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Articles

Rendering Arbitral Awards with Reasons:
The Elaboration of a Common Law of International Transactions

THOMAS E. CARBONNEAU*

With the growth of international trade, arbitration has emerged as the preferred remedy for resolving private international commercial disputes.¹ In fact, among major Western legal systems such as

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¹ Without arbitration or other alternate dispute resolution mechanisms, such as conciliation or mediation, which are now also starting to flourish in the international sector, the only recourse for parties to an international commercial contract in the event of a dispute is to litigate before national courts. Attempts at negotiation in all likelihood would fail, given the breakdown of the contractual relationship. Recourse to national court adjudication is also problematic given the usual choice of forum and choice of law problems.

Traditionally, commentators advance three contradistinctive theories to explain the nature of arbitral adjudication. Each theory emphasizes a particular view of the relationship between the state and private individuals and expresses a different attitude regarding private and public authority. A fourth theory adds a more contemporary dimension to the debate by envisaging arbitration as a transnational process. See J. LEW, APPLICABLE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION 51-61 (1978). For a discussion of this general topic, see P. FOUCHARD, L'ARBITRAGE COMMERCIAL INTERNATIONAL (1965); J. ROBERT & T. CARBONNEAU, THE FRENCH LAW OF ARBITRATION (1983); J. RUBELLIN-DEVICHI, L'ARBITRAGE: NATURE JURIDIQUE, DROIT INTERNE ET DROIT INTERNATIONAL PRIVÉ
those of England, the United States and France,2 statutory and decisional law developments indicate a nearly complete acceptance of international arbitral adjudication.3 This recognition of arbitration has resulted in the elaboration of agreed upon rules, relating to arbitral procedure and the enforcement of awards, which are given uniform legal recognition and enforcement by domestic legal systems, either as provisions in international conventions or as principles of national statutory or decisional law. These rules, in effect, represent an international consensus on arbitration and constitute a normative procedural policy of transnational proportions.

A fully functional transnational adjudicatory process, however, must not only provide certainty as to remedial relief but also fulfill a substantive mission. Professor René David properly characterizes the implications of the continued evolution of the international arbitral process when he states:

We must not, in effect, succumb to illusions. Arbitration in current international practice is neither arbitration "properly speaking" which is disposed to the application of a national law nor amiable composition as it was conceived of at


3. See, e.g., Arbitral Adjudication supra note 2.
the beginning by the canon law scholars. It is much more an aspiration toward a new type of law. 4

The critical question regarding the future development of international arbitral adjudication, then, is whether it can produce substantive legal principles and, in effect, stimulate and foster the development of a common law of international transactions.

This article argues that "reasoned awards," or awards accompanied by written opinions based on law, are an appropriate and useful instrument for fulfilling the normative potential of transnational arbitration and satisfying the "aspiration toward a new type of law." 5

Reasoned awards could serve as a means of assessing the arbitrators' ability to assure the parties of a principled decisional basis. Furthermore, reasoned awards could act as nonbinding persuasive authority, gradually defining the basic substantive tenets of an international law merchant. The publication of such awards and their subsequent enforcement by national courts (thus confirming the content of the awards provided the awards comply with a limited notion of substantive international public policy) might lead to the creation of a general arbitral principle of stare decisis possessing a transnational stature.

I. REAPPRAISING THE ROLE OF REASONED AWARDS IN INTERNATIONAL ARBITRAL PRACTICE

The prevalent practice has been to render international arbitral awards without explaining the reasons by which the decision was reached. This practice has its antecedents in antiquated English common law, where the writ procedure provided for having an arbitral award reviewed on the merits by a court for an error of law. To avoid such review, it became commonplace for English arbitral tribunals to render awards without providing the underlying reasons. 6

This English practice eventually was adopted in the United States, although its adoption appears to have occurred in an unstated and implied fashion. 7 French law, on the other hand, mandated as a matter of public policy that domestic arbitral awards be rendered with reasons. 8 Beginning in the late nineteenth century, however, French courts recognized and enforced foreign awards that lacked reasons if the

5. Id.
6. See Arbitral Adjudication, supra note 2, at 40-41.
7. Id. at 102.
applicable foreign law of procedure permitted the rendering of such awards.9

In the relevant decisional law,10 the French courts justified their divergent posture toward international awards (which could be enforced despite a lack of reasons) and domestic awards (which needed to be rendered with reasons in order to be legally valid) by claiming commercial necessity. The courts emphasized that the English practice of rendering awards without reasons had been adopted by a majority of countries in the international commercial community, and most importantly in U.S. arbitral practice. At that time, Anglo-American interests exercised a veritable hegemony in world commerce, and arbitration clauses already figured prominently in interna-

9. Id. At the time these decisions were rendered, the term "international arbitration" apparently had not yet come into vogue. The courts consistently characterized as "foreign" those arbitrations which took place abroad between parties of different nationalities and those arbitral awards which were rendered by arbitral tribunals sitting in jurisdictions other than France. Such a determination was reached even though the arbitral awards basically involved the resolution of international commercial disputes. No attempt was made by the courts or legal scholars to draw a distinction between foreign and international arbitral awards; the notion of foreign arbitrations and arbitral awards appeared to cover both categories.

This lack of conceptual differentiation between the two terms still exists to some extent. For example, some of the scholarly literature still refers to the enforcement of foreign, not international, arbitral awards, but it is evident that the discussion is meant to apply to both types of awards. This lack of distinction between the notion of foreign and international arbitral awards is supported by the formal title of the 1958 New York Convention, infra note 18, which refers to the recognition and enforcement of foreign arbitral awards, although the Convention was intended to be the universal charter of international arbitration. The latest arbitral convention, the 1961 European Convention, however, refers to international arbitration. European Convention On International Commercial Arbitration, Apr. 21, 1961, 484 U.N.T.S. 364, T.I.A.S. No. 7041 (1963-64) (Geneva).

A reading of more recent French judicial opinions relating to international arbitration reveals that contemporary French courts are speaking in terms of international arbitral awards and not foreign awards, again blurring the distinction between the two. Many legal commentators have abandoned efforts to maintain a workable distinction between the two types of awards. In effect, what were referred to formerly as foreign awards are now being categorized as international arbitral awards.

The distinction seems to be of limited utility. It is unlikely to surface in the context of arbitral awards rendered abroad and sought to be enforced in France because the vast majority of such awards involve international commercial interests. The distinction could become more important in circumstances in which a French domestic arbitration and arbitral award involved the interest of international commerce. Here, the liberal regime for international commercial arbitration could apply to this "domestic" award because the subject matter of the arbitration involved the interests of international commerce.

Nevertheless, some French legal scholars have insisted upon maintaining the distinction, despite its lack of practical significance in actual litigation. For an extensive discussion of this distinction, see, e.g., Fragistras, Arbitrage étranger et arbitrage international en droit privé, 49 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ [R.C.D.I.P.] 1 (1960); Fouchard, Quand un arbitrage est-il international, [1970] REVUE DE L’ARBITRAGE [REV. ARB.] 59; Goldman, Les conflits de lois dans l’arbitrage international de droit privé, 1 RECEUIL DES COURS (HAGUE ACAD. INT’L L.) 359 (1963).

10. See generally Carbonneau supra note 8.
tional contracts. The French courts concluded, therefore, that a malleable position, minimizing the reach of domestic public policy requirements relating to arbitration, was indispensable to the advancement of French commercial interests. Judicial inflexibility on this score would have rendered French parties essentially incapable of effectively engaging in foreign trade transactions.\(^1\)

Other factors, pertaining specifically to transactional concerns, may have contributed more directly to making the practice of rendering awards without reasons a necessary and accepted feature of the emerging international arbitral process. Commercial parties may have considered such awards to be a viable means of promoting the efficiency and economy of arbitral proceedings. Unreasoned awards also eliminated the possibility of a review on the merits by national courts, institutions dreaded for their potential parochialism and reputed inability to comprehend the emerging needs of transnational commerce. Given the reasoning which characterized the French case law, however, one suspects that these considerations evolved from, rather than originated with, the practice of unreasoned awards in international arbitration.

As the French court opinions\(^12\) suggest, fortuitous historical circumstances seem to account more properly for the development and prevalence of international awards without reasons. In keeping with the creation of other juridical institutions, U.S. arbitration law and practice at their inception may have relied, unthinkingly and unjustifiably, upon the English example to formulate rules regarding the arbitral award. English practice was inextricably linked to longstanding English distrust of arbitral adjudication and a concomitant tradition of judicial review of the merits of awards; English arbitrators rendered awards without reasons to avoid judicial second-guessing of their determinations. English courts were, as a matter of public policy, steadfastly committed to requiring substantive legal accuracy from arbitral tribunals, and permitted the practice to stand, yet thwarted it indirectly (but effectively) by having recourse to the stated case procedure.\(^13\) That procedure, in effect, allowed the courts to en-

\(^{11}\) Id.


