

Fordham International Law Journal

Volume 12, Issue 4

1988

Article 1

The Modern Trend Towards Exclusion of Recourse Against Transnational Arbitral Awards: A European Perspective

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The Modern Trend Towards Exclusion of Recourse Against Transnational Arbitral Awards: A European Perspective

Klaus Peter Berger

Abstract

This Article will analyze this trend [the liberal tradition in international commercial arbitration] and attempt to assess its impact on the efficiency of international commercial arbitration as a viable alternative to litigation before the national judiciary. Where appropriate, the new laws will be compared to the UNCITRAL Model Law (the “Model Law”), today’s archetype of modern commercial arbitration laws. Finally, this Article will focus on the possible influence of the new laws on arbitration laws of other states, taking the Federal Republic of Germany as an illustrative example.

ARTICLE

THE MODERN TREND TOWARDS EXCLUSION OF RECOURSE AGAINST TRANSNATIONAL ARBITRAL AWARDS: A EUROPEAN PERSPECTIVE

Klaus Peter Berger *

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For the actors in international commerce, it is the worst of both worlds when agreement to arbitration results in both arbitration and litigation.

Mark B. Feldman¹

INTRODUCTION

It is common knowledge among lawyers from both common and civil law jurisdictions that the ever-growing case load of their national judiciary constitutes the main obstacle for an effective dispute resolution process. In the United States, the court system is close to breaking down,² and in Germany it can take a litigant up to six years to take a case through all instances for a final judgment.³ Even the European Court of Justice in Luxembourg is suffering from an increased case load of forty percent in 1987, which has triggered the proposal for a new European Court of First Instance.⁴ Viewed against this background, arbitration as an alternative to litigation gains additional importance. This is especially true for recourse to municipal courts against final arbitral awards and is of tremendous importance for the choice of the right *situs* and the ultimate enforcement of the award.⁵

There is an inherent conflict of interests involved in any arbitration proceeding that makes this relationship so difficult and problematic. On one side, there are the interests of the parties to a contract containing an arbitration clause (*clause*

1. Feldman, *The Annulment Proceedings and the Finality of ICSID Arbitral Awards*, 2 *ICSID REV.-FOREIGN INVESTMENT L.J.* 85, 87 (1987).

2. "We have reached the point where our system of justice—both state and federal—may literally break down before the end of the century . . ." Ribicoff, *Alternatives to Litigation: Their Application to International Business Disputes*, *ARB. J.*, Dec. 1983, at 4 (quoting Chief Justice Warren Burger).

3. Möller, *Die Handelsschiedsgerichte sind eine Alternative zur Streitbeilegung vor den Staatlichen Gerichten*, *Handelsblatt*, Oct. 7/8, 1988, at 8, col. 4. For a comprehensive analysis of the German appellate system, see Meador, *Appellate Subject Matter Organization: The German Design from an American Perspective*, 5 *HASTINGS INT'L & COMP. L. REV.* 27 (1981). A German judge, complaining about the case load and insufficient staffing of German courts, once called the long duration of German trials "a cold-blooded way of expropriation." Interview with Judge P. Springer, Judge, District Court, Hagen, West Germany, in Bielefeld, West Germany (Sept. 26, 1988).

4. See *Critical Situation Pending in Luxembourg*, *BUS. L. BRIEF*, Apr. 1988, at 19.

5. See Iwasaki, *Selection of Situs: Criterias and Priorities*, 1 *ARB. INT'L* 57 (1986).

compromissoire).⁶ Some reasons for resorting to arbitration instead of the national courts, apart from its confidentiality, include the widespread mistrust of the efficiency, technical expertise, and impartiality of these courts.⁷ Parties to a complex and technically intricate international transaction have always been and are becoming increasingly reluctant to rely on the national judiciary for dispute settlement, which, naturally, often lacks the required special economic, technical, and legal knowledge.⁸ The arbitration clause is expected to ensure an impartial, effective, knowledgeable,⁹ and above all speedy resolution to any conflict that might arise out of or relating to the contract.¹⁰ In contrast to this "flight from national

6. The term "*clause compromissoire*" is rooted in French law and refers to future disputes in contrast to a "*compromis*," which refers to submitting a current dispute to arbitration. A. REDFERN & M. HUNTER, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 8 (1986).

7. See Yates, *Arbitration or Court Litigation for Private International Dispute Resolution: The Lesser of Two Evils*, in *RESOLVING TRANSNATIONAL DISPUTES THROUGH INTERNATIONAL ARBITRATION* 224, 230-32 (T. Carbonneau ed. 1984).

8. Legal knowledge oftentimes does not keep pace with the growing internationalization of national legal systems and cases. To make matters worse, the doctrine of *forum non conveniens* regards international cases as an "unwarranted burden on our taxpayer . . . [and] an added impediment to the speedy disposition of the controversies between and on behalf of our own citizen[s]." M. FERID, *INTERNATIONALES PRIVATRECHT* 54-55 (3d ed. 1986).

9. Shilston, *The Evolution of Modern Commercial Arbitration*, *J. INT'L ARB.*, June 1987, at 45. Shilston notes that

arbitration tribunals need to be informed, as procedural designers, about the state of the art of the common fund of arbitral knowledge, but also in a more detailed procedural sense, to be familiar with the sub-cultural practices and nuances of the particular commercial environment in which the dispute is placed.

Id. at 49. The role of the technical expert varies, however, and seems to be more prominent in the arbitration proceedings of the Anglo-Saxon type, while on the Continent, the primary role is still with the lawyer. Glossner, *Contract Adaptation Through Third Party Intervener: The Referee Arbitral*, in *ADAPTATION AND RENEGOTIATION OF CONTRACTS IN INTERNATIONAL TRADE AND FINANCE* 191, 194-95 (N. Horn ed. 1985).

10. An arbitration clause may provide that: "Any dispute, controversy of claim arising out of or relation to this contract, of the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules." U.N. Comm'n on Int'l Trade Law, *Arbitration Rules*, art. 1(1) n.1, U.N. Sales No. E.77.V6 (1977) [hereinafter UNCITRAL Rules]. Under U.S. law, a "narrow" arbitration clause submitting only claims "arising out of" the agreement to the arbitral tribunal might exclude the power of the tribunal to determine whether the agreement containing the arbitration clause is valid. *SURVEY OF INTERNATIONAL ARBITRATION SITES* 106 (Am. Arbitration Ass'n ed. 1984) [hereinafter *INTERNATIONAL ARBITRATION SITES*].

courts,"¹¹ one is confronted with the inherent paradox of arbitration: Arbitration proceedings sometimes cannot function properly without these courts.¹²

The powers vested in national courts by the national legislature are oftentimes needed throughout the arbitration proceedings to prevent frustration of the arbitration clause and to ensure recognition and enforcement of the ultimate award. The national courts' authority in this area ranges from enforcing the arbitration agreement¹³ and provisional measures,¹⁴ to nominating and replacing arbitrators,¹⁵ as well as the taking of evidence.¹⁶ Most States, however, do not lend their support to arbitral tribunals operating on their soil without claiming some degree of control over the conduct of these tribunals.¹⁷ The most important way to gain this control is to provide for recourse against arbitral awards.¹⁸ This procedure, however, in-

11. One writer has labeled this phenomenon "conflict avoidance." G. DELAUME, *LAW AND PRACTICE OF TRANSNATIONAL CONTRACTS* 290 (1988).

12. "[C]e sont les parties et le tribunal arbitral lui-même qui sont intéressés à la puissance publique, dont l'aide leur est souvent indispensable . . . [L]e rôle de la puissance publique est subsidiaire. Elle n'intervient que sur requête." Voyame, *L'Etat et l'Arbitrage Commercial International*, in *RECUEIL DE TRAVAUX SUISSES SUR L'ARBITRAGE INTERNATIONAL* 15, 18 (Int'l Council for Commercial Arbitration ed. 1984).

13. Most arbitration laws provide that courts may stay proceedings or decline to accept jurisdiction to give effect to an arbitration clause in the principal contract. This is also true for arbitrations in foreign countries according to article II(3) of the New York Convention. New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, art. II(3), 21 U.S.T. 2517, 2519, T.I.A.S. No. 6997, at 1, 330 U.N.T.S. 38, 40 [hereinafter New York Convention]. See generally Stein & Wotman, *International Commercial Arbitration in the 1980's: A Comparison of the Major Arbitral Systems and Rules*, 38 *BUS. LAW.* 1685, 1688-93 (1983) (discussing prearbitration judicial proceedings).

14. In the field of interim measures of protection related to the subject matter of the dispute, there is a duality of recourse to the arbitration tribunal and/or to the national courts. See UNCITRAL Rules, *supra* note 10, art. 26(1), (3); International Chamber of Commerce, Rules of Conciliation and Arbitration of the ICC art. 8(5) (1975) [hereinafter ICC Arbitration Rules]; see also McDonell, *The Availability of Provisional Relief in International Commercial Arbitration*, 22 *COLUM. J. TRANSNAT'L L.* 273 (1984) (discussing judicial relief measures applicable to arbitration proceedings).

15. For a review on the power of national courts to aid the parties in the appointment of arbitrators, see G. DELAUME, *supra* note 11, at 316-19.

16. Under most arbitration laws, arbitrators have broad powers to procure evidence, but in some countries, such as France, assistance of the courts is necessary to compel production of documents possessed by third parties. See A. REDFERN & M. HUNTER, *supra* note 6, at 234; Stein & Wotman, *supra* note 13, at 1707-08.

17. See A. REDFERN & M. HUNTER, *supra* note 6, at 43, 316.

18. See *id.* at 316.

creases the potential for the use of dilatory tactics by the losing party.

Thus, the inherent conflict of the recourse problem becomes apparent: either restrain judicial recourse as much as possible in order to allow maximum arbitral freedom or provide for recourse to national courts, which might open the door to misuse by the losing party resulting in delay of the conflict resolution process. Where the latter option is followed, the original purpose of the arbitration clause is perverted by converting arbitration proceedings into nothing more than an additional instance of the national judiciary.¹⁹

In the past decade, national legislatures, especially those of the "classical" European arbitration nations,²⁰ have become increasingly concerned with the relationship between their courts and arbitral tribunals. Many have tried to relax the grip of their judiciary on final arbitral awards by confining supervision to some minimum standards. Realizing that international commercial arbitration constitutes an important source of revenues,²¹ these states have tried to render their legal environment more attractive for arbitrations by enacting new, or revising their old, arbitration laws. These new or revised laws do not only provide the parties with a more flexible procedural framework, they also regulate to a varying extent the right of recourse against a final arbitral award before the national courts.

This trend began in England in 1979 (the "U.K. Arbitration Act"),²² followed by France in 1981 (the "French Arbitra-

19. See Schlosser, *Schiedsgerichtsbarkeit und Rechtsmittel zu den Staatlichen Gerichten*, 92 ZEITSCHRIFT FÜR ZIVILPROZESS 125, 150 (1979).

20. Some countries have been traditionally preferred as *situs* of arbitral proceedings due to their reputed arbitral institutions or liberal arbitration laws. According to a poll conducted by the International Chamber of Commerce in Paris (the "ICC"), 32.5% of the arbitrations under the auspices of the ICC between 1980 and 1982 took place in France, 26.5% in Switzerland, 9% in the United Kingdom, 5% in Belgium, 3% in Austria, and 3% in The Netherlands. W.L. CRAIG, W. PARK & J. PAULSSON, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION app. I, at 15 (1984). Around 85% of the ICC arbitrations are held in Europe. See Jarvin, *The Enforcement of I.C.C. Arbitral Awards*, 1988 REVUE DE DROIT DES AFFAIRES INTERNATIONALES 242, 243.

21. Lord Cullen of Ashborne estimated that a new English arbitration law might attract as much as £500 million per year of additional revenues in the form of fees for arbitrators, barristers, solicitors, and expert witnesses. W.L. CRAIG, W. PARK & J. PAULSSON, *supra* note 20, § 29.03.

22. Arbitration Act, 1979, ch. 42, reprinted in V Y.B. COM. ARB. 239 (1980). The

tion Law"),²³ Austria in 1983 (the "Austrian Arbitration Law"),²⁴ Belgium in 1985 (the "Belgium Recourse Provision"),²⁵ The Netherlands (the "Dutch Arbitration Act")²⁶ in 1986, and Switzerland in 1989 (the "Swiss Arbitration Law").²⁷ Sweden, which has a long-standing liberal tradition in international commercial arbitration,²⁸ will also be examined in this Article.

This Article will analyze this trend and attempt to assess its impact on the efficiency of international commercial arbitration as a viable alternative to litigation before the national judiciary. Where appropriate, the new laws will be compared to the UNCITRAL Model Law (the "Model Law"),²⁹ today's archetype of modern commercial arbitration laws. Finally, this

act applies in England and Wales but not in Scotland. *Id.* § 8(4), *reprinted in* V Y.B. COM. ARB. at 246.

23. Decree No. 81-500 on International Arbitration, 1981 *JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE* 1402 (codified as amended at CODE CIVIL [C. CIV.] arts. 1492-1507), *reprinted in* VII Y.B. COM. ARB. 272 (1982) (English trans.).

24. Federal Law of Feb. 2, 1983 (codified as amended at Zivilprozessordnung [ZPO] §§ 577-599 (Aus.)), *reprinted in* IX Y.B. COM. ARB. 301 (1984) (English trans.). The new law was strongly influenced by the proposals of a 1980 U.S.-Hungarian working group. Melis, *Guide to Commercial Arbitration in Austria*, in *INTERNATIONAL COMMERCIAL ARBITRATION* pt. IV.B.(a).1, 7 (1986). Austria's growing significance as *situs* for international arbitrations is reflected in the 1985 Tripartite Agreement Among the Austrian Federal Economic Chamber, Vienna, the American Arbitration Association, New York, and the Bulgarian Chamber of Commerce and Industry, Sofia, *reprinted in* XII Y.B. COM. ARB. 197 (1987) (English trans.), recommending that arbitration be conducted under the auspices of the Arbitral Centre of the Austrian Federal Economic Chamber.

25. Loi Relative à l'Annulation des Sentences Arbitrales, 1985 *MONITEUR BELGE* 5106 (codified as amended at CODE JUDICIAIRE [C. JUD.] art. 1717(4)), *reprinted in* XI Y.B. COM. ARB. 369 (1986) (English trans.).

26. Netherlands Arbitration Act 1986 (codified as amended at WETBOEK VAN BURGERLIJKE RECHTSVORDERING [RV.] arts. 1020-1076, *reprinted in* XII Y.B. COM. ARB. 370 (1987) (English trans.).

27. Bundesgesetz über das Internationale Privatrecht [IPRG], ch. 12, arts. 176-197, Systematische Sammlung des Bundesrechts [SR] 291, Recueil Systematique du Droit Fédéral [RS] 291, Raccolta Sistemática del Diritto Federale [RS] 291 (Switz.), *reprinted in* XIII Y.B. COM. ARB. 446 (1988) (English trans.).

28. The US/USSR Optional Arbitration Clause Agreement of 1977 recommends arbitration to be held under the auspices of the Stockholm Chamber of Commerce. III Y.B. COM. ARB. 299 (1978). Further, over 90% of U.S.-China contracts provide for Beijing or Stockholm as *situs* for arbitration. See Mitchell & Stein, *United States-China Commercial Contracts*, 20 *INT'L LAW*. 897, 911-12 (1986).

29. UNCITRAL, MODEL LAW OF INTERNATIONAL COMMERCIAL ARBITRATION, UN Doc. A/40/17 (1985) (United Nations Commission for International Trade Law) [hereinafter MODEL LAW], *reprinted in* XI Y.B. COM. ARB. 380 (1986). See generally Herrmann, *The UNCITRAL Model Law—Its Background, Salient Features and Purposes*, 1

Article will focus on the possible influence of the new laws on arbitration laws of other states, taking the Federal Republic of Germany as an illustrative example.

I. TRANSNATIONAL COMMERCIAL ARBITRATION: A DEFINITIONAL APPROACH

In contrast to the term "commercial," which is given wide meaning in most of the laws and the Model Law,³⁰ it is necessary to find at least a rudimentary definition of "transnational" or "international" arbitration, since most of the new laws distinguish between national and international arbitration and apply the liberal provisions of their laws only to the latter with domestic arbitration remaining under more stringent control of municipal courts.³¹

What exactly constitutes this international character of the arbitral proceedings is still disputed among courts, practitioners, and national legislatures. The new laws can be divided into three categories. The first category consists of those laws that provide an entire legal framework for international arbitration. The second category includes laws enacted with special provisions for recourse to national courts in international

ARB. INT'L 6 (1985) (discussing the history of, and negotiation process leading to, the final version of the Model Law).

30. The Model Law refers to the term "commercial" in a footnote to article 1(1), emphasizing that the term

should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road.

MODEL LAW, *supra* note 29, art. 1(1) n.1, reprinted in XI Y.B. COM. ARB. at 381. The Model Law leaves untouched, however, all laws "by virtue of which certain disputes may not be submitted to arbitration . . ." *Id.* art. 1(5), reprinted in XI Y.B. COM. ARB. at 381. The new Swiss arbitration law covers "any claim related to a party's assets, rights or liabilities," which includes "all types of claims, whether contractual, tortious, commercial, or financial." Poncet & Gaillard, *Introductory Note*, 27 I.L.M. 37, 45 n.1 (1988).

