xecuted those sales on impersonal national securities exchanges prior to an-
ounced tender offers, should have any entitlement to the additional premium
ıter offered. Since the company about to make an offer has no duty to tell such
ıvestors of its intention in advance (and thereby incur the substantial probabil-
y that the price will go up in anticipation of its offer), why should any person
·ading with knowledge of the offeror's future intention incur a liability prem-
ised on such a duty?

The suggestion that liability should be imposed in such cases in order to deter
rongful conduct by employees is unpersuasive and to some extent begs the
uestion whether the conduct is wrongful and, if so, vis-a-vis whom. In the
ender offer context, one rationale suggested in *Newman* and other cases is that
ıe price paid by the offeror has been artificially changed by the trading of those
efendants. No decision yet has cited any empirical facts that support this
ationale or the conclusion that the purchases of the defendants did in fact alter
ıe price later offered and paid by the offeror. If that should ever occur, the
fferor presumably would have a redressable claim against the person whose
ıisappropriation or like conduct occasioned some identifiable financial loss. It
oes not appear appropriate for a court to speculate in that regard in order to
onjure up a conceptual basis on which to impose regulatory or criminal
ability. Similarly, with regard to predicating such liability on breaches of
uties owed to an employer, there are sufficient remedies available to an
mployer to deal with employee misbehavior without using such an event as an
logical linchpin of a securities law violation.

Should legislation, regulation, or case law move toward the idea of equal
ıformation advantage, the role of securities analysis and investment investiga-
on will again become dubious. This is the activity that results in the develop-
ıent of information from various sources and the bringing of analytical judg-
ıent to bear on the wisdom of any given purchase or sale. Prevailing prices
ıould reflect the best information possible. It makes little sense to penalize such
ctivity or to have it conducted at the risk of being deemed illegal.

For better or worse, the area of inside information remains uncertain, and in
ıany cases, clear guidance as to whether conduct is illegal or could give rise to
ivil liability is not available. The essence of a good tip remains not only its
ccuracy but also its timeliness. By definition, a tip precedes public knowledge
f the information, and its value is realized by acting in advance of the general
ıarket's reaction to public disclosure. As long as the SEC finds offense in such
onduct, one trades at uncertain peril despite two holdings of the nation's
ighest court.

Arbitration of International Contract Disputes

*By William W. Park**

International commercial arbitration has been the victim of its own success. Arbitration is often the only dispute resolution process acceptable in business contexts where parties from different countries have rejected recourse to each other's legal system at the outset of the contractual relationship. For example, when a Swedish shipyard contracts to build tankers for an agency of the Libyan government, the Swedes are unlikely to relish the prospect of appearing before Libyan courts, and the Libyans may view submission to the courts of Sweden (or of another industrialized Western nation) as an affront to Libyan national sovereignty. Neither the Swedish shipyard nor the Libyan government "chooses" arbitration. Rather, arbitration imposes itself for lack of an acceptable alternative. Hard tasks take a high toll, and arbitration thus may become a long and costly process.

THE ARBITRATION AGREEMENT[1]

PATHOLOGICAL CLAUSES: THE SIN OF EQUIVOCATION

Parties to international contracts often fail to face squarely the issue of whether they really want arbitration rather than either court litigation or nonbinding procedures such as conciliation and mediation. This equivocation has led to an intellectually fascinating pathology contained in some of the most sophisticated and voluminous of contracts prepared by intelligent and resourceful counsel who make the primitive error of trying to serve two or more masters.

Parties to international contracts who want binding arbitration of potential future disputes should say so clearly. A timid straddle between arbitration and litigation, requiring an element of further mutual consent in order to create a

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1. For a more intensive treatment of the drafting of arbitration agreements, the reader is referred to chs. 4 through 9 of W. Craig, W. Park, & J. Paulsson, International Chamber of Commerce Arbitration (1984).

binding dispute resolution process, turns the arbitration into mere foreplay to litigation[2]

In a purely national setting, the results of an inability to make up one's mind may not be serious. The American with a deficient arbitration clause in a contract with another American is faced with the prospect of an American judge applying American rules with proceedings in English. In the international context, however, the alternative may be dramatically disagreeable. A company that desired arbitration in London in the language of Shakespeare may instead end up with French proceedings in Toulon in the language of Molière, or proceedings before Saudi courts in Riyadh in the language of the Prophet Mohammed.

INSTITUTIONAL OR AD HOC ARBITRATION?

Arbitration clauses generally provide either for ad hoc arbitration or for arbitration conducted under the aegis of an institution. An arbitrator's jurisdiction normally is created by inserting an arbitration clause in the main contract drafted before the particularities of the controversy are known. These agreements generally are distinguished from "special submissions," which are drafted after the dispute has arisen. Special submissions are *often* referred to by the French term *compromis*, distinguished from the arbitration agreement in the main contract, called the *clause compromissoire* by the French and a "future disputes clause" by the British. The ad hoc clause is intended to be self-executing: it provides for the parties to initiate and to proceed with the arbitration without the assistance of any permanent supervisory institution. Many ad hoc clauses are lengthy and highly crafted.

One should counsel against ad hoc arbitration. At the time of the signing of contract, it is difficult to foresee all of the procedural issues that may arise during a dispute. Even if an arbitration clause is lengthy and complex, an institution should still be named to fill the gaps that inevitably arise in the adjudication of complex, international business disputes. When the marriage has gone sour, the defendant alone is happy with ad hoc clauses. And the greater his bad faith, the greater his glee.