\(^{13}\) The stated case procedure originated with the Common Law Procedure Act, 1854, 17 & 18 Vict., cited in Lord Hacking, The "Stated Case" Abolished: The United Kingdom Arbitration Act of 1979, 14 INT'L L. 95 (1980). This procedure authorized arbitrators to state an award, in whole or in part, to a court as a special case, requesting that the court assess the legal substance of the award. Common Law Procedure Act, 1854, 17 & 18 Vict., ch. 125, § V,
gage in a review on the merits of arbitral awards. Despite attempted reform in 1950, the systemic distrust of the arbitral process and the substantive reviewability of awards continued in England until the enactment of the 1979 Arbitration Act.\(^{14}\)

In the U.S. context, transplanting the procedure of unreasoned awards was both inappropriate and unnecessary; the essential components of the English experience were lacking. Although U.S. courts initially were as skeptical of arbitration as their English counterparts, that attitude was discredited as early as 1925 with the Federal Arbitration Act: legislation symbolizing the coming-of-age of the U.S. arbitral process and the initiation of its autonomous national development.\(^{15}\) Moreover, the United States did not have a historical pattern consecrating the judicial supervision of the merits of awards.\(^{16}\) Nineteenth century U.S. court opposition to arbitration centered upon attacking the validity and enforceability of arbitral agreements, not the substantive correctness of awards.\(^{17}\)

Unreasoned awards served no meaningful purpose in the U.S. arbitral process. Had the practice of unreasoned awards violated the U.S. notion of adjudicatory public policy, some means would have been devised to undermine the practice, as was achieved in England with the creation of the stated case procedure. That, however, did not happen. The inevitable conclusion is that the U.S. incorporation of

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at 978. Although the authority to state a special case resided with the arbitrators, the parties to the arbitration could revoke the arbitrators' discretionary authority in their agreement. Eventually, as the practice surrounding the remedy evolved, this revocation power was eliminated. The special case procedure covered any question of law arising during the arbitral proceeding. In 1922, the Court of Appeal in Czarnikow v. Roth, Schmidt & Co., [1922] 2 K.B. 478 [C.A.], held that the parties could not revoke the court's authority to require the arbitrator to state an award in the form of a special case, thereby eliminating the possibility of excluding judicial review by contract. This ruling was later changed by the Arbitration Act, 1979, 27 & 28 Eliz. 2, ch. 42, § 3(1), to allow the parties to contract away judicial review once arbitration had begun.

The ostensible purpose of the Arbitration Act of 1950, 14 Geo. 6, ch. 27, reprinted in 2 INT'L COM. ARB., Doc. VII, E.1, 129-49 (C. Schmitthoff ed. 1983), was to recognize arbitration as an acceptable alternative adjudicatory procedure. The distinguishing feature of the 1950 Act, which contrasted sharply with its more liberal provisions, was its provision for judicial review of the legal substance of awards. The 1950 Act provided for fairly extensive judicial intervention in the arbitral proceeding and in regard to the award. For example, the Act adopted the stated case procedure, which became the principal mechanism for the judicial review of awards. The statutory procedure included both a "consultative case," applying to requests for judicial guidance made during the arbitral proceeding, and "alternative final awards," applying to the arbitrator's statement of questions at the end of the proceeding.

16. Id.
17. Id.
the English practice was a historical anomaly. It survived because it was transplanted into a total vacuum, and thereafter gained a measure of functional utility by responding to the need of the process for transactional efficiency. The historical rationale underlying the procedure and the motives for its adoption were completely severed from its operational reality.

Given the preeminence of U.S. business interests in the early stages of the development of international commerce, other countries, such as France, may have felt obligated to acquiesce to the established rules of U.S. arbitral practice. The international subservience to the practice of unreasoned awards, based on a sense of expediency, was no more astute than the national adoption of the practice in the United States. No one peered through the veil of acceptance which surrounded the practice of rendering awards without reasons and discovered its underlying gravamen: it was exclusively rooted in the special, indeed unique, circumstances of English domestic arbitral practice. While process factors may have arisen subsequently to validate, to some extent, the initial integration of unreasoned awards in domestic arbitral practice, the incorporation of the procedure into the international arbitral process has been achieved on an unstudied and therefore most questionable basis; hence, both its theoretical and practical utility in that context must be reconsidered.

There has been some significant contemporary evolution in precisely that direction. Although the 1958 New York Convention is silent on the question of whether awards should be reasoned, the 1961 European Convention and the United Nations Commission on International Trade and Law (UNCITRAL) rules establish a pre-
assumption favoring the rendering of awards with reasons. This presumption, which can be defeated only by an express party agreement to the contrary, has a number of evident advantages. First, it gives the process a true adjudicatory character, making arbitration in yet another respect the equivalent of judicial proceedings. Second, it guarantees that the parties will have a statement explaining the tribunal’s ultimate determination. If there is subsequent, albeit limited, judicial confirmation of the merits of awards, the parties also are assured that their award has complied with a minimum standard of substantive due process. Third, although commercial customs and trade usages usually influence the application of law in arbitral proceedings, the practice of rendering awards with reasons works in tandem with the general procedural mandate that arbitral tribunals make decisions in accord with substantive rules of law.

These factors may point to a fourth reason coinciding with, yet transcending in importance, the foregoing three reasons that justify adoption of such a practice. To develop creatively, arbitration must maintain its preferred remedial status while improving its ability to generate substantive international commercial law norms. To avoid the pitfall of transforming arbitration into the equivalent of adjudication before national courts, and at the same time to gain the full benefit of the consensus surrounding arbitration as a remedial alternative to judicial adjudication, arbitral decisional law based on a form of transnational stare decisis must emerge. Such arbitral decisional law would satisfy a quest for further stabilization in the international commercial community. Professor Cremades’ analysis attests to the fact that current arbitral practice already has presaged such a development:

[I]t is fair to say that arbitral decision-making has introduced a new commercial ethic into the international business community. The constant flow of arbitration awards is nourishing a new legal order that is born of, and particularly suited to, regulating world business. Trade usages and custom, as well as professional regulations, will attain the status of law as they become embodied in arbitral decision making.21

are to be given.” The rules are reprinted in 1 INTERNATIONAL COMMERCIAL ARBITRATION Doc. I.10, at 181, 195 (C. Schmitthoff ed. 1983); see also 2 Y.B. COM. ARB. 161, 168 (1977).

II. The Results Achieved with Reasoned Awards in Actual Practice

A. Maritime Arbitration

A practice of rendering awards with reasons, to some degree, has already emerged in one specialized area of international trade: maritime arbitration. The customary practice in maritime arbitration is to render reasoned awards that have a recognized precedential value.\(^2\) The maritime industry functions on basically standardized contracts that need uniform construction in order to insure some measure of predictability for industry transactions. Once rendered, the awards are published, which reinforces the stature of awards as applicable precedents. Since there is basic agreement that the industry’s need for transactional predictability and stability can be achieved through uniform arbitral interpretation by a cohesive corps of expert arbitrators, there is little, if any, need for recourse to the judicial review of the merits of the awards.

While the perimeters of the present study permit drawing only tentative conclusions, a perusal of published maritime arbitral awards indicates that there is a high degree of substantive adjudicatory uniformity on major issues which typically arise in maritime litigation. Moreover, although maritime arbitral decisional law is built around a nucleus of specialized conventional transactions, it nonetheless reveals that international traders do favor, or at least accept, a system of alternate dispute resolution which yields principled rules and achieves greater substantive predictability. It also illustrates that as the transactional setting becomes more formalized, the resort to the remedial process begins to generate norms which, under the aegis of the more structured transactional format, are suitable for systematic adjudicatory application. Finally, despite minority positions and variations in the content of some awards (inconsistencies which are characteristic of any form of adjudication), reasoned arbitral adjudication in the maritime area has resulted in the elaboration of meaningful legal principles for dealing with the disputes that accompany the breakdown of contractual relationships.\(^3\)

B. International Chamber of Commerce Arbitration

Because its processes touch upon a wider variety of commercial disputes, International Chamber of Commerce (ICC) institutional ar-

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\(^3\) For a comprehensive survey of the maritime arbitral decisional law, see Society Maritime Arbitrators, Award Service (Multivolume series).
bitration is more directly relevant to the present considerations. The ICC experience reveals that transactional standardization, similar to that which has occurred in the maritime field, also exists in other areas of international trade. There are, for example, form contracts for joint venture dealings, licensing agreements, and turn-key construction operations. The process of institutional arbitration which provides a remedy for the generality of international commercial disputes, additionally affords the possibility of uniform substantive adjudication which undoubtedly would enhance the stability of those transactions that make up international trade.

