¹⁴ *But see* H. Smit, *Punitive Damages in Arbitration—An Encore*, 6 *Am. Rev. Int'l Arb.* 313, 316 ("At the most, recognition might be denied if the amount of punitive damages was so excessive as to offend internationally accepted notions of fairness").

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addressed to decline enforcement in whole or in part.¹¹⁵ The same would be true under the Model Law, which mirrors the Convention's non-recognition grounds.

12.13.2 THE PRESENT SITUATION

Under American law, a penalty measure of damages may result either from a statutory multiplier provision or from a tort-based theory of recovery addressing outrageous conduct. The Supreme Court in *Mastrobuono*¹¹⁶ held that arbitrators may award punitive damages in arbitrations governed by the FAA, unless the parties have clearly excluded that possibility in their agreement to arbitrate.¹¹⁷ It was not dispositive that the law governing the commercial agreement prohibited arbitrators from rendering punitive damage awards; rather, strong federal policies favoring arbitrator competency were to

¹¹⁵ See generally H. Bungert, *Enforcing U.S. Excessive and Punitive Damages Awards in Germany*, 27 Int'l Law 1075 (1993). But see, V. Veeder, *The New York Convention in Common Law Countries*, in ASA, *The New York Convention of 1958* 117, 126 (1996) ("To my knowledge, no English court has ever refused to enforce or recognize a foreign award on the ground of public policy").

¹¹⁶ 115 S. Ct. 1212 (1995).

¹¹⁷ The Court held in an eight to one decision that an arbitral award granting, in addition to certain compensatory damages, \$400,000 in punitive damages should not have been vacated even though the contract expressly stipulated New York law as governing, 115 S. Ct. at 1217-18. The Court reasoned that as a matter of contract interpretation, given an unrestrictive arbitration clause, the choice of New York law could not be said to unambiguously convey the parties' agreement to prohibit the award of punitive damages. *Id.* at 1218. In the absence of a clear contractual prohibition of that remedy, the FAA's policy favoring wide arbitrability controlled.

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prevail unless supplanted by the parties' agreement.¹¹⁸ The Court, however, provided no detailed rules governing the exercise of arbitral discretion in relation to punitive damages. Post-*Mastrobuono* cases confirm that a number of factors remain relevant.¹¹⁹

Todd Shipyards Corp. v. Cunard Line, Ltd.,¹²⁰ is the type of case that gives non-Americans pause. It arose from a contract that called for Todd to repair and refit Cunard's ship. The governing arbitration clause was broadly worded.¹²¹ After a AAA arbitration held in California which lasted over two years, the tribunal awarded Todd \$11.4 million, which included punitive damages. The measure was tort-based and not required by statute. Todd had alleged bad faith on the part of Cunard; the tribunal apparently agreed. Though largely unreasoned, the award cited Cunard's deceptive practices

¹¹⁸ Said the Court, its own precedent made "clear that if the contracting parties agree to include claims for punitive damages within the issues to be arbitrated, the FAA ensures that their agreement will be enforced according to its terms even if a rule of state law would otherwise exclude such claims from arbitration." 115 S. Ct. at 1216-17.

¹¹⁹ For a case applying *Mastrobuono*, see, e.g., *Kelley v. Michaels*, 59 F.3d 1050, 1055 (10th Cir. 1995). After *Mastrobuono*, whether an award of punitive damages will be vulnerable to attack will, as before the decision, be influenced by the scope and content of the parties' arbitration agreement, the rules they have chosen, and the content of any state arbitration law they have unambiguously designated. Some courts will continue to look for a basis in the applicable substantive law as well.

¹²⁰ 943 F.2d 1050, 1056 (9th Cir. 1991).

¹²¹ The clause provided: "Any and every dispute, difference or question between the parties hereto which shall at any time arise after the execution of this Agreement . . . relating to this Agreement, shall be referred to arbitration." *Todd Shipyards*, 943 F.2d at 1060. New York law governed the contract. *Id.*

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during performance and its withholding of monies due.¹²² Because the arbitrators provided no detailed rationale, the appellate court's review was based upon "findings implicit in the arbitration award."¹²³ It found no reason to vacate the award, for, "[t]he arbitration panel obviously was convinced Cunard was guilty of willful and wanton fraud." Accordingly, the tribunal had not exceeded its powers.¹²⁴

12.13.3 REFORM OPTIONS

At present, when an arbitration is governed by the FAA, parties wishing to preclude punitive damages must unambiguously opt-out of the remedy. Under *Mastrobuono*, it is not sufficient to designate as the governing law of the underlying contract one which limits arbitrators to compensatory damages. As the New Act begins to take shape, several possibilities might be discussed. One is to retain existing law by not addressing punitive damages; another is to invert the *Mastrobuono* presumption. These are taken in turn.

Do Nothing

Leaving the law unchanged is consistent with the prevailing sense, especially under American doctrine, that arbitrators should have wide discretion in formulating remedies. There is,

¹²² *Id.* at 1061.

¹²³ *Id.* at 1058.

¹²⁴ The implied finding of fraud sufficed, therefore, against allegations that the arbitrators had "manifestly disregarded the law." *Id.*

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moreover, little indication that this discretion has been widely abused.¹²⁵

Furthermore, because the parties have the power to prevent awards of such damages, only the ill-informed will be at risk from unintended results. Domestic business counsel and the various administering institutions are well equipped to instruct the parties how to eliminate exposure to punitive damages. Institutions may do so in the same way that they educate about other elements of arbitration clause drafting.¹²⁶

Not attempting to address punitive damages by statute also leaves institutions with flexibility in developing their own policies. When revised in 1997, for example, the AAA International Rules included a provision on point. Unless the parties grant a broader remedial mandate, the provision limits punitive damages to those required by a statute, such as RICO or the Sherman Act.¹²⁷ The provision¹²⁸ does not contem-

¹²⁵ Cf. National Conference of Commissioners on Uniform State Laws, *Revision of Uniform Arbitration Act*, Discussion Draft of Oct. 31, 1997, (hereinafter *UAA Discussion Draft*), at 79 (discussing securities arbitration).

¹²⁶ Arbitral seat, applicable law, and number of arbitrators are all subjects of standard reminders in the rules booklets distributed by various institutions.

¹²⁷ Article 28(5) of the AAA International Rules provides:
Unless the parties agree otherwise, the parties expressly waive and forego any right to punitive, exemplary or similar damages unless a statute requires that compensatory damages be increased in a specified manner. This provision shall not apply to any award of arbitration costs to a party to compensate for dilatory or bad faith conduct in the arbitration.

¹²⁸ The revision arose in response to *Mastrobuono* and the fact that: [f]oreign parties often fear the award of punitive damages by American tribunals...[and from] the nature of commercial disputes that are most commonly subject to arbitration under these

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plate a complete ban, but, unless the parties disturb the presumption, it precludes punitive awards in cases such as *Todd Shipyards*, noted above.¹²⁹

Reverse the Mastrobuono Presumption by Statute

Congress could of course reverse *Mastrobuono*, in whole or in part, at least as to arbitrations deemed to be international. This would meet the primary objection, that the remedy is not within the reasonable expectation of foreign disputants. This is the reform urged, for example, by the New York State Bar's International Practice Section.¹³⁰ The same distinction is reflected in the AAA rule revisions noted above, which only

[international] rules. [The revisions are designed to] provide comfort to both U.S. and foreign parties about arbitrating under these rules.

Task Force to Enhance AAA International Arbitration Rules, *Commentary on the Proposed Revisions to the International Arbitration Rules*, reprinted in, *ADR Currents*, Winter 1996/97, at 6.

¹²⁹ The October 1997 Discussion Draft of Uniform Arbitration Act (UAA) revisions would leave unbridled the arbitrators' power to award punitive damages in circumstances in which a court could do so. It would insist, however, that the tribunal's reasoning in awarding punitive damages is contained in a retrievable record, unlike what occurred in *Todd Shipyards*. The record is apparently designed to facilitate court assessment of whether the arbitrators exceeded their powers, a ground for vacatur under both the FAA and the UAA. See *UAA Discussion Draft*, at 72, 75-79. If it is also intended to promote review for errors of law, it is inconsistent with the appreciable trend away from substantive review of arbitral awards.

¹³⁰ See *Report on Punitive Damages in International Commercial Arbitration*, New York State Bar Association, Section of International Law & Practice (Jan. 1992), reprinted in 5 *New York Int'l L. Rev.* 103 (1992).

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affect the International Rules, leaving the very broad remedial grant in the AAA Commercial Rules undisturbed.¹³¹

If *Mastrobuono* is to be altered, it seems preferable to merely reverse the presumption established in that case, rather than to prohibit punitive damages irrebuttable. To allow the parties to expressly allow for such a recovery would be consistent with the FAA's emphasis upon party autonomy. If the parties are to be rebuttably presumed to desire no punitive damage exposure, another question arises: should that presumption extend to statutorily enhanced measures? That more inclusive premise arguably subverts the policies of deterrence driving statutory damage multipliers and offers arbitration as a hiding place for conduct that might otherwise carry greater sanction.¹³² One can thus see the crafting in the above-mentioned AAA revisions,¹³³ which on balance seem worthy of imitation in the New Act.

12.14 Tribunal Powers to Facilitate Settlement

Increasingly, arbitration is being coupled in practice with non-arbitral ADR, often but not invariably as a precursor proce-

¹³¹ See Article 43 thereof ("any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement").

¹³² Troubling implications notwithstanding, it remains unclear under the negative inference of *Mastrobuono*, whether the parties could preclude the award of statutorily multiplied punitive damages by expressly so providing; certainly they could not evade completely the application of RICO, the Sherman Act and other public laws. An award not taking account of such laws would be subject, in a U.S. court, to vacatur or non-recognition based upon public policy. See *Mitsubishi*, 473 U.S. at 637, n.19.

¹³³ See *supra* notes 127-28 and accompanying text.

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dure.¹³⁴ These procedures often lead to outcomes that are cheaper and more beneficial to the underlying relationship than the more court-like arbitration. Even if a separate chapter or section within the New Act is not devoted to international mediation (conciliation), a provision urging the tribunal to accommodate non-arbitral techniques would be useful.¹³⁵ It would remind all concerned of the possibility and would make clear that a tribunal has not exceeded its powers if recommending alternative procedures to the parties at any time during the arbitral process or if pursuing such methods upon the parties' request.

The prevailing standard is clear that a tribunal may not act as both mediator and arbitrator unless the parties agree and this rule could be codified in the statute without controversy.¹³⁶

¹³⁴ See generally Peter, *Med-Arb*.