31. See Lalive, *Problèmes Spécifiques de l'Arbitrage International*, 1980 REVUE DE L'ARBITRAGE 341, 345; Klein, *La Nouvelle Réglementation Française de l'Arbitrage International et les Lois Suisses*, in RECUEIL DE TRAVAUX SUISSES SUR L'ARBITRAGE INTERNATIONAL 57, 58-59 (Int'l Council for Commercial Arbitration ed. 1984).

arbitrations. The third category covers the laws that make no distinction at all between national and international arbitration taking place on their soil.

The French Arbitration Law belongs to the first category and is rooted in the case law of the French Cour de Cassation.³² It focuses on the nature of the dispute and defines international arbitration as "any dispute that involves the interests of international trade."³³ This formulation requires a complex consideration of mostly economic criteria inherent in the transaction, the nationality of the parties, transborder movement of goods or payment,³⁴ and seat of the arbitration.³⁵ Similarly, to be recognized as international under the Swiss Arbitration Law, "at the time of the conclusion of the arbitration agreement, at least one of the parties had neither its domicile nor its habitual residence in Switzerland."³⁶

The U.K. Arbitration Act belongs to the second category and by means of a negative definition, uses a geographic criterion to determine those arbitrations where exclusion agreements are allowed and regards as domestic any agreement that does not provide, expressly or by implication, for arbitration outside the United Kingdom or to which there was no foreign party, be it individual or corporation, at the time the agreement was made.³⁷ The Belgian Recourse Provision is applicable only in cases where neither of the parties is a Belgian national, is a legal entity created in Belgium or has a branch or

32. The court focused on this criterion as early as 1930. See Judgment of Feb. 19, 1930, Cass. civ., Fr., 1930 Bulletin des arrêts de la Cour de cassation, chambres civiles [Bull. Civ.] 75 ("mettant ainsi en jeu des intérêts de commerce international"); accord Judgment of January 27, 1931, Cass. civ., Fr., 1931 Bull. Civ. 13.

33. C. Civ. art. 1492, reprinted in VII Y.B. COM. ARB. 280 (1982) (English trans.).

34. "[L]e contrat doit produire comme un mouvement de flux et de reflux au-dessus des frontières, des conséquences réciproques dans un pays et dans un autre." Fouchard, *L'Arbitrage International en France Après le Décret du 12 Mai 1981*, 109 JOURNAL DU DROIT INTERNATIONAL [J.D.I.] 374, 377 (1982) (quoting Judgment of May 17, 1927, Cass. Civ., Fr., 1928 Périodique et Critique 25).

35. See Judgment of Apr. 26, 1985, Cour d'appel, Paris, Fr., reprinted in 113 J.D.I. 175, 179 (1986); see also Fouchard, *Quand un Arbitrage est-Il International?*, 1970 REVUE DE L'ARBITRAGE 59.

36. IPRG art. 176(1), SR 291, RS 291, RS 291, reprinted in XIII Y.B. COM. ARB. 446, 447 (1988) (English trans.).

37. Arbitration Act, 1979, ch. 42, art. 3(7), reprinted in V Y.B. COM. ARB. 239, 243 (1980).

any other establishment in Belgium.³⁸ Under Austrian law, an award is considered "foreign" if it is rendered outside Austria,³⁹ meaning there is no distinction in Austria between domestic and international arbitration,⁴⁰ and this approach also holds true for the Swedish Arbitration Act.⁴¹ The European Convention Providing a Uniform Law on Arbitration, on the other hand, although predating the new laws by more than twenty years, combines the "nature" and geographical test and looks at interests of international trade and residence or seat of the parties involved.⁴²

The Model Law, in its efforts to reach maximum acceptability in the international community, combines all the above approaches and focuses *alternatively* on the place of business or seat of arbitration or place of performance or agreement of the parties.⁴³ In addition, the Model Law is applicable in cases where "the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country."⁴⁴

The Dutch Arbitration Act belongs to the third category, since it applies equally to both domestic and international arbitral proceedings.⁴⁵ The Dutch legislature was well aware of the problems and uncertainties connected with the traditional distinction between international and domestic arbitration, which is the major flaw of today's modern commercial arbitration.⁴⁶ The drafters, strongly influenced by the Model Law, thought that the flexibility of the new law allows application

38. C. JUD. art. 1717(4), *reprinted in XI Y.B. COM. ARB.* 369 (1986) (English trans.).

39. *See Melis, supra note 24*, at 29.

40. *See Melis, Austria*, IV Y.B. COM. ARB. 21, 35 (1979).

41. *See ARBITRATION IN SWEDEN* 160 (Stockholm Chamber of Commerce ed. 1984).

42. European Convention Providing a Uniform Law on Arbitration, June 20, 1966, art. 1(1)(a), II Europ. T.S. No. 56.

43. MODEL LAW, *supra note 29*, art. 1(3), *reprinted in XI Y.B. COM. ARB.* at 381.

44. *Id.* art. 1(3)(c), *reprinted in XI Y.B. COM. ARB.* at 381.

45. The new Arbitration Rules of the Netherlands Arbitration Institute, in force as of December 1, 1986, contain some provisions that apply only to international arbitration. Article 1(g), for example, defines international arbitration as "an arbitration in which at least one of the parties is domiciled or has his seat or actual residence outside the Netherlands." Arbitration Rules of the Netherlands Arbitration Institute, art. 1(g), *reprinted in XIII Y.B. COM. ARB.* 205, 209 (1988) (English trans.). The Netherlands Arbitration Institute has, thus, adopted the Swiss approach.

46. *See generally Delaume, Court Intervention in Arbitral Proceedings*, in *RESOLVING*

and, more importantly, adjustment to both kinds of arbitration.⁴⁷

Interestingly enough, the German delegation was not successful during the negotiations of the Model Law when it suggested a broad scope of application covering both domestic and transnational arbitrations.⁴⁸ Many countries opposed this idea, arguing that traditionally grown arbitrations, which have evolved out of the typical national particularities of each country, should be maintained.⁴⁹ Consequently, negotiations on this issue were particularly tough and long.⁵⁰ The traditional dichotomy, however, is not without flaws. Under the new Swiss Arbitration Law, a dispute involving a cross-border sale of goods by two subsidiaries incorporated in Switzerland, but fully owned by foreign companies, might be deemed domestic and hence fall outside of the scope of the new law.⁵¹

The U.S. delegation, during the Model Law negotiations, tried to find a remedy for these frictions and favored a provision that included conflicts between domestic companies, if at least one of them is a foreign owned subsidiary.⁵² This proposal was rejected, however, which seems acceptable, given the fact that the broad coverage provision of article 1(3)(c) of the Model Law⁵³ might eventually be applied to these cases.⁵⁴

The French judiciary has encountered considerable

TRANSNATIONAL DISPUTES THROUGH INTERNATIONAL ARBITRATION 195, 223 (T. Carbonneau ed. 1984).

47. See van den Berg, *The Netherlands Arbitration Act 1986*, 15 INT'L BUS. LAW. 356 (1987).

48. See Böckstiegel, *Das UNCITRAL-Modell-Gesetz für die Internationale Wirtschafts-Schiedsgerichtsbarkeit*, 30 RECHT DER INTERNATIONALEN WIRTSCHAFT [RIW] 670, 675 (1984). Professor Böckstiegel participated in the negotiations of the Model Law as a representative of the International Law Association.

49. See *Id.*

50. *Id.* France favored a general, abstract definition, which was also rejected since many countries feared this would leave too much freedom to national courts to interpret this definition too restrictively. *Id.*

51. See Poncet & Gaillard, *supra* note 30, at 39. The result might be different under French law. See Gaillard, *The UNCITRAL Model Law and Recent Statutes on International Arbitration in Europe and North America*, 2 ICSID REV.- FOREIGN INVESTMENT L.J. 424, 428-29 (1987).

52. See Böckstiegel, *supra* note 48, at 676.

53. MODEL LAW, *supra* note 29, art. 1(3)(c), reprinted in XI Y.B. COM. ARB. 380, 381 (1986). Such conflict might involve substantial foreign commercial interests which might be sufficient to fall under the Model Law. See Böckstiegel, *supra* note 48, at 676.

54. See Böckstiegel, *supra* note 48, at 676.

problems in determining consistent criteria for the international character of arbitration under the French Arbitration Law. The Cour d'appel, Paris, for example, had to pierce the corporate veil of one of the parties to consider as international an arbitration involving the sale of a vessel between two Italian companies in Rome that had provided for arbitration under the auspices of the International Chamber of Commerce (the "ICC") in Paris.⁵⁵ In contrast, the Cour de Cassation refused to consider as international an arbitration involving an agency contract between two French parties concerning representation of one of the parties in Colombia.⁵⁶

The German proposals during the Model Law negotiations and the new Dutch Arbitration Act question the different treatment of domestic and international arbitration.⁵⁷ Today's dispute over the nature of transnational or international commercial arbitration seems to polarize the analysis into two extreme positions: either continue to cope with conflicting definitions deemed necessary to uphold a different treatment of both domestic and international arbitrations or abolish this traditional dual approach and find a uniform law for both. The latter extreme may lead to a harmonization of the national law but would by no means guarantee harmonization of the different national arbitration laws. In view of the still existing multifaceted picture of domestic arbitrations in many countries, the way of the Model Law seems more practical.

At present, however, there is no uniform picture as to the scope of the new laws, and one needs to look at the approach chosen by the respective national legislature when interpreting the new laws.

55. Judgment of Apr. 26, 1985, Cour d'appel, Paris, Fr., reprinted in 113 J.D.I. 175 (1986), where the court, leaving aside the legal criteria of *siège social* (seat), which is used in French jurisprudence to determine the seat of a company, focused on two purely economic criteria, the foreign shareholders controlling the company and the funds for the transaction being obtained from foreign sources. *Id.*, reprinted in 113 J.D.I. at 179-80.

56. Judgment of Oct. 7, 1980, Cass. civ. Ire, Fr., La Semaine Juridique (Juris-Classeur Périodique) [J.C.P.] II No. 54, 19480.

57. It should be pointed out that the element of consumer protection, a basic premise for control of domestic arbitration, is of less importance in international arbitrations. See A. REDFERN & M. HUNTER, *supra* note 6, at 10.

II. RECOURSE AND RELATED REMEDIES

When a litigant is dissatisfied with the judgment of a national court, he may appeal to a court of higher instance. The two- or multi-instance court system is established in both common- and civil-law systems and is designed to ensure justice and uniformity of case law.⁵⁸ The appeal is the only ordinary remedy and can be based on issues of procedural or substantive law and leaves the case within the court system.

The arbitration process, on the other hand, is more complicated due to its dual private and jurisdictional nature.⁵⁹ A first distinction has to be made between internal recourse, which leaves the case within the arbitral system, and external recourse, which transfers the case from arbitration into the national judicial system. The former is rarely utilized but can be found in commodity arbitrations or other arbitrations established by trade associations,⁶⁰ as well as in the Dutch Arbitration Act,⁶¹ and to a lesser extent the Austrian Arbitration Law.⁶² Modern arbitration laws and institutional arbitration

58. See M. GLENDON, M. GORDON, & C. OSAKWE, *COMPARATIVE LEGAL TRADITIONS* 191 (1985). The authors discuss appellate review in the civil-law systems, pointing out that a party dissatisfied with the results of the appeal may seek review by the highest court (Cour de Cassation in France, Bundesgerichtshof in Germany) which, however, may only consider questions of law and not of facts. *Id.* For a discussion of appellate procedure in common-law jurisdictions, see *id.* at 547.

59. See Poznanski, *The Nature and Extent of an Arbitrator's Powers in International Commercial Arbitration*, J. INT'L ARB., Sept. 1987, at 71.

Commercial arbitration is consensual in that it rests upon the agreement of the parties to submit their dispute for resolution to a third party. However, it is also judicial in that it provides for a final determination of the dispute which carries with it the possibility of direct enforcement, as does the judgment of an ordinary court.

Id.

60. Typical examples are the Grain and Feed Trade Association Arbitration Rules, reprinted in 3 C. SCHMITTHOFF, *INTERNATIONAL COMMERCIAL ARBITRATION* pt. V (1985), and Netherlands Oils, Fats and Oilseeds Trade Association, Rules of Arbitration, reprinted in C. SCHMITTHOFF, *supra*. In this context, one has to distinguish between "quality" and "technical" arbitration since appeal provisions are usually only applicable to the latter. See ZENSKE, *DIE SCHIEDSGERICHTSBARKEIT IM INTERNATIONALEN HANDEL MIT BAUMWOLLE, GETREIDE, KAFFEE UND ZUCKER* 362 (1975). The Dutch arbitration law, however, provides that arbitration may be used to determine "only . . . the quality or condition of goods." Rv. art. 1020(4)(a), reprinted in XII Y.B. COM. ARB. 370, 372 (1987) (English trans.).

61. See Rv. art. 1050, reprinted in XII Y.B. COM. ARB. 370, 378-79 (1987) (English trans.).

62. See ZPO § 594(1), reprinted in IX Y.B. COM. ARB. 301, 304 (1983) (English trans.).

frameworks or standard arbitration clauses tend not to provide for internal recourse procedures, mainly because the parties want a speedy resolution of their dispute.

External recourse is further distinguished between appeal to a court on points of law or factual mistakes and other grounds for recourse. Again, provisions that provide for appeal in international arbitration are unknown or have been abolished in most jurisdictions⁶³ and can only be found in the United Kingdom under the U.K. Arbitration Act.⁶⁴ In the other jurisdictions that are analyzed in this Article, the term "recourse" includes any motion to vary or set aside (annul) the award or to remit it for reconsideration to the arbitral tribunal.⁶⁵ In contrast to an appeal, however, the grounds for this recourse are limited to procedural deficiencies or violations of public policy.⁶⁶

These forms of recourse, all of which may be characterized as ordinary remedies similar to those generally found in codes of civil procedure, have to be distinguished from mere corrections of awards, which are allowed under many national arbitration laws,⁶⁷ including the Model Law⁶⁸ and the Arbitration Rules.⁶⁹ This refers to corrections of minor clerical or typographical errors in awards by the arbitral tribunal, which is

63. "Under the law of most countries, there is no appeal against an [international] arbitral award." Delaume, *supra* note 46, at 217. This general trend is understandable, given the fact that appeal would lead to a reconsideration of the merits of the case with the court substituting its own decision for that of the arbitral tribunal, a procedure that runs counter to the trend of arbitral autonomy. See A. REDFERN & M. HUNTER, *supra* note 6, at 319, 325. The situation is different in domestic arbitrations, like in France, where the parties have the right to appeal. C. CIV. art. 1481, *reprinted in* VII Y.B. COM. ARB. 272, 278 (1982) (English trans.).

64. Arbitration Act, 1979, ch. 42, § 2, *reprinted in* V Y.B. COM. ARB. 239, 240 (1980); *see infra* notes 175-176 and accompanying text.

65. See A. REDFERN & M. HUNTER, *supra* note 6, at 321.

66. For an analysis of whether the notion of "public policy" in this context comprises substantive rather than procedural issues, *see infra* notes 253-55 and accompanying text.

67. See, e.g., Rv. art. 1060(1), *reprinted in* XII Y.B. COM. ARB. 370, 381 (1987) (English trans.) (correction justified no later than 30 days after deposit of award in the case of "manifest computing or clerical error," either upon request or upon its own initiative); Arbitration Act, 1950, 14 Geo. 6, ch. 27, § 17 (correction restricted to "any clerical mistake or error arising from any accidental slip or omission").

68. The Model Law imposes a time limit of 30 days from the receipt of the award. MODEL LAW, *supra* note 29, art. 33(1)-(2), *reprinted in* XI Y.B. COM. ARB. at 388.

69. UNCITRAL Rules, *supra* note 10, art. 36.

common in many court systems,⁷⁰ and constitutes an informal procedure falling outside the scope of recourse or appeal. There is an inherent danger, however, that application for correction may be abused as a well disguised attempt to achieve review of the award on the merits.⁷¹

The Model Law⁷² inspired the Dutch legislature to give parties the opportunity to apply to the tribunal for an "additional award" in case of a material omission in the original award, i.e., the tribunal not having decided one of the issues before it (decision *infra petita*).⁷³ Such application is an indispensable precondition for an action to have the award set aside.⁷⁴ The new laws did not go as far, however, as to allow application to the tribunal for authoritative interpretation of the award, since the potential for abuse was deemed too dangerous for effective arbitration and enforcement proceedings.⁷⁵

A further important distinction has to be drawn between recourse from a final arbitral award and the defenses raised in enforcement proceedings under article V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention").⁷⁶ This is all the more important since most of the legislatures have tried to avoid frictions between judicial supervision of the award and the ensuing enforcement proceedings abroad by adapting the grounds for challenging an award to the defenses of article V

70. See, e.g., Zivilprozessordnung [ZPO] § 319 (W. Ger.) (corrections of judgments).

71. English courts require strong prima facie proof of mistake by arbitrator. See *Food Corp. of India v. Marastro Cia Naviera S.A.*, 1986 Lloyd's Rep. 209, 216 (C.A.).

72. The MODEL LAW, *supra* note 29, art. 33(3), reprinted in XI Y.B. COM. ARB. at 388-89, and the UNCITRAL Rules, *supra* note 10, art. 37, both impose a time limit of 30 days upon receipt of the award.

73. Rv. art. 1061, reprinted in XII Y.B. COM. ARB. 370, 381-82 (1987) (English trans.). It has been pointed out that the points overlooked, had they been decided in the original award, might have altered the whole balance of the award, and the aggrieved party should have the right to have the award set aside. See A. REDFERN & M. HUNTER, *supra* note 6, at 328.