The ICC Rules of Arbitration\(^\text{24}\) are silent with respect to whether reasoned awards should be rendered or published. Available reports on ICC awards, however, indicate that reasoned awards are not at all uncommon in actual ICC practice. Many of these awards are being published on a regular basis, either in full or in extract form, as part of a continuing commentary in the Journal du Droit International.\(^\text{25}\)


\(^{25}\) See Cour d'arbitrage de la Chambre de commerce internationale chronique des sentences arbitrales, 104 JOURNAL DU DROIT INTERNATIONAL—CLUNET 977 (Derains rep. 1978) [105 CLUNET]; Cour d'arbitrage de la Chambre de commerce internationale chronique des sentences arbitrales, 105 JOURNAL DU DROIT INTERNATIONAL—CLUNET 978 (Derains rep. 1979) [106 CLUNET]; Cour d'arbitrage de la Chambre de commerce internationale chronique des sentences arbitrales, 106 JOURNAL DU DROIT INTERNATIONAL—CLUNET 979 (Derains rep. 1980) [107 CLUNET]; Cour d'arbitrage de la Chambre de commerce internationale chronique des sentences arbitrales, 107 JOURNAL DU DROIT INTERNATIONAL—CLUNET 980 (Derains rep. 1981) [108 CLUNET]; Cour d'arbitrage de la Chambre de commerce internationale chronique des sentences arbitrales, 108 JOURNAL DU DROIT INTERNATIONAL—CLUNET 981 (Derains rep. 1982) [109 CLUNET]; Cour d'arbitrage de la Chambre de commerce internationale chronique des sentences arbitrales, 109 JOURNAL DU DROIT INTERNATIONAL—CLUNET 982 (Derains rep. 1983) [110 CLUNET].

According to the former Secretary General of the ICC Court of Arbitration, Yves Derains, the ICC selects for publication "[o]nly those awards in which arbitrators have felt least constrained to apply national law." 104 CLUNET, supra, at 874, 876. In his inaugural introduction to the publication of the ICC award, Derains added the following caveats: that awards are published with the permission of the parties who determine the extent of editing; that the ICC does not require its arbitrators to look to precedent; and that ICC arbitrators, as a rule, are not aware of prior arbitral awards. \textit{Id.}

Moreover, according to Craig, Park and Paulsson, ICC awards "invariably state reasons." This allows the parties and the ICC Court of Arbitration "to appraise the thoroughness of the arbitrators' treatment of the issues." There also appears to be a number of factors which encourage a wide diversity in the form and content of ICC awards, such as the background of
Although a full account of the reasoned ICC awards merits a separate study, a preliminary examination of the substance of the awards rendered during the last ten years reveals that a group of core principles is beginning to take shape. While the emergence of these principles conceivably stems from a variety of sources and factors, such as their presence and predominance in domestic commercial laws, their development as legal concepts applicable to the regulation of international commercial relationships can be attributed in large measure to reasoned ICC arbitral adjudication. Again, despite some variations, the substance of ICC awards is basically consistent.

1. Good Faith

A common law of international contracts, with very definite contours, is beginning to appear. This body of law consists of three different sets of rules: universally acknowledged, natural-law-type principles; national legal principles adapted to international commercial practices; and more sui generis principles which mirror the pragmatic ethic of the community of international merchants. ICC awards, for example, hold that parties to international commercial contracts are under a good faith obligation in their dealings. These awards further establish that the good faith obligation implies other duties: the duty to inform the other party of circumstances which might threaten performance of the contract; the duty to renegotiate the contract in order to salvage the commercial relationship if circumstances permit; and the duty to mitigate damages in the event of a breach.26

Commercial parties cannot act to the detriment of the other party without incurring liability in arbitral proceedings. Parties also

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26. See, e.g., 103 CLUNET, supra note 25, Sentence No. 2291, at 989; 101 CLUNET, supra note 25, Sentence No. 2103, at 902; 102 CLUNET, supra note 25, Sentence No. 2216, at 917; 102 CLUNET, supra note 25, Sentence No. 2478, at 923; 102 CLUNET, supra note 25, Sentence No. 2139, at 929; 109 CLUNET, supra note 25, Sentence No. 3344, at 978.
must act with due diligence in the performance of their obligations. ICC arbitrators consider the good faith obligation as part of international commercial usages. They apply it as a matter of law in all proceedings. The view that good faith is a central element of cohesion in the operation of international commerce is supported by the generality of international arbitral awards and the accompanying scholarly commentary, most notably by Professor Cremades:

Arbitral decision-making has developed good faith as an overriding rule of international contracting. The international business community shares a common desire to increase its field of activity and good faith is the cohesive element that makes the achievement of such an end possible. It demands an acceptance of the rules of the game by which international commerce is played. It is the *modus vivendi* that requires a debtor and creditor to work as partners rather than as adversaries. Good faith is a regulatory norm through which arbitrators apply equitable principles as the supreme rule of contractual interpretation.

The good faith obligation represents a broad legal principle that is recognized in most advanced legal systems. Few are likely to argue that good faith should not apply to contractual conduct. The statement of such a duty in ICC arbitral awards, however, is neither meaningless nor gratuitous. While the content of the rule is not new or special, it does have considerable importance in the dynamics of the system in which it operates. Good faith, as understood by international merchants for the special purposes of their activity, now formally applies, as a matter of law, at the transnational level, a domain of activity which previously was considered at worst to be without law and at best to be governed by legal provisions suited to domestic needs. The statement of the rule formally embodies a "new ethic in international business," the expression of a tacit understanding of the community of international merchants, without reference to national laws, as to how their specific relations should be conducted.

A broad parallel can be drawn between the statement of these general obligations in the area of international commerce and the interrelationship of codes and decisional law in civil law jurisdictions. To some extent, these obligations amount to a code of conduct for international business transactions, awaiting refinement through more

27. See, e.g., 103 CLUNET, *supra* note 25, Sentence No. 2291, at 989.
29. Id. at 526.
detailed application in the specific content of arbitral cases. They pro-
vide, at the very least, an organized substantive framework for initiat-
ing principled adjudication which might yield more specific, fact-
bound rules in particular cases.

2. Mitigation of Damages

The statement and application of the duty to mitigate damages
points to other considerations. The mitigation concept is not formally
recognized in some legal systems, although strong arguments can be
made that it at least has an implied or indirect presence in these sys-
tems. While the duty to mitigate may not have the same universal
status as the good faith obligation, it is a commonly adhered to legal
principle. The contribution of reasoned ICC arbitral adjudication is
that, for purposes of international commerce, it eliminates any confu-
sion which might arise from the ambiguous domestic status of the
concept, especially in the event that arbitrators are bound by a domes-
tic law which does not expressly recognize the duty. In this sense, the
reasoned basis of ICC awards transcends the possibly conflicting sub-
stance of national legal systems and elaborates an appropriate and un-
ambiguous rule for international commercial transactions.

3. Renegotiation

The duty to renegotiate represents yet a third level of rule elab-

31. According to the relevant sources, the duty of parties engaged in an international
contract to undertake the renegotiation of an agreement (the performance of which is jeopard-
ized by dispute) is anchored in the umbrella concept of good faith. See 103 Clunet, supra
note 25, Sentence No. 2291, at 990 (citing Horsmans & Verwilghen, Conclusion Stabilité et
Évolution du Contrat économique international, in Centre Charles De Visscher Pour Le
Droit International, Le Contrat Économique International Stabilité Et
Évolution 449, 466-67 (1975)).

The obligation incumbent upon contracting parties to act according to the dictates of
good faith in confecting and executing their agreement is recognized as a fundamental provi-
sion of the “code” which regulates private international economic conduct. For instance, it
mandates that parties cooperate in the performance of the contract so as not to imperil their
mutual interests which led them originally to enter into the agreement. As a consequence,
whenever circumstances (such as changes in general market conditions relating to demand,
price, or currency value) disrupt performance, parties have a duty to undertake reasonable
efforts to achieve a renegotiation of the agreement before pursuing more formal dispute resolu-
tion mechanisms. The tribunal in Sentence No. 2291, supra, states that the duty to renegotiate
has become a customary principle of private international economic relations, further noting
that parties must deploy “normal, useful, and reasonable” diligence in the protection of their
interests. For example, in the event that the performance of a contract is disturbed, parties—
though at the risk of breaching their good faith obligation to make a reasonable attempt at
renegotiation—should not make “hasty and ill-conceived” offers which would unfairly surprise
the other party. Horsmans and Verwilghen, supra, go further in the conceptualization of the
obligation. Seeing pragmatic cooperation as applicable to all stages of the transaction, they
oration. Unlike the duty to notify the other party of adverse circumstances which might threaten performance, it cannot be linked as directly to the bona fides principle; in contrast to the mitigation concept, it is not an express part of some national juridical cultures. In the context of ICC awards, the duty to renegotiate has been advanced as a general obligation which inheres in international economic relations. The recognition and application of the concept, therefore, represents neither the integration of universal principles nor distillation of national legal rules. Rather, it is a legal rule specifically designed for, and responding to, the needs and patterns of conduct that are prevalent in the community of international merchants. The duty to renegotiate, derived from international arbitrators' perception of the particular demands and requirements of private international eco-

argue that the joining of good faith with attempts at renegotiation in the context of a breakdown of performance requires that the parties approach such problems with the view that the conflicts between them should be resolved by fashioning a dialogue that will lead to the creative and effective resolution of disputes. In a word, the duty to renegotiate requires parties to engage in meaningful practical attempts to salvage the transaction in an arms-length atmosphere.

