STATE CONTRACTS AND TRANSNATIONAL ARBITRATION

By George R. Delaume*

Agreements providing for the arbitral settlement of disputes arising out of contracts between foreign sovereigns and private contracting parties have become a permanent feature of transnational commerce. This particular favor for the arbitral, as opposed to the judicial, settlement of state contract disputes is attributable to a number of reasons, some of which are conventional and others the consequence of contemporary developments. Traditionally, arbitration has proved attractive because of the special expertise that it may provide and lack of publicity, which may increase the willingness of the losing party to comply with the award. These considerations are still valid, but new incentives to have recourse to arbitration are now found in a network of treaty, statutory, and judicial developments, which greatly improve the effectiveness of the arbitration process.

In the forefront are a number of conventions regarding the recognition and enforcement of commercial awards, such as (1) the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention); (2) the European Convention on International Commercial Arbitration of 1961 (the European Arbitration Convention); and (3) the Inter-American Convention on International Commercial Arbitration of 1975 (the Inter-American Convention), whose ratification by the United States is expected in the near future.

In addition to these Conventions, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1966 (the ICSID Convention) offers new facilities for the arbitral settlement of disputes arising out of economic development agreements.

Parallel with these treaty developments, the restrictive doctrine of immunity has made much progress in recent years as a result of (1) bilateral treaties, and the European Convention on State Immunity (the European Immunity Convention); (2) and statutory enactments, such as the Foreign Sovereign Immunities Act of 1976 (FSIA), and the UK State Immunity Act of 1978 (SIA), as well as (3) judicial pronouncements in countries whose law remains uncodified.

By emphasizing the binding character of waivers of immunity including those resulting from arbitration agreements, and expelling, in a variable though increased number of instances, the property of foreign states to measures of execution, this new approach to immunity can only contribute to the effectiveness of arbitration as a means of settling state contract disputes.

This remark does not mean, however, that current developments, rewarding as they may be, necessarily provide uniform and simple answers to basic problems. From the date of execution of the arbitration agreement throughout the proceedings and, ultimately, at the time of enforcement of an award, the presence of a state as a party to the dispute gives a particular coloration to the arbitration process.

Initially, the threshold question of the arbitrability of state contracts is to be faced. This is a question to which there is no uniform answer. While the law of certain countries has been relaxed, limitations are still found in other countries. Elementary prudence, therefore, requires thorough investigation of the issue, coupled, if it is favorably answered, with a careful review of the authority of public officials to bind their principal.

During the course of the proceedings, considerations of sovereign immunity may have an impact upon the enforceability of the arbitration agreement, the taking of interim measures of protection or the enforcement of awards against the state involved or its property, and possibly also upon the "internationalization" of the procedure.

Aside from issues directly relating to the conduct of the proceedings and their outcome, issues of a substantive nature have also to be considered, such as those concerning the determination of the law applicable to the contract in dispute. These issues, however, which do not arise with the same degree of intensity in all cases. Two basic situations may be distinguished.

Ordinary commercial transactions involving states present no particular originality in the sense that the determination of the proper law of the contract will result either from express stipulations of applicable law or from the usual norms of conflicts rules. All that needs to be said in this respect is that the former presumption in favor of the applicability of the law of the contracting state no longer provides an automatic solution to the problem.

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188 UNTS 349, reproduced in G. DELAUME, supra note 1, at 29.
1 Reproduced in id. at 57.
2 17 UST 1270, TIAS No. 6090, 575 UNTS 159, reproduced in id., App. II, Booklet B, at 5.
3 The term "investment" is not defined in the Convention, but would presumably include most economic development agreements ranging from the conventional concessory agreement to such modern types of agreements as those regarding joint ventures, profit sharing, and service contracts.
4 G. DELAUME, supra note 1, paras. 11.02 and 12.06.

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Immunity Convention); (2) and statutory enactments, such as the Foreign Sovereign Immunities Act of 1976 (FSIA), and the UK State Immunity Act of 1978 (SIA); as well as (3) judicial pronouncements in countries whose law remains uncodified. By emphasizing the binding character of waivers of immunity including those resulting from arbitration agreements, and expelling, in a variable though increased number of instances, the property of foreign states to measures of execution, this new approach to immunity can only contribute to the effectiveness of arbitration as a means of settling state contract disputes.

This remark does not mean, however, that current developments, rewarding as they may be, necessarily provide uniform and simple answers to basic problems. From the date of execution of the arbitration agreement throughout the proceedings and, ultimately, at the time of enforcement of an award, the presence of a state as a party to the dispute gives a particular coloration to the arbitration process.

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The real difficulty occurs in connection with state contracts, such as economic development agreements, that purport to be "internationalized" or "de-localized" in order to escape the reach of the host state's law. For a long time the issue of much controversy, the question whether contracts between states and private law persons can be removed from domestic law or "de-localized" in order to escape the reach of the host state's law. For advocates of a new economic order in the making, and the lack of concordance of arbitral awards, some of which appear questionable, there is no reason why this solution should be limited to a particular category of state contracts. In other words, the resolution of issues of applicable law (II); and the recognition and enforcement of arbitral awards (III).

I. SOVEREIGN IMMUNITY AND THE ARBITRATION PROCESS

ENFORCEMENT OF THE ARBITRATION AGREEMENT

Submission to Arbitration as a Waiver of Sovereign Immunity

In the absence of an express waiver of immunity, the question arises whether submission to arbitration should be regarded as an implicit waiver of immunity. The overwhelming weight of authority calls for an affirmative answer. Decisions of arbitral tribunals, treaty and statutory provisions found in the European Immunity Convention, the SIA, and the FSIA

Section 1605(a)(1) of the FSIA provides that a state party to an arbitration agreement is precluded from pleading immunity in U.S. courts unless submission to arbitration would be treated as a waiver of immunity, it should be so regarded, irrespective of which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration.

Unlike the European Convention, this provision is not limited in scope to situations in which the seat of arbitration would be in the United Kingdom or in which arbitration would be conducted in accordance with, e.g., English law. Conceptually, sections 9(1) would apply in connection with non-British arbitration to the extent that action would be brought in a court in the United Kingdom to enforce an arbitration agreement providing for arbitration in another country.
execution to domestic rules of immunity, it is possible that, in the case of other arbitral awards, those rendered under the Convention will be subjected to different treatment in contracting states.

Although this possibility cannot be ignored, there is nevertheless a significant difference between the rights of an award-creditor under the Convention and those of a party to a non-ICSID award. The fact that, in adhering to the Convention, contracting states do not surrender their own right to immunity from execution in no way relieves them of their obligations under the Convention. In particular, it is clear that if a contracting state party to a dispute invoked immunity from execution, either in its own courts or the courts of another contracting state, in order to frustrate enforcement of an award, that state would violate its obligation to comply with the award. Moreover, it would be exposed to various sanctions since failure to comply would restore the right of the contracting state whose national is the award-creditor to give diplomatic protection to its national and to bring an international claim on his behalf, or would give that state the right to bring action in the International Court of Justice against the defaulting state.

In other words, although the Convention does not purport to change existing rules of immunity from execution, it nevertheless imparts a new spirit to the rules by which the game may be played.

CONCLUSION

At the end of this incursion into a domain that deserves further exploration, several conclusions are nevertheless clear:

1. In the field of commercial arbitration:
   (a) Current developments in the law of sovereign immunity, coupled with the modern improvement of the arbitration machinery, significantly improve both the climate in which state contract arbitration is conducted and the effectiveness of the arbitration process.
   (b) Because many immunity rules are of recent vintage or are still in the process of evolution, many uncertainties remain about their precise significance.
   (c) Under the circumstances, parties to state contracts would be well advised to supplement arbitration clauses with appropriate waivers of immunity, both from suit and from execution.

2. In the field of "international" arbitration:
   (a) The pronouncements of arbitral awards in regard to both procedural and substantive issues are not as consistent as would be desirable for the formulation of rules of general application.
   (b) The fact that arbitrators (and scholars) are sometimes inclined to refer to the decisions of other arbitral tribunals rendered in a different context is not helpful to the identification of precise rules.

138 See supra note 4, Art. 27.
139 Art. 64.
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This particular favor for the arbitral, as opposed to the judicial, settlement of state contract disputes is attributable to a number of reasons, some of which are conventional and others the consequence of contemporary developments. Traditionally, arbitration has proved attractive because of the special expertise that it may provide and lack of publicity, which may increase the willingness of the losing party to comply with the award.

These considerations are still valid, but new incentives to have recourse to arbitration are now found in a network of treaty, statutory, and judicial developments, which greatly improve the effectiveness of the arbitration process.

In the forefront are a number of conventions regarding the recognition and enforcement of commercial awards, such as (1) the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention); n1 (2) the European Convention on International Commercial Arbitration of 1961 (the European Arbitration Convention); n2 and (3) the Inter-American Convention on International Commercial Arbitration of 1975 (the Inter-American Convention), n3 whose ratification by the United States is expected in the near future.


n2 484 UNTS 349, reproduced in G. DELAUME, supra note 1, at 29.

n3 Reproduced in id. at 57.

In addition to these Conventions, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1966 (the
ICSID Convention), n4 offers new facilities for the arbitral settlement of disputes arising out of economic development agreements. n5

n4 17 UST 1270, TIAS No. 6090, 575 UNTS 159, reproduced in id., App. II, Booklet B, at 5.

n5 The term "investment" is not defined in the Convention, but would presumably include most economic development agreements ranging from the conventional concessionary agreement to such modern types of agreements as those regarding joint ventures, profit sharing, and service contracts.

Parallel with these treaty developments, the restrictive doctrine of immunity has made much progress in recent years as a result of (1) bilateral treaties, n6 and the European Convention on State Immunity (the European [*785] Immunity Convention); n7 and (2) statutory enactments, such as the Foreign Sovereign Immunities Act of 1976 (FSIA), n8 and the UK State Immunity Act of 1978 (SIA); n9 as well as (3) judicial pronouncements in countries whose law remains uncodified. n10 By emphasizing the binding character of waivers of immunity including those resulting from arbitration agreements, and exposing, in a variable though increased number of instances, the property of foreign states to measures of execution, this new approach to immunity can only contribute to the effectiveness of arbitration as a means of settling state contract disputes.

n6 G. DELAUME, note 1 supra, paras. 11.02 and 12.06.

n7 Reproduced in id., App. I, Booklet D, at 5.


n10 G. DELAUME, supra note 1, chs. XI and XII.

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Initially, the threshold question of the arbitrability of state contracts is to be faced. This is a question to which there is no uniform answer. While the law of certain countries has been relaxed, limitations are still found in other countries. n11 Elementary prudence, therefore, requires thorough investigation of the issue, coupled, if it is favorably answered, with a careful review of the authority of public officials to bind their principal. n12
n11 Id., para. 13.05.

n12 The SIA (§ 2(7)) attempts to solve this problem by providing that the head of a state’s diplomatic mission in the United Kingdom shall be deemed to have authority to submit on behalf of his state in regard to any proceedings. The FSIA does not address the question; section 1605(a)(1) simply provides that a waiver of immunity, once made, is irrevocable.

