Arbitral Adjudication: A Comparative Assessment of Its Remedial and Substantive Status in Transnational Commerce

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ARTICLES

Arbitral Adjudication: A Comparative Assessment of Its Remedial and Substantive Status in Transnational Commerce

THOMAS E. CARBONNEAULT

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INTRODUCTION

With the growth of international trade, arbitration has emerged as the
preferred remedy for disputes in private international commerce.1 Its ad-
judicatory features respond well to the sui generis dispute resolution needs

1. The process of arbitration is an alternative means of adjudicating disputes. When
authorized by statute and invoked by private agreement, arbitration stands as a substitute
for the usual judicial remedies proffered by the legal system. J. ROBERT & T. CARBONNEAU,
Volontaire en Droit Privé 274 (1937). Traditionally, commentators advance three con-
tradistinctive theories to explain the nature of arbitral adjudication. Each theory empha-
sizes a particular view of the relationship between the state and private individuals and
of international commercial contracts. Most significantly, an arbitration

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 the first of the traditionalist views—a jurisdictional theory that is essentially socialist in orientation—see J. Lew, supra, at 52-54, 61, n.65.1, (citing Laine, De L'exécution en France des sentences arbitrales étrangères, 26 Journal du Droit International Clunet [J. Dr. Int'l] 641 (1899)); 1 E. Bartin, Principes de Droit International Privé §§ 217-18 (1930); 6 J. Niboyet, Traité de droit international privé français §§ 2, §§ 1983-95 (1950); 2 A. Pillet, Traité pratique de droit international privé § 659 (1924). See also J. Lew, supra, at 52-53, 62, n.66.3 (citing F. Klein, Considérations sur l'arbitrage en droit international privé 181 (1955)); Mann, Lex Facit Arbitrum, in International Arbitration: Liber Amicorum for Martin Domke 157, 160-62 (P. Sanders ed. 1967). The arbitral process is inextricably linked to and becomes an extension of the state's local jurisdictional authority to provide adjudicatory mechanisms. See Laine, supra. Under the second explanation—a "contractualist" theory—the party autonomy principle is controlling. See P. Foucaud, L'Arbitrage Commercial International §§ 18-21 (1965). See also J. Lew, supra, at 54-57. The contractualist theory of arbitration posits that any form of state intervention through the courts is unnecessary and anomalous with the contractual right to agree to arbitrate disputes. See, e.g., id. at 54-57.

The third definition of arbitration, the so-called "mixed" or "hybrid" theory, attempts to reconcile these extreme views. It holds that neither the jurisdictional nor consensual characteristic of arbitration, on its own, fully explains the nature of the process, and that a more accurate theory must merge the two perspectives. See id. at 57 (citing, inter alia, J. Robert, Arbitrage civil et commercial en droit interne et international privé para. 210 (4th ed. 1967)); Carabiber, L'évolution de l'arbitrage commercial international, 99 Recueil des cours de l'Académie de droit international [Rec. Des Cours] 119 (1960-I); Sauser-Hall, L'arbitrage en droit international privé, 44-1 Annuaire de l'Institut de Droit International [Ann. Inst. Dr. Int'l] 469 (1952) (developed further in 47-III Ann. Inst. Dr. Int'l 394 (1957)). State authority plays a critical role in legitimizing the process of arbitration. Once arbitration is recognized and established, however, the state's jurisdictional hold on the process is considerably diminished due to the primacy of the party autonomy principle. See J. Lew, supra, at 57-58. For example, the state's public policy imposes only minimal limitations on the process, basically in the form of due process and fair hearing requirements. Arbitration is meant to function as a viable alternate dispute resolution mechanism. Once they agree to submit a dispute that is arbitrable under the laws of the state concerned, the parties are bound by their arbitration agreement unless they mutually agree to rescind it. They cannot apply to the courts for relief on the merits. See id. at 58-59.

Finally, the consensus favoring arbitration has been especially marked in the international area, leading some experts to speculate about arbitral adjudication as a "supranational" phenomenon. See, e.g., id. at 59-60 (citing J. Rubellin-Devici, L'arbitrage nature juridique. Droit interne et Droit International privé paras. 14, 117 & 582 (1965)). For a discussion of this general topic, see P. Foucaud, supra, § 29; J. Lew, supra, at 11-34; J. Robert & T. Carbonneau, supra, § 1.01; J. Rubellin-Devici, supra. See also Mentschikoff, Commercial Arbitration, 61 Colum. L. Rev. 846 (1961); Wilner, Determining the Law Governing Performance in International Commercial Arbitration: A Comparative Study, 19 Rutgers L. Rev. 646, 650-52 (1965). See generally 1 & 3 international commercial arbitration (C. Schmitthof, ed. 1983); 1-5 J. Wetter, The International Arbitral Process: Public and Private (1979). For what is perhaps the most lucid and thoughtful contemporary statement of the problems and issues, see de Vries, International Commercial Arbitration: A Contractual Substitute for National Courts, 57 Tul. L. Rev. 42 (1982).

2. See generally Bibliotheque de la Faculte de Droit de l'Universite Catholique de Louvain, Le Contrat Economique International: stabilité et
agreement acts as an elaborate choice-of-forum clause. It allows the parties to satisfy their need for a predictable and effective dispute resolution process by creating a more realistic and workable framework that supersedes the fundamentally parochial alternative proffered by national legal systems. The party autonomy principle that underlies arbitration gives the contracting parties the power to fashion a remedial process tailored to their specific needs, limited only by fundamental public policy concerns.

3. For example, an international joint venture agreement for the construction of a high technology plant in the Middle East might involve the contractual collaboration of United States construction firm and a French electronics enterprise, as well as a state-owned company in the country where the work is to be performed. Although the parties may be eager to close a lucrative deal, their legal counsel must take into account the legal issues that might arise in the event of a dispute.

This transaction would involve parties of three different nationalities whose legal representatives are trained in essentially three different legal traditions. Therefore, each party might assert that his own national courts are the proper forum in which to adjudicate disputes and that his own national law should govern the contract and any disputes arising therefrom. Such positions would create distrust, possibly placing the entire venture in peril.

Additionally, the substance of any particular national law is unlikely to adequately respond to the sui generis international character of the undertaking. Local courts might apply ill-suited rules by analogy and thereby reach inadequate results. Moreover, the choice-of-law rules of the various countries might provide for different governing laws. Finally, the highly complex character of the transaction might exceed the technical expertise of national judges.

The disparity between common-law and civil-law legal procedure might engender additional circumspection and disagreement among the contracting parties. For a discussion of these differences, see H. de Vries, CIVIL LAW AND THE ANGLO-AMERICAN LAWYER 187-201 (1976); P. Herzog, CIVIL PROCEDURE IN FRANCE 253-365 (1967); R. Schlesinger, COMPARATIVE LAW 352-434 (4th ed. 1980).


4. For instance, arbitration offers parties of different nationalities the opportunity to select a neutral geographical forum and impartial, qualified adjudicators. More importantly, within the limitations imposed by basic public policy concerns and subject to the possible restrictions of the lex arbitri, the parties can select the procedural rules that will apply to the proceeding, as well as the governing substantive law. Rather than surrendering
The use of arbitration to settle international commercial disputes resulted largely from the dynamic interplay between twentieth century commercial practice and national legal systems.\(^5\) Faced with complex and internationalized commercial disputes, national legal systems enacted legislation and their courts handed down supporting decisional law, confirming what had already become a commercial reality. Furthermore, they provided indispensable support for the emerging process, which could have been easily frustrated by parochial domestic attitudes. The fundamental practicality of arbitration, which gave it a favored status among international merchants, would have been ineffective without this equally pragmatic attitude on the part of national legislatures and courts.

The uniformly favorable attitude of many advanced Western legal systems\(^6\) toward arbitration has essentially created a situation of *de lege ferenda*: the elaboration of customary legal norms, either remedial or quasi-substantive, for private international law. These emerging principles include the following: the recognition of the jurisdictional impact of arbitration agreements; the acknowledgment of the central importance of party autonomy in the arbitral process; the provision for judicial assistance, rather than intervention, in the arbitral process; the recognition of the autonomy of arbitral adjudication by adopting the separability and *kompetenz-kompetenz*\(^7\) doctrines; the acceptance of the state, despite possible domestic restrictions, as a party in international commercial arbitration; the minimization of national public policy considerations; and the provision for very limited court supervision of awards.\(^8\)

themselves to the possible uncertainty and inconsistency of national legal solutions, the parties can resolve major jurisdictional and conflicts-of-law problems beforehand in bona fide negotiations and decrease the risks in their transaction by increasing dramatically its predictability of performance. Finally, although the issue has not yet been finally resolved in some jurisdictions, it is generally held that, once a state or state entity enters into a valid agreement to arbitrate contractual disputes, it waives its sovereign immunity from suit. See Cogan, *Are Government Bodies Bound by Arbitration Agreements?*, 22 ARB. J. 151 (1967); Delaume, *State Contracts and Transnational Arbitration*, 75 AM. J. INT'L L. 784 (1981); Mann, *State Contracts and International Arbitration*, 42 BRIT. Y.B. INT'L L. 1 (1967).


7. *See infra* note 101 and text accompanying notes 100-01.

8. *See infra* notes 105-12 and accompanying text.
Arbitration has achieved for private international law what remains to be developed in the public sector: The elaboration of agreed upon rules, such as those relating to arbitral procedure and the enforcement of awards, that as provisions in international conventions or as principles of national statutory or decisional law, are given uniform legal recognition and enforcement by national legal systems. This consensus represents a normative procedural policy that has a definite transnational dimension. The critical question is whether international arbitral adjudication can yield normative substantive legal principles and, in effect, stimulate and foster the development of an international law merchant.

This Article endeavors to assess the substantive potential of international arbitration. It assumes that a fully functional transnational adjudicatory process must not only provide certainty as to remedial relief but must also fulfill a normative mission. To quote the very eminent Professor David:

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 the beginning by the canon law scholars. It is much more an aspiration toward a new type of law.10

Initially, the consensus surrounding international arbitration as a remedial process was grounded in and legitimated by the domestic policies of national legal systems. That consensus continues to be sustained by the private international law policies of these countries. Accordingly, this analysis focuses upon the historical and contemporary status of arbitral law in three major industrialized states: England, the United States, and France. Ultimately, the law of each nation is evaluated in terms of its response to the emergence of "anational" or "supranational" arbitration. This concept of international arbitration essentially eliminates the importance of the lex loci arbitri, the arbitral law of the place of arbitration, almost completely detaches international arbitral adjudication from any


The rendering of reasoned awards, which state the tribunal’s basis for decision, is a necessary complement to the existing remedial process. Although the applicable rules in each of the three systems support the current practice of rendering unreasoned awards, international conventions on arbitration and rules of institutional arbitration encourage the development of a different practice. It is the thesis of this Article that reasoned awards are the appropriate instruments by which to fulfill the normative potential of transnational arbitration, to satisfy the “aspiration toward a new type of law.”

Reasoned awards could serve as a measure of the arbitrators’ ability to rule and assure parties of a principled decisional basis. Furthermore, they 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, based on a limited notion of substantive international public policy, might lead to the creation of a general international arbitral stare decisis.

I. THE DOMESTIC REASSESSMENT

The status of arbitration as a viable remedial alternative was not always well recognized in major domestic legal systems. To some extent, its transnational vocation was effected by a domestic reassessment of its viability as an adjudicatory process by which to resolve commercial disputes. In

11. Id.

In England, the courts deemed arbitration agreements to be against public policy because they ousted the courts' jurisdiction and the guarantees of judicial justice. As a result, a party, anticipating that an award would be rendered against him, could revoke his initial consent to arbitrate, claiming that the arbitration agreement was against public policy.

American courts integrated these basic English tenets into their case law. Under prior United States judicial conceptions, an arbitration agreement was unenforceable through specific performance and could be revoked by either party before an award had been rendered. See, e.g., Jones, Historical Development of Commercial Arbitration in the United States, 12 MINN. L. REV. 240, 241 (1927); Zubrod, supra, at 1056. Such an agreement had no jurisdictional impact to stay court proceedings. Although an action for breach of contract would lie, it resulted only in a judgment for nominal damages. See, e.g., Sayre, Development of Commercial Arbitration Law, 37 YALE L.J. 595, 604-05 (1927). See also Wolaver, The Historical Background of Commercial Arbitration, 83 U. Pa. L. Rev. 132 (1934); Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109 (1924); Kulukundis Shipping Co., S/A v.Amtorg Trading Corp., 126 F.2d 978, 982-84 (2d Cir. 1942).

In an 1814 case, Tobey v. County of Bristol, 23 F. Cas. 1313 (C.C. Mass. 1845) (No.
turn, the development of international trade made this domestic reassessment a virtual necessity.

A. The English Experience

1. The Writ Procedure

Judicial supervision of arbitral awards through merit review is a longstanding English tradition. In the eighteenth century, for example, a party could invoke a writ of certiorari, alleging that an arbitral award contained an error of fact or law on its face and requesting that the King's Bench quash the award. Through this common-law procedure, the courts sought to remedy any legal or factual substantive abuses that might occur in adjudication by lay judges.

Rather than preventing manifest substantive abuses, however, the writ procedure was seen as posing a threat to the arbitral process. The effect of

14,065), Mr. Justice Story characterized the American judicial perception of arbitral adjudication in rather contradictory terms:

Courts of equity do not refuse to interfere to compel a party specifically to perform an agreement to refer to arbitration, because they wish to discourage arbitration, as against public policy. On the contrary, they have and can have no just objection to these domestic forums, and will enforce, and promptly interfere to enforce their awards when fairly and lawfully made, without hesitation or question. But when they are asked to proceed farther and to compel the parties to appoint arbitrators whose award shall be final, they necessarily pause to consider, whether such tribunals possess adequate means of giving redress, and whether they have a right to compel a reluctant party to submit to such a tribunal, and to close against him the doors of the common courts of justice, provided by the government to protect rights and to redress wrongs.

Id. at 1320-21. See also Note, Enforcing International Commercial Arbitration Agreements and Awards Not Subject to the New York Convention, 23 VA. J. INT'L L. 75, 83 n.30 (1982).

Nineteenth century French decisional law concurred with these doctrinal positions of common-law jurisdictions. See Carbonneau, The Elaboration of a French Court Doctrine on International Commercial Arbitration: A Study in Liberal Civilian Judicial Creativity, 55 TUL. L. REV. 1, 6-16 (1980). In L'Alliance c. Prunier, Cass. civ., Judgment of July 10, 1843, 1843 S. Jur. I 561, the French Cour de cassation, through a strained interpretation of article 1006 of the Code de procédure civile of 1806, held a compromissory clause, whereby the parties agreed to arbitrate future disputes, invalid under French domestic law. Moreover, stringent regulatory requirements applied to the compromis or submission, the agreement to arbitrate existing disputes. The L'Alliance opinion epitomizes the prevailing judicial attitude toward arbitration at that time: Arbitrators did not possess sufficient probity, impartiality, and/or competence necessary to render judgments. Mayer, Les réactions de la doctrine à la création du droit par les juge en droit international privé, 31 TRAVAUX DE L'ASSOCIATION HENRI CAPITANT 385 (1980). See also infra note 88.

Subsequently, in England and the United States, legislative acts modified the unfavorable judicial perception of arbitration. In France, judicial reconsideration, fostered by a developing arbitration bar, achieved the same result—leading eventually to new statutes. See infra Part II.

13. See supra note 12 and accompanying text. See particularly Lord Hacking, supra note 12, at 96.

14. See Lord Hacking, supra note 12, at 96.

15. Requiring facial accuracy as to the legal and factual substance of awards did not appear to be too much to demand from any viable dispute resolution process.
a successful writ action was rather draconian: the entire award was set aside. Due to its drastic consequences, the writ procedure gave rise to the practice of rendering awards without reasons. An unreasoned award could be set aside only for evident factual error. In practical terms, the writ procedure made judicial supervision of the merits of awards impossible.

In 1854, the Common Law Procedure Act attempted to rectify this situation. It 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. Ultimately, the special case procedure covered any question of law arising during the arbitral proceeding. In 1922, the Court of Appeal in 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. The court's reasoning was grounded on a general distrust of any adjudicatory process not guided by properly trained legal minds. The court also emphasized the fact that English arbitrators ordinarily ruled according to law and eventually justified its result in public policy terms.

Moreover, parties could not authorize arbitrators to rule ex aequo et bono, because the courts could not supervise rulings in equity. In effect, although arbitrators could avoid judicial review of their awards by not stating reasons, the courts could still exercise wide-ranging supervisory powers over the merits of the proceeding through the stated case procedure.

16. Lord Hacking, supra note 12, at 96.
17. Manifest substantive abuses, if they existed, continued, and the basic substantive uniformity envisaged between arbitral and judicial adjudication could not be achieved.
19. Id. § V, 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.
20. See Lord Hacking, supra note 12, at 97.
21. [1922] 2 K.B. 478 (C.A.). The court here considered a standard contract provision that attempted to exclude any party's right to have questions of law stated as a special case to the Court of Appeal.
22. Id. See also Park, supra note 12, at 91 n.20.
23. The court's reasoning was reminiscent of the French L'Alliance opinion. See supra note 12 and accompanying text.
24. "This is done in order that the Courts may ensure the proper administration of the law by inferior tribunals. In my view, to allow English citizens to agree to exclude this safeguard for the administration of the law is contrary to public policy. There must be no Alsatia in England where the King's Writ does not run." [1922] 2 K.B. at 488.
2. The Arbitration Act of 1950

The ostensible purpose of the Arbitration Act of 1950\textsuperscript{26} was to recognize arbitration as an acceptable alternative adjudicatory procedure. Under the 1950 Act, arbitration agreements were deemed enforceable and, by leave of the court, awards could be enforced in the same manner as judicial judgments.\textsuperscript{27} Furthermore, the 1950 Act provided for recourse on quite limited grounds, such as when the arbitration had been conducted improperly or when an award had been obtained through fraud.\textsuperscript{28}

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.\textsuperscript{29} Here, the Act "codified" the previous legislative and decisional law developments,\textsuperscript{30} thereby, perhaps inadvertently, incorporating the view that arbitration, as the unruly adoptee of the legal system, needed corrective judicial supervision in order to behave properly. In its wisdom, this elder sibling, as the true repository of public adjudicatory standards, would prevent the arbitral process from becoming lawless. Thus, 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


\textsuperscript{27} Id. § 26.

\textsuperscript{28} Id. § 24. Such provisions were commonplace in most domestic arbitration statutes at this time. Following common-law procedural traditions, the 1950 Act attributed judicial adjudicatory powers to the arbitral tribunal. It provided, \textit{inter alia}, that the arbitrators would hear the parties and witnesses under an oath that would be administered by the arbitrators, unless the agreement expressly provided otherwise. In addition, the arbitrators could issue subpoenas against any party, "but no person shall be compelled under any such writ to produce any document which he could not be compelled to produce on the trial of an action." Id. § 12(4). This grant of procedural authority at least gave arbitration the trappings of a proper adjudicatory process and heightened its systemic stature.

In true cooperative fashion, the courts could assist the arbitrators and the parties by enforcing discovery orders, removing indolent arbitrators, or extending the time for the commencement of the arbitration. Id. §§ 10, 12(6), 13 & 23. The creation of this cooperative relationship between the courts and the arbitral process reflected an advanced concept of arbitral adjudication. It not only strengthened the legitimization of the process, but it also indicated a possible full rehabilitation of the English perception of arbitration.

\textsuperscript{29} Id. § 21. See, e.g., Jones, \textit{supra} note 12, at 246; Park, \textit{supra} note 12, at 91-92. In effect, this feature of the Act almost entirely eliminated the possibility of a full rehabilitation of the arbitral process.

\textsuperscript{30} The 1950 Act essentially integrated the old common-law writ procedure into its regulatory framework. An award could be set aside for an "error on its face," that is, when a superficial scrutiny of the award revealed that it was based on a manifestly erroneous legal conclusion. As under common law, because awards were unreasoned, this ground for substantive judicial review had no practical impact.
arbitrator's statement of questions at the end of the proceeding.\textsuperscript{31}

In the celebrated \textit{Lysland} case,\textsuperscript{32} decided in 1973, the Court of Appeal ordered that a case be stated over the arbitrator's objections. In this case, Lord Denning elaborated a three-prong test for determining whether questions in a given arbitration should be stated: (1) "[t]he point of law should be real and substantial and such as to be open to serious argument and appropriate for decision by a court of law;" (2) it should be "clear cut and capable of being accurately stated as a point of law;" and (3) it should be "of such importance that the resolution of it is necessary for the proper determination of the case."\textsuperscript{33} Following \textit{Lysland}, it was "commonly presumed" that, if an arbitrator "unreasonably" refused to state a case or to apply for an order directing a case to be stated, the courts would consider the arbitrator to have engaged in "misconduct," a ground upon which the award could be set aside.\textsuperscript{34}

The "codification" of the stated case procedure by the 1950 Act can be criticized on a number of grounds. First, it might not be desirable to have disputes that have been submitted to arbitration subsequently resolved by the application of traditional legal principles in a way acceptable to a court of law. Second, such substantive uniformity might even be impossible given the fluidity and evolving character of commerce and commercial customs. Furthermore, in light of the basic nature of arbitral adjudication and the parties' expectations, such supervision might be illusory and unwarranted. Finally, in practice, the stated case procedure often became a tactical, dilatory instrument invoked by parties who were likely to have an unfavorable award rendered against them.\textsuperscript{35} This practice became so commonplace that English-speaking attorneys, apprehensive of malpractice

\footnotesize{\textsuperscript{31} Park, supra note 12, at 92 (citing Arbitration Act, 1950, 14 Geo. 6, ch. 27, § 21(1)(a) & (b)). Either the arbitrator could state the case or the High Court could order him to do so. Arbitration Act, 1950, 14 Geo. 6, ch. 27, § 21(1). When an arbitrator refused to state a case upon a party's request, the latter could seek a court order to compel the arbitrator to do so.  


\textsuperscript{33} \textit{Id}. at 861-62.  