The description of the duty to renegotiate and its association to the good faith obligation leave a number of questions unanswered. Although good faith is at the core of the common law of international transactions, its precise status and role are difficult to conceptualize. Does acting in one's economic self-interest, for example, by taking advantage of the evolution of circumstances amount to bad faith? If so, does it constitute bad faith in each and every instance? Assume a situation in which A orders 500 factory parts from B and B delivers 495 parts. During the interval between ordering and delivery, the price of the parts goes down considerably and A can obtain them from other sources at the reduced price. Would A's rejection of the contract for B's defective performance constitute a breach of A's good faith obligation? Of its duty to reasonably attempt renegotiation? Should these parties or one of them be allowed to invoke arbitration pursuant to a valid agreement without first attempting renegotiation? Would the failure to make a reasonable attempt at renegotiation constitute a failure to exhaust available mandatory remedies? In the context of an arbitral proceeding, how would the tribunal sanction a failure to attempt renegotiation? If no sanction is imposed, does that mean that the duty to renegotiate is unenforceable in the context of binding adjudication and therefore is not a duty at all? Finally, how do good faith and the duty to renegotiate fit into the view espoused by the arbitral decisional law that pacta sunt servanda and the strict adherence to contract terms are cardinal principles of international economic relations?

Answers to these questions can only be adumbrated. At a preliminary level, it should be underscored that the consensus and ethical givens of international commercial conduct should provide significant guidance to the resolution of such issues. Moreover, the good faith obligation and the duty to renegotiate apply primarily to the informal and conciliatory phase of the dispute resolution process largely controlled by the parties and preceding binding arbitral adjudication by third parties. Once arbitration is invoked, different or modified rules motivated by larger policy and systemic considerations, such as the need to maintain the stability and predictability of transactions, may apply. Although a precise resolution of the issues raised is unavailable given the current status of arbitral decisional law, the very existence of so many unanswered questions forcefully indicates that the practice of rendering awards with reasons needs to become a basic feature of current international arbitral practice. The substance of such awards may be the only means of effectively articulating and elaborating the basic rules of international commercial relations.

32. 103 CLUNET, supra note 25, Sentence No. 2291, at 989-90.
nomic relations as gauged by their general sense of legality and equity, reflects the most innovative feature of rule creation under ICC arbitral adjudication and perhaps the most authentic part of the emerging *lex mercatoria* (law governing commercial transactions).

4. Other Rules

ICC awards have yielded other rules to deal with issues that traditionally arise in international commercial litigation. These rules generally refine the application of the more broad-gauged principles. The classical and interrelated doctrines of *pacta sunt servanda* (agreements of the parties must be observed), *rebus sic stantibus* (obligations end when the underlying facts are substantially changed) and *force majeure* (irresistible force), for example, are often germane to the adjudication of disputes arising under international commercial contracts. In ICC awards, issues have surfaced especially in regard to the effect of a change in circumstances upon existing contractual obligations, that is, whether a turn of events, for example, amounts to circumstances of *force majeure* and excuses the parties from any or further performance.

In the relevant awards, the basic approach adopted by ICC arbitrators has been to attribute a dominant impact to *pacta sunt servanda*, emphasizing the sanctity of contracts, and to minimize the applicability of *rebus sic stantibus*. This approach can be explained by certain presumptions that ICC arbitrators derive from their reading of the dynamics of international commercial transactions and then integrate into their reasoning. First, the arbitrators presume that parties engaged in international contracts are knowledgeable about their transactions and are aware of the risks such transactions present. Accordingly, parties are expected to include hardship, adaptation, or indexation clauses in their contracts to anticipate possible variations in circumstances during performance. Given the parties' professional sophistication as international merchants, ICC arbitrators interpret party silence about possible future contingencies as a conscious decision to assume the risk of such eventualities.

In keeping with this approach, ICC arbitrators have taken a rather restrictive view of *force majeure* as an excuse for performance. International commercial parties often include *force majeure*
clauses in their contracts precisely to deal with significant changes in circumstances which modify or impair the economic value or feasibility of the obligations under their agreement. Some of these clauses simply amount to a general statement that a force majeure event will excuse performance, leaving the definition of force majeure for subsequent determination by an adjudicatory body. Many of these clauses, however, are slightly more sophisticated. Usually, a clause contains an enumeration of events which the parties agree will constitute instances of force majeure. The central question of adjudication remains definitional, but is focused more specifically upon whether the enumerated list of events is exhaustive or merely illustrative.

Rather than refer to national legal rules or those which may apply to the merits of the dispute, ICC arbitrators rule on force majeure claims according to general legal principles and the will of the parties. In ICC arbitrations, the force majeure doctrine functions as part of a generally applicable body of international commercial law principles. Given the well-established character of the doctrine in most legal systems and its direct relevance to transnational commercial ventures, there is little doubt that it should figure as an established part of the evolving lex mercatoria. ICC arbitrators have assumed a stringent and rigorous posture on force majeure questions. Unlike French-Canadian courts, ICC arbitrators require that all of the traditional elements of the doctrine be satisfied in order to trigger its application, namely, that the event in question be unforeseeable, irresistible, and external to the party invoking the defense. For example, in some ICC awards, arbitrators have ruled that fluctuations in exchange controls do not constitute force majeure because the controls (and, presumably, the possibility that they would fluctuate) existed at the time the contract was made; consequently, the fluctuations were neither irresistible nor unforeseeable.

Such determinations reflect ICC arbitrators' commitment to the pacta sunt servanda doctrine and the presumption that international commercial parties are aware of the risks involved in transactions. An overly flexible approach might destabilize transactions by making performance less predictable. As a matter of commercial usage, contracting parties should have the foresight to provide for appropriate

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36. See supra note 35.
37. See Azard, La force majeure délictuelle et contractuelle dans le droit civil québécois, 25 Revue Du Barreau 357 (1965); see also Arbitral Adjudication, supra note 2, at 105-09.
38. See, e.g., 107 CLUNET, supra note 25, Sentence No. 3093/3100, at 951.
contractual stipulations against the usual hazards of international trading. It seems that, under ICC arbitral adjudication, events disruptive of the performance of a contract will constitute force majeure only when they render that performance absolutely impossible. Even in circumstances found to amount to force majeure, the existence of the defense will not necessarily excuse the invoking party from performance; rather, the usual effect of a finding of force majeure is to suspend temporarily the performance of the contractual obligation during the existence of the event.\textsuperscript{39} This rule contrasts sharply with national courts' usual solution to the same question,\textsuperscript{40} and illustrates that ICC arbitrators have adapted the rule to the exigencies of international trade.

In addition to rulings pertaining to the arbitral process itself (for example, the jurisdictional authority of the tribunal, the rules of interpretation regarding the arbitration clause, and the standing of the State to arbitrate),\textsuperscript{41} ICC awards have articulated rules relating to situations involving defective consent, unilateral rescission, and the measurement of damages.\textsuperscript{42} On these matters, the reasoning is consistent with the elaboration of the other rules and incorporates the presumptions applying to international commercial parties.

5. Stature of the Rules

Skeptics of the process might argue that the authoritative basis of this would-be ICC arbitral decisional law is too limited to allow for the elaboration of comprehensive norms; this law merely reflects what ICC arbitrators think are necessary rules in international commerce. Moreover, it might be argued that giving arbitrators such discretion in elaborating rules is fraught with potential difficulties (including possibly unjustified departures from the would-be established rules). ICC arbitration, however, is one of the most effective and most often used forms of institutional arbitration in the international area,\textsuperscript{43} given the status of ICC arbitration, the norms elaborated above probably reflect the inception of a majority trend rather than a set of rules founded upon a questionable predicate. The fact that awards have been so consistent and predictable in the statement of these basic prin-

\textsuperscript{39} 101 CLUNET, supra note 25, Sentence No. 1703, at 894.
\textsuperscript{40} See Azard supra note 37.
\textsuperscript{41} See, e.g., 103 CLUNET, supra note 25, Sentence No. 1434, at 978; 103 CLUNET, supra note 25, Sentence No. 2531, at 997; 105 CLUNET, supra note 25, Sentence No. 1704, at 977; 109 CLUNET, supra note 25, Sentence No. 3281, at 990.
\textsuperscript{42} See, e.g., 101 CLUNET, supra note 25, Sentence No. 1990, at 897; 101 CLUNET, supra note 25, Sentence No. 2103, at 902; 102 CLUNET, supra note 25, Sentence No. 2216, at 917; 102 CLUNET, supra note 25, Sentence No. 2139, at 929.
\textsuperscript{43} See W. CRAIG, W. PARK & J. PAULSSON supra note 24.
ciples should minimize apprehension regarding possible arbitrator deviance and irregularity.