74. Rv. art. 1065(6), reprinted in XII Y.B. COM. ARB. 370, 383 (1987) (English trans.).

75. For a comment on the result under the Swiss arbitration law, see Briner, *Die Anfechtung und Vollstreckung des Schiedsentscheides*, in *DIE INTERNATIONALE SCHIEDSGERICHTSBARKEIT IN DER SCHWEIZ* (II) 99, 106 (K. Böckstiegel ed. 1989).

76. New York Convention, *supra* note 13, art. V, 21 U.S.T. at 2520, T.I.A.S. No. 6997, at 4, 330 U.N.T.S. at 40.

of the New York Convention. In addition, decisions of the courts in the enforcement proceeding may be appealed to a higher court, so that there may be parallel recourse proceedings, one against the award itself and the other abroad against the enforcement decision of the foreign court.⁷⁷

III. THE NEW ARBITRATION LAWS

The new arbitration laws analyzed in this section are in order of rigidity with which each national legislature has dealt with the issue of recourse and appeal to its national courts. This section also includes a brief look at the genesis of each law to reveal that the problem of challenging international arbitral awards was of paramount importance, in one way or another, in the drafting of the new laws.

A. France: Limited, Non-Excludable Recourse

The French Arbitration Law was mainly a response to the Götaverken⁷⁸ and NORSOLOR⁷⁹ cases in which the Cour d'appel, Paris flatly declined appellate jurisdiction over an award rendered in France under the ICC Arbitration Rules. The court, in these cases, reasoned that since the awards had no link whatsoever with the French legal system—even though in the NORSOLOR case the defendant was a French company—and appeal under the then existing French arbitration law⁸⁰ was permissible only for domestic and not for international arbitration, the awards were insulated from any judicial review by the French courts. In the aftermath of these decisions, French arbitration experts feared that as a result of this *laissez-faire* attitude of the Cour d'appel, the international com-

77. In Judgment of July 12, 1984, District Court Amsterdam (*The Pyramids*), reprinted in X Y.B. COM. ARB. 487 (1985) (English trans.), an arbitration award was recognized by a Dutch court on the same day it was annulled by a French Court in Judgment of July 12, 1984, Cour d'appel, Paris, Fr. (*The Pyramids*), reprinted in 23 I.L.M. 1048 (1984) (English trans.).

78. Judgment of Feb. 21, 1980, Cour d'appel, Paris, Fr., 1980 Recueil Dalloz-Sirey, *Jurisprudence* [D.S. Jur.] 568.

79. Judgment of Dec. 9, 1980, Cour d'appel, Paris, Fr., reprinted in 20 I.L.M. 887 (1980) (English trans.).

80. France had just promulgated a new law on domestic arbitration, Decree No. 80-354, 1980 J.O. 1238 (codified as amended at C. Civ. art. 1442-1491). For a general discussion of Decree No. 80-354, see *La Reforme de Droit Français de l'Arbitrage*, 1980 REVUE DE L'ARBITRAGE 579.

munity would lose confidence in French international commercial arbitration,⁸¹ and transnational awards rendered in France would become unenforceable abroad under the New York Convention.⁸² In response to these concerns, the French Arbitration Law was enacted to allow actions for annulment of transnational awards ("recours en annulation") if (i) there was no valid arbitration agreement or if the agreement had lapsed,⁸³ (ii) there were irregularities in the appointment of the arbitrators or composition of the tribunal,⁸⁴ (iii) the arbitrators exceeded their authority,⁸⁵ (iv) the "principle of adversarial process" (due process) was ignored,⁸⁶ or (v) the recognition or enforcement would be contrary to international public policy.⁸⁷ The action has to be brought within one month following official notification of judicial declaration of the award's executory force.⁸⁸ The French legislature did not leave it up to the parties to exclude these mandatory recourse provisions,⁸⁹ but the exhaustive list of grounds for annulment constitutes the minimum standard for judicial review and enforceability of transnational awards.⁹⁰

It should be noted, however, that execution of the award is suspended during the one-month period of challenge and the challenge itself.⁹¹ This provision may have serious repercussions on the enforceability of the award abroad under article V(1)(e) of the New York Convention, since the court of the enforcement jurisdiction may refuse enforcement on the grounds that the award has been suspended in the country in

81. See W.L. CRAIG, W. PARK & J. PAULSSON, *supra* note 20, § 30.03.

82. See Fouchard, *Les Recours Contre les Sentences Non Françaises*, 1980 *REVUE DE L'ARBITRAGE* 693, 696.

83. C. CIV. art. 1504, *reprinted in VII Y.B. COM. ARB.* 272, 282 (1982) (English trans.).

84. *Id.* art. 1502(1), *reprinted in VII Y.B. COM. ARB.* at 281.

85. *Id.* art. 1502(2), *reprinted in VII Y.B. COM. ARB.* at 281.

86. *Id.* art. 1502(3), *reprinted in VII Y.B. COM. ARB.* at 281.

87. *Id.* art. 1502(5), *reprinted in VII Y.B. COM. ARB.* at 282.

88. *Id.* art. 1505, *reprinted in VII Y.B. COM. ARB.* at 282.

89. In Judgment of July 12, 1984, Cours d'appel, Paris, Fr., *reprinted in 23 I.L.M.* 1048 (1984) (English trans.), the court held that article 24 of the ICC Arbitration Rules did not contemplate a waiver of recourse under French law. *Id.*, *reprinted in 23 I.L.M.* at 1055.

90. W.L. CRAIG, W. PARK & J. PAULSSON, *supra* note 20, § 30.04.

91. C. CIV. art. 1506, *reprinted in VII Y.B. COM. ARB.* 272, 282 (1982) (English trans.).

which it was made.⁹²

B. *Sweden: Limited, Non-Excludable Recourse*

Sweden, under the Swedish Arbitration Act,⁹³ has long maintained a liberal attitude towards the relation of its judiciary to arbitrations taking place on its soil,⁹⁴ thus there is no appeal of arbitral awards to domestic courts under the Swedish Arbitration Act. An award is void *ipso iure* only if (i) there was no valid arbitration agreement,⁹⁵ (ii) the subject matter was non-arbitratable,⁹⁶ (iii) the award was not in writing or was not signed by at least a majority of the arbitrators,⁹⁷ (iv) the award involved a question that was subject to a pending court action,⁹⁸ or (v) the award is so obscure as to make enforcement impossible.⁹⁹ The nullity of the award can be invoked by the parties, without prior motion to have the award set aside, but a declaratory action is permissible.¹⁰⁰ In the case of "voidable" awards, the party has to launch an action to set aside the award within sixty days after the service of the award on pain of being considered to have waived the right.¹⁰¹ A waiver may also be inferred from procedural conduct of the party, one example being the party taking part in the proceedings without objec-

92. New York Convention, *supra* note 13, art. V, 21 U.S.T. at 2520, T.I.A.S. No. 6997, at 5, 330 U.N.T.S. at 40.

93. Lag om skiljemän, 1929 SVENSK FÖRFATTNINGSSAMLING [SFS] 145, *reprinted in* ARBITRATION IN SWEDEN app. 2, at 172 (Stockholm Chamber of Commerce ed. 1984) (English trans.); Lag om utländska Skiljeavtal och skiljedomar, 1929 SFS 147, *reprinted in* ARBITRATION IN SWEDEN, *supra*, app. 3, at 181.

94. Judgment of Oct. 11, 1955, 1955 Nytt Juridiskt Arkiv [NJA] 500. There the court refused to review an award on the merits. One author has noted that "[w]hether the award is rendered within or [outside] Sweden, the desire to maintain the integrity of the institution of arbitration predominates and, as a result, every effort is made to give effect to an award" Paulsson, *The Role of Swedish Courts in Transnational Commercial Arbitration*, 21 VA. J. INT'L L. 211, 230 (1981).

95. 1929 SFS 145, § 20(1), *reprinted in* ARBITRATION IN SWEDEN, *supra* note 93, at 177.

96. *Id.* § 20(3), *reprinted in* ARBITRATION IN SWEDEN, *supra* note 93, at 177.

97. *Id.* § 20(2), *reprinted in* ARBITRATION IN SWEDEN, *supra* note 93, at 177.

98. *Id.* § 20(3), *reprinted in* Arbitration in Sweden, *supra* note 93, at 177, in connection with § 1, *reprinted in* Arbitration in Sweden, *supra* note 93, at 172.

99. *Id.* § 22, *reprinted in* ARBITRATION IN SWEDEN, *supra* note 93, at 178.

100. See Alley, *International Arbitration: The Alternative of the Stockholm Chamber of Commerce*, 22 INT'L LAW. 837, 843 (1988).

101. 1929 SFS 145, § 21, *reprinted in* ARBITRATION IN SWEDEN, *supra* note 93, at 178.

tions.¹⁰² The grounds for challenge include (i) excess of jurisdiction,¹⁰³ (ii) choice of Sweden as improper forum,¹⁰⁴ (iii) improper appointment or disqualification of arbitrators,¹⁰⁵ (iv) award given after agreed arbitration period,¹⁰⁶ and (v) other procedural irregularities that "in probability" may be assumed to have influenced the decision of the tribunal.¹⁰⁷ The action must be brought within sixty days from receipt of the original or certified copy of the award,¹⁰⁸ and decisions of the court may be appealed to the Court of Appeal and even to the Supreme Court, but neither court is allowed to review the award on the merits.¹⁰⁹ The statutory time limit of six months for rendering an award does not apply to arbitrations when at least one party is domiciled outside Sweden. Section 17 of the Stockholm Chamber of Commerce Arbitration Rules, however, provides for a time limit of one year, extendable upon request of a party or the court,¹¹⁰ which triggers the mechanism of section 18 of the Swedish Arbitration Act.¹¹¹ Under this section, the arbitration agreement becomes void if the award is not rendered within the period stipulated by the parties.¹¹²

C. *The Netherlands: Limited, Non-Excludable Recourse*

The Dutch Arbitration Act replaced the old Dutch arbitration law, which had remained almost unchanged since 1838.¹¹³ Interestingly enough, the old Dutch arbitration law, though rooted firmly in the continental civil-law tradition, was strongly influenced and shaped by domestic case law to an extent that

102. See W.L. CRAIG, W. PARK & J. PAULSSON, *supra* note 20, § 31.03; Alley, *supra* note 100, at 843.

103. 1929 SFS 145, § 21(1), *reprinted in* ARBITRATION IN SWEDEN, *supra* note 93, at 178.

104. *Id.* § 21(2), *reprinted in* ARBITRATION IN SWEDEN, *supra* note 93, at 178.

105. *Id.* § 21(3), *reprinted in* ARBITRATION IN SWEDEN, *supra* note 93, at 178.

106. *Id.* § 21(1), *reprinted in* ARBITRATION IN SWEDEN, *supra* note 93, at 178.

107. *Id.* § 21(4), *reprinted in* ARBITRATION IN SWEDEN, *supra* note 93, at 178.

108. *Id.*

109. See INTERNATIONAL ARBITRATION SITES, *supra* note 10, at 72.

110. Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, art. 17, *reprinted in* ARBITRATION IN SWEDEN, *supra* note 93, app. 6, at 211, 215.

111. 1929 SFS 145, § 18, *reprinted in* ARBITRATION IN SWEDEN, *supra* note 94, at 177.

112. *Id.* An award without reasons is not sufficient to keep this deadline. See M. ADEN, INTERNATIONALE HANDELSCHIEDSGERICHTSBARKEIT 206 (1988).

113. See Vellekoop, *The New Arbitration Law in the Netherlands*, INT'L FIN. L. REV., May 1987, at 16.

made it impossible for foreign parties to judge the value of the Netherlands as a *situs* for international arbitration without knowing the details of the case law.¹¹⁴ The Dutch Arbitration Act is, to a large extent, a codification of this case law. The need for reform became even more necessary when, in 1981, the Iran-U.S. Claims Tribunal was established in The Hague and Dutch arbitration law, although not applicable to the procedure of the Tribunal, had to play an assistory role.¹¹⁵

The Dutch Arbitration Act is generally considered as one of the most liberal arbitration laws since it leaves maximum freedom to the parties in designing an arbitration framework suitable to their specific situation.¹¹⁶ Consequently, many provisions of the Dutch Arbitration Act are so-called "fall-back" provisions and apply only in case the parties have failed to provide otherwise.¹¹⁷ As to recourse against arbitral awards, the Dutch Arbitration Act has abolished the remedy of appeal to national courts.¹¹⁸ The Dutch Arbitration Act, however, provides for an extraordinary remedy of revocation of the award by national courts in case of fraud, forgery, or discovery of new documents ("request civiel"),¹¹⁹ but these grounds occur very rarely.¹²⁰ The only means of recourse under the Dutch Arbitration Act is the action for annulment ("vernietiging") of the award if (i) a valid arbitration agreement was lacking,¹²¹ (ii) the tribunal was constituted in violation of the rules applicable

114. See *id.*; see also Bühler, *Das Neue Niederländische Gesetz für Schiedsgerichtsbarkeit*, 33 RIW 901 (1987) (discussing basic principles of the Netherlands Arbitration Act).

115. See Tebbens, *A Facelift for Dutch Arbitration Law*, 34 NETH. INT'L L. REV. 141 (1987). The proceedings of the Tribunal are subject to the UNCITRAL Rules. The Netherlands legislature even considered a bill on the applicability of Dutch arbitration law to awards rendered by the Tribunal. See van den Berg, *Proposed Dutch Law on the Iran-U.S. Settlement Declaration: A Reaction to Mr. Hardenberg's Article*, 12 INT'L BUS. LAW. 341, 342 (1984).

116. See Bühler, *supra* note 114, at 901.

117. See van den Berg, *The Netherlands*, XII Y.B. COM. ARB. 3, 4 (1987).

118. See *id.* at 29. Previously, this remedy had to be consented to by the parties, and Dutch practice developed a way of recourse that resulted in a declaration of nullity or voidness *ab initio* of the award. See Tebbens, *supra* note 115, at 157.

119. Rv. art. 1068(1), reprinted in XII Y.B. COM. ARB. 370, 384 (1987) (English trans.). This remedy parallels the "recours en révision" under C. Civ. art. 1491, reprinted in VII Y.B. COM. ARB. 272, 280 (1982) (English trans.).

120. See van den Berg, *supra* note 117, at 33.

121. Rv. art. 1065(1)(a), reprinted in XII Y.B. COM. ARB. 370, 383 (1987) (English trans.).

thereto,¹²² (iii) the tribunal has not complied with its mandate,¹²³ (iv) the award was not signed or does not contain reasons as required by Dutch law,¹²⁴ or (v) the award or the way in which it was made, violates "public policy or good morals."¹²⁵

The Dutch legislature was well aware of the dangers of dilatory tactics and included several procedural safeguards. The party is barred from attacking the award on grounds enumerated in (i) to (iii) above if it has not invoked them in the arbitral proceedings, even though these grounds were already known to the party.¹²⁶ To ensure that a party does not invoke the grounds for challenge one after the other before the court, the party has to mention *all* grounds for setting aside in the writ of summons on pain of being barred.¹²⁷ The time limit for a motion to set aside the award is three months from the date of deposit of the award with the Registry of the court or from the date the award is officially served upon the other party.¹²⁸ In contrast to the French Arbitration Law, and to avoid enforcement problems under the New York Convention, the Dutch Arbitration Act provides that an application for setting aside the award does not suspend the enforcement of the award unless the court that decides the application grants suspension.¹²⁹ The Dutch courts will hopefully construe this provision restrictively and grant suspension only in cases where they consider the action for setting aside the award "evidently" or "obviously" justified.

It is important to note at this juncture that the Dutch Arbitration Act is not without its flaws. The successful challenge of the award leads to a total transfer of the dispute into the national court system,¹³⁰ a situation that is highly problematic for international arbitration.¹³¹ In many jurisdictions, the arbitra-

122. *Id.* art. 1065(1)(b), reprinted in XII Y.B. COM. ARB. at 383.

123. *Id.* art. 1065(1)(c), reprinted in XII Y.B. COM. ARB. at 383.

124. *Id.* art. 1065(1)(d), reprinted in XII Y.B. COM. ARB. at 383.

125. *Id.* art. 1065(1)(e), reprinted in XII Y.B. COM. ARB. at 383.

126. *Id.* art. 1065(2),(3), (4), reprinted in XII Y.B. COM. ARB. at 383.

127. *Id.* art. 1064(5), reprinted in XII Y.B. COM. ARB. at 383.

128. *Id.* art. 1064(3), reprinted in XII Y.B. COM. ARB. at 383.

129. *Id.* art. 1066(1)-(2), reprinted in XII Y.B. COM. ARB. at 383-84.