\textsuperscript{34} Park, supra note 12, at 94. Under the 1950 Act, as before, the stated case procedure embodied a rather paternalistic view of arbitration, robbing it of autonomy and distorting its primary purpose. One distinguished commentator, however, argues that the underlying motivation for the stated case procedure was a laudable one, to achieve a basic harmony and essential cooperation between the courts and arbitral tribunals: "It provided a useful reference procedure through which the arbitrator and the parties could seek assistance of the courts on difficult points of law, and thus provided a bridge between the tribunals of arbitration and the courts of law." Lord Hacking, supra note 12, at 98. In effect, the use of the stated case procedure avoided the phenomena that the French call "\textit{une jurisprudence cachée à la jurisprudence,}" and provided for a stabilization of English commercial law norms: "The traffic over this bridge greatly assisted the evolution of English commercial law. In contrast with other countries, such as the United States where commercial law has developed separately under the awards of the arbitrators and court judgments, England developed one commercial law." \textit{Id}.  

\textsuperscript{35} See Lord Hacking, supra note 12, at 98; Park, supra 12, at 94-95.}
claims, began to advise against the use of arbitration agreements designat-
ing London as the place of arbitration.\[36\]

In summary, despite its more liberal provisions, the Arbitration Act of 1950 embodied a continuing distrust of arbitral adjudication. While an arbitral tribunal could rule pursuant to a binding agreement, it was required to apply the usual legal rules in much the same way as a court of competent jurisdiction would have done. Questions of law were to be referred to the High Court to guarantee basic substantive uniformity between court rulings and arbitral awards. Because the award, upon review, was tantamount to a judicial determination, substantive judicial review, in effect, defeated the parties' initial recourse to arbitration. By agreeing to arbitrate, the parties were not guaranteed that their disputes would be resolved by knowledgeable experts in conformity with basic trade usage. For purposes of adjudication, the English concept of public policy seemed to require determinations based upon "correct" legal reasoning. The parties' contractual stipulation providing for arbitration allowed them to gain only procedural flexibility in a perhaps less costly and more expeditious proceeding. Prior to 1979, the stated case procedure, which the parties could not waive by contract, provided for mandatory judicial review and appeal of arbitral proceedings on questions of law at either party's request and, thus, negated some of the primary benefits of arbitration.

3. The Arbitration Act of 1979

The Arbitration Act of 1979,\[37\] which entered into force on August 1, 1979,\[38\] redefined judicial supervision of arbitral proceedings and awards in England and Wales. The 1979 Act generally lessened the authority of the courts.\[39\] It repealed an entire section of the 1950 Act and, subject to certain exceptions and qualifications, abolished the common-law jurisdiction of the High Court to set aside an award for a manifest error of fact or law.\[40\] More significantly, the 1979 Act abolished the stated case procedure.\[41\] It was replaced by "a more limited right of appeal to the High Court."\[42\]
This right of appeal can be invoked only with the consent of the opposing party or by leave of the court. Leave will be granted only when the determination of the legal question "could substantially affect the rights of one or more of the parties." Moreover, the court, in its discretion, may attach conditions to the leave, such as requiring security for the enforcement of the award. Further appeal to the Court of Appeal can be made only if the High Court certifies the matter as one of "general public importance" or for some other "special reason."

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

While the ultimate success of the 1979 Act depends upon favorable judicial implementation, its policy implications and objectives are clear. The provision for a more limited form of judicial review, in addition to continuing cooperation and assistance between the courts and the arbitral tribunals, makes it evident that arbitration is no longer perceived as an untrustworthy and potentially unruly stepchild. Under present English legislative conceptions, arbitration is a viable parallel system of domestic adjudication, the determinations of which need not be second-guessed by the courts.

B. The American Experience

In many respects, the reevaluation of arbitral agreements and awards in the United States has mirrored its English analogue. The initial impetus for modifying the negative American judicial position on arbitration came from state statutes, primarily, the New York Arbitration Act of 1920.46

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43. Arbitration Act, 1979, ch. 42, § 1(4), reprinted in 5 Y.B. Com. Arb. 239-46 (P. Sanders ed. 1980). See Park & Paulsson, supra note 42, at 273. The precise meaning of the term "substantially affect" is, of course, of critical importance. Although it connotes a high standard and a presumption that leave will not be granted readily, only the Court's attitude in future adjudication will determine the exact significance of the phrase.

44. Park & Paulsson, supra note 42, at 273 (quoting Arbitration Act, 1979, § 1(7)).

45. Id. (footnotes omitted).

46. 1920 N.Y. Laws ch. 275. See also Jones, Three Centuries of Commercial Arbitration In New York: A Brief Survey, 1956 Wash. U.L.Q. 193. Unlike prior state statutes, which only recognized submissions as enforceable, the New York Act provided that the agreement to arbitrate future disputes was binding and enforceable according to the usual rules of contracts. See A. Widiss, Arbitration: Commercial Disputes, Insurance and Tort Claims 3 (1979).
Following the enactment of the New York legislation, every state, with the exception of Vermont, enacted some type of arbitration statute.\textsuperscript{47}

1. Federal Legislation

The United States Arbitration Act,\textsuperscript{48} enacted in 1925, contained many of the features and principles that characterize modern state statutes. This Act put an end to the era in which United States courts were willing to entertain suits brought in violation of an arbitration clause. According to the express language of the federal Act, arbitration agreements are "valid, irrevocable, and enforceable."\textsuperscript{49} Essentially, the Act promoted arbitral adjudication as a viable alternative to the judicial resolution of disputes.

The current federal Act\textsuperscript{50} retains substantially all of the original language and continues to address the major considerations concerning arbitration with unmistakable liberalism. First, the legislation recognizes the fundamentally consensual nature of arbitration, giving primacy to the principle of party autonomy in most instances. The requirement that an arbitration agreement be in writing\textsuperscript{51} does not indicate a distrust of or create limitations on the process. Rather, it underscores the contractual nexus that is at the heart of the process and the need to formally establish the parties' intent to arbitrate and forgo judicial remedies.

\textsuperscript{47} See F. KELLOR, AMERICAN ARBITRATION: ITS HISTORY, FUNCTIONS AND ACHIEVEMENTS (1948).


During the congressional debate on the Act in 1924, a proponent of the legislation explained its underlying purpose and rationale in the following terms:

This bill is one prepared in answer to a great demand for the correction of what seems to be an anachronism in our law, inherited from English jurisprudence. Originally, agreements to arbitrate, the English courts refused to enforce, jealous of their own power and because it would oust the jurisdiction of the courts. That has come into our law with the common law from England. This bill simply provides for one thing, and that is to give an opportunity to enforce an agreement in commercial contracts and admiralty contracts—an agreement to arbitrate, when voluntarily placed in the document by the parties to it. It does not involve any new principle of law except to provide a simple method by which the parties may be brought before the court in order to give enforcement to that which they have already agreed to. It does not affect any contract that has not the agreement in it to arbitrate, and only gives the opportunity after personal service of asking the parties to come in and carry through, in good faith, what they have agreed to do. It does nothing more than that. It creates no new legislation, grants no new rights, except a remedy to enforce an agreement in commercial contracts and in admiralty contracts.


\textsuperscript{50} 9 U.S.C. §§ 1-14 (1982).

\textsuperscript{51} Id. § 2. The "in writing" requirement excludes oral arbitration agreements unless the parties have agreed otherwise or eventually formalize their oral agreement or do not challenge its validity. Therefore, if the parties wish to forgo judicial adjudication and its benefits for an adjudicatory mechanism that they deem more appropriate, they generally must state their intent in a legally binding, written document.
Furthermore, the party autonomy principle is coupled with arbitral flexibility in the federal Act. Within the confines of basic public policy regarding adjudicatory justice, the parties can fashion the procedural rules to be applied during the arbitral proceeding. Although the tribunal is not bound by legal rules of evidence, it must hear all relevant evidence presented by the parties and make such evidence available to all the parties. These provisions indicate an intent to afford the contracting parties maximum discretion in establishing and regulating the proceeding, while providing essential safeguards against abuses that could undermine the legitimacy of the process.

Second, under the federal Act, the courts do not perform any "watchdog" functions in regard to the arbitral proceeding. Rather, judicial authority assists the arbitration process. For example, if a recalcitrant party refuses to arbitrate or appoint an arbitrator despite a valid arbitration agreement, the courts can compel arbitration or appoint an arbitrator. Also, the federal Act requires that the courts recognize the jurisdictional effect of an arbitration agreement. The legislation specifically provides that a valid arbitration agreement stays any court proceedings relating to a dispute submitted to arbitration, thereby attributing to arbitration the status of an autonomous and bona fide adjudicatory process.

Third, the federal legislation provides for limited judicial supervision of awards. An award may be modified or corrected by a federal court only on very narrow grounds. Section 10 of the federal Act states that a final award may be set aside or vacated only:

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52. *Id.* § 10(c).
53. *Id.* §§ 4-5.
54. *Id.* § 3. As a result of this provision, the question of whether a dispute will be submitted to arbitration no longer is answered through the prism of judicial hostility, a matter of competition. Instead, the answer is dictated by the principle of contractual autonomy.
55. *Id.* § 11. A court can confirm an award, provided that the parties expressly consent in their agreement to the entry of a judgment on the award by a court. *Id.* § 9. Otherwise, no judicial action is contemplated unless the award is challenged. Upon the application of any party to the arbitration, the federal court for the district where the award was rendered can issue an order modifying or correcting the award. *Id.* § 11. A successful suit results merely in the modification or correction of an otherwise valid and enforceable award:

1. Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
2. Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
3. Where the award is imperfect in matter of form not affecting the merits of the controversy. The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

*Id.*

The legislative objective of fostering arbitration is apparent from the provision itself. On the one hand, it provides a mechanism that avoids setting aside an award for mere formal
Where the award was procured by corruption, fraud, or undue means.

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

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

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

Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

The substance of these grounds revolves around basic procedural concerns of due process and the essential right to a fair hearing. The infringement of such public policy concerns is apparently the exclusive basis for having an arbitral award set aside under the federal Act.

Case law has added another ground for vacating awards. In Wilko v. Swan, the United States Supreme Court stated in dicta that an award could also be set aside for "a manifest disregard of the law." Subsequently, other federal courts have held that awards that are rendered "in manifest disregard" of the applicable law are subject to judicial vacation.

deficiencies. On the other hand, it allows the vacation of an award for more substantive defects or errors.

Technically, a ruling on an unsubmitted matter, especially one that affects the merits, is an excess of arbitral authority, which breaches the arbitral tribunal's jurisdictional mandate and which constitutes fairly serious misconduct. Were the basic orientation of the legislation more conservative, such a "defect" could have easily resulted in the setting aside of the award. Under the federal Act, however, the court merely corrects the award, presumably by modifying it to exclude that particular ruling, if the ruling has some bearing on the ultimate merits of the decision. Going beyond the terms of reference is not perceived as a flagrant violation of the adjudicatory mandate simply because, with the appropriate judicial modification, it does not prejudice the rights of the parties. Despite the added ruling, the parties still have an award that is substantively intact.

56. Id. Here, the excess of arbitral authority or the misfeasance of arbitral duties taints the entire award; it does not merely represent the tribunal's going beyond the terms of reference. Much like the final sentence of section 11, concerning an action to correct or modify an award, section 10(e) admonishes the vacating court to achieve the ends of justice between the parties by resubmitting the case to the arbitral tribunal if the time limit has not expired. Unlike other examples of contemporary domestic legislation on arbitration, most notably, the French domestic arbitration law, the statute does not contemplate a judicial ruling on the merits if an award is set aside.

57. 346 U.S. 427 (1953).

58. Id. at 436. See also Bauer, Manifest Disregard of the Law, 2 LLOYD'S MAR. & COM. L.Q. 142 (1979).

59. See Drayer v. Krasner, 572 F.2d 348 (2d Cir.), cert. denied 436 U.S. 948 (1978); Trafalgar Shipping Co. v. International Milling Co., 401 F.2d 568 (2d Cir. 1968); Saxis S.S.
In a fairly recent case, one federal court essentially equated the “manifest disregard of law” standard of review with the excess of arbitral authority ground for vacating an award under the federal Act. The party alleging “a manifest disregard of the law” bears an exceedingly heavy burden of proof. According to the relevant decisions, “a manifest disregard” involves much more than an error in legal reasoning or a failure to follow legal precedent. Even when the arbitral tribunal misinterprets the contract, there is no basis for vacating the award for “a manifest disregard of the law,” provided that the erroneous interpretation was not “irrational.”

“A manifest disregard of the law” appears to exist only where the arbitral tribunal correctly states the applicable law and then entirely ignores that law in its ruling. While such a standard of review may bear some affinity to a merit review procedure, this standard, like the other grounds for setting aside awards, provides for judicial review only where flagrant
abuses exist that would undermine the legitimacy of any adjudicatory process. The standard certainly has little resemblance to the stated case procedure which was applicable under former English law.

Under the federal Act, arbitral practice in the United States, like its English counterpart, includes certain features of the common-law procedural tradition. For example, arbitral tribunals have subpoena powers that can be applied against third parties. The integration of such features into arbitral practice makes arbitration in common-law jurisdictions rather unusual and perhaps somewhat questionable to parties from civil-law jurisdictions. The power to act against third parties clearly strains the contractual foundation of arbitration and may lend too much weight to its jurisdictional character.

In summary, the United States Arbitration Act defines the position of the federal government and judiciary on arbitration. It provides for the binding validity of arbitration agreements and delimits the scope of judicial assistance and recourse. It is not, however, a thorough statutory statement on arbitral procedure; rather, it is a statement of legislative policy to be applied by the federal courts.

2. The Uniform Arbitration Act: A Model for State Arbitration Statutes

The Uniform Arbitration Act, which acts as a model for many state statutes on arbitration, embodies an unmistakably liberal policy on arbitration. The Uniform Act contains more comprehensive regulatory provisions than its federal counterpart and is more illustrative of what a typical state arbitration statute would provide.

The comprehensiveness of the Uniform Act is reflected in several of its provisions. Section 2 contains fairly detailed rules regarding the proceedings to compel or stay arbitration. These rules, unlike those in the federal Act, include a variety of procedural refinements. Section 2 not only joins...
the two procedures in a single provision, but it also extends its coverage beyond notice and the right to a jury trial, the preeminent concerns of federal law, to procedural issues directly relevant to the actual proceeding. For example, section 2 specifically provides for summary disposition of challenges to the validity of arbitration agreements and for the severability of disputes submitted to arbitration from other claims in a court action.\textsuperscript{68}

The rules contained in this section clearly favor arbitration and afford the process systemic autonomy. Section 2(e) provides that a motion to compel arbitration does not allow the courts to infringe upon the arbitral tribunal's jurisdictional mandate: "An order for arbitration shall not be refused on the ground that the claim in issue lacks merit or bona fides or because any fault or grounds for the claim sought to be arbitrated have not been shown."\textsuperscript{69}

In addition, under section 4 of the Uniform Act, which has no counterpart in the federal statute, the duties of the arbitrators can be satisfied by majority action "unless otherwise provided by the agreement or by this act."\textsuperscript{70} The provisions in the Uniform Act on hearings\textsuperscript{71} are considerably more elaborate than those in the federal Act, where such rules are basically implied in the grounds for vacating awards.\textsuperscript{72} Section 5 of the Uniform Act states the rules regarding the time and place, notice, adjournment, and postponement of the hearing and vests the arbitral tribunal with the authority to reach these determinations.\textsuperscript{73} It also integrates into this framework a standard of basic procedural due process. According to section 5(b): "The parties are entitled to be heard, to present evidence material to the controversy and to cross-examine witnesses appearing at the hearing."\textsuperscript{74} Other rules establish the parties' right to legal representation,\textsuperscript{75} a right not expressly included in the federal Act, and define, in a manner similar to the federal Act, the arbitrators' subpoena powers.\textsuperscript{76}

Moreover, while such provisions are lacking in the federal legislation, the Uniform Act contains express requirements regarding the form of arbitral awards. Awards must be "in writing and signed by the arbitrators joining in the award," as well as rendered within the time limit established by the agreement or ordered by the court.\textsuperscript{77} Like the federal Act, however, the Uniform Act fails to specify whether awards must be reasoned. Given the express enumeration of other requirements and the potential importance of providing reasons, the omission must mean that reasons need not

\textsuperscript{68.} Id. \S 2(a).
\textsuperscript{69.} Id. \S 2(e).
\textsuperscript{70.} Id. \S 4.
\textsuperscript{71.} Id. \S 5.
\textsuperscript{72.} See supra notes 55 & 56 and accompanying text.
\textsuperscript{73.} UNIFORM ACT, supra note 67, \S 5.
\textsuperscript{74.} Id. \S 5(b).
\textsuperscript{75.} Id. \S 6.
\textsuperscript{76.} Id. \S 7.
\textsuperscript{77.} Id. \S 8(a) & (b).
be given. The same conclusion applies to the federal Act and is supported by the decisional law.\textsuperscript{78}

Finally, the Uniform Act allows either the arbitral tribunal or the court to correct or modify the award on basically the same grounds as those contained in the federal Act.\textsuperscript{79} The Uniform Act provides for essentially the same means of recourse to the courts as its federal counterpart, although its excess of authority ground is more limited and its rehearing option if an award is vacated is slightly more complicated.\textsuperscript{80} In striking contrast to the former English statutes on domestic arbitration, the section on vacating awards in the Uniform Act expressly eliminates any mandatory conformity to a judicial standard as a ground for setting aside an award: "But the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award."\textsuperscript{82} The Act thus recognizes the autonomy and sui generis character of arbitral adjudication.\textsuperscript{83}

\textsuperscript{78} See supra note 64. The enumeration of certain requirements and the omission of others raises a number of observations. First, the reference to a time limit in section 8(b) is unique to the Uniform Act, supra note 67; even here, however, there is no statutorily established time limit to serve as a general guideline. Arbitration statutes in some other national jurisdictions do limit the duration of arbitral proceedings. The time limit in section 8(b) can be modified either by the parties or at the request of the arbitral tribunal through a court order. It does indicate, however, that some restraint should be imposed to avoid interminable adjudication and to guarantee the effectiveness of the process.

Second, the reference to "the arbitrators joining in the award," id. § 8(a), confirms the majoritarian character of the award but leaves unanswered the question of whether dissenting opinions can be rendered. Presumably, the legislative granting to arbitral tribunals of powers that are equal to those of courts of law such as subpoena and deposition powers would also support the rendering of dissenting opinions. The utility of dissenting opinions, however, is questionable especially in light of the fact that no judicial review of the award's merits is available. A dissent might provide the losing party with some dilatory incentive or, more positively, at least give him some rational explanation for his defeat. Because arbitral proceedings are private and awards usually go unpublished, dissenting opinions can do little to modify a basically unknown position in the arbitral decisional law. Furthermore, the rendering of minority views could become problematic when the award is unreasoned and the dissent alleges violations of basic due process considerations that constitute grounds for vacating an award. In addition, arbitral deliberations are usually confidential like their judicial counterparts, and an untoward dissent could breach this requirement.

\textsuperscript{79} Uniform Arbitration Act, supra note 67, § 11.

\textsuperscript{80} Id. § 12.

\textsuperscript{81} See supra notes 29-36 and accompanying text.

\textsuperscript{82} Uniform Arbitration Act, supra note 67, § 12(a).

\textsuperscript{83} Currently, 36 states have modern arbitration statutes modelled on the Uniform Act. Holtzmann, United States, 2 Y.B. Com. Arb. 116 (1977). According to the late Professor Domke, these modern state statutes contain a number of typical provisions that embody essential arbitral principles. First, the statutes regard arbitration agreements relating to future disputes as binding and irrevocable and recognize a party's right to compel arbitration by court action. Second, they recognize the jurisdictional effect of arbitration agreements, namely, that a court proceeding relating to a dispute covered by an arbitration agreement can be stayed until arbitration is completed in the agreed-upon manner. Third, they envisage judicial cooperation with the arbitral process by giving the courts the authority to appoint arbitrators when one of the parties refused or cannot do so or when an arbitrator
C. L'Expérience Française

1. The Prior Posture

Before the enactment\(^{84}\) of the Decree of May 14, 1980 (the 1980 Decree),\(^{85}\) the rules applying to arbitration in France were contained in the *Code de procédure civile*,\(^{86}\) which was promulgated in 1806. These provisions were ill-suited to the modern needs of arbitral adjudication.\(^{87}\) Although the French courts eventually played a critical role in adapting the antiquated legislation to modern needs, their initial attitude toward arbitration was nearly identical to the views that prevailed in early English and American judicial opinions.\(^{88}\)

withdraws or is unable to serve. Fourth, they generally restrict the courts' authority to review the arbitral tribunal's findings of fact and application of law. Finally, they usually establish narrow and limited grounds upon which an award may be challenged for procedural defects. See M. Domke, *supra* note 64, at 20.


86. CODE DE PROCEDURE CIVILE [C. PR. CIV.], art. 546, (Dalloz 1975-1976).

87. For example, the code provisions referred to the *tiers arbitre* procedure, which provided for the appointment of a third arbitrator to render a ruling when there was a deadlock between the two arbitrators named at the outset of the proceeding. The only reason for this procedure, one that obviously created unnecessary delay and additional costs, was the failure to require that an uneven number of arbitrators sit on arbitral tribunals. See Carbonneau, *supra* note 84, at 289, 306-07. Moreover, the recourse provisions resulted in an overly intricate system in which many of the available remedies overlapped. See id. at 319-26.

88. The question of the legal validity of the compromissory clause is a case in point. The *Code de procédure civile* only provided for regulation of a *compromis* or submission, that is an agreement to arbitrate an existing dispute. Article 1006 required that a valid *compromis* define the subject matter of the dispute and appoint the arbitrators. It did not have any provisions specifically relating to a *clause compromissoire*, or an agreement to submit future disputes to arbitration. See id., at 282-84, n.17.

In L'Alliance c. Prunier, Judgment of July 10, 1843, Cass. civ., 1843 S. Jur. 1 561 (discussed *supra* note 12), the *Cour de cassation*, the French Supreme Court, rendered an exceedingly conservative answer to the question of what requirements applied to the validity of compromissory clauses. With blatantly circuitous reasoning, the Court held that the requirements enumerated in article 1006 of the *Code de procédure civile*, despite its literal reference to the submission, applied to both the *compromis* and the *clause compromissoire*. Therefore, a valid agreement to submit future disputes to arbitration had to define the subject matter of the dispute and appoint the arbitrators. Because the *clause compromissoire* could not satisfy these requirements, the Court concluded that such clauses were unlawful under French domestic law.