In international arbitration, the key to successful implementation, either as to procedure or substance, always has been, and continues to be, anchoring the determination in a consensus, which in turn is founded upon an understanding of the needs of the community of international merchants. ICC arbitrators are well aware of the process and appear to read its needs accurately. ICC arbitral law would be valid at least for advanced Western commercial parties who regularly submit to ICC arbitration, and there are indications that an even wider group of commercial parties are referring to and invoking ICC arbitration.

The existence or desirability of this emerging arbitral law is not being questioned. The main source of concern, rather, centers upon a more technical consideration, namely, the implications of the elaboration of these substantive rules upon the jurisdictional authority of international arbitrators. Does it imply that they all rule, at least to some extent, as amiables compositeurs (arbitrators authorized to abate the strictness of the law in favor of natural equity), a status which allows them to disregard both substantive and procedural legal rules if they so choose, except those having a public policy character, and to resolve the dispute according to equitable considerations or according to their own convictions? If so, what would happen to the arbitrators' rule-making authority if the parties specifically provided that the arbitral tribunal was not to rule in amiable composition?44

These questions undeniably raise significant issues, but a fully comprehensive answer requires a review of current arbitral decisional law outside the scope of this article. A partial response, however, exists in the consideration of the effects of an agreement to submit disputes to international institutional arbitration. For instance, it could be argued that the jurisdictional authority of the arbitral tribunal under such an agreement arises simultaneously from the given terms of reference and the institution which holds the arbitration as well as the context in which the arbitration takes place. The parties' engage-

44. Id.

ment in a transnational commercial venture and invocation of the international arbitral process constitute an implied submission to the law which governs all transnational commercial ventures.

The application of any law designated by the parties must be tempered, as a matter of usual practice, by reference to commercial usage, which now is being progressively formalized into the basic tenets of the *lex mercatoria*. In any given international arbitration, the arbitrators can modify provisions of the governing law and adapt them to the particular contours of international transactions. In brief, the parties' agreement to arbitrate disputes arising under an international contract implies that, in addition to any other specific provisions stipulated by the parties, the general commercial practices of the community of international merchants will apply to the resolution of disputes. This implied jurisdictional authority, to invoke Professor David's remark regarding the evolution of international arbitration generally, is neither *amicable composition* properly speaking nor a ruling according to law in its usual acceptation; rather, it demonstrates that a specially-created, innovative, and substantive adjudicatory basis applies in the area of international arbitration.

III. ADVOCATING THE ADOPTION OF REASONED AWARDS

A. Preliminary Observations

The following argument needs to be considered in the context of a number of preliminary observations. First, reasoned international arbitral awards would provide a better basis for the elaboration of a common law of international transactions than national court decisions for the same reasons that made arbitration the premier remedy for transnational commercial disputes. Arbitral tribunals are neutral with respect to domestic legal traditions and interests; they are usually guided by the rules of international centers for institutional arbitration. They have a true, albeit private and unofficial, international stature. Ordinarily, these tribunals refer to trade usages and customs and apply the governing law flexibly with reference to commercial practices. Expertly qualified adjudicators can adapt general legal principles more readily to complex commercial realities than judges, who by their training and experience may attach more importance to doctrinal considerations in the application of the law.46

Second, the recommendation that follows regarding the render-

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46. The advantages derived from flexibility, expertise and pragmatism may be lessened by the fact that arbitral tribunals may not have a sense of their own international and precedential stature. Arbitrators may be more concerned with reaching a resolution of the particular dispute before them. Such an attitude, however, is not necessarily absent from judicial...
ing of awards with reasons is made merely in a preliminary fashion and at a general, systemic level. A conclusive view on this issue would require a comprehensive study of all the available awards, which is properly the subject of further research. Pending definitive empirical research, a practice of reasoned awards at the transnational level is a logical outgrowth of the comparative domestic and international development of arbitral law, and a potentially fruitful means by which to derive substantive norms for international contract law without compromising the remedial effectiveness of the arbitral process.

B. The Substance of the Recommendation

The perception of arbitration as a fundamentally consensual and private process of adjudication dominated by the principle of party autonomy militates against formulating a mandatory requirement of reasoned awards. The presumptive approach (favoring though not requiring reasoned awards) adopted in both the European Convention and the UNCITRAL rules may be the strongest statement that should be made in this regard.47 The viability of arbitration essentially resides in a type of transnational pragmatism and cooperation. Given that attitude, a less than mandatory rule for reasoned awards would be sensible since it would not impede (but would also not compel) the articulation of the basic substance of a *lex mercatoria* if such an objective were in the interests of the international commercial community.49

If the presumptive rule of rendering international awards with reasons is adopted, the enforcement of such awards by national courts might mean that these courts would give their approval not only to the procedure which gave rise to the award and the arbitrability of its subject matter, but also to the reasoning the award contains on its merits. The latter facet of the enforcement process certainly would not make a full review on the merits necessary; merits supervision

rulings, and the dictates of proper adjudication may require a larger perspective on the part of the arbitral tribunals.

47. Moreover, the recommendation as to reasoned awards is made with an eye to the realities of international practice in this area. International arbitrations usually are conducted with sophisticated legal representation on both sides. Many of the legal counsel involved are trained in the common law tradition, and civilian attorneys are familiar with the concept of *une jurisprudence établie ou constante*. In all likelihood, the practice of rendering awards with reasons (reasons that are generally consistent with prior adjudicatory determinations) would mirror the way in which the case has been presented to the arbitral tribunal. This approach (which applies in contemporary practice) has not made international arbitration any less desirable as an alternative dispute resolution process.

48. See *Arbitral Adjudication*, supra note 2, at 103.

49. *Id.*
could be achieved on grounds akin to the flexible procedural review that currently applies. Moreover, validation of the awards by national courts in enforcement proceedings would provide greater precedential value in subsequent arbitrations. As Professor Cremades states, "[t]rade usage and custom, as interpreted in arbitration awards, have had the effect of law because such awards are judicially enforceable." Similar to the consensus on arbitration as a transnational remedy, the support of national legal systems would legitimate the emerging rules. A more dramatic process, such as an international commercial court which reviews the reasoning in arbitral awards, would be impractical and self-defeating, given the attendant jurisdictional problems and the experience with such institutions in the public international law sector. Moreover, the creation of such a separate, supra-national administrative apparatus might make transnational arbitration less attractive as a remedial process.

A system of reasoned awards would go far in harmonizing and unifying the law in a given and special area of activity. It also would create a substantive analogue to the special procedural regime applied to international arbitration and thereby further "a-nationalize" the process. Finally, such a system would illustrate the full value of the comparative methodology by establishing a transnational legal regime for commercial dealings.

IV. A Critical Evaluation of the Recommendation

A. Arguments Against Reasoned Awards

A number of arguments can be made against the rendering of awards with reasons. In addition to the historical factors which fostered the contrary practice, the rendering of such awards might prolong arbitral proceedings and increase their costs. Moreover, the proposed practice might exceed or even contravene the expectations of the parties who might only want to obtain a disposition of their case rather than a court-like ruling on the matter. The principle of party autonomy, however, seems to obviate the possibility of such negative consequences. Since the proposed regime would create only a presumption that awards be rendered with reasons, the parties could always defeat that presumption by stipulating in their agreement to the contrary.

As applied in these circumstances, however, the party autonomy rule raises other problems. First, it presumes that the parties can

50. Cremades, supra note 21, at 534.
51. Id. at 533-34.
52. See Arbitral Adjudication, supra note 2, at 40-41.
agree, either at the time of contracting or during the arbitral proceeding, that reasons be excluded from the eventual award. Adding an area of possible disagreement to the process could encourage the use of dilatory tactics and ultimately undermine its viability. Second, allowing for party prerogative (a necessary and irreducible feature of arbitration) leaves the emergence and evolution of the lex mercatoria through reasoned awards to the discretion, whim and invention of the contracting parties. What should happen if a significant number of arbitration clauses exclude awards with reasons, and the remainder provide for the exclusive application of a domestic law or laws? Since the norms which might result from the process would be unpredictable, confused and incomplete, the so-called common law of international transactions would amount to a negligible body of ill-defined and improperly established legal principles.

Other problems of implementation which are more practical in nature can be anticipated. One of the salient problems centers upon the creation of a system for reporting reasoned awards. Can or should an appropriate clearinghouse reporter be established? In what form and under whose authority? The gathering, systematizing and availability of reasoned awards obviously is critical to the possible decisional law value of these awards. Systematic organization, however, may give too much structure to a process which has flourished in a looser and more decentralized framework. More importantly, the need for collecting and disseminating reasoned awards ultimately could come into conflict with the parties' desire to maintain the confidentiality of the arbitral process, a facet of the process which presumably attracts many parties involved in international commercial ventures. Although a system of anonymous reporting could be established, the characteristics of the transaction as described in the award might reveal the identity of the parties. Ultimately, the parties' refusal to have their award published would be controlling.