During the course of the proceedings, considerations of sovereign immunity may have an impact upon the enforceability of the arbitration agreement, the taking of interim measures of protection or the enforcement of awards against the state involved or its property, and possibly also upon the "internationalization" of the procedure.

Aside from issues directly relating to the conduct of the proceedings and their outcome, issues of a substantive nature have also to be considered, such as those concerning the determination of the law applicable to the contract in dispute. These are issues, however, which do not arise with the same degree of intensity in all cases. Two basic situations may be distinguished.

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n13 G. DELAUME, note 1 supra, para. 3.03.

[*786] The real difficulty occurs in connection with state contracts, such as economic development agreements, that purport to be "internationalized" or "de-localized" in order to escape the reach of the host state’s law. For a long time the object of much controversy, the question whether contracts between states and private law persons can be removed from domestic law and made subject to international rules of law is now clearly answered in the affirmative by Article 42 of the ICSID Convention. To be sure, Article 42 is limited to investment agreements and disputes that may arise thereunder. However, in the world today, there is no reason why this solution should be limited to a particular category of state contracts. In other words, the rule formulated in Article 42 can be considered as illustrative of a principle of wider application. n14

n14 Id., para. 1.01.

Assuming that this is the correct approach, it remains to be seen how the parties may make use of their freedom of choice and how effective the choice of applicable law, once it has been made, is likely to be. These are issues which remain beclouded by scholarly controversies, conflicting opinions between the
tenants of the traditional legal order and the advocates of a new economic order in the making, and the lack of concordance of arbitral awards, some of which appear questionable. n15

n15 See text and notes 30-43, 63-66, and 73-88.

This paper will consider both procedural and substantive issues in the order of their appearance on the arbitration stage, namely in regard to the introduction and conduct of the proceedings (I); the resolution of issues of applicable law (II); and the recognition and enforcement of arbitral awards (III).

I. SOVEREIGN IMMUNITY AND THE ARBITRATION PROCESS

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Submission to Arbitration as a Waiver of Immunity

In the absence of an express waiver of immunity, the question arises whether submission to arbitration should be regarded as an implicit waiver of immunity. The overwhelming weight of authority calls for an affirmative answer. Decisions of arbitral tribunals, n16 treaty and statutory provisions found in the European Immunity Convention, n17 the SIA, n18 and the FSIA, n19 and the pronouncements of domestic courts, n20 all concur that a state party to an arbitration agreement is precluded from asserting its immunity in order to frustrate the purpose of the agreement.

n16 See text and note 26 infra.

n17 Art. 12(1), reading as follows:

1. Where a Contracting State has agreed in writing to submit to arbitration a dispute which has arisen or may arise out of a civil or commercial matter, that State may not claim immunity from the jurisdiction of a court of another Contracting State on the territory or according to the law of which the arbitration has taken or will take place in respect of any proceeding relating to:

(a) the validity or interpretation of the arbitration agreement;

(b) the arbitration procedures;

(c) the setting aside of the awards, unless the arbitration agreement otherwise provides.

n18 Section 9(1), reading as follows: "Where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration."
Unlike the European Convention, this provision is not limited in scope to situations in which the seat of arbitration would be in the United Kingdom or in which arbitration would be conducted in accordance with, e.g., English law. Conceptually, section 9(1) would apply in connection with non-British arbitration to the extent that action would be brought in a court in the United Kingdom to enforce an arbitration agreement providing for arbitration in another country.

n19 Section 1605(a)(1).


The judgment of the Swiss Federal Tribunal of June 19, 1980, Socialist Libyan Arabic Popular-Jamahiriya v. LIAMCO, 20 ILM 151 does not deal with the question, but with the related issue of whether fixing the seat of arbitration in Switzerland is a sufficient basis for the jurisdiction of the Swiss courts. See text and note 138 infra.

Although the rule is of general application, its implementation within the context of the FSIA has given rise to controversy.

In order to set the issue in proper perspective, it should be recalled that section 1605(a)(1) of the FSIA simply provides that a state is not immune when it has waived its immunity "either explicitly or by implication" and that the legislative history mentions as an example of implicit waiver the case "where a foreign state has agreed to arbitration in another country." n21


The question that has caused some divergence of opinion is whether by referring to "another country," the authors of the FSIA had in mind the United States or considered that so long as the seat of arbitration was outside the territory of the state involved, submission to arbitration constituted an implicit waiver of immunity.

The first and restrictive interpretation was suggested, although by way of dictum only, in a case involving a contract between a Dutch corporation and Nigeria, which included an agreement providing for arbitration by the International Chamber of Commerce (ICC) in Paris, France. According to the court, section 1605(a)(1) would not apply in the absence of a territorial nexus between the arbitration and the United States. When the seat of arbitration is outside the United States, the state involved would not be precluded from pleading immunity in U.S. courts. n22
If submission to arbitration is to be immunity, it should be so regarded, irrespective of the seat of arbitration. This view has fortunately been endorsed by the Department of Justice, following the revocation of a concession in Switzerland. Appeal was discontinued following settlement between

At the seat of arbitration was located in a country party to the New York Convention. The question remains undecided whether the United States would prevail if the seat of arbitration were located in a country party to the New York Convention.

The Arbitration Agreement and sovereign immunity, it is generally agreed that submission to arbitration and then refuses to proceed unilaterally. n25

However, it is clear that enforcing an arbitration may not be free from difficulty, unless the parties have provided an effective method of terminating the agreement, given the arbitrators. This principle is now clearly stated in Article 25 of the Convention, according to which: "When the parties have given their consent unilaterally."


An isolated opinion to the contrary is that of Dr. Mann, who considers that in the event the arbitration agreement is governed by the law of the state party, the state would have the power to nullify the agreement by changing its own law. See Mann, State Contracts and International Arbitration, reprinted in P. MANN, STUDIES IN INTERNATIONAL LAW 256, 286 (1973). This opinion is just as unacceptable as the view advanced by the same author, that a state would incur no responsibility if it changed the content of its own law when that law is the proper law of the contract. See Mann, State Contracts and State Responsibility, 54 AJIL 570, 581 (1960).

In view of this consensus, the recent decision of the Swiss Federal Tribunal in Societe des Grands Travaux de Marseille v. Republique Populaire du Bangladesh n27 can be acknowledged only with considerable surprise and dismay. The background to the case is as follows.


In 1965, the East Pakistan Industrial Development Corporation (EPIDC), an entity wholly owned by the Pakistani Government, and a French company (SGTM) concluded a contract for the construction of a gas pipeline in Eastern Pakistan, which in 1971 became the People's Republic of Bangladesh. The contract, which was governed by the law of Pakistan, provided for arbitration in Geneva, Switzerland, under the Rules of the International Chamber of Commerce.

In 1969, SGTM made a claim of 12 million francs and both parties designated a sole arbitrator. The terms of reference of the arbitrators were agreed by the parties on May 7, 1972.

Two days after that agreement, the President of Bangladesh issued a decree, retrospective to March 26, 1971, providing for the creation of the Bangladesh Industrial Development Corporation (BIDC), as successor to EPIDC. EPIDC's assets were transferred to BIDC and so were EPIDC's debts and liabilities.
"unless the Bangladesh Government otherwise directed." The order stated:

All arbitration proceedings to which, immediately before the commencement of the Order, the East Pakistan Development Corporation was a party, shall be deemed to have abated and no award or decision made or given in such proceedings shall have any effect or be binding on, or enforceable against, the East Pakistan Development Corporation or the Bangladesh Industrial Development Corporation, and all power or authority to act on behalf of the East Pakistan Development Corporation in any such proceedings shall be deemed to be revoked and cancelled with effect from the 26th of March, 1971, and any provision in the contract or agreement providing for the settlement by arbitration of the disputes in respect of which such proceedings were instituted, shall be deemed of no legal effect.

In September 1972, SGTM asked the arbitrator to substitute BIDC as respondent for EPIDC, and the arbitrator fixed November 20, 1972, as the date for a hearing.

Thereupon, the President of Bangladesh decreed that any debt or obligation incurred or undertaken by EPIDC should be deemed not to have been assumed by BIDC if such debt or liability "is or was the subject matter of any dispute." For good measure, a subsequent decree was issued 4 days later (5 days before the date of the hearing), which dissolved BIDC and transferred its "assets" to the Government. As to BIDC's liabilities, the Government reserved for itself the power to make ex gratia payment in respect of any claim "if and to the extent that the same shall to it appear to be just."

[*790] On December 15, 1972, the arbitrator ordered that BIDC be substituted for EPIDC and that the Bangladesh Government be joined as a second respondent. On May 31, 1973, the arbitrator rendered a final award holding BIDC and the Government jointly and severally liable to SGTM. n28

n28 Parts of the award are reproduced in 5 Y.B. COM. ARB. 179 (1980).

Bangladesh responded by petitioning the Swiss courts to annul the award. Acknowledging the discriminatory character of the Bangladesh orders, the Federal Tribunal held, nevertheless, that the petition should be granted on the grounds that (1) matters of succession to the assets and liabilities of the entities involved were governed by the law of Bangladesh (which was not the question in issue, since the real question was whether the Government of Bangladesh could nullify an arbitration clause by unilaterally withdrawing from it n29); (2) there did not exist in Swiss law any mandatory rule compelling anyone to submit against his will to arbitration (which was the real question, since all that the arbitrators had done was to give effect to an existing arbitration agreement); and (3) the Bangladesh order, though discriminatory and depriving SGTM of an agreed contractual forum, did not offend Swiss public policy because it did not affect the rights of Swiss creditors (a holding that constitutes a new kind of discrimination against non-Swiss nationals and seriously raises the question of the advisability of providing for arbitration in Switzerland).
n29 Compare the attempt by the Greek Government retrospectively to exempt Greek entities from obligations undertaken as obligors and guarantors of bonds issued in England, which met with defeat in the English courts: Adams v. National Bank of Greece & Athens, [1960] All E.R. 421. See also G. DELAUME, note 1 supra, para. 4.05.

Under the circumstances, one can only agree with a leading Swiss commentator that this decision is one of the most objectionable that the Swiss courts have rendered in a long time. n30 In fact, it is truly a "horror" case.

n30 Lalive, note 27 supra, para. 23, at 400.

PROCEDURAL RULES

Provisions in arbitration agreements concerning the conduct of the proceedings vary significantly in context and precision, depending upon whether the parties rely on rules of institutional arbitration, such as those of private institutions or the ICSID rules, or whether the parties elect to refer disputes to ad hoc arbitration.

In the first instance, the parties are assured that institutional rules are available to provide an answer to procedural issues or, at least, to supplement the rules that may have been agreed upon by the parties themselves.

The situation is quite different in the case of ad hoc arbitration. Frequently, provisions in current use are formulated in general terms and give ample freedom to the arbitral tribunal to determine its own rules of procedure. In the absence of specific agreement, matters such as the time and place of the hearings, the manner of giving notice of hearings, and the presentation of evidence are left to the reasonable discretion of the tribunal.