The practical consequences of the *L'Alliance* holding were unmistakable. Because parties involved in a contractual dispute are unlikely to reach a mutual consensus about anything except their individual need for vindication and exclusive right to redress and because mutual consensus is an indispensable element of any arbitration agreement, the only effective arbitration agreement under the *Code de procédure civile* was one relating to future disputes. In effect, the *L'Alliance* holding gutted the possibility of recourse to arbitration in French domestic commercial matters.
As in England and the United States, legislation modified the judicial hostility toward arbitration. Initially, the modification was fairly limited in nature. After extensive and vehement debate, the French Parliament enacted the Law of December 31, 1925, which provided that a *clause compromissoire* was lawful for commercial matters enumerated in article 631 of the *Code de commerce*,\(^{89}\) namely, disputes regarding the obligations and dealings among businessmen, merchants, and bankers.

Although considered lawful in its most critical area of application, an agreement to arbitrate future disputes was not even mentioned in the legislation specifically relating to arbitration. Once a dispute arose, the parties to a *clause compromissoire* had to enter into a submission to bring the dispute before an arbitral tribunal.\(^9^0\) Thus, the compromissory clause was still tainted by a sense of illegality.

In fact, article 2061 of the *Code civil*\(^{91}\) provided that agreements to arbitrate future disputes were null and void unless otherwise provided by law (clearly referring to article 631 of the *Code de commerce*). Under French legislation, the *compromis* was considered the primary arbitration agreement, a position that did not reflect the realities of actual practice. Under the early French perceptions, arbitral adjudication was seen as a distinctly ancillary and basically unsophisticated, perhaps even dangerous, method of resolving disputes.\(^9^2\)

Unlike the English and American experience, the veritable impetus in France for the reassessment of arbitration within the legal system came, quite paradoxically, from the courts. Due to the efforts of practitioners and academic commentators, the French judiciary began to remedy the lacunae in the applicable legislation and to view arbitration as a viable adjudicatory process.\(^9^3\) As a result, an entire body of law, largely independent of the literal language of the code provisions, was developed which took into account the actual needs and problems of commercial arbitration.\(^9^4\)

2. The Decree of May 14, 1980

The reform of the French domestic procedural law on arbitration was enacted in the form of the Decree of May 14, 1980.\(^9^5\) The 1980 Decree

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89. See Carbonneau, *supra* note 84 (citing P. HERZOG, CIVIL PROCEDURE IN FRANCE 513, n.169; CODE DE COMMERCE [C. Com.] art. 631 (Dalloz 1979-1980)).

90. The substance of the latter agreement was governed by the legislative provisions.

91. CODE CIVIL [C. Civ.] art. 2061 (Dalloz 1979-1980).


93. *Id.* at 281-82. For example, despite the complication of and overlap among the various means of recourse, the courts applied these remedial actions with a view toward sustaining the arbitral process. *See id.* at 319-26.

94. *See id.* at 275.

repealed articles 1005 through 1028 of the Code de procédure civile, replacing them with fifty new provisions. The new legislation embodied a single policy objective: to promote arbitration as a legitimate and viable process of dispute resolution. Although many of the provisions simply codified the decisional law achievements, the 1980 Decree represents, from a statutory vantage point, a radical change from the former code provisions, evidencing a total reassessment of the arbitral process.96

For example, the 1980 Decree expressly recognizes the compromissory clause and establishes separate rules for the compromis and clause compromissoire.97 As a result, an agreement to arbitrate future disputes is no longer shrouded with a sense of legal invalidity. Despite the unfortunate and perhaps conflicting language of article 2061 of the Code civil, the compromissory clause is given express legal recognition. As a consequence, the legislation, by implication, acknowledges it as the premier agreement to arbitrate—a status that it unquestionably has in actual practice. Because the compromissory clause is governed independently in the legislation, rules regulating the submission no longer apply to it. As a result, parties who have entered into a clause compromissoire need not subsequently agree to a compromis in order to initiate an arbitral proceeding.98

96. The Decree filled gaps and reorganized rules into a more coherent regulatory statement. The substance of the new legislation makes it perhaps the most advanced domestic arbitration statute.


98. The provision that the arbitral tribunals consist of one or an uneven number of arbitrators has done away with the tiers arbitre procedure. Id. art. 13. Arbitral tribunals can no longer become deadlocked, and the complications, delays, and resort to dilatory tactics that could follow from such a situation have been eliminated. More importantly, the concept of the arbitral proceeding and arbitral functions has been revised. While arbitration can never be more than a private form of consensual justice under civilian concepts, the 1980 Decree brings it as close as possible to a public judicial proceeding by giving it an unmistakable adjudicatory and jurisdictional character. For instance, the legislation refers to the arbitral proceeding as an instance, a term of art used to describe judicial proceedings. Carbonneau, supra note 84, at 293. Moreover, an arbitral proceeding—like a court proceeding—must be conducted in a manner that allows the parties to rebut opposing arguments and evidence (le contradictoire). Id.

The arbitral tribunal’s increased procedural authority also attests to the legislation’s intent to confer a bona fide adjudicatory character on arbitration. The arbitral tribunal can order a party to the arbitration to produce relevant evidence. 1980 Decree, 1980 J.O. 1238, art. 20. This grant of authority basically corresponds to the power vested in a court of law under article 11(2) of the (new) Code of Civil Procedure. While a court can levy a fine (astreinte) against a party who defies its order, the arbitral tribunal, which lacks public adjudicatory authority, can only take the noncomplying party’s lack of cooperation into account in rendering the award. It cannot directly sanction the party. Moreover, the tribunal’s authority to order the production of evidence applies only to the parties to the arbitration, not third parties. Unlike their American and English analogues, arbitral tribunals under French law do not have subpoena power over nonarbitrating parties. In addition, neither the arbitration agreement nor the award can impinge upon the rights of third parties. Although such a limitation makes arbitral adjudication inferior to its judicial counterpart, it correctly recognizes the distinction between a private contractual and a public form of rendering justice. The American and English variations on this point may be excessive and contrary to the general consensus surrounding arbitral procedure.
The grant of additional jurisdictional authority to the arbitral tribunal is a key innovation of the 1980 Decree. Previously, a party could effectively undermine or delay the arbitral proceeding by alleging that the main contract was void and that its nullity voided the arbitration agreement or by maintaining that the dispute submitted to the tribunal was not included within the terms of reference. Such allegations would result in a stay of the arbitral proceeding while a court resolved the jurisdictional controversy. Because the jurisdictional mandate and authority of the arbitral tribunal were anchored in the contractual document, any challenge to its validity or scope placed the very raison d'être of the arbitration in question and generated an issue that was outside the tribunal's jurisdiction. This strict view of the consensual aspect of arbitral adjudicatory authority was a fertile source for dilatory tactics, which threatened to undermine the effectiveness of the process.

The 1980 Decree obviates these problems by adopting the kompetenz-kompetenz doctrine, giving the arbitral tribunal jurisdictional authority to rule upon challenges to either the principle or scope of its own jurisdictional authority. The ruling of the tribunal is subject to judicial review only through fairly limited statutory means that are normally invoked at the end of the process. The additional jurisdictional authority not only has evident practical benefits, but also reinforces the autonomy of the arbitral process.

The 1980 Decree also emphasizes the critical importance of party autonomy. The entire process is born of the parties' willingness and mutual desire to have their contractual disputes resolved through arbitration. The parties, therefore, have considerable authority in determining the perimeters of their agreement, the procedure applying to the proceeding, and the law governing the merits.

An arbitral proceeding in a civil-law jurisdiction will differ in its basic procedural orientation from that in a common-law jurisdiction, like the United States. Oral testimony is generally not considered fundamental under French procedural law, and the judge plays a more active role in the proceeding than his American counterpart. Accordingly, written evidence will usually be emphasized, and, although a form of cross-examination is available to question the parties when they make an appearance, cross-examination is not viewed as an indispensable part of the procedure.

Finally, French legislation provides that awards, once rendered, have res judicata or force de la chose jugée effect. They are a final and binding determination of the dispute, subject to recourse to the courts. Once such recourse has been exhausted, the award requires full and final res judicata effect or autorité de la chose jugée. Here, again, the legislation emphasizes the basic equivalency between arbitration and judicial adjudication by making an arbitral award nearly synonymous with a court judgment. See Carbonneau, supra note 84, at 311-12.

99. See Carbonneau, supra note 84, at 295 & 298.
100. 1980 J.O. 1238, arts. 26 & 27.
101. See Carbonneau, supra note 84, at 299-300. Although it has a lesser formal status, the kompetenz-kompetenz doctrine is also a feature of modern English and American arbitral law. See Steyn, supra note 12, at 11, 24; Holtzmann, supra note 83, at 123, 132.
One of the essential contributions of the new legislation, which follows logically from the foregoing, involves defining the role of the courts in the arbitral process. The 1980 Degree expressly recognizes the jurisdictional impact of the arbitration agreement, seeking to give full legal effect to the parties' intent to submit disputes to arbitration. A court must declare that it lacks jurisdiction to hear a dispute when that dispute is the subject of an arbitration agreement.\textsuperscript{102} Also, the courts can review arbitral awards, but the gravamen of the means of recourse actions is to prevent serious procedural abuses by ensuring a basic conformity to technical requirements and a few fundamental public policy concerns.\textsuperscript{103} Rather than acting as a limitation on the process, this type of judicial supervision only enhances its systemic stature.

Finally, and most importantly, the 1980 Decree affirms the complementary relationship between the arbitral and judicial processes of adjudication. In light of the provisions of the Decree, the concepts of "judicial intervention" in or "judicial interference" with the arbitral process have become completely inapposite. "Cooperation" and "assistance" appropriately describe the interrelationship between these twin modes of adjudication. The new legislation empowers the courts, at the request of the parties or the tribunal, to assist the functioning of the proceeding whenever a public adjudicatory body is necessary to overcome technical difficulties in the process.\textsuperscript{104}

\section*{II. An Assessment of the Parallel Domestic Developments}

\textbf{A. A Summary of the Similarities and Differences}

Developments in the legal systems of England, the United States, and France evidence a clear "rehabilitation" of arbitration as a parallel process of resolving domestic disputes.\textsuperscript{105} The redefinition of the judicial role in

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\begin{enumerate}
\item[102.] Carbonneau, \textit{supra} note 84, at 292.
\item[103.] \textit{Id.} at 326-38.
\item[104.] For example, a court can appoint an arbitrator when one party refuses to do so or when an even number of arbitrators have been appointed; it can extend the arbitral time limit; and it can resolve arbitrator disqualification problems. 1980 Decree. 1980 J.O. 1238, 1980 D.S.L. 207, arts. 14, 16, \& 23. In each instance, the court rules in its \textit{rèféré} capacity, on its authority to hear urgent matters, thereby providing an expeditious resolution of the uncertainties that can attend an arbitral proceeding. Carbonneau, \textit{supra} note 84, at 290-91 \& n.71. The 1980 Decree, therefore, provides for court participation only in exceptional, limited, and absolutely necessary circumstances—essentially, to remedy otherwise intractable procedural deficiencies.
\item[105.] Each system retains a defense of "inarbitrability," which limits the availability of arbitration to contractual, nonpublic policy matters. For example, questions concerning status and capacity are not arbitrable; the validity of patents and trademarks usually cannot be submitted to arbitration; and questions concerning the interpretation of public policy legislation, such as antitrust provisions, ordinarily exceed the legitimate adjudicatory authority of arbitral tribunals. Despite certain chronological and systemic variations, the evolution and its ultimate result in each system bear striking affinities to the others.
\end{enumerate}
\end{footnotesize}
arbitration was central to the reevaluation in each country. Rather than a competitive relationship, the various domestic arbitration laws mandated collaboration between the judicial and arbitral processes, with the public process lending the assistance of its coercive jurisdictional authority where necessary. In England, this phenomenon principally involved a lessening of judicial review powers and the abolition of the stated case procedure. In the United States and France, the legislation expressly established a cooperative interrelationship between the courts and arbitral tribunals. Furthermore, the French legislation specifically equated the arbitral proceeding with its judicial analogue whenever possible.

The parallel development of arbitration law in the three legal systems will be discussed in a subsequent section after a consideration of each system’s reaction to the emergence of international commercial arbitration. Suffice it to note here that, generally, the English law of arbitration has been and, despite marked advances, continues to be the most resistant to both change and a full acceptance of arbitration as an independent system of adjudication. Despite its affinity to the English tradition, the American legislative and judicial perception of arbitration is much more accommodating, reflecting a clear willingness to allow the process to function essentially upon its own dynamism. Nevertheless, certain features of the common-law procedural tradition such as the use of subpoena powers and the cross-examination of witnesses have become part of United States arbitral procedure; they seem to be at odds with the concept of a fully contractual and autonomous arbitral procedure. The French legislation and the decisional law tradition that preceded it remain the most unequivocal statement favoring the juridical independence of arbitral adjudication.

B. The Motivation

The reasons for these parallel and rather dramatic reversals in attitude in different legal systems and traditions are grounded in pragmatic considerations. The industrial revolution gave rise to an increased number of commercial transactions and, concomitantly, to more commercial litigation. Court dockets became crowded with commercial disputes of a moderate to highly complex nature. Unlike other litigation, however, the commercial disputes required expeditious resolution so as not to stymie commerce and economic growth. Moreover, the obligations involved were generally contractual and did not pertain to duties imposed by operation of law; therefore, they did not implicate public policy considerations. Finally, businessmen and merchants carried on their activities according to a special modus vivendi, tailored to their needs and involving special practices and customs.

The arbitral process responded so well to these aspects of commercial dispute resolution that it would have been foolhardy, in light of the evolving needs of society, not to reverse the judicial hostility and distrust. The
privileged adjudicatory domain of the courts, much like the pristine notion of tortious liability based exclusively upon an uncompromising sense of legal and moral fault, was too costly and impractical to maintain. Merchants wanted and needed a means of dispute resolution that would adapt to the particular contours of their accustomed practices. Commercial prosperity was vital to society and the societal concern with preventing potential abuses in commercial practices was allayed by the traditional self-regulatory character of the sector. Finally, the reevaluation of domestic laws on arbitration was partly in response to the growth of international trade, where the needs and realities of international commerce dictated recourse to arbitration. An uncompromising, negative perception of arbitration would have imperiled the ability of merchants in each legal system to participate effectively in international commerce.

C. Apparent Incongruities

In this context, it is rather extraordinary and paradoxical to note that, in the United States, where courts, pursuant to the common-law tradition of stare decisis, take an active, if not principal, role in creating law, statutes were the source of change in the arbitration area. Conversely, in France, a civil-law jurisdiction in which the legal system is wedded to the principle of legislation as the primary source of law, the decisional law was for decades the bastion of change and dynamic adaption in the law of arbitration. Moreover, in a country like France, where parallel tribunals, such as commercial and labor law courts, exist for the resolution of disputes, it is rather astonishing that the limited reform contained in the Law of December 31, 1925, gave rise to such acrimony during its consideration by the Parliament. The legislators may have felt that validating the compromissory clause would undermine the commercial court system which at least provided a judicial means for resolving commercial disputes.

It seems that these systemic incongruities reflected a difference in approach among the respective business forces that supported change in each country. In the United States, supporters may have felt, in light of the adamant judicial position and its fairly longstanding character, that it was

106. One could speculate and search for other contributing factors. In England, the familiar idea of the law merchant must have facilitated the acceptance of a special remedial system designed principally for commercial disputes. The longstanding tradition of judicial review of the merits of awards and the corollary quest for substantive uniformity between arbitral and judicial determinations in the commercial area, however, delayed the coming-of-age of arbitration until 1979. In the United States, as was noted previously, the principal impetus for federal reform came from the New York Arbitration Act of 1920, a statute fostered and supported by a number of key business organizations in a state where the needs of commerce were felt most intensely. In France, the legal system already had the Code de commerce and a separate system of commercial courts presided over by merchants. The idea of a separate adjudicatory process applying primarily to commercial disputes, therefore, was not alien to the legal system and its tradition.

107. See supra note 89 and accompanying text.
more expedient to bring their proposals before legislative bodies. Because no previous law had been enacted on the subject, the legislatures did not have an established interest in the debate. They could therefore address the issue pragmatically without being burdened by antiquated positions. It was certainly more prudent and politic to first petition for change among the states, especially where the nation's industrial centers were located, and then seek a reappraisal of arbitration in federal legislation. As a result, state statutes could serve as precedent and as an indication of an emerging national consensus, while allowing Congress to figure prominently in a ground-breaking legislative movement. Once a legislative mandate was issued with such a clear policy objective, the courts simply had to follow suit.

In France, code provisions on arbitration had been in effect since 1806. In 1925, the French Parliament had to somehow reconcile any reassessment with the then current decisional law position. The legislators had to reach a compromise between what was emerging as a commercial imperative and their sense that the Code and the courts viewed arbitration as an essentially lawless and potentially abuse-ridden process. Moreover, at this time, the International Chamber of Commerce established its headquarters in Paris and the national law of the host jurisdiction could not really provide that agreements to arbitrate future disputes were absolutely unlawful. The limited, but nonetheless significant, French reform in 1925 attempted to reconcile all these divergent factors.

Given the restrained legislative enthusiasm in France, the proponents for change looked to the courts to take the fairly scanty provisions and fill in the gaps as well as to adapt them to the needs of modern arbitration practice. The impetus for change resulted from the collaborative efforts of the courts, scholarly writers, and practitioners, whose work bore formal fruit in the provisions of the 1980 Decree. During the hiatus between 1925 and 1980, the reversal in the judicial attitude was achieved through the holding of colloquia on arbitration, the constant exchange of views and ideas between the various groups, the publication of doctoral theses and treatises on the subject of arbitration, giving it important university recognition, and the founding of the now prestigious Revue de l'arbitrage. In arguing for the reappraisal of arbitration, scholars and practitioners emphasized the particularly civilian concept of party autonomy in contractual matters. Under the French Code civil, they noted that a contract acts as law between the parties. The parties' authority to establish the rules and responsibilities flowing from the agreement is, thus, limited only by the dictates of public policy. Because arbitration is a contractual process, these advocates argued, the willingness of the parties to arbitrate should be curtailed only in those exceptional circumstances where the process violated public policy considerations, such as when the subject matter of the

dispute is not arbitrable. It was precisely this sort of argument that led to the progressive restructuring in France of the judicial and ultimately the legislative concepts of arbitration.

III. THE EMERGENCE OF INTERNATIONAL COMMERCIAL ARBITRATION

The domestic rehabilitation of arbitration was accompanied and possibly inspired by the emergence of arbitration as the premier remedy for disputes arising from international contracts. It would have been difficult for major trading nations to maintain totally contradistinctive attitudes toward arbitration in domestic and international matters. Moreover, in each country, a basic recognition prevailed that special and less restrictive rules should apply to judicial supervision of international arbitral proceedings and to the enforcement of the awards that resulted from such proceedings, whether conducted domestically or abroad. The courts were the primary vehicle for establishing that recognition, although in each jurisdiction legislation either provided the incentive for or eventually confirmed the judicial position.

The interplay of a number of factors contributed to the development of the judicial stance on international arbitration. Since 1925, a number of international documents and conventions have attempted to facilitate the enforcement of foreign arbitral awards. Although the Geneva Protocol and Convention placed too much emphasis upon choice-of-law factors and the lex arbitri, the 1958 New York Convention established a very liberal regime for the recognition and enforcement of foreign arbitral awards, predating the latter upon basically "anational" or "supranational" rules. All three countries ratified the Convention.

The courts in each state apparently felt bound to apply not only the letter of the Convention, but also its underlying spirit; they may have wanted to avoid appearing parochial. A unilaterally conservative interpretation of the Convention might have generated accusations of the extraterritorial application of an overly restrictive domestic attitude that thwarted the emerging international consensus. Given the consensus embodied in the New York Convention, national courts became less protective of

109. International commercial arbitration emerged in the early part of the twentieth century and has expanded its dominion in the last several decades.


112. For instance, the extraterritorial application of United States antitrust laws has given rise to untoward jurisdictional conflicts and reprisal legislation in recent years.
domestic public policy interests, and endeavored to give national legal expression to the emerging international consensus.

Perhaps most importantly, as with domestic arbitration, practical factors militated for the adoption of a favorable judicial and legislative posture. As noted previously, the practices of the international business community had established arbitration as the remedy of choice for international transactions. A restrictive national attitude toward arbitration, in the form of excessive judicial supervision or stringent enforcement policies or both, would single out the jurisdiction as hostile to arbitration and deprive the country of revenues generated by arbitration.