Assuming that a significant number of awards could be collected and released for publication, should all awards be reported or should a process of qualitative selection preclude some or many awards from being reported? Would some awards be reported in full, while others are included only in extract fashion, and yet others simply summarized? Who would make these potentially critical editorial decisions and from where would an organization or person derive its authority? Selective reporting of awards or the existence of unreported awards also might give rise to other issues. What status should an arbitral tribunal, empowered in a given case to render a reasoned award according to the principles of the emerging arbitral lex mercatoria, attribute to an award which is submitted by a party as relevant to the
determination of the matter under consideration, but which either has not been or is only partially reported? Should potential sources of the emerging *lex mercatoria* be recognized if they fall outside the established system of reported awards?

Since there are as yet no comprehensive or well-established statutes regulating international commerce, reasoned awards may serve no useful purpose in the international context. In fact, they may inhibit arbitral determinations and modify negatively and unjustifiably the way in which international arbitrators rule. Moreover, the consensus position surrounding a given legal principle may vary from case to case, with arbitrators referring to the particular facts of the given dispute to disregard the otherwise applicable legal principle. Finally, even if principles were to emerge and be recognized, they may be of such general character that they would have been acknowledged as applicable rules without being codified in arbitral decisions.

Another possible issue of contention concerns the need for and scope of judicial review. Domestic judicial confirmation of the substance of reasoned awards undoubtedly would confer a measure of legitimacy to substantive international arbitral adjudication and possibly would enhance the persuasive effect of the awards. Essentially, this domestic judicial function would parallel the role that national courts have played, principally under the 1958 New York Convention, in validating arbitration as a procedural process for the resolution of international commercial disputes. Substantive arbitral determinations would be anchored, to some extent, in the binding jurisdictional authority of domestic legal systems.

A number of basic objections can be levied at this aspect of the proposal. First, regarding the more practical problems of implementation, if judicial review is deemed imperative, should it be the equivalent of an ordinary appeal on a question of law? Or should it be tantamount to a full de novo review covering both questions of fact and law? If the arbitral tribunal rules in equity, would that eliminate any possibility of substantive judicial recourse or could the court review the award on the basis of its equitable adjudicatory powers? What if the arbitrators rule primarily according to commercial customs and trade usages, matters in which they are particularly expert? Would a court of law have the necessary expertise to deal with such an award? If arbitral precedents were binding, what would be the result if the arbitral tribunal inadvertently failed to apply or consider a given precedent, deliberately disregarded it under its equitable adjudicatory powers, or erroneously interpreted the prior ruling? Finally, would substantive judicial review be exercised in the rendering state
by an action to set aside or would review be available solely in the state of enforcement?

Second, the concept of judicial supervision of the merits of awards is so antithetical to current perceptions of the international (or even domestic) arbitral process (especially in France and the United States) that the mere possibility of having even a limited form of judicial supervision could be viewed as completely undesirable. The apprehension is that, once such a process is initiated, it may grow, eventually resulting in much more judicial supervision of the merits, and ultimately abrogate the viability of arbitration.

Further, if a parallel to the procedural regime under the New York Convention applies, would domestic courts be willing to engage in a substantive form of review that is basically cosmetic and perfunctory except in the most egregious of cases? Courts might feel that procedural and substantive approval of international arbitral awards are two entirely different matters, that substantive affirmation implicates their dignity and that of the national legal system, and that no international convention suggests, mandates or legitimates such a potentially compromising acquiescence. Given the current international consensus surrounding commercial arbitration, national courts probably would not see review on the merits of reasoned international arbitral awards as an open invitation to undermine an established and very workable institution of private international commerce. The real difficulty lies precisely in the national courts' perception of the systemic implications underlying the substantive approval of awards.

Finally, there is the problem of coordinating the possible elaboration of substantive norms through reasoned awards with international efforts aimed at codifying principles of international law in international agreements. The recent Vienna Convention on the international law of sales represents just such an attempt. What if a reasoned award or a series of them conflicts with, seems to deviate from, or proposes some modification of a legal principle contained in an international instrument on substantive law which has been ratified by a majority of states prior to the rendering of the award? Such a situation would likely impede rather than promote the development of the lex mercatoria. The law governing international transactions, then, would be anchored in an unruly and chaotic base.

53. Id. at 45-61, 65-84.
B. Arguments Favoring Reasoned Awards

After cataloguing all of these potential woes, one is tempted to abandon any suggestion that the process of international commercial arbitration be modified even slightly to achieve its normative potential. In fact, given these potential problems, one wonders whether the attempt to generate substantive arbitral norms is at all desirable, whether it would not cause more problems than it solves, and whether tinkering with present procedures in this fashion might not result in irreparable damage to the current integrity of the process. Despite these misgivings, strong reasons exist to espouse a more balanced view of the utility of reasoned awards in the current system.

1. The Needs of the International Process

In contradistinction to domestic U.S. arbitral practice where, for example, the American Arbitration Association (AAA) encourages arbitrators to render, and the parties to agree to, awards without reasons,\(^5\) there is a greater need to instill a level of substantive predictability in international commercial transactions. Parties to international contracts agree to arbitrate for a number of reasons; primary among them is the avoidance of local procedural rules or the substantive law of either contracting party. Unfamiliarity with foreign law and the unfair advantage which can be anticipated from the application of domestic procedures calls for a neutralization of the entire dispute resolution process. In the private international setting, the parties' desire is not to be outside the law, but rather to be governed by substantive and procedural provisions which are free of national bias and which are molded to the particular features of their sui generis commercial relationship.

In this sense, the dispute resolution needs of commercial parties in the international area differ quite markedly from the needs of their domestic counterparts. Parties engaged in purely domestic commercial transactions seek expert adjudicators, an economical and expeditious way in which to terminate their conflict, and a system that avoids what appears to be a costly and frustrating legal morass. Their need for an alternate dispute resolution mechanism is not grounded primarily in a concern for neutrality or in a perception that the application of an alien law will result in unfairness. They simply want a

56. Interview with Professor Suman Naresh, Arbitrator for the American Arbitration Association, in New Orleans, Louisiana (July 7, 1984); see also AMERICAN ARBITRATION ASSOCIATION, A MANUAL FOR COMMERCIAL ARBITRATORS (1959). “Arbitrators are not required to write opinions explaining reasons for their decisions. . . . [One] reason . . . is that written opinions might open avenues for attack on the award by the losing party.” Id. at 23.
better (in the sense of quicker, less costly and more commercially realistic) way of dealing with disputes. In fact, the domestic law already provides, and the parties expect to be governed by, a sophisticated and adapted body of rules by which to regulate commercial relationships.

International merchants, on the other hand, need not only a process, but ultimately also a body of stable and increasingly refined legal principles which properly regulates their specific types of transactions. A fully viable process of alternate dispute resolution must accommodate this two-fold adjudicatory need for neutrality. In this regard, the substance of article 1496 of the French Decree of May 12, 1981,57 perhaps best expresses the distinctive requirements of the international arbitral process when that process is compared to its domestic analogue. Article 1496 provides that international arbitrators must apply the substantive law chosen by the parties and, absent a party choice, those substantive legal rules they deem appropriate. The provision concludes by stating that, regardless of who makes the choice or what choice is made, the arbitrators must take commercial usage into account in applying the relevant law.

Under this regime, the parties have basically unlimited discretion in choosing a governing law: they can select a given national law, freeze its provisions at a particular time, exclude some of its content, combine it with the substance of another national law, or even invent their own rules. When the parties have not exercised their prerogative, the arbitrators conceivably could do the same. The important point here is that any application of substantive legal rules must be tempered by reference to commercial usage, a factor which allows the arbitrators a relatively large degree of flexibility even in interpreting and applying the legal rules and principles from a given domestic law. The French provision is remarkable in the sense that it reads well the current needs and anticipates the trends of private international commercial dispute resolution. In effect, it amounts to an implied recognition that transnational commercial ventures need to be governed by a substantive law which transcends national legal boundaries and which adapts to the needs and requirements of such transactions as they evolve in the dynamics of international trade.

The rendering of reasoned awards could assist the effort to establish a common law of international transactions, and could introduce a greater degree of substantive predictability in the dispute resolution process. In an organic and evolutionary sense, the elaboration of normative rules of law can be seen as the normal and logical systemic outgrowth of the development of the international arbitral process.

57. 1981 J.O. 1401; see also supra note 2.
The volume and complexity of cases are increasing, and institutions (such as the ICC and AAA)\textsuperscript{58} have been created to refine and develop the process. Greater attention now should be focused upon the substantive aspects of international commercial dispute resolution through arbitration.