130. *Id.* art. 1067, reprinted in XII Y.B. COM. ARB. at 384. The parties may agree otherwise. *Id.*

131. Professor Fouchard maintains that parties to an international arbitration do not want their case to be litigated by the national judiciary of any country. The fact that the award is rendered (and appealed) in a certain country should not be suffi-

tion clause remains valid even after the award has been set aside.¹³² It is regrettable that the Dutch legislature has not adopted the approach taken by the Model Law, which gives the court authority to suspend the setting-aside proceedings to give the arbitral tribunal the opportunity to resume the arbitral proceedings or "to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside."¹³³

The Dutch Arbitration Act, which intended to avoid the problems connected with the enormous case load of the national courts, may ultimately become a victim of this very problem through this multi-instance challenge procedure before the Dutch judiciary. Time will show whether the Dutch legislature has indeed succeeded in striking "a fair balance between recourse instituted for justified reasons and recourse started for dilatory purposes."¹³⁴

D. Austria: Limited, Partially Excludable Recourse

The Austrian Arbitration Law provides a broad and exhaustive catalogue of grounds for an action to set aside an award rendered in Austria.¹³⁵ The grounds for a set-aside action ("Aufhebungsklage") include (i) invalid or missing arbitration agreement,¹³⁶ (ii) incapacity to conclude arbitration agreement,¹³⁷ (iii) improper representation of the parties,¹³⁸ (iv) irregular composition of the tribunal and other procedural irregularities,¹³⁹ (v) unjustified rejection of challenge of arbi-

cient to establish the jurisdiction of its courts. "Le juge français n'a aucune raison, ni aucun pouvoir, pour oublier dans ce cas leur volonté." Fouchard, *supra* note 34, at 412.

132. Melis, *supra* note 24, at 27.

133. MODEL LAW, *supra* note 29, art. 34(4), reprinted in XI Y.B. COM. ARB. at 389; see Bühler, *supra* note 114, at 905.

134. van den Berg, *supra* note 117, at 30.

135. ZPO § 595, reprinted in IX Y.B. COM. ARB. 301, 304-05 (1984) (English trans.). The revision was primarily intended to adapt the law to the growing number of international arbitrations taking place in Austria, especially in Vienna. See Melis, *Zur Neuordnung der Bestimmungen über die Schiedsgerichtsbarkeit in der Österreichischen Zivilprozessordnung*, in Festschrift für Arthur Bülow 129, 133 (Böckstiegel ed. 1981).

136. ZPO § 595(1)(1), reprinted in IX Y.B. COM. ARB. 301, 304 (1984) (English trans.).

137. *Id.*

138. *Id.* § 595(1)(2), reprinted in IX Y.B. COM. ARB. at 304.

139. *Id.* § 595(1)(3), reprinted in IX Y.B. COM. ARB. at 304.

trators,¹⁴⁰ (vi) excess of jurisdiction,¹⁴¹ and (vii) grounds for a trial *de novo* like awards obtained through forged documents, fraudulent or criminal acts, appearance of new favorable facts, or final judgments.¹⁴² The most important and potentially far-reaching ground contained in the Austrian Arbitration Law refers to an award that is

incompatible with the basic principles of the Austrian legal system or if it infringes mandatory provisions of the law, the application of which cannot be set aside by a choice of law of the parties even in a case where a foreign contact according to Article 35 of the International Private Law Act is involved.¹⁴³

This provision was intended to bring the Austrian Arbitration Law in line with the new Austrian Statute on Private International Law.¹⁴⁴ The first ground refers to violation of public policy, meaning Austrian public policy, which includes the basic principle of domestic constitutional, private, criminal, and procedural law.¹⁴⁵ The second alternative includes mandatory consumer protection laws, worker protection laws, and other laws designed to protect weak parties.¹⁴⁶ These grounds refer solely to domestic issues and are, thus, of no relevance for international arbitration.¹⁴⁷

The court, however, is not allowed to enter into a review of the merits. To avoid endless proceedings, the Austrian Arbitration Law provides that the arbitration clause becomes void if an award has been set aside twice by final and binding judgment.¹⁴⁸ Except for fraud and criminal behavior,¹⁴⁹ the

140. *Id.* § 595(1)(4), reprinted in IX Y.B. COM. ARB. at 304.

141. *Id.* § 595(1)(5), reprinted in IX Y.B. COM. ARB. at 305.

142. *Id.* § 595(1)(7), reprinted in IX Y.B. COM. ARB. at 305.

143. *Id.* § 595(1)(6), reprinted in IX Y.B. COM. ARB. at 305.

144. See H. FASCHING, *LEHRBUCH DES ÖSTERREICHISCHEN ZIVILPROZESSRECHTS* 1001 (1984).

145. See *id.*

146. See Melis, *supra* note 135, at 138.

147. See Melis, *supra* note 24, at 27-28.

148. ZPO § 595(2), reprinted in IX Y.B. COM. ARB. 301, 305 (1984) (English trans.). The underlying rationale for this provision was that appointment of an obviously incapable arbitral tribunal should not prevent the parties from pursuing the case in a different manner. See Melis, *supra* note 24, at 27-28. This provision does not, however, apply to awards set-aside under ZPO § 595(1)(1), reprinted in IX Y.B. Com. Arb. 301, 304 (1984) (English trans.).

149. ZPO § 596(3), reprinted in IX Y.B. COM. ARB. 301, 305 (1984) (English trans.).

time limit for an action to set aside is three months commencing with the service of the award.¹⁵⁰ The Austrian legislature has taken a very careful approach to exclusion of judicial review through party agreement, confining these exclusion agreements to the grounds of fraud, forged documents, criminal behavior, or appearance of new evidence;¹⁵¹ provided that both parties concluding the arbitration clause are businessmen.¹⁵² This provision was intended to increase the appeal of Austria as site for the international arbitration.¹⁵³ Challenge to the award on these grounds is allowed within ten years after the award has become final and non-appealable. This provision, however, was deemed impracticable for international arbitrations.¹⁵⁴ The other grounds are expressly designed as mandatory and non-excludable.¹⁵⁵

E. *England: Limited, Partially Excludable Recourse*

The English legislature was the first in Europe to tackle the problem of revising its old arbitration law. The U.K. Arbitration Act and its genesis are typical of all European laws. Regulation of appeal and rights of recourse were the primary reason for the revision and also the major benefit of the new law.

Prior to 1979, English courts exercised strong judicial control over both the arbitral proceedings and the ultimate

150. *Id.* § 596(2), reprinted in IX Y.B. COM. ARB. at 305.

151. *Id.* § 598(2), reprinted in IX Y.B. COM. ARB. at 306.

152. *Id.*

153. Professor Fasching has stated that the broad language of the new provision also applies to domestic arbitration, thus leading to the unique situation that Austrian parties can exclude, albeit to a limited extent, supervision by their national courts. H. FASCHING, *supra* note 144, at 1000. For the parallel situation and its constitutional implications in Switzerland, see *infra* note 219 and accompanying text.

154. See Melis, *supra* note 135, at 139.

155. ZPO art. 598(1), reprinted in IX Y.B. COM. ARB. 301, 306 (1984) (English trans.). The Rules of Arbitration and Conciliation of the Arbitral Centre of the Federal Economic Chamber of Vienna provide that "the awards of the Arbitral Centre are final. They cannot be the subject of any means of recourse." Rules of Arbitration and Conciliation of the Arbitral Centre of the Federal Economic Chamber of Vienna, sec. 25(1), reprinted in 2 C. SCHMITTHOFF, INTERNATIONAL COMMERCIAL ARBITRATION pt. IV.B. (a), 2, at 45, 52 (1986) (English trans.). This section, however, refers solely to internal appeal to a second arbitral tribunal or committee, while the domestic law on review of arbitral awards by national courts remains untouched. For case law related to this subject in the French and English courts, see *supra* note 89 and *infra* note 184, respectively.

award¹⁵⁶ to ensure uniform development of English commercial law and to lend predictability to the outcome of arbitral proceedings.¹⁵⁷ The system of appeals and application to remit and set aside awards was complicated, particularly for foreign lawyers,¹⁵⁸ and the ICC avoided England as seat for arbitrations under its auspices, since it offered numerous ways of dilatory tactics to the non-meritorious party.¹⁵⁹

The "interventionist"¹⁶⁰ character of English arbitration law was brought about by two special procedural features. The first was the "special case" procedure of the Arbitration Act, 1950 (the "1950 Arbitration Act").¹⁶¹ This was a post-award challenge procedure allowing the parties to raise questions of law for the decision of the courts or the courts to decide issues of law upon their own initiative either during the arbitral proceedings (consultative case) or in the ultimate award (alternative award). The courts' review, though limited to questions of law, could in practice include the finding of secondary facts by inference from the primary facts. The courts were also empowered to remit the award for further findings of facts and even to set aside the award for an inadequate factual basis.¹⁶² Parties were also not allowed to contract out this special review procedure.¹⁶³ A further source for delay was the court practice of setting aside an award if it was shown that there was an error on its face on a point of law.¹⁶⁴ This led many arbitrators to

156. "There appears to be an organic and psychological ethos which has made the English superior courts cherish their role in the conduct of both domestic and international commercial arbitrations and the related awards." Bentil, *Making England a More Attractive Venue for International Commercial Arbitration by Less Judicial Oversight*, J. INT'L ARB., Mar. 1988, at 49, 51.

157. See Kerr, *Arbitration Law Relevant to English-German Business Relations*, in *COMMERCIAL ARBITRATION IN THE FEDERAL REPUBLIC OF GERMANY AND IN ENGLAND* 5, 11 (K.H. Böckstiegel ed. 1987). The English Court of Appeals noted that if parties could exclude jurisdiction of the courts on questions of law, "the result might be that in time codes of law would come to be administered in various trades differing substantially from the English mercantile law." *Czarnikow & Co. v. Roth, Schmidt & Co.* [1922] 2 K.B. 478, 491 (C.A.).

158. See P. SANDERS, *ARBITRAGE INTERNATIONAL COMMERCIAL* 87 (1960).

159. See W.L. CRAIG, W. PARK & J. PAULSSON, *supra* note 20, § 29.01.

160. See Steyn, *England*, VIII Y.B. COM. ARB. 3, 4 (1983).

161. Arbitration Act, 1950, 14 Geo. 6, ch. 27, § 21.

162. See, e.g., *Fratelli Schiavo di Gennaro v. Richard J. Hall, Ltd.*, [1953] 2 Lloyd's Rep. 169, 173 (Q.B.).

163. See *Czarnikow & Co. v. Roth, Schmidt & Co.*, [1922] 2 K.B. 478, 488 (C.A.).

164. See *Absalom Ltd. v. Great W. Garden Village Soc'y Ltd.*, 1933 App. Cas. 592; *Landauer v. Asser*, [1905] 2 K.B. 184.

render their awards without reasons in order to avoid judicial supervision.¹⁶⁵ This structure led to the criticism that it would be "a matter of professional negligence to allow an English arbitration clause in any contract."¹⁶⁶

The U.K. Arbitration Act has restructured this review system significantly without, however, eliminating it. Appeal to a court of an arbitration award now requires consent of all parties or leave of the court.¹⁶⁷ This presupposes that the determination of the question of law concerned could substantially affect the rights of one or more of the parties. The court may condition its leave upon furnishing security or similar measures.¹⁶⁸ Appeal from the High Court's decision is still possible but is equally conditioned upon leave granted by the High Court or the Court of Appeals, and then only upon certification by the High Court that the matter is of "general public importance" or should be considered by the Court of Appeal "for some other special reason."¹⁶⁹ Although the U.K. Arbitration Act states that the special case procedure has been abolished, application to the High Court for interlocutory clarification of a question of law is still possible,¹⁷⁰ provided that the arbitrator or all parties agree and, most important, the court is convinced that the determination might produce "substantial savings in costs to the parties" and the question is one in respect of which leave to appeal would likely be granted.¹⁷¹ Under the U.K. Arbitration Act, awards are now immediately enforceable in order to avoid negative repercussions on enforcement abroad.¹⁷² Further, the High Court may, on application of one of the parties, order the arbitrator to render rea-

165. See W.L. CRAIG, W. PARK & J. PAULSSON, *supra* note 20, § 29.03.

166. See Park, *Judicial Supervision of Transnational Commercial Arbitration: The English Arbitration Act of 1979*, 21 HARV. INT'L L.J. 87, 94 n.42 (1980) (quoting Lord Hacking).

167. Arbitration Act, 1979, ch. 42, § 1(3)-(4), *reprinted in* V Y.B. COM. ARB. 239, 240 (1980).

168. *Id.* § 1(4), *reprinted in* V Y.B. COM. ARB. at 240.

169. *Id.* § 1(7)(b), *reprinted in* V Y.B. COM. ARB. at 241.

170. One author maintains that the Arbitration Act has reintroduced the case-stated and appeal procedure "in a slightly different form." Bentil, *supra* note 156, at 52 (quoting J. PARRIS, *ARBITRATION: PRINCIPLES AND PRACTICE* (1983)).

171. Arbitration Act, 1979, ch. 42, § 2(1)-(2), *reprinted in* V Y.B. COM. ARB. 239, 241 (1980). Appeal from this decision is again limited to cases which the court considers to be of general public importance or which should be considered by the Court of Appeals "for some other special reason." *Id.* § 2(3), *reprinted in* V Y.B. COM. ARB. at 241.

172. See W.L. CRAIG, W. PARK & J. PAULSSON, *supra* note 20, § 29.04; see Kolkey,

sons for his award, thus making judicial determination easier.¹⁷³

In contrast to the Dutch Arbitration Act, which regards its review provisions as mandatory and non-excludable,¹⁷⁴ the U.K. Arbitration Act provides that in non-domestic arbitrations¹⁷⁵ the parties may enter into an "exclusion agreement," to contract out the right to appeal to the High Court, the right to apply for a reasoned award, and the right to apply for interlocutory clarification of a question of law.¹⁷⁶ Although seemingly rather broad, this option is limited in two ways. First, the parties cannot abrogate the courts' powers to deal with arbitrators' misconduct and to remit awards for reconsideration.¹⁷⁷ Second, the exclusion agreements are further limited to so called "one-off" contracts intended for only one transaction¹⁷⁸ and are not permissible in "special category" arbitration (shipping, insurance, commodity) where standard form contracts require protection of the weak party and preservation of uniformity of law.¹⁷⁹

The U.K. Arbitration Act is thus a "typical English com-

Attacking Arbitral Awards: Rights of Appeal and Review in International Arbitrations, 22 INT'L LAW. 693, 704-05 (1988).

173. Arbitration Act, 1979, ch. 42, § 1(5), *reprinted in* V Y.B. COM. ARB. 239, 240 (1980). This section does not apply, however, unless the arbitrator has been notified by one of the parties that a reasoned award should be required unless such notice was unnecessary. *Id.* § 1(6), *reprinted in* V Y.B. COM. ARB. at 240.

174. Rv. art. 1020(3), *reprinted in* XII Y.B. COM. ARB. 370, 372 (1987) (English trans.).

175. Arbitration Act, 1979, ch. 42, § 3(7), *reprinted in* V Y.B. COM. ARB. 239, 243 (1980) (defining domestic arbitration). In domestic arbitrations, an exclusion agreement is permissible only after the commencement of the arbitration. *Id.* § 3(6), *reprinted in* V Y.B. COM. ARB. at 242.

176. *Id.* § 3(4), *reprinted in* V Y.B. COM. ARB. at 241-42.

177. Arbitration Act, 1950, 14 Geo. 6, ch. 27, §§ 22-23. Only section 21 of the Arbitration Act, 1950, ceased to have effect. *See* Arbitration Act, 1979, ch. 42, § 1(1), *reprinted in* V Y.B. COM. ARB. 239, 239-40 (1980).

178. The Arbitration Act, 1979, was primarily intended to favor "one-off" supra-national development contracts such as joint venture contracts between private parties and Third World governments, which are frequently executed on English forms and governed by English law. *See* Park, *supra* note 166, at 98.

179. In these cases, the exclusion agreement is possible only after the proceedings have commenced. Arbitration Act, 1979, ch. 42, § 4(1)(c)(i), *reprinted in* V Y.B. COM. ARB. 239, 243 (1980). This section does not apply to contracts governed by foreign law. *Id.* § 4(1)(c)(ii), *reprinted in* V Y.B. COM. ARB. at 243. In the case of a commodity contract subject to the law of Bermuda, which is English law, an exclusion agreement would be valid. This anomaly is known in London as "the Bermuda Hole." *See* Steyn, *supra* note 160, at 30.

promise,"¹⁸⁰ which has removed some of the major flaws of the 1950 Arbitration Act, but still leaves much to be desired. Foreign parties still run the risk of getting lost in the labyrinth of three different Arbitration Acts and the related case law.¹⁸¹ This is especially true for the exclusion agreement. The terminology is deceptive since parties can't insulate the arbitral award from any judicial review. Parties who for some particular reason want to maintain full judicial control over the ultimate award, however, have to be careful to avoid institutional arbitration frameworks that contain a waiver clause like the ICC Arbitration Rules¹⁸² or the Rules of the London Court of International Arbitration.¹⁸³ The English Commercial Court has considered this an exclusion agreement under section 3 of the U.K. Arbitration Act even though it was an oral stipulation, incorporated by reference in the contract.¹⁸⁴

Moreover, courts might utilize the many ambiguous terms in the U.K. Arbitration Act to exercise judicial review through the back door.¹⁸⁵ English courts have, however, worked out restrictive standards for review on questions of contractual interpretation, treating standard form contracts more leniently (leave is to be granted if the award is *probably* wrong on the point), then "one-off" clauses or contracts (leave is to be granted only if the award is *obviously* wrong on the point).¹⁸⁶

180. Kerr, *supra* note 157, at 11.

181. The third act affecting arbitrations in England is the Arbitration Act, 1975, ch. 3 (giving effect to the New York Convention).

182. The ICC Arbitration Rules provide that "[b]y submitting the dispute to arbitration by the International Chamber of Commerce, the parties shall be deemed . . . to have waived their right to any form of appeal insofar as such waiver can validly be made." ICC Arbitration Rules, *supra* note 14, art. 24(2).