¹³⁵ California's International title is expressly pro-conciliation, positing that state policy prefers conciliation over arbitration when either is available, Cal. Civ. Proc. Code § 1297.341. It also suggests that the tribunal, with the parties' permission, may use mediation and other procedures "at any time during the arbitral proceedings to encourage settlement," *id.* § 1297.301 and that the tribunal may select a conciliator for the parties upon request. *Id.* § 1297.341.

¹³⁶ Experts differ as to whether it is desirable for the tribunal to play both roles even if the parties have so authorized. The IBA Ethics text (Rule 8) counsels against *ex parte* meetings with the parties in pursuit of settlement, though such caucusing is, in mediation simpliciter, an important technique. Provided the parties authorize the specific use of that procedure, the prohibition against *ex parte* receipt of evidence should be deemed waived. In practice, med-arbitrators will inform the parties of the nature of the procedure envisaged and confirm their approval before beginning. In addition, many arbitrators will be inclined to limit their non-arbitral activities to proposals of settlement terms formulated without caucusing. It seems unnecessary, however, to limit them

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More debatable is whether the New Act should adopt the California innovation, which likens a conciliated agreement to an award if certain formalities are observed.¹³⁷ Such a provision raises interesting questions under the New York Convention concerning which experts will likely disagree,¹³⁸ but ultimately does little harm to international standards.¹³⁹

12.15 Awards of Interest

The Model Law does not treat the significant matter of interest, although members of the Secretariat believe the question to be so important as to warrant a priority on UNCIT-

to this latter role by statute.

¹³⁷ Cal. Civ. Proc. Code § 1297.401 states that a written conciliation agreement signed by the conciliator(s) and the parties “shall be treated as an arbitral award rendered by an arbitral tribunal duly constituted in and pursuant to the laws of this state, and shall have the same force and effect as a final award in arbitration.”

¹³⁸ See, e.g., A. Redfern, *Enforcement of International Arbitral Awards and Settlement Agreements*, Arbitration, May 1988, at 124, 126-28 (conciliated agreement not an arbitral award properly understood).

¹³⁹ It seems to be merely a variant of the award on agreed terms concept widely acknowledged in rules and statutes, including the Model Law (Art. 30). Regardless, there may be some doubts expressed abroad when the “award” is presented for enforcement under the New York Convention. The court addressed may wonder if it is less of an award because it has not been produced through an adversarial proceeding. Probably most courts would not find international public policy engaged but some may as an interpretive matter find that the Convention simply does not apply since the instrument presented is not an award classically understood. In principle, if default awards and awards on agreed terms are enforceable, conciliated agreements ought to be too, in the majority of circumstances.

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RAL's agenda.¹⁴⁰ Under this heading, several related issues have arisen in American law. As to arbitral powers, there seems to be agreement that unless otherwise restricted by the parties' agreement a tribunal may award interest reflecting the period of lost use between the time the cause of action arose and the award, *i.e.* "pre-award interest." Less agreement exists among courts and arbitrators as to post-award interest.¹⁴¹ A provision to be welcomed is one that confirms the tribunal's power as to both segments and also clarifies the extent to which an arbitral grant of post award interest affects courts called upon to confirm the award.¹⁴² An express recognition of arbitral discretion in setting the rate of interest would also be beneficial. Arbitrators ought not to be confined to legal rates of interest in addressing the aggrieved party's loss of use.¹⁴³

¹⁴⁰ See G. Hermann, *The Implementing Legislation*, in ASA, THE NEW YORK CONVENTION OF 1958 135-35 (1996).

¹⁴¹ See, *e.g.*, *Sun Ship Inc. v. Matson Navigation Co.*, 785 F.2d 59, 62-63 (3d Cir. 1986)(arbitrator lacked authority to dictate interest to be borne by the award); *but see Carte Blanche (Sing.) v. Carte Blanche (Int'l)*, 888 F.2d 260, 264-70 (2d Cir. 1989)(post-award, but not post-judgment interest could be fixed by arbitrators at near-market rate).

¹⁴² A principal question is to what extent should the court converting the award to judgment adopt (for the period from confirmation onward) the interest rate stipulated by the arbitrators, as opposed to that designated by the federal statute for court judgments. The prevailing view is that confirmation transforms the award to a judgment so that the statutory rate should apply from confirmation hence. *Carte Blanche*, 888 F. 2d at 264-70. This approach offers a bright line demarcation and seems to do little damage to arbitral discretion, which would govern the period up to confirmation.

¹⁴³ Certain international formulations authorize the arbitrators to award compound interest at market rates, rather than being tied to the prevailing federal rate for judgments. See, *e.g.*, LCIA Rules, Art. 26.6 ("...Tribunal may order that simple or com-

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12.16 The Currency of the Award

12.16.1 TRIBUNAL POWERS

Many arbitral venues allow a tribunal to designate the currency in which the award is to be paid, a prerogative made express in the LCIA and WIPO Rules.¹⁴⁴ The lack of specific treatment in, *e.g.*, the ICC and AAA Rules has not prevented arbitrators from choosing a currency appropriate to the parties and their obligations. It was thus an uncontroversial AAA award rendered in New York that ordered the respondents to pay certain sums in Japanese yen, and the parties to pay the arbitrators' fees and costs in American dollars.¹⁴⁵ Requiring payment in yen was entirely logical for as the confirming court noted: “[t]he parties . . . conducted all their transactions in yen.”¹⁴⁶ An arbitrator's ability to render the award in an appropriate currency is merely one aspect of the wide remedial discretion he or she ought to enjoy under a broadly cast arbitration clause.

pound interest ...at such rates as the Tribunal determines to be appropriate...in respect of any period which the Arbitral Tribunal determines to be appropriate...”); *see also* AAA International Rules, Art. 28.5 (“tribunal may award such pre-award and post-award interest, simple or compound, as it considers appropriate, *taking into consideration the contract and applicable law*”). The italicized portion gives the tribunal flexible guidance and mitigates any sense of arbitrariness—a good starting place in crafting legislative language.

¹⁴⁴ *See* LCIA Rules, Art. 26.5; WIPO Rules, Art. 60 (1994).

¹⁴⁵ *Mitsui & Co. v. Oceantrawl Corp.*, 906 F. Supp. 202 (S.D.N.Y. 1995); *see U.S. Court Confirms Award in Japanese Yen*, 10 No. 12 Int'l Arb. Rep. 3 (1995).

¹⁴⁶ *Mitsui*, 906 F. Supp. at 204.

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12.16.2 CONVERSION TO JUDGMENT

There is emerging authority for the proposition that awards in foreign currencies may be confirmed in U.S. courts without conversion to U.S. dollars. The traditional position¹⁴⁷ requires that awards in foreign currency be converted to U.S. dollars when judgment upon the award is entered. Thus, in *Sae Sadelmi S.P.A. v. Papua New Guinea Electricity Commission*,¹⁴⁸ the federal court serving the southern district of New York confirmed an ICC award of English Pounds and PNG Kina, but directed the clerk of the court to enter the judgment in the equivalent number of U.S. dollars. The court observed, “[a]n American court . . . can only enter a money judgment in U.S. dollars.”¹⁴⁹

The Second and Seventh Circuits have helped precipitate an incremental move in the other direction. Both, when faced with judgments in foreign currencies, had questioned the traditional rule in light of the 1982 repeal of the Coinage Act of 1792, an enactment upon which the “dollar-judgment” rule was in part based. In 1995, the southern district for New York, when presented an award denominated in Japanese yen, departed from the established approach. In *Mitsui & Co. Ltd., v. Oceantrawl Corp.*,¹⁵⁰ the court was influenced by the doubts expressed by Second and Seventh Circuits and concluded “were the Second Circuit faced with the question today, it would hold that American courts may enter judgments in

¹⁴⁷ See generally Newman & Zaslowsky at 175-180.

¹⁴⁸ 1994 WL 669543 (S.D.N.Y. 1994).

¹⁴⁹ *Id.* at 2 (citing *Fils et Cables D’Achier de Lens v. Midland Metals Corp.*, 584 F. Supp. 240, 245 (S.D.N.Y. 1984)).

¹⁵⁰ 906 F. Supp. 202 (S.D.N.Y. 1995).

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foreign currency.”¹⁵¹ It found further support for its holding in the Restatement (Third)¹⁵² and a New York statute requiring courts to render judgments in a currency other than U.S. dollars whenever the “action is based upon an obligation denominated in [that] currency.”¹⁵³

An express provision allowing courts to recognize and enforce non-dollar awards would not contradict Model Law Article 36, which does not treat the issue. It would be consistent with a provision allowing *arbitrators* to make such awards and is apt supplementation in light of the nature of modern international commerce and the disputes generated thereby.

12.17 Immunity of Arbitrators and Others

12.16.1 EXISTING LAW AND TEXTS

Under existing American law, arbitrators are recognized as serving a quasi-judicial function and thus enjoy certain forms of immunity in connection with the arbitrations they con-

¹⁵¹ *Id.* at 204.

¹⁵² Section 823(1) thereof, in pertinent part, states:

Courts in the United States ordinarily give judgment on causes of action . . . denominated in a foreign currency, in United States dollars, but they are not precluded from giving judgment in the currency in which the obligation is denominated or the loss was incurred.

¹⁵³ N.Y. Jud. Law § 27(b) (McKinney 1987 & Supp. 1995); see J. Freeman, *Judgments in Foreign Currency—A Little Known Change in New York Law*, 23 Int’l Law. 737 (1989).

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duct.¹⁵⁴ The principle is over a century old in American jurisprudence,¹⁵⁵ and has been endorsed by the United States Supreme Court.¹⁵⁶ While there is diversity within the case law, in general, immunity extends to all alleged acts or omissions occurring during the arbitral process.¹⁵⁷ The shield from claims applies regardless of whether the arbitrators are party-appointed or whether they are compensated.¹⁵⁸ Nor does immunity subside because an arbitrator's jurisdiction is in doubt;¹⁵⁹ it obtains even where it is argued that the party bringing the claim never agreed to arbitrate.¹⁶⁰ To maintain immunity, no threshold level of formality or judicial likeness need be observed.¹⁶¹ In addition, alleged bias does not lessen an arbitrator's immunity.¹⁶²

Generally, the immunity conferred is said to be "absolute" in the sense that it extends to alleged willful or grossly negligent acts,¹⁶³ though aberrant decisions exist.¹⁶⁴

¹⁵⁴ See generally Branson and Wallace at 85-96; M. Hoellering, *Immunity from Liability*, in ARBITRATION AND THE LAW 1991-92 41 (M. Hoellering *et al.*, eds., 1992).