A. The English Position

Although still conservative by comparison, the contemporary English position on international arbitration has been liberalized. The Arbitration Act of 1979\textsuperscript{113} not only abolished the stated case procedure and instituted a new and less stringent form of judicial review in domestic arbitration, but it also authorized exclusion agreements in nondomestic arbitrations, allowing the parties to limit judicial intervention by eliminating some of the High Court's supervisory powers.\textsuperscript{114} Parties to an international or, more precisely, a nondomestic contract have the right to eliminate judicial review of future disputes by inserting a stipulation into the principal contract precluding the courts from hearing appeals, requiring reasoned awards, or providing interlocutory clarification of questions of law.\textsuperscript{115}

Although an exclusion agreement precludes court intervention in international arbitrations when there is an allegation of fraud between the parties, the courts still have the authority to sanction arbitrator misconduct, such as dishonesty or corruption, by setting aside the award, remitting the award for reconsideration, or revoking the arbitrator's authority.\textsuperscript{116} Moreover, exclusion agreements\textsuperscript{117} cannot be used to eliminate "[t]he benefits of English \textit{lex loci arbitri},"\textsuperscript{118} namely, the judicial assistance of the arbitral proceeding, which includes the authority of the court to enforce interlocutory or discovery orders; to order the examination of witnesses; or to extend the time limit for filing a claim. Stating that "[t]he pre-arbitration

\textsuperscript{114} Id. § 4(10)-(11). The High Court's authority to remit an award to the arbitrator or to set aside an award for arbitrator misconduct cannot, however, be excluded by party agreement.
\textsuperscript{115} Id. § 3(1); \textit{cf.} id. § 3(4). When a valid exclusion agreement has been entered into, both parties must consent before recourse can be had to any of the foregoing forms of judicial intervention.
\textsuperscript{116} Park & Paulsson, \textit{supra} note 42, at 274 (citing Arbitration Act, 1950, §§ 22, 23(1) & (2)).
\textsuperscript{117} Arbitration Act, 1979, ch. 42, § 3(1), \textit{reprinted in} 5 Y.B. COM. ARB. 239-46 (P. Sanders ed. 1980).
\textsuperscript{118} Park & Paulsson, \textit{supra} note 42, at 277.
exclusion agreement is possible only for international, or 'non-domestic,' arbitrations"119 and noting that such agreements "are void as to the so-called 'special category' contracts [which are governed by English law] . . . in the areas of shipping, insurance, and commodities,"120 one knowledgeable commentator characterized the underlying purpose and scope of exclusion agreements as:

intended for what Lord Diplock referred to as "one-off" contracts, that is, agreements negotiated on an ad hoc basis for a single transaction. The "one-off" contract presumably is negotiated at arm's length by parties with relatively equal bargaining power, making it unnecessary to provide a nonwaivable right of judicial review to protect the weak or unsophisticated against unconscionable demands for relinquishment of their legal rights.121

The 1979 Act, however, is not free of ambiguities, lacunae, or insufficiencies. For example, it contains a rather narrow and formalistic definition of international arbitration, referring to such arbitrations as "non-domestic" arbitrations.122 Rather than defining the concept by reference to the economic content and impact of the transaction, the standard takes into account only the parties' nationalities and places of residence. It is quite conceivable that parties residing in England or of English nationality could enter into a "one-off" contract that has all the trappings of an international economic transaction. Under the rather mechanical concept of international arbitration in the 1979 Act, an "other than a domestic" arbitration, such parties would, for example, be denied the benefit of entering into a prearbitration exclusion agreement. In addition, the 1979 Act makes no mention of institutional arbitrations that are conducted in London. One question that arises here is whether institutional rules barring the appeal of awards would constitute the equivalent of a prearbitration exclusion agreement.124

Finally, the invalidity of exclusion agreements in regard to "special category" contracts (shipping, insurance, and commodity contracts), despite the evident international character of many of these transactions even under English definitions, is a source of serious concern. Presumably, these types of transactions constitute a major part of the international business that goes through England. One wonders why they should be singled out for possible substantive judicial supervision. This provision for judicial review would seem to severely diminish the achievements of the other, more liberal sections of the Act.

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119. Id. at 275.
120. Id. at 276 (footnotes omitted).
121. Id. at 274-75.
122. Id. at 275 & n.112.
124. Park & Paulsson, supra note 42, 276-77.
In *Pioneer Shipping v. B.T.P. Tioxide Ltd.*, the first case to reach the House of Lords under the 1979 Act, Lord Diplock advanced the following justification for exclusion agreements in "special category" contracts:

The parliamentary intention evinced by S 4 in maintaining for the time being a prohibition on pre-dispute exclusion agreements only was to facilitate the continued performance by the courts of their useful function of preserving, in the light of changes in technology and commercial practices adopted in various trades, the comprehensiveness and certainty of English law as to the legal obligations assumed by the parties to commercial contracts of the classes listed, and particularly those expressed in standard terms

The legislative provision and its judicial justification appear to reintroduce the stated case procedure, or at least its underlying rationale, into the new legislation. Although judicial review is limited to instances in which English law applies and its use would make the substance of arbitral rulings publicly available, the invalidity of exclusion agreements in "special category" contracts indicates that judicial review of the legal substance of awards, historically the distinguishing characteristic of the English law of arbitration, is still important.

The integration of this exception into international or "non-domestic" arbitration is untoward because it gives extraterritorial scope to English law and confounds the efforts to elaborate a truly international law merchant. As Lord Diplock indicated, the exception is meant to function for the benefit of English law to guarantee its "comprehensiveness and certainty." Surely, the English law or any national law cannot be considered as the repository of truly international legal commercial standards. Moreover, the very idea of strict arbitral conformity to judicial standards for the construction of legal principles is unrealistic. It is a view that mistakes the mission of a remedial procedure and makes the modified vocation of arbitration a function of national court authority. It continues to express fundamental distrust of the arbitral process, refuses to recognize its coming-of-age, and ultimately can rob international commerce of an effective and necessary dispute resolution mechanism.

The English view of international arbitration, as qualified by the "special category" contracts exception, creates unwarranted tension between

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126. Id. at 741.
127. In other international commercial areas, arbitrators resolve disputes without the aid and assistance of the English courts. Many other national jurisdictions take the view that arbitrators are better able to deal with the fluidity and evolving character of commercial practices and to gauge the standards for a commercially acceptable resolution of disputes.
128. Matters involving the application of foreign law are considered to be questions of fact in England and, therefore, not subject to judicial review. See A. DICEY, CONFLICT OF LAWS 1124-33 (J. Morris 9th ed. 1973).
129. See *supra* text accompanying note 126.
judicial and arbitral adjudication. While the former can provide correct legal results, the latter, at this stage in its development, needs to yield binding and final awards. Although a balance between the judicial and arbitral processes and their competing needs and interests must be achieved, primary recognition should be given to the international consensus that surrounds the private dispute resolution process. Court supervision should be limited to the fundamental concerns of procedural fairness: the need to curb the abusive exercise of excessive arbitral authority and the need to protect the rights of third parties in the private proceeding between the contracting parties.

Despite these misgivings, the 1979 Act does liberalize the English law on arbitration by attenuating the possibility of judicial intervention. Ultimately, the success of the reform will depend upon the courts' willingness to follow the general objective of the Act, which seeks to attribute greater autonomy to arbitrators. As Professor Park notes, recent House of Lords decisions "indicate a developing judicial respect for arbitral autonomy."130 Emphasizing the critical importance of the courts' attitude in this area, he concludes that:

[T]he High Court's power to set aside awards on the vague ground of arbitrator "misconduct" should be replaced by a provision allowing awards to be challenged only for clearly enumerated procedural deficiencies, or for a fundamental discord between what or how the arbitrator decided and what or how the parties authorized him to decide. Admittedly, rules flexible enough to be useful may not deter an aggressive judge straining to impose what he sees as the right result in a controversy. Nonetheless, guidelines would provide arbitration lawyers with a greater measure of predictability.131

B. The American Position

Prior to 1970, the United States was not a party to any international agreement on arbitration.132 Although a delegation attended the meetings on the United Nations Convention on Commercial Arbitration held in New York in 1958, the United States refused to accede to the Convention until 1970.133 This restrictive view of the significance of the Convention as an international document on arbitration created evident difficulties for

130. Park & Paulsson, supra note 42, at 278.
131. Id. at 284-85.
132. For example, it did not adhere to either the 1923 Geneva Protocol on Arbitral Clauses or the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards. See Holtzmann, supra note 83, at 138.
133. The United States grounded its refusal on the following set of considerations:
   1. The Convention, if accepted on a basis that avoids conflict with state laws and judicial procedures, will confer no meaningful advantages on the United States.
   2. The Convention, if accepted on a basis that assures such advantage, will
American business interests, which wanted to participate in and perhaps guide the development of international trade.¹³⁴

During the period between 1958 and 1970, a number of private organizations, including the American Bar Association, the American Arbitration Association, and the United States Council of the International Chamber of Commerce, attempted to reverse the United States position on the New York Convention.¹³⁵ In May 1960, the American Bar Association Committee on International Unification of Private Law submitted a report in which it recommended that the United States accede to the New York Convention and make the appropriate changes in the Federal Arbitration Act of 1925. Other prominent groups, such as the American Bar Association House of Delegates, strongly endorsed these recommendations. In 1963, the United States abandoned its longstanding opposition to the international unification of private law and participated in the Hague Conference on Private International Law. Finally, in 1970, subject to the double reservation that the Convention would be applied on the basis of reciprocity and only to disputes arising out of contractual or other relationships considered as commercial under United States law, the United States ratified the 1958 New York Convention.¹³⁶

The implementation of the Convention led to the enactment of the 1970 Arbitration Act,¹³⁷ establishing a set of new provisions for dealing with litigation falling under the Convention. The Convention governs cases in

override the arbitration laws of a substantial number of states and entail changes in state and possibly Federal court proceedings.

3. The United States lacks a sufficient domestic legal basis for acceptance of an advanced international Convention on the subject matter.

4. The Convention embodies principles of arbitration law which it would not be desirable for the United States to endorse.


134. See Burstein, *Arbitration of International Commercial Disputes*, 6 B.C. INDUS. & COM. L. REV. 569, 570 (1965); Domke, *American Arbitral Awards: Enforcement in Foreign Countries*, U. ILL. L. FOR. 399, 400 (1965). Although parties could sign and ultimately invoke contracts containing arbitration clauses, enforcing the ensuing award or predicting the enforceability of awards at the time the contract was being negotiated was precarious at best. Since the New York Convention contained a reciprocity reservation by which a signatory state could qualify its accession, an award rendered against a foreign contractor in favor of his American partner might not be enforceable in the foreign contractor's home jurisdiction (the situs of his assets). Similarly, given the refusal to accede to the Convention, foreign commercial parties could not be assured that awards rendered against a company could be enforced in United States jurisdictions. In this setting, the available alternatives were all equally unacceptable: either refuse to do business or enter into an agreement providing for arbitration, the end result of which could be gutted entirely by negative court action, or enter into contracts with only a limited provision for dispute resolution, thereby instilling the transaction with a dangerous lack of predictability. The litigation that could arise from the second or third alternative might be protracted and costly, involving, *inter alia*, exceedingly complicated jurisdictional, choice-of-law, and evidentiary issues.


136. *Id.* at 73.

which an arbitration agreement or award arises out of a dispute in which both parties are foreign nationals or one of them is a United States national while the other is of foreign nationality. When both parties are United States nationals, the Convention governs only in instances in which the "relationship involves property located abroad, envisages performance or enforcement abroad, or has some other rational relation with one or more foreign states." Like the English definition of international arbitration in the Arbitration Act of 1979, the American legislation focuses upon the formalistic requirement of the parties' nationalities. The applicable definition in cases in which no party is a foreign national, however, reflects a far more considered and realistic approach than the English concept of "non-domestic" contracts. The United States definition looks to the actual economic impact of the commercial relationship in the international community to determine whether the award is international and subject to the provisions of the Convention.

Moreover, the 1970 Act grants jurisdiction to the federal courts regardless of the amount of controversy and provides for the removal of cases from state to federal courts. Also, the courts may issue an order to compel arbitration where a valid arbitration agreement exists regardless of whether the agreement provides for arbitration in a place "within or without the United States." To some extent, the jurisdictional reach of the federal courts is given an extraterritorial, albeit positive, effect in that their authority is used to buttress the application of a legal norm that is contained in an international instrument. This norm is the principle of the jurisdictional effect of an arbitration agreement. As stated in article 2(1) of the Convention, the courts can assist the arbitral process by appointing arbitrators when necessary "in accordance with the provisions of the agreement." This provision not only evidences a strong respect for the contractual aspect of arbitration, but also integrates into the legislative


138. New York Convention, supra note 111, art. 1.
141. Id. § 206.
142. Id.
scheme the concept of judicial assistance of and cooperation with the arbitral process. Finally, the 1970 Act establishes a three-year prescriptive period (tolling from the date the award is rendered) for the confirmation of awards; the "refusal or deferral of recognition or enforcement" can be obtained only upon the narrow grounds set forth in the Convention. Unlike the 1979 English Act, the procedure for confirming awards obviously excludes any possibility of the judicial review of the merits of international arbitral awards.

Because of their moderate substantive character, the judicial construction of these provisions is vital. The attitude of the courts has been in keeping with the policy underlying the New York Convention, which favors the enforcement of foreign arbitral awards. Indeed, the courts have interpreted the 1970 Act rather expansively, holding that it contains a strong public policy favoring international arbitration generally.

1. The Scherk Decision

Scherk v. Alberto-Culver Co. is the seminal case in the United States decisional law on international arbitration. It clearly illustrates the basic tenets of the United States judicial position. In this case, Alberto-Culver, a United States manufacturer based in Illinois, in order to expand its foreign operations, purchased three companies from Scherk, a German national. The United States party also bought all the trademark rights attaching to these companies, which were incorporated under the laws of Germany and Liechtenstein. The contract pertaining to the sale was negotiated in the United States, England, and Germany; signed in Austria; and closed in Switzerland. It contained express warranties stating that the trademarks were unencumbered and an arbitration clause providing for ICC arbitration in the event of a dispute. The contract also provided that the law of Illinois would be the law governing the contract.

143. Id. § 207.
144. See, e.g., Fotochrome, Inc. v. Copal Co., 517 F.2d 512, 516 (2d Cir. 1975). In addition, the courts have held that the definition of the word "commerce" is broader under the New York Convention than the 1925 Federal Act. See, e.g., Sumitomo Corp. v. Parakopi Compania Maritima, S.A., 477 F. Supp. 737, 740 (S.D.N.Y. 1979), aff'd 620 F.2d 286 (2d Cir. 1980). That the public policy notion in the Convention and the Act "is to be construed narrowly to be applied only where enforcement would violate the forum state's most basic notions of morality and justice." See Fotochrome, Inc. v. Copal Co., 517 F.2d 512, 516 (2d Cir. 1975). "[T]he extensive judicial review frustrates the basic purpose of arbitration, which is to dispose of disputes quickly and avoid the expense and delay of extended court proceedings." Parsons & Whittemore Overseas Co. v. Société Générale De L'Industrie Du Papier, 508 F.2d 969, 977 (2d Cir. 1974) (quoting Saxis Steamship Co. v. MultiFaces International Traders, Inc., 375 F.2d 577, 582 (2d Cir. 1967)). "In applying federal law . . . , the court must focus on the single question of whether there was an agreement on the clause in the contract providing for arbitration." In re Hart Ski Mfg. Co., 18 Bankr. 154, amended on other grounds, 22 Bankr. 762, aff'd 22 Bankr. 763 (Bankr. D. Minn. 1982).
146. Id. at 508.
Almost a year later, when Alberto-Culver allegedly found the trademarks to be substantially encumbered, it offered to tender the property back to its co-contractant and rescind the contract; Scherk, however, refused to accept the offer. The United States manufacturer then brought suit before the Federal District Court in Illinois, alleging that Scherk's fraudulent representations regarding the trademarks violated provisions in the Securities Exchange Act of 1934. The German defendant filed a number of exceptions, including a motion to stay the judicial proceeding pending ICC arbitration pursuant to the terms of the contract. Relying upon the United States Supreme Court decision in *Wilko v. Swan*, the Federal District Court granted a preliminary order enjoining Scherk from proceeding with the arbitration. In *Wilko*, the Court held that an arbitration agreement could not preclude a buyer of a security from seeking a judicial remedy under the Securities Act of 1933. The Court of Appeals for the Seventh Circuit affirmed the District Court determination, reasoning that the *Wilko* decision was controlling.

On appeal to the United States Supreme Court, the record was not very favorable to the German defendant. Not only were there allegations of manifest fraud on his part, but also his plea to proceed with arbitration was colored by the fact that he had taken steps to initiate ICC arbitration only at a very late date during the District Court proceeding. Indeed, his conduct in this regard smacked of the dilatory. Moreover, the two Securities Acts in question contained express legislative language mandating the application of the remedies provided for in the legislation, barring "[a]ny condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provisions of this subchapter . . . ."

Although the facts of the case appeared to direct all the equities toward Alberto-Culver, and the 1953 *Wilko* view of the public policy statute of the judicial remedies proffered by the Securities Act seemed to be dispositive, the United States Supreme Court reversed the District Court order enjoining Scherk from proceeding with arbitration. The Court's doctrinal approach to the question presented in the case transcended both the factual and domestic precedential aspects of the litigation, elevating it to a new policy dimension created (or at least supported) by the enactment of the 1970 Arbitration Act.

In the Court's assessment, the critical factor that served to distinguish *Scherk* from *Wilko* and provided the justification for its ultimate holding was the "truly international" character of the contract in *Scherk*:

Accepting the premise, however, that the operative portions of the language of the 1933 Act relied upon in *Wilko* are contained

147. 346 U.S. 427 (1953).
149. *Id.* at 512 (quoting Securities Act of 1933, 15 U.S.C. § 77n (1976)).
150. *Id.* at 521-22.
in the Securities Exchange Act of 1934, the respondent's reliance on *Wilko* in this case ignores the significant and, we find, crucial difference between the agreement involved in *Wilko* and the one signed by the parties here. Alberto-Culver's contract to purchase the business entities belonging to Scherk was a truly international agreement.\(^{151}\)

The Court went on to provide a definition, or at least an analytical account, of what it meant by the phrase "truly international" agreement. It looked to the parties' divergent nationalities, where they conducted their principal business activities, and the place of incorporation of the companies in question. It also took into account the fact that the negotiating, signing, and closing of the contract took place in a variety of different countries.\(^{152}\) The subject matter of the contract, however, appeared to be the conclusive consideration in the Court's assessment of what constituted a "truly international" agreement: "Finally, and most significantly, the subject matter of the contract concerned the sale of business enterprises organized under the laws of and primarily situated in European countries, whose activities were largely, if not entirely, directed to European markets."\(^{153}\)

The reference in the analysis to this final factor appears to represent a decisional law gloss on section 202 of the 1970 Arbitration Act, which provides that "[a]n agreement or award arising out of such [a commercial] relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states." Although the transaction in *Scherk* did not involve exclusively United States nationals, the Court took great pains to emphasize the economic impact of the agreement in question, making that consideration, as opposed to mere diversity of nationality, the distinctive feature of "truly international" contracts. Moreover, this interpretation appears to convert the status of the economic impact criterion in the statute from that of a factor subordinate to the nationality requirement to one that is conclusive in determining the scope of application of the New York Convention.

The Court's emphasis upon the economic impact criterion in its analysis of what constitutes a "truly international" contract indicates that it did not perceive the ratification of the New York Convention and the enactment of the 1970 Arbitration Act as the mere elaboration of rules for dealing with the enforcement of foreign arbitral awards. Rather, the Court's decision illustrates its view that the New York Convention embodies a general

\(^{151}\) Id. at 515.

\(^{152}\) Id.

\(^{153}\) Id.
policy on international trade—one that favors the development of international trade through the elaboration of legal rules and principles that minimize the national legal obstacles to the performance of international contracts.

Admittedly, the New York Convention deals only with the recognition and enforcement of foreign arbitral awards. It does not purport to cover other issues, nor does it ever refer to anything international, much less something "truly international." Because the enforcement of awards, however, is critical to the viability of the arbitral process, the Convention actually articulates rules that are supportive of the entire process. The Convention creates a policy, founded upon an international consensus, that favors, or at least recognizes as legitimate, the resolution of disputes through arbitration. Logically speaking, because arbitration provides a means for avoiding intractable jurisdictional, choice-of-law, and other problems in international contracts, arbitration is a process that is indispensable to the development and continued growth of international trade. In this sense—and this seems to be the Court's implied view in Scherk—the provisions of the New York Convention and the implementing domestic legislation transcend the mere articulation of an enforcement procedure for foreign arbitral awards, but rather embody a type of global consensus on international trade itself (to which the United States has adhered). With its implementing legislation and the Scherk opinion, the United States is indeed a far cry from the rather unimaginative and overly restrictive English view of international arbitration as mere "non-domestic" arbitration.

These implied considerations buttress the Court's express and very significant pronouncement that a separate legal regime governs issues arising under international contracts containing arbitration clauses. In Wilko, which involved a purely domestic transaction, the Court found that an arbitration agreement could not constitute a waiver of the judicial remedies contemplated under section 14 of the Securities Act of 1933. In Scherk, however, the Court stated that the international character of the transaction called for the application of a different rule: "Such a contract involves considerations and policies significantly different from those found controlling in Wilko." In Wilko, although two policy objectives were in conflict, one favoring arbitration and the other providing for nonwaivable judicial recourse in disputes involving security transactions, the exclusively domestic character of the transaction precluded the possibility that "international conflict-of-laws problems would arise" because United States law alone was applicable. Giving judicial remedies priority over arbitration

155. Scherk, 417 U.S. at 515.
156. Id. at 516.
in *Wilko* did not disturb the parties' substantive expectations, at least as they were created under the provisions of the governing law or compromise the nature of the transaction. An overriding domestic public policy concern mandated a judicial resolution of disputes involving allegations of fraud and misrepresentation in securities transactions.

According to the Court, an arbitration agreement contained in an international contract has a very different legal status, impact, and role. “The exception to the clear provisions of the Arbitration Act carved out by *Wilko* is simply inapposite to a case” like *Scherk*:157

Such . . . [an international] contract involves considerations and policies significantly different from those found controlling in *Wilko*. . . . In this [the Scherk] case, by contrast, in the absence of the arbitration provision considerable uncertainty existed at the time of the agreement, and still exists, concerning the law applicable to the resolution of disputes arising out of the contract.158

Although articulated in choice-of-law language, the Court’s concern was more than merely legalistic. Its reasoning reflected a broader pragmatic concern for the viability of international commerce, a desire to establish an American judicial posture untainted by parochialism or the extraterritorial application of national standards. The Court properly recognized the critical importance of international arbitration to the “fabric of international commerce”:159

Such uncertainty will almost inevitably exist with respect to any contract touching two or more countries, each with its own substantive laws and conflict-of-laws rules. A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction. Furthermore, such a provision obviates the danger that a dispute under the agreement might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved.

A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages. In the present case, for example, it is not inconceivable that if Scherk had anticipated that Alberto-Culver would be able in this country to enjoin resort to arbitration he might have sought an order in France or some other country enjoining Alberto-Culver from proceeding with its litigation in the United

157. *Id.* at 517.
158. *Id.* at 515-16.
159. *Id.* at 517.
States. Whatever recognition the courts of this country might ultimately have granted to the order of the foreign court, the dicey atmosphere of such a legal no-man's-land would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements.\textsuperscript{160}

In his dissent, Justice Douglas assailed the majority opinion, decrying its "invocation of the 'international contract' talisman"\textsuperscript{161} through which parties could "immunize"\textsuperscript{162} themselves and thereby escape the reach of domestic public policy considerations contained in the Securities Acts. In his lengthy discussion of the "undesirable effects of remitting a securities plaintiff to an arbitral, rather than a judicial forum," Justice Douglas concluded that "[t]he loss of the proper judicial forum carries with it the loss of substantial rights,"\textsuperscript{163} stating further that:

The agreements in this case provided that the "laws of the State of Illinois" are applicable. Even if the arbitration court should read this clause to require application of Rule 10b-5's standards, Alberto-Culver's victory would be Pyrrhic. The arbitral court may improperly interpret the substantive protections of the Rule, and if it does its error will not be reviewable as would the error of a federal court. And the ability of Alberto-Culver to prosecute its claim would be eviscerated by lack of discovery. These are the policy considerations which underlay \textit{Wilko} and which apply to the instant case as well.\textsuperscript{164}

Finally, he emphasized the need to afford United States substantive and procedural remedies to American investors dealing abroad, despite what a dispute-resolution clause in their contract might provide:

Those [federal security] laws are rendered a chimera when foreign corporations or funds—unlike domestic defendants—cannullify them by virtue of arbitration clauses which send defrauded American investors to the uncertainty of arbitration on foreign soil, or, if those investors cannot afford to arbitrate their claims in a far-off forum, to no remedy at all.