In this connection, the question arises whether the tribunal, in the exercise of its discretion, may elect to be guided by municipal rules or may choose to ignore those rules and "internationalize" the proceedings. This is an issue on which there is no consensus. Several arbitral awards are in point.

The Alsing, n31 Sapphire, n32 and BP n33 awards hold that municipal law, and more particularly the law of the seat of arbitration (lex loci arbitri) should govern procedural matters. However, although these awards agree in their result, they are not based on identical reasoning.


n33 BP Exploration Co. (Libya) Ltd. v. Libyan Arab Republic, 53 ILR 297 (1979) [hereinafter cited as BP award].
In the Alsing case, the arbitrator had received power "to amend, complete and interpret the rules proposed by the parties"; n34 holding that the dispute had "the character of an international arbitration" in the sense of the Geneva Protocol of 1923, the arbitrator determined that, in accordance with Article 2 of the Protocol, procedural rules needed to supplement those agreed upon by the parties should be those in effect at the seat of arbitration, i.e., those found in the Code of Civil Procedure of the Swiss Canton of Vaud. n35

n34 23 ILR at 639.

n35 Ibid.

In both the Sapphire and BP awards, the arbitrators were influenced by other considerations and in particular:

(1) the fact that "the arbitration should be governed by a law procedure, and that it should be subject to the supervision of a State authority, such as the judicial sovereignty of a State"; n36 and

(2) the need to facilitate the enforcement of the award:

By providing for arbitration as an exclusive mechanism for resolving contractual disputes, the parties to an agreement, even if one of them is a State, must, however, be presumed to have intended to create an effective remedy. The effectiveness of an arbitral award that lacks nationality -- which it may if the law of the arbitrator is international law -- generally is smaller than that of an award founded on the procedural law of a specific legal system and partaking of its nationality. n37

n36 Sapphire award, 35 id. at 169; see also BP award, 53 id. at 309.

n37 BP award, 53 id. at 309; compare Sapphire award, 35 id. at 168.

The opposite view prevailed in the ARAMCO n38 and the TOPOCO/ Calasiatic n39 awards. In both cases, the arbitrators held that the arbitration was directly governed by international law on the following grounds:

(1) "The jurisdictional immunity of States (the principle par in parem non habet jurisdictionem) excludes the possibility, for the judicial [*792] authorities of the country of the seat, of exercising their right of supervision and interference in the arbitral proceedings which they have in certain cases." n40

(2) "Considering the jurisdictional immunity of foreign States, recognized by international law in a spirit of respect for the essential dignity of sovereign power, the Tribunal is unable to hold that arbitral proceedings to which a sovereign State is a Party could be subject to the law of another State. Any interference by the latter State would constitute an infringement of the prerogatives of the State which is a Party to the arbitration. This would render illusory the award given in such circumstances. For these reasons, the Tribunal finds that the law of Geneva [i.e., the law of the seat of the
Tribunal] cannot be applied to the present arbitration.

"It follows that the arbitration, as such, can only be governed by international law, since the Parties have clearly expressed their common intention that it should not be governed by the law of Saudi Arabia, and since there is no ground for the application of the American law of the other Party. This is not only because the seat of the Tribunal is not in the United States, but also because of the principle of complete equality of the Parties in the proceedings before the arbitrators." n41

n38 Saudi Arabia v. Arabian American Oil Co. (Aramco), Aug. 23, 1958, 27 id. at 117, 155 (1963) [hereinafter cited as ARAMCO award].


n40 ARAMCO award, 27 ILR at 155; see also TOPCO/Calasiatic award, para. 13.

n41 ARAMCO award, 27 ILR at 155-56, quoted in TOPCO/Calasiatic award, para. 13.

In TOPCO, the arbitrator found additional bases for his decision by noting that:

(1) the parties had agreed that either one of them could apply to the President of the ICJ to appoint a sole arbitrator, and that "the fact of having requested the President of the International Court of Justice to appoint the Sole Arbitrator can only reinforce the necessity of subjecting this arbitration directly to international law"; n42 and

(2) applying international law to the proceedings was consistent with the intention of the parties and the rules of procedure adopted by the tribunal, without objection from the parties, which provided that the arbitration should be governed by those rules "to the exclusion of the local law." n43

n42 TOPCO/Calasiatic award, para. 14.

n43 Id., para. 15.

These decisions raise a number of provocative questions. The BP-Sapphire doctrine starts from the premises that reliance on the lex loci arbitri affords guidance to the arbitrators and, in view of the network of bilateral treaties and multinational conventions on the subject, should facilitate the recognition and enforcement of arbitral awards. Against this view, it can be said, as was done in TOPCO, that considerations relating to enforcement are "not within the jurisdiction of the arbitrator" n44 or, perhaps more precisely, should be of greater concern to the parties than to the arbitrator. In other words, the arbitrator should have no more concern for the ultimate enforcement of his award than a court of law for the recognition and enforcement abroad of a judgment.
involving a transnational situation. In both cases, it is the responsibility of the parties to assess, from the point of view of effectiveness, the respective merits of choosing between arbitral and judicial litigation and to bear the consequences of their choice.

n44 Id., para. 12.

Another objection that can be made to the BP-Sapphire doctrine is that this doctrine assumes too readily that the parties, one of which is a state, are always willing to submit to the lex loci arbitri and to accept the supervision of the local judicial authority for the sole purpose of securing an "effective" award. In this connection, it may be appropriate to recall that the English Arbitration Act, 1979, abolishing the special case procedure, was enacted for the purpose, among others, of assuring foreign states that by submitting to arbitration in London, they would no longer have to fear that the submission implied acceptance of the judicial supervisory authority of the English courts.

n45 An altogether different question is whether the Act will achieve its purpose. Although the possibility of avoiding English judicial review of awards may make London a more attractive place of arbitration, foreign states cannot remain indifferent to the fact that their immunity is seriously curtailed by the SIA and that their assets in England might be subject in a significant number of cases to measures of execution. See G. DELAUME, note 1 supra, para. 13.11.

The ARAMCO-TOPCO doctrine avoids these objections, but lends itself to the criticism that it places excessive emphasis on considerations of sovereign immunity as a factor of determination. To hold that procedural rules should be "internationalized" solely because of reasons of jurisdictional immunity is to ignore the fact that submission to arbitration is in itself a waiver of that immunity. Unless it is assumed that, in submitting to arbitration, a state does so with mental reservations, there is no reason to believe that the submission should have an impact upon the nature, domestic or international, of procedural rules.

The LIAMCO award adopts an intermediate position. Considering that in the absence of express agreement between the parties it is incumbent upon the arbitrator to determine the applicable procedural rules and that such a determination should be made "independently of the local law of the seat of arbitration," n46 the arbitrator held: (1) that the seat of arbitration should be fixed in Geneva; and (2) that "[t]he Arbitrator, in his procedure, shall be guided as much as possible by the general principles contained in the Draft Convention on Arbitral Procedure elaborated by the International Law Commission of the United Nations in 1958." n47

n46 Libyan American Oil Co. v. Government of the Libyan Arab Republic, 20 ILM at 42 (p. 82 of the award) [hereinafter cited as LIAMCO award].
n47 Id. at 43 (p. 83 of the award).

This approach, which is consistent with the modern view that de-emphasizes the significance of the lex loci arbitri, n48 does not necessarily solve all problems. In particular, it does not answer the argument made by the supporters of the BP doctrine that "international" awards might not be as easily enforced as a domestic award. This is an argument which cannot be summarily dismissed and will require further consideration. n49

n48 In particular, Art. IV(1) of the European Arbitration Convention. See G. DELAUME, note 1 supra, para. 13.10.13.

n49 See the subsection "Finding the Applicable Law" in section II of this paper.

[*794] INTERIM MEASURES

Whether prior to the institution of arbitral proceedings or during the course of the proceedings, the parties may seek interim measures of protection, such as the appointment of experts to inspect the disputed quality of goods or other matters, or attachment of assets in litigation or intended to secure satisfaction of the award. Depending upon the circumstances, the parties may request either the arbitral tribunal or domestic courts to order such measures. This option is acknowledged in arbitration rules, such as those of the ICC, n50 and the UNCITRAL Rules, n51 and has been given effect in judicial decisions, the reported number of which, however, is small. n52

n50 1975 Rules, Art. 8(5):

Before the file is transmitted to the arbitrator, and in exceptional circumstances even thereafter, the parties shall be at liberty to apply to any competent judicial authority for interim or conservatory measures, and they shall not by so doing be held to infringe the agreement to arbitrate or to affect the relevant powers reserved to the arbitrator.

n51 Art. 26:

1. At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.

2. Such interim measures may be established in the form of an interim award. The arbitral tribunal shall be entitled to require security for the costs of such measures.

3. A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.
No such option is given to the parties to ICSID arbitration. Pursuant to Article 26 of the ICSID Convention, consent to arbitration is "exclusive of any other remedy," at least to the extent that the parties have not otherwise agreed. In the absence of specific agreement, the "exclusivity" of ICSID arbitration bars the parties from seeking interim measures in domestic courts; but the parties may request that the arbitral tribunal recommend provisional measures for the preservation of their respective rights. n53 The majority of clauses providing for ICSID arbitration, known to the ICSID Secretariat, make no exception to this general rule. However, on occasion certain clauses provide that the parties expressly agree to comply with interim measures recommended by the arbitral tribunal and that the state party to the dispute waives any right to assert the defense of sovereign immunity not only in regard to the enforcement of an award, but also in regard to any interim measures, including attachment of the assets of the state involved. An example is the following:

The consent to ICSID arbitration shall not preclude any party to this Agreement from taking any provisional measures or pursuing any provisional remedies, such as attachment or similar proceedings, which may be available to such party under the laws of any jurisdiction, pending the institution of any arbitration proceeding pursuant to this Agreement or pending the rendering, execution and payment in full of any arbitral award made by the Arbitral Tribunal.

The Government hereby agrees that, should the investor bring any judicial proceeding in relation to any matter arising under this Agreement, including without limitation any arbitration proceeding and any action to enforce any arbitral award, no immunity from such judicial proceeding, from attachment of the Government's property or from execution of judgment shall be claimed by or on behalf of the Government or with respect to its properties, any such immunity being hereby waived by the Government.

n53 ICSID Arbitration Rules, Rule 39:

(1) At any time during the proceeding a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.

(2) The Tribunal shall give priority to the consideration of a request made pursuant to paragraph (1).

(3) The Tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request. It may at any time modify or revoke its recommendations.

(4) The Tribunal shall only recommend provisional measures, or modify or revoke its recommendations, after giving each party an opportunity of presenting its observations.
This provision, which compares with clauses found in state contracts subject to rules of commercial arbitration, is a good reminder that, in the absence of an express waiver of immunity, sovereign immunity rules may be a bar to the taking of interim measures. However, the impact of sovereign immunity upon such measures is not necessarily the same in all cases.

n54 See, e.g., the Federative Republic of Brazil DM 150 million bonds of 1979/1987, according to which:

(3) All disputes arising from matters provided for in these conditions shall be settled pursuant to a separate Arbitration Agreement of December 14, 1978, under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by three Arbitrators appointed in accordance with the Rules. Place of Arbitration shall be Paris, France. The bondholders are also entitled, however, upon their discretion, to bring any legal action before any competent Court of law in Brazil without waiving their right to arbitration.