¹⁵⁵ See *Jones v. Brown*, 6 N.W. 140 (Iowa 1880).

¹⁵⁶ *Butz v. Economou*, 438 U.S. 478 (1978) (explaining that federal agency officials are entitled to immunity for their decisions).

¹⁵⁷ Branson and Wallace at 88.

¹⁵⁸ *Id.*

¹⁵⁹ See *Tamari v. Conrad*, 552 F.2d 778, 780 (7th Cir. 1977).

¹⁶⁰ See *Raitport v. Provident Nat'l Bank*, 451 F. Supp. 522 (E.D. Pa. 1978).

¹⁶¹ Branson and Wallace at 89.

¹⁶² See *Yates v. Yellow Freight Syst.*, 501 F. Supp. 101 (S.D. Ohio 1980); *cf. Rubenstein v. Otterbourg*, 357 N.Y.S.2d 62, 63 (N.Y. Civ. Ct. 1973) (concluding that an alleged conflict of interest did not alter arbitrator's immunity).

¹⁶³ See *Wasyf, Inc. v. First Boston Corp.*, 813 F.2d 1579, 1582 (9th Cir. 1987).

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Florida's International Arbitration Act, for example, provides the following succinct rule:

No person may sue in the courts of this state or assert a cause of action under the law of this state against any arbitrator when such suit or action arises from the performance of such arbitrator's duties.¹⁶⁵

The AAA Commercial¹⁶⁶ and the ICC Rules¹⁶⁷ contain a similarly unqualified version of the doctrine. Certain formulae, however, have embraced narrower positions that extend immunity only to the extent that the claim is not the product of "conscious and deliberate wrongdoing." Institutional texts adopting this approach include the AAA International Rules,¹⁶⁸ the CPR International Rules,¹⁶⁹ the WIPO Rules,¹⁷⁰ and the LCIA Rules.¹⁷¹ The English Arbitration Act also adopts qualified immunity, exempting from immunity acts or omissions "shown to have been in bad faith."¹⁷² Certain Model Law-based statutes have also chosen qualified

¹⁶⁴ See Branson and Wallace at 93 n.49. While "absolute," arbitral immunity only extends to acts or omissions performed within a quasi-judicial capacity. Hence, "an arbitrator would not be immune from suit over a car accident that occurs on the way to an arbitration." *Id.* at 94.

¹⁶⁵ Fla. Stat. Ann. § 684.35 (West 1990); see also Ohio Rev. Code Ann. § 2712.68 (Anderson 1992) (providing immunity to arbitrators acting in official capacity); Cal. Civ. Proc. Code § 1280.1 (West Supp. 1996) (same).

¹⁶⁶ Rule 47(d).

¹⁶⁷ Article 34.

¹⁶⁸ Article 35.

¹⁶⁹ Rule 19.

¹⁷⁰ Article 77.

¹⁷¹ Article 31.1.

¹⁷² English Arbitration Act, § 29(1).

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immunity¹⁷³ and the IBA Ethics Text also concedes a qualified rule.¹⁷⁴

12.17.2 SUGGESTED PROVISION

Like the FAA, the Model Law¹⁷⁵ does not address immunity of arbitrators and institutions.¹⁷⁶ Since both are largely uncontroversial under American law, to treat both in the same provision seems efficient. The immunity of tribunal-appointed experts may be addressed in that provision as well.¹⁷⁷

¹⁷³ See, e.g., Bermuda International Conciliation and Arbitration Act, § 34.

¹⁷⁴ See Introductory Note thereto.

¹⁷⁵ See Holtzmann & Neuhaus at 1119.

¹⁷⁶ Arbitral institutions such as the AAA have been given immunity for reasons paralleling those driving arbitrator immunity. In *Cort v. American Arbitration Association*, 795 F. Supp. 970 (N.D. Cal. 1992), for example, the plaintiff sued the AAA for alleged mishandling of certain documents produced during his arbitration. Relying on *Austern v. Chicago Bd. of Options Exch., Inc.*, 898 F.2d 882 (2d Cir. 1990), the court concluded that the AAA's management of evidence was a type of quasi-judicial activity warranting immunity. *Cort*, 795 F. Supp. at 972-73; see also *Corey v. New York Stock Exch.*, 691 F.2d 1205, 1209 (6th Cir. 1982) (extending immunity to "boards which sponsor arbitration").

¹⁷⁷ Some thought should be given to whether to cover experts in general. The immunity of expert witnesses has been established in California, the highest court there reasoning that the privilege promotes candor in experts by removing the risk of liability. *Moore v. Conliffe*, 871 P.2d 204, 209 (Cal. 1994) (medical expert); see also *Wagshal v. Foster*, 28 F.3d 1249, 1254 (D.C. Cir. 1994) (court-appointed mediator entitled to absolute immunity when acting in official capacity), *cert. denied*, 115 S. Ct. 1314 (1995).

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Whether to adopt a qualified or unqualified rule is debatable. On balance, the “conscious and deliberate” exception seems sufficiently narrow and the policy it contains sufficiently compelling to counsel its adoption in the New Act; harmful conduct that is truly intentional ought not to find a sanctuary there. Though such a provision will invite more lawsuits than an absolute formulation, it can require courts to insist upon demonstrable proof of deliberate wrong-doing. Authorized grants of attorneys’ fees will assure that an arbitrator won’t remain unreimbursed in cases in which the suit embodies merely a personal vendetta or speculative accusations.¹⁷⁸ Moreover, the stricter default rule within the New Act can be made subject to the parties’ agreement to confer a broader immunity.¹⁷⁹

12.18 Participation in Subsequent Proceedings

Sometimes a dissatisfied party attempts to discover matters related to the deliberative process in an attempt to support a vacatur proceeding. In general, courts have not been receptive to attempts to examine arbitrators, whether majority or dissenting, or to efforts to discover documents related to the tribunal’s decision-making process.¹⁸⁰ As one California court put the proposition, “[t]he deliberations of the arbitrators are

¹⁷⁸ It may be that this deterrent should be made express in the provision itself.

¹⁷⁹ Nonetheless, there will likely be robust debate as to whether qualified immunity should be among the Act’s mandatory rules.

¹⁸⁰ *See Andros Compania Maritima, S.A. v. Marc Rich & Co., A.G.*, 579 F.2d 691, 702-03 (2d Cir. 1978); *Arco Alaska, Inc. v. Superior Court*, 214 Cal. Rptr. 51, 57 (Ct. App. 1985).

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sacrosanct.”¹⁸¹ Decisions allowing dissenting and majority arbitrators to be deposed concerning specific acts of misconduct affecting the award¹⁸² are exceptional and narrowly reasoned; there must be a reasonable basis for believing that misconduct has occurred,¹⁸³ and the inquiry may not delve into the “mental process of the arbitrators.”¹⁸⁴

While one must acknowledge the possibility for injustice occasionally to result, on balance the integrity and finality of the arbitral process would be best preserved by adoption of a provision roughly assimilating that found in the LCIA Rules. Adapting LCIA Article 31.2 for that purpose might yield the following:

After the award has been made and the possibilities of correction and additional awards referred to in [Model Law Article 33] have elapsed or been exhausted, neither [an administering institution as defined in this Act] nor any arbitrator or expert to the Arbitral Tribunal shall be under any obligation to make any statement to any person about any matter concerning the arbitration, nor shall any party seek to make any of these persons a witness in any legal or other proceedings arising out of the arbitration.

¹⁸¹ *Arco Alaska*, 214 Cal. Rptr. at 58. The court explained further: Absent an agreement so to do, the parties to an arbitration may not join in the deliberations of the arbitrators as they sit around the arbitration table or through discovery of documents reflecting those deliberations.

Id.

¹⁸² See *Carolina-Virginia Fashion Exhibitors, Inc. v. Gunter*, 230 S.E.2d 380 (N.C. 1976); *Griffith Co. v. San Diego College for Women*, 289 P.2d 476, 478 (Cal. 1955).

¹⁸³ *Gunter*, 230 S.E.2d at 387-88.

¹⁸⁴ See *id.* at 387. The mental-process limitation is born of the domestic arbitration system in which awards are not reasoned. Equally strong policies would seem to argue against a disgruntled party's ability to secure, *e.g.*, intra-tribunal memoranda leading to a reasoned award.

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A provision of the preceding type, in conjunction with the immunity provision suggested above, would reassure prospective arbitrators who might otherwise be dissuaded from authoring a dissenting opinion, fearful of prolonged duties as a witness in a foreign land. It also adds to an institution's ability to perform its important tasks. As to both entities, the phrasing of the LCIA provision seems to allow for the privilege to be waived, potentially raising ethical concerns.¹⁸⁵

12.19 Costs

12.19.1 BY ARBITRATORS

The Model Law does not treat the question of fees and costs. It can be argued that this deliberate omission¹⁸⁶ is insignificant given that standard rules formulations contain costs provi-

¹⁸⁵ There are subtle differences between the available canon texts. The ABA/AAA Ethics Code, Canon VI.C states in pertinent part: "After an arbitration award has been made, it is not proper for an arbitrator to assist in post-arbitral proceedings, except as required by law." The IBA Rules, Rule 9, adopts the same general position, excepting situations in which the arbitrator "considers it his duty to disclose any material misconduct or fraud on the part of his fellow arbitrators." To restate the rule common to these texts as part of the LCIA-based provision set forth above seems prudent. The AAA/ABA exception ("as required by law") would not be greatly expanded by adding the IBA's fraud exception, though modified to require "manifest and palpable fraud"—or similar phrasing designed to discourage volunteerism based merely upon alleged intellectual dishonesty or interpretive differences among arbitrators.

¹⁸⁶ See Holtzmann & Neuhaus at 1118-19 (neither the Working Group nor the Secretariat were in favor of a comprehensive provision on costs).

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sions.¹⁸⁷ There are, nonetheless, at least two reasons for adding a provision which provides some guidance upon the issue.

First, as noted in Chapter 7, the American rule under which each party pays its own costs is not a fixture of international practice but merely one possibility among several typically available to the arbitral tribunal.¹⁸⁸ A statutory provision would thus confirm that under the New Act an American seat does not entail, necessarily, the American rule on costs.

Second, such a provision would remove doubt about the permitted elements of costs.¹⁸⁹ Study of the many modern treatments of the question in rules and statutes should facilitate composition of a provision which establishes appropriately broad arbitral discretion and confirms that legal as well as other costs may be awarded in whole or in part to any party.¹⁹⁰

¹⁸⁷ Accordingly, certain adopting states have added provisions on costs. *See, e.g.*, N. Kaplan and P. Caldwell, *Hong Kong Arbitration Thrives*, 7(2) *News & Notes Inst. Transnat'l Arb.* 1 (1992) (provisions on costs and interest added by Hong Kong).