Arbitral institutions set the process in motion by appointing an arbitrator or an arbitral panel.[3] Some institutions also supervise the arbitral process itself. The International Chamber of Commerce (ICC) Court of Arbitration, fo

2. One equivocal clause dealt with by a recent French court was headed "choices [plural] o forum." The clause provided: "In case of a dispute the parties undertake to submit to arbitration bu in case of litigation the *Tribunal de la Seine* shall have exclusive jurisdiction." Decisions of 1 Fe 1979, T.G.I. Paris, 1980 *Rev. Arb.* 97 (1980) and 16 Oct. 1979, 1980 *Rev. Arb.* 101 (1980). O pathological arbitration agreements, see generally F. Eisenmann, *La Clause d'Arbitrage Pathologique*, in Essais In Memoriam E. Minoli, 129 (1974) and C. Schmitthoff, *Defective Arbitration Clauses,* J. Bus. Law 9 (1975).

3. Some institutions—about 50 around the world at last count—are general purpose. A uncounted number, such as London's Grain and Feed Trade Association and the Federation of O Seeds & Fat Association, deal only with disputes in a special sector.

ample, must approve any award issued by arbitrators acting under its aegis, insure the award's conformity to any mandatory norms of local procedural w. Supervised arbitration benefits from the prestige and the recognition of the pervising institution. A presumptive legitimacy attaches to the award when a dge of a national court is faced with a request for enforcement.

The drawback of supervised arbitration, of course, is a greater cost. Arbitrars' fees and administrative costs may run to tens and even hundreds of ousands of dollars. When large amounts are in controversy, however, the nefit generally is worth the cost. When the award is presented for enforceent, the winning claimant in an ICC arbitration benefits from the reputation an institution built over sixty years and four thousand cases.

ELEMENTS OF THE ARBITRATION AGREEMENT

Essential Elements

No universally ideal arbitration clause exists. The appropriateness of each of e elements of a clause depends upon the context of the transaction: the parties, e type of contracts, the laws that bear on performance, and the places where e award might be enforced.

Essential to a binding arbitration clause is, of course, an unambiguous and equivocal reference to arbitration, preferably under the rules of a reputable d experienced institution. One bare-bones agreement worth consideration is e ICC model clause: "All disputes arising in connection with the present ntract shall be finally settled under the Rules of Conciliation and Arbitration the International Chamber of Commerce by one or more arbitrators apinted in accordance with the said Rules."

The second indispensable element in an arbitration clause is the circumscripn of the arbitrator's authority, the scope of the dispute to be arbitrated. The st approach for international business contracts is to grant the arbitrator oad authority to decide disputes arising "in connection with" a contract. The bitrator can then rule on claims that are in quasi-contract and, in some cases, en tort claims.

Defining the arbitrator's authority is not always easy, however. There is a y area between an arbitrator who merely decides incorrectly, and an arbitra- who renders an award in excess of the mission conferred upon him by the rties. For example, in *Mobil Oil v. Asamera*,[4] a contract for exploration and oduction of petroleum in Indonesia provided for Mobil to pay royalties on rude oil". The arbitral award, however, ordered Mobil to pay royalties on gas d liquid hydrocarbons other than crude oil. Mobil argued that the arbitrators d exceeded their mission by essentially rewriting the contract terms. The bitrators' interpretation of crude oil to include all hydrocarbons, despite the mmonsense definition of the term, could be characterized either as a simple or, or as a modification of the contract constituting an act outside the scope of

4. Mobil Oil Indonesia v. Asamera Oil, 487 F. Supp. 63 (S.D.N.Y. 1980).

the authority conferred by the parties. The U.S. District Court for the Southern District of New York refused to vacate the award, finding it sufficient that the arbitrators' statement of reason contained a "barely colorable" justification for the outcome.

Occasionally Useful Elements

Eight occasionally useful elements commend themselves for inclusion in an arbitration clause.

Number of Arbitrators

A sole arbitrator is generally cheaper and quicker than a three-member tribunal. For a complicated transaction with a large amount in controversy, however, a three-member tribunal has the merit of enhancing the completeness of the examination of the issues. The ICC Court of Arbitration, absent stipulation by the parties, has power to determine the number of arbitrators. The practice in recent years has tended toward three arbitrators rather than one.

The parties may also wish to specify the nationalities and qualifications of th arbitrators. One must be careful, however, not to be too precise. The greater th difficulty in meeting such qualifications, the greater the risk of making th arbitration unworkable and subject to challenge as not conducted according the parties' agreement. It would be tempting the devil to require that t arbitrator be an English-speaking Italian with a French law degree and familiarity with Mid-East construction contracts.

Language

A choice of language clause is advisable to avoid polemic if the arbitrat happens to prefer a language other than the one desired by the parties. A bit bilingualism can be added by providing that documents may be submitt without translation in a designated language of which the arbitrator is likely have a reading knowledge. For example, it might be stipulated that the la guage of the proceedings will be English, but that parties may submit doc ments in French.

Law Applicable to the Merits of the Dispute

A specific national law should be stipulated to govern interpretation of t contract. No matter how carefully the contract is drafted, issues may arise th are not dealt with efficiently by general principles of law and equity. Such issu include, for example, rate of interest for late payment, time limits for buy complaints about defective goods, and statute of limitations. Lack of a speci

5. ICC Arbitration Rules, art. 2(5).

-tional law to govern these issues can lead to delays, higher costs, polemics, nd even written and oral submissions.