183. Rules of the London Court of International Arbitration, art. 16.8, *reprinted in* 24 I.L.M. 1147, 1154 (1985).

184. See *Marine Contractors, Inc. v. Shell Petroleum Development Co. of Nigeria*, [1984] 2 Lloyd's Rep. 77, 79 (C.A.); *Arab African Energy Corp. v. Olieprodukten Nederland*, [1983] 2 Lloyd's Rep. 419, 423 (Q.B.).

185. See W.L. CRAIG, W. PARK & J. PAULSSON, *supra* note 20, § 29.06. "To render the exercise of these [still existing supervisory] powers innocuous, or less obnoxious to the international business or commercial community, the superior courts would need to demonstrate unwillingness, or considerable restraint in exercising them." Benti, *supra* note 156, at 51.

186. See *Antaios Compania Naviera S.A. v. Salen Rederierna (The Antaios)*, 1985 App. Cas. 191; *Pioneer Shipping Ltd. v. B.T.P. Tioxide (The Nema)*, 1982 App. Cas. 724. *But see* *Aden Refinery Co. Ltd. v. Ugland Management Co.*, 1987 Q.B. 650 (C.A.) (holding that irrespective of the probability of mistake, leave to appeal should be granted if conflicting arbitral decisions exist).

Further, a strong *prima facie* case that the arbitrator was plainly wrong is required.¹⁸⁷ The same holds true for a decision to grant or refuse leave to appeal, which is appealable only under very limited circumstances.¹⁸⁸ Some courts, however, seem to construe the appeal provisions too liberally.¹⁸⁹ The U.K. Arbitration Act has already been criticized as outdated and lagging behind international developments.¹⁹⁰

F. *Switzerland: Limited, Excludable Recourse*

Until January 1, 1989, arbitration in Switzerland was governed by the Concordat,¹⁹¹ the uniform Swiss arbitration law superseding the codes of civil procedure in most cantons.¹⁹² The Concordat allowed judicial recourse against an arbitration award in cases of alleged punishable acts in which a sentence was issued, or if the award was rendered in ignorance of important facts or of other evidence of decisive importance.¹⁹³ By far the most important recourse provision of the Concordat was article 36, which allowed a motion to set-aside the award ("Nichtigkeitbeschwerde," "recours en nullité") before cantonal courts in case of procedural irregularities¹⁹⁴ or if the

187. See *Seaworld Ocean Line Co. v. Cateye Maritime Co.*, [1989] 1 Lloyd's Rep. 30 (C.A.) (1988).

188. In *The Antaios*, the House of Lords limited such appeal to cases where the judge feels that the rules governing appeal from an award need "some amplification, elucidation or adaptation to changing practices." *The Antaios*, 1985 App. Cas. at 194.

189. See *Atkins Int'l H.A. v. Islamic Republic of Iran Shipping Lines*, [1987] 2 Lloyd's Rep. 37 (granting leave to review arbitration award on grounds that it was of general public interest). See generally Samuel, *Developments in English Arbitration Law Since the 1984 Antaios Decision*, J. INT'L ARB., Sept. 1988, at 9.

190. "There is a general agreement among lawyers and arbitrators that The United Kingdom needs a new Arbitration Act." Schmitthoff, *Contractual Instead of Statutory Judicial Review of Arbitration Awards*, BUS. L. BRIEF, Feb. 1988, at 19.

191. Konkordat über die Schiedsgerichtsbarkeit, SR 279, RS 279, RS 279 [hereinafter Concordat], reprinted in 3 C. SCHMITTHOFF, INTERNATIONAL COMMERCIAL ARBITRATION pt. VII, Doc. VII.J.1 (1985) [hereinafter INTERNATIONAL COMMERCIAL ARBITRATION] (English trans.).

192. The term "Concordat" refers to an agreement between cantons on matters falling within their own jurisdiction. See INTERNATIONAL COMMERCIAL ARBITRATION, *supra* note 191, at 20. The law of civil procedure falls within the cantonal jurisdiction. Concordat, *supra* note 191, art. 45, SR 279, RS 279, RS 279, reprinted in INTERNATIONAL COMMERCIAL ARBITRATION, *supra* note 191, at 20. The Concordat is not applicable in the cantons of Lucerne, and Thurgau, but is applicable in the major Swiss arbitration centers of Geneva and Zurich. See Kolkey, *supra* note 172, at 711 n.103.

193. Concordat, *supra* note 191, art. 41, SR 279, RS 279, RS 279, reprinted in INTERNATIONAL COMMERCIAL ARBITRATION, *supra* note 191, at 18.

194. *Id.* art. 36, SR 279, RS 279, RS 279, reprinted in INTERNATIONAL COMMERCIAL

award was "arbitrary in that it was based on findings which were manifestly contrary to the facts appearing on the file, or in that it constitutes a clear violation of law or equity" ¹⁹⁵ It was mainly this latter provision that, though rarely invoked and construed restrictively by the cantonal courts, ¹⁹⁶ made Swiss arbitrators encounter the same objections that lead to the passage of the U.K. Arbitration Act.

The courts' search for "clear violations of law and equity" led to a review on the merits of the award, since "law" in the context of article 36(f) of the Concordat was generally regarded as the law governing the merits of the dispute. ¹⁹⁷ In rare cases, where the cantonal court had violated constitutional rights of the parties, appeal was permissible to the Swiss Federal Tribunal. ¹⁹⁸ The Tribunal itself contributed a great deal to the growing dissatisfaction with Swiss arbitration law by refusing to design special rules for international commercial arbitration. ¹⁹⁹

International arbitration conducted in Switzerland is now governed by the Swiss Arbitration Law, which became effective on January 1, 1989. The Swiss Arbitration Law, which allows the parties to opt for the Concordat ("panic clause"), ²⁰⁰ replaced the Concordat review system with a single remedy, the action to set aside ("recours," "Amfechtung") to the Swiss

ARBITRATION, *supra* note 191, at 16-17. These procedural irregularities included improper constitution of the tribunal, excess of jurisdiction, decisions *infra* or *ultra petita*, breach of mandatory procedural rules, award made after expiration of time limit, formal deficiencies of the award, or fixing of arbitrator's fees that were manifestly excessive. *Id.*

195. *Id.* art. 36(f), SR 279, RS 279, RS 279, reprinted in INTERNATIONAL COMMERCIAL ARBITRATION, *supra* note 191, at 17.

196. See, e.g., Judgment of Oct. 14, 1981, Cour de Justice, Republique et Canton de Genève, Switz., 104 La Semaine Judiciaire [SJ] 31 (1982) (award will be set aside only if it seriously violates an undisputed legal norm or principle or contradicts sentiment of justice, provided that contradiction was determinative for outcome of proceedings).

197. See W.L. CRAIG, W. PARK & J. PAULSSON, *supra* note 20, § 32.06 (discussing Swiss court treatment of Concordat art. 36(f)).

198. See Malinverni, *Remarques sur la Qualité pour Recourir dans le Recours de Droit Public pour Violation du Concordat*, 74 SCHWEIZERISCHE JURISTEN-ZEITUNG 233, 234 (1978).

199. Habscheid, *Das Neue Schweizerische Recht der Internationalen Schiedsgerichtsbarkeit nach dem Bundesgesetz über das Internationale Privatrecht*, 34 RIW 766, 767 (1988).

200. IPRG art. 176(2), SR 291, RS 291, RS 291, reprinted in XIII Y.B. COM. ARB. 446, 447 (1988) (English trans.).

Federal Tribunal or, in case the parties agree, to the cantonal court of the seat.²⁰¹ The initial draft of the Swiss private international law limited the grounds for setting-aside to "denial of justice or for arbitrariness."²⁰² This language was changed in the parliamentary chamber to read "'so obvious and fundamental principles of law are violated that the award would be incompatible with public policy'"²⁰³ The law that was eventually passed, however, contains an exhaustive catalogue of grounds for setting-aside an award, including (i) irregular appointment of arbitrators,²⁰⁴ (ii) no jurisdiction of the arbitral tribunal,²⁰⁵ (iii) excess of jurisdiction or failure to rule on a claim submitted to it,²⁰⁶ (iv) violation of the right to be heard or to be treated equally,²⁰⁷ or (v) awards that are incompatible with public policy.²⁰⁸

The final version was expressly directed towards reducing court intervention to a "bare minimum" and to bring Swiss law more in line with the modern restrictive trend of international arbitration law as to judicial review of the merits.²⁰⁹ It is important to note that "public policy" refers to international public policy, *not* Swiss public policy.²¹⁰ The time limit for challenge is thirty days from communication of the award.²¹¹ The Federal Tribunal may, however, reject the application for review summarily.²¹² Upon successful challenge, the Tribunal

201. *Id.* art. 191, SR 291, RS 291, RS 291, reprinted in XIII Y.B. COM. ARB. at 450.

202. See Briner, *Switzerland*, IX Y.B. COM. ARB. 55, 59 (1984).

203. See Blessing, *The New International Arbitration Law in Switzerland: A Significant Step Towards Liberalism*, J. INT'L ARB., June 1988, at 9, 69 (quoting draft adopted by the *Conseil National* on Oct. 6, 1986).

204. IPRG art. 190(2)(a), SR 291, RS 291, RS 291, reprinted in XIII Y.B. COM. ARB. 446, 450 (1988) (English trans.).

205. *Id.* art. 190(2)(b), SR 291, RS 291, RS 291, reprinted in XIII Y.B. COM. ARB. at 450.

206. *Id.* art. 190(2)(c), SR 291, RS 291, RS 291, reprinted in XIII Y.B. COM. ARB. at 450.

207. *Id.* art. 190(2)(d), SR 291, RS 291, RS 291, reprinted in XIII Y.B. COM. ARB. at 450.

208. *Id.* art. 190(2)(e), SR 291, RS 291, RS 291, reprinted in XIII Y.B. COM. ARB. at 450.

209. See Blessing, *supra* note 203, at 69-70.

210. See *id.* at 70; A. BUCHER, *LE NOUVEL ARBITRAGE INTERNATIONAL EN SUISSE* 120-21 (1988).

211. Bundesgesetz über die Organisation der Bundesrechtspflege, art. 89(1), SR 173.110, RS 173.110, RS 173.110.

212. *Id.* art. 92, SR 173.110, RS 173.110, RS 173.110. This is known as "guillo-

will remit the award to the arbitral tribunal instead of supplanting its own decision for that of the tribunal.²¹³ In contrast to the law of the Concordat, which allowed challenge of interim awards up to the Tribunal,²¹⁴ leading to enormous delays of the main proceedings, the new law limits such recourse to the first two grounds enumerated above and subjects them to the same time limits.²¹⁵ Interestingly enough, the parties may opt for the jurisdiction of the Cantonal Court instead of that of the Federal Tribunal, and the decision of the Cantonal Courts are non-appealable.²¹⁶

As to exclusion of judicial review, which was not possible under the Concordat,²¹⁷ the Swiss legislature went even further than the English and allowed pre-arbitration exclusion of any judicial supervision, totally or partially, provided, however, there is no connection to Switzerland.²¹⁸ The Swiss Arbitration Act requires *both* parties to be domiciled or resident outside Switzerland,²¹⁹ while under the U.K. Arbitration Act exclusion is permissible when at least one of the parties is foreign.²²⁰ A further important deviation from the U.K. Arbitration Act is that the exclusion agreement has to be stated "expressly" in the arbitration clause or a subsequent written agreement, so that unintended exclusion of judicial review by

time" in Swiss legal jargon. See Karrer, *International Arbitration in Switzerland*, INT'L FIN. L. REV., Nov. 1987, at 24.

213. See Blessing, *supra* note 203, at 73-74.

214. The Concordat did mention partial awards but not interim awards. Concordat, *supra* note 191, art. 32, SR 279, RS 279, RS 279, reprinted in INTERNATIONAL COMMERCIAL ARBITRATION, *supra* note 191, at 14. The Swiss Federal Tribunal has held, however, that such interim awards were permissible and subject to appeal. Judgment of Oct. 10, 1984, Bundesgericht, Switz., 110 Entscheidungen des Schweizerischen Bundesgerichts, Amtliche Sammlung [BGE] Ia, at 131.

215. IPRG art. 190(3), SR 291, RS 291, RS 291, reprinted in XIII Y.B. COM. ARB. 446, 450 (1988) (English trans.).

216. *Id.* art. 191, SR 291, RS 291, RS 291, reprinted in XIII Y.B. COM. ARB. at 450.

217. Judgment of Oct. 15, 1984, Bundesgericht, Switz., 110 BGE Ia, at 131.

218. IPRG art. 192(1), SR 291, RS 291, RS 291, reprinted in XIII Y.B. COM. ARB. 446, 451 (1988) (English trans.). Previous proposals provided for exclusion agreements only after the establishment of the arbitral tribunal. Briner, *supra* note 202, at 59.

219. The fact that both parties, and not just one, have to be domiciled or resident outside Switzerland is required by art. 4 of the Swiss Constitution, according to which all Swiss citizens are equal before the law and thus enjoy the protection of Swiss courts. W.L. CRAIG, W. PARK & J. PAULSSON, *supra* note 20, § 32.08.

220. See *supra* notes 37, 175-76 and accompanying text.

reference to boilerplate arbitration frameworks like that of the ICC becomes impossible.²²¹

The filing of an action to set aside does not *per se* have a suspensive effect unless the court grants suspension.²²² A Swiss scholar has suggested that the Swiss courts should go beyond the letter of the new law and develop grounds that render an award void *per se* for non-arbitrability or violation of public policy, and to allow recourse in case of fraud, fraudulent documents, or wrong testimonies.²²³ This would mean a serious set-back for the new law, since it would reduce its value as a predictable and modern arbitration law. One can only hope that Swiss courts respect the decision of the Swiss legislature and look at other jurisdictions, such as the German, where the statutory list of grounds to set aside arbitral awards is not open for construction *praeter legem*.²²⁴

G. *Belgium: Exclusion of Recourse Ex Lege*

The Belgian legislature has taken the most radical approach towards restraint of judicial supervision of arbitral awards. Under the old law,²²⁵ which covered any award rendered in Belgium without distinguishing between national and international arbitration, appeal to a court on points of law was abolished,²²⁶ and the only remedy available was the action to set aside on grounds of violation of public policy, non-arbi-

221. See W.L. CRAIG, W. PARK & J. PAULSSON, *supra* note 20, § 32.08. For a discussion of the liberal case law of the English courts, see *supra* note 184 and accompanying text.

222. IPRG art. 190(1), SR 291, RS 291, RS 291, *reprinted in* XIII Y.B. COM. ARB. 446, 450 (1988) (English trans.). The Dutch arbitration law contains a similar provision. See Rv. art. 1066(1), *reprinted in* XII Y.B. COM. ARB. 370, 383 (1987) (English trans.). One author has pointed out that Swiss courts under the Concordat showed considerable reluctance to grant suspensive effect. Blessing, *supra* note 203, at 73.

223. See Habscheid, *supra* note 199, at 771.

224. See BAUMBACH, LAUTERBACH & ALBERS, COMMENTARY ON THE GERMAN CODE OF CIVIL PROCEDURE § 1041 (44th ed. 1986).

225. Loi Approuvant la Convention Européenne Loi Uniforme en Matière d'Arbitrage, Faite à Strasbourg 20 Janvier 1966 et Introduisant dans le Code Judiciaire une Sixième Partie Concernant l'Arbitrage (1), 1972 MONITEUR BELGE 8717 (implementing the European Convention). Belgium is the only European country to have adopted the Convention.

226. It was one of the goals of the European Convention to abolish any rights of appeal to national courts in order to avoid dilatory tactics by the losing party. See 3 P. SANDERS, ARBITRATION INTERNATIONAL COMMERCIAL 387 (Int'l Ass'n of Lawyers ed. 1965).

trability of the subject matter of the dispute, award obtained by fraud or based on false evidence, and other procedural irregularities.²²⁷ Pre-arbitration agreements to contract out all or some causes for annulment are impermissible and void.²²⁸

The Belgian Arbitration Provision abolishes any judicial review of arbitral awards if no party has a connection to Belgium.²²⁹ This new provision bluntly prohibits the action to set aside in cases of international arbitration between two foreign parties, instead of leaving the choice to the parties as in England and Switzerland.

The situation in Belgium is now parallel to that in France before the enactment of the French Arbitration Law when the French Cour de Cassation flatly declined to review awards rendered in international arbitration in France.²³⁰ The burden of reviewing the award is shifted to those courts abroad where the winning party seeks to have the award enforced under the New York Convention or the respective national laws. Again, the underlying premise for this revision to the law was that means of recourse against arbitral awards at the seat of the arbitration often serve merely dilatory purposes.²³¹ Although the U.K. Arbitration Act served as a model for the Belgian Arbitration Provision,²³² Belgium went much further in that it excluded any judicial review directly *ex lege* and not indirectly through party agreement. Further, the Belgian Arbitration Provision abolished any review, whereas under the U.K. Arbitration Act, supervision over arbitrators' misconduct remains non-excluda-

227. C. JUD. art. 1704(2), (3) (providing thirteen grounds for annulment).

228. C. JUD. art. 1704(2). For a discussion of the possible effects on article 1704 resulting from the enactment of the Belgium Arbitration Provision, see Matray, *Belgium*, V Y.B. COM. ARB. 1, 22 (1980); Vanderelst, *Increasing the Appeal of Belgium as an International Arbitration Forum? The Belgian Law of March 27, 1985 Concerning the Annulment of Arbitral Awards*, J. INT'L ARB., June 1986, at 77, 80.