¹⁸⁸ *See, e.g.*, Act on the Reform of the Law Relating to Arbitral Proceedings of 22 December 1997, § 1057 *Bundesgesetzblatt part I*, p. 3224 (1997)(*unofficial trans. reprinted in J. Gotanda, SUPPLEMENTAL DAMAGES, Ch. 5*)(arbitrators to allocate costs within the award, considering outcome of the proceedings).

¹⁸⁹ There may be, for instance, some doubt in the minds of the arbitrators regarding costs components corresponding to executive time spent in preparing for and participating in the arbitration.

¹⁹⁰ California lawmakers in adopting the Model Law added a non-exhaustive enumeration of permissible cost elements. *Cal. Civ. Proc. Code* § 1297.318.

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12.19.2 IN VACATUR PROCEEDINGS

A survey of vacatur cases indicates that the vast majority of such proceedings resulted in the award being upheld. They nonetheless occupied the courts and delayed the day of reckoning. The interest carried by the award in those cases was a poor substitute for reimbursement of costs. Moreover, with the refinements made to Rule 11 in 1993, only palpably ill-founded attacks on an award will lead to sanctions, which in turn do not invariably include costs.¹⁹¹ There is good reason therefore to consider the relative merits of erecting a statutory presumption which favors reimbursement of expenses when vacatur proves unsuccessful.

An analogue for such a fee-shifting presumption can be found in recent U.S. legislation,¹⁹² which strengthened Rule 11 in relation to certain securities lawsuits by requiring federal courts to affirmatively apply the Rule's requirements that actions have evidentiary and non-frivolous legal support. Where a violation is found, attorneys' fees are presumed to be the proper sanction from among those otherwise available to the court.¹⁹³ In the interest of conserving judicial resources

¹⁹¹ Sanctions other than the award of costs—such as non-monetary directives and fines paid into court—can be deployed under the Rule. To escape penalty, the unsuccessful party need only demonstrate that the argument for vacatur was made after an inquiry into applicable law and relevant facts which was “reasonable under the circumstances,” phrasing designed to soften the Rule's original content. Fed. Rule Civ. Proc. § 11(b)(c) (1993).

¹⁹² See R. Phillips and G. Miller, *The Private Securities Litigation Reform Act of 1995: Rebalancing Litigation Risks and Rewards for Class Action Plaintiffs, Defendants and Lawyers*, 51 Bus. Law. 1009, 1046-47 (1996).

¹⁹³ *Id.*

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and to promote the finality of awards rendered in the United States, a similar provision ought to be included in the New Act.

12.20 Accommodating Legal Representation

The importance to international arbitration of the current trend toward relaxing obstacles to foreign lawyers was noted in Chapter 5. (§ 5.8.2). In California, non-California lawyers involved in *international* arbitrations have the comfort of a provision sanctioning their activities. A recent case in that state, however, sounds a cautionary note and underscores the need for an express provision in the New Act.

The California Supreme Court in *Birbrower, Montalbano, Condon & Frank v. Superior Court*¹⁹⁴ declined to acknowledge an arbitration exception to the unauthorized practice of law; the New York firm there involved could thus not enforce its fee arrangement with a client for which it had performed services in relation to an arbitration. The court noted that state lawmakers had enacted an exception in relation to international disputes; accordingly, they could be entrusted to do so for domestic arbitrations if such an exemption were thought warranted.

One can readily appreciate the deterrent effect that *Birbrower* might have on foreign counsel and disputants contemplating an American arbitration. Its influence upon other jurisdictions is difficult to predict.

¹⁹⁴ 949 P.2d 1 (1998).

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Despite the traditional role of states in regulating the practice of law, federal power to relax the practice rules in relation to arbitrations covered by the New Act seems clear. Because the scope of any exception created may otherwise come into question, the New Act should add to a general authorization¹⁹⁵ an illustrative list of activities that will not be deemed to violate local practice limits.¹⁹⁶

¹⁹⁵ The California analogue merely provides:

The parties may....be represented by any person of their choice. A person assisting or representing a party need not be a member of the legal profession or licensed to practice law in California.

Cal. Civ. Proc. Code § 1297.351. Interestingly, the provision is found in the Chapter devoted to conciliation thus creating doubt about its application in arbitration.

¹⁹⁶ *Prima facie* the non-exhaustive list should include: the filing of arbitration demands and arbitral briefs, oral advocacy and other appearances before a tribunal, participation in inspections and in non-arbitral forms of ADR such as negotiation and mediation. Court appearances by contrast would be subject to local rules, unaffected by the New Act. The same provision should make express that serving as an *arbitrator* or other neutral does not violate local practice restrictions.

EPILOGUE

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Introduction

The world has changed dramatically since 1925 when the FAA was first enacted. The surprise is that the law has lasted as long as it has, not that it is in need of reform today.

Thus observed Judge Daniel Kolkey—then a practitioner specializing in international arbitration—in his 1990 study of the FAA’s viability. Though offered once above to foreshadow this study,¹ Kolkey’s words seem worth intoning again, this time in conclusion; for, as of mid-1999, the FAA remains unchanged, increasingly stark in its contrast to the many modern regimes abroad and to the rapidly changing milieu in which it must continue to function.

¹ See Author’s Foreword, note 2 (citing Kolkey, 1 Amer. Rev. Int’l Arb. at 534).

The Present Array

Among the notions sponsored in preceding chapters are that statutes designed to regulate international commercial arbitration should be comprehensive, should offer centralized content, should be presented in an accessible way, should be modern and forward-looking, and should embody recognized, internationally-accepted solutions and approaches to prevailing issues. When examined in light of these ideals, the FAA falls woefully short; its coverage is episodic and the law developed under it is diffuse, conflicting and well understood only by specialists.² In a federation in which federal law-makers enjoy virtually plenary power to address matters affecting interstate and international commerce, the retention (fundamentally unchanged) of a fragmentary 1925 statute is nearly inexplicable, especially given the preeminence assumed by commercial arbitration since the statute's inception.

Though helpful to arbitration, the progressive case law propounded by the U.S. Supreme Court is not an apt substitute for codification and consolidation, for as Macneil's historical account of the FAA has concluded, "major fault lines" run through the case law bedrock upon which modern federal

² See generally Chapter 7A.

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arbitration law is built.³ In a manner reminiscent of the Emperor's clothes, the FAA (originally conceived of as a procedural text for federal courts) has been selectively imbued with substantive character and imposed upon state courts; the resulting unhappy fit derives from the FAA's failure to contemplate such duty and from its modest scope. Not surprisingly, persistent questions remain about the augmentative role of state law in arbitrations governed by the FAA.

The Way Forward

Consistent with what thoughtful observers have offered, this work has argued not that the FAA is in dire need of emergency care, effectuated through precipitous abandon, but rather that studied reform is inevitable and desirable. At least as to the regulation of international disputes, however, it has proposed a reformatting of regime more comprehensive than that suggested within the literature at large. It thus may be seen to be more ambitious than for example, Professor Park's characteristically sensible counsel⁴—that reform should be

³ I. MacNeil, *AMERICAN ARBITRATION LAW* 175 (1992).

⁴ W. Park, *The Interaction of the Courts and Arbitrators in England: The 1996 Act as a Model for the United States*, 1(2) *Int'l Arb. L. Rev.* 54, 67 (1998).

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narrow and of a high quality.⁵ While Park and other considered voices cannot be dismissed lightly (they evince obvious practical and political insight), the difference in the view here expressed is merely one of degree, not principle. Indeed, given the manner in which the self restraint of others is sometimes couched, one is entitled to suspect that proponents of incrementalism are partly influenced by an unduly pessimistic sense of what is practically achievable, rather than by what would be ideal.⁶ Moreover, much of the

⁵ Professor Park's recent reaction to the Arbitration Act 1996 in relation to its American counterpart concludes with the following observations:

Whether the new English Act commends itself for transport across the Atlantic remains uncertain, however. One need not be a Luddite to resist wholesale replacement of an established arbitration statute, even by one of superior vintage, until there has been considerable study devoted to the consequences.

Modification of American arbitration law should proceed through focus on the specific aspects of the current legal framework that have performed poorly....

Shooting before all the ducks are in a row has sometimes been part of the American genius. At this time, however, the path of prudence lies in holding fire on broad scale reform, in order better to attend to those precise and identifiable defects in federal arbitration law that clearly need fixing.

⁶ One need not look far for cautionary notes boding ill for reformist zeal. Macneil, for example, ventured the following general prognosis based upon the inertia he detected in 1992 among the better placed agents of modernization:

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literature assumes that reform will be FAA-wide, *i.e.*, addressed to commercial arbitration in general, a premise from which arguably should follow more modest, deliberate initiatives.⁷

[I]t seems quite unlikely that anything like the old reform movement will come forth to give American arbitration law a good old-fashioned comprehensive going over. That movement itself has accomplished most of its aims and its organization, the American Arbitration Association, has settled into establishmentarian institutional maturity. And in spite of the great interest in arbitration of various groups, the legal situation is unlikely to be so desperate that enough of them will come together to give arbitration law a comprehensive shake-up, comparable, for example, to that given commercial law by the UCC. No one can, however, tell for sure....

⁷The notion that only modest change is required or achievable cannot be taken as full agreement upon what changes should be made; some vital improvements are well agreed upon, others are not. Nor, when viewed as a whole, are the recommended changes found in the literature minimal; when combined, they form the beginnings of a relatively substantial restructuring. Professor Park, for example, has suggested:

At present the most pressing need is for piecemeal change addressed to consolidation, pre-award attachment, federal pre-emption, informed consent, contractual expansion of judicial review of awards, and the allocation of functions between courts and arbitrators with respect to arbitral preconditions.

At a later stage, the United States might consider replacing the existing grounds for judicial vacatur of awards with at least the analogous provisions in the English law [substantive excess and serious procedural

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Many of the practical and political advantages of the piecemeal approach can be realized by treating international arbitration separately and firstly.⁸ If reform of the regime

irregularity]....

Park, *supra* note 4, at 67. He also notes that probably awards should be reviewable for errors of law, at the option of the parties, referring to the 1996 Act, § 69 (though it is unclear whether he advocates an opt-in or an opt-out format).