Moreover, the international aura which the Court gives this case is ominous. We now have many multinational corporations in vast operations around the world—Europe, Latin America, the Middle East, and Asia. The investments of many American investors turn on dealings by these companies. Up to this day, it has been assumed by reason of \textit{Wilko} that they were all protected by our various federal securities Acts. If these guarantees are to

\textsuperscript{160} Id. at 516-17.
\textsuperscript{161} Id. at 529 (Douglas, J., dissenting).
\textsuperscript{162} Id. at 530.
\textsuperscript{163} Id. at 532.
\textsuperscript{164} Id. at n.11.
be removed, it should take a legislative enactment. I would enforce our laws as they stand, unless Congress makes an exception.165

Citing its previous opinion in *The Bremen v. Zapata Off-Shore Co.*,166 and alluding to the *pacta sunt servanda* principle, the majority responded by incorporating a truly internationalist attitude into its holding:

An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute. The invalidation of such an agreement in the case before us would not only allow the respondent to repudiate its solemn promise but would, as well, reflect a "parochial concept that all disputes must be resolved under our laws and in our courts . . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts."167

Pursuant to the United States accession to the New York Convention, the *Scherk* Court, in effect, recognized international commercial activity regulated by agreements to arbitrate as a unique area of commercial dealings, and exempted them from the reach of most domestic public policy requirements. The role of the national judiciary was to promote this process, rather than curtail it.

Although the basic thrust of the *Scherk* opinion is unmistakably favorable to arbitration, courts might distinguish circumstances in which the parties would agree to arbitration in another European city, without reference to the ICC, and stipulate that the arbitral tribunal apply the provisions of a foreign law. Recent federal court decisions on international arbitration do not reveal any further refinement of the general position assumed by the Court in *Scherk*. Most of the relevant rulings simply reiterate the essential policy perspective and decide cases accordingly. Any conclusion on this question without the support of appropriate case law is merely speculative, but one can legitimately suspect that *Scherk* and its progeny represent a judicial posture that is much more than a mere liberalizing trend. The evident inequities worked upon Alberto-Culver, Scherk's less than above-board conduct, and the possibility that the provisions of Rule 10b-5 of the Securities Exchange Act of 1934 would be applied by foreign nonlawyers on the arbitral tribunal did not dissuade the Court from upholding the process of international arbitration. Given the apparent strength of the Court's conviction, it seems doubtful that an ad hoc international arbitration requiring acquiescence not only in an agreed-upon foreign forum, but also in the nonapplication of otherwise applicable domestic public policy rules would fare less well.

165. *Id.* at 533.
2. Developments Subsequent to Scherk

Since 1970 and the Scherk decision, the United States courts have exhibited a very favorable attitude toward international arbitration. The decisional law construing the applicable federal legislation appears to strongly emphasize the contractual character of arbitration, thereby creating a reluctance on the part of the courts to "strait-jacket" the process with overly comprehensive rules. These decisions limit court activity to assistance in the proceeding and basic scrutiny of awards for violations of limited fundamental public policy considerations, such as arbitrability and due process. For example, although an arbitration agreement must be in writing, the courts have adopted a flexible interpretation of the word "writing," which reflects the technological character of the current means of communication. Specifically, in cases involving international arbitration, the United States courts generally engage in a very flexible construction of the requirements pertaining to the validity of the arbitration clause, leaving it to the moving party to establish its deficiencies and viewing any public policy exception narrowly. Moreover, the jurisdictional effect of a valid agreement to arbitrate is well-recognized: It results in a stay of the court proceeding.

In the appropriate circumstances, the courts will assist arbitration either by compelling arbitration or appointing arbitrators. Matters related to the arbitral procedure are, thus, within the parties' contractual discretion, limited only by basic public policy concerns. Essentially, this involves the right to a fair hearing, namely, notice and the opportunity to present evidence and arguments. The parties, however, can waive their right to an oral hearing and require the arbitral tribunal to rule on the basis of a written exchange of documents and arguments. Moreover, since the landmark opinion in Prima Paint Co. v. Flood & Conklin Mfg. Co., United States courts have recognized the separability doctrine, providing that an arbitration agreement is separable from the main contract. Accordingly, allegations that the main contract is invalid will not result in a divestiture of the arbitral tribunal's jurisdictional authority. The arbitration agreement is a self-sufficient and autonomous legal document that gives the arbitral tribunal jurisdictional authority to consider all arbitrable disputes arising under the main contract. Allegations relating to the invalidity of the arbitration agreement itself, however, can lead to the judicial

169. See id. at 797.
170. See id. at 797-98.
171. See id.
172. See id. at 800-06.
resolution of the dispute if the allegation appears convincing and the recourse to arbitration more than likely would prove to be futile given the apparent eventual invalidation of the main contract and the arbitration agreement. ¹⁷⁴

¹⁷⁴ See Delaume, supra note 168, at 799-800. The result in Astra Footwear Industry v. Harwin International, 442 F.Supp. 907 (S.D.N.Y. 1978), illustrates the very considerable lengths to which United States courts will go to uphold the parties’ original contractual intent to submit disputes to arbitration, notwithstanding objections concerning the arbitration agreement's technical validity. In this case, the parties to the contract, a Yugoslavian manufacturer and a New York distributor, agreed to submit any future disputes to arbitration by the New York Chamber of Commerce. Both parties were unaware that the Chamber had ceased to exist at the time the arbitration agreement was signed. When a dispute arose, one party filed an action to compel arbitration, while the other argued that the arbitration agreement was void because its express terms could not be carried out. The court disregarded the latter argument and issued an order compelling arbitration. It reasoned that the parties’ intent to submit disputes to arbitration was clearly established. Id. at 910. See Delaume, supra note 168, at 801-02.

Moreover, as noted previously, decisional law has established that awards need not be accompanied by reasons. In Bernhardt v. Polygraphic Co., 350 U.S. 198 (1956), the Court held that, because the federal legislation contained no rules regarding this matter, arbitral awards did not need to contain reasons explaining the result. The Bernhardt holding reflected the Court’s willingness to recognize not only the letter, but also the spirit of the federal Act. It impliedly subscribed to the view that juridical obstacles should not be created to obstruct the normal course of arbitration and the courts should assist rather than attempt to hinder the process. In pragmatic terms, requiring reasoned awards would have created an opportunity for delay and the exercise of dilatory tactics and increased the possibility of appeal and the vacating of awards. See id. See also supra note 62 and accompanying text.

Maritime arbitral practice constitutes an exception to the general rule of unreasoned awards. There, given the special circumstances of the maritime industry, particularly the use of standard form contracts for nearly all maritime transactions, there is a need for having a consistent and predictable arbitral interpretation of the provisions of the standard forms. See supra note 64 and accompanying text.

It seems that, in addition to preserving basic public policy interests in the arbitral process, the primary role of the United States courts is to assist the parties and the tribunal in bringing the arbitration to a successful completion, such as by aiding in discovery, bringing witnesses before the tribunal, and ordering conservatory measures. The American law of arbitral procedure has several distinctive features. These procedural differences can be vitally important when United States law is applied to international arbitral proceedings. First, an arbitral tribunal ruling under the federal legislation, although not bound by the strict rules of evidence applying to judicial proceedings, does have subpoena powers over the arbitrating parties and third-parties.

Second, following their basic procedural powers, a majority of American courts can assume the authority to consolidate arbitral proceedings that deal with similar or identical facts and issues. See Delaume, supra note 168, at 802-04.

Under the civil-law concept of arbitration, such authority on the part of the courts—even though it is used to achieve the ends of adjudicatory efficiency and consistency—would be considered in all likelihood as une immixtion, an unwarranted interference by the judiciary in private arbitral proceedings.

Finally, dissenting opinions are permitted in United States arbitral practice. Again, the contrast with civil-law concepts of arbitral adjudication could make the reaching of an agreement to arbitrate in the United States or according to United States rules difficult. In civil-law countries, courts rule as unitary public bodies; as a result, dissenting opinions are never rendered. The issuance of such an opinion could imperil the secrecy of the deliberations and create additional difficulties if the award is unreasoned.
C. *La Prise de la Position Française*

1. The Decree of May 12, 1981

The French Decree of May 12, 1981, is the first French legislative enactment concerning international arbitration.\(^{175}\) While it is generally in keeping with the tone and substance of its English and American counterparts, the Decree actually constitutes a more liberal and advanced statement of national policy on international commercial arbitration. In many evident respects, it bears much greater affinity to the 1970 American Arbitration Act than to the English Arbitration Act of 1979. Like the 1970 Act, it is a succinct statement of the enforcement framework relating to international arbitral awards. While the American statute merely implements the provisions of the 1958 New York Convention, the French Decree constitutes a document separate from the treaty provisions. Under Article 7 of the Convention, the Decree is a set of national rules that coexists with the rules of the Convention. In some instances, the provisions of the Decree, in fact, are more liberal than their counterparts in the Convention.\(^{176}\)

Of the three domestic legislative documents, the Decree, in its celebrated article 1492, advances the most comprehensive definition of international arbitration. The article provides that an international arbitration is one that "implicates the interests of international commerce." There is no artificial choice-of-law reference to the nationality factor; rather, the determination of the character of a contract is made by exclusive reference to the economic substance and impact of the transaction.\(^{177}\) By implication, the language of article 1492, then, recognizes a sphere of lawful adjudication that is not anchored in any national legal system while nonetheless representing a consensus among nations.\(^{178}\)

The Decree expressly attributes predominant importance to the principle of party autonomy. It contemplates imposing only the most necessary

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176. See J. ROBERT & T. CARBONNEAU, *supra* note 1, at pt. II. The Decree also contains substantive pronouncements on international arbitration that are either merely implied or lacking in the Convention.

177. See id.

178. Such a development essentially mirrors the evolution of the meaning attributed to the French concept of private international law. Traditionally, this concept referred to choice-of-law rules that applied to international litigation; in its more current acceptance, it refers to national substantive principles that have been created to apply specifically in this type of litigation.
restraints on the arbitral process, making international arbitration largely independent of any national control. For instance, the parties in their agreement provide for the appointment of arbitrators and choose the applicable procedural and substantive law. This recognition of institutional arbitration is unique to the French legislation and reflects its intent to account for contemporary arbitral developments and to allow arbitration to evolve and function on its own terms. Also, the arbitral tribunal must rule according to the rules of law. The parties, however, can select the applicable legal rules and modify their content. In any event, in its ruling, the tribunal must take commercial usages into account. Finally, the parties can authorize the tribunal to rule ex aequo et bono.

In these matters, party discretion can range from the selection of national law to institutional rules to self-devised provisions and end with a combination of these various possibilities. Party autonomy is essentially unfettered. Flexibility and choice are two essential features of international commercial arbitration, and, here as elsewhere, the Decree gives them full impact. For example, article 1495 provides, in relevant part: "When the international arbitration is submitted to the French [domestic] law [of arbitration], its provisions . . . are applicable only when there is no agreement to the contrary . . . ." Although French law may have been specifically designated by the parties, its rules control only when the parties have failed to provide for other applicable rules. In matters of international arbitration, under the French legislation, the party autonomy principle can eliminate the application of an otherwise controlling national domestic law.

The courts can intervene in the proceeding only to assist the process and only in fairly limited circumstances. When the arbitration is taking place in France or is submitted to French procedural law, the district court in Paris can appoint arbitrators at the request of one of the parties in the event of a difficulty, unless the agreement provides to the contrary. The Decree does not contemplate any other form of court assistance. For instance, when the agreement fails to provide for an applicable procedural or substantive law, the arbitral tribunal has the authority to make a determination. The provision for limited judicial assistance attests to the intent of the the French legislation to give full recognition to the special charac-

179. See J. ROBERT & T. CARBONNEAU, supra note 1, at pt. II.
180. See id.
181. See id.
182. See id.
183. See id.
184. See id.
185. See id.
teristics of international commercial arbitration and provide regulations for a process that is "anational" or "supranational" in character.186

The initial statement of policy is followed by a set of rules relating to the recognition and enforcement of foreign and international arbitral awards.187 These rules apply independently of the provisions of the New York Convention, either when a party designates them as applicable or when the award falls outside the scope of the Convention. These rules are basically identical to—if not, in fact, more liberal than—their counterparts in the Convention.188

The means of recourse available under the Decree are quite limited. Although a full-blown appeal can be lodged against a decision that denies recognition or enforcement of an award, recourse can be had against a decision granting recognition or enforcement only upon the basis of specifically enumerated and narrow grounds:

1) When the arbitral tribunal ruled without an arbitration agreement or on the basis of an expired or void agreement;
2) When the arbitral tribunal was irregularly constituted or the sole arbitrator irregularly designated;
3) When the arbitral tribunal ruled outside of its terms of reference;
4) When the principle of contradictory proceedings was not followed;
5) When recognition or enforcement is against international public policy.

These grounds limit the availability of recourse to technical violations of the tribunal's jurisdictional mandate and infringements of basic due process rights.190

186. In this sense, the substance of the 1981 Decree becomes a document of private international law—in the modern sense of that phrase.
187. See J. ROBERT & T. CARBONNEAU, supra note 1, at pt. II.
188. For example, the Decree's express reference to international awards leaves no doubt as to its scope of application. To have an award recognized or enforced under the Decree, a party need only prove that the award exists and that it does not contravene the dictates of international public policy. The French legislation expressly states what the Scherk Court implied from the text of the 1970 United States Arbitration Act: A separate legal framework applies to international awards under which only the most essential provisions of domestic public policy can be made felt against truly international awards.
189. See J. ROBERT & T. CARBONNEAU, supra note 1, at pt. II.
190. That is why the last ground refers, somewhat redundantly, to international public policy. It should be emphasized that appeal is the only remedy available against international awards that have been rendered in a jurisdiction other than France; it is levied against the judicial decision granting recognition or enforcement, not the arbitral award itself or its merits. When an international award is rendered in France, the action of setting aside an award (recours en annulation) can be invoked, but only on those grounds provided for in the foregoing action of appeal. This precludes any appeal against the enforcement decision because the grounds for lodging each action are identical. The provision for such a remedy, although it adds nothing of substance to the means of recourse framework, provides for a basic consistency between the French legislation and the New York Convention.
2. The Decisional Law

Despite its stature, the 1981 Decree does not refer to or incorporate the substantive rulings of the French decisional law on international arbitration.\textsuperscript{191} The decisional law rulings, still very much in force, constitute a remarkable corpus of legal principles, the basic spirit of which permeates the procedural rules of the Decree.\textsuperscript{192} Because the evolution of these decisional law developments have been analyzed in detail elsewhere,\textsuperscript{193} it suffices here to underscore the major tenets.

The Cour de cassation, the French Supreme Court for civil and criminal matters, in the famous \textit{L'Alliance} case declared the arbitral clause unlawful in French domestic law.\textsuperscript{194} Shortly thereafter, in 1894 and 1904, the French courts held that this domestic prohibition was not part of French public policy concerns and, therefore, need not be applied in litigation concerning international arbitral awards.\textsuperscript{195} The courts also applied the same reasoning to the exorbitant jurisdictional rules contained in articles 14 and 15 of the French \textit{Code civil}. In nineteenth century opinions (subsequently confirmed by more contemporary decisions), the French courts held the exorbitant jurisdictional rules to be nonpublic policy provisions

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\textsuperscript{191} This is due to the legislative form of the enactment—it is a \textit{décret} and not a \textit{loi}, principally an executive form of legislation that is limited to regulatory and procedural matters, as opposed to questions of substantive rights, which are reserved specifically for parliamentary statutes. The adoption of this form of legislative enactment resulted from the desire to complete the reformulation of the French law of arbitration, which had begun with the 1980 Decree on the domestic law before the completion of the 1981 national presidential election (the results of which came in a few days after the Decree was officially enacted and which brought about a considerable change in the ideological orientation of the French Government). The letter to the Prime Minister that accompanied the Decree made evident, however, that the failure to "codify" the decisional law in no way abrogated it or rendered it inapplicable:

The new provisions on international arbitration only relate to procedural matters and in no way call into question the now well-established principles of the decisional law of the Court of Cassation regarding the legal regime of international arbitration.\.\.\.J. ROBERT & T. CARBONNEAU, \textit{supra} note 1, at app. B at 22. Unfortunate though the political pressure and the legislative form may have been, the substantive contributions of the decisional law unquestionably remain applicable.

\textsuperscript{192} The French decisional law is remarkable in two critically important ways. First, it has been consistently supportive of international arbitration, insulating it ("immunizing" it, as Justice Douglas stated in \textit{Scherk}) from the reach of domestic restrictions on arbitration and thereby recognizing the singularity and international stature of the process. The French courts evidenced a clear aversion to and retreat from any isolationist national parochialism in this area of litigation. Second, the elaboration of this judicial stance predates by nearly three-quarters of a century the emergence of the same attitude in the 1970 United States Arbitration Act and the 1975 and 1979 English Arbitration Acts. In effect, the decisional law prepared the way for the advanced legislative perception of international arbitration embodied in the 1981 Decree. \textit{See generally} Carbonneau, \textit{supra} note 12.

\textsuperscript{193} \textit{See id.}

\textsuperscript{194} Judgment of July 10, 1843, Cass. civ., Fr., 1843 S. Jur. 1 561.

\textsuperscript{195} Carbonneau, \textit{supra} note 12, at 19-20.
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and waivable. Specifically, when a French national entered into an arbitration agreement, he gave up his jurisdictional prerogatives under articles 14 and 15. In addition, in the early twentieth century, courts distinguished foreign arbitral awards from foreign judgments to avoid a merits review of such awards, which at that time applied to foreign judgments.\(^{196}\)

Contemporary decisional law not only upheld the substance of the early case law, but also made significant doctrinal pronouncements of its own. The courts avoided any reference to a restrictive concept of nationality in articulating a definition of international arbitration and in establishing the scope of application of their liberal rulings. International arbitrations resulted from international contracts—economic agreements linked to the legal system of different states that acted as instruments of international commerce. This definition, except for the superfluous reference to the multistate effect of such contracts, was incorporated into article 1492 of the 1981 Decree. The courts recognized the contractual nature of arbitration and also took pains to give legal effect to the parties' intent to engage in arbitration. Moreover, the parties had the power to choose the law governing the agreement and the applicable procedural law; they also could fashion the provisions of the agreement to suit their particular (sometimes rather idiosyncratic) needs.\(^{197}\)

Furthermore, the French decisional law held that the state's domestic incapacity to engage in arbitration did not apply when the state entered into an international contract. This holding was critical to the viability of international arbitration. The incapacity, although included in domestic public policy regulations, was not part of international public policy concerns. The courts' unqualified pragmatism and progression toward the recognition of an "anational" arbitral process was unmistakable. In landmark cases, the courts have reasoned that it simply would be against the international commercial interests of the French state not to allow its representatives to agree to a well-established dispute resolution procedure. The same "internationalism" and pragmatism were integrated into the

\(^{196}\) See id. Given the early judicial hostility toward domestic arbitration, the courts' position in international litigation, by comparison, certainly was novel—in fact it was almost unthinkable. It could not have been predicted either by way of logic or analogy. Moreover, the exemption of international arbitration from the exorbitant jurisdictional rules and the then-applicable merits review of foreign court judgments illustrated that, in every international area other than arbitration, the French courts exhibited a nationalistic and parochial attitude. It is clear that international arbitration (possibly for very pragmatic reasons, for without it, the French would have been hard-pressed to participate in international trade) was singled out for special judicial treatment. It is perhaps this dynamic and spontaneous judicial acquiescence to the realities of international commercial practices that led to the later general transformation of private international law from an intricate system of *renvoi* and technical (perhaps artificial) choice-of-law considerations to a corpus of substantive legal norms tailored to and exclusively applicable in international litigation. See id. at 58-59.

\(^{197}\) See id. at 59-60.
1981 Decree and appear to be at the very core of the French concept of international arbitration. 198

The recognition of the separability doctrine in the celebrated Gosset decision 199 was perhaps the chief accomplishment of the French decisional law. While steadfastly refusing to acknowledge the doctrine in domestic arbitral law, the Cour de cassation integrated it into the legal framework applying to international arbitration. This holding attested to the Court's recognition that the process of international arbitration had a special legal status and needed to be autonomous: "[I]n matters of international arbitration, the compromissory clause, whether separately concluded or inserted into the main contract, always presents . . . a complete juridical autonomy, excluding the possibility that it could be affected by the eventual nullity of the main contract." 200

Finally, the courts limited the impact of public policy considerations on international arbitral awards, which were subject under the legislation to recourse on that ground. The courts, for instance, minimized the effects of a public policy violation. The fact that the subject matter of a contract with an arbitration clause violated a public policy regulation did not mean that ancillary disputes arising from nonperformance could not be validly submitted to arbitration. 201 The tribunal was merely prohibited from ruling on the matter directly giving rise to the public policy violation.

IV. AN ASSESSMENT OF THE PARALLEL INTERNATIONAL DEVELOPMENTS

Due to a deeply-rooted historical tradition providing for judicial review of the merits of awards, the English rehabilitation of the law of arbitration was the most reticent and painstaking. 202 Ultimately, it provided for fairly mixed results despite the general abolition of the stated case procedure. The notion of "special category" contracts provides the greatest resistance to an autonomous concept of transnational commercial arbitration.