229. C. JUD. art. 1717(4). Article 1717(4) provides as follows:

Les tribunaux belges ne peuvent connaître d'une demande en annulation que lorsqu'au moins une partie au différend tranché par la sentence arbitrale est soit une personne physique ayant la nationalité belge ou une résidence en Belgique, soit une personne morale constituée en Belgique ou y ayant une succursale ou un siège quelconque d'opération.

Id.

230. *See supra* note 78-82 and accompanying text.

231. *See* Nelissen-Grade, *The Annulment of Arbitral Awards in Belgium*, Int'l Fin. L. Rev., Nov. 1986, at 35.

232. *See id.*

ble.²³³

V. UNSETTLED ISSUES UNDER THE NEW LAWS

The new laws have considerably liberalized international arbitration in general and the review of arbitral awards in particular. Narrow grounds for review, time limits for motions to set aside, and optional exclusion agreements contribute to the growing attractiveness of many European arbitration centers. Finality seems to be more important than legality of awards.²³⁴ This development has gained such momentum that the U.K. Arbitration Act has become outdated before it has reached its tenth anniversary. Yet, the new laws are by no means a panacea for the problems and intricacies of transnational commercial arbitration. This is especially true for the concept of public policy in international arbitration and the issue of "de-localized" awards.

A. Public Policy: Appeal Through the Back Door?

The above analysis reveals that there are basically three groups of grounds for recourse against arbitral awards in international arbitration laws. The first group addresses the contractual basis for an award, including incapacity of a party to the arbitration agreement or invalid arbitration clause,²³⁵ excess of jurisdiction,²³⁶ and non-arbitrability of the subject-matter.²³⁷ The second group encompasses procedural irregulari-

233. Compare C. JUD. art. 1717(4), reprinted in XI Y.B. COM. ARB. 369 (1986) (English trans.) with Arbitration Act, 1950, 14 Geo. 6, ch. 27, §§ 22-23.

234. Typical in this respect is the statement of Judge Leggat, in *Arab African Energy Corp. v. Olieprodukten Nederland B.V.*, [1983] 2 Lloyd's Rep. 419 (Q.B.).

True it is, that formerly the Court was careful to maintain its supervisory jurisdiction over arbitrators and their awards. But that aspect of public policy has now given way to the need for finality. In this respect the striving for legal accuracy may be said to have been overtaken by commercial expediency.

Id. at 423.

235. MODEL LAW, *supra* note 29, arts. 34(2)(a)(i), 36(1)(a)(i), reprinted in XI Y.B. COM. ARB. 380, 389, 390 (1986); New York Convention, *supra* note 13, art. V(1)(a), 21 U.S.T. at 2520, T.I.A.S. No. 6997, at 4, 330 U.N.T.S. at 40.

236. MODEL LAW, *supra* note 29, arts. 34(2)(a)(iii), 36(1)(a)(iii), reprinted in XI Y.B. COM. ARB. at 389, 390; New York Convention, *supra* note 13, art. V(1)(c), 21 U.S.T. at 2520, T.I.A.S. No. 6997, at 4, 330 U.N.T.S. at 42.

237. MODEL LAW, *supra* note 29, arts. 34(2)(b)(i), 36(1)(b)(i), reprinted in XI Y.B. COM. ARB. at 389, 390; New York Convention, *supra* note 13, art. V(2)(a), 21 U.S.T. at 2520, T.I.A.S. No. 6997, at 4, 330 U.N.T.S. at 42.

ties including forged documents, defects of the award itself, improper notice of arbitrator appointment or the proceedings or inability to state one's case,²³⁸ and the composition of the tribunal violating the agreement of the parties.²³⁹ The third category involves violation of public policy.²⁴⁰ The Model Law, both in its recourse²⁴¹ and enforcement²⁴² provisions, as well as the New York Convention,²⁴³ clearly reflect this classical *trias* and present an example "par excellence" for the growing unification of international arbitration law.

The most important ground in the first group, which is comparatively easy to detect and open to objective ascertainment, is the issue of jurisdiction of the arbitrator.²⁴⁴ The tribunal has the right to rule on its own jurisdiction (*Kompetenz-Kompetenz*),²⁴⁵ but the ultimate determination is left to the national courts.²⁴⁶ Under English law, excess of jurisdiction is part of the arbitrator's misconduct, a ground for setting aside that cannot be excluded through party agreement,²⁴⁷ thus forc-

238. MODEL LAW, *supra* note 29, arts. 34(2)(a)(ii), 36(1)(a)(ii), *reprinted in* XI Y.B. COM. ARB. at 389, 390; New York Convention, *supra* note 13, art. V(1)(b), 21 U.S.T. at 2520, T.I.A.S. No. 6997, at 4, 330 U.N.T.S. at 42.

239. MODEL LAW, *supra* note 29, arts. 34(2)(a)(iv), 36(1)(a)(iv), *reprinted in* XI Y.B. COM. ARB. at 389, 390; New York Convention, *supra* note 13, art. V(1)(d), 21 U.S.T. at 2520, T.I.A.S. No. 6997, at 4, 330 U.N.T.S. at 42.

240. See Schlosser, *supra* note 19, at 131. Some authors suggest that challenges of awards should be allowed only in case of (1) violation of procedural fairness, (2) excess of arbitral authority, or (3) violation of international public policy. See Stein & Wotman, *supra* note 13, at 1725.

241. MODEL LAW, *supra* note 29, art. 34, *reprinted in* XI Y.B. COM. ARB. at 389.

242. MODEL LAW, *supra* note 29, art. 36, *reprinted in* XI Y.B. COM. ARB. at 390.

243. New York Convention, *supra* note 13, art. V, 21 U.S.T. at 2520, T.I.A.S. No. 6997, at 5, 330 U.N.T.S. at 42.

244. See A. REDFERN & M. HUNTER, *supra* note 6, at 330.

245. See, e.g., MODEL LAW, *supra* note 29, art. 16(1), *reprinted in* XI Y.B. COM. ARB. at 385; Rv. art. 1052(1), *reprinted in* XII Y.B. COM. ARB. 370, 379 (1987) (English trans.); IPRG art. 186(1), SR 291, RS 291, RS 291, *reprinted in* XIII Y.B. COM. ARB. 446, 449 (1988) (English trans.); ICC Arbitration Rules, *supra* note 14, art. 8(3). See generally Schmitthoff, *The Jurisdiction of the Arbitrator*, in *THE ART OF ARBITRATION* 285 (J. Schultz ed. 1982) (discussing issues affecting arbitrators' jurisdictional decisions).

246. See, e.g., MODEL LAW, *supra* note 29, art. 6, 16(3), *reprinted in* XI Y.B. COM. ARB. at 382, 385; Rv. art. 1065(1)(a), (b), *reprinted in* XII Y.B. COM. ARB. 370, 380-81, 382 (1987) (English trans.); IPRG art. 190(2)(b), SR 291, RS 291, RS 291, *reprinted in* XIII Y.B. COM. ARB. 446, 450 (1988) (English trans.); see also Judgment of July 12, 1984, Cour d'appel, Paris, Fr., *reprinted in* 23 I.L.M. 1048 (1984) (English trans.). There the court stated that "it is an error to maintain that the arbitral tribunal had the power *without being subject to review* to rule on its jurisdiction . . ." *Id.* at 1054 (emphasis added).

247. See *supra* note 177 and accompanying text.

ing the courts to distinguish between errors of law, which can be excluded as grounds for recourse, and excess of jurisdiction, which cannot.²⁴⁸

The grounds included in the second group are concerned with procedural irregularities and defective awards and vary according to the rigidity and requirements of the domestic law. A typical example is the missing arbitrator's signature, which is a ground for setting aside under the Austrian Arbitration Law²⁴⁹ and under the Dutch Arbitration Act,²⁵⁰ but not under the Swiss Arbitration Law, even though all three jurisdictions require the award to be signed by the arbitrators.²⁵¹ A fundamental principle, reflected in most of the laws, is that of "due process," i.e., procedural equality of the parties and the right to be heard and to present one's case.²⁵²

The third group, setting aside an award on the ground that it is in violation of "public policy," is contained in all of the laws and the Model Law, but is by far the most problematic. The problem lies in the hybrid and ambiguous nature of a provision that embraces both procedural and substantive aspects²⁵³ and that refers to "the fundamental economic, legal, moral, political, religious and social standards of every State or extra-national community . . . [which are] 'so sacrosanct as to require their maintenance at all costs and without exception.'"²⁵⁴ Since the procedural aspect of public policy is al-

248. "Whenever a tribunal goes wrong in law, it goes outside the jurisdiction conferred on it and its decision is void . . ." W.L. CRAIG, W. PARK & J. PAULSSON, *supra* note 20, § 29.06 (quoting Lord Denning).

249. ZPO § 595(1)(3), *reprinted in* IX Y.B. COM. ARB. 301, 304 (1984) (English trans.).

250. Rv. art. 1065(1)(d), *reprinted in* XII Y.B. COM. ARB. 370, 383 (1987) (English trans.).

251. ZPO § 592(2), *reprinted in* IX Y.B. COM. ARB. 301, 304 (1984) (English trans.); Rv. art. 1057(2)-(3), *reprinted in* XII Y.B. COM. ARB. 370, 380 (1987) (English trans.); IPRG art. 189(2), SR 291, RS 291, RS 291, *reprinted in* XIII Y.B. COM. ARB. 446, 450 (1988) (English trans.).

252. *See, e.g.*, IPRG art. 190(2)(d), SR 291, RS 291, RS 291, *reprinted in* XIII Y.B. COM. ARB. 446, 450 (1988) (English trans.).

253. "[T]he term 'public policy', which was used in the 1958 New York Convention and many other treaties, cover[s] fundamental principles of law and justice in substantive as well as procedural respects." U.N. Comm'n on Int'l Trade Law, U.N. Doc. A/40/17, § 297 (1985) (emphasis added).

254. J. LEW, *APPLICABLE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION* 532 (1978) (quoting CHESHIRE & NORTH, *PRIVATE INTERNATIONAL LAW* 149-50 (9th ed.)). A comprehensive and generally accepted definition has not yet been proposed.

ready covered by the various grounds included within the first and second group discussed above, the ground of public policy will be mainly concerned with the substantive defects of the award.²⁵⁵ This might ultimately reintroduce review of awards on the merits, which would run counter to the modern trend of arbitral autonomy and independence.

The legislatures were well aware of this danger when they enacted the new arbitration laws and some of them have tried to confine this ground to the very basic principles of law and morality. The Austrian legislature, for example, no longer relies on "violation of mandatory provisions of Austrian law,"²⁵⁶ which covered a broader field than just Austrian public order,²⁵⁷ but on incompatibility with the basic principles of the Austrian legal system.²⁵⁸ This shift in public policy focus implies that an award might well be contrary to mandatory provisions of Austrian domestic law without violating Austrian public policy.²⁵⁹ Violation of mandatory law is not totally excluded, however, but the applicable Austrian procedural rules are not relevant in international arbitration.²⁶⁰ A different approach has been taken by the French and Swiss legislatures. Both the French Arbitration Law and the Swiss Arbitration Law have restricted the notion of public policy to "international" public policy²⁶¹ in order to save the award from the strict application of purely domestic rules of public policy. The change to international public policy is particularly surprising in the Swiss legal context, since the Swiss Federal Tribunal has held that "[i]t cannot be ascertained how an 'ordre

255. C. CALAVROS, *DAS UNCITRAL-MODELLGESETZ ÜBER DIE INTERNATIONALE HANDELSSTREITGERICHTSBARKEIT* 161 (1988).

256. ZPO § 595(1)(6) (repealed 1983).

257. See Melis, *Austria*, IX Y.B. COM. ARB. 42, 48 (1984). This was seen as offering the possibility for Austrian courts to review cases on the merits. *Id.*

258. ZPO § 595(1)(6), *reprinted in* IX Y.B. COM. ARB. 301, 304 (1984) (English trans.).

259. See H. FASCHING, *supra* note 144, at 1001. A decision of the Swiss Federal Tribunal makes it clear that it is not necessarily a violation of Swiss public policy if a foreign rule is contrary to a mandatory provision of Swiss law. Judgment of May 5, 1976, Bundesgericht, Switz. (*Bangladesh*), 102 BGE Ia 574.

260. See *supra* note 147 and accompanying text.

261. C. CIV. art. 1502(5), *reprinted in* VII Y.B. COM. ARB. 280, 282 (1982) (English trans.). Although the Swiss Arbitration Act refers only to public policy, IPRG art. 190(e), SR 291, RS 291, RS 291, *reprinted in* XIII Y.B. COM. ARB. 446, 450 (1988) (English trans.), Swiss legal scholars have restricted the meaning to international public policy. See Bucher, *supra* note 210, at 121.

public international' would limit the application of foreign law more, or in other manner, than Swiss public order does."²⁶² The French and Swiss legislatures have, therefore, reacted to a general trend in international arbitration, whereas the courts have carefully begun to develop a narrow and restricted concept of "international" public policy.²⁶³

Though difficult to define, international public policy involves the fundamental rule of natural law, the principles of "universal justice," *jus cogens* in public international law, and the general principles of morality and public policy accepted by civilized nations.²⁶⁴ It is clear that if the courts do actually adhere to this restrictive notion of public policy, awards will be set aside only in very rare "absolutely blatant cases."²⁶⁵ The concept of international public policy, however, does not alleviate the burden of the courts to determine the contents of "public policy." Its vagueness and flexible character, leaving it in a constant state of flux, leaves great responsibility with the courts, especially since international public policy may well embrace principles of domestic public policy.²⁶⁶ This fact may tempt the French and Swiss courts to rule according to the wider principles of "their" domestic public policy, a concept with which they are more familiar.

A final but important safeguard against a liberal application of the public policy ground is found in Swiss, Austrian, and French legal doctrine according to which the holding of the award itself, and not just the reasons given by the arbitra-

262. Judgment of May 5, 1976, Bundesgericht, Switz., 102 BGE Ia 574, 583 (translation by author).

263. See, e.g., *id.*; Judgment of July 12, 1984, Cours d'appel, Paris, Fr., reprinted in 23 I.L.M. 1048 (1984) (English trans.); see also Domke, *Towards an "International" Public Policy in Commercial Arbitration*, in *FESTSCHRIFT FÜR ARTHUR BÜLOW* 49, 51 (K.H. Böckstiegel ed. 1981).

264. See J. LEW, *supra* note 254, at 534. Typical examples would be protection of fundamental human rights and abhorrence of slavery; racial, religious, and sexual discrimination; kidnapping; murder; piracy; and terrorism. *Id.*

265. Blessing, *supra* note 203, at 70. "[Q]ue le tribunal fédéral limite son examen aux cas absolument crasses." *Id.* at 70-71 (quoting the minutes of the Swiss Conseil National).

266. In France, the principle of suspension of individual claim in bankruptcy law is an element of both domestic and international public policy: "est à la fois d'ordre public interne et international . . ." Judgment of Mar. 8, 1988, Cass. civ., Ire, Fr., 1988 Bull. Civ. I, 42, 43.

tors, have to violate public policy.²⁶⁷ If the award can be upheld and justified on grounds other than those listed in the award itself, then there is no violation of public policy.²⁶⁸

In all jurisdictions that subject international awards to judicial control of violations of international public policy, much will depend on whether the courts are able and willing to develop a restrictive concept of public policy that does not lead to an appeal through the back door.

B. *The New Laws and Delocalized Awards*

1. Delocalization Through Party Agreement

Under the U.K. Arbitration Act, Swiss Arbitration Law, and to a much more limited extent the Austrian Arbitration Law, parties may agree to exclude judicial supervision of arbitral awards. This leads to the much disputed question of whether parties to an arbitration agreement may, regardless of any provisions allowing exclusion agreements, avoid constraints of any domestic procedural arbitration law, and with it the intervention and supervision of national courts, by "detaching" the proceedings from domestic laws and lifting them on a transnational, even non-legal plane.²⁶⁹ This involves both the law applicable to the merits of the dispute (substantive aspect of denationalization) and the rules governing the procedure (procedural aspect of denationalization), an important distinction that is oftentimes not properly drawn.²⁷⁰

This is astounding, given the fact that in a transnational context it happens more often than not that different laws govern the procedure and the substance of the arbitration proceeding.²⁷¹ In the context of this analysis, only the procedural

267. See H. FASCHING, *supra* note 144, at 1001 (Austrian law); Blessing, *supra* note 203, at 71 (Swiss law); Fouchard, *supra* note 34, at 417 (French law).

268. See Fouchard, *supra* note 34, at 417. Mr. Blessing gives the example that the court might deem a contract, the essence of which was a mandate to bribe a minister, in violation of public policy, but might nevertheless uphold the award if the sum awarded can be justified on some quasi-contractual or unjust enrichment basis. Blessing, *supra* note 203, at 71.

269. See Mann, *State Contracts and International Arbitration*, 1983 BRIT. Y.B. INT'L L. 1; Paulsson, *Arbitration Unbound: Award Detached from the Law of Its Country of Origin*, 30 INT'L & COMP. L.Q. 358 (1981).