Other potential improvements are contained within the joint findings of the several committees on arbitral reform and within commentaries taking up the same mandate. The Washington Foreign Law Society, for example, though ultimately not endorsing adoption of the Model Law by the U.S., recommended that the U.S. enact provisions allowing: the challenge of arbitrators along Model Law lines *Washington Report*, 3 Ohio St. J. Disp. Resol. 303, 314-15 (1988), arbitral tribunals to designate the place of arbitration (Model Law, Art. 20), *Washington Report* at 315-16, and (as widely endorsed) courts to grant interim measures in aid of arbitration (see Model Law, Art. 9), *Washington Report* at 313-14. *Accord* Rivkin and Kellner, 1 Am. Rev. Int'l Arb. at 551; New York State Bar Ass'n, *Report on the UNCITRAL Model Law on International Commercial Arbitration by the International Litigation Committee* 35 (1990). Other studies would add the Model Law's applicable law provision (Article 28), see *New York State Bar Report, supra*, at 35-36, and a provision designed to prevent the application of state arbitration law in all but the clearest cases of intentional opting out by the parties. *Id.* at 28-30.

⁸ Both as a matter of federal politics (state individuality and traditional dominion over contract law) and inertia (a preference for the familiar), international arbitration will be viewed to be the more legitimate focus of federal lawmaking. By contrast, a proposal to expand and unify federal law in a manner affecting all commercial arbitration touching interstate commerce will likely meet with multi-faceted opposition. Because a comprehensive consolidation will supplant state law, some will argue that the effort is tardy, wasteful, and unnecessary given the newly revised Uniform Arbitration Act (RUAA) (*see infra* note 18 and accompanying text). Second, consumer advocates will likely oppose any arbitration law that does not effect a net enhancement in consumer

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affecting international arbitration is addressed first, the arguably more complicated task of modernizing the FAA generally can be discharged more simply and surgically than would be the case if lawmakers were faced with generating a single text serviceable in all commercial contexts—international and domestic. Further, the feasibility of starting with international disputes is greatly enhanced by the existence of the Model Law. At least as it relates to *international* arbitration, it represents the emerging standard; moreover, it is not greatly at odds with existing American practice in the field.⁹ Its foibles are largely faults of omission—curable by augmentation; and in application, it has apparently functioned well abroad.

Moreover, Model Law adoption by the United States would further unify the arbitral regimes of the existing NAFTA countries¹⁰ and would improve the general accessibility of American arbitration law to foreign counsel and disputants.

protection in relation to arbitration clauses in certain kinds of form contracts; to strike the correct balance may require prolonged study. Third, important arbitration states, such as New York, may consider their state arbitration laws to be superior to anything that may emerge at the federal level. While an effort to reform international arbitration may encounter the same sentiment, if the parties' ability to choose state arbitration law remains undisturbed, established arbitration states may have little to fear from federal law limited to international disputes.

⁹ See Chapter 11.

¹⁰ All provinces of Canada have adopted the Model Law and Mexico's recently enacted statute replicates many of the Model's features.

Improving Upon The Model Law—A Summing Up

Though finding considerable merit the UNCITRAL Model Law as a foundational text, this work has suggested supplementation designed to account both for desirable aspects of the prevailing regime and for the often-purposeful lapses in Model Law coverage. In general, these augmentations will clarify the New Act's interpretation and coverage,¹¹ will improve judicial powers in appropriate ways,¹² will enhance express tribunal powers,¹³ will promote

¹¹ These changes include: statutorily adopting UNCITRAL's definition of "commercial" (*see* §§ 11.2.1, 12.2) exhaustively listing the New Act's mandatory provisions (*see* § 12.2.2) and perhaps providing an official commentary not unlike that supporting the Uniform Arbitration Act. *See also infra* note 23 and accompanying text. Consideration should also be given to designation of judicial powers exercisable when no place of arbitration has been set or has been fixed outside the United States (*cf.* §11.5.1, n.101; *and see* English Arbitration Act 1996, § 2 (3)(4)).

¹² Such as by authorizing orders compelling arbitration (*see* § 12.3), by adding a non-exhaustive catalog of measures within a court's power under the Model Law (*cf.* § 11.5.1, n.101), by authorizing consolidation of related arbitrations and tribunal appointments to facilitate multiparty arbitration (*see* § 12.6), by removing potential impediments to arbitration based upon the sovereign character of a party (*see* § 12.5), and by enabling courts to facilitate discovery in favor of arbitration, irrespective of the seat of arbitration (*see* §12.11).

¹³ These recommendations included removing restrictive language governing tribunal grants of interim measures (*see* § 11.4.4), adding subpoena powers (*see* § 12.11), and confirming tribunal power: to award interest and costs (*see* §§ 12.15, 12.19), to designate the currency in which the award should be paid (*see* § 12.16) and to facilitate settlement (§ 12.14). Also proposed are a clarification of the

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the integrity of the process¹⁴ and finality of the result, and will limit artificial impediments to selection of the United States as a situs for arbitration.¹⁵ More amplification may result, of course, as the process unfolds.¹⁶

Though this study has proposed a bolder undertaking than that endorsed elsewhere (at least as to international disputes), it is not one that is out of step with the developments in other countries. In fact, most states adopting the Model Law have added to its 36 articles; so too are arbitration statutes in non-Model Law jurisdictions far more code-like than the FAA. Thus, if resisting the temptation to simply apply more bandages to the FAA, U.S. lawmakers will have an opportunity to match the considered efforts of their counterparts in other leading international arbitration venues.

ex aequo et bono mandates (see §12.12.4), broadened discretion in tribunal choice of law (§12.12.3), and an opt-in condition for tribunal awards of non-statutory exemplary damages (§ 12.13).

¹⁴ Specific recommendations under this heading include that arbitrators must conduct a reasonable, pre-appointment, search for conflicts (see §12.8), that a failure to disclose matters raising doubts about impartiality should bear upon actions to set aside an award (see §12.8.1), that *ex parte* contact with a party should, with narrow exception, be prohibited (see §12.7), that costs attach to parties resisting an award without good cause (see §12.19.2) that arbitrators should observe applicable privileges (see § 12.10) and that arbitrators should be immune from suit (see § 12.17).

¹⁵ Such as by eliminating practice restrictions for enumerated arbitration-related activities (see § 12.20).

¹⁶ It may prove desirable, for example, to include a provision enabling a case initially filed in a state court and covered by the New Act to be removed to a federal court. *Cf.* FAA § 205.

The Value of Getting Started

Within the period during which this study was finalized, the efforts to revise the Uniform Arbitration Act (UAA) mentioned in Chapter 8¹⁷ have advanced apace.¹⁸ Many state arbitration statutes are based upon that document. During the same period UNCITRAL announced an intention to embark upon a project designed to consider, and perhaps to draft, supplemental Model Law provisions, to be available for consideration by adopting states.¹⁹ There is thus at present momentum and assembled expertise that may be harnessed (both as to inspiration and personnel) in an effort to privately produce a draft international chapter which takes account of the likely developments coming out of UNCITRAL²⁰ and, to

¹⁷ At page 217, note 5.

¹⁸ Since Chapter 8 was written, the RUAA has undergone several drafts. The final text is to be discussed, and perhaps approved, at a convention to be held in Denver from July 23-30, 1999. While the text includes certain provision that should be excluded in a statute for international arbitration, if the FAA's later-crafted domestic chapter were to assimilate the style and content of the RUAA, harmonization would result, limiting thereby the potential for conflicts among regimes devoted to non-international disputes. If, as recommended in this work, the FAA's international arbitration chapter were free-standing, the drafters of its domestic chapter would be at liberty to borrow from the RUAA in material respects without concern for the international standard influencing the international chapter.

¹⁹ Speech by Dr. Gerhold Herrmann, Secretary of UNCITRAL, before Institute of Transnational Arbitration, Dallas, June 17, 1999.

²⁰ In the interests of avoiding delay in what may prove to be a prolonged project, the FAA international chapter should not await the

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the extent consistent with the aims noted herein, the modern treatment of certain issues to be found in the RUAA.²¹ This could be accomplished best by staffing a private drafting committee with persons involved in all three projects.²²

The New Act in Operation—Nurturing the Promise

One risk faced by reform is that it will go unnoticed. Courts, arbitrators and counsel may allow their comfort with

outcome of UNCITRAL's further work; cross-fertilization between the two projects may be desirable however.

²¹ The Prefatory Note accompanying the RUAA of June-July 1999 states that while the drafters "did not directly address international arbitration" they did utilize "provisions of UNCITRAL, the New York Convention, and the 1996 English Arbitration Act as sources of statutory language...." *Id.* at 5.

²² The author assumes that the most efficient and substantively satisfying approach would involve producing a draft through a private initiative and to gain support for it among international arbitration authorities and relevant constituencies before seeking sponsorship within Congress. For example, the Drafting Committee's members might include one member of the ABA's International Arbitration Committee, the General Council of the AAA, the two academic lawyers who consulted Uniform Law Commissioners in producing the RUAA, perhaps one or two other publicists (practitioner or academic) respected in the field, a further member nominated by the Center for Public Resources, at least one jurist with background in international arbitration under the FAA and, *ex officio*, the Secretary of UNCITRAL.

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familiar ways to obscure the obvious. Some questions will arise in good faith, others from wishful thinking; both types will in turn cause dismay among observers abroad, for whom the statute was supposed to be attractive and illuminating. Accordingly, lawmakers should: 1] strive in the statutory language to avoid technical, specialized language, Latin incantations, and convoluted structure; 2] provide sufficient supporting information to provide genuine guidance, a beneficial practice that ought to be inspired by European examples;²³ 3] give broad principles of construction within the Act itself and an exhaustive schedule of mandatory provisions, and 4] refer courts and other users, to the extent a matter is not covered in the accompanying report, to the *travaux preparatoires* surrounding the Model Law.²⁴

The Supreme Court for its part should edify the New Act's rules of construction by elaborating others designed to preclude the unpredictability injected into the process by state law and state rules of contract construction. To appreciate the need for top-down interpretive discipline, one need only recall the California courts' insistence in *Volt*, acquiesced in by the

²³ See, e.g., *Mustill and Saville Reports*, the respective reports by Jenard and Schlosser on the Brussels Convention and Protocol thereto at [1979] O.J. C59 at, 1, 66, 71 and the Guiliano and Lagarde Report on the Rome Convention at [1980] O.J. C282 at 4.

²⁴ This is the approach followed in, e.g., the Bermuda International Act which in § 24 authorizes the use of various UNICITRAL documents such as those prepared by the Secretariat.

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majority of the Court, that “the law of the place where the project is located” (contained in a form contract) included by implication a reference to California’s arbitration law—a law probably not contemplated by the parties which nonetheless side-tracked an arbitration otherwise governed by the FAA.²⁵

The specific question in *Volt* can be addressed within the New Act itself, by requiring the parties to be unambiguous in opting for a state arbitration regime; the general tendency for state law to create unpredictability, however, will require sustained supervision lest the allure of the New Act be quickly lost.