2. The Consensus Surrounding the Process

The skepticism expressed—concerning the application of the party autonomy principle, the establishment of a reporting system for awards, and the coordination of the emerging arbitral norms and the provisions of international conventions codifying substantive legal rules—seems unjustified not only in light of the needs of the international process, but also in regard to the consensus which sustains and nourishes it. These potential problems are not intractable, and their statement fails to recognize that aspect of arbitral adjudication which has been essential to its success in the international area. A process of alternate dispute resolution can be viable only in a setting in which it is needed and to which it can be adapted. By definition, an alternative to judicial adjudication will not be successful where coercive public jurisdictional authority remains necessary to the effective resolution of disputes. Commercial parties need not and cannot be forced to agree to arbitration. Whether the substitute for judicial adjudication is arbitration, mediation or conciliation, none will work unless the parties perceive the utility and value of the process and support it as an alternate means of dispute resolution.

Accordingly, the apprehension that the party autonomy principle might destroy the norm-generating capacity of reasoned international awards (when the parties in their agreement exclude the rendering of a reasoned award or provide for the exclusive application of a domestic substantive law) ignores the principal attribute of arbitration: the wide and deeply rooted international consensus which surrounds the process. It also ignores the possibility of expanding the international utility of the process by having it fill a troublesome and gaping substantive void. Party support could considerably diminish, if not eliminate, the problems of implementation no matter how great they may appear. Parties engaged in the process of international commercial arbitration might perceive reasoned awards as in their best self-interest. Such a procedure not only would make the arbitrators more accountable, but also would add an element of substantive predictability to the resolution of the parties' particular dispute and to the process as a whole.

\textsuperscript{58} See Arbitral Adjudication, supra note 2, at 92-97.
Having reasoned awards might increase the duration and costs of the proceeding. Moreover, parties who are engaged in litigation are notoriously sensitive to such considerations and tend to be more short-sighted when it comes to seeing the long-range benefits of the larger enterprise. Such observations, however, again minimize the particular features and needs of international arbitral adjudication. ICC institutional arbitration, for example, is renowned for its expense and length: fees are established according to a percentage of the amount in controversy and an average proceeding typically lasts for approximately eighteen months. Yet international commercial parties refer to and invoke ICC arbitration with increasing frequency. The length and cost of proceedings have not dissuaded international merchants involved in complex, multi-million dollar transactions from having recourse to ICC institutional arbitration. In any event, the rendering of reasoned awards—a practice which already is being followed quite consistently in ICC institutional arbitrations—would not add an inordinate amount of time to existing procedures and the cost would already be included in the percentage of the anticipated overall costs.

Arguably, parties to an arbitration may never be, or may not foresee the possibility of being, involved in another transnational commercial venture leading to arbitration. Their interest in the process may be localized to their particular dispute and may not extend to the systemic integrity of the process. Again, the experience of ICC arbitration is both apposite and opposite. ICC officials state that there is a 90% voluntary compliance rate with ICC awards, indicating not only that ICC institutional arbitration is perceived as arriving at satisfactory results, but also that parties want to uphold the viability of a process which they perceive as necessary and useful to the general commercial community.

A similar cooperation founded upon consensus might arise to validate and uphold the practice of rendering reasoned awards. International commercial parties might view an emerging set of rules as beneficial, providing at least a moderately predictable substantive basis for the growing complexity of their transactions. In order to gain this advantage—to obtain a principled basis for the determination of their dispute and to support an emerging practice in the community

60. *Id.*, pt. I, §§ 1.01-1.08, at 1-15.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
of international merchants—parties in all likelihood would not exclude the use of reasoned awards or provide for the exclusive application of a domestic law to their transaction. In any event, the latter prospect of exclusive application of domestic law is rather untoward in the international arbitral process given the need for adjudicatory neutrality. As noted above, unless the parties specifically provide otherwise, international arbitrators probably would mitigate the influence of the domestic law by taking commercial usage into account.

One objection, however, is that the essential basis for party compliance with awards is absent in acquiescence to reasoned awards. Moreover, a high level of voluntary compliance with ICC awards may not reflect a party perception that the remedial process which generated the award needs to be maintained, but rather indicates a concern that the on-going contractual relationship which gave rise to the dispute be salvaged or that the viability of other such relationships in the future be preserved notwithstanding that a particular conflict arose at a given time. Any accurate reading of this phenomenon, however, must be multi-factorial in character. If parties who voluntarily comply with awards were interested primarily or exclusively in maintaining their existing or future contractual relationships, arbitration would be no less necessary to the resolution of disputes which might arise after the initial arbitration. One of the recurring conclusions of any analysis of international arbitral adjudication is that it is difficult to separate the availability of the arbitral process from the viability of international commerce generally.

Although reasons of expediency and implementation exist, it is difficult to understand why international commercial parties would want to discourage or impede the practice of reasoned awards. These parties, even for reasons purely of self-interest, are concerned with the evolution and dynamics of the arbitral process. Reasoned awards are a stepping stone to the definition of customary trade usages and the elaboration of general international commercial law principles, and hence are a bridge to a greater degree of substantive adjudicatory predictability. Certainly, some element of substantive predictability would be preferable in the context of multi-million dollar transactions than ad hoc determinations reached without any attempt at articulating a basic rationale.

Given the complexity of the debate, it might be appropriate to have the preference of practitioners and the arbitral institutions guide party choice on this matter. In current practice, the practitioners who

65. See supra text at and accompanying note 57.
66. See Arbitral Adjudication, supra note 2, at 58-59.
represent arbitrating parties often refer to the substance of past awards when attempting to guide the arbitral tribunal in its determination. The existing litigation practice could be combined, following the example of the 1961 European Convention and the UNCITRAL Rules, with a presumption in institutional rules that reasoned awards would be rendered unless the parties specifically provide otherwise. Such a procedure would strike a realistic balance between the need to maintain the integrity of the party autonomy principle and the need to allow arbitral institutions to refine and guide the existing process at a larger systemic level. AAA and ICC rules, for example, already contain provisions which limit the exercise of party autonomy (for instance, in the appointment of arbitrators and the selection of an arbitral forum) once institutional arbitration has been chosen and invoked.\(^6\) The presumptive rule regarding reasoned awards would be a mild variant on these more stringent provisions, and would constitute essentially an innocuous way of determining whether reasoned awards would be acceptable to the community of international merchants.

In conjunction with the presumption of giving reasons, a system for reporting reasoned awards might be organized around the main centers of institutional arbitration. Parties who have submitted their dispute to institutional arbitration could be presented at the outset of the process with an administrative document reminding them that the rules of the institution favor the rendering of awards with reasons and their publication. The administrative document would give the parties the option to empower the arbitral tribunal to render an award with reasons and to authorize the arbitral institution to publish the award on an anonymous basis in an official reporter. Assuming general compliance with this procedure, the staff of each institution would then collect the awards and forward them to a commercial publisher. The latter would organize the awards, place them in chronological order and classify them according to subject matter with an appropriate list of headnotes and an index.

It appears unlikely that a trend of awards would undermine efforts at embodying general commercial principles in international instruments. To the contrary, the general historical and contemporary viability of international arbitration indicates that arbitral norms would coincide with, supplement and update the provisions of international conventions. They would add the clarification of detail to generally accepted and broadly gauged legal principles.

Finally, the question of the form and scope of the applicable judi-

\(^6\) Id. at 92-93.
cial review presents problems that are more difficult to resolve. Obviously, any viable solution must somehow mediate between the need to avoid returning to the old form of English judicial merits supervision and the equally pressing need somehow to legitimate the substance of the awards by anchoring that substance in the private international law of a given national legal system. Use of recourse provisions in contemporary national arbitration statutes and international agreements on arbitration could be of utility here by analogy. These provisions essentially allow the setting aside of an award for a technical excess of arbitral authority or a procedural due process violation based upon public policy. One could argue that a substantive counterpart to the public policy exception, based upon procedural considerations, should apply in terms of merits supervision. An award therefore could be invalidated only if the merits violated a fundamental rule of substantive international public policy, such as a human rights provision or a prohibition against corporate bribery. One could also expand this to cover the erroneous application of a basic legal principle which is common to most developed legal systems and is interpreted as having a particular meaning. This would be the equivalent of the U.S. rule of “manifest disregard of the law.”

Limited court supervision of the merits usually in the country of enforcement would result in a type of negative affirmance of the reasoned substance of the award: the narrow determination that the reasoning in the award does not contain a “manifest disregard of the law” or violate an essential stricture of international public policy. Much like the public policy exception in the New York Convention, this ground for review would cover only the most egregious of situations. Court affirmance would not legitimate the substance of the award in an international sense, but would only lend more weight to its credibility. Any ultimate conclusion as to the normative status of the award would be determined by adjudicators in the international arbitral process. Moreover, the two aspects of the proposed procedure—having reasoned international awards and having them be sub-

68. The stare decisis rule that should apply, however, is one which is more akin to U.S. than English legal tradition. It is one in which the power of distinguishing cases from one another is the basic rule rather than the exception. The substance of prior awards, in effect, should be used as a type of general persuasive guidance for other arbitral adjudications, perhaps giving more meaningful definition to the concepts of “ruling according to substantive legal principles” and “in accordance with commercial custom and trade usages.” An arbitral adjudication could not then turn merely on amorphous vagaries, and the process would benefit from its specially articulated corpus of law.