270. See 2 J.G. WETTER, *THE INTERNATIONAL ARBITRAL PROCESS: PUBLIC AND PRIVATE* 369 (1979).

271. See, e.g., *Naviera Amazonica Peruana S.A. v. Compania Internacional de*

aspects of the theory are of interest.²⁷² The premise underlying this theory is clear. If states do actually have less interest in arbitrations involving non-nationals and if the only legal basis of any arbitration and the source of the arbitrator's power is the arbitration agreement, then the parties should be entitled to create their own transnational arbitration law, the *lex arbitri*, which is totally different from the arbitration law of the seat, the *lex loci arbitri*.²⁷³ The arbitration law is thus "contractualized."²⁷⁴ This approach, which emerged in the 1960s,²⁷⁵ seems to give maximum effect to the current trend towards arbitral autonomy and renders choice of *situs* meaningless for questions of applicable law.

This doctrine, however, is also impractical for two reasons. First, there is no comprehensive and consistent procedural framework provided by international law that could cover any issue arising during the arbitration proceedings where the parties, having expressly excluded application of any domestic law, exclude the "supplemental"²⁷⁶ role of these laws and of the relevant courts to fill gaps in the arbitration agreement where necessary. This is especially true for recourse to national courts. The parties themselves cannot "create" authority for national, and frequently, foreign courts' supervision of arbitral awards in their arbitration clause unless the law of the *situs* allows such "contracting in."²⁷⁷ Hence, the losing

Seguros del Peru, [1988] 1 Lloyd's Rep. 116 (C.A.). There the court stated that all contracts providing for arbitration may involve three potentially relevant systems of law: the law governing the substance, the law governing the arbitration clause, and the law governing the conduct of the arbitration proceedings, i.e., the *lex arbitri*, and the latter two will often be different from the first. *Id.* at 119.

272. For a comprehensive analysis of the various ways to determine the applicable substantive law rules—with or without reference to a particular national system of private international law—and of arbitrations governed by non-national law, see J. LEW, *supra* note 254, at 285-508.

273. For a discussion of this distinction, see Hirsch, *The Place of Arbitration and the Lex Arbitri*, *ARB. J.*, Sept. 1979, at 43; Park, *The Lex Loci Arbitri and International Commercial Arbitration*, 32 *INT'L & COMP. L.Q.* 21 (1983).

274. "La loi est en d'autres termes, 'contractualisée.'" Klein, *supra* note 31, at 59.

275. See P. FOUCHARD, *L'ARBITRAGE COMMERCIAL INTERNATIONAL* 22-27 (1965).

276. See Bühler, *Staatsgerichtliche Aufhebungskontrolle am Schiedsort? Zur Reform Belgiens*, 7 *PRAXIS DES INTERNATIONALEN PRIVAT-UND VERFAHRENSRECHTS [IPRAX]* 253, 254 (1987) (discussing "Aushilfsfunktion" (supportive function) of courts); Shindler, *Arbitration Still Bound*, 102 *L.Q. REV.* 500, 504 (1986).

277. Professor Schmitthoff suggests that the principle of "contracting out" used in the 1979 Arbitration Act should be reversed by the principle of "contracting in,"

claimant would not be able to challenge the "de-localized" award even if the law of the seat provides for recourse to national courts, a result that seems to contradict the basic notions of procedural fairness and equity. The losing defendant, on the other hand, would be forced to raise defenses under article V of the New York Convention in every country where enforcement is sought by the claimant, instead of having the award declared void once and for all before the courts of the *situs*, a very cumbersome procedure that also hinders the losing party from obtaining redress.²⁷⁸

More important, it is more than doubtful whether the New York Convention applies at all to these kinds of internationalized awards,²⁷⁹ an argument that ultimately led to the revision of the French law in the aftermath of the *Götaverken* case²⁸⁰ and hints at the strong interaction of judicial supervision and ultimate enforcement of the award. This is also expressed in article 24 of the ICC Arbitration Rules, which commands the tribunal to ensure enforceability of its award.²⁸¹ Under article V(1)(e) of the New York Convention, enforcement may be refused if the award has been set aside "by a competent authority of the country in which, or under the law of which, the award was made,"²⁸² implying that every award must have a nationality and every arbitration is to be governed by a national arbitration law.²⁸³ This law has to be the law of the seat and only if

i.e., allowing the parties to provide for judicial review on points of law in their arbitration agreement. Schmitthoff, *supra* note 190, at 20.

278. See Vanderelst, *supra* note 228, at 86. "Lui permettre de contester immédiatement et sur place la régularité de la sentence est pour la partie condamnée une garantie essentielle, et non un encouragement à la chicane." Fouchard, *supra* note 34, at 412.

279. See A. VAN DEN BERG, *THE NEW YORK ARBITRATION CONVENTION OF 1958*, at 34-40 (1981).

280. Judgment of Feb. 21, 1980, Cours d'appel, Paris, Fr., 1980 Recueil Dalloz-Sirey, *Jurisprudence* [D.S. Jur.] 568.

281. ICC Arbitration Rules, *supra* note 14, art. 24. "In conferring authority upon an arbitrator to settle an international dispute, a term is implied in the parties' agreement with the arbitrator that he will render an award which is enforceable under the New York Convention." Poznanski, *supra* note 59, at 86 (footnote omitted).

282. New York Convention, *supra* note 13, art. V(1)(e), 21 U.S.T. at 2520, T.I.A.S. No. 6997, at 4, 330 U.N.T.S. at 42 (emphasis added).

283. See J.G. WETTER, *supra* note 270, at 409. For a discussion on the emerging enforcement problems under the New York Convention, see van den Berg, *Some Recent Problems in the Practice of Enforcement Under the New York and ICSID Conventions*, 2 ISCID REV.-FOREIGN INVESTMENT L.J. 439, 445 (1987) [hereinafter *Recent Problems*];

this law allows party autonomy may the parties create their own procedural framework, which has to comply, however, with the mandatory provisions of the *lex loci arbitri*.²⁸⁴

States have a legitimate interest in regulating arbitrations on their soil.²⁸⁵ The growing conviction that arbitrations should be linked to the law of the seat is also reflected in the Dutch Arbitration Act, which requires application of Dutch law to arbitrations taking place in the Netherlands.²⁸⁶ The same is true under the U.K. Arbitration Act²⁸⁷ and is also reflected in the Model Law.²⁸⁸ However, the Swiss Arbitration Law, after lengthy parliamentary debates, disconnected the international arbitration from domestic procedural law.²⁸⁹ This doctrine must necessarily lead to the converse conclusion that in cases where the arbitration clause provides for a certain law to govern the proceedings without determining the seat, that country has to be the seat and its courts are competent to control and assist the arbitration.²⁹⁰

Detachment from any national law may be appropriate in arbitration with state parties where international comity and respect of the jurisdictional immunity of states that are parties to an arbitration may require application of non-national

van den Berg, *Should an International Arbitrator Apply the New York Arbitration Convention of 1958?*, in *THE ART OF ARBITRATION* 39, 47 (J. Schultz ed. 1982).

284. Mann, *Lex Facit Arbitrum*, in *INTERNATIONAL ARBITRATION* 157, 161 (P. Sanders ed. 1967). "It is the law that confers such a right [to disregard the national law of the forum]. Where the law fails to grant it, no arbitrator can lawfully arrogate it to himself." *Id.* at 170 (footnote omitted); see also Catranis, *Probleme der Nationalisierung Ausländischer Unternehmen vor Internationalen Schiedsgerichten*, 28 *RIW* 19, 21 (1982); Iwasaki, *supra* note 5, at 67; *Recent Problems*, *supra* note 283, at 443; von Hoffmann, *Die Novellierung des Deutschen Schiedsverfahrensrechts von 1986*, 6 *IPRAX* 337 (1986).

285. "Certes, étant une institution juridique, l'arbitrage ne peut se soustraire à l'autorité de l'Etat." Voyame, *supra* note 12, at 22.

286. See Tebbens, *supra* note 115, at 143.

287. Arbitration Act, 1950, 14 *Geo. 6*, ch. 27, § 12(6); see also Mann, *England Rejects "De-Localized" Contracts and Arbitration*, 33 *INT'L & COMP. L.Q.* 193, 197-98 (1984). But see G. DELAUME, *supra* note 11, at 326 (noting that French law is more liberal in this respect and does not adhere to the *lex loci arbitri* doctrine).

288. It has been pointed out that the mandatory character of some provisions of the Model Law shows that the Model Law does not accept the concept of delocalized or floating arbitration. Böckstiegel, *supra* note 48, at 675.

289. Otherwise the parties "have to take the trouble to look into the local niceties of purely domestic procedural rules and appoint Swiss counsel to look into bulky commentaries and trace abundant case law of purely domestic courts, materials not even available in English." Blessing, *supra* note 203, at 47.

290. See *Naviera Amazonica Peruana S.A. v. Compania Internacional de Seguros del Peru*, [1988] 1 *Lloyd's Rep.* 116, 119 (C.A.).

standards.²⁹¹ Example of this would be the awards of the US-Iran Claims Tribunal in The Hague²⁹² and investment arbitration under the auspices of ICSID.²⁹³ These rules, however, cannot be transferred to private party arbitration. As a matter of international practice, arbitrators frequently have the nationality of the seat and tend to apply "their" arbitration law in case no predetermination has been made by the parties.²⁹⁴ This serves as an additional safeguard for the *lex loci arbitri* rule.

2. Detachment Through National Legislatures

If an effective interaction of arbitration and enforcement requires respect of the law of the seat, the question remains whether these laws may abolish judicial review of transnational awards—directly as in Belgium or indirectly by allowing exclusion agreements as in Switzerland—without destroying the complicated equilibrium of arbitration and enforcement.

In Belgium, the proceedings are still governed by domestic law²⁹⁵ and domestic courts may still exercise their assistory role during the proceedings.²⁹⁶ The award, however, cannot be supervised by the courts of the seat, although its law, to the

291. The delocalization doctrine was first employed in the Saudi Arabia v. ARAMCO, 27 INT'L L. REP. 117 (1963), and Lybia v. TOPCO, 17 I.L.M. 3 (1979), arbitrations. Both arbitrations involved state parties (Saudi Arabia and Libya respectively) where the arbitrators held that the respect for the jurisdictional immunity of foreign states forbids a state party in arbitration to be subject to the law of another state.

292. Some consider the awards of the Tribunal as "anational" since they are governed by the UNCITRAL Rules instead of Dutch arbitration law. van den Berg, *Recent Problems*, *supra* note 283, at 442. *But see* Dallal v. Bank Mellat, 1986 Q.B. 441, where the court recognized an award of the arbitration tribunal as valid even though the arbitration agreement violated Dutch arbitration law. The court stressed that the decision would have been different in case of a purely "consensual arbitration" involving only non-state parties with no authority and competence derived from international law. *See id.* at 456.

293. The ICSID Convention takes account of the interaction of arbitration and enforcement and obligates member states to enforce ICSID awards, thereby insulating them from any national enforcement provisions. Delaume, *Foreign Sovereign Immunity: Impact on Arbitration*, 38 ARB. J. 34, 35-36 (1983).

294. *See* Triebel & Viertel, *Die Bundesrepublik Deutschland wird als Schiedsgerichtsort im Internationalen Schiedsverfahren gemieden*, 41 BETRIEBS-BERATER 1168, 1169 (1986).

295. *See* Bühler, *supra* note 276, at 255; Vanderelst, *supra* note 228, at 85. Awards rendered in Belgium are considered Belgium awards under the Belgium Judicial Code. *See* Matray, *La Loi Belge du 27 Mars 1985 et Ses Répercussions sur l'Arbitrage Commercial International*, 64 REVUE DE DROIT INTERNATIONAL ET DE DROIT COMPARÉ 243, 256 (1987).

296. *See* Vanderelst, *supra* note 228, at 84. "[T]here can be no question that the

extent that it contains mandatory provisions, has to be applied by the arbitrators. This is a paradoxical situation and it seems that these legislatures have gone too far in their efforts to achieve “the best of both worlds.”

Judicial control during the proceedings seems to be no appropriate surrogate for recourse,²⁹⁷ since oftentimes parties and their counsel cannot determine chances for recourse before they have the ultimate award. It also seems very problematic to rely on the expertise and reputation of acknowledged arbitration centers instead of judicial control,²⁹⁸ because this can by no means guarantee insulation from any procedural irregularities to an extent that would render judicial control superfluous and would mean an invitation for executor shopping by the winning party.²⁹⁹ More importantly, courts of the enforcement state frequently rely on judicial control through the courts of the *situs*. Apart from these practical considerations, it seems that, as in the case of delocalization through party agreements, article V(1)(e) of the New York Convention prohibits the enforcement of awards insulated from any judicial control of the *situs*, requiring not only application of its law but also control through its courts.³⁰⁰

awards, though no longer subject to annulment, are still subject to the control of the Belgian courts.” Nelissen-Grade, *supra* note 231, at 36.

297. Mr. Nelissen-Grade seems to argue that judicial control during the proceedings makes control of the ultimate award redundant. See Nelissen-Grade, *supra* note 231, at 36.

298. “To us, there seems to be only little danger that the award is defective so as to prevent enforcement under the New York Convention; this is especially true for a well respected and experienced arbitration center like the Zurich Chamber of Commerce.” Letter from the Zurich Chamber of Commerce to Klaus Peter Berger (Sept. 27, 1988) (copy on file at the *Fordham International Law Journal* office) (translation by the author). Mr. Bühler, the former legal counsel to the ICC Court of Arbitration in Paris, maintains that in institutional arbitration such as that under the auspices of the ICC, reputation of arbitrators may be adversely affected by defective awards, a fact that they want to avoid especially when interested in their reelection. Bühler, *supra* note 276, at 255 n.39. Lord Justice M. Kerr recommends that arbitrations be conducted without an exclusion agreement “unless it is possible to agree in advance on an arbitral tribunal of known high calibre—but in practice this is rarely a realistic possibility.” Kerr, *supra* note 157, at 14.

299. Mr. Nelissen-Grade concedes that “[a]lthough difficulties may exist for the winning party trying to obtain an exequatur if the award contains serious flaws, its existence is not impaired. The losing party cannot have it annulled by a Belgian court.” Nelissen-Grade, *supra* note 231, at 37; see also Vanderelst, *supra* note 228, at 85.

300. See Habscheid, *supra* note 199, at 772 (Swiss law).

Although it is true that awards rendered by the Arbitration Court at the USSR Chamber of Commerce and Industry are enforceable under the New York Convention, though they are not subject to any means of recourse,³⁰¹ this is mainly due to the specificities of the Soviet legal system and should not be generalized.³⁰² If the arbitrator has to apply the mandatory standards of the local law, which under the new laws constitute the minimum standards of international arbitration, then it should be the judiciary of this country that controls the application of these standards once and for all with binding force for the enforcement jurisdiction. Article V(1)(e) of the New York Convention, in connection with a bilateral treaty containing special enforcement provisions, led the Austrian Supreme Court in *NORSOLOR*³⁰³ to accept jurisdiction of Austrian courts for actions of annulment over an award rendered in Austria between two foreign parties, though there was a movement in Austria that its courts should refrain from reviewing such "international" awards.³⁰⁴ In Sweden, where commentators have voiced similar concerns against judicial review of purely international awards, a lower court has accepted jurisdiction for an action under section 21 of the Swedish Arbitration Act.³⁰⁵ The Austrian Arbitration Law has introduced a provision that provides for a competent court for any applications during the arbitration proceedings, including actions to set aside,³⁰⁶ while in Sweden the issue remains to be settled.³⁰⁷

Judicial control over international awards through the

301. See Timmermans, *The New Statute on the Arbitration Court at the USSR Chamber of Commerce and Industry*, J. INT'L ARB., Sept. 1988, at 97, 100-02.

302. *But see* Matray, *supra* note 295, at 261 (wanting to generalize experience with Soviet awards).

303. Judgment of Feb. 1, 1980, Oberster Gerichtshof, Aust., *reprinted in* VII Y.B. COM. ARB. 312 (1982) (English trans.). The court also referred to art. IX(1) of the European Convention and concluded that there was a particular need for legal protection for the affirmation of the competence of Austrian courts to examine and eventually set aside the award. *Id.* at 313.

304. See Melis, *supra* note 135, at 134. The arbitral proceedings involved a French and a Turkish party. Professor Melis stressed that this was the first purely "international" case to have reached the Austrian Supreme Court. Melis, *Comment*, VII Y.B. COM. ARB. 314, 315 (1982). With the Austrian courts having jurisdiction, the action to have the award set aside again reached the Austrian Supreme Court. *Id.*

305. See W.L. CRAIG, W. PARK & J. PAULSSON, *supra* note 20, § 31.04.

306. ZPO § 582, *reprinted in* IX Y.B. COM. ARB. 301, 302 (1984) (English trans.).

307. See Paulsson, *supra* note 94, at 230-35.

courts of the *situs* should hence be maintained,³⁰⁸ and the Belgian solution, aimed at increasing the attractiveness of Belgium for international arbitration, might turn out to be a flop, because the Belgian legislature, focusing solely on the dilatory aspect of the problem, might not have been aware of the legal and practical problems connected with its radical approach.³⁰⁹ Today's modern arbitration practice shows that parties generally want the mandatory rules of the local arbitration law to govern the proceedings, because parties want their case to be decided in clearly defined and workable procedural frameworks that guarantee effective enforcement proceedings.³¹⁰

V. *DEVELOPMENTS IN GERMAN LAW: GOING AHEAD OR LAGGING BEHIND?*

The trend towards more arbitral freedom and judicial restraint has gained momentum both within and outside Europe. Italy,³¹¹ Australia,³¹² Canada,³¹³ and Hong Kong³¹⁴ have opened the worldwide competition. Egypt is considering

308. The annulment of awards solely in the jurisdiction in which they were rendered results in a "simplification considérable du statut international des sentences; elles ne pourraient être annulées que dans le pays où elles ont été rendues, mais elles pourraient toujours y être, pour les causes déterminées par cet Etat." Fouchard, *supra* note 34, at 411. This is also the opinion of the German Committee on Arbitration, Bonn. "We are of the opinion that it does not promote arbitration if such ground for annulment [i.e. for violation of public policy] is negated." Letter from the German Committee on Arbitration, Bonn, to Klaus Peter Berger (Aug. 31, 1988) (copy on file at the *Fordham International Law Journal* office) (translation by the author).