²⁵ *Volt*, 489 U.S. at 472. The dissent’s analysis of the that clause, 489 U.S. at 479 *et seq.*, was far more consistent with contemporary construction in private international law. It was emulated somewhat in *Mastrobuono*, which itself has nonetheless been evaded by lower court use of state rules of construction. See L. Marinuzzi, *Punitive Damages in Arbitration—The Debate Continues*, 52 Disp. Resol. J. 67, 72 (1997) (citing Dean Witter Reynolds v. Trimble, No. 119930/94 1995 N.Y. Misc. Lexus 401, at *7 (Sup. Ct. June 13 1995)).

Table 1
Express Statutory Treatment of Specific
Topics (FAA and Model Law Compared)*

TRIBUNAL IN GENERAL

	FAA	ML
1. Arbitrator Independence & Impartiality	§ 10 (by implication?)	A12
2. Tribunal Composition	NO	AA10, 12
3. Number of Arbitrators	§ 5 (apparently)	A10

TRIBUNAL POWERS

	FAA	ML
Select Applicable Law	NO	A28
Assess Own Jurisdiction	NO	A16
Interim Measures	NO	A17
Assess/Manage Evidence	NO	A19(2)
Determine Language	NO	A22(default)
Determine Place	NO	A20(default)
Order Translations	NO	A22
Subpoena	§ 7	NO
Appoint Experts	NO	A26
Request Court Assistance (discovery)	NO [but see § 7]	A27

*"NO" indicates not covered, but does not preclude case law or rule coverage of the issue listed.

JUDICIAL ASSISTANCE/INTERVENTION

	FAA	ML
Whether Waiver	NO	A9
Limits Upon	NO	A5
Appointment of Arbitrators	§ 5	A15
Deciding Challenges to Arbitrators	NO	A13
Arbitrator's Failure to Act, Removal	NO	A14
Replacement of	§ 5	A15
In Taking Evidence	§ 7	A27
Remand of Awards	NO	A34(4)
Setting aside of awards	§ 10	A34

ARBITRAL PROCEEDINGS

	FAA	ML
Pleadings (order, content)	NO	A23
Language/Place	NO	A22
Hearings	NO	A24
Default of a Party	NO	A25
Experts	NO	AA24, 26
Applicable Law	NO	A28
Termination of	NO	A32

THE AWARD & RELATED MATTERS

	FAA	ML
Arbitral Decision-Making	NO	A29
Form and Content (reasons)	NO	A31
On Agreed Terms	NO	A30
Post-Award Adjustment (by Court)	FAA § 11	NO
Post-Award Adjustment (by Tribunal)	NO	A33
Remission/Remand of	NO	A34(4)
Recognition/Enforcement of Domestic Awards	§ 9	A35
Setting Aside (Vacation)	YES § 10	A34
Recognition/Enforcement (Foreign Awards)	§§ 207, 302, 304	A35

TABLE 2

SCHEDULE OF SELECTED TOPICS AND ISSUES NOT ADDRESSED BY THE MODEL LAW OR THE FAA BUT FOUND IN OTHER ARBITRATION STATUTES AND TEXTS

Scope Note and Abbreviations: This table provides a checklist of the issues not treated in the FAA or the Model Law that arbitration rule and statute drafters have nonetheless addressed in certain other texts. The examples given are illustrative, not exhaustive. The purpose is to raise these matters for potential inclusion by lawmakers contemplating an international chapter within the FAA, whether or not that chapter is based upon the Model Law. The following abbreviations have been used: **AAA Int'l**– American Arbitration Association Rules for International Arbitration (1997); **BC**–British Columbia International Commercial Arbitration Act (1996); **Berm.**–Bermuda International Conciliation and Arbitration Act (1993); **Cal.**–California Title 9.3, Arbitration and Conciliation of International Commercial Disputes, Cal. Code Civ. Proc. §§ 1297.11 et seq; **CPR Int'l**–Center for Public Resource Rules for Non-Administered International Arbitration (1992); **Eng.** Arbitration Act 1996; **Fla.**–Florida International Arbitration Act of 1996, Fla. Statutes Ann. §§ 684 et seq.; **Germ.**–German Act on the Reform of the Law Related to Arbitral Proceedings (Tenth Book Civ. Proc. §§ 1025-1066); **HK**–Hong Kong Arbitration Ordinance (Cap 341 as amended by Ordinance No. 75 of 1996); **ICC**–International Chamber of Commerce Rules for Arbitration (1998); **ICSID Convention**–Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965); **ICSID Rules**–International Centre for the Settlement of Investment Disputes Rules of Procedure for Arbitration; **LCIA**–London Court of International Arbitration Rules (1998); **ML**–UNCITRAL Model Law 1985; **NL**–Netherlands Arbitration Act (1986) (Code of Civil Proc., Book IV); **RUAA**–Revised Uniform Arbitration Act (July 1999 draft); **Scot.**– Law Reform Scotland Act 1990 (§ 66 and Schedule 7 incorporating the ML); **Sing.**–Singapore International Arbitration Act (1994); **Switz.**–Swiss Private International Act (1987), Ch.12, **WIPO**–World Intellectual Property Organization Arbitration Rules (1994).

Table 2

I. Act Coverage and Interpretation

A. *A statutory definition of “commercial.”*

1. Examples: BC § 1(6); Cal. §1297.16. Scot., art. 2g.

2. Comment: those encountered have based the statutory definition of “commercial” on the official footnote to the ML. Some ML countries, e.g., Germany and Hong Kong, have not limited ML application to “commercial” arbitrations

B. *Powers exercisable by a court before the place of arbitration has been designated or when seat is abroad.*

1. Example: Eng. § 2(2)(3); NL art. 1074(2).

2. Comment: recall ML dependence upon place of arbitration being within the state.

C. *Power of the parties to select another curial law.*

1. Example: Eng. § 4.

2. Comment: *See Saville Report*, para. 23.

D. *Canons of construction for courts and arbitrators; relevance of any travaux.*

1. Example: BC § 6; Berm. § 24, Eng. § 1.

2. Comment: One approach is to designate specific UN documents as citable or persuasive.

E. *Mandatory rules listed in one location or otherwise clearly indicated.*

1. Example: Eng. § 4(1), Sched. 1.

2. Comment: *See Saville Report*, paras. 28-30.

Table 2

II. Court Powers To:

A. *Grant specific interim measures: an illustrative catalog of the permitted types.*

1. **Example:** Cal. § 1297.93; Fla. § 684.23(b)(3).

2. **Comment:** The listing in these provisions is not intended to be exhaustive.

B. *Consolidate related arbitrations and staff the tribunal for multiparty disputes.*

1. **Example:** BC § 27(2); Cal. § 1297.271 *et seq.*; HK § 6B; NL art. 1046.

2. **Comment:** Australia's ML (international disputes) approach is to authorize requests to the *tribunals* involved to consider consolidation jointly; no reference to a court is contemplated. Apparently, Hong Kong's provision has been little used (Morgan, [1998] ADRLJ 287 at 301). NL's provision is not dependent upon the parties' consent.

C. *Dismiss stale arbitration claims.*

1. **Example:** HK § 29A.

2. **Comment:** By way of related historical note, see 1979 Act (England and Wales) § 5 and § 13 A of Courts and Legal Services Act 1990 (empowering *tribunal* to pursue designated measures).

III. Tribunal Powers

A. *To act a mediator, appoint mediators, or otherwise promote settlement.*

1. **Example:** Berm. §§3-21; Cal. § 1297.341; Canada (all provinces); Fla. § 684.10; HK §§ 2A, 2B.

Table 2

2. Comment: Some ML States have enacted separate chapters or detailed provisions on conciliation. These include: Berm., Cal., HK, Nigeria, Ohio, Oregon, and Texas. Bermuda and Nigeria attach the UNCITRAL Conciliation Rules (1980) as a schedule.

B. *To award interest.*

1. Example: BC § 31(7); Cal. § 1297.317; Eng. § 49; HK § 2GH(1).

2. Comment: Certain rules texts grant this power as well; *see, e.g.*, LCIA art. 26.6; AAA Int'l art. 28(4).

C. *To allocate costs.*

1. Example: Cal. § 1297.318; Eng. § 61; HK §§ 2GJ (1), 2GL (as amended 1996).

2. Comment: The ML states that have added provisions on interest have generally also treated costs.

D. *To designate currency of the award.*

1. Example: Eng. § 48(4); Fla. § 684.46 (by inference).

2. Comment: Certain rules texts grant this power: *see* LCIA art. 26.6; AAA Int'l art. 28(4).

E. *To proceed when “truncated.”*

1. Example: Germ. § 1025(2)(3).

2. Comment: *See also* LCIA arts. 12, 26(2)(4); ICC Rules art. 12.

F. *To implement specific case management measures.*

1. Example: Eng. § 34; AAA Int'l arts. 16(2)(3), 20(4).

Table 2

2. Comment: The above-referenced English provision allows (but does not require) a tribunal to proceed in inquisitorial (civil law) fashion, thus enabling an active role in fact finding and in determining order and manner of proofs.

G. *To provide/attach separate opinions.*

1. Example: ICSID Convention art. 48(4).

2. Comment: The ICSID Rules counterpart is art. 47(3).

H. *To decide specified categories of subject matter (arbitrability).*

1. Example: NL art. 1020(3); Germ. § 1030; Switz. art. 177.

2. Comment: The Dutch provision asserts the truism that the matter must be one of which the parties can freely dispose. The Swiss provision grants arbitrability to “any dispute involving financial interests.” The German counterpart (“claims involving an economic interest”) adds that parties may arbitrate non-commercial disputes which the law allows them to settle by agreement, a grant which corresponds to the statute’s intentional coverage of non-commercial matters. Concerning the German statute, *see* Delaume, 37 I.L.M. 790 (1998).

I. *To require security for costs.*

1. Examples: Eng. § 38(3).

2. Comment: The English provision contemplates that claimant is the party to whom the order will issue but would include counter-claimants also. Distinguish *tribunal* power from the now-eliminated power of English courts in this regard, reversing *Ken-Ren Chemicals*, [1995] 1 AC 38.

J. *To secure the ultimate award.*

Table 2

1. **Examples:** Eng. §§ 38(4)(a), 39(2).
2. **Comment:** *See also* LCIA art. 25.

K. To render partial/interim awards.

1. **Examples:** Berm. § 36; Cal. § 1297.316; Eng. § 39(2); Switz. art. 188.
2. **Comment:** The Swiss statute, art. 190(3), limits the grounds upon which partial awards can be attacked.