The American example was much less equivocal. In the nascent stage of the evolution, the 1925 United States Arbitration Act integrated a policy imperative favoring the resolution of commercial disputes through arbitration. This legislative policy was confirmed by the courts. Like its English counterpart, the American law of arbitration contains certain common-law

198. See id. at 60.
200. See Carbonneau, supra note 12, at 32.
201. See id. at 38-39. Also, certain public policy requirements relating to domestic arbitration, such as the requirement of reasoned awards and the statutory mandate of a time limit for the proceedings, were held inapplicable to matters of international arbitration. These latter rulings were integrated by implication into the 1980 Decree.
202. To some extent, the comparative development of the law of domestic and international arbitration in each of these national legal systems can be likened to the various color strands on a light prism. Although the development in each national legal system represents a separate and distinct color, they ultimately are combined to form a unitary stream of light.
procedural devices, such as the granting of subpoena and deposition powers to arbitral tribunals and the cross-examination of witnesses, which challenge the contractualist aspect of arbitration. Although intended and used to promote adjudicatory efficiency, the authority of the American courts to join various but related arbitral proceedings, despite the self-imposed judicial restrictions, is a controversial decisional law addition. Moreover, the 1970 Act, while it implements the letter and spirit of the 1958 New York Convention, is a very sheer, albeit clear, statement of policy regarding international arbitration. It leaves much, in its implementation, to judicial discretion. Although Scherk provides clear guidance as to the direction of the law of international arbitration in the United States, the American statutory position on arbitration occupies an intermediary position between its English and French analogues.

Despite a few incongruities in the statute on domestic arbitration, the French law of arbitration represents the most advanced national legal position on both domestic and international arbitral adjudication of the three jurisdictions. Pursuant to a longstanding position in the decisional law, the 1981 Decree contains a very broad subject matter definition of international arbitration. Most of its provisions, in fact, imply a view of international arbitration that is "anational" or "supranational" in orientation. Party autonomy is nearly an absolute rule even when the arbitration is linked to the French legal order. The process of institutional arbitration is specifically recognized.203

In each system, modern arbitration statutes have one uniform characteristic. They have transformed self-proclaimed judicial hostility into a statutorily-required duty to cooperate with and assist arbitral tribunals in conducting their proceedings. The corollary to this development has been to minimize the role of judicial intervention in regard to awards, thus minimizing, if not eradicating, any possibility of a merits review and confining judicial scrutiny to technical violations of the arbitral mandate and infringements of basic due process rights.204 The uniformity of the national legislation on international arbitration appears to reflect an instance of de lege feranda. At least among developed Western nations, there is an emerging consensus about the role of national laws and courts in regard to dispute resolution mechanisms in the context of international trade.205

203. Moreover, unlike England and the United States, France acceded to the 1958 New York Convention almost immediately. France ratified the Convention in 1959, while the United States and England did not do so until 1970 and 1975 respectively. This further reinforces the view that the French system perceives the advent of international arbitration as a transnational phenomenon, despite whatever talismanic aspects it may have.

204. In this sense, the statutes recognize not only the contractual, but also the jurisdictional characteristic of arbitral adjudication, viewing it as a twin and perhaps sui generis process of dispute resolution.

205. Moreover, this international (or more accurately, trinational) consensus highlights the unstated, albeit indisputable, gravamen of the statutory reassessment (both domestic and
In each jurisdiction, the domestic legitimization of the process was anchored in a sense of necessity. There was a need to deal with the rise in commercial activity and its attended disputes. Pragmatic decisionmaking was also at the heart of each system's favorable response to international arbitration. Each jurisdiction acknowledged that international commerce had established arbitration as the premier remedy for international commercial disputes. There was a systemic acquiescence in a praetorian creation of international commercial activity. None of the national jurisdictions wanted to be deprived of the benefits of that activity or act as an artificial obstacle to the dynamic evolution of the process. In the case of France, the 1981 Decree actually attempted to propel the evolution even further through its implied recognition of "anational" or "truly international" (to use a phrase from the Scherk opinion) awards.

V. ARBITRATION AND INTERNATIONAL CONVENTIONS AND INSTITUTIONS

The existence of international conventions on arbitration that favor the emergence and development of this alternate process of adjudication attests to the recognition at a non-national level that arbitration is of increasing importance in contractual matters crossing national boundaries. To some extent, these international instruments on arbitration either prefaced and stimulated or responded to and consolidated the enactment of liberal national laws of arbitration. In the case of the United States, for example, although the 1925 Federal Arbitration Act predated the 1958 New York Convention by a considerable period of time, the basic thrust of the celebrated Scherk opinion owes its primary inspiration to the underlying policy of that Convention rather than the policy of the national act. While the French law of arbitration evolved somewhat differently in response to another set of factors, its basic tenets are in full accord with the most advanced non-national perception of arbitration. Finally, the latest English legislative enactment on the subject of arbitration seeks to integrate, albeit imperfectly, the relevant English law into the consensus embodied in international agreements.

The two principal international conventions on arbitration represent variations on the international status and potential of arbitration. The New York Convention pays much greater heed to national law in establishing rules by which to deal with problems relating to the recognition and enforcement of foreign arbitral awards. The narrow scope of the Convention, its consideration of only a single, admittedly important, phase of the arbitral process, and its goal of being a universal charter for international arbitration combined with its deference to national law, all are factors meant to achieve maximum ratification. The New York Convention international) of arbitral adjudication and the subsequent or prior judicial construction of these provisions.
was meant to do no more than codify in a legal text, without much attempt at modification, an already existing de facto consensus rather than explore the ultimate ramifications of the process in terms of private international dispute resolution.

As will be made evident below, the 1961 European Convention is more comprehensive and radical in its orientation. It embodies a willingness to experiment with the systemic and substantive implications of having arbitration as the premier mechanism for resolving transnational commercial disputes. It envisages arbitration squarely in the context of international commerce and proposes rules that regulate the process at a proper, international level. Unlike its New York counterpart, the European Convention detaches its regime from any marked dependence on national law. Although ratification, of course, remains essential, the provisions of the Convention essentially require the signatory states to adhere to the regulation of an arbitral process that mirrors the basic transnational characteristics of the transactions to which it applies and that draws its basic inspiration from the needs of international commerce rather than the narrower dictates of national public policy.

The contrast between the two conventions is significant. It reveals the presence of tension at a non-national level similar to that felt in the various national legal systems in their attempt to reconcile domestic imperatives with the development of international arbitration. Once states acceded to an international policy favoring the recognition and enforcement of foreign arbitral awards, the question became one of determining whether the individual national accession to a non-national consensus possessed a dynamism allowing it to eventually transform itself into a more independent international process. Some national judicial constructions of the provisions of the New York Convention and the substance of the European Convention, like the Scherk opinion and the French Decree of May 12, 1981, at least raise the question and suggest an affirmative answer to it. Under the impetus of the New York Convention, basic rules were agreed upon for the process of recognition and enforcement of the entire international commercial arbitral process. The European Convention (like Scherk and the French Decree) expressly places these and other rules in a "truly international" setting by withdrawing them as much as possible from validation by national legal processes. This raises the question, at least by implication, of whether the process should be detached entirely from any basis in national legal provisions. Provision for reasoned awards further raises the possibility that international arbitration could act as the purveyor of the preliminary norms of an international law merchant.
A. The Conventions

1. The 1958 New York Convention
   a) Scope of Application

The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards\textsuperscript{206} is the primary international agreement on arbitration. While the Convention can be interpreted as a document that deals with what have been described as "non-domestic" or "truly international" arbitral awards, it envisages arbitration as basically an international rather than a transnational process. In a technical sense, the Convention provides only rules of procedure relating to recognition and enforcement, and not normative principles applying to international arbitral adjudication. Moreover, it deals with foreign awards, first defined as "awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought. . . ."\textsuperscript{207} This mechanical definition of foreign arbitral awards is unfortunate, especially when contrasted with the French definition of international arbitration. The subsequent definition in the Convention, "awards not considered as domestic awards in the State where their recognition and enforcement are sought,"\textsuperscript{208} while implying a broader standard, also links the definition of awards directly to provisions of national law and, thereby, undercuts any possible international dimension to the definition.

The Convention may be ratified with two reservations: limiting the application of the Convention to situations in which there is reciprocal state ratification and to commercial disputes as defined by the national law of the state in question.\textsuperscript{209} These reservations also underscore the continuing importance of national law in the implementation of the Convention. Maintaining the importance of national legal provisions in the process may have been necessary to achieve adoption among a large number of countries. While bending its knee before the sacred principle of national sovereignty, the Convention perhaps was designed to achieve its underlying objective by implication, relying upon creative national court construction of its contents.\textsuperscript{210}

\textsuperscript{206} New York Convention, \textit{supra} note 111. According to article VII, para. 2, the Convention supersedes both the 1923 Geneva Protocol and the 1927 Geneva Convention, and is intended to be the universal charter of international arbitration.

\textsuperscript{207} \textit{Id.} art. I., para. 1.

\textsuperscript{208} \textit{Id}.

\textsuperscript{209} \textit{Id}. art. I.

\textsuperscript{210} \textit{Id}. art. I, para. 3. Both the French and American versions of international arbitration transcend the more limited focus of the Convention.
b) Other Provisions

A subsequent article of the Convention articulates more normative principles of arbitration procedure. It defines the jurisdictional effect of arbitration agreements and the role of national courts in relation to awards. Here, the contracting states agree to recognize arbitration agreements as legally valid and to compel arbitration when such an agreement exists. The courts can deny recognition or enforcement only on the basis of technical excesses of arbitral authority, due process violations, inarbitrability, or breach of public policy.

These provisions of the Convention correspond to the language contained in modern domestic statutes on arbitration, which embody a definite policy favoring arbitration. The Convention represents a consensus among many national jurisdictions as to the normative procedural principles that apply to arbitral adjudication, in both domestic and international areas. It provides for the legitimacy of arbitration, a presumption favoring its use, and circumscription of judicial supervision. The Convention does not attempt to create a transnational regime, for its concept of arbitrability and public policy are defined in terms of the law of the requested state and not as international public policy. This contrasts with the express provisions of the French law and the implications of the reasoning in Scherk.

2. The 1961 European Convention

a) Scope of Application

The 1961 European Convention On International Commercial Arbitration, as the reference to the word "international" in its title indicates, is much less circumspect about transnational arbitration than the New York Convention. Its aim is to provide regulatory provisions for the entire arbitral process, which it describes expressly as international. It is intended to promote, in particular with Eastern Bloc countries, "the development of European trade by, as far as possible, removing certain difficulties that may impede the organization and operation of international commercial trade, as well as..."

211. Id. art. II. Presumably, it is this section of the Convention that is the foundation for the Scherk Court's reasoning relating to "truly international" contracts and its implied recognition of a special legal framework applying to international trade litigation.

212. The inarbitrability and public policy grounds are determined according to the law of the requested state. Id. art. V.

213. For example, under the Convention, an "agreement in writing" may consist of "an exchange of letters or telegrams." Id. art. II(2). States may not make the enforcement of foreign arbitral awards more onerous or expensive than domestic awards; the validity of arbitration agreements is determined according to the usual rules of contract law; and the party opposing the enforcement of the award bears the burden of proof. Id. arts. III, V.

214. 484 U.N.T.S. 349.

215. Id. art. I, para. 1(a).
arbitration in relations between physical or legal persons of different European countries. . . .”

According to article I, the substance of the Convention applies to arbitration agreements, proceedings, and awards, “concluded for the purpose of settling disputes arising from international trade between physical or legal persons having, when concluding the agreement, their habitual place of residence or their seat in different Contracting States.” Although this provision adopts the geographical location of the parties as a critical factor in determining the applicability of the Convention, there is no doubt as to the substantive scope of the application of the Convention, namely, international commercial arbitration. Like the New York Convention, it contains a very flexible definition of the “in writing” requirement. This Convention, however, goes further than a recognition of the modern means of communication (“contained in an exchange of letters, telegrams, or in a communication by teleprinter”) and acknowledges the applicability of national laws not requiring a written form for the arbitration agreement. Moreover, it specifically expands the meaning of the term “arbitration” to include arbitration by permanent arbitral institutions, a method of arbitration that has basically replaced the traditional ad hoc form of arbitration.

Article II(1) of the Convention contains important language regarding the viability of East-West commercial transactions. It provides that state entities “have the right to conclude valid arbitration agreements,” thereby making possible the elimination or minimization of a potentially difficult obstacle, for example, sovereign immunity, in the commercial trading undertaken by the contracting states. Under article IV, the Convention grants wide-ranging discretion to the parties to choose between institutional or ad hoc arbitration. If the ad hoc method is chosen, the Convention gives broad authority to appoint arbitrators and to select the place of arbitration and the procedural law. The implied distinction that the Convention establishes between the place of arbitration and the applicable procedural law illustrates that it minimizes the importance of the lex arbitri, reinforcing the international character of arbitral proceedings governed by the Convention.

This international character is further illustrated by the procedure for assisting the arbitral proceedings. Rather than contemplating judicial recourse in circumstances in which, for example, one party refuses to nominate an arbitrator in an ad hoc arbitration, the Convention states that the

216. Id. Preamble.
217. Id. art. I, para. 1(a).
218. Id.
219. Id. art. I, para. 2(b).
220. Id. art. IV., para. 1(a).
party seeking arbitration can lodge an action before the competent authority of the appropriate Chamber of Commerce. This provision underscores not only the special international character of these arbitral proceedings, but also their fundamentally commercial character. The procedure also is available for institutional arbitration.  

b) Other Provisions

Article V incorporates the kompetenz-kompetenz doctrine and, as a result, gives the relevant arbitral tribunal autonomy from judicial intervention on jurisdictional challenges. Although both the Convention and the 1981 French Decree have a definite transnational orientation, the Convention goes further. It imposes procedural restrictions on the raising of jurisdictional challenges to arbitral jurisdiction. Article V(1) requires jurisdictional challenges to be made in a rigorously timely fashion to guarantee their speedy resolution and grants authority to the arbitral tribunal to deal with the exceptional case. The substance of article V(2) limits judicial review in these circumstances to a consideration of the tribunal’s exercise of discretionary authority.

As with all of the statutes that have been examined previously, the European Convention provides for a procedure by which the courts can compel arbitration. The applicable rules under article VI are particularly complex. They regulate both situations in which a party raises questions concerning the existence of an arbitration agreement during a court proceeding and circumstances in which a court action is lodged after the initiation of arbitral proceedings. The first several rules under article VI

221. Id. art. IV.

222. "The party which intends to raise a plea as to the arbitrator's jurisdiction based on the fact that the arbitration agreement was either non-existent or null and void or had lapsed shall do so during the arbitration proceedings, not later than the delivery of its statement of claim or defence relating to the substance of the dispute; those based on the fact that an arbitrator has exceeded his terms of reference shall be raised during the arbitration proceedings as soon as the question on which the arbitrator is alleged to have no jurisdiction is raised during the arbitral procedure. Where the delay in raising the plea is due to a cause which the arbitrator deems justified, the arbitrator shall declare the plea admissible." Id. art. V, para. 1.

223. "Pleas to the jurisdiction . . . that have not been raised during the time limits . . . may not be entered either during a subsequent stage of the arbitral proceedings where they are pleas left to the sole discretion of the parties under the law applicable by the arbitrator, or during subsequent court proceedings concerning the substance of the enforcement of the award where such pleas are left to the discretion of the parties under the rule of conflict of the court seized of the substance of the dispute or the enforcement of the award. The arbitrator's decision on the delay in raising the plea, will, however, be subject to judicial control." Id. art. V, para. 2.

224. As to the former, a motion to compel arbitration must be made in a timely fashion during the court proceeding, presumably to avoid wasteful double litigation of a controversy. Moreover, in assessing the existence or validity of an arbitration agreement, the court—although it must determine the contractual capacity of the parties in reference to their national law—examines other issues according to a sliding scale of alternative laws:
of the Convention delineate a rule of procedural reason controlling motions to compel arbitration which arise during a judicial proceeding. If introduced at an inopportune stage, such motions would disrupt the efficiency of adjudicatory processes. The constraints placed upon the making of such motions do not unnecessarily or unreasonably infringe upon the parties' rights; they simply require the parties to be diligent for the sake of practicality. Except for individual contractual capacity, which is traditionally and logically a matter governed by the national law of the party, the rules give primacy to the party autonomy principle regarding the issue of which law governs the validity of arbitration agreements. Rather than emphasizing the importance of the lex arbitri, the alternative provisions as to which law governs seem simply to provide for "stop-gap" measures when the parties have failed to exercise their prerogatives.225

Finally, article VI provides that interim judicial relief (for example, conservatory measures) can be granted that is not "deemed incompatible with the arbitration agreement, or regarded as a submission of the substance of the case to the court." The use of public judicial authority in this way only reinforces the adjudicatory authority of the arbitral process, rather than compromising it.226

c) The Law Governing the Merits

According to article VII, issues concerning the law governing the merits are resolved entirely within the confines of the arbitral process. The parties have complete discretion to make the determination. If the parties fail to exercise their authority, the arbitral tribunal "shall apply the proper law under the rule of conflict that the arbitrators deem applicable."227 "In both cases the arbitrators shall take account of the terms of the contract

(1) the law chosen by the parties in their agreement; (2) the law of the country in which the award is to be rendered; or (3) the law designated by the choice-of-law rules of the requested forum. The invoking of each alternative depends upon the court's inability to apply the preceding one. Also, the courts can refuse to recognize the jurisdictional effect of an existing arbitration agreement and to compel arbitration if the law of the forum deems the subject matter of the dispute to be non-arbitrable. Id. art. VI.

225. In situations in which a court action is lodged after the initiation of arbitral proceedings, the article VI rules provide that the courts will not rule on an action concerning the same dispute or questions concerning the validity of the arbitration agreement "until the arbitral award is made, unless they have good and substantial reasons to the contrary." Id. art. VI, para. 4. Again, the evident purpose of the provision is to avoid dilatory tactics and the interruption of adjudication. It is only in circumstances in which there is a blatant defect in the agreement or manifest problem in the process that courts will intervene at an earlier stage. Like the 1981 French Decree, judicial intervention is essentially confined to the end of the process, indicating a confidence that arbitrations will yield acceptable results and that negative judicial action will be an exceptional occurrence. Id.

226. Id. art. VI, para. 4.
227. Id. art. VII, para. 1.
Moreover, the parties may authorize the arbitral tribunal to rule *ex aequo et bono* "if they may do so under the law applicable to the arbitration." Rather than ground the arbitration in the provisions of a national law, the additional references in the Convention to the "terms of the contract" and to the law applying to the arbitration in regard to *amicable composition* emphasize the role of party autonomy in the process.

**d) Grounds for Setting Aside an Award**

The grounds for setting aside an award under the European Convention are nearly identical in content to those of the New York Convention. While article IX of the European Convention does not preclude a court in a contracting state from setting an award aside on other than its enumerated grounds, it does limit the denial of recognition or enforcement of an award in another contracting state to setting aside on the basis of the grounds enumerated in paragraph 1 of article IX. These grounds include: the parties' lack of capacity to enter into an arbitration agreement; the invalidity of the arbitration agreement; violations of essential due process requirements regarding the party opposing the award; excess of arbitral authority as defined by the terms of reference; and the failure to conform to the requirements of the parties' agreement or of the Convention regarding the composition of the tribunal or the arbitral procedure.

In each case, the Convention attributes a primary role to the party autonomy principle. For example, the validity of the arbitration agreement is governed by the law designated by the parties, unless they have failed to make "any indication" in this regard. Concerning the matter of excess arbitral authority, the Convention provides for a severance doctrine, which allows the valid part of the award to be enforced. In article IX(2), the Convention specifically "limits the application of article V(1)(e) of the New York Convention [concerning the nonbinding effect, setting aside, or suspension of an award in the rendering state] solely to the cases of setting aside set out under paragraph 1 above." Finally, article IX does not refer to the national nonarbitrability defense or the domestic public policy exception to the recognition and enforcement of arbitral awards. This final feature of the provisions for setting aside an award illustrates the strength of the European Convention's "anational" or transnational orientation.

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228. *Id.*

229. *Id.* art. VI, para. 2. The substance of these provisions is nearly identical to the language of articles 1496 and 1497 of the 1981 French Decree; they attribute recognition and very considerable autonomy to "truly" transnational or "anational" commercial arbitration.

230. *Id.* art. VII, para. 2.

231. *Id.* art. IX.
e) Reasoned Awards

The requirement of rendering reasoned awards is a unique feature of the European Convention. Under article VIII, the Convention establishes a presumption that final awards are to be rendered with reasons, unless the parties specifically agree otherwise or have agreed to "an arbitral procedure under which it is not customary to give reasons for awards, provided that in this case neither party requests before the end of the hearing, or if there has not been a hearing then before the making of the award, that reasons be given." The incorporation of this requirement into an international document espousing and promoting the concept of "anational" arbitration may have a number of significant implications for the future evolution of the international arbitral process. The drawbacks and advantages as well as the implications of having reasoned awards will be discussed in the concluding section.

B. Institutional Arbitration

The creation of major international centers and institutional rules by which to administer international arbitrations is further testimony to the recognition and growth of arbitration under non-national auspices. Quite evidently, the development of five major centers of institutional arbitration was an outgrowth of the expansion of international trade and the general internationalization of commercial transactions, as well as the more frequent provision for arbitration in these dealings. Over time, the volume of transactions led progressively to a standard form for the transactions and a greater predictability as to their likely pitfalls. Standard form contracts (relating to such matters as leasing, factoring, franchising, syndicated financing) emerged and, to achieve neutral and expert adjudication in complex transactions involving parties with widely varying economic interests, cultural assumptions, and ideological preferences, these contracts usually provided for arbitration as a means of resolving contract disputes.

The growing availability of institutional arbitration probably encouraged parties to engage in arbitration and consolidated the status of arbitration as the remedy of choice in the international area. Its advantages are numerous. It relieves the parties from devising their own rules for ad hoc arbitration and yields awards that have a greater recognition

232. Id.
factor for purposes of enforcement. Institutional arbitration also allows the parties to avail themselves of sophisticated facilities and benefit from the institution’s expertise and experience in a specialized area of adjudication. The parties can select the institution that is best suited for the specific characteristics of their transaction. For example, as the following analysis demonstrates, when an international contract involves a private corporate concern located in one country and a foreign public entity or government, the parties can opt to refer their disputes to ICSID arbitration, given that institution’s special provisions regarding sovereign immunity issues. The primary significance of institutional arbitration, however, lies in its expression of the non-national recognition of arbitration, a recognition that it advances in the direction of a full internationalization of the arbitral process. Centers of institutional arbitration not only provide neutrality, procedural and substantive expertise, and an ability to deal with the problems associated with complex international transactions, but they also represent an increasingly “anational” means of implementing the arbitral remedy.