(4) Brazil is not entitled to any right of immunity in connection with any Arbitration proceeding or a proceeding before a Brazilian Court.

Thus, it would seem that sovereign immunity should not be a real obstacle to such proceedings as those calling for the appointment of technical experts entrusted with a fact-finding mission, which involve no measures of execution against a state or its property.

Insofar as measures of execution are concerned, and in particular prejudgment attachment, there is no general answer to the problem. Each case must be considered individually and determined in the context of domestic rules, which are not always concordant in regard to either the persons entitled to plead immunity or the type of assets subject to execution. n55

n55 G. DELAUME, note 1 supra, paras. 12.02-.04.

[796] II. SOVEREIGN PREROGATIVES AND ISSUES OF APPLICABLE LAW

FINDING THE APPLICABLE LAW

Express Stipulations

Stipulations of applicable law in state contracts, to the extent that they are provided, which is not always the case, exhibit significant variations. Most of the stipulations found in ordinary commercial contracts, such as those for the supply of goods or services, and in financial agreements, such as loan contracts or bonds issued in capital markets, follow well-established patterns and may lead to the applicability of the law of the state party, that of the private party, or that of some neutral country. In all these cases, the contractual relationship is made subject to some municipal system of law.

A similar trend obtains in regard to so-called economic development agreements, including traditional concessions and modern contractual relationships, such as those relating to production sharing or service
contracts, or operating agreements. The overwhelming majority of such agreements, to the extent that they contain a stipulation of applicable law, provide for the applicability of the law of the host state. n56

n56 Subject to "depecage" techniques making allowance for the possible application to specific issues of the law of the investor's country, e.g., in regard to its corporate authority and its subjection to the laws of its own country that regulate foreign investments. See id., para. 1.03 & n. 11, and para. 1.13 n.2.

A rather remarkable exception is found in the Service Agreement dated Oct. 16, 1978, between Total Abu Al Bu Khoosh, S.A. & Compagnie Francaise des Petroles for Operation of Abu Al Bu Khoosh Field (PETROLEUM LEGIS., MIDDLE EAST, Supp. 67), which provides in Article 10 that "[t]he construction, validity and performance of this Agreement shall be governed by French law."

In certain cases, whose number appears to be decreasing, n57 the parties seek to "internationalize" or "de-localize" some of the major features of the agreement n58 in an obvious attempt to withdraw the relationship from the reach (and possible change) of the host state's law. n59

n57 In contrast to stipulations found in arrangements contracted during the 1950's and 1960's, which attempted to "internationalize" or "de-localize" economic development agreements, agreements concluded in the 1970's mostly provide for the applicability of the law of the host state. See G. DELAUME, note 1 supra, para. 1.13 & nn. 41-46.

n58 Note that "internationalization" or "de-localization" of economic development agreements is never complete. There are always matters, such as those regarding the movements of expatriate staff, the employment of local labor, social legislation, and customs and exchange regulations, to name but a few, that continue to be governed by the law of the host state. Although that law may itself be "stabilized" in various respects, this does not mean that it is always frozen in point of time and that a gradual adjustment of the respective rights and obligations of the parties is necessarily excluded with the passage of time. Typical examples are those regarding taxation and the payment of royalties or other financial arrangements between the parties which provide for greater allowances in the initial start-up period than during years of full operation.

Certain "internationalizing" clauses are simply formulated and compare with ordinary choice-of-law clauses, such as the following: "The arbitrators shall base their decision on equity and the principles of international law." n60


Other provisions are more complex in the sense that the choice of law consists of a combination of alternatives culminating in a reference to the general principles of law. An example is found in a number of concession agreements between Libya and foreign oil companies, which provided:

The 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, including such of those principles as may have been applied by international tribunals.

Following the revocation by Libya of a number of concessions granted to foreign oil companies, the meaning of this provision was referred to arbitration. In both the LIAMCO n61 and the BP n62 awards, the arbitrators agreed in substance that the provision meant that (1) the law of Libya was the proper law of the concession, but only to the extent that it was consistent with the principles of international law; and (2) in the event of inconsistency between these two legal systems, the general principles of law should govern. However, in the TOPOCO award, the arbitrator held that the stipulation meant that "international law," rather than the general principles of law, was the governing law. In the words of the arbitrator:

In the present dispute, general principles of law have a subsidiary role in the governing law clause and apply in the case of lack of conformity between the principles of Libyan law and the principles of international law; but precisely the expression "principles of international law" is of much wider scope than "general principles of law", because the latter contribute with other elements (international custom and practice which is accepted by the law of nations) to constitute what is called the "principles of international law". . . . Now, these principles of international law must, in the present case, be the standard for the application of Libyan law since it is only if Libyan law is in conformity with international law that it should be applied. Therefore, the reference which is made mainly to the principles of international law and, secondarily, to the general principles of law must have as a consequence the application of international law to the legal relations between the parties. n63

n61 LIAMCO award, 20 ILM at 35 (p. 67 of the award).

n62 BP award, 53 ILR at 329.

n63 TOPOCO/Calasiatic award, para. 41.
In view of the clear sequence of the choice-of-law clause agreed upon by the parties, this construction appears unwarranted. Nor was the arbitrator on much firmer ground when he chose to buttress his conclusion by finding additional evidence of the internationalization of the agreement in the arbitration [*798] machinery provided by the parties and "precedents" of doubtful value, which now deserve consideration.

Implicit Choice of Law

1. Submission to arbitration. According to the TOPCO award, "Another process for the internationalization of a contract consists in inserting a clause providing that possible differences which may arise in respect of the interpretation and the performance of the contract shall be submitted to arbitration." n64

n64 Id., para. 44.

To be sure, submission to arbitration may be a factor to be taken into account in determining whether the parties effectively intended to "internationalize" or "de-localize" their relationship. However, it does not necessarily follow that submission to arbitration and "internationalization" or "de-localization" are always coterminous. n65 Such an assumption would be conducive to the same rigidity of results as the opposite presumption, that in the absence of a choice of law, state contracts should be governed by the law of the state involved. Neither presumption corresponds to reality.

n65 Even in regard to transactions between private persons, no longer is the maxim Qui eligit judicem eligit just deemed to constitute an automatic choice of law. See G. DELAUME, note 1 supra, para. 3.03 & nn. 18-26.

The primary purpose of an arbitration clause in an economic development agreement is to remove possible disputes from the jurisdiction of domestic courts, not only those of the host state, but also those of the investor's country or of some other country, and to afford the parties a neutral forum in which to bring their claims. Under the circumstances, it cannot be said that submission to arbitration should necessarily have a determinative impact upon the issue of applicable law. n66

n66 See P. Lalive, note 26 supra, para. 41.

Thus, in some instances recourse to arbitration coexists with express stipulations of applicable law in favor of the law (possibly stabilized in several respects) of the host state. Typical examples are the following:

(a) Service contract dated August 7, 1974, between National Iranian Oil Company (NIOC) and Ultramer Company: n67

"This Service Contract shall be governed by and interpreted in accordance with the Laws of Iran" (Article 25);
"Any dispute arising from the execution or interpretation of the provisions of this Service Contract shall be settled by an Arbitration Board consisting of three arbitrators" (Article 22(1)); and

"The place of arbitration shall be Tehran, Iran, unless the parties agree upon an alternate site" (Article 26(6)).

(b) Production Sharing Contract dated October 13, 1978, between Pertamina (the Indonesian state enterprise) and Esso Sumatera Inc., and Mobil Andalas Inc., n68 which provides for the submission of disputes to arbitration in accordance with the Rules of Arbitration of the International Chamber of Commerce, n69 but contains in regard to matters of applicable law the following provisions:

Law and Regulations

2.1 The laws of the Republic of Indonesia shall apply to this Contract.

2.2 No term or provisions of this Contract, including the agreement of the Parties to submit to arbitration hereunder, shall prevent or limit the Government of Indonesia from exercising its inalienable rights. n70

(c) Joint Operation Agreement dated December 20, 1977, between the British National Oil Company (BNOC) and Texaco North Sea U.K. Ltd./Texaco North Sea U.K. Co., n71 which provides for the arbitral settlement of disputes in accordance with the ICC Rules (Article 25) and also that "[t]his Agreement shall be governed by and construed in accordance with English law and each of the Parties and Texaco N.S. Ltd. hereby submits to the jurisdiction of the High Court of England" (Article 24).

n67 PETROLEUM LEGIS., MIDDLE EAST, Supp. 51.

n68 Id., ASIA AND AUSTRALASIA, Supp. 60.

n69 Section XI, 1.2, 1.3 and 1.5. Note, however, that section XI, 1.4 provides that "[i]n the event the arbitrators are unable to reach a decision, the dispute shall be referred to Indonesian courts of law for settlement."

A similar "fallback" provision in favor of the host state courts is found in the Petroleum Operation Contract dated Dec. 7, 1977, between Empresa Nacional de Petroleo and Areo Petroleos Chile, S.A., and Amerada Hess Petroleos Chile, S.A. (Art. 15), which also provides that Chilean law shall govern the contract (Art. 14). See PETROLEUM LEGIS., SOUTH AMERICA, Supp. 50.

n70 The provision of section II, 2.2 contrasts with section XII, 1.2 of the contract, according to which "This Contract shall not be annulled, amended or modified in any respect, except by mutual consent in writing of the Parties thereto."

n71 PETROLEUM LEGIS., EUROPE, Supp. 54.

Finally, it should be noted that agreements between certain governments, such as Egypt or Syria, and their National Oil Companies, on the one hand, and
foreign investors, on the other hand, make a distinction between disputes to which the host country is a party -- which fall within the jurisdiction of the local courts -- and those between the National Oil Company and the investors -- which are to be settled by arbitration n72 -- even though in both cases the dispute would be governed by the same stipulation of applicable law. That stipulation might include the "general principles of law," in addition to reference to the principles of "good will" and "good faith."

n72 See, e.g., the 1977 Production Sharing Contract for Petroleum Exploration and Production between the Syrian Arab Republic, the Syrian Petroleum Co. and the Syrian American Oil Corp. (SAMOCO), (Art. XXIII), id., MIDDLE EAST, Supp. 57.