IV. Tribunal Duties

A. To observe privileges.

1. **Example:** AAA Int'l art. 20(6); CPR Int'l, Rule 17; *cf.* Eng. § 43(4).
2. **Comment:** For the American case law position, see Carter at 2(1) *ADR Currents*, Winter 1996/1997, at 1, 15.

B. To observe confidentiality.

1. **Example:** AAA Int'l art. 34; CPR Int'l rule 17; LCIA art. 30 (partial); ICSID Rule 48(4) (refers expressly only to Centre); WIPO art. 76.
2. **Comment:** A statutory provision could draw upon the above referenced rule texts. Disclosures required by law or fiduciary obligation may be exempted.

C. To avoid unnecessary delay or expense.

1. **Examples:** Eng. § 33 (1)(b), (2); HK § 2GA(1)(a).
2. **Comment:** A similar duty is set forth in certain rules texts; *see, e.g.*, AAA Int'l art. 16(2); LCIA art. 14(2).

V. Party Autonomy To:

Table 2

A. *Expand substantive review of the award.*

1. Examples: RUAA § 20, Alternatives I and II.

2. Comment: On existing American case law, see Lowenfeld, 3(3) *ADR Currents* (Sept. 1998) at 1,12.

B. *Limit review of the award.*

1. Examples: Eng. § 45; Switz. art. 192.

2. Comment: In England, review for serious procedural irregularity apparently cannot be eliminated by an exclusion agreement, but can be waived by a failure to complain in time. *See* Arbitration Act 1996, §§ 68, 73.

VI. Miscellaneous

A. *The immunity of arbitrators from suit.*

1. Example: Berm. § 34; Cal. § 1297.119; Eng. § 29, Fla. § 684.35.

2. Comment: Most rules texts grant immunity, either qualified or absolute, to arbitrators; *see, e.g.*, AAA Int'l art. 35; ICC art. 34; LCIA art. 31; WIPO art. 77.

B. *The immunity of arbitral institutions.*

1. Example: Eng. § 74.

2. Comment: In the United States, immunity has been conferred by case law; *see* *Cort v. American Arbitration Association*, 795 F. Supp. 970 (N.D. Cal. 1992). Various rule formulations also immunize the institution in question; *see, e.g.*, LCIA art. 31; ICC art. 34.

C. *Whether arbitrators privileged to not testify in subsequent proceedings related to the award.*

Table 2

1. **Examples:** *Cf.* ICSID Convention 21(a).
 2. **Comment:** *Cf.* LCIA art. 30(2) (tribunal deliberations confidential).
- D. *The confidentiality of arbitral proceedings within the courts.***
1. **Example:** Berm. § 45.
 2. **Comment:** The Bermudian provision provides: “subject to the Constitution, proceedings in any court under this Act shall on the application of any party to the proceedings be heard otherwise than in open court.”
- E. *Exemptions from local practice restrictions for arbitrators and representatives of a party.***
1. **Examples:** Berm. § 37(2); Eng. § 36; HK § 2F (1989).
 2. **Comment:** *See also* Cal. § 1297.351 (found in the Conciliation chapter but phrased in a general manner).
- F. *Clarification of continuing relevance of convention reservations.***
1. **Examples:** HK (by omission of arts. 35 and 36).
 2. **Comment:** Unlike the NYC as implemented by many states, the ML has no reciprocity requirement.
- G. *Liability of parties to tribunal for fees and expenses.***
1. **Examples:** Eng. § 28 (joint and severable).
 2. **Comment:** to the same effect is LCIA art. 28.5
- H. *Intervention of a third party.***

Table 2

1. **Example:** NL art. 1045; LCIA art 22(h).

2. **Comment:** *See also* art. 26 of ML as adopted in Iran, discussed by Seife, 5(2) J. Int'l Arb. 5, 27 (1998). *Cf.* NAFTA art. 1128 (State party to NAFTA may make submissions to Tribunal on matters of interpretation).

I. ***Linking the equal treatment and opportunity-to-be-heard rules directly to set aside (vacatur) provision.***

1. **Example:** Switz. art. 190(2)(d).

2. **Comment:** The Swiss provision, in the English and French texts, requires that the parties be heard in an “adversarial procedure.”

APPENDIX

U.S. FEDERAL ARBITRATION ACT*

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* Title 9, U.S. Code sections 1-14, first enacted February 12, 1925 (43 Stat. 883), codified July 30, 1947 (61 Stat. 669), and amended September 3, 1954 (68 Stat. 1233). Chapter 2 added July 31, 1970 (84 Stat. 692). Section 15 added November 16, 1988 (102 Stat. 3969); Section 16 added on November 19, 1988 (102 Stat. 4671) [renumbered as § 16 December 1, 1990 (Stat. 5120)]. Chapter 3 added August 15, 1990 (104 Stat. 448).

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CHAPTER 1. GENERAL PROVISIONS

1. **“Maritime Transactions” and “Commerce” Defined; Exceptions to Operation of Title**

“Maritime transactions,” as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies, furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; “commerce,” as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

2. **Validity, Irrevocability, and Enforcement of Agreements to Arbitrate**

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

3. **Stay of Proceedings Where Issue Therein Referable to Arbitration**

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

4. **Failure to Arbitrate Under Agreement; Petition to United States Court Having Jurisdiction for Order to Compel Arbitration; Notice and Service Thereof; Hearing and Determination**

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the

trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

5. Appointment of Arbitrators or Umpire

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

6. Application Heard as Motion

Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

7. Witnesses Before Arbitrators; Fees; Compelling Attendance

The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States court in and for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided on February 12, 1925, for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

8. Proceedings Begun by Libel in Admiralty and Seizure of Vessel or Property

If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction

to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

9. Award of Arbitrators; Confirmation; Jurisdiction; Procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a non-resident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

10. Same; Vacation; Grounds; Rehearing

In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

- (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.
- (e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

11. Same; Modification or Correction; Grounds; Order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—

- (a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
- (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
- (c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

12. Notice of Motions to Vacate or Modify; Service; Stay of Proceedings

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

13. Papers Filed with Order on Motions; Judgment; Docketing; Force and Effect; Enforcement

The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:

- (a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.
- (b) The award.
- (c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

14. Contracts Not Affected

This title shall not apply to contracts made prior to January 1, 1926.

15. Inapplicability of the Act of State Doctrine

Enforcement of arbitral agreements, confirmation of arbitral awards, and execution upon judgments based on orders confirming such awards shall not be refused on the basis of the Act of State Doctrine.

16. Appeals

(a) An appeal may be taken from—

(1) an order—

(A) refusing a stay of any action under section 3 of this title,

- (B) denying a petition under section 4 of this title to order arbitration to proceed,
 - (C) denying an application under section 206 of this title to compel arbitration,
 - (D) confirming or denying confirmation of an award or partial award, or
 - (E) modifying, correcting, or vacating an award;
- (2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or
 - (3) a final decision with respect to an arbitration that is subject to this title.
- (b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order—
- (1) granting a stay of any action under section 3 of this title;
 - (2) directing arbitration to proceed under section 4 of this title;
 - (3) compelling arbitration under section 206 of this title; or
 - (4) refusing to enjoin an arbitration that is subject to this title.

CHAPTER 2. CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

201. Enforcement of Convention

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.

202. Agreement or Award Falling Under the Convention

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

203. Jurisdiction; Amount in Controversy

An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in section 460 of title 28) shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.

204. Venue

An action or proceeding over which the district courts have jurisdiction pursuant to section 203 of this title may be brought in any such court in which save for the arbitration agreement an action or proceeding with respect to the controversy between the parties could be brought,

or in such court for the district and division which embraces the place designated in the agreement as the place of arbitration if such place is within the United States.

205. Removal of Cases from State Courts

Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. For the purposes of Chapter 1 of this title any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed.

206. Order to Compel Arbitration; Appointment of Arbitrators

A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. Such court may also appoint arbitrators in accordance with the provisions of the agreement.

207. Award of Arbitrators; Confirmation; Jurisdiction; Proceeding

Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.

208. Chapter 1; Residual Application

Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States.

CHAPTER 3. INTER-AMERICAN CONVENTION ON INTERNATIONAL COMMERCIAL ARBITRATION

301. Enforcement of Convention

The Inter-American Convention on International Commercial Arbitration of January 30, 1975, shall be enforced in United States courts in accordance with this chapter.

302. Incorporation by Reference

Sections 202, 203, 204, 205, and 207 of this title shall apply to this chapter as if specifically set forth herein, except that for the purposes of this chapter "the Convention" shall mean the Inter-American Convention.

303. Order to Compel Arbitration; Appointment of Arbitrators; Locale

(a) A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within

or without the United States. The court may also appoint arbitrators in accordance with the provisions of the agreement.

- (b) In the event the agreement does not make provision for the place of arbitration or the appointment of arbitrators, the court shall direct that the arbitration shall be held and the arbitrators be appointed in accordance with Article 3 of the Inter-American Convention.

304. Recognition and Enforcement of Foreign Arbitral Decisions and Awards; Reciprocity

Arbitral decisions or awards made in the territory of a foreign State shall, on the basis of reciprocity, be recognized and enforced under this chapter only if that State has ratified or acceded to the Inter-American Convention.

305. Relationship between Inter-American Convention and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958

When the requirements for application of both the Inter-American Convention and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, are met, determination as to which Convention applies shall, unless otherwise expressly agreed, be made as follows:

- (1) If a majority of the parties to the arbitration agreement are citizens of a State or States that have ratified or acceded to the Inter-American Convention and are member States of the Organization of American States, the Inter-American Convention shall apply.
- (2) In all other cases the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall apply.

306. Applicable rules of Inter-American Commercial Arbitration Commission

- (a) For the purposes of this chapter the rules of procedure of the Inter-American Commercial Arbitration Commission referred to in Article 3 of the Inter-American Convention shall, subject to subsection (b) of this section, be those rules as promulgated by the Commission on July 1, 1988.
- (b) In the event of the rules of procedure of the Inter-American Commercial Arbitration Commission are modified or amended in accordance with the procedures for amendment of the rules of that Commission, the Secretary of State, by regulation in accordance with section 553 of title 5, consistent with the aims and purposes of this Convention, may prescribe that such modifications or amendments shall be effective for purposes of this chapter.

307. Chapter 1; Residual Application

Chapter 1 applies to actions and proceedings brought under this chapter to the extent chapter 1 is not in conflict with this chapter or the Inter-American Convention as ratified by the United States.