Parties should be explicit that the chosen law applies to the merits of the ispute, to avoid the *renvoi* mechanism, whereby reference to one law results in pplication of a second, by virtue of the choice of law principles of the first.

A choice of law clause generally is respected by arbitrators. The law must be osen in good faith; however, the clause should not represent a deliberate tempt to escape the mandatory public policy norms of the law that would herwise govern the contract.[6]

Parties sometimes stipulate *lex mercatoria*, the international law merchant, ould apply, although not all lawyers agree on the term's meaning. Trade age, a common law of international contracts, or the entirety of transnational gal norms affecting international business operations have all been connected scholars and practitioners to the concept of *lex mercatoria*.

One recent case involving *lex mercatoria, Norsolor v. Pabalk Ticaret*,[7] in- lved a French company that had been held liable for breach of its contract ith a Turkish commercial agent. Vienna had been selected as the place of bitration. No applicable national law was stipulated by the parties. An award s rendered on October 26, 1979, holding the French company in breach and arding damages fixed at eight hundred thousand French francs.

The arbitral tribunal applied no single national law, but simply based its cision on its understanding of the litigious agreement, on *lex mercatoria*, and the principles of good-faith dealings and mutual trust in business relations. e arbitrators affirmed that they understood *lex mercatoria* to include a rule t damages are payable if a contract is wrongfully terminated causing loss to innocent party. Norsolor sought to have the award set aside, but the strian Supreme Court confirmed the award, holding that the arbitration had violated any mandatory norms of Austrian law in applying *lex mercatoria*.

The parties sometimes authorize the arbitrator to act as *amiable com- iteur*.[8] Amiable composition, literally translated as "friendly compromise," uld not be confused with conciliation or mediation. The award, rendered by arbitrator acting as *amiable compositeur*, is binding on the parties. The itrator decides according to "equitable principles" or *ex aequo et bono*. The itrator does not ignore the law, but rather refrains from applying the letter of law if it conflicts with his own concept of fairness. The contract is not ritten, but its terms may be adjusted.

See Seeman v. Philadelphia Warehouse Co., 274 U.S. 403 (1927); Vita Food Prod. v. Unus ping, A.C. 277 (1939); *see generally* B. Audit. Fraude à la Loi (1974), 470 *et seq*, at 369 *et seq*.
Supreme Court of Austria (Oberster Gerichtshof), decision of 18 November 1982 (unpub- d). On *lex mercatoria*, see generally Goldman, *La Lex Mercatoria Dans Les Contrats et rage Internationaux: Realités et Perspectives*, 106 Journal de Droit International 475 (1979).
See generally E. Loquin, L'Amiable Composition en Droit International (1980).

Conciliation or Mediation

Provision for a settlement attempt before binding arbitration can supply the occasion for a useful cooling down period, as long as care is taken to avoid emasculating the arbitration clause through equivocal language. Stipulation of specific rules or procedures is frequently helpful, or the parties may prefer a nonbinding mini-trial before a neutral advisor.[9]

Entry of Judgment Stipulation

Language in the Federal Arbitration Act[10] concerning federal court confirmation of awards has led to the practice in the United States of providing that "judgment upon the arbitral award may be entered in any court having jurisdiction thereof." However, the line of cases arising under the Act involves domestic rather than international transactions. In light of the 1970 amendments to the Act, the entry of judgment stipulation may not be necessary for international arbitration.[11]

Waiver of Appeal

Assuming the desirability of a final award, waiver of appeal should be stipulated either explicitly or by reference to institutional rules.[12] Of course, the party that expects to lose (or wants to prepare for this misfortune) may resist waiver of its right to call on a national court to intervene.

Waiver stipulations are not always effective. Some legal systems, such as the English, recognize waiver as valid only in limited circumstances. Other systems, such as the law of Geneva, provide back-door mechanisms for appeal that are mandatorily imposed on all arbitration conducted within the jurisdiction. These restrictions on waiver are discussed below.

Waiver of Sovereign Immunity

The arbitration agreement itself tends increasingly to be considered an implicit waiver of sovereign immunity. As a precaution, however, an explicit waiver should be obtained in international contracts involving states, state entities, state agencies, or other emanations of national power.

Place of Arbitration

In all countries arbitration is subject to some judicial supervision to ensure compliance with mandatory norms of local procedural law. The extent of court

9. On mini-trials, see Perlman & Nelson, *New Approaches to the Resolution of International Disputes*, 17 Int'l Law. 215 (1983).

10. 9 U.S.C. § 9 (1982).

11. Nevertheless, the precaution should be taken to comply with registration formalities of the seat of arbitration. For example, registration with local cantonal courts is required in many cantons. See art. 35(5) of the Swiss Intercantonal Arbitration Concordat.

12. *See, e.g.*, art. 24 of the ICC Arbitration Rules, quoted *infra* at note 18.

[int]ervention in the arbitral process varies widely, however, and can range from [lai]ssez-faire, as in France and the United States, to appeal or challenge for [arb]itrator error, as in England and Switzerland.

[I]f one views the goal of international arbitration as a final and private [adj]udication according to "delocalized" procedure in a neutral forum, then it is [bes]t to select a situs where judges are reluctant to intervene in the arbitration. [Co]urt intervention adds cost and delays to the process of producing an enforce[ab]le award.