1. ICC, AAA, and LCA Arbitration

Because of the large involvement of United States parties in many international arbitrations, International Chamber of Commerce (ICC) arbitration has become an often-resorted-to form of institutional arbitration. ICC arbitration, like that of the American Arbitration Association (AAA) and London Court of Arbitration (LCA), is geared to arbitration concerning disputes that arise out of private transnational commercial ventures. Although the ICC rules pay due heed to the party autonomy principle, they provide for an institutional remedy in the event of a deficiency in the process. In those circumstances, the ICC assumes the function of minimizing the negative effects of dilatory tactics and unfettered party discretion. Although ICC arbitration is not renown for the economical and expeditious resolution of disputes, its case load has been rather voluminous and is growing. The ICC boasts of a ninety percent voluntary compliance rate with its awards.

ICC, AAA, and LCA institutional arbitrations do indicate, by their very existence, that arbitration clauses have become standard fare in international business dealings. Moreover, national legislation, in particular the 1981 French Decree, gives official recognition to institutional arbitration, acknowledging it as one of the remedial alternatives available to a contracting party. Finally, the creation of centers and special rules for institutional arbitration contributes to the emergence of an “anational” or “truly transnational” form of arbitration which effectively minimizes, perhaps eliminates, the interplay between national law and the process of international commercial arbitration.
2. UNCITRAL and ICSID Arbitration
   
a) Scope

The United Nations Commission on International Trade Law (UNCITRAL) rules on arbitration and the International Centre for the Settlement of Investment Disputes (ICSID) arbitration are two variants on the same basic theme. They are designed to respond to particular aspects of transnational ventures. The UNCITRAL rules deal primarily with considerations arising from the disparity between developed and underdeveloped countries (commonly referred to as the North-South Axis), while ICSID arbitration generally governs dealings between private investors and states.\(^2\)\(^3\)\(^4\) In light of the disparity in the economic interests and bargaining positions of parties from developed and developing countries, the UNCITRAL rules attempt to reconcile these differences by giving the principle of party autonomy a very central role in determining the essential phases of the arbitral process. As a result, the content of the rules is quite detailed, usually specifically leaving matters to party discretion and then adding a number of alternate ways by which the parties may reach a determination. Article VI, dealing with the appointment of arbitrators, is illustrative of the intricate pattern on which many of the UNCITRAL rules are constructed.\(^2\)\(^3\)\(^5\)

When alternate mechanisms need to be invoked, recourse is either to an agreed-upon "authority" or the Secretary-General of the Permanent Court of Arbitration at The Hague. Resort to national judicial tribunals is never contemplated. Also, once the arbitral proceeding has begun, the arbitral tribunal is given considerable authority to deal with jurisdictional and other challenges and difficulties that may arise during the proceeding. These various features demonstrate that the UNCITRAL rules attempt to predicate the arbitration upon the parties' ability to agree upon its essential phases and give the arbitral tribunal considerable discretion in certain areas of the proceeding. This totally neutralizes the arbitral process with respect to the reach of national law. The neutrality factor, of course, is indispensable to the viability of any dispute resolution process instituted between commercial parties with such widely varying interests, cultures, and positions. In this sense, the UNCITRAL rules, almost of necessity, support the emergence of "anational" arbitration.\(^2\)\(^3\)\(^6\)

ICSID arbitration was created pursuant to the 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other

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235. Sanders, supra note 234.
236. Id.
States, which came into force on October 14, 1966. The purpose of ICSID arbitration, and of its conciliation process, is to provide a means by which to resolve investment disputes arising between a state or state-party and an investor who is a national of another contracting state. Accordingly, in order for ICSID arbitration to apply, the dispute must involve a contracting state or one of its entities and a national of another contracting state, and relate to a legal dispute concerning an investment. The fact that a state has ratified the 1965 Convention does not oblige it to have recourse to ICSID arbitration in each and every investment agreement to which it is a party. Nor are the private investors required to submit to this form of dispute resolution mechanism. In each instance, the provision for recourse to ICSID arbitration is a fully consensual process on the part of the parties and depends upon the vicissitudes encountered in negotiating that particular contract. Once the parties have agreed, however, their consent becomes irrevocable and cannot be withdrawn unilaterally.

Moreover, according to article 44 of the Convention, ICSID arbitration, unless the parties provide otherwise, is completely independent of any national legal provisions and free from the possibility of national court intervention or supervision. ICSID rules are designed to be comprehensive and detailed enough to function as a self-sufficient body of arbitral regulations, leaving problems arising during the proceeding to be resolved by the arbitral tribunal. The arbitral tribunal has the authority to deal with jurisdictional challenges. When a court in a contracting state hears a dispute to which an ICSID arbitration clause applies, it must rule that it lacks jurisdiction to entertain the matter and must refer the parties to ICSID arbitration. Once an award is rendered, it is a final and binding determination of the dispute. The award can be challenged only upon a very limited number of grounds: It can be modified under article 51 of the Convention if new evidence has been discovered and it can be set aside under article 52 for grounds common to most statutes or conventions dealing with international arbitration. These common grounds include: defective composition of the arbitral tribunal, excess of arbitral authority, corruption of the arbitrator(s), failure to follow fundamental procedural requirements, and failure to give reasons for the award.

These means of recourse must be lodged before ICSID. An ICSID award can never be challenged on any ground before the courts of a contracting state. In this sense, ICSID arbitration is truly autonomous and "supranational." Unlike other forms of international arbitration, it does

not refer to an external source of national public adjudicatory authority to validate its determinations. ICSID arbitration is based exclusively upon the parties' consensual agreement. Article 54 of the Convention requires the contracting states to recognize ICSID awards as binding and to guarantee that such awards will be enforced like the final judgments of domestic courts. The ICSID Convention does not admit of any exception, public policy or otherwise, to the enforcement of its awards in contracting states. Under article 54 of the Convention, the state that is a party to the arbitration and the award is presumed to have waived any defense to recognition and enforcement, including sovereign immunity from suit and immunity from execution.\textsuperscript{240} To have an ICSID award enforced, then, a party need only introduce it before a court in a contracting state.

In this regard, article 55 states that the Convention does not intend to derogate from the applicable rules in the contracting states concerning immunity from execution for the state or foreign states. The fact that a contracting state invokes its immunity from execution under its domestic law to impede the enforcement of an ICSID award rendered against it would amount to a breach of the state's obligation under article 53(1) to recognize the mandatory character of such awards and to give them effect "according to its terms." In these circumstances, the Convention contemplates sanctions against the state, including the exercise of diplomatic protection on the part of the investor's home state which might lead to litigation before the International Court of Justice.\textsuperscript{241}

b) An Evaluation

Both the UNCITRAL rules and ICSID arbitration procedures attempt to deal with classical public international law problems in the context of private transnational commercial dealings. The cultural, ideological, and economic rift between countries in the North-South Axis makes commercial trading hazardous and possibly untenable. The UNCITRAL rules seek to foster predictability of dispute resolution in such transactions by establishing an arbitral mechanism based on the primacy of party autonomy that functions outside the ambit of national court jurisdiction. The UNCITRAL rules thereby create parity for transactions characterized by economic imbalance.

Although ICSID arbitration has generated only a modest volume of cases,\textsuperscript{242} it is a means by which to deal with the knotty problem of sovereign immunity in the context of transnational commercial ventures. A sovereign state's immunity from suit or execution can become an intractable problem and defeat any attempt to foster predictability and stability in

\textsuperscript{240} ICSID Convention, supra note 237.

\textsuperscript{241} Id.

\textsuperscript{242} Id. See also Weil, \textit{Problèmes relatifs aux contrats passés entre un État et un particulier}, 128 Rec. des Cours 95 (III-1969).
international commercial transactions. Once a state consents to ICSID arbitration, it does so irrevocably. It thereby agrees to waive its jurisdictional immunity from suit as well as its immunity from execution. The ICSID solution to sovereign immunity, however, is not totally effective. Despite the contemplated sanctions, a contracting state can thwart enforcement by invoking the provisions of its domestic law on immunity from execution. Without a guarantee of execution, the problem of sovereign immunity looms as large as ever, albeit in a more indirect and disguised form. The paucity of actual cases in this area prevents further speculation about possibly emerging customary practice.243

The transnational orientation of ICSID is achieved basically through the provisions of the Convention and the states' willingness to accede to the Convention and to consent thereafter to ICSID clauses in specific contracts. The domestic law reservation concerning immunity from execution could undermine not only the "anationalism" of ICSID, but also its basic effectiveness. The drawback to ICSID arbitration lies in its failure to allow the various national judiciaries to assume a creative role in preparing, sustaining, or confirming the intent of the ICSID Convention. In the United States (after Scherk and the New York Convention) and especially in France, the courts assumed strategic roles in advancing and expanding the underlying policy objectives of international and other agreements on arbitration. Perhaps a judicial position on the sovereign immunity question that reflects a basic consensus among national judiciaries on the issue would rectify any possible ambiguities and uncertainties concerning immunity from execution.244 This emerging consensus would be anchored in the substantive law of major legal systems. In a word, given the potential prerogatives afforded states in their domestic law on the execution issue, the "anationalism" or "supranationalism" of the Convention can have no real meaning until it is validated by a consensus among national judiciaries or national legislation. It is only in this sense that a truly meaningful form of "supranational" arbitration can be achieved.

243. Id. See also Lalive, Un grand arbitrage pétrolier entre un Gouvernement et deux sociétés privées étrangères, 104 J. DR. INT'L 319 (1977).

VI. ARBITRAL ADJUDICATION AND THE GENERATION OF NORMATIVE PRINCIPLES

Arbitration is no longer an adjudicatory outcast. It is recognized as a legitimate remedy, especially in the area of commercial disputes, and has vital application in private international commercial transactions.245 The analysis of the 1979 English Arbitration Act illustrates that a critical factor to the continuing effectiveness of arbitration is the courts' willingness to espouse the commercial community's perception of the process. For example, lingering doubts concerning the English concept of arbitration will either be dissipated or reinforced by the adjudicatory attitude of the English courts. In the United States, the Scherk opinion represents precisely such judicial creativity and liberalism. The 1981 French Decree embodies and amplifies an already-existing favorable decisional law position.246

245. Arbitration has had tremendous success in the commercial area. The need to achieve fairly rapid, expert, and nonlegalistic results in an arm's length, cost-benefit setting certainly bolstered the stature of commercial arbitration. Although arbitral adjudication has been considered and attempted in other dispute areas, it has not fared well, except in the labor area.

Disputes involving allegations of medical malpractice, relating to products liability and those involving the financial consequences of a divorce seem unsuitable for this type of alternate adjudicatory model. These disputes involve noncontractual duties imposed by operation of law and a disparity in the position between the parties, which make them ill-suited for the consensual nature of arbitration. Moreover, parties in these areas are not subject to the homogeneity and practical imperatives that characterize the commercial community. In large measure, arbitration has achieved its preeminence as a result of the common perception of businessmen that it works and works well.


Although the findings of a few studies indicate that arbitration reduces the time and costs of resolving medical malpractice disputes, other commentators believe that arbitration proceedings actually add to the expense of resolution. See Sakayan, Arbitration and Screening Panels: Recent Experience and Trends, 17 Forum 682 (1981-1982); Heintz, Arbitration of Medical Malpractice Claims: Is it Cost Effective?, 36 Md. L. Rev. 533 (1977); Comment, Recent Medical Malpractice Legislation—A First Checkup, 50 Tul. L. Rev. 655 (1976).


International conventions and the rules of permanent centers of arbitration codified the emerging consensus on arbitration and adapted the process of arbitration to various aspects of international trade. The various international documents affirm the emergence of "anational" or "supranational" arbitration which is essentially detached, either in whole or in part, from a domestic legal system. Under some conventions, national courts examine awards only for facial technical deficiencies or violations of basic public policy concerns, while, under other frameworks, they are excluded entirely from the process.

These developments appear to amount to de lege ferenda at least as to remedies. There is no doubt that arbitral adjudication is recognized as the remedy of choice. It fills the "black hole" of unpredictability in international commercial ventures. Certain basic procedural principles have emerged that can be characterized as the customary private international law of arbitration. First, there is a recognition of a juridical phenomenon called international arbitration which, despite a divergence of definitions, relates to international trade and to which a special set of legal rules and doctrines apply. Second, international arbitration is governed nearly exclusively by the party autonomy principle, leaving only a small place for the integration of the national state interest in the process. Third, in relation to the arbitral proceeding, national courts cooperate with and assist the process. Being essentially autonomous, the arbitral process needs judicial support only when coercive public jurisdictional authority is absolutely essential.

Fourth, judicial review of the merits of arbitral awards is generally excluded; the means of recourse cover only manifest violations of the arbitral jurisdictional mandate or fundamental public policy violations. Finally, the public policy considerations that apply are a distilled version of their domestic equivalent and usually involve only the most basic requirements of adjudicatory justice, such as the right to a fair hearing.

In the French and American legal systems especially, these principles are part of the jurisdiction's private international law, and they reflect the articulation of pragmatic rules in response to the felt necessities of international trade. When compared to the recent developments concerning antitrust provisions and reprisal legislation, they represent a positive


247. The phrase "truly international" from Scherk seems to render the notion of transnational arbitration best.

248. Here, the significance of the lex arbitri is limited to its beneficial impact.

249. In recent years, the extraterritorial application of United States antitrust laws has provoked a significant amount of resentment, official protest, and legislative retaliation from many major United States trading partners (including the United Kingdom, Canada, France, Australia, South Africa, and New Zealand). The United States advanced a number of reasons to justify its policy, all of which center upon establishing and maintaining free economic competition. The American position is meant first to promote similar (hence
expression of the extraterritorial application of domestic law, simultaneously responding to and creating a transnational law of arbitration. A corpus of shared legal principles is thereby created, codifying a consensus on arbitration, making it an "anational" remedial alternative and anchoring that concept in national legislation and decisional law.

The future evolution of arbitration does not need to be assessed in regard to its status as a procedural remedy for certain types of commercial transactions. Rather, the creative future of arbitration lies in maintaining its preferred remedial status while developing its potential for the generation of substantive international commercial law norms (otherwise expressed variously as the *lex mercatoria* or the international law merchant: a common law of international transactions). While avoiding the pitfall of transforming arbitration into the substantive equivalent of adjudication before national courts, to gain the full benefit of the consensus surrounding arbitration as a remedial alternative to judicial adjudication, it seems that an arbitral decisional law, based on a form of transnational stare decisis, should emerge and satisfy a quest for further stabilization in the international commercial community. To quote Professor Cremades,

[I]t is fair to say that arbitral decision making has introduced a new commercial ethic into the international business community.

equal) regulation of businesses located in the United States and those located abroad, second to protect United States consumer interests by preventing foreign-made arrangements from depriving these consumers of the benefits of competition among importers and between domestic and foreign suppliers of goods, and finally to limit the antitrust immunity that might attach to foreign conduct that has an effect on United States commerce. For a thorough discussion of these points, see Comment, Extraterritorial Application of the Antitrust Laws and Retaliatory Legislation by Foreign Countries, 11 Golden Gate L. Rev. 577 (1981); Shenefield, The Perspective of the U.S. Department of Justice, in Perspectives on the Extraterritorial Application of U.S. Antitrust and Other Laws 12 (J. Griffin ed. 1979).

Other countries argue that the extraterritorial application violates their sovereignty and amounts to an infringement of their jurisdiction. They take exception to the practice on a number of more specific grounds. For example, competition, although vital under United States perceptions, may not be considered as a fundamental or critically important value in the economic regulatory policies of other states. Other legal systems seem to prefer to have antitrust disputes resolved by administrative rather than judicial proceedings. Also, the enforcement of antitrust provisions may lead to a clash of economic interest of the various states involved. Finally, extraterritorial application is seen as a form of United States intrusion into the internal affairs of foreign states. See generally 1 J. Atwood & K. Brewster, Antitrust and American Business Abroad (2d ed. 1981); Comment, Shortening the Long Arm of American Antitrust Jurisdiction: Extraterritoriality and the Foreign Blocking Statutes, 28 Loy. L. Rev. 213 (1982); Samie, Extraterritorial Enforcement of United States Antitrust Laws: The British Reaction, 16 Int'l L. Rev. 313 (1982). For a detailed discussion of this conflict, see Gordon, Extraterritorial Application of United States Economic Laws: Britain Draws the Line, 14 Int'l L. Rev. 151 (1980); Comment, Foreign Blocking Legislation: Recent Roadblocks to Effective Enforcement of American Antitrust Law, 1981 Ariz. St. L.J. 945; Grundman, The New Imperialism: The Extraterritorial Application of United States Law, 14 Int'l L. Rev. 25 (1980); Recent Developments—Antitrust Law: Extraterritoriality, 21 Harv. Int'l L.J. 515 (1980); Zwarensteyn, The Foreign Reach of the American Antitrust Laws, 3 Am. Bus. L.J. 163 (1965).
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.\textsuperscript{250}

It is at this juncture that the domestic law developments concerning arbitration and the analysis of article VIII of the European Convention appear most relevant to the assessment of the future of the process. The critical factor here is the provision for reasoned awards.

\textit{A. Reasoned Awards: A First Step Toward the Elaboration of Substantive Norms}

The following discussion needs to be qualified at the outset by two assumptions. 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 and are usually guided by the rules of international centers for institutional arbitration. They have, albeit unofficially, a proper international stature. Ordinarily, these tribunals refer to trade usages and custom 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 may attach more importance to the conceptual purity of the applicable principles. The central disadvantage, which is outweighed by the strength of the foregoing considerations, lies in 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 brought before them by the parties. Such an attitude, however, is not necessarily absent from judicial rulings and the dictates of proper adjudication may require a larger perspective on the part of the arbitral tribunals.

Second, the recommendations that follow regarding the use of reasoned awards are made merely in preliminary form 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 such research, it seems that 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. Finally, the recommendation as to a practice of reasoned awards

is made with an eye to the realities of international practice in this area. Major and even minor international arbitrations are usually conducted with very sophisticated legal representation on both sides. Many of the legal counsel involved are trained in the common-law tradition, and civilian attorneys are not familiar with the concept of *une jurisprudence constante*. One can, therefore, assume without too much trepidation that a practice of rendering awards with reasons generally consistent with prior adjudication would mirror to a large extent the way in which the case has been presented to the arbitral tribunal. This existing aspect of the process has not rendered international arbitration any less desirable as an alternate means of adjudication.

The rendering of awards without reasons began with English common-law practice. Because the writ procedure provided for the possibility of having an award reviewed on the merits by a court (for an error of law), it became commonplace for English arbitral tribunals to render awards without reasons. This practice was eventually integrated into United States arbitral procedure in an unstated and implied fashion. Despite the longstanding domestic public policy requirement that awards be reasoned, the French courts, beginning in the late nineteenth century, recognized and granted enforceability to foreign awards that lacked reasons if the applicable foreign procedural law allowed the rendering of such awards. The rationale for this judicial position was that the English practice of unreasoned awards had been adopted in most of the commercial world, and a contrary position would essentially have deprived French commercial interests of the ability to do business with foreign trading partners. It is important, however, to underscore that the practice of rendering unreasoned awards was adopted originally in England to avoid judicial review of the merits of awards. Unreasoned awards became accepted practice in international commercial arbitration for reasons of commercial expediency, unrelated to the original purpose of the practice primarily because of its unquestioning incorporation in United States practice.

Although the 1958 New York Convention is silent regarding reasoned awards, the 1961 European Convention and the UNCITRAL rules provide for the rendering of reasoned awards unless the parties agree otherwise. The presumption in favor of reasoned awards, 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 status, making arbitration in yet another respect the equivalent of a judicial proceeding. Second, it guarantees that the parties will have at least a minimum of substantive due process because they will know the basic reasons for the ultimate determination. Finally, the practice of rendering reasoned awards works in tandem with the generally applicable rule that arbitral tribunals rule according to substantive legal principles, with the caveat that they take commercial customs and trade usages into account.
Even under the 1979 English Act, the prospect of judicial review of the merits of awards has been substantially curtailed, if not completely eliminated, thus the practice of rendering unreasoned awards has lost its original raison d'être. Moreover, important international instruments on arbitration call for the rendering of reasoned awards. These factors may point to a fourth reason, coinciding with, yet transcending in importance, the three mentioned above, justifying such a practice. This reason is the possibility of guiding and influencing the substance of international contract law, thus elaborating a type of arbitral stare decisis, a decisional law articulating the principles of a lex mercatoria, which would apply in or at least guide other arbitral adjudications. The incorporation of a rule generally requiring, or simply favoring, the rendering of reasoned awards into the existing "anational" body of paradigmatic procedural arbitral principles raises a number of important questions and would involve significant modifications of those principles.

At a threshold level of analysis, it must be stated that the perception of arbitration as a fundamentally consensual and private process of adjudication dominated by the principle of party autonomy would militate against formulating the rule as a mandatory requirement. The presumptive approach adopted in both the European Convention and the UNCITRAL rules appears to be the strongest possible statement that can be made in this regard. The viability of arbitration essentially resides in a type of transnational pragmatism and cooperation. Given that attitude, having a less than mandatory rule for reasoned awards would not impede efforts to articulate the basic substance of a lex mercatoria if such an objective were in the interests of the international commercial community. The customary cooperation and consensus would also be operative here.

Having reasoned international awards, however, might make some form of judicial review necessary. Reasoned awards could be given informal recognition in practice by being used as general authority in briefs and arguments. If they are to create an effective stare decisis, however, the substance of such awards should probably be confirmed by national courts. 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." Like the consensus on arbitration as a transnational remedy, the support of national legal systems would legitimize the emerging rules. A more dramatic process, such as an international commercial court for reviewing the reasoning of arbitral awards, would probably be impractical and self-defeating. It could make transnational arbitration less attractive for its advocates.

The evident questions here concern the form and scope of the substantive review. If judicial review is deemed an imperative, should it be the

251. Id. at 534.
equivalent of an ordinary appeal on a question of law? 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 ruled 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? Would substantive judicial review be exercised in the rendering state by an action to set aside or would review be solely in the state of enforcement?