APPENDIX

UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION*

CHAPTER I. GENERAL PROVISIONS

Article 1—Scope of Application

- (1) This Law applies to international commercial arbitration, subject to any agreement in force between this State and any other State or States.
- (2) The provisions of this Law, except articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State.
- (3) An arbitration is international if:
 - (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or
 - (b) one of the following places is situated outside the State in which the parties have their places of business:
 - (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;
 - (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or
 - (c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.
- (4) For the purposes of paragraph (3) of this article:
 - (a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;
 - (b) if a party does not have a place of business, reference is to be made to his habitual residence.
- (5) This Law shall not affect any other law of this State by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law.

* Adopted by the United Nations Commission on International Trade Law on June 21, 1985.

Article 2—Definitions and Rules of Interpretation

For the purposes of this Law:

- (a) “arbitration” means any arbitration whether or not administered by a permanent arbitral institution;
- (b) “arbitral tribunal” means a sole arbitrator or a panel of arbitrators;
- (c) “court” means a body or organ of the judicial system of a State;
- (d) where a provision of this Law, except article 28, leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorize a third party, including an institution, to make that determination;
- (e) where a provision of this Law refers to the fact that the parties have agreed or that they may agree or in any other way refers to an agreement of the parties, such agreement includes any arbitration rules referred to in that agreement;
- (f) where a provision of this Law, other than in articles 25(a) and 32(2)(a), refers to a claim, it also applies to a counter-claim, and where it refers to a defence, it also applies to a defence to such counter-claim.

Article 3—Receipt of Written Communications

(1) Unless otherwise agreed by the parties:

- (a) any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his place of business, habitual residence or mailing address; if none of these can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee’s last-known place of business, habitual residence or mailing address by registered letter or any other means which provides a record of the attempt to deliver it;
- (b) the communication is deemed to have been received on the day it is so delivered.

(2) The provisions of this article do not apply to communications in court proceedings.

Article 4—Waiver of Right to Object

A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefor, within such period of time, shall be deemed to have waived his right to object.

Article 5—Extent of Court Intervention

In matters governed by this Law, no court shall intervene except where so provided in this Law.

Article 6—Court or Other Authority for Certain Functions of Arbitration Assistance and Supervision

The functions referred to in articles 11(3), 11(4), 13(3), 14, 16(3) and 34(2) shall be performed by . . . [Each State enacting this model law specifies the court, courts or, where referred to therein, other authority competent to perform these functions.]

CHAPTER II. ARBITRATION AGREEMENT

Article 7—Definition and Form of Arbitration Agreement

- (1) “Arbitration agreement” is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
- (2) The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.

Article 8—Arbitration Agreement and Substantive Claim Before Court

- (1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.
- (2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

Article 9—Arbitration Agreement and Interim Measures by Court

It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

CHAPTER III. COMPOSITION OF ARBITRAL TRIBUNAL

Article 10—Number of Arbitrators

- (1) The parties are free to determine the number of arbitrators.
- (2) Failing such determination, the number of arbitrators shall be three.

Article 11—Appointment of Arbitrators

- (1) No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.
- (2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of this article.
- (3) Failing such agreement,
 - (a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to

appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority specified in article 6;

(b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court or other authority specified in article 6.

(4) Where, under an appointment procedure agreed upon by the parties,

(a) a party fails to act as required under such procedure, or

(b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or

(c) a third party, including an institution, fails to perform any function entrusted to it under such procedure,

any party may request the court or other authority specified in article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(5) A decision on a matter entrusted by paragraph (3) or (4) of this article to the court or other authority specified in article 6 shall be subject to no appeal. The court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.

Article 12—Grounds for Challenge

(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.

(2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

Article 13—Challenge Procedure

(1) The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of paragraph (3) of this article.

(2) Failing such agreement, a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in article 12(2), send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

- (3) If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court or other authority specified in article 6 to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

Article 14—Failure or Impossibility to Act

- (1) If an arbitrator becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from his office or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request the court or other authority specified in article 6 to decide on the termination of the mandate, which decision shall be subject to no appeal.
- (2) If, under this article or article 13(2), an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, this does not imply acceptance of the validity of any ground referred to in this article or article 12(2).

Article 15—Appointment of Substitute Arbitrator

Where the mandate of an arbitrator terminates under article 13 or 14 or because of his withdrawal from office for any other reason or because of the revocation of his mandate by agreement of the parties or in any other case of termination of his mandate, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

CHAPTER IV. JURISDICTION OF ARBITRAL TRIBUNAL

Article 16—Competence of Arbitral Tribunal to Rule on Its Jurisdiction

- (1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.
- (2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.
- (3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

Article 17—Power of Arbitral Tribunal to Order Interim Measures

Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure.

CHAPTER V. CONDUCT OF ARBITRAL PROCEEDINGS

Article 18—Equal Treatment of Parties

The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.

Article 19—Determination of Rules of Procedure

- (1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.
- (2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

Article 20—Place of Arbitration

- (1) The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.
- (2) Notwithstanding the provisions of paragraph (1) of this article, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.

Article 21—Commencement of Arbitral Proceedings

Unless otherwise agreed by the parties, the arbitral tribunal proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

Article 22—Language

- (1) The parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings. This agreement or determination, unless otherwise specified therein, shall apply to any written statement by a party, any hearing and any award, decision or other communication by the arbitral tribunal.
- (2) The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

Article 23—Statements of Claim and Defence

- (1) Within the period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of such statements. The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.
- (2) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendments having regard to the delay in making it.

Article 24—Hearings and Written Proceedings

- (1) Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.
- (2) The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of goods, other property or documents.
- (3) All statements, documents or other information supplied to the arbitration tribunal by one party shall be communicated to the other party. Also any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.

Article 25—Default of a Party

Unless otherwise agreed by the parties, if, without showing sufficient cause,

- (a) the claimant fails to communicate his statement of claim in accordance with article 23(1), the arbitral tribunal shall terminate the proceedings;
- (b) the respondent fails to communicate his statement of defence in accordance with article 23(1), the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations;
- (c) any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.

Article 26—Expert Appointed by Arbitral Tribunal

- (1) Unless otherwise agreed by the parties, the arbitral tribunal
 - (a) may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;
 - (b) may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.
- (2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.

Article 27—Court Assistance in Taking Evidence

The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.

CHAPTER VI. MAKING OF AWARD AND TERMINATION OF PROCEEDINGS

Article 28—Rules Applicable to Substance of Dispute

- (1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.
- (2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.
- (3) The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorized it to do so.
- (4) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

Article 29—Decision-Making by Panel of Arbitrators

In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members. However, questions of procedure may be decided by a presiding arbitrator, if so authorized by the parties or all members of the arbitral tribunal.

Article 30—Settlement

- (1) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.
- (2) An award on agreed terms shall be made in accordance with the provisions of article 31 and shall state that it is an award. Such an award has the same status and effect as any other award on the merits of the case.

Article 31—Form and Contents of Award

- (1) The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.
- (2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 30.
- (3) The award shall state its date and the place of arbitration as determined in accordance with article 20(1). The award shall be deemed to have been made at that place.
- (4) After the award is made, a copy signed by the arbitrators in accordance with paragraph (1) of this article shall be delivered to each party.

Article 32—Termination of Proceedings

- (1) The arbitral proceedings are terminated by the final award or by an order of the arbitral tribunal in accordance with paragraph (2) of this article.
- (2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings when:
 - (a) the claimant withdraws his claim, unless the respondent objects thereto and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute;
 - (b) the parties agree on the termination of the proceedings;
 - (c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.
- (3) The mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings, subject to the provisions of articles 33 and 34(4).

Article 33—Correction and Interpretation of Award; Additional Award

- (1) Within thirty days of receipt of the award, unless another period of time has been agreed upon by the parties:
 - (a) a party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature;
 - (b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within thirty days of receipt of the request. The interpretation shall form part of the award.

- (2) The arbitral tribunal may correct any error of the type referred to in paragraph (1)(a) of this article on its own initiative within thirty days of the date of the award.
- (3) Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within thirty days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within sixty days.
- (4) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, interpretation or an additional award under paragraph (1) or (3) of this article.
- (5) The provisions of article 31 shall apply to a correction or interpretation of the award or to an additional award.

CHAPTER VII. RECOURSE AGAINST AWARD

Article 34—Application for Setting Aside as Exclusive Recourse Against Arbitral Award

- (1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

- (2) An arbitral award may be set aside by the court specified in article 6 only if:
- (a) the party making the application furnishes proof that:
 - (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or
 - (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
 - (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
 - (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or
 - (b) the court finds that:
 - (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
 - (ii) the award is in conflict with the public policy of this State.
- (3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.
- (4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

CHAPTER VIII. RECOGNITION AND ENFORCEMENT OF AWARDS

Article 35—Recognition and Enforcement

- (1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.
- (2) The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement referred to in article 7 or a duly certified copy thereof. If the award or agreement is not made in an official language of this State, the party shall supply a duly certified translation thereof into such language.

Article 36—Grounds for Refusing Recognition or Enforcement

- (1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:**
 - (a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:**
 - (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or**
 - (ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or**
 - (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or**
 - (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or**
 - (v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or**
 - (b) if the court finds that:**
 - (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or**
 - (ii) the recognition or enforcement of the award would be contrary to the public policy of this State.**
- (2) If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1)(a)(v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.**

APPENDIX

THE NEW YORK CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS*

Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.
2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.
3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Article II

1. Each Contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject-matter capable of settlement by arbitration.
2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.
3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

* June 10, 1958. Sometimes also referred to as: the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. For a list of signatories and parties, see Appendix 47.

Article III

Each Contracting State shall recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Article IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:
 - (a) The duly authenticated original award or a duly certified copy thereof;
 - (b) The original agreement referred to in article II or a duly certified copy thereof.
2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
 - (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
 - (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
 - (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced; or
 - (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
 - (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.
2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

- (a) The subject-matter of the difference is not capable of settlement by arbitration under the law of that country; or
- (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Article VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Article VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.
2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

Article VIII

1. This Convention shall be open until December 31, 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialised agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.
2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

Article IX

1. This Convention shall be open for accession to all States referred to in article VIII.
2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.
2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification,

or as from the date of entry into force of the Convention for the State concerned, whichever is the later. . . .

Article XI

In the case of a federal or non-unitary State, the following provisions shall apply:

- (a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;
- (b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment.
- (c) A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

Article XII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.
2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit of such State of its instrument of ratification or accession.

Article XIII

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General. . . .
2. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

Article XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

Article XV

The Secretary-General of this United Nations shall notify the States contemplated in article VIII of [various State activities affecting adherence to this Convention]. . . .

Article XVI

- 1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.**
- 2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.**

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