The difficulty in choosing a place of arbitration is that business lawyers are [oft]en unsure of the current arbitration laws and trends in the alternative [cou]ntries. Therefore, it may be best to leave the choice of a situs to an institution [wi]th some experience in the matter, such as the International Chamber of [Co]mmerce. Although its headquarters is in Paris, the ICC frequently designates [oth]er places as the seat of the arbitration. During the three-year period [inc]luding 1980-82, the ICC designated Paris as the situs for arbitrations in only [..]1 of the 615 cases where the parties left the situs open. The majority of ICC [arb]itrations are held in western European cities.

Even the experienced arbitration lawyer may find it wise to leave the choice [of] situs to an institution. Changes in national procedural law and judicial or [po]litical climate often occur between signing the contract and the time a dispute [ari]ses. An undesirable situs may become more attractive (as witnessed by recent [dev]elopments in England), or vice versa.

[T]HE INTERACTION OF JUDGE AND ARBITRATOR

[:] THE NEW YORK ARBITRATION CONVENTION

Assuming that one seeks a dispute resolution mechanism that will produce an [int]ernationally enforceable award, the first consideration in choosing a situs for [arb]itration is that the country of the proceedings be a party to the 1958 New [Yo]rk Convention on Recognition and Enforcement of Foreign Arbitral [Aw]ards.[13] The Convention requires courts of a contracting state to recognize [tha]t a written arbitration agreement takes precedence over normal rules of [jur]isdiction, and to enforce arbitral awards rendered abroad.[14]

[1]3. 330 U.N.T.S. p. 38, no. 4739 (1959). The Convention generally does not apply to disputes [bet]ween U.S. citizens. Corporations are deemed U.S. citizens if their place of incorporation or [pri]ncipal place of business is in the United States.

14. Art. II(1) of the Convention covers only disputes "capable of settlement by arbitration." The [arbit]ration clause constitutes an autonomous agreement, separate and independent from the main [cont]ract in which it is found, and thus the issue of arbitrability may be subject to a different law [tha]n the one chosen to govern the merits of the dispute. Subjects that often raise problems of [arbit]rability include patents, trademarks, bankruptcy, securities law, employment agreements, [pro]hibited international boycotts, antitrust law, and contracts against international public policy [(con]tra bonus mores).

International contracts (characterized as "international" either by reference to the nationality or [resi]dence of the parties or by the commercial interests implicated by the transaction), frequently [esca]pe the limits on arbitrability imposed on purely domestic contracts. For example, federal courts [nor]mally possess exclusive jurisdiction to apply federal law governing the sale of securities; in

Parties to the Convention may reserve application of its enforcement provisions on the basis of geographical reciprocity. The state making the reservation may provide that only "awards made in the territory of another Contracting State" benefit from enforcement under the Convention. The fact that this reservation has been taken by two-thirds of the sixty-two countries that have ratified the Convention makes it preferable to choose, as the place of arbitration, a country that is a party to the Convention.

The New York Convention contains no nationality requirements. In contrast to the 1961 European Convention on International Commercial Arbitration, which requires both parties to be domiciled in countries that have ratified the Convention, the New York Convention is blind to the parties' nationality.

The Convention sets forth uniform grounds upon which an award may be refused recognition, one of which is that the award has been set aside by "a competent authority of the country in which, or under the law of which the award was made."[15] The procedures for challenge of an award at the arbitration situs are thus critical to the binding force of the award, and it is wisest to choose as a situs for arbitration a place where judges are reluctant to interfere in the proceedings.

ILLUSTRATIVE LEGAL SYSTEMS

England: "Exclusion Agreements"

In England until 1979, the "case stated" procedure permitted a party to compel an arbitrator to submit a point of law to the High Court. Until the High Court had answered the legal question stated by the arbitrator, there was no final award.[16]

The 1979 English Arbitration Act[17] replaced the "case stated" procedure with a more limited right of appeal to the High Court. Appeal of an award for arbitrator error of law now may be made, with leave of the court, if the legal question "could substantially affect the rights of one or more of the parties."

For international arbitration the Act authorizes "exclusion agreements." Parties to what the Act calls "non-domestic" transactions may exclude appeal by a clause in the principal contract itself. A non-domestic contract is

international transactions, however, parties may agree to arbitration of securities disputes. Scherk v. Alberto Culver Co., 417 U.S. 506 (1974).

15. Art. V(1)(e). The New York Convention, unlike the old Geneva Convention of 1927, does not require that an award be granted judicial execution or entry of judgment in the country of origin, the so-called "double exequatur." The Convention permits, but does not require, refusal of recognition to awards annulled where rendered. Despite the permissive, rather than mandatory nature of the provision, courts do not in practice enforce foreign awards set aside in their country of origin. There is no reported case in which an award has been enforced after explicit annulment in the country where rendered.

16. The uniqueness of English law lay in the timing of the appeal, which was allowed before formal delivery of the award. As a result, the decision might be refused enforcement in a country in which the debtor had assets because the award might not be deemed binding.

17. Arbitration Act, 1979. The Act does not apply to arbitrations conducted in Scotland

greement to which at least one of the parties is not British. Parties to such ntracts may agree in writing to preclude the courts from hearing appeals or roviding interlocutory rulings on questions of law.