69. See Arbitral Adjudication, supra note 2, at 48-50. In applying that rule, courts in the United States have held that “a manifest disregard of the law” appears to exist only where the arbitral tribunal correctly states the applicable law and then ignores it entirely in its ruling.
ject to limited national court supervision of the merits upon
enforcement—eventually should reinforce one another, fostering the
anationalism and autonomy of the arbitral process and making issues
which surface in its regard an authentic part of the forum’s policy
toward private international law matters. As a corpus of arbitral de-
cisional law develops, courts of enforcement are less likely to evaluate
the reasoning of awards from a primarily national perspective, and
will begin to anchor their assessments in the substance of prior
awards. Thus, the development of the process will entail a reduction
in the problems that might surface at the inception of the procedure,
specifically in terms of the hazards normally associated with judicial
review of the merits of awards in the context of arbitration.

V. CONCLUSIONS

Given the scope and character of the current ICC arbitral deci-
sional law, as well as the experience with maritime arbitration, it
seems that reasoned awards are at least worth experimentation. They
appear to be a necessary first step toward elaborating the basic tenets
of a common law of international transactions. The use of a compara-
tive methodology with international implications is the most appro-
priate means by which to achieve that substantive end. The recourse
to such a methodology would require some degree of legal sophistica-
tion on the part of the arbitrators and the representatives of the par-
ties. The proposed model also assumes that the arbitral tribunal
would have the power to rule according to a general adjudicatory
mandate that includes a general “respect for law” and refers to cus-
tomy international commercial and trade practices. One can as-
sume that most international arbitral adjudications, by definition,
involve arbitrators who have an internationalist orientation, and that
parties want their disputes resolved according to a neutral substantive
basis that mirrors the sui generis characteristics of their transaction.

At this stage, the essential problem relates to the implementation
rather than to the content of the recommended procedure. In keeping
with the general trend of international arbitral adjudication, the most
effective approach is to leave adoption of the practice of reasoned
awards to the consensus of the international commercial community.
International merchants will decide whether to reverse the customary
procedure of having unreasoned awards, a practice based on a mis-
perception of its historical antecedents and a confusion as to its ac-
knowledged status. Although there should be little opposition to
following the approach suggested by the European Convention and
the UNCITRAL rule in this area, once a consensus has emerged it
should perhaps be codified in an appropriate international instrument. This instrument should contain a reference to the judicial supervision of the substance of reasoned awards on the basis of a limited substantive public policy ground, thereby creating by implication a presumption that awards basically satisfy such a standard. The important practical consideration is how to have such awards published either in a comprehensive fashion or on a selective basis in keeping with the current practice regarding ICC awards, while maintaining the anonymity of the parties. The awards, as in the area of maritime arbitration, can provide substantive guidance for subsequent arbitral tribunals ruling on similar questions.

Perhaps the most efficient and effective way of integrating judicial review of reasoned awards into current international practice would be to propose an addition to article V of the 1958 New York Convention. In its present form, article V allows a court in a requested state to refuse recognition and enforcement of a foreign arbitral award on the basis of narrow technical grounds and larger, albeit restrictively interpreted, substantive grounds. Article V(1) lists five bases for denial of enforcement, including excess of arbitral authority in the award, lack of basic due process in the proceeding giving rise to the award, and other major irregularities regarding the arbitral procedure. Article V(2) allows denial on the basis of inarbitrability of the subject matter of the award in the country of enforcement or for the reason that "the recognition or enforcement of the award would be contrary to the public policy" of the enforcing jurisdiction. It should be emphasized that both of the available defenses to enforcement under article V(2) of the Convention have been narrowly construed by a vast majority of national courts.70

An additional clause could be added to the substance of article V(2) to allow for either a full or partial denial of enforcement when the content of a reasoned award contains a manifest violation of international public policy or of law. For example, such a clause might read:

When a foreign arbitral award contains reasons for its determination, the court of enforcement shall, without substituting its judgment for that of the arbitral tribunal or otherwise impinging upon the tribunal's adjudicatory authority, engage in a general scrutiny of the reasoning to determine whether the reasons given conform to the fundamental dic-

tates of international public policy and do not represent a manifest disregard of such public policy or of law.

In the event that the court of enforcement finds that the reasoning of an otherwise enforceable award contains a manifest disregard of international public policy or of law, it may either sever the award from its reasons and grant enforcement to the award alone or deny enforcement to the award on the basis that a grant of enforcement to such an award would be contrary to the public policy of the jurisdiction.

Undoubtedly, the proposed language will generate considerable debate. It attempts to integrate a procedure into current practice that historically has been deemed antithetical to the autonomy of the arbitral process. Moreover, in keeping with the latter view, it raises the possibility that an award that satisfies all other procedural and substantive requirements could be denied enforcement on the basis of a merits review. Pending a dialogue on the question, it is submitted that the incorporation of the proposed language into the existing framework of the New York Convention would represent a considerable gain acquired at minimal costs.

In practical and theoretical terms, a denial of enforcement or even a severance of the award from its reasons on the basis of the proposed language would be very unlikely. First, the requested court can only engage in a "general scrutiny" of the reasoning, meaning that its consideration, for all intents and purposes, is limited to a perusal of the reasoning. Second, judicial objection to the reasoning can only be achieved when the facial consideration reveals a "manifest disregard" of international public policy or of law. Obviously, such a standard of review can only be triggered in the most egregious of cases where, for example, the arbitral tribunal has engaged in a clearly irrational application of the law to the facts, or ignored completely and without reason its own statement of the applicable law in deciding the case. Third, the favorable presumption toward the enforcement of awards implied in the New York Convention and the receptive and nearly uniform disposition of national courts in regard to that presumption, renders improbable a very stringent form of review which would ultimately undermine the entire process. Fourth, the opinions contained in the reasoned awards rendered by ICC arbitrators indicate that there is little cause for concern as to the quality of the reasoning given by international arbitrators, many of whom are distinguished jurists.

In some, albeit rare, circumstances, a court may find that the
reasoning in an award, on its face, is particularly questionable and may be fundamentally improper. The requested court might conclude that the discrepancy with acceptable juridical standards constitutes a manifest disregard of law or is violative of international public policy. The court, however, may agree with the result reached by the arbitral tribunal. In these instances, the court of enforcement could sever the reasons from the award, refusing to give its seal of approval to the opinion and nonetheless enforce the award. Where the reasoning is blatantly in violation of either international public policy or of law and compels the determination in the award, the court may refuse to enforce the award altogether on the basis of the domestic public policy exception to enforcement. Such an outcome can be justified on two grounds. On the one hand, a similar determination may have been reached without the addition of the merits review language if the result contained in the award was itself offensive to the jurisdiction's public policy. On the other hand, more importantly, an egregious departure from the usual high quality international adjudication achieved through arbitration should be censored primarily for the benefit and integrity of the arbitral process. The likelihood that non-conforming awards and instances of denial will be a rarity makes the suggested addition to article V of the New York Convention an effective reconciliation of the competing and equally-pressing needs to avoid unwarranted judicial supervision of the merits of reasoned international awards and to provide some national court support for and general validation of the emerging arbitral decisional law.

Finally, the use of reasoned awards in contemporary ICC practice coincides with a rise in the general popularity of ICC arbitration, especially among commercial parties who traditionally were not a significant percentage of the ICC's clientele. This includes parties from Middle Eastern, African, Far Eastern, Latin American and Eastern European countries.71 The expansion of ICC institutional arbitration to include the newer, non-Western participants in international trade certainly indicates that the ICC proffers a remedial process which is becoming universally acknowledged as the vehicle by which to resolve transnational commercial disputes. While the use of reasoned awards may be quite separate from this expansion, there is room for speculation that the ICC's practice of rendering awards with reasons may have fostered the entry of a larger and more diverse group of international merchants in the process. Given the vast ideological, political

and legal disparity among parties from the North-South and East-West axes, there is an increasing need for parties to supervise the arbitrators' basis of decision and for a neutral governing law that is detached from national preoccupations and mirrors the true economic realities of transnational commerce. Reasoned awards, whether perceived as a cause or an effect of more diverse participation in world trade, are evidently instrumental in the achievement of a greater form of neutrality, which is mandated by the increased diverse participation.

By integrating more comprehensively into current practice the procedure of rendering awards with reasons, it seems that other commercial parties from every region of the world community would be drawn to international commercial arbitral adjudication. As a consequence, the process eventually should come to satisfy its substantive mission and fulfill the "aspiration" toward a new type of law that it embodies, the *lex mercatoria*. 