309. See Vanderelst, *supra* note 228, at 84-85.

310. See Habscheid, *supra* note 199, at 767. Interested parties during the negotiations of the Model Law opposed the concept of "denationalized" awards, which they considered to peril the predictability of the proceedings and the enforcement of the transnational award. See Böckstiegel, *supra* note 48, at 675.

311. Law No. 28 of Feb. 9, 1983 (codified as amended at Codice di Procedura Civile, arts. 806-831 (Italy)), reprinted in IX Y.B. COM. ARB. 309 (1984) (English trans.).

312. Most Australian states have adopted a "uniform" arbitration law since 1984, which has substantially changed the powers of the courts to entertain challenges to arbitral awards and is closely modelled on the U.K. Arbitration Act, 1979, including appeals on points of law and exclusion agreements. See Golding & Christie, *Australia*, XIII Y.B. COM. ARB. 381-92 (1988).

313. See Noecker & Hentzen, *The New Legislation on Arbitration in Canada*, 22 INT'L LAW. 829, 830 n.10 (1988).

314. See De Speville, *Arbitration in Hong Kong*, 1 ARB. INT'L 109 (1985).

adopting a modified version of the Model Law,³¹⁵ and the 1983 Lebanese Code of Civil Procedure³¹⁶ contains new arbitration provisions closely modeled after those of the French Arbitration Law, an indication that the trend has reached the trade centers of the Middle East.

In view of this international development it seems strange that the Federal Republic of Germany is still relying on an arbitration law that is now more than 100 years old (the "German Arbitration Law").³¹⁷ In spite of Germany's strong position in world trade, only 2.5% of ICC arbitrations conducted between 1980 and 1982 took place in Germany, and of the two hundred arbitration proceedings conducted in Europe in 1985, only seven had a German *situs*.³¹⁸ The reasons for this skepticism are the perceived flaws of German Arbitration Law, which are partly justified and partly due to international practitioners' lack of familiarity with the German laws on arbitration.³¹⁹

In spite of its age, the German Arbitration Law is considered to be one of the most liberal and flexible in the world,³²⁰ but it is still not without flaws. In contrast to most jurisdictions, the German Arbitration Law recognizes as international every arbitration that is not covered by German Arbitration Law irrespective of the *situs*.³²¹ This may lead to unforeseen frictions with other arbitration laws.³²² The 1986 revision of

315. See Rashed, *The UNCITRAL Model Law and Recent Developments in Egypt*, 3 IC SID REV.- FOREIGN INVESTMENT L.J. 126 (1988).

316. Legislative Decree No. 90/83 of Sept. 16, 1983 (Lebanon), reprinted in 27 I.L.M. 1022 (1988) (English trans.).

317. ZPO §§ 1025-1048.

318. See Sandrock, *Zügigkeit und Leichtigkeit Versus Gründlichkeit*, 41 JURISTEN ZEITUNG 370 n.2 (1986); von Hoffmann, *supra* note 284, at 338.

319. See Lörcher, *Schiedsgerichtsbarkeit: Übernahme des UNCITRAL-Modellgesetzes?*, 20 ZEITSCHRIFT FÜR RECHTSPOLITIK 230, 231 (1987).

320. See von Hoffmann, *supra* note 284, at 340.

321. See Judgment of Sept. 26, 1985, Bundesgerichtshof, W. Ger., 96 Bundesgerichtshof in Zivilsachen [BGHZ] 40, 41; Judgment of Oct. 3, 1956, Bundesgerichtshof, W. Ger., 27 BGHZ 365. The law implementing the New York Convention in West Germany provides that where an award falling under the Convention made in another Contracting State according to German procedural law, the action for setting aside the award can be initiated in Germany. Gesetz zu dem Übereinkommen vom 10. Juni 1958 über die Anerkennung und Vollstreckung ausländischer Schiedssprüche § 2(1), 1961 BGBl II 121 (W. Ger.).

322. An award subject to English arbitration law but rendered in Germany might be insulated from any recourse to national courts since German courts consider the award to be English while English courts qualify it as German, both denying

the German International Private Law³²³ has further improved the legal environment in that it allows signatures of the majority of arbitrators instead of all of them, thus following the Model Law and the French Arbitration Law, Swiss Arbitration Law, and Austrian Arbitration Law.³²⁴ It also allows different ways of notification of the award to the parties instead of solely by formal service through state organs³²⁵ and no longer requires as mandatory recording of the award at the clerk's office of the competent court.³²⁶ This revision was intended to make it more difficult for an unwilling foreign party to escape a final award under German procedural law, thus meeting concerns that had been raised before the revision.³²⁷

As to grounds for setting aside an award, German Arbitration Law provides that awards may be set aside only if (i) there was no valid arbitration agreement,³²⁸ (ii) the award is based on improper proceedings (including violation of institutional arbitration rules, application of *lex mercatoria* without authorization,³²⁹ improper appointment of arbitrators,³³⁰ excess of jurisdiction and awards *infra* and *ultra petita*³³¹),³³² (iii) the party was not represented according to the provisions of the law (unless

recourse according to their domestic arbitration law. See Triebel & Petzold, *Grenzen der lex Mercatoria in der Internationalen Schiedsgerichtsbarkeit*, 34 RIW 245, 249 (1988).

323. Gesetz zur Neuregelung des Internationalen Privatrechts [GNIP], 1986 Bundesgesetzblatt, Teil I [BGBl.I] 43 (W. Ger.), reprinted in 27 I.L.M. 6 (1988) (English trans.); see also Gildeggen & Langkeit, *The New Conflict of Laws Code Provisions of the Federal Republic of Germany*, 17 GA. J. INT'L & COMP. L. 229 (1987).

324. Compare ZPO § 1039(1), as amended by GNIP, art. 4(10), 1986 BGBl.I 1152, reprinted in 27 I.L.M. 6, 28 (1988) (English trans.) with MODEL LAW, *supra* note 29, art. 31(1), reprinted in XI Y.B. COM. ARB. at 388. Under the former § 1039, an arbitrator, sometimes influenced by "his" party, could prevent the award from becoming final by simply refusing his signature. To sue the arbitrator for his signature was possible but particularly cumbersome, especially in the case of foreign arbitrators.

325. ZPO § 1039(2), as amended by GNIP, art. 4(10), 1986 BGBl.I 1152, reprinted in 27 I.L.M. 6, 28 (1988) (English trans.).

326. ZPO § 1039(3), as amended by GNIP, art. 4(10), 1986 BGBl.I 1152, reprinted in 27 I.L.M. 6, 29 (1988) (English trans.).

327. See Triebel & Viertel, *supra* note 294, at 1170-72.

328. ZPO § 1041(1).

329. Application of *lex mercatoria* without authorization also constitutes a ground for refusing enforcement under article V(1)(c) of the New York Convention. See Triebel & Petzold, *supra* note 322, at 250.

330. Judgment of May 5, 1986, Bundesgerichtshof, W. Ger., 49 Neue Juristische Wochenschrift [NJW] 3079, 3080 (1986).

331. See BAUMBACH, LAUTERBACH & ALBERS, *supra* note 224, at 2151.

332. ZPO § 1041(1).

it has agreed either tacitly or explicitly to the proceedings),³³³ (iv) there existed a violation of the right to be heard,³³⁴ (v) the award is rendered without reasons,³³⁵ or (vi) as grounds for a trial *de novo*—in case of fraud, forged documents, wrong testimonies under oath, and other violations of criminal laws.³³⁶ As to violations of public policy, the German Arbitration Law no longer relies on mere “violation of public policy,” because the 1986 revision of Germany’s International Private Law has changed the wording to any awards the recognition of which would lead “to a result that is manifestly incompatible with essential principles of German law, in particular if the recognition is incompatible with fundamental rights.”³³⁷ The changed wording of this provision finds some parallels in the Austrian Arbitration Law.³³⁸ The German solution is more ambiguous, though, because it relies on a “manifest” violation, leaving the exact determination to future case law, which does not contribute to certainty and predictability. It was for this reason that the Swiss legislature expressly avoided such qualifications.³³⁹

As in the case of the French Arbitration Law, Austrian Arbitration Law, and the Swiss Arbitration Law, the award itself has to violate the essential principles of German law.³⁴⁰ According to the German Federal High Court, parties cannot waive their right of recourse until after the award has been rendered and the ground for setting aside is known to them.³⁴¹ The right to have the award set aside for absence of reasons, however, may be waived in advance by the parties.³⁴² Improper application of substantive law does not constitute a ground for setting aside,³⁴³ but the German Federal High

333. *Id.* § 1041(1)(3).

334. *Id.* § 1041(1)(4).

335. *Id.* § 1041(1)(5).

336. *Id.* § 1041(1)(6).

337. *Id.* § 1041(1)(2), as amended by GNIP, art. 4(11), 1986 BGBl.I 1152, reprinted in 27 I.L.M. 6, 29 (1988) (English trans.).

338. See *supra* notes 143, 258 and accompanying text.

339. See Blessing, *supra* note 203, at 70.

340. See BAUMBACH, LAUTERBACH & ALBERS, *supra* note 224, at 2152 (discussing this issue as developed by German scholars and practitioners).

341. See Judgment of Sept. 26, 1985, Bundesgerichtshof, W. Ger., 39 NJW 1436 (ICC Arbitration Rule article 24 does not constitute a valid waiver of judicial review under German arbitration law); Judgment of Dec. 21, 1983, Oberlandesgericht, Frankfurt, W. Ger., 37 NJW 2768.

342. See ZPO § 1041.

343. Judgment of Sept. 26, 1985, Bundesgerichtshof, W. Ger., 96 BGHZ 40, 46.

Court has applied article 1041 of the German Code of Civil Procedure in a case where the tribunal disregarded a choice of law contract of the parties,³⁴⁴ which is clearly an error related to substantive and not to procedural law.³⁴⁵ This illustrates the still existing problems and intricacies of German arbitration case law.

All in all, the 1986 revision has not substantially changed the legal environment for international arbitrations except for the issue of achieving finality. In view of the worldwide development towards more uniformity of law and more arbitral freedom, it seems sensible to suggest a principal revision of German arbitration law and adoption of the Model Law.³⁴⁶ This would mean that judicial control of international awards would be maintained³⁴⁷ but confined to the exhaustive catalogue of article 34 of the Model Law. In addition, German arbitration law would no longer be a conglomerate of statutory and voluminous case law, thus becoming more attractive for foreign counsel. To safeguard a speedy disposition of such cases through the national judiciary, the legislature should work towards a substantial reduction of case duration. Under the present German Arbitration Law, parties may take an action to have an award set aside through three instances up to the Federal High Court, which may refer the case back to the second instance. If the award is set aside, the court has to decide the case instead of remitting it to the arbitral tribunal, because the arbitration clause is consummated when the award has been set aside.³⁴⁸ In a recent case, the German Federal High Court referred a case back to the second instance nine years after

344. *Id.* at 44.

345. See Sandrock, *supra* note 318, at 374-75.

346. Several authors have already suggested this step. See Lörcher, *supra* note 319, at 232; von Hoffmann, *supra* note 284, at 340. The 1987 working group at the German Institute for Arbitration in Cologne recommended the adoption of the Model Law, albeit limited to international arbitrations. See Schwab, *Das Uncitral-Model Law und das Deutsche Recht*, in *BEITRÄGE ZUM INTERNATIONALEN VERFAHRENSRECHT UND ZUR SCHIEDSGERICHTSBARKEIT* 427, 445 (H. Nagel ed. 1987).

347. Most German commentators favor judicial control of arbitral awards according to some minimal principles. See Bühler, *supra* note 276, at 256; Sandrock, *supra* note 318, at 378; von Hoffmann, *supra* note 284, at 340.

348. See R. SCHÜTZE, D. TSCHERNING & W. WAIS, *HANDBUCH DES SCHIEDSVERFAHRENS: PRAXIS DER DEUTSCHEN UND INTERNATIONALEN SCHIEDSGERICHTSBARKEIT* 84 (1985). The parties may provide for the reopening of arbitral proceedings. *Id.*

commencement of the arbitral proceedings³⁴⁹ and the case was still far from settled. The district court had to reconsider the whole case, English documents had to be translated and English speaking witnesses required translators.³⁵⁰ In addition, since the court language has to be German, parties had to hire German attorneys that were admitted at the court, thus incurring substantial attorneys' fees.

According to a very promising proposal,³⁵¹ one should concentrate the jurisdiction to recognize and enforce international awards and to have them set aside in one court, possibly of a higher instance, without the possibility of further appeal. This would guarantee accumulation of expertise in international matters in this court and consistency and predictability of case law. The latter would substantially increase the confidence of foreign parties and their counsel in German arbitration law. This proposal should also be considered in other jurisdictions, because it seems to offer an ideal way to reconcile the expectations of the parties to an international arbitration with the intricacies of a national court system. This proposal would curtail the stages of appeal, in that it bars appeal to the Federal High Court,³⁵² which is the ultimate supervisory instance of the German civil court system, but this is no real disadvantage given the high expertise of the new court, which would guarantee legally and economically sound decisions. Interestingly enough, this system has already been established, albeit optional and on a smaller scale, in Switzerland, where the parties may agree for the cantonal court to hear the action for setting aside instead of the Federal Tribunal.³⁵³ These decisions cannot be appealed, though in all other matters, cantonal court decisions may be appealed up to the Federal Supreme Court.³⁵⁴

349. Judgment of Sept. 26, 1985, Bundesgerichtshof, W. Ger., 96 BGHZ 40.

350. See Sandrock, *supra* note 318, at 377-78.

351. See Glossner, *Eine Zentrale Gerichtsinstanz für Internationale Schiedsverfahren in der Bundesrepublik Deutschland?*, 32 RIW 214 (1986).

352. One author considers circumvention of the Federal High Court the major flaw of the proposal. Raesche-Kessler, *Neuere Entwicklungen im Bereich der Internationalen Schiedsgerichtsbarkeit*, 41 NJW 3042, 3051 (1988).

353. IPRG, art. 191(2), SR 291, RS 291, RS 291, *reprinted in XIII Y.B. COM. ARB.* 446, 450 (1988).

354. *Id.* "Cantonal courts . . . have earned a high degree of confidence, and from this point of view it is a welcome decision that parties are given the option to

CONCLUSION

International commercial arbitration and its relation to national courts is still far from being a settled issue. However, the attempts made by the legislatures within and outside Europe coupled with the strong influence of the Model Law represent a promising step in the right direction.

These legislatures had to fulfill a difficult task. The international arbitration community demanded more arbitral freedom while the complicated and fragile equilibrium of arbitration and enforcement abroad requires a careful and deliberate approach in order to maintain the major benefit of arbitration, the quick and easy enforcement of arbitral awards.

Radical solutions, often praised as panaceas to all problems, be they "contracting-in," "contracting-out," or abolishing all judicial review, are not suitable for the solution of this sensitive issue. Instead, most legislatures have taken the right way in maintaining judicial control of transnational awards but confining it to the minimum standards of international arbitration law as embodied in the Model Law and developed by national courts over the past decades.

The national court judge as "guarantor of arbitral integrity"³⁵⁵ remains an indispensable factor in the international arbitration system, but he also holds an enormous responsibility. He has to develop the right "sensitivity to the need of the international commercial system for predictability in the resolution of disputes."³⁵⁶ In international arbitration cases more than in others, he has to be aware of the effects of his decision, which go beyond the case before him, especially since such cases are carefully monitored by the international arbitration community.³⁵⁷

Review of arbitral awards also involves an important psychological aspect. The constant threat of judicial review along clearly defined criteria leads arbitrators to pay due regard to the interests of the parties and factual and legal setting of the

agree on an action for setting aside being heard by the cantonal court acting in place of the Federal Supreme Court." Blessing, *supra* note 203, at 74.

355. Schlosser, *Notwendige Reformen des Deutschen Rechts der Schiedsgerichtsbarkeit*, 8 *ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT* 492 (1987) (translation by the author).

356. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 629 (1985).

357. Raeschke-Kessler, *supra* note 352, at 3042-43.

case, thus further contributing to more legality in arbitral proceedings.

As to stages of appeal, the practice of the Swiss cantonal courts and the English commercial courts, both having acquired substantial expertise in arbitration matters, shows that courts with a high degree of experience in international commercial matters can make the multi-instance recourse system obsolete without being a "denial of justice" to the parties.

If the courts support the efforts of national legislatures and develop a liberal attitude towards international arbitrations on their soil, parties to an international contract resorting to arbitration instead of litigation will ultimately realize that they have chosen the best and not the worst of both worlds, provided however, they pay due regard to the careful drafting of the arbitration clause instead of just "hop[ing] for the best."³⁵⁸

358. "In practice both parties tend to be exhausted by the time the negotiations have reached the stage of the arbitration clause. They will rarely get beyond the applicable rules (if any) and the venue. For the rest they just hope for the best." Kerr, *supra* note 157, at 14.