2. References to the principle of "good faith." Provisions in concession agreements to the effect that the parties intend to base their relations on "good faith," "good will," or "good conscience" have sometimes been regarded by arbitrators as evidence of the parties' intention to "internationalize" their relationship. n73


[*800] These decisions, which are old, are questionable. Failing an explicit reference to international law or to the general principles of law in an agreement between a developed country and a foreign investor, it would occur to no one to construe a reference to "good faith" otherwise than as a reminder of an elementary rule of contract law. Why should a different solution prevail when the contracting state is a developing nation whose law is capable of supplying the basic legal framework of the transaction? n74 In this respect, to place excessive emphasis on isolated arbitral decisions rendered several decades ago in particular circumstances would be most unwise. So much the more, since in recent years earlier gaps in the law of developing nations regarding mines and minerals have been filled by custom or the enactment of modern laws on this subject.

n74 The contrast between investments in developed and developing countries and the response to the legal problems arising therefrom is particularly well put by Wengler, Les Accords entre Etats et entreprises etrangeres sont-ils des traites de droit international?, 76 REV. GENERALE DROIT INT'L PUBLIC 313 (1972).

If this is the correct approach, only dissent can be expressed with the solution that prevailed in the Sapphire arbitration, involving a dispute between a Canadian company and the National Iranian Oil Company. Unlike other similar
agreements concluded by NIOC, which provided for the application of the "principles of law common" to Iran and the investor's country or, in the absence of such common principles, then by and in accordance with principles of law recognized by civilized nations in general, including such of those principles as may have been applied by international tribunals," n75 the Sapphire agreement merely provided that the parties undertook to carry out their obligations "in accordance with the principles of good faith and good will and to respect the spirit as well as the letter of the agreement." The agreement, however, made specific reference to the law of Iran, which was "stabilized" in several respects. n76 It further contained a "force majeure" clause relieving the parties of their obligations in the event of impossibility to perform, force majeure being defined for the purpose as "occurrences which are recognized as such by the principles of international law" (Article 37(2)).

n75 See, e.g., Art. 46 of the Agreement of Sept. 9, 1954 between Iran and the Consortium, quoted in Sapphire award, 35 ILR at 174. See also Suratgar, note 32 supra, at 162-63.

n76 This aspect of the problem is discussed in G. DELAUME, note 1 supra, para. 2.07 & nn. 15-19.

These provisions paint a composite picture of a transaction which nevertheless had its own characteristics. To construe the particular features of the transaction, including its choice-of-law elements, by reference to other agreements whose stipulations differed from those in the Sapphire case was, to say the least, a perilous exercise. Yet, this is exactly what the arbitrator did. Ignoring this vital element of the negotiating process, which may compel the parties to stipulate, or refrain from stipulating, provisions found in other agreements within the same class, the arbitrator held that the Sapphire agreement should be construed in the light of the provisions currently stipulated in other Iranian agreements. n77 Dismissing the particular references to Iranian law mentioned above, the arbitrator held that the parties had intended to insulate the agreement from the reach of Iranian law. Finding support in the reference to the "principles of good faith and good will" in the agreement, the arbitrator held:

[A] reference to rules of good faith, together with the absence of any reference to a national system of law, leads the judge to determine, according to the spirit of the agreement, what meaning he can reasonably give to a provision of the agreement which is in dispute. It is therefore perfectly legitimate to find in such a clause evidence of the intention of the parties not to apply the strict rules of a particular system but, rather, to rely upon the rules of law, based upon reason, which are common to civilized nations. These rules are enshrined in Article 38 of the Statute of the International Court of Justice as a source of law, and numerous decisions of international tribunals have made use of them and clarified them. Their application is particularly justified in the present contract, which was concluded between a State organ and a foreign company, and depends upon public law in certain of its aspects. This contract has therefore a quasi-international character which releases it from the sovereignty of a particular legal system, and it differs fundamentally from an ordinary commercial contract. It should be mentioned that the question of the law applicable did not altogether escape the draughtsman of the agreement . . .; and the absence of any reference to a national system of law can only
confirm this conclusion. n78

n77 35 ILR at 174.

n78 Id. at 173.

In order to give additional support to this conclusion, the arbitrator also relied on the force majeure clause in the agreement and its reference to "the principles of international law." In the process, however, he mistook what was an incorporation of such principles into the agreement for a choice of governing law. Unlike other Iranian agreements that are mentioned in the award and that contained a reference to the principles of international law in regard to both force majeure and the choice of governing law, n79 here the reference to international law was limited to force majeure. Under the circumstances and unless the two types of stipulations found in other such agreements are treated as redundant, which I submit they are not, the interpretation of the Sapphire force majeure as a choice-of-law clause appears unwarranted.

n79 Thus, the NIOC-AGIP Agreement of Aug. 24, 1957 (1 PETROLEUM LEGIS., MIDDLE EAST), which is referred to in the Sapphire award, contained both a reference to cases of force majeure "if recognized as such by principles of international law" (Art. 37C) and a choice of governing law reading as follows:

In view of the difference in the nationality of the parties to this Agreement, the latter shall remain valid, and must be interpreted and applied according to the principles of law common to both Iran and Italy and, in the absence of such principles, in accordance with the principles of law recognized normally by civilized nations, namely those which have already been involved [sic] by international tribunals [Art. 40].

[*802] Absence of Choice of Law

Even more surprising is the decision reached by the majority in the award of August 24, 1978, in the dispute between Revere Copper & Brass, Inc. v. Overseas Private Investment Corp. (OPIC). n80 The dispute arose under a contract of guarantee relating to an investment made by Revere and its wholly owned subsidiary, Revere Jamaica Alumina, Ltd. (RJA), both Maryland corporations, for the purpose of financing a bauxite mining venture in Jamaica.


Revere's investment was made pursuant to an agreement between the Government of Jamaica and RJA, dated March 10, 1967, which provided, inter alia, that it would remain in force for 25 years and that no further taxes or levies, except as stated, would be imposed upon RJA and that no obligation would be placed on RJA that would derogate from its right to own and operate the property held in connection with the project.
Contrary to the provisions of this agreement, the Government of Jamaica subsequently imposed a "bauxite levy" on RJA's production and significantly increased the rate of royalties payable by RJA. Following the collapse of negotiations between RJA and the Government, RJA shut down its plant and instituted proceedings against the Government in the Supreme Court of Jamaica for a determination that the bauxite levy was a breach of the agreement and for an injunction against its imposition. The court denied the claim of breach, but held that the levy could not be imposed when RJA was not producing bauxite. This decision was on appeal when the award was rendered.

Revere's claim against OPIC was based on the contention that the Government's action fell within the "Expropriatory Action" clause of the Contract of Guarantee. OPIC objected that the bauxite levy did not prevent RJA from exercising effective control and did not deprive RJA of a substantial portion of its property because the levy could be passed through to an ultimate consumer. As for the breach-of-contract argument, OPIC argued that there was no breach since the 1967 agreement was clearly governed by Jamaican law and the Supreme Court of Jamaica had rejected RJA's claim on the ground that the prohibitions against increased taxes were void ab initio.

n81 That clause read in part as follows:

1.15. Expropriatory Action. The term "Expropriatory Action" means any action which is taken, authorized, ratified or condoned by the Government of the Project Country, commencing during the Guaranty Period, with or without compensation therefor, and which for a period of one year directly results in preventing:

(d) the Foreign Enterprise from exercising effective control over the use or disposition of a substantial portion of its property or from constructing the Project or operating the same.

17 ILM at 1322.

[*803] The majority of the tribunal held for Revere. The majority considered that even though the agreement was silent on the issue of applicable law, the law of Jamaica was not the only law to be taken into account. In the majority's opinion, the issue of breach was not subject solely to municipal law and ought to be determined in the light of international law:

Although the Agreement was silent as to the applicable law, we accept Jamaican law for all ordinary purposes of the Agreement, but we do not consider that its applicability for some purposes precludes the application of principles of public international law which govern the responsibility of States for injuries to aliens. We regard these principles as particularly applicable where the question is, as here, whether actions taken by a government contrary to and damaging to the economic interests of aliens are in conflict with undertakings and assurances given in good faith to such aliens as an inducement to their making the investments affected by the action. n82
The majority went on to say:

In such cases, the question of breach is not left to the determination of municipal courts applying municipal law. The reason for this is that such contracts, while not made between governments and therefore wholly international, are basically international in that they are entered into as part of a contemporary international process of economic development, particularly in the less developed countries. The very reason for their existence is that the private parties entering into such agreements and committing large amounts of capital over a long period of time require contractual guarantees for their security; governments of developing countries in turn are willing to provide such guarantees in order to promote much needed economic development. Moreover, while the agreements are entered into between governments and private parties, the governments of such parties are very much interested in such agreements and in promoting their conclusion. In this instance, the government of the investor provided its own guarantee for the investment in addition to the contractual guarantee furnished by the foreign government.

A majority of the Panel has concluded that the 1967 Agreement falls within this category of a long term economic development agreement and that principles of public international law apply to it insofar as the government party is concerned and therefore that the question of breach by such party cannot be determined solely by municipal law. n83

n83 Ibid.

In order to substantiate this opinion, the majority recalled (1) the "pioneer effort" (yet unsuccessful) made by the United Kingdom in the Anglo-Iranian Oil Co. case n84 to establish the international illegality of a contract breach by a government; (2) the reliance on the general principles of law, found in the ARAMCO award, which is not a model of clarity and relates to an altogether different situation; and (3) the TOPCO award discussed above, n85 which, because of the specific provisions of applicable law in the concession agreements, bore no relation to the Revere/OPIC situation.

n84 ICJ Pleadings 64-280 (1952).

n85 See text and notes 63-64 supra.

[*804] Having found these "precedents" "persuasive as regards the question of internationalization of the agreement between RJA and the Government of Jamaica," n86 the majority elected to support its argumentation by resorting to a grouping of connecting factors more reminiscent, however, of a conflict-of-laws approach than of a public international diagnosis of the basic issues:

Thus, we note that the parties were of different nationalities; the Government of Jamaica, on the one hand, and a Maryland corporation of the United States, on the other. The Company was to construct an alumina plant in
Jamaica at the suggestion of the Government. Private capital was to be raised outside Jamaica and invested there. According to the preamble, this contribution of about 125 million dollars to the economy of Jamaica entitled RJA "... to have its capital investments in Jamaica, actual and potential, secured by reasonable safeguards on a long term basis, some of which are hereby placed on record. ..."

n86 17 ILM at 1335.

The capital was raised in the United States, on a long term basis. Revere made a public issue to its stockholders in December 1967 of $55,059,300 of 5 1/2% Convertible Subordinated Debentures due 1992, the Prospectus describing the Jamaica bauxite mining and alumina plant project as part of a $168,000,000 primary aluminum project involving an issue also of $97,000,000 of Industrial Development Revenue Bonds for the construction of a 112,400 ton aluminum reduction plant near Scottsboro, Alabama. This complex of bauxite mining and alumina production in Jamaica, designed to produce 220,000 short tons of alumina per annum, and aluminum ingot production in Alabama was thus truly an international production operation. The raw material processed into alumina in Jamaica moved from there to the United States where it was reduced to aluminum ingot. After being rolled and fabricated into sheets, strips, tubes and forgings, a wide range of household and industrial products were then sold in the United States and abroad.

All of the elements which were found by the TOPCO/Libya Award to characterize "economic development agreements" are thus found in the RJA/GOJ Agreement of March 10, 1967. n87

n87 Ibid. (footnote omitted).