All of these questions point to the difficulty of determining the contours and content of an appropriate regime. If the presumptive rule of rendering reasoned awards is adopted, validation of the awards by national courts in enforcement proceedings could give them greater precedential value in subsequent arbitrations. The stare decisis rule that should apply, however, is one which is more akin to American rather 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.

The question of the form and scope of the applicable judicial review is a more difficult problem to resolve. Obviously, any viable solution must somehow mediate between the need to avoid at all costs the return to the old form of English judicial merits supervision and the equally pressing need to somehow legitimize the substance of the awards by anchoring that substance in the private international law of a given national legal system. Following the example of the means of recourse in contemporary national arbitration statutes and international agreements on arbitration, one could argue that a substantive counterpart to the international public policy exception, based upon procedural considerations, should apply. This would mean an award could be invalidated only if the merits of the award violated a fundamental rule of substantive international public policy, such as a human rights provision, a prohibition against corporate bribery, or basic inarbitrability of the dispute. One could also expand this ground to cover the erroneous or other misapplication of a basic legal principle common to most developed legal systems that is interpreted as having a particular meaning, which the arbitral tribunal manifestly misconstrued. This would
be the equivalent of the American rule of "manifest disregard of the law." Such a process would go far in the direction of advancing the harmonization and unification of national laws in a given and special area of activity. It would also create a substantive analogue to the special procedural regime applied to international arbitration and thereby further "anationalize" the process. Finally, such a process would illustrate the full value of the comparative methodology by establishing a "supranational" legal regime among countries despite the differences in their legal systems.

To some extent, such a framework has already been implemented in a specialized area of international trade and achieved by statute in one jurisdiction. The customary practice in maritime arbitration is to render reasoned awards that have an important precedential value. There, the maritime industry functions on basically standardized contracts, which need to be interpreted in a consistent fashion by arbitral tribunals to guarantee some measure of predictability for industry transactions. The awards are published on a regular basis to insure their precedential value. The need of the industry for predictability and stability assures uniform arbitral interpretation without resort to judicial review of the merits of the awards. Such standardization is becoming more apparent in other areas of international trade. For example, there are form contracts for joint venture agreements, licensing agreements, and turn-key construction operations. The benefits of uniform substantive adjudication here also might be considerable, increasing the predictability of the transaction not only in a remedial but also in a substantive sense.

The concept of "special category contracts" in the 1979 English Arbitration Act (already alluded to but in more negative terms) proffers the possibility of a similar framework. Unlike other "non-domestic" contracts, "special category" contracts cannot contain "exclusion agreements" under which the parties can contract out of judicial review by the English courts. These contracts cover shipping, insurance, and commodities and are governed by English law. The invalidity of exclusion agreements in such contracts is meant to promote the consistent interpretation of the applicable English law. Although the parochial and nationalistic attitude that underpins this feature of the English Act is basically untenable (at least in a Scherk-like system of "truly international" arbitration), the basic procedure, when its parochial focus on national law considerations is eliminated, could serve as a model. The model would eliminate the narrow focus on considerations of national law and would integrate the "special category contract" concept with the notion (referred to earlier) of an "anational" substantive international public policy.

B. An Example of a Possible Approach

The utility of adding a substantive dimension to international arbitral adjudication is evident in terms of harmonizing law and the predictability
of dispute resolution. It would confirm Professor David's view that transnational arbitration represents an "aspiration toward a new type of law." For example, given the commercial character of disputes, the potential hazards associated with international ventures, and the growing state involvement in such dealings, issues related to application of the contractual principles of mitigation of damages and force majeure are likely to arise in arbitral adjudication. These concepts, however, have no established international status and are interpreted differently in common-law and civil-law jurisdictions. An international arbitral tribunal, confronted by either issue, and empowered to rule either according to a general "respect for law" or according to a given national law tempered by international commercial customs and trade usages, should conduct a comparative assessment of these concepts in an effort to articulate their international dimension.

In regard to force majeure, a reasoned award might include some of the following considerations, which would clarify the substantive content of the concept for the purposes of international arbitral adjudication. Although all developed legal systems recognize to some extent the idea of the excuse of performance due to impossible circumstances, the notion of force majeure as a defense excusing the obligations of a contracting party or a tortfeasor has a distinct status in common-law and civil-law systems. Under the common-law perspective, force majeure traditionally has been equated with the notion of "act of God," usually defined as an unforeseeable and uncontrollable natural event or force of nature such as a hurricane, flood, or tornado. The notion of "act of God" in common-law systems has applied primarily, if not exclusively, in the context of personal injury actions. Although the concepts of frustration of purpose and impossibility of performance are similar to some extent, it is difficult to find a true equivalent to force majeure in common-law contract doctrine.

In the civil law, the concept of force majeure is formally recognized because the relevant decisional law specifically recognizes a delictual force majeure. In France and francophonic legal systems generally, the courts, however, usually construe the notion of force majeure in very restrictive terms, interpreting it to refer to an irresistible and unforeseeable

255. See generally id.
This decisional law position reflects historical circumstances dating back to 1804 when the French *Code civil* was enacted. The prevalent ideology at that time placed a premium upon a fairly diffuse *laissez-faire* philosophy, individual self-reliance, and contractual freedom. As a consequence, the courts looked upon *force majeure* as an exceptional doctrine, corresponding basically to the common-law tort notion of "act of God." The very limited judicial application of the doctrine also can be attributed to the fact that a finding of *force majeure* completely excused the nonperforming party from liability.

This traditional civilian view of *force majeure* has been criticized severely by a number of contemporary legal writers. The civilian perception of *force majeure* as a difficult to establish, all or nothing clause of exoneration offers little to the equitable adjudication of either delictual or contractual disputes. The recent decisional law of the Quebec courts offers an alternative to this approach. The traditional interpretation has been modified to allow expansion of the scope of the doctrine, most notably in the contractual area. Rather than maintain an absolutely unbending assessment of unforeseeability, the Quebec courts have adopted a relative evaluation of that factor, grounded in the circumstances of the contract and the usages of the trade.

Accordingly, where an unexpected event occurs during the performance of a contract and the invoking party can show that the usual precautions against its occurrence were taken, the courts might find such circumstances to amount to *force majeure*. The event need only have been relatively, rather than absolutely, unforeseeable. The courts have also assessed the "irresistible" character of the event relatively, examining the invoking party's conduct according to the specific provisions of the contract and general commercial usages. This emerging liberal interpretation disregards the essentially obsolete civilian rationale behind the *force majeure* doctrine and emphasizes the characteristics of the contemporary economic system in the construction of the doctrine. Current commercial dealings, by their variety, place a premium upon speed and flexibility.

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260. The parallel here between *force majeure*, the defenses of contributory negligence and assumption of risk, and comparative negligence in terms of history and rationale is striking.


262. *See* Azard, *supra* note 258. For the following text, the author has relied heavily upon Professor Azard's article. This general statement obviates the need for further extensive footnotes.
Certain provisions contained in European Community Commission Regulations expressly recognize the concept of *force majeure*. For example, citing from the European Court's decision in *IFG v. Commission*:

Article 20 of Commission Regulation (EEC) No. 193/75 provides that where as a result of *force majeure* importation or exportation cannot be effected during the period of validity of the license or certificate, the competent agency shall decide . . . that the obligation to import or export be cancelled, . . . or that the period of validity of the license or certificate be extended.

Article 6(1) of the Commission Regulation 192/75 and article 4 of Commission Regulation 1308/68 also contain specific references to *force majeure*.

The question of whether *force majeure* is a "wider principle of law" in the Community context, however, is an issue of considerable contention. The disagreement exists in large measure because of the European Court's failure to render a clear and unequivocal ruling on the question. It should be noted that the Court has never stated that *force majeure* is not "a doctrine of general application in Community law." Moreover, in cases in which the doctrine has applied either by way of a legislative text or through court construction by analogy, the Court has demonstrated a receptive, albeit systemically ambiguous, attitude toward the doctrine. In light of these considerations, it is difficult to disagree with the opinion of one writer that "*force majeure* is already included, if not especially conspicuous, among the select fold of the general principles guaranteed by the Community legal system."

Emerging trends in private international commercial practice indicate unmistakably that *force majeure* is an important consideration in many international contracts, and that patterns of customary conduct are surfacing. *Force majeure* clauses are commonplace in such transactions and serve a vital function. As Professor Delaume states, "*force majeure* clauses are essentially conceived as a form of insurance against the abrupt termination of a long-term, and hopefully profitable, association . . . rather than . . . an 'escape' clause affording an easy way out of contractual commitments."
Certain well-settled rules seem to have emerged regarding *force majeure* in the context of economic development agreements. In many instances, these rules can be considered as common to all legal systems and to the general law of contracts. In any event, they have been upheld by international tribunals. Briefly stated, these rules indicate that:

(a) The failing party will not be excused unless it is in a position to establish that:
   (i) it is not in default at the time of the occurrence of an event of force majeure and has made all reasonable efforts to avoid the failure, or more generally that the event is beyond its reasonable control;
   (ii) there is a direct nexus or causal relation between the event involved and the failure to perform; and
   (iii) as a result of the event in question performance has been hindered or delayed, or has become totally impossible.

(b) When these conditions are met, the obligations of the failing party may be suspended for the duration of the event or for additional periods if, following the termination of the event, time is needed to resume full performance. In any event, it is expected that the failing party will use all reasonable steps to correct the situation as soon as circumstances permit with a view to resuming full performance as quickly as possible.

(c) Termination of the agreement, while not excluded, is clearly intended to take place only if no understanding is reached between the parties as to a possible readjustment of the terms of the contract or the consequences of non-performance and the means to mitigate them.273

In regard to the mitigation principle, there seems to be little doubt that the duty to mitigate damages is recognized as part of international practice.274 It is a concept that represents a just and equitable accommodation of competing contractual positions and interests, preventing retaliatory conduct on the part of the aggrieved party and lessening the cost of contractual disputes.

Despite the recognition of the concept in international practice and

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273. *Id.* at 38-39 (footnotes omitted). These economic development agreements can include "concessions, joint ventures, and other arrangements between such parties as private investors, public domestic agencies, sovereign states and international organizations with world-wide or regional responsibilities." *Id.* at 24.

agreements, a question arises as to whether the duty to mitigate or minimize damages is of universal application in all or most legal systems in their regulation of contractual relationships. Common-law jurisdictions give the concept unmistakable status. Civil-law doctrine or decisional law, however, does not contain a forthright statement of the duty to mitigate comparable to that contained in Williston, Corbin, or Chitty. This absence of commentary and elaboration is due in large measure to the civil-law codification methodology. Civil law does not demarcate torts from contracts as clearly as common law, but rather groups these two areas of law under the rubric of obligations. As a consequence, the notion of damages has a more comprehensive definition to the civilian mind. It encompasses both contractual (the lack of performance of an existing obligation) and delictual (an unlawful act outside the contractual field) liability. Not only does the idea of mitigation have no express grounding in civilian code provisions, but it is also destined to become a type of composite notion straddling the fence between delictual and contractual principles of liability.

Many civil-law systems, including those of France and Germany, do recognize the idea of mitigation. In German law, the rule of Mitverschulden (which refers to the reciprocal contractual fault of the parties) provides that the aggrieved party, although the victim of the defendant’s breach, should not be allowed to recover for losses that the victim could reasonably have avoided. The victim’s failure to minimize losses is tantamount to fault and will entail a reduction of damages. The principle known as Vorteilsausgleichung requires that the compensating advantages


277. See supra note 276 and accompanying text. In this regard, Professors von Mehren and Gordley have stated that “[s]omewhat similar results appear to be reached in both French and German law.” A. VON MEHREN & J. GORDLEY, THE CIVIL LAW SYSTEM 1115 (2d ed. 1977).

278. In discussing this topic, Professor Litvinoff cites only one article. See 2 S. LITVINOFF, LOUISIANA CIVIL LAW TREATISE: OBLIGATIONS § 214, n. 19 (1975) (citing Weill, Dommagesintérêts compensatoires et mise en demeure, 79 Rev. Crim. Leg. Jur. 203 (1939)). Professor Litvinoff confirmed in a telephone conversation (Aug. 12, 1982) that the Weill article was the only civilian scholarly commentary that referred to the notion of mitigation of damages. Professors von Mehren and Gordley have made a similar observation. See A. VON MEHREN & J. GORDLEY, supra note 277.

279. See 1 S. LITVINOFF, supra note 278, § 44.


281. See id. ch. 16 at 75.
of a breach be taken into account in gauging the aggrieved party's damages.\textsuperscript{282}

In keeping with these general principles, section 324 of the German Civil Code\textsuperscript{283} provides that, in those circumstances in which the performance of a reciprocal or bilateral contract becomes impossible through the fault of one party, the other party retains a claim for performance, subject to a deduction for that which the aggrieved party (\textit{Böswillig}) saved or willfully failed to do.\textsuperscript{284} In other words, the aggrieved party cannot exploit the opportunity to remain idle at the other party's expense.\textsuperscript{285} This same idea is also present in section 615 of the German Civil Code and section 1162b of the Austrian Code, which require a wrongfully discharged employee to seek substitute employment.\textsuperscript{286} These rules correspond to the general principle of the civil law that contracts are to be performed in good faith. Although they require the aggrieved party to engage in positive conduct to minimize losses, the duty they impose is only one of reasonable conduct. The plaintiff need not, for example, undertake complicated litigation with third parties to mitigate damages as a result of a breach.\textsuperscript{287}

Finally, the principle of mitigation is also given expression in a civilian delictual theory under which failure by the aggrieved party to take positive steps to avoid the harmful effects of a breach may result in contributory fault, that of omission rather than commission.\textsuperscript{288} In common law, this notion applies primarily in tort cases as the defense of contributory or comparative negligence. In the civil law, the concept is known as \textit{faute de la victime} and also functions principally, albeit not exclusively, in the delictual liability context. Although most extensively developed in French decisional law, this theory has a counterpart in other civilian legal systems. For example, section 254 of the German Civil Code, article 44(1) of the Swiss Civil Code, and section 1304 of the Austrian Civil Code provide that, if the injured victim contributed by his own fault to his injury, the extent of the defendant's duty to compensate depends upon the circumstances, especially to what extent the loss falls within the "\textit{verursacht oder verschuldet}" provision, due to the fault of one or the other of the parties.\textsuperscript{289}

In his treatise on the law of obligations,\textsuperscript{290} Professor Litvinoff states that it is beyond dispute in the French law of obligations that the obligee is under a duty:

\begin{quote}
\textit{to minimize the damages that the obligor's nonperformance or defective performance may cause. The obligee must do whatever}
\end{quote}

\begin{thebibliography}{99}
\bibitem{282} See \textit{id.} ch. 16 at 75-76, 80.
\bibitem{283} See \textit{id.} at 80.
\bibitem{284} See \textit{id.} at 77.
\bibitem{285} See \textit{id.}
\bibitem{286} See \textit{id.}
\bibitem{287} See \textit{id.}
\bibitem{288} See \textit{id.} at 75-76.
\bibitem{289} See \textit{id.} at 81.
\bibitem{290} See \textit{I S. LITVINOFF, supra} note 278, \S\ 138.
\end{thebibliography}
is in his power to prevent the damaging consequences of the other party's default from getting worse. This is regarded as another consequence of the duty of cooperation the parties owe themselves reciprocally.  

According to Professor Litvinoff, the new social approach to conventional obligations mandates that contracting parties have a reciprocal "duty of cooperation by virtue of which a certain degree of tolerance may be demanded from the obligee."  

CONCLUSIONS  

Reasoned awards that go beyond the mere factual perimeters of the dispute and the giving of conclusory reasons and instead engage in an effort to articulate the actual content of the applicable legal principles would obviously be a necessary first step toward elaborating the basic tenets of an international law merchant. The use of a comparative methodology with international implications appears to be the most appropriate means by which to achieve that substantive end. The recourse to such a methodology would require some degree of legal sophistication on the part of the arbitrators and the representatives of the parties. The suggested 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 customary international commercial and trade practices. One can assume 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 proposed procedure. To date, only the Iran-United States Claims Tribunal has presented a significant opportunity to experiment systematically with the idea of using reasoned opinions to  

291. 2 S. Litvinoff, supra note 278, § 214.  
292. Id. § 214.  
293. The Islamic Revolution in Iran put a very sudden end to the commercial relationships that had existed between United States companies and Iranian interests. Commercial activities which had amounted to several billion dollars a year during the last decade or so were completely destroyed. In response to the taking of the American hostages in Iran, the United States Government froze some $12 billion of Iranian assets in the United States and abroad. Under the Algiers Accord of January 19, 1981, the parties agreed not only to the release of the hostages in return for certain undertakings, but also gave their assent to a Claims Settlement Agreement. The latter establishes a new international arbitral body, the Iran-United States Claims Tribunal, which is empowered to rule on the claims presented by nationals of one state against the other state arising out of debts, contracts, expropriations, and other measures affecting property rights. Its determinations must be based on a "respect for law."  

A number of the features of the Iran-United States Claims Arbitration augur well for the possible elaboration by the Claims Tribunal of normative commercial law principles having a transnational legal dimension. The stature of the Tribunal as a bona fide international
elaborate substantive international law norms. The Tribunal is empowered to rule according to a "respect for law" and the applicable procedural rules (the UNCITRAL rules) require the Tribunal to render reasoned awards. The volume and amount of the claims together with the political and diplomatic circumstances under which the arbitration is being conducted may not allow the Tribunal to address each substantive legal issue with the appropriate full consideration. Certainly, the actual awards rendered by the Tribunal have thus far been singularly disappointing from a normative point of view. With the exception of a few dissenting and concurring opinions from the United States arbitrators on the Tribunal, two adjudicatory body created and empowered to rule by an international agreement (the Algiers Accords, specifically, the Claims Settlement Agreement of those Accords) gives it at least a bilateral, if not truly international, jurisdictional base. Also, the essentially commercial and international character of the disputes that are to be resolved by the Tribunal exclude, by definition, the application of national law. These factors combined with the Tribunal's adjudicatory mandate, established by the Claims Settlement Agreement, that it rule on the "basis of respect for law" strongly suggest that the legal basis for decision be anchored in universally or generally accepted legal principles. Because the UNCITRAL rules apply to the arbitral procedure, the Tribunal is required, as a general rule, to render reasoned awards, and it can rule ex aequo et bono. Reasoned opinions can give the Tribunal's awards precedent setting value or allow them at least to serve a clarificatory function; the Tribunal's possible use of equitable adjudicatory powers would allow it to mold the applicable legal principles to the special characteristics of transnational commercial disputes.

All of the foregoing features of the arbitration give the Claims Tribunal the rather unique opportunity to make full use of the comparative methodology in a singularly meaningful and practical way and to participate (as perhaps no other arbitral tribunal) in the elaboration of an international law merchant. The Tribunal could define its reasoned basis of decision by distilling a corpus of commercial law principles from the statutory and decisional law base of various national legal systems, allowing it to resolve disputes on the basis of a principled substantive consensus among legal systems (a "respect for law"). The critical problems here should be primarily methodological in nature and they relate to how the Tribunal arrives at its assessment of the transnational status of the applicable law: namely, which national legal systems it chooses as representative of the general consensus; how it arrives at its determination that a particular legal principle or rule is agreed upon; and how it should avoid the pitfall of articulating and adopting overly general statements of the applicable law. In any event, most of these considerations should be tempered by the fact that the Tribunal must give reasons for its award and that it need rule only with a "respect for law" (giving it substantial discretion in applying the relevant legal principles). See Audit, Les "Accords" d'Alger du 19 janvier 1981 tendant au reglement des differends entre les Etats-Unis et l'Iran, 108 J. DR. INT'L 713 (1981). See also Aksen, The Iran-U.S. Claims Tribunal and the UNCITRAL Arbitration Rules—An Early Comment, in THE ART OF ARBITRATION, supra note 175, at 1.


295. See Concurring Opinion of Howard M. Holtzmann and Richard M. Mosk To Interim Award Re Stay of Proceedings Before A Court in Iran, Case no. 388, Award no. ITM 13-388-FT (Feb. 9, 1983); Concurring Opinion of Richard M. Mosk with Respect to Interlocutory Award, Case no. 43, Award no. ITL 10-43-FT (Dec. 10, 1982); Dissenting and Concurring Opinions of Howard M. Holtzmann and Richard M. Mosk with Respect to Interlocutory Awards on Jurisdiction, Case nos. 6, 51, 68, 121, 140, 159, 254, 293, and 466 (Nov. 5, 1982).
the awards have been grounded in exclusively factual and conclusory reasoning, which deliberately avoids any consideration of the international status of applicable legal principles.\textsuperscript{296}

Despite this initial disappointment with the Tribunal, in keeping with the general trend of international arbitral adjudication, the most effective developmental approach is leaving adoption of the practice of reasoned awards to the consensus of international arbitral commercial practice itself. The community of international merchants will decide whether to reverse the customary practice of having unreasoned awards, a practice based on an obsolete and functionally unimportant rationale. 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 to have such awards published while maintaining the anonymity of the parties, either in a comprehensive fashion or on a selective basis in keeping with the current practice regarding ICC awards. The awards can, then, as in the area of maritime arbitration or domestic labor arbitration, provide substantive guidance for subsequent arbitral tribunals ruling on similar questions. By integrating such a procedure into current practice, international commercial arbitral adjudication eventually should come to satisfy, by the simple accumulation of reasoned awards and the de facto persuasive or binding effect that would attach to them, its normative mission and fulfill the "aspiration" that it embodies toward a new type of law—the \textit{lex mercatoria}.\textsuperscript{297}

\textsuperscript{296} See Carbonneau in \textit{PROCEEDINGS OF THE SEVENTH SOKOL COLLOQUIUM} (R. Lillich ed. forthcoming).

\textsuperscript{297} For a discussion of the concept of a \textit{lex mercatoria}, see Goldman, \textit{Frontières du droit et lex mercatoria}, in \textit{ARCHIVES DE PHILOSOPHIE DU DROIT} 177 (1964); Goldman, \textit{La "lex mercatoria" dans les contrats et l'arbitrage international: réalités et perspectives}, 106 J. DR. INT'L 475 (1979). See also J. ROBERT & T. CARBONNEAU, \textit{supra} note 1, at §§ II 4.01-4.02.