Predispute exclusion agreements are void as to shipping, insurance, and mmodities contracts governed by English law. Court review of disputes in ese areas was considered a fruitful catalyst for development of English law, ng pre-eminent in maritime, insurance, and commodities matters. Prohibition predispute exclusion agreements in these areas was intended to encourage rtilization of English law by the commercial community through judicially viewable arbitration. Exclusion of appeal in these "special category" disputes possible only after the disputes actually arise.

The Act is silent on incorporation of exclusion agreements by reference to stitutional arbitration rules. Thus the effect of a reference to the ICC Rules s been problematic,[18] and it would be prudent for parties wishing to exclude dicial review in England to state this explicitly in the arbitration clause itself. However, such a specific exclusion agreement may not be necessary in light of o recent High Court cases holding that reference to the ICC Arbitration Rules constituted the incorporation of a valid "exclusion agreement" under the ct.[19]

The 1979 Act did not repeal the High Court's residual statutory power to emit awards for reconsideration by the arbitrator and to set aside an award for bitrator misconduct.[20] The term "misconduct," as interpreted by judicial cisions rendered before 1979, has been applied to "procedural errors and missions by arbitrators who are doing their best to uphold the highest standards of their profession."[21] Thus there is still the possibility for English courts remit or to set aside awards, despite an exclusion agreement.[22]

Recent English case law,[23] however, suggests a trend toward judicial respect f the independence of the arbitral process that may remove some of the sting

18. Art. 24(2) of the ICC Rules provides that "[b]y submitting the dispute to arbitration by the ernational Chamber of Commerce, the parties shall be deemed to have undertaken to carry out resulting award without delay and to have waived their right to any form of appeal insofar as h waiver can validly be made."

19. Arab African Energy Corp. v. Olie Produkten Nederland, [1983] 2 Lloyd's L.R. 419 (Q.B., m. Ct.); unofficial reports in [1983] Com. L.R. 195, and The Times, 18 May 1983. The award, ich arose under a contract for sale of oil by Arafenco, confirmed by telexes from OPN's brokers Arafenco, denied Arafenco's claim for monies due and granted the counter-claim for demurrage. rine Contractors v. Shell Petroleum, Com. L.R. 251 (21 Nov. 1983), involving a claim that arose m the laying of a pipeline for Shell in a Nigerian swamp.

20. *See* §§ 22 and 23 of the 1950 Arbitration Act.

21. 1978 Commercial Court Committee Report on Arbitration (Cmnd. 7284), at 17 (paragraph

22. As of this writing, no case yet deals with a judicial attempt to circumvent an exclusion eement by exercise of the court's power to set aside or to remit an award.

23. *See, e.g.*, Moran v. Lloyd [1983] 2 WRL 672 (*re* arbitror misconduct); Pioneer Shipping v. P. Troxide (Nema) (1981) 2 A.E.R. 1030 (*re* appeal to the High Court); Arab African Energy p. v. Olie Produkten Nederland, [1983] Com. L.R. 195 (*re* "exclusion agreements" incorporated by reference to the rules of an institution); and Bank Mellet v. Helsinki Techniki, decided 3

from much of the past criticism of interventionist attitudes of English judges.[24] Nevertheless, the text of the statute may still be less important than the context of its application. The legal correspondent of the Financial Times has recently stated with customary British elegance: "No manner of legislation, however, will remove . . . the professional zeal of London solicitors and barristers who transplant into arbitration proceedings the habits acquired in the courts. Only competition from such institutions as the ICC will make them adopt more relaxed attitudes."[25]

France: Arbitral Autonomy

In May 1981, the Prime Minister of France promulgated a decree providi[ng] special rules applicable to international commercial arbitration. An importa[nt] element to understanding the decree is the *Götaverken* case of the previo[us] year.[26] An ICC award had been rendered in favor of a Swedish shipyard th[at] had built three petroleum tankers for an agency of the Libyan government. T[he] Libyans sought to have the award set aside in France by direct appeal. Und[er] the existing law such a procedure was available only for French, as opposed [to] international, arbitral awards. The Paris Court of Appeal held that the awa[rd] was not a French award. Therefore the court considered itself to lack jurisdi[c]tion to hear the challenge.

In the wake of this decision, commentators urged legislative clarification [of] the role of French courts with respect to international commercial arbitrati[on] taking place in France. A completely laissez-faire approach, it was argue[d,] might impede efficient international arbitration. Courts abroad, when fa[ced] with an award rendered in France, might less readily grant enforcement [if] international arbitration in France was conducted with no judicial control o[ver] the fairness of the proceedings. The foreign court might feel it necessary [to] supply (through a broad construction of the New York Convention's groun[ds] for refusal of recognition) its own more exacting control mechanism.

International arbitral awards rendered in France may now be set aside [by] French courts, thus providing some judicial control at the place of arbitrati[on.] The decree carefully limits the grounds on which arbitral awards may [be]

March 1983, reported in The Times, 28 June 1983 (*re* security for costs). David Shenton's excel[lent] discussion of these cases appears in the proceedings of the American Bar Association Litiga[tion] Section program in Atlanta, 2 August 1983, and the International Bar Association progra[m] Toronto, October 1983.

24. The author earlier expressed concern that English judges might pursue interventionist ha[bits] despite the 1979 Act. I am unsure whether the appropriate response to the recent cases cited in [note] 23 *supra* is repentance for past doubt, or rejoicing at the conversion of sinners. *See* Park, *The Loci Arbitri and International Commercial Arbitration*, 32 Int'l & Comp. L.Q. 21 (1983); P[ark,] *Judicial Supervision of Transnational Arbitration*, 21 Harv. Int'l L.J. 87 (1980).

25. A. Herman, The Financial Times, 20 Oct. 1983, at 38, cols. 5-8.

26. Libyan Gen. Nat'l Maritime Transp. Co. v. Götaverken Arendal, Judgment of 21 Febr[uary] 1980, Cour d'Appel, Paris, (1980).

[an]nulled, however, allowing French judges only the power to insure observance [of] minimum standards of honesty and integrity of proceedings.[27]

Switzerland

In 1969 an intercantonal commission drafted a uniform Swiss arbitration law [ref]erred to as the Concordat.[28] At this writing, twenty-one cantons have enacted [the] Concordat. Zürich, the most important of the nonsignatory cantons, has [re]sisted the trend toward togetherness and retains its own arbitration rules.

The Concordat's "mandatory" provisions (*dispositions impératives*) apply [not]withstanding the parties' desire to tailor the arbitral proceedings otherwise. [Tw]o-thirds of the Concordat's forty-six articles are designated as mandatory, [giv]ing the arbitrator and the parties less autonomy than under the law of other [ma]jor arbitral centers.

Some mandatory provisions are merely matters of fairness or common sense. [Th]ese include the requirements that the arbitral tribunal be properly consti[tut]ed, and that the arbitrators respect the jurisdiction conferred upon them by [the] parties.

Other mandatory provisions, however, permit extensive court intervention in [the] arbitral process. In particular, article 36(f) gives judges the power to set [asi]de awards that they consider "arbitrary." Arbitrary awards are defined as [tho]se decisions that constitute a "violation of law or equity," with equity used to [me]an fairness rather than its technical sense in English law.[29] An award may [als]o be arbitrary if it is based on findings "manifestly contrary to the facts." An [act]ion for nullification, *recours en nullité*, may be brought before the cantonal [cou]rt of the seat of the arbitration. The right to challenge is not waivable by the [pa]rties.

[27]. The grounds under which an international award rendered in France may be set aside are as [follo]ws: if the arbitrator decided in the absence of an arbitration agreement; if the arbitral tribunal [was] irregularly composed or appointed; if the arbitrator violated the terms of his mission; if due [proce]ss (literally the "principle of an adversarial process") was not respected; and, if the recognition [or e]nforcement of the award would be contrary to international public policy (*ordre public [inter]national*).

[In]ternational awards may be challenged for a violation of international, as opposed to domestic, [publi]c policy. The former includes the policies French courts consider relevant to international [cont]racts. Thus an international commercial dispute may be arbitrable even though the principal [contr]act from which it arises violates French internal public policy. See Craig, Park & Paulsson, [Frenc]h *Codification of a Legal Framework for International Commercial Arbitration*, 13 Geo. J. L. [& Pol]'y Int'l Bus. 727 (1981).

[28]. *See generally* Neyroud & Park, *Predestination and Swiss Arbitration Law*, 2 B.U. Int'l [L.J.] 1 (1983).

[29]. The definition of "law" for purposes of art. 36(f) has been much debated. Natural law, [Swis]s law, the law of the arbitration, and the law applicable on the merits have been among the [inter]pretations discussed.

The 1980 case of *Berardi v. Clair*[30] illustrates the practical impact of Swiss annulment of an award. At issue was the balance sheet of a Gabonese company whose shares had been sold by a Canadian (Berardi) to a Frenchman (Clair). The arbitrator awarded the seller 23 million francs. The Geneva cantonal Cour de Justice later annulled the award as "arbitrary," substituting its own conclusions about the balance sheet's accuracy for those of the arbitrators. In Paris three months earlier, the Tribunal deGrande Instance had granted leave to enforce the award. On learning of the award's annulment, however, the Cour d'Appel of Paris quashed the lower court's decision.

A proposed revision of Swiss "private international law" would limit the intervention of Swiss courts in international commercial arbitration. Contractual exclusion of appeal would be available when both parties to the arbitration are foreign, having "neither domicile, nor habitual residence, nor place of business in Switzerland." This provision for ouster of court supervision differs from that of the English Arbitration Act of 1979, which permits ouster when at least one of the parties is foreign.

DELOCALIZATION OF THE ARBITRAL PROCESS

The world would be a simpler place for international arbitration if national legal systems treated the arbitral process in essentially similar ways. Parties would be less preoccupied with procedural considerations under local law.

Concern with the distortion of the arbitral process by national law has [illegible] some scholars and practitioners to question the traditional role of the law of the place of the proceedings, often called the *lex loci arbitri*.[31] Proponents [illegible] "delocalized" arbitration have suggested that an international commercial arbitral award may float or drift free from the constraints of the national law of the place of the proceedings, and may be enforced abroad even if annulled where rendered.[32]

Enforcement of an award annulled in its country of origin might be appropriate in two cases. The first presumes that the local judiciary is corrupt or biased. For example, a judge in a country lacking a tradition of judicial independence might set aside an award rendered against his own government merely to please the bureaucracy. Secondly, postannulment recognition might be justified where the award was set aside for reasons so peculiar to the local law of the place of the proceedings that nonrecognition would defeat an efficient international arbitral process. For example, the local law of the place of the proceedings

30. Judgment of 20 June 1980, No. 11542, Cour d'Appel, Paris; unpublished opinion, summarized by International Council for Commercial Arbitration in 7 Yearbook of Commercial Arbitration 319–21 (1982).