With all due respect, I would suggest that these factors bore no relevance to the issue of applicable law. They were simply characteristics of the type of arrangements for transnational ventures of such a magnitude, regardless of whether the venture involves private parties only or a private party and a foreign government or its instrumentalities. In effect, in a purely private venture, the various components of the venture would lead, in regard to matters of applicable law, to conclusions directly contrary to those reached by the majority. The basic arrangement to carry out the venture would be governed by its own law, which would likely be different from the law or laws applicable to borrowings in the capital market and from the proper law of sales-purchase contracts. Instead of pointing to a grouping of factors [*805] in favor of a single law, these considerations would lead to a "depegage" of the overall transaction, each of its components being governed by its proper law.

The situation was not substantially different in this case in regard to the law governing the investment in Jamaica and that applicable to the relations between Revere and OPIC. Both situations ought to have been distinguished, as did the arbitrator in minority when he said:
The contract which is subject of this arbitration is not a contract between Revere and Jamaica, but a contract between two American corporations entered into in the District of Columbia and containing a provision for the arbitration in the District of Columbia of disputes arising under it. The contract and its interpretation are thus governed by the law of the United States and not by International Law.

Heavy stress is placed by the majority on the international character of the contract between Jamaica and RJA and on the effect that a breach or repudiation of such a contract could have in bringing home a liability to Jamaica under international law before a tribunal having jurisdiction of that country. But that is not this present controversy and international law is not the standard, and indeed is quite irrelevant, to the rules of law which should guide this arbitration to which neither RJA nor Jamaica is a party.

It seems significant that although . . . subsequent contracts between Jamaica and aluminum companies made in 1974 and 1976, as the majority points out, contained provisions for international arbitration, no such provision was made in the 1967 contract with RJA and the omission must be deemed intentional.

The interpretation of the Revere-OPIC contract before this Tribunal must, therefore, be in accordance with the standards of American law. n88

n88 Id. at 1372.

CONTENT OF THE APPLICABLE LAW

Changes in the Applicable Law

It is generally agreed that, in the absence of "stabilization" devices, the law governing a contract is the law at the time of application and not merely as it stood at the time of the contract. This general rule would seem to apply not only when the contract is governed by domestic law, but also when the parties attempt to "internationalize" the legal framework of their relationship. To the extent that an "internationalization" clause is not limited to incorporating into the contract specific rules of international law and implies effective submission to international law, the stability of the relationship may subsequently be put in question.

True, the rules of international law evolve more slowly than those of domestic law. Nevertheless, it is conceivable that, particularly in regard to long-term agreements, and especially those which are "internationalized," new rules may emerge between the time of the contract and that of an actual [*806] dispute. If this were the case, the judge or the arbitrator would have little alternative but to apply the rules in force at the time of the dispute. To hold otherwise would deprive international law of its true nature as a legal system whose function in the determination of the proper law of the agreement is substantially the same as that of any domestic legal system in ordinary conflicts law.

Although this consideration may not always be fully realized by the parties at the time of contracting, it may come to light in subsequent proceedings. The treatment given to UN resolutions on permanent sovereignty over natural
resources and the establishment of a new international economic order in recent arbitral awards shows sufficiently the nature of the problem as well as the difficulty of determining precisely the significance of the evolution of international law norms. n89

n89 See the TOPCO/Calasiatic award, paras. 81-89, and the LIAMCO award, 20 ILM at 51-58 (pp. 99-113 of the award). See also R. von Mehren & Kourides, International Arbitrations Between States and Foreign Private Parties: The Libyan Nationalization Cases, 75 AJIL 476, 522-29 (1981).

This remark can be extended to the classical question whether a state incurs international responsibility if it changes the content of its own law, which happens to be the proper law of the contract. This is a subject which would require separate treatment. All that needs to be said is that the answer cannot be found in extreme positions that either advocate the unfettered right of a contracting state to bring its contractual undertakings to naught or deny a state the right to legislate in its sovereign capacity to the extent that the exercise of its sovereign prerogatives would infringe upon the rights of the other contracting party. Clearly, the realities of this world call for a more flexible approach to the question, not only in regard to matters of state responsibility, n90 but also in regard to the remedies available for seeking redress against a state. The TOPCO, BP, and LIAMCO awards nicely illustrate this last point, as well as the usefulness of comparative law analysis as a possible factor of determination.

n90 See, e.g., Weil, note 59 supra, at 205 et seq.; P. Lalive, note 26 supra, paras. 50 et seq.; G. DELAUME, note 1 supra, para. 2.07.

Remedies: Comparative Law and the General Principles

In the TOPCO award, the arbitrator reached the conclusion, primarily on the basis of an analysis of arguments raised in international pleadings, n91 the opinions of international scholars, n92 and dicta found in international decisions, n93 that specific performance (in the form of restitutio in integrum) is the "normal sanction for non-performance of contractual obligations and that it is inapplicable only to the extent that restoration of the status quo ante is impossible." n94 Thus, the arbitrator proceeded to order that the Libyan Government perform, within a stated period of time, its obligations under the relevant concession. n95

n91 TOPCO/Calasiatic award, para. 101.

n92 Id., paras. 102-08.

n93 Id., para. 97.

n94 Id., para. 109.
The opposite view prevailed in the BP award. The arbitrator, in addition to considering international law material, focused his attention on comparative analysis of municipal rules.

As to international rules of possible application, the arbitrator noted first that no case in point could be found. True, there existed dicta in international decisions, n96 and related pleadings, n97 to support the contention that specific performance might be the proper remedy in the event of breach by a state of its contractual undertakings. However, the arbitrator concluded:

The survey of cases and other relevant materials . . . demonstrates that there is no explicit support for the proposition that specific performance, and even less restitutio in integrum, are remedies of public international law available at the option of a party suffering a wrongful breach by a co-contracting party. An analysis of the cases shows instead that while declaratory awards have often been made in terms of defining the rights and obligations of parties to a concession contract, these cases have never involved the total expropriation or taking by the State of the property, rights and interests of the concessionaire; and indeed in the most important of the cases, the validity and continued existence of the contract have not been questioned. The case analysis also demonstrates that the responsibility incurred by the defaulting party for breach of an obligation to perform a contractual undertaking is a duty to pay damages, and that the concept of restitutio in integrum has been employed merely as a vehicle for establishing the amount of damages. n98

Turning to the concept of specific performance under Libyan and other systems of law capable of supplying "general principles" for the solution of the dispute, the arbitrator held that these principles cannot be said to exist. To be sure, Article 159 of the Libyan Civil Code provides that "If one of the parties does not perform his obligation the other party may, after serving a formal summons on the debtor, demand the performance of the contract or its rescission, with damages, if due, in either case." n99 It is therefore comparable to the law of other civil law countries, such as France or Germany. However, since it is well known that the law of these countries is not in accord with that of common law countries, the arbitrator concluded that "it is clear . . . that there does not exist a . . . uniform general principle of law pursuant to which specific performance is a remedy available at the option of the innocent party, especially not a private party acting under a contract with a Government." n100
Except for its final qualification, this statement would appear to be somewhat oversimplified. True enough, in common law countries the normal remedy in the event of breach of contractual obligations is monetary compensation or damages, whereas in civil law countries the creditor is in principle entitled to claim specific performance. However, this broad picture does not account for the fact that in practice, the solutions obtaining in each group of countries (even admitting differences between countries in the same group) are not necessarily as far apart as the premises would seem to imply. Thus, both civil law and common law courts acknowledge such qualifications to the basic rules as the following: (1) a creditor may claim specific performance when damages would not be an adequate remedy for the delivery of specific goods, (2) damages rather than specific performance is the proper remedy when the cost of performance would be disproportionately high in comparison to the benefit that performance would bring to the creditor; and (3) specific performance is excluded when to order it would infringe upon the personal liberty of the debtor. Thus, though the "principles," as broadly formulated, differ, the points of contact between the two systems are greater than could be expected from their basic points of departure. In this respect, therefore, the arbitrator's denial of a "general principle" of specific performance would appear to require some qualification.


n102 See preceding note. See also U.C.C. § 2-716(1). Compare Uniform Law on the International Sale of Goods (ULIS), Arts. 41(1) and 42(1). Note, however, that under Article VII of the ULIS Convention:

Where under the provisions of the Uniform Law one party to a contract of sale is entitled to require performance of any obligation by the other party, a court shall not be bound to enter or enforce a judgment providing for specific performance except in the cases in which it would do so under its law in respect of similar contracts of sale not governed by the Uniform Law.

See 3 ILM 854 (1964) for the Convention and the law.

This provision was intended to accommodate the United Kingdom, and it is therefore not surprising to find that the language of Article VII has been incorporated into Article 16 of the UK Uniform Laws on International Sales Act, 1967 (reproduced in R. GRAVESON, E. CORN, & D. GRAVESON, THE UNIFORM LAWS ON INTERNATIONAL SALES ACT 1967, at 137 (1968)).

However, one must agree with the arbitrator that:

The principles even of those systems of law which recognize the most far-reaching rights for an innocent party to demand specific performance, are principles of ordinary commercial law. They have been devised, discussed and applied mostly in relation to everyday sale of goods contracts and other transactions of limited duration where, moreover, typically one party performs in kind and the other with money. It is only by stretching the meaning of legal concepts and general words into the extreme that these principles can be said to extend to contracts which like the BP Concession still have a term of 40 years to run and which provide for the right to extract and remove natural resources requiring vast fixed industrial installations and presuppose an intimate and complex relationship between the parties. n105

And that:

The fact that the State is the respondent party is one which cannot be overlooked. Dr. Mitchell [The Contract of Public Authorities (1954), p.20], on the basis of a survey of the municipal laws of England, France and the United States, has made it clear that the remedies of specific performance and restitution in kind normally are unavailable against governmental authorities under public contracts. n106

And that:

A rule of reason therefore dictates . . . that, when by exercise of sovereign power a State has committed a fundamental breach of a concession agreement by repudiating it through a nationalization of the enterprise and its assets in a manner which implied finality, the concessionaire is not entitled to call for specific performance by the Government of the agreement and reinstatement of his contractual rights, but his sole remedy is an action for damages. n107

n105 BP award, 53 ILR at 349.
n106 Ibid.
n107 Id. at 354.

The LIAMCO award confirms this conclusion. In that case, however, the arbitrator acknowledged that, according to "the principles of municipal law of Libya which are common to those of international law, and which in fact are also consistent with the general principles of law . . . , obligations are to be performed, principally, in kind, if such performance is possible." n108

n108 LIAMCO award, 20 ILM at 63 (p. 123 of the award).
The arbitrator further stated that "[t]his general principle is also common to international law, in which restitutio in integrum is conditioned by the possibility of performance, and consequently hindered by its impossibility. Such impossibility is in fact most usual in the international field." n109 He held that in the instant case such impossibility existed, with the consequence that LIAMCO could only recover "equitable compensation" n110 for its loss.

n109 Ibid. (p. 124 of the award).

n110 Id. at 86 (p. 170 of the award).

I believe that the comparative law approach followed by the BP and LIAMCO arbitrators is the road to progress. Even though it may not always be conducted in the same fashion or lead to identical conclusions, it is the proper way to give substantive meaning to those principles of law which are part and parcel of the law governing the contract.

III. RECOGNITION AND ENFORCEMENT OF AWARDS

ARBITRATION RULES

Foreign and "International" Awards

Subject to considerations of sovereign immunity, which deserve separate treatment, the issues attendant upon the recognition and enforcement of foreign awards concerning state contracts are not usually different from those relating to awards involving disputes between private parties.

[*810] In the absence of treaty provisions, recognition and enforcement depend upon the rules obtaining at the recognizing forum, including those regarding the final and binding character of the award, the issue of merger, if the award has been judicially confirmed, and the defenses that can be raised for the purpose of preventing recognition and enforcement.

Treaties in existence, and in particular the New York Convention, n111 the Inter-American Convention, n112 and the European Arbitration Convention, n113 significantly improve the situation by limiting the grounds on which recognition and enforcement can be denied. However, even within the scope of these Conventions, difficult issues are not excluded.

n111 Supra note 1, Art. V.

n112 Supra note 3, Art. 5.

n113 Supra note 2, Art. IX.

The proceedings regarding the recognition and enforcement of the 1956 award in Societe Europeenne d’Etudes et d’Entreprises (SEEE) v. People’s Federal Republic of Yugoslav, n114 which after 25 years are still continuing, clearly illustrate this remark.
Before World War II, the SEEE, a French company, had constructed a railway in Yugoslavia. Certain sums remained due and in 1950, the French Government, espousing the SEEE's claim, negotiated a settlement with Yugoslavia. A few years later, the SEEE contended that the sums received from Yugoslavia under the French-Yugoslav agreement did not exhaust the amount of its claim and initiated arbitration proceedings in Lausanne, Switzerland. Yugoslavia objected to the proceedings on the ground that the SEEE's claim had been fully settled and refused to participate in the proceedings. In 1956, a default award was rendered against Yugoslavia by a panel of two arbitrators. The SEEE registered the award with the registrar of the Cantonal Tribunal of Vaud. The Yugoslav Government brought action in the same tribunal to have the award declared null and void on various grounds, including the fact that the arbitral tribunal did not include an uneven number of arbitrators, as required by the law of the Canton of Vaud. The SEEE demurred that the action should be dismissed since the award was not subject to Vaud law.

The tribunal dismissed the action and held that the award could not be considered as an arbitral award within the meaning of Vaud law. At the same time, the tribunal held that, since the award was not a Vaud award, it could not be registered in the canton and that the earlier registration should be canceled and the text of the award remitted to the parties. In reaching this decision, the tribunal stated in an interesting dictum:

[The tribunal,] which holds that it lacks jurisdiction in respect of the action directed against an arbitral award not subject to Vaud's judicial sovereignty, does not intend to preclude the validity and binding character of such award in accordance with the intention of the parties or under such legal system as would be applicable to [the award].


[*811] The SEEE appealed to the Swiss Federal Tribunal, but the appeal was dismissed on the ground that the Cantonal "Tribunal did not annul, even in part, the award, since all that it did was to hold that the award did not constitute an arbitral award within the meaning of Article 516 of the Code of Civil Procedure and that it should, therefore, be handed back to the parties."


Noting in particular the dictum quoted above in the lower court's judgment, the Federal Tribunal held that since the tribunal of Vaud had not passed judgment on the binding character of the award or its enforceability "outside the Canton of Vaud," the judgment did not prejudice any rights that the SEEE
might have under the award.

These decisions seem to imply that the 1956 award, while it was not a "Vaud" award, might nevertheless be an "international" or a "non-Swiss" award subject to some nonidentified legal system. Under the circumstances, the question arises whether the 1956 award meets the tests set forth in Article I(1) of the New York Convention and qualifies for recognition in other countries party to the Convention. The question was submitted for consideration by the Dutch courts when recognition proceedings were brought in the Netherlands by the SEE.

In this connection, it should be recalled that the Convention applies to awards both "made in the territory" of a contracting state and "not considered as domestic awards" by the recognizing forum (Article I(1)). This double-barreled test applies, however, only in the absence of a contrary declaration, and such a declaration had been made by both Switzerland and the Netherlands stating that they would apply the Convention only to awards "made in the territory" of another contracting state. n117

n117 Another issue raised by Yugoslavia was that since Yugoslavia had not acceded to the New York Convention, the Convention was not applicable and the conditions for recognition should be those set forth in the Geneva Convention of 1927, which remained applicable as between Yugoslavia and the Netherlands.

This contention failed. In its 1973 decision (see note 119 infra), the Hoge Raad held that since both the Netherlands and Switzerland are parties to the New York Convention, the nationality of the parties was irrelevant and the decisive factor was the place where the award was made, i.e., the seat of arbitration.

This view is consistent with the opinion expressed in the U.S. amicus curiae brief regarding the recognition of the LIAMCO award in the United States. See 20 ILM 161 (1981).

The question whether the 1956 award could be considered as "made" in Switzerland was not uniformly decided by the Dutch courts. According to the Hague Court of Appeal, the "making" of an award should not refer only to the geographical location of the seat of arbitration; this concept should include also a reference to the municipal law of the state in which the award was rendered. In view of the fact that the Swiss courts had held that the 1956 award did not satisfy the requirements of Vaud law, the court of appeal felt that the award was not a "Swiss" award, and was therefore not entitled to recognition in the Netherlands. n118


[*812] On appeal, in 1973 the Hoge Raad quashed the decision of the Hague court on the ground, inter alia, that neither the provisions of Article I(1) of the Convention nor the travaux preparatoires justified the construction adopted by the lower court. According to the Hoge Raad:
Neither the text nor the history of the Convention gives an indication -- apart from a plea of the impediments mentioned in Article V(1) -- that the competent authority of the country where recognition and enforcement are sought of an arbitral award given in the territory of another State should, before giving its decision, investigate the relationship between the award and the law of the country where it was made and, failing such relationship, refuse recognition and enforcement. n119


Upon remand from the Hoge Raad, the Hague Court of Appeal persisted in refusing to recognize the 1956 award, but this time on another ground, namely that the award was contrary to Dutch public policy because to give it effect in the Netherlands would be contrary to the terms of the 1950 settlement agreed upon by France and Yugoslavia. n120


A new appeal was taken to the Hoge Raad. The Court entertained the appeal insofar as it concerned the public policy argument, but held in 1975 that in the final analysis, recognition of the award should be denied on the basis of Article V(1)(a) of the Convention, i.e., because as a result of the decisions of the Swiss courts, the 1956 award was no longer capable of execution in Switzerland, and consequently of recognition in the Netherlands. Said the court:

... the Supreme Court decided in its first decision in the present case that the circumstance that the decision by Mr. Ripert and Mr. Panchaud was not recognized as an arbitral award within the meaning of Article 516 of the Code of Civil Procedure of Canton Vaud did not necessarily imply that the same decision could not be considered as an arbitral award within the meaning of Article I of the New York Convention. However, this does not mean that the decision by the Swiss judge bears no consequence for the application of Article V(1)(e) of the Convention, according to which the recognition and enforcement of an arbitral award may be refused by the competent authority of the State where the recognition and enforcement is sought, if the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country to which, or under the law of which, that award was made. Yugoslavia rightly pleaded in the present case that such provision is an obstacle to the enforcement of the award. Surely, even though the award did not qualify for annulment by the Swiss judge, because he did not regard the decision as an arbitral award within the meaning of his law and consequently did not consider that the provisions regarding arbitration of the relevant procedural law should apply, the decisions by the judge ... as a consequence of which the enforcement of the decision given by Mr. Ripert and Mr. Panchaud was denied by a competent authority of the country in which ... the decision was given, and the possibility of enforcement in the same country was ruled out -- should be considered as equivalent, in the present case, to the circumstance mentioned in Article V(1)(e) of the Convention, namely that the relevant authority made
it impossible to enforce the award by setting it aside. Since it was not stated
and does not appear that the decision was made under the law of any other
country, the judgment by the Vaud Cantonal Tribunal had the same effect as an
annulment. n121

n121 Decision of Nov. 7, 1975, Hoge Raad, as translated by G. GAJA, note 119

The exact significance of the Hoge Raad’s decisions is somewhat uncertain.
The 1973 decision seems to support the view that an "international" award may
qualify for recognition under the Convention so long as it is "made" in the
territory of a contracting state. However, the 1975 decision reverts to
additional considerations that would seem to "renationalize" the award by
bringing it within the legal system of the country in which the award is "made."
n122

n122 Parallel with the Dutch proceedings, the SEEE had sought recognition and
enforcement of the award in France. The French proceedings, which began in the
1960’s, are still pending. Unlike the Dutch decisions, the French judgments
rendered so far do not deal with the applicability of the New York Convention.
While they deny recognition to the 1956 award, this solution is based on other
considerations. For a review of these cases, see G. DELAUME, note 1 supra,
para. 13.16.

Whatever the correct interpretation, the Dutch decisions make it apparent
that the attempt to remove the arbitration proceedings from the lex loci arbitri
and to "internationalize" or "de-localize" the proceedings may have its price.
It may deprive the parties of the benefit of the liberal provisions of
multilateral Conventions regarding the recognition and enforcement of "foreign,"
as opposed to "international," awards.

A recent French decision, although it involves a commercial contract between
private parties and not a state contract, illustrates the point. n123 An award
had been rendered in Paris under the ICC Rules. Appeal was taken to the Paris
Court of Appeal. This raised a question of jurisdiction. The French courts’
appellate jurisdiction can be exercised only in regard to French, as opposed to
foreign, awards. The question at issue was therefore whether the ICC award
rendered pursuant to non-French arbitration rules should be treated as a French
award because of where it was made, or whether it should be characterized as a
non-French award in view of the rules followed by the arbitrators. The second
alternative prevailed and the court declined jurisdiction. The court held that
the award had an "international" character because the procedural rules were not
French, the parties were aliens, and the contract in dispute had been made and
was to be performed outside France.

n123 General Nat’l Maritime Transport Co. c. Societe Gotaverken Arendal A.B.,
In order to buttress its argumentation, the court also held that the award did not fall within the scope of the New York Convention. The court reasoned that in ratifying the Convention, France had declared that it would apply the Convention on the basis of reciprocity with awards "made" in another contracting state. According to the court, an "international" (or at least "de-localized") award, such as the instant ICC award, was not covered by the Convention. Whether this decision was based on a strict interpretation of the Convention or was influenced by the view, advocated mainly by French scholars, that "international" arbitration may hover over domestic law and contribute to a new lex mercatoria in the making, is an interesting question. However, if that decision is left to stand, it will have dealt a serious blow to institutional commercial arbitration.