31. An alternative solution to the difficulties arising from divergent national laws is the M[illegible] Arbitration Law proposed by the United Nations Commission on International Trade L[illegible] (UNCITRAL). *See* chapter 28.06 in W. Craig, W. Park & J. Paulsson, *supra* note 1.

32. For a summary of the debate on delocalized arbitration see Park, *The Lex Loci Arb*[illegible] *supra* note 24, and the reply thereto in Paulsson, *Delocalisation of International Comm*[illegible] *Arbitration: When and Why It Matters*, 32 Int'l & Comp. L.Q. 53 (1983).

ight provide that all arbitrators must sign the award. Application of the local ile to an international arbitration might be unfortunate if the parties presumed at international rules (such as those of the International Chamber of Commerce) would apply, and that a recalcitrant arbitrator could not block an ward.[33]

A complete lack of judicial control, however, is undesirable. National courts ave an interest in ensuring the integrity of proceedings conducted within their nal borders to avoid debasement of the currency of these awards abroad. By lowing an award rendered in its territory to become binding, a state facilitates s enforcement under the New York Convention. Thus the state should provide mechanism for controlling the fairness of the proceedings; the court should nsure an accord between what and how the arbitrator decided and what and w he was empowered by the parties to decide. The contesting party should be ble to expose procedural irregularities at the place of the arbitration, which rmally has as great a claim to mutual convenience as any other forum, rather an be forced to attack the award in each state where it might be enforced ainst its property.

CONCLUSION

The hybrid nature of the arbitral process, forever a cross between the judicial nd the contractual,[34] requires a delicacy in the drafting of the arbitration reement that defies the articulation or application of facile rules. Two idelines may be suggested, however. First, one should avoid equivocation in afting the clause. If the parties intend dispute resolution by binding arbitran, rather than litigation or conciliation, they should say so explicitly. Second, e place of the proceedings should be selected with an eye to minimizing the andatory procedural rules imposed by local law. Choice of a situs may best be t to an experienced arbitral institution that monitors developments in national bitration law.

33. The European Convention on International Commercial Arbitration (21 April 1961, 484 T.S. 349) embodies the principle of delocalized arbitration to a limited degree by providing for al of recognition of awards covered by the Convention only when annulment has been made for ns enumerated in the Convention.

34. For an interesting historical perspective on the hybrid nature of the arbitral process, see Yves nclos, L'Arbitrage En Bourgogne et en Champagne du XII au XVè Siècle (1977).

APPENDIX

ILLUSTRATIVE ARBITRATION AGREEMENTS

ICC Model Clause

All disputes arising in connection with the present contract shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.

ICC Model Amplified

(a) All disputes arising in connection with the present Agreement shall be finally settled under the Rules of Conciliation and Arbitration of the Interna- tional Chamber of Commerce, by one or more arbitrators appointed in accor- dance with the said Rules.

(b) In the absence of an agreement by the parties at the time of the arbitration that it is appropriate to submit the dispute to a single arbitrator, the arbitral tribunal shall be composed of three arbitrators. Each party sh appoint one arbitrator. If a party fails to nominate an arbitrator within thi (30) days from the date when the Claimant's Request for Arbitration has b communicated to the other party, such appointment shall be made by the Co of Arbitration of the ICC. The two arbitrators thus appointed shall attempt agree upon the third arbitrator to act as chairman.

If said two arbitrators fail to nominate the Chairman within thirty (30) d from the date of appointment of the latter arbitrator, the Chairman shall selected by the Court of Arbitration of the ICC. In all cases, the Chairman sh be a lawyer fluent in English and shall not be of the same nationality as eit party.

The arbitral tribunal shall be constituted in accordance with the pres clause, and with respect to matters not dealt with in this clause, in accorda with the then existing Rules of Conciliation and Arbitration of the Internatio Chamber of Commerce.

(c) The place of arbitration shall be London, England. The arbitral proce ings shall be conducted in the English language.

(d) The parties hereby exclude any right of application or appeal to court, to the extent that they may validly so agree, and in particular connection with any question of law arising in the course of the reference or of the award. The parties intend the aforesaid exclusion to operate as exclusion agreement as defined by Section 3 of the English Arbitration Ac 1979.

(e) Judgment on the award of the arbitrators may be entered in any c having jurisdiction thereof or having jurisdiction over one or more of the par or their assets.

London Court of Arbitration Model Clause

The validity, construction and performance of this contract shall be governed the law of England and any dispute that may arise out of or in connection ith this contract, including its validity, construction and performance, shall be etermined by arbitration under the Rules of the London Court of Arbitration pplicable to international arbitration at the date hereof, which Rules with spect to matters not regulated by them, incorporate the UNCITRAL Arbitra- n Rules. The parties agree that service of any notices in reference to such bitration at their addresses as given in this contract (or as subsequently varied writing by them) shall be valid and sufficient.

merican Arbitration Association Model Clause

Any controversy or claim arising out of or relating to this contract, or the each thereof, shall be settled by arbitration in accordance with the Rules of e American Arbitration Association, and judgment upon the award rendered the Arbitrator(s) may be entered in any Court having jurisdiction thereof.

d Hoc Clause—Libyan Oil Concession

1) If at any time during or after the currency of this contract any difference dispute shall arise between the Government and the Company concerning the erpretation or performance of the provisions of this contract, or its annexes, in connection with the rights and liabilities of either of the contracting parties reunder, and if the parties should fail to settle such difference or dispute by reement, the same shall, failing any agreement to settle it in any other way, be erred to two Arbitrators, one of whom shall be appointed by each party, and Umpire who shall be appointed by the Arbitrators immediately after their pointment.

In the event of the Arbitrators' failing to agree upon an Umpire within 60 s from the date of the appointment of the second Arbitrator, either of such rties may request the President or, if the President is a national of Libya or of country where the Company is incorporated, the Vice-President, of the ernational Court of Justice to appoint the Umpire.

2) The institution of the arbitration proceedings shall take place upon the eipt by one of such parties of a written request for arbitration from the other, ich request shall specify the matter in respect of which arbitration is uested and name the Arbitrator appointed by the party requesting arbitra- n.

3) The party receiving the request shall within 90 days of such receipt oint its Arbitrator and notify this appointment to the other party, failing ich that other party may request the President or, in the case referred to in agraph (1) above, the Vice-President of the International Court of Justice to

appoint a Sole Arbitrator, and the award of the Sole Arbitrator so appointed shall be binding upon both parties.

(4) If the Arbitrators appointed by the two parties fail to agree upon a decision within 6 months of the institution of arbitration proceedings, or either or both Arbitrators become unable or unwilling to perform their functions at any time within such period, the Umpire shall then enter upon the arbitration process. The award of the Arbitrators, or in case of a difference of opinion between them, the award of the Umpire shall be final. If the Umpire or the Sole Arbitrator, as the case may be, is unable or unwilling to enter upon or complete the arbitration process, then, unless the parties otherwise agree, a substitute will be appointed at the request of either of said parties by the President or, in the case referred to in paragraph (1) above, by the Vice-President, of the International Court of Justice.

(5) The Umpire however appointed or the Sole Arbitrator shall not be either a national of Libya or of the country in which the Company or any Company which directly or indirectly controls it was incorporated, nor shall he be or have been in the employ of either such parties or of the Government of any of the aforesaid countries.

The application of the provisions of this paragraph and the determination of the procedure to be followed in the arbitration shall be decided by the Arbitra tors or, in the event they fail to agree within 60 days from the date of appointment of the second Arbitrator, then by the Umpire or, in the event a Sole Arbitrator is appointed, then by the Sole Arbitrator.

In giving the Award the Arbitrators, the Umpire or the Sole Arbitrator, as the case may be, shall give an adequate period of time during which the party against whom the Award is given shall execute that Award, and such party shall not be in default if it has conformed to said Award prior to the expiry of that period.

(6) The seat of arbitration shall be such as may be agreed upon by the two parties. In default of agreement between them within 120 days from the date of the initiation of the arbitration as specified in paragraph (2) above, it shall be determined by the Arbitrators or, in the event the Arbitrators fail to agree within 60 days from the date of appointment of the second Arbitrator, then by the Umpire or, in the event a Sole Arbitrator is appointed, then by the Sole Arbitrator.

(7) This Concession shall be governed by and interpreted in accordance with the principles of law of Libya common to the principles of international law and in the absence of such common principles then by and in accordance with the general principles of law as may have been applied by international tribunals.

(8) The costs of the arbitration shall be borne by the said two parties in such proportion and manner as may be fixed in the Award.

UNCITRAL Clause for Joint Venture

Any controversy or claim arising out of or relating to this Agreement, or the reach hereof, shall be settled by arbitration to be held in Stockholm, Sweden, in ccordance with and through the UNCITRAL Arbitration Rules in effect on he date of this Agreement. The arbitration shall be conducted by a single rbitrator selected by the Arbitration Institute of the Stockholm Chamber of Commerce, and this arbitrator shall decide ex aequo et bono. All proceedings of he arbitration, including arguments and briefs, shall be conducted in English. The arbitrator shall take evidence directly from witnesses and documents as resented by the parties; all witnesses shall be made available for cross-xamination. The arbitrator shall render a written decision, stating his reasons herefor, and shall render an award within 12 months of the request for rbitration, and such award shall be final and binding upon both parties. Any ish award shall be payable in U.S. Dollars through a bank in the United tates. Judgment upon the award rendered by the arbitrator(s) may be entered n any court of record of competent jurisdiction in any country, or application ay be made to such court for a judicial acceptance of the award and an order f enforcement, as the law of such jurisdiction may require or allow. The xpenses of the arbitration shall be borne among the parties to the arbitration as etermined by the arbitrator(s); provided that each party shall pay for and bear e cost of its own experts, evidence and legal counsel.

ICSID Clause

Les parties consentent par les présentes à soumettre à la compétence du entre International pour le Règlement des Différends relatifs aux investisse-ents tout différend auquel le présent accord pourrait donner lieu aux fins de glement par voie [de conciliation] [d'arbitrage] conformément à la Conven-n pour le Règlement des Différends Relatifs aux Investissements entre Etats Ressortissants d'autres Etats.

The parties hereto hereby consent to submit to the International Centre for tlement of Investment Disputes any dispute in relation to or arising out of s Agreement for settlement by conciliation/arbitration pursuant to the Con-tion on the Settlement of Investment Disputes between States and Nationals Other States.

Pathological Clause

All disputes arising in connection with the present agreement should be lved by negotiation and friendly settlement. If this method of resolution uld be impracticable, the disputed questions shall be decided in accordance h the Rules of Arbitration of the ICC in Paris. In the event the proceedings e not able to decide the questions for any reason whatsoever, the judicial rts of the injured party shall decide the dispute on a legal basis.