A recent decision of the Court of Appeal of Paris, as yet unpublished (Aksa v. Norsolor S.A., Dec. 9, 1980), follows the Gotaverken doctrine. In the Aksa case, however, one of the parties was a French corporation (the other being a Turkish corporation), the contract concerned the sale by the French corporation of goods to be delivered in Turkey, and the terms of reference of the arbitrators, although fixing the seat of arbitration in Vienna, Austria, provided that hearings would take place in Paris, France. Notwithstanding these various "French" connecting factors, the court held that "[t]he award in question, rendered in accordance with a procedure [the ICC Rules] which is not that provided by French law, cannot be characterized as a French award" (as translated).

The recent French Decree of May 12, 1981 ([1981] J.O. 1402) contains provisions dealing specifically with "international" arbitration and in effect endorses the position taken by the French courts.

Another issue that has arisen in the context of the SEEYugoslav litigation is whether the award was effectively a "commercial" award within the meaning of the Convention. Yugoslavia argued that the award did not have that character because the building of the railway in question had strategic importance and military significance, and that the related contract was therefore, on the part of Yugoslavia, in the category of acta jure imperii.

Although this argument failed, it is nevertheless a good reminder that there may be room to query whether the type of arbitration clauses that are frequently stipulated in economic development agreements with foreign states meet the "commercial" requirements of the Convention. If the answer were to be found in the negative, the winning party might be deprived of the advantages of the Convention machinery.
ICSID Awards

The problem of enforcing a truly international award n126 is solved effectively in the context of ICSID awards.


The Convention provides: (1) that the parties are bound by the award and that each party must abide by, and comply with, the terms of the award (Article 53); and (2) that every contracting state must recognize ICSID [*815] awards and enforce the pecuniary obligations imposed by them as if they were a final judgment of a court in the state where recognition and enforcement are sought (Article 54(1)).

In addition, Article 54(2) of the Convention makes the procedure for recognition and enforcement as simple as possible. Any party to an ICSID award may obtain recognition and enforcement by furnishing to the competent court or authority designated in advance by each contracting state a copy of the award certified by the Secretary-General of ICSID. n127

n127 See text and notes 133 and 134 infra.

This simple procedure eliminates the problems that subsist in domestic laws and in the context of multinational conventions when an attempt is made to recognize and enforce international awards. Under the ICSID Convention, no defense can be raised against the recognition and enforcement of ICSID awards based on the nature of the award or of the underlying transaction or, for that matter, on public policy. ICSID awards are binding as such and must be enforced in each of the contracting states.

The only limitation to this general rule is found in Article 55 of the Convention, which provides that the procedures set forth for the recognition and enforcement of awards shall in no way "be construed as derogatory from the law in force in any Contracting State relating to immunity of that State or any foreign State from execution." In other words, only sovereign immunity considerations may stand in the path of the enforcement of ICSID awards. Even then, the ICSID machinery contrasts favorably with the machinery available under other conventions.

THE IMPACT OF SOVEREIGN IMMUNITY

A Threshold Question

Whether an award can be enforced by execution against a state and its property is an issue that must be decided in accordance with the sovereign immunity rules obtaining in the forum in which execution is sought. However,
before measures of execution are considered, a preliminary question must be solved. Execution proper can ensue only after recognition of the award in the form of a confirmation, an exequatur, or similar proceedings. The nature of these proceedings is still a matter of controversy in the sense that they may be regarded as the ultimate phase of the arbitration process or as the preliminary phase of execution.

Understandably, states usually contend that the second characterization should prevail. As a rule, however, this argument has failed to impress the courts. Thus, courts in the Netherlands, the United States, and France have held that when a state has waived its immunity by submitting to arbitration, the scope of the waiver extends to proceedings for the confirmation or recognition of the resulting award.

This argument was made, but was defeated, in the cases referred to in notes 129 to 131 infra.


Ipitrade Int'l S.A. v. Federal Republic of Nigeria, 465 F.Supp. 824 (D.D.C. 1978), reprinted in 17 ILM 1395 (1978). Ipitrade reasoning was followed in Libyan American Oil Co. v. Socialist People's Libyan Arab Jamahirya, 482 F.Supp. 1175 (D.D.C. 1980), although in that case, the court held that it could not exercise jurisdiction under the act of state doctrine, since this would imply ruling on the validity of the Libyan nationalization law. This case was discontinued, following settlement between the parties during the appellate proceedings.


SEE c. Republique Socialiste Federale de Yougoslavie et al., Decision of July 6, 1970, Trib. Gr. Inst., Paris (referes), [1975] REV. ARB. 328, 98 J. DROIT INT'L 131 (1971), [1971] J.C.P. II 16,810, according to which: "Whereas in subscribing to the arbitration clause, the Yugoslav State has thereby agreed to waive its jurisdictional immunity in regard to the arbitrators and their award until the exequatur proceedings required to give full effect to the award are completed" (translated by the author).

These decisions represent the better view, since otherwise sovereign the arbitration process. Recognition of immunity would make a mockery of the arbitration process. Recognition of an award and execution are two different notions. The first is the natural complement of the binding character of any agreement to submit to arbitration and should not be impaired by considerations of immunity, which are proper to matters of execution.

The distinction between these two concepts is clearly illustrated by the provisions of the ICSID Convention. As already mentioned, the Convention offers a simple and effective procedure for the recognition of ICSID awards in contracting states. At the same time, the Convention acknowledges that this procedure shall in no way "be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution." n132

n132 Supra note 4, Art. 55.

A recent decision illustrates the point. In Benvenuti & Bonfant v. The Government of the People's Republic of Congo, n133 an ICSID award had been granted recognition by the President of the Tribunal de Grande Instance of Paris, but the President had qualified the order granting recognition by stating that if the award creditors wanted to execute the award upon Congolese assets in France, they would have first to seek his authorization. On appeal, the Court of Appeal of Paris reversed that part of the lower court's order regarding execution. It held that Article 54(2) was intended to facilitate the recognition and enforcement of ICSID awards in contracting states and that it limited the function of the recognizing forum to ascertaining the authenticity of the award as certified by the Secretary-General of ICSID. Consistent with French case law regarding the nature of an exequatur order, n134 the court restated the view that recognition and enforcement of an arbitral award do not constitute a measure of execution and that, therefore, in addressing the issue of immunity from execution at the time of recognition, the President of the tribunal had exceeded his authority.


n134 See text and note 131 supra.

Sovereign Immunity and What to Do About It

The rules regarding sovereign immunity from execution are in greater disarray than those concerning immunity from suit. Certain legal systems continue to deny execution against the property of foreign states even after rendition of a judgment or award against the state involved. n135 Other systems subject execution to prior approval by the executive branch of the government. n136 Even in those countries which endorse a monolithic doctrine of immunity and hold that there should be no immunity from execution when there is no immunity from suit, this general rule is subject to various exceptions, n137 or is qualified by specific requirements, including the existence of a reasonable territorial connection between the underlying transaction and the country in which
execution is sought. n138

n135 G. DELAUME, note 1 supra, para. 12.03. For a recent symposium covering the law of a number of countries, see 10 NETH. Y.B. INT'L L. 3-289 (1979). See also Crawford, Execution of Judgments and Foreign Sovereign Immunity, p. 820 infra.

n136 As in Italy, Greece, and the Netherlands. G. DELAUME, note 1 supra, para. 12.01.

n137 Id., paras. 12.03-.04.


In recognition proceedings brought by LIAMCO in Sweden, the Court of Appeals of Svea (Stockholm) held that recognition should be granted to the award on the ground that by consenting to arbitration, Libya had waived its immunity and that the award was not incompatible with "basic principles of justice" prevailing in Sweden. The text of this decision, dated June 18, 1980, has been communicated to the author by Mr. Jan Paulsson, Coudert Bros., Paris.

The complexity of immunity rules makes forum shopping not only an attractive possibility, but a distinct reality.

In order to impart some degree of predictability into their relationship, the parties to state contracts would therefore be well advised to deal directly with issues of sovereign immunity by way of express stipulations in the contract. Although there are indications that, at least in certain sectors of transnational commerce, waivers of immunity are becoming increasingly popular, the fact remains that there are still many long-term state contracts that fail to deal with the problem. Under the circumstances, sovereign immunity is likely to continue to be a stumbling block in the smooth enforcement of judgments and awards involving foreign states.

In this respect, however, a final remark must be made, which concerns ICSID awards. Because the ICSID Convention surrenders measures of [*818] execution to domestic rules of immunity, it is possible that, as in the case of other arbitral awards, those rendered under the Convention will be subjected to different treatment in contracting states.

Although this possibility cannot be ignored, there is nevertheless a significant difference between the rights of an award-creditor under the Convention and those of a party to a non-ICSID award. The fact that, in adhering to the Convention, contracting states do not surrender their own right to immunity from execution in no way relieves them of their obligations under the Convention. In particular, it is clear that if a contracting state party to a dispute invoked immunity from execution, either in its own courts or the
courts of another contracting state, in order to frustrate enforcement of an award, that state would violate its obligation to comply with the award. Moreover, it would be exposed to various sanctions since failure to comply would restore the right of the contracting state whose national is the award-creditor to give diplomatic protection to its national and to bring an international claim on his behalf, n139 or would give that state the right to bring action in the International Court of Justice against the defaulting state. n140

n139 Supra note 4, Art. 27.

n140 Art. 64.

In other words, although the Convention does not purport to change existing rules of immunity from execution, it nevertheless imparts a new spirit to the rules by which the game may be played.

CONCLUSION

At the end of this incursion into a domain that deserves further exploration, several conclusions are nevertheless clear:

1. In the field of commercial arbitration:

   (a) Current developments in the law of sovereign immunity, coupled with the modern improvement of the arbitration machinery, significantly improve both the climate in which state contract arbitration is conducted and the effectiveness of the arbitration process.

   (b) Because many immunity rules are of recent vintage or are still in the process of evolution, many uncertainties remain about their precise significance.

   (c) Under the circumstances, parties to state contracts would be well advised to supplement arbitration clauses with appropriate waivers of immunity, both from suit and from execution.

2. In the field of "international" arbitration:

   (a) The pronouncements of arbitral awards in regard to both procedural and substantive issues are not as consistent as would be desirable for the formulation of rules of general application.

   (b) The fact that arbitrators (and scholars) are sometimes inclined to refer to the decisions of other arbitral tribunals rendered in a different context is not helpful to the identification of precise rules.

   ["819] (c) "International" awards may fall outside the scope of arbitration conventions and expose the parties to unexpected difficulties at the time of recognition and enforcement. Only the ICSID machinery supplies a positive answer to these problems.

   (d) Because submission to "international" arbitration, including ICSID arbitration, does not solve issues of immunity from execution, these issues
ought to be considered at the time of submission. As in the case of commercial arbitration, the best way to deal with sovereign immunity is, in the final analysis, to remove the issue by means of appropriate contractual stipulations in the form of waivers of immunity.

Finally, in both fields the parties would be well advised to anticipate issues of applicable law by means of appropriate stipulations precisely worded. n141

n141 Note that the undertakings of the United States and Iran in respect to the settlement of claims (20 ILM 230 (1981)) remit the solution of issues of applicable law to the International Arbitral Tribunal established for the purpose: "ARTICLE V. The tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances."