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DUTY AND DISCRETION IN INTERNATIONAL ARBITRATION

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Introduction

After a long arbitration in New York, a Canadian company wins substantial damages against a British multinational, only to see a federal court vacate the award.¹ Two ground are given for vacatur: the arbitrator was biased and the arbitrator manifestly disregarded the applicable law. Not deterred by the vacatur, the winning claimant seeks to enforce the award against the defendant's London bank accounts.

What effect (if any) should a court in England give the American award? Should an English court ignore the arbitrator's decision or the federal judge's order? Should the English court make its own investigation into the legitimacy of the vacatur?

Unconditional respect for all foreign annulments will hardly promote efficient arbitration, since an award might be annulled in bad faith or in violation of fundamental notions of justice. Without some deference, however, victims of tainted arbitrations must prove *de novo* the award's defects in every jurisdiction where they either have assets or seek to rely on subsequent awards.

The treaty framework for international arbitration provides no clear guidance on when annulments should have extraterritorial effect.² In Paris and Washington, however, courts have recently recognized awards vacated at the arbitral situs,³ sparking a debate on two rival policies: extending

¹ The verbs “annul,” “vacate” and “set aside” represent different labels for analogous actions, depending on the country, and are used interchangeably in this Article.

² *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 330 U.N.T.S. 38, 21 U.S.T. 2517, T.I.A.S. No. 6997 (1958) [hereinafter New York Convention]. In force in 120 nations, the Convention mandates foreign award enforcement subject to a set of defenses that include vacatur at the arbitral situs. *See* discussion in text at notes 33-43.

³ *See* discussion of *Hilmarton* and *Chromalloy* cases in text at notes 7-25.

comity toward foreign judgments and enforcing arbitral awards. The proper balancing of these policies depends in large measure on one's conclusions about the nature of commitments to resolve cross-border commercial disputes through arbitration.

Like prisms, these French and American cases help to refract the interaction of three overlapping legal orders: national statutes, international law and privatized dispute resolution. While lending itself to few elegant dogmas, analysis of award annulment offers insights into how these legal systems interact, and suggests two modest conclusions.

First, courts should defer to annulments that are consistent with procedural fairness and international public policy. Such deference follows not from any explicit treaty mandate, but from the parties' mutual commitments. Merchants who contract for an arbitral situs should be held to the implicit consequences of the bargain, whether this means narrow or broad judicial scrutiny. If the chosen review standards appear problematic on post-dispute reflection, market forces will direct future arbitrations elsewhere. Although this approach occasionally will be inconvenient for some business managers, it provides a better balance of social and economic consequences than other realistic alternatives.

Second, countries that host international arbitration should maintain their traditional role in monitoring the fairness of proceedings conducted within their borders. At the same time, these national legal systems should seek to limit the type of intrusive review procedures that invite disregard of annulments. To this end, the United States should adopt a separate statutory regime for international commercial arbitration, embodying more *laissez-faire* review than might apply to purely domestic cases.

I. Annulled Awards

A. Options

Returning to our opening scenario, several approaches are open to British judges considering enforcement of awards vacated at the arbitral situs. They might (1) never defer to annulments, (2) always defer to annulments, or (3) defer to annulments only on certain conditions, such as compatibility with public policy or with English grounds for vacatur.

Traditionally, annulment was thought to uproot an award so as to make it unenforceable abroad.⁴ There is no reason, however, that this must be so. An annulled award might well take its legitimacy solely from the enforcement forum, much as a contract void in one nation can be enforced in another.⁵ As discussed below, the French and American court cases mentioned in the introduction

⁴ See ALBERT JAN VAN DEN BERG, THE NEW YORK CONVENTION OF 1958 §III(4), (5), at 331-358 (1981); Albert Jan van den Berg, *Annulment of Awards in International Arbitration*, in INTERNATIONAL ARBITRATION IN THE 21ST CENTURY 133 (R. Lillich & C. Brower eds., 1994). For illustration, see *Southern Pacific Properties v. Egypt*, where vacatur in Paris led to dismissal of enforcement in the Netherlands. *Cour d'appel de Paris*, 12 July 1984, 1986 REV. ARB. 75, 23 I.L.M. 1048 (E. Gaillard trans., 1984); District Court of Amsterdam, 12 July 1984, [1988] N.J. 67, 10 Yearbook Comm. Arb. 487 (1985), 1986 Rev. Arb. 101, 24 I.L.M. 1040 (A.J. van den Berg trans., 1985). The Dutch action was dismissed after French decision was confirmed by the *Cour de Cassation, Ière Ch. civ.*, 6 January 1987, 1987 REV. ARB. 469, note Ph. Leboulanger, 26 I.L.M.1004 (E. Gaillard trans., 1987).

⁵ For example, a court in the United States might grant interest on a debt contracted in Saudi Arabia even if a Saudi court would not. Whether the relevant choice-of-law principles looked to Saudi public policy might depend on matters such as the nationality and residence of the parties, the place of performance and the otherwise applicable law. See Restatement (Second) Conflict of Laws §187 (1971) (law chosen by the parties given effect unless in conflict with a fundamental policy of “a state which has a materially greater interest . . . in the determination of the particular issue”). See generally MAURICE ROSENBERG ET AL., CONFLICT OF LAWS 536-49 (10th ed. 1996).

took exactly this approach.⁶

B. Case Law

In the many faceted saga of *Hilmarton v. OTV*,⁷ an arbitrator in Geneva denied a claim for consulting fees, erroneously believing that a contract subject to Swiss law violated Switzerland's public policy.⁸ After a cantonal court vacated the award on the basis of this mistake, a second arbitral tribunal gave damages to the claimant.⁹

⁶ A Belgian court also refused to enforce an annulled award rendered in Algiers against the Algerian government's gas exporter. See *Sonatrach v. Ford, Bacon & Davis*, *Trib. de 1ère Instance de Bruxelles*, 23 July 1987, *Trib. de 1ère Instance de Bruxelles*, 6 Dec. 1988, 1990 *Annales de droit de Liège* 267, 7 *ASA Bull.* 213 (1989), 15 *YEARBOOK COMM. ARB.* 370 (1990), *aff'd*, *Cour d'Appel de Bruxelles*, 9 Jan. 1990 (8ème Ch) 1990 *J. T.* 386. The special facts of the case (New York Convention held not to have retroactive application) make it inappropriate for comparative analysis. See generally Guy Horsmans, *Actualité et évolution du droit belge de l'arbitrage*, 1992 *REV. ARB.* 417, 426.

⁷ 1997 *REV. ARB.* 376, note Ph. Fouchard. See generally Philippe Fouchard, *La Portée internationale de l'annulation de la sentence arbitrale dans son pays d'origine*, 1997 *REV. ARB.* 329; Jean-François Poudret, *Quelle Solution Pour en Finir avec L'Affaire Hilmarton?*, 1998 *REV. ARB.* 7 (1998); Eric Schwartz, *French Supreme Court Renders Final Judgment in the Hilmarton Case*, 1997 *INT'L ARB. L.R.* 45; Georges Delaume, *Enforcement Against a Foreign State of an Arbitral Award Annulled in the Foreign State*, 1997 (No. 2) *REV. DROIT DES AFFAIRES INT./INT'L BUS. L.J.* 253; Jan Paulsson, *Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment*, 9 *ICC BULL.* (May 1998), at 14. For an earlier decision along these lines, see *Pabalk v. Norsolor*, *Cour de Cassation*, 9 Oct. 1984, 1985 *REV. ARB.* 431, note B. Goldman; 112 *J. DR. INT'L* 679 (1985), note Ph. Kahn (award vacated in Austria qualified for enforcement in France).

⁸ The consultant successfully helped obtain a contract for drainage in Algiers. While there was no allegation of bribery, the consultant's activity allegedly ran afoul of an Algerian statute on commercial intermediaries.

⁹ The award was rendered in August 1988, and thus subject to challenge for "arbitrariness" under Article 36 of the Intercantonal Arbitration Concordat. Since January 1989 awards in international arbitration would normally be subject to the *Loi fédérale sur le droit internationale privé*

In France both awards were recognized, each in a separate proceeding: first the annulled decision in favor of the defendant;¹⁰ then the award in the second arbitration in favor of the claimant.¹¹ Ultimately the *Cour de Cassation* held that the first judgment, recognizing the annulled decision, prevented recognition of the second arbitral award.¹²

The position of the *Cour de Cassation* on *res judicata* is understandable. However, its enforcement of the vacated award is less so. The court's reasoning that international arbitrations are not integrated into the legal order of the arbitral situs¹³ is hardly consistent with the fact that French judges annul awards in international arbitrations conducted in France.¹⁴ Moreover, in *Hilmarton* the ultimate

(LDIP). Upheld by the Swiss *Tribunal fédéral*, the Geneva court found that the conflict with Algerian legislation did not constitute a violation of Swiss public policy. See 1993 REV. ARB. 315 (*Court de Justice du Canton de Genève*, 17 Nov. 1989), 322 (*Tribunal fédéral*, 17 Apr. 1990).

¹⁰ *Cour d'Appel de Paris*, 1993 REV. ARB. 300, relying on NCPC arts. 1498, 1502, which limit appeal against award recognition to grounds that do not include annulment of the award where rendered. The appellate court was upheld by the *Cour de cassation*, 1994 REV. ARB. 327, with commentary by Charles Jarrosson; English translation in 9 MEALEY'S INT'L ARB. REP., E-3 (May 1994); 20 Y.B. COM. ARB. 663. See generally Vincent Heuzé, *La Morale, L'Arbitre et Le Juge*, 1993 REV. ARB. 179.

¹¹ The order of the Nanterre *Tribunal de Grande Instance*, which recognized the second award (as well as the Swiss court's annulment of the first award), was confirmed by the Versailles *Cour d'Appel*, 29 June 1995, 1995 REV. ARB. 639.

¹² 10 June 1997, 1997 REV. ARB. 376.

¹³ See *Cour de cassation* decision affirming the lower court's recognition of the annulled award, 1994 REV. ARB. 327 (stating that the Geneva award "n'était pas intégrée à l'ordre juridique de [la Suisse]").

¹⁴ See NCPC art. 1502. See also Bruno Leurent, *Société Procédés de préfabrication pour le béton v. Libye*, 1998 REV. ARB. 399, 407. Commenting on a court's refusal to monitor arbitration conducted in France because its official seat was Geneva, Leurent notes the inconsistency of giving significance to the arbitral seat in that case while assuming that the *Hilmarton* award was not integrated

result of recognizing the annulled award was that the claimant who prevailed at the bargained-for situs was hindered in obtaining unpaid fees.¹⁵

In the United States a similar scenario arose in *Chromalloy Aeroservices v. Egypt*,¹⁶ where an arbitral tribunal in Cairo had awarded damages to an American company for Egypt's breach of a military helicopter maintenance contract.¹⁷ The award was then vacated for the arbitrator's failure to

into the Swiss legal order. *See id.*

¹⁵ A different result obtained across the Channel, where the English High Court recognized the second award, finding that the award offended neither the contract's governing law nor the public policy of the arbitral situs. Queen's Bench Division, Commercial Court, 24 May 1999, *reprinted in* 14 MEALEY'S INT'L ARB. REP. §A (June 1999). Since the claimant's performance did not include acts contrary to English public policy, it was irrelevant that an English arbitrator might have decided differently. *Compare* *Soleimany v. Soleimany*, [1993] 3 W.L.R. 811 (refusing to enforce an award that on its face implemented a smuggling contract).

¹⁶ 939 F.Supp. 907 (D.D.C. 1996). *See generally* Richard Hulbert, *Further Observations on Chromalloy: A Contract Misconstrued, a Law Misapplied and an Opportunity Foregone*, 13 ICSID REV. 124 (1998); Gary Sampliner, *Enforcement of Foreign Arbitral Awards After Annulment in their Country of Origin*, 11 MEALEY'S INT'L ARB. REP. 22 (Sept. 1996); Eric Schwartz, *A Comment on Chromalloy: Hilmarton à l'Américaine*, 14 (No. 2) J. INT'L ARB. 125 (June 1997); Hamid Gharavi, *A Nightmare Called Hilmarton*, 12 MEALEY'S INT'L ARB. REP. 20 (Sept. 1997); Jan Paulsson, *Rediscovering the New York Convention: Further Reflections on Chromalloy*, 12 MEALEY'S INT'L ARB. REP. 20 (Apr. 1997); Pierre Karrer, *Judicial Review of International Arbitration Awards: Who Needs it?*, 1998 TABLE TALK 9 (International Arbitration Club, London); Albert Jan van den Berg, *Enforcement of Annulled Awards?*, 9 ICC Bull. 15 (1998); Dana Freyer & Hamid Gharavi, *Finality and Enforceability of Foreign Arbitral Awards*, 13 ICSID REV. 101 (1998); Lawrence Newman & Michael Burrows, *Setting Aside Arbitral Awards Under the New York Convention*, N.Y. L.J., 18 Nov. 1997; Stephen Ostrowski & Yuval Shany, *Chromalloy: United States Law and International Arbitration at the Crossroads*, 73 N.Y.U. L. REV. 1650 (1998); Ray Chan, *The Enforceability of Foreign Arbitral Awards in the United States*, 13 B.U. INT'L L. J. 141 (1999).

¹⁷ Text of the award can be found at 11 (No. 8) MEALEY'S INT'L ARB. REP., C-1 (Aug. 1996) (D.D.C. July 31, 1996).

apply the correct law, a non-waivable ground for annulment in Egypt.¹⁸

Despite the annulment, a U.S. federal court ordered enforcement of the award against the defendant's American assets.¹⁹ In an opinion with neither precedent nor progeny,²⁰ the court reasoned that since the Federal Arbitration Act does not list error of law as a ground for vacatur, the claimant "maintains all rights [to award enforcement] that it would have in the absence of the Convention."²¹

Two aspects of the federal court's controversial reasoning deserve special mention. First, the Egyptian practice of annulling erroneous awards does not differ significantly from the way American courts vacate awards for "manifest disregard of the law" or improper choice-of-law reasoning.²²

¹⁸ See arts. 53(1)(d), 54, Egyptian Arbitration Law of 1994, reproduced in SMIT'S GUIDE TO INTERNATIONAL ARBITRATION, NATIONAL ARBITRATION LAWS, Vol. 1, EGY B1. The contract was subject to Egyptian law, and the Cairo court reasoned that this meant the civil code.

¹⁹ Not surprisingly, the Paris *Cour d'Appel* also enforced the award. See 1997 REV. ARB. 395.

²⁰ In *Baker Marine Ltd. v. Chevron Ltd.*, 191 F. 3d 194 (2d Cir. 1999) the court refused to enforce two awards rendered in Lagos but vacated by a Nigerian court. Nigerian award published in 14 Mealey's Int'l Arb. Rep. D-3. (August 1999). In addition, the Second Circuit has held that a district court should wait to enforce an Italian award until after judicial review in Italy. See *Europcar Italia v. Maiellano Tours*, 156 F.3d 310, 317 (2d Cir. 1998) (citing possibly "conflicting results and the consequent offence to international comity"). While respectful of the judiciary at the arbitral situs, the deferral of enforcement in *Europcar* is not the same as the deference to the foreign court in *Baker Marine*. An American judge might merely want the benefit of the foreign court's findings.

²¹ 939 F.Supp 910. The court referred to Convention Article VII, which provides that the Convention shall not "deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied on." See text at note 40. The Second Circuit in *Baker Marine*, *supra* note 20, rejected this argument by noting that "[n]othing suggests that the parties intended United States domestic arbitral law to govern their dispute." 191 F. 3d 194.

²² On "manifest disregard," see note 100. On review of choice-of-law methodology, see *Mastrobuono v. Shearson Lehman*, 514 U.S. 52 (1995), which interprets the proper scope of a New

Second, to invoke the vacatur standards of the Federal Arbitration Act²³ risks giving the impression that American courts can annul foreign awards, a result at odds with existing law²⁴ and efficient arbitration.²⁵

II. The Interaction of Treaty and Statute

A. Control Mechanisms

Judicial review of arbitral awards constitutes a form of risk management designed to safeguard

York choice selection clause.

²³ *Chromalloy* looked to 9 U.S.C. §10 in Chapter I of the Federal Arbitration Act, which applies to domestic awards. However, foreign awards are subject to Chapter II, which gives Chapter I residual effect only if not inconsistent with Chapter II. *See* 9 U.S.C. §208.

²⁴ *See* *International Standard Electric Corporation v. Bidas Sociedad Anonima Petrolera, Industrial Y Commercial*, 745 F.Supp. 172 (S.D.N.Y. 1990) (holding that the Federal Arbitration Act did not allow vacatur of an award rendered in Mexico even if the merits of the dispute were to be decided under New York law).

²⁵ In theory, parties might stipulate that an arbitration will be conducted in one country subject to the procedural law of another. New York Convention Article V(1)(e) speaks of awards set aside by a competent authority “of the country in which, *or under the law of which*, the award was made” (emphasis added). Thus two Israelis might elect to arbitrate in New York subject to the arbitration law of Israel. In such rare situations, however, it would create unnecessary conflict if Israeli courts were to attempt to vacate the resulting award, since courts in New York might also set aside a local award that violated the mandatory American norms. *See generally*, *Oil & Natural Gas Commission v. Western Company of North America*, 1987 ALL INDIA REP. 674, 13 Y.B. COM. ARB. 473 (1988) (action to annul foreign award on the basis that Indian law applied to the arbitration agreement); *National Thermal Power Corp. v. Singer Corp.*, 18 Y.B. COM. ARB. 403 (1993) (action to annul London award when Indian law governed the dispute). *Compare* *Renusager Power Co. v. General Electric Co.*, discussed in *Tony Khindria, Enforcement of Arbitration Awards in India*, 23 INT’L BUS. LAW. 11 (Jan. 1995).

against perverse arbitrators and shameless intermeddlers.²⁶ Such public scrutiny of arbitration is inevitable when the winners ask courts to recognize awards by seizing assets or by denying the losers access to otherwise competent courts.²⁷

Inherent in judicial review is a tension between two rival goals of efficient dispute resolution, which underlie most aspects of arbitration law. Finality, promoted by freeing awards from challenge, competes with community confidence in control mechanisms that protect against enforcement of aberrant decisions.

Award finality enhances political and procedural neutrality, which is compromised if the winner must re-litigate the case. Without a reliable alternative to the uncertainty of third country tribunals²⁸ and the other side's "hometown justice,"²⁹ many transactions will remain unconsummated, or be concluded

²⁶ A decision-maker cannot be an arbitrator unless the person alleged to have waived court jurisdiction has in fact authorized the relevant individual to decide the disputed issues.

²⁷ See generally W. MICHAEL REISMAN, SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION & ARBITRATION (1992).

²⁸ In seeking recourse to third country courts, uncertainties result from factors such as *forum non conveniens*, lack of subject matter jurisdiction and the absence of comprehensive jurisdiction and judgments treaties. See WILLIAM W. PARK, INTERNATIONAL FORUM SELECTION (1995); William W. Park, *When and Why Arbitration Matters*, in THE COMMERCIAL WAY TO JUSTICE 73 (G. Beresford Hartwell ed., 1997); William W. Park, *Bridging the Gap in Forum Selection*, 8 TRANS. L. & CONTEMP. PROBS. 19 (1998).

²⁹ The reality of litigation bias may be less significant than the perception that such prejudice exists. In federal civil actions in the United States, foreigners actually fare better than domestic parties, perhaps because fear of bias causes foreigners to continue to judgment only with particularly strong cases. See Kevin Clermont & Theodore Eisenberg, *Xenophilia in American Courts*, 109 HARV. L. REV. 1122 (1996).

at increased prices to cover the risk of biased adjudication.³⁰

The second goal of efficient arbitration, community confidence that aberrant decisions will not be enforced, implicates judicial scrutiny of an arbitration's basic procedural fairness.³¹ Fidelity to the parties' shared expectations in this regard is as important as speed and economy.

Courts monitor the arbitral process in two distinct modes, depending on whether the reviewing forum has jurisdiction over the parties' assets or serves only as a convenient arbitral situs.³² In the latter case, review occurs before any attempt to enforce the arbitrator's decision, as courts simply pronounce an award void upon a motion to vacate, or valid upon a motion to confirm. By contrast, enforcement actions call for more dramatic judicial behavior, typically attachment of property or refusal to hear a claim allegedly covered by the arbitrator's decision.

In domestic transactions the distinction between these two types of review will rarely be

³⁰ Greater risks require greater returns. To illustrate, imagine two potential investments, one in Country A presenting an opportunity for a large profit, but with a good chance that local courts will be biased against a foreign party, and another in Country B yielding a smaller profit, but with fair dispute resolution. Depending on how large the disparity between the expected returns, many risk-averse foreign merchants will choose the lower return coupled with the fairer legal system. *See generally* William W. Park, *Neutrality, Predictability and Economic Cooperation*, 12 (No. 4) J. INT'L ARB. 99 (1995).

³¹ Commercial actors are unlikely to retain confidence in a dispute resolution system allowing arbitrators to roll dice, flip coins or consult the entrails of disemboweled poultry. Nor do business managers expect arbitrators to deny one side the opportunity to present its case, or to decide issues never submitted to them.

³² *See* W. MICHAEL REISMAN, SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION & ARBITRATION 113 (1992) (distinguishing between "primary" and "secondary" control). *See also* Anthony Diamond & V.V. Veeder, *The New English Arbitration Act 1996: Challenging an English Award Before the English Court*, 8 AM. REV. INT'L ARB. 47 (1997) (making the distinction between passive waiting for an opponent to seek award enforcement and active challenge to an award immediately after it is made).

important, since both occur in the same legal system, often pursuant to simultaneous motions to confirm and to vacate. In cross-border disputes, however, pre-enforcement scrutiny and enforcement actions can occur in different countries. Understanding the interaction of these two jurisdictions requires a brief look at the New York Convention.

B. The New York Convention

1. Framework

The New York Convention operates on two levels to promote the international currency of commitments to arbitrate. First, the Convention requires deference to valid arbitration

agreements.³³ Second, courts must enforce foreign awards³⁴ as they would domestic ones.³⁵ Award recognition, however, is subject to several defenses. One group furthers the loser's right to a fair arbitration, by allowing courts to reject awards tainted with excess of authority and procedural irregularity.³⁶ Another set of defenses protects the forum's own interest in withholding support for awards that deal with non-arbitrable subjects or violate public policy.³⁷

The Convention's effectiveness depends largely on each country's national arbitration law.³⁸

³³ Convention Article II(3) requires national courts to "refer parties to arbitration" in respect of matters covered by an agreement to arbitrate.

³⁴ Although its principal focus is on foreign awards (i.e., awards rendered in a country other than the one where enforcement is sought), the Convention also covers awards "not considered as domestic." This latter category includes awards arising from disputes that directly implicate international commerce. *See* *Lander Co. v. MMP, Invs.*, 107 F.3d 476 (1997) (arbitration between two American companies selling shampoo in Poland); *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928 (2d Cir. 1983) (arbitration between Swiss company and Norwegian shipowner).

³⁵ Convention Article III provides for award enforcement "in accordance with the rules of procedure of the territory where the award is relied upon," leaving open a theoretical possibility of onerous conditions on all arbitral decisions, domestic and foreign. Such abuse of rights would violate the Convention, just as onerous state arbitration laws violate the Federal Arbitration Act. *See* *Doctor's Associates v. Casarotto*, 517 U.S. 681 (1996).

³⁶ Convention Article V(1)(a)-(d) deals with invalid arbitration agreements, lack of due process, arbitrator excess of authority and irregular composition of the arbitral tribunal. *See also* Convention Article V(1)(e), concerning annulled awards, discussed in text at notes 45-57.

³⁷ Convention art. V(2). A growing consensus urges a narrow application of the public policy defense to award enforcement. *See* Audley Sheppard, *in Public Policy as a Ground for refusing Enforcement of Foreign Arbitral Awards*, INT'L LAW ASS'N, COMMITTEE ON INTERNATIONAL COMMERCIAL ARBITRATION, TAIPEI CONFERENCE (1998). *See also* Homayoon Arfazadeh, *L'ordre public du fond et l'annulation des sentences arbitrales internationales en Suisse*, 1995 REV. SUISSE DR. INT. & DR. EUROPÉEN 223.

³⁸ For one attempt at achieving uniformity in arbitration law, see UNCITRAL Model Law on International Commercial Arbitration, adopted 21 June 1985, UN Doc. A/40/17, Annex 1 (hereinafter

Arbitration agreements must be enforced if not "null and void," essentially a notion of local contract principles.³⁹ More significantly, the Convention says nothing about proper or improper annulment standards, but leaves each country free to establish its own grounds for vacating awards made within its territory.

The Convention will not deprive interested parties of the right to rely on awards to the extent allowed by an enforcement forum's own law.⁴⁰ Therefore the structure of national arbitration law becomes significant. For example, the French arbitration decree relevant in *Hilmarton* requires courts to recognize foreign awards unless contrary to international public policy,⁴¹ and permits appeal of recognition orders only on limited grounds that do not include annulment.⁴² By contrast, the Federal Arbitration Act explicitly ties into the New York Convention, calling for confirmation of foreign award if

UNCITRAL Model Law). *See generally* HOWARD HOLTZMANN & JOSEPH NEWHAUS, GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION (1989).

³⁹ Convention art. II(3). In the United States the validity of arbitration clauses is generally determined by state law principles governing contract formation. *See First Options v. Kaplan*, 514 U.S. 938, 943 (1995). Only rarely does one find invocation of supra-national standards for the validity of arbitration agreements. *See Rhone Méditerranée v. Achille Lauro*, 712 F.2d 50, 53 (3d Cir. 1983) (referring to an “internationally recognized defense such as duress, mistake, fraud or waiver”). *See also* *Municipalité de El Magreb v. Dalico*, *Cour de Cassation* (France), 1994 REV. ARB. 116, 117 (holding that the existence of an international arbitration clause is determined without reference to national law (“*sans qu'il soit nécessaire de se référer à une loi étatique*”)).

⁴⁰ *See* Convention art. VII, quoted in note 21.

⁴¹ *NCPC*, art. 1498.

⁴² *NCPC* Article 1502 permits appeal of recognition orders for (i) lack of a valid arbitration agreement, (ii) irregular composition of the arbitral tribunal, (iii) excess of authority, (iv) failure to respect due process (*principe de la contradiction*) and (v) violation of international public policy.

no treaty reasons exist to deny recognition.⁴³ Since vacatur at the arbitral situs is one ground for non-recognition under the New York Convention, some observers consider *Chromalloy* to be wrongly decided.

2. Convention Article V(1)(e)

a. Text

The analytic architecture for much of the dialogue about annulled awards lies in that part of the New York Convention providing that awards set aside at the arbitral situs lose the benefit of the treaty's enforcement scheme. The English version of Article V(1)(e) reads: "Recognition and enforcement of the award may be refused . . . if . . . [the award] has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made."⁴⁴ The French text lends itself to a more forceful interpretation,⁴⁵ while the Chinese, Russian and Spanish versions comport

⁴³ 9 U.S.C. §207.

⁴⁴ Under Convention Article XVI the treaty's Chinese, English, French, Russian, and Spanish texts are "equally authentic." On the comparison of treaty texts with different meanings, see Vienna Convention on the Law of Treaties, art. 33(4), 23 May 1969, UN DOC. A/CONF. 39/27, which provides for adoption of the "meaning which best reconciles the texts having regard to the object and purposes of the treaty." See generally, Georgios Petrochilos, *On the Mechanics and Rationale of Enforcing Awards Annulled in their State of Origin under the New York Convention*, 48 INT'L & COMP. L. Q. 858 (1999).

⁴⁵ The French text provides that "recognition and enforcement will not be refused unless the award . . . was annulled where rendered" (*La reconnaissance et l'exécution de la sentence ne seront refusées que si la sentence . . . a été annulée ou suspendue*). This future indicative was given a mandatory reading in *Clair v. Berardi*, Paris *Cour d'Appel*, 20 June 1980, 1981 REV. ARB. 424, note Mezger, *discussed in* VII Y.B. COM. ARB. 319 (1982), a case that would be decided differently today under the 1981 Arbitration Decree. See also Philippe Fouchard, *La Portée internationale de l'annulation de la sentence arbitrale dans son pays d'origine*, 1997 REV. ARB. 329, 344

with the permissive English.⁴⁶

Some scholars argue that under the Convention annulment triggers a universal effect, making an award unenforceable in all places where presented for enforcement.⁴⁷ According to one view, the Convention contains an implicit understanding that the arbitral situs will monitor an arbitration's procedural integrity, in exchange for which other countries will recognize awards that pass muster where rendered.⁴⁸ This power to uproot an arbitrator's decision would mean that the place of arbitration could invalidate a defective award once and for all.⁴⁹

Other commentators read the Convention as allowing enforcement courts discretion in dealing with annulled awards.⁵⁰ They rely on the Convention's permissive language (enforcement "may" be

(commenting that "the English text's ambiguity does not exist in the French version").

⁴⁶ See Richard W. Hulbert, *Further Observations on Chromalloy: A Contract Misconstrued, a Law Misapplied, and an Opportunity Foregone*, 13 ICSID REV. 124, 144 (Spring 1998); Jan Paulsson, *May or Must Under the New York Convention: An Exercise in Syntax and Linguistics*, 14 ARB. INT'L 227, 229 (1998).

⁴⁷ See Albert Jan van den Berg *Annulment of Awards in International Arbitration*, in INTERNATIONAL ARBITRATION IN THE 21ST CENTURY 133, 137 (R. Lillich & C. Brower eds., 1994) (referring to the "erga omnes effect" of annulled awards); W. Laurence Craig, *Some Trends and Developments in the Laws and Practice of International Commercial Arbitration*, 30 TEX. INT'L L.J. 1, 58 (1995) (warning (in connection with attempts to enjoin arbitration conducted abroad) of dangers in failing to recognize the "primacy of the procedural law of the place of arbitration").

⁴⁸ See W. MICHAEL REISMAN, SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION 113-120 (1992).

⁴⁹ See ALBERT JAN VAN DEN BERG, THE NEW YORK CONVENTION OF 1958 355-58 (1981).

⁵⁰ See Jan Paulsson, *Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment*, 9 ICC BULL. 14, 29 (May 1998); Jan Paulsson, *The Case for Disregarding Local Standard Annulments Under the New York Convention*, 7 AM. REV. INT'L ARB. 99 (1996).

refused), as well as the "more favorable law" provision in Article VII, which in some circumstances permits national law to override more restrictive Convention terms.⁵¹ Under this view, the latitude allowed judges depends on the structure and content of national arbitration law.⁵²

b. Context

For better or for worse, the New York Convention was not designed to address the *over-enforcement* that occurs when annulled awards are recognized. Rather, it was intended to deal with the *under-enforcement* of awards that resulted from the cumbersome "double exequatur" requirement of an earlier arbitration treaty, which called for judicial recognition at both the arbitral situs and the enforcement forum.⁵³

In response to the unsatisfactory state of prior law, the International Chamber of Commerce proposed a new treaty that aspired to make arbitration "completely independent of national laws."⁵⁴

⁵¹ See Convention Art. VII, discussed in text at notes 21 & 40.

⁵² See discussion of the difference between French and American arbitration law, text at notes 40-43.

⁵³ See Convention on the Execution of Foreign Arbitral Awards, Geneva 1927, art. 4, 92 L.N.T.S. 301 (requiring the party seeking recognition to have an award "duly authenticated" under the law of the country where made, as well as evidence that the award was not "open to opposition, *appel* or *pourvoi en cassation*" or pending proceedings to contest its validity).

⁵⁴ Enforcement of International Arbitral Awards: Report and Preliminary Draft Convention, ICC Brochure No. 174 (1953), UN DOC. E/C.2/373, reprinted in 9 ICC BULL. 32 (May 1998). In language prefiguring Professor Goldman's theories of "a-national arbitration" (see note 103) the ICC proposed giving "full value to the autonomy of the [parties'] will," noting with admirable candor that this position contradicted the traditional view that commercial relationships are "subject to some national law." *Id.* at 32. For a critique of the ICC proposal, see W. MICHAEL REISMAN, NULLITY AND REVISION 825-33 (1971) (stating at 829 that "The point overlooked [by the ICC] is that if an

The United Nations Economic and Social Council, however, rejected broad notions of autonomous "international" awards, in favor of simply making "foreign" awards more transportable from one country to another.⁵⁵

The middle course eventually taken in drafting the New York Convention was one that reduced, but did not eliminate, the role of the arbitral situs. Confirmation at the place of arbitration is no longer necessary, but enforcement of vacated awards may be refused. One consequence of this compromise has been uncertainty about the fate of annulled awards.

c. Interpretation

Interpreting Article V(1)(e) should begin with the "ordinary meaning [of the terms of the treaty] in their context and in the light of [the treaty's] object and purpose."⁵⁶ Applying this principle, the text might be read simply as an acknowledgment that no treaty violation occurs when annulled awards are not recognized. This reading is favored by the contrast between the mandatory terms of Article III

[enforcement] action of this type should arise, some community or communities must assert a valid interest in supervision").

⁵⁵ UN DOC. E/2704 & Corr. 1 (1955). For comments by governments see UN DOC. E/2822 & Add.1-6 (1956-58). *See generally* ALBERT JAN VAN DEN BERG, *THE NEW YORK ARBITRATION CONVENTION OF 1958*, at 6-8 (1981).

⁵⁶ Vienna Convention on the Law of Treaties, 23 May 1969, art. 31, U.N. DOC. A/CONF. 39/27, *entered into force* 27 Jan. 1980, 63 AJIL 875 (1969), 81 I.L.M. 679 (1969). Article 32 allows recourse to other elements when the ordinary meaning is "ambiguous or obscure" or leads to "manifestly absurd or unreasonable" results. *See generally* PAUL REUTER, *INTRODUCTION TO THE LAW OF TREATIES* §§142-148, 96-98 (J.M. & P. Haggemacher trans., 2d English ed. 1995). The Vienna Convention does not apply retroactively (*see* art. 4), and thus as a technical matter does not cover the New York Convention.

(awards "shall" be recognized) and the permissive language of Article V (annulled awards "may" be refused recognition).

A more energetic reading suggests that the Convention contemplates comity regarding foreign judgments. Stating that enforcement may be refused affirms a positive norm (as in "one may worship as conscience dictates") rather than a value-neutral choice (as in "one may order either chocolate or vanilla"). Supporting this view is the fact that Article V(1)(e) is nestled among defects that clearly make awards unenforceable, such as void arbitration agreements, lack of due process and excess of authority.⁵⁷

C. Approved Annulment Standards

Under the European Arbitration Convention,⁵⁸ annulment constitutes a ground for non-recognition of awards only if based on approved vacatur standards. These track the first four defenses to award enforcement under the New York Convention: absence of a valid arbitration agreement, lack of opportunity to present one's case, arbitrator excess of jurisdiction and irregular composition of the arbitral tribunal. Accordingly, courts in Germany could ignore a French order setting aside a Paris award for violation of "international public policy," a ground for vacatur in France that is not among the

⁵⁷ Convention art. V(1)(a)-(d). Article V(2) also uses the very same permissive language (recognition "may be refused") with respect to public policy violations, which almost by definition make awards unenforceable, notwithstanding recourse to local courts in circumscribing the relevant policies.

⁵⁸ See European Convention on International Commercial Arbitration, Geneva, 21 Apr. 1961, art. 9, 484 U.N.T.S. 349, which was adopted to supplement the New York Convention among residents of member states. For support of this position, see Paulsson at note 7.

four listed defenses.⁵⁹

The chief difficulty in this approach lies in its promiscuous taxonomy, which indiscriminately mixes both good and bad review standards. While some annulments falling outside the approved grounds impede efficient arbitration,⁶⁰ others (such as mechanisms to deal with arbitrator bias or clear legal error⁶¹) further legitimate interests of the regulating state⁶² or the parties.⁶³

In addition, the line between approved and unapproved grounds for vacatur is not as clear-cut as the European Convention suggests. For example, misapplication of the law (not an approved standard) by arbitrators deliberately rejecting governing legal principles might be interpreted as excess of authority (which is an approved annulment standard).⁶⁴

III. Comity Toward Annulments

A. Bad Faith and Public Policy

⁵⁹ See reference to *ordre public international* as a ground for annulment in France under *NCPC* art. 1502(5).

⁶⁰ For instance, requiring that all arbitrators sign awards (a standard abolished by Austria in 1983) gives dissenting arbitrators a tool to sabotage the arbitration.

⁶¹ In some cases, of course, biased behavior and manifest disregard of the law might be characterized as conduct outside the arbitrator's jurisdiction.

⁶² For example, London courts that hear appeals on points of English law (allowed by 1996 Arbitration Act unless the parties agree otherwise) promote the development of a legal system on which many business managers rely.

⁶³ Some litigants, for example, might see judicial review as enhancing predictability in contract interpretation.

⁶⁴ On the distinction between error of law and excess of authority, see notes 100 & 102.

To end litigation in a way that promotes efficient cross-border economic relationships, many developed legal systems enforce foreign judgments either pursuant to treaty⁶⁵ or as a matter of discretionary comity.⁶⁶ In much the same way that courts enforce arbitral awards without examining their merits,⁶⁷ principles of comity call for recognition of foreign judgments on condition that there be no serious procedural irregularity or violation of public policy.⁶⁸

The soundest policy toward annulment orders is to treat them like other foreign money

⁶⁵ See, e.g., European Union Convention on Jurisdiction and Judgments in Civil and Commercial Matters, Bruxelles, 27 Sept. 1968, art. 27(1).

⁶⁶ See generally RONALD A. BRAND, ENFORCING FOREIGN JUDGMENTS IN THE UNITED STATES AND UNITED STATES JUDGMENTS ABROAD (1992); Ronald A. Brand, *Enforcement of Foreign Money-Judgments in the United States: In Search of Uniformity and International Acceptance*, 67 NOTRE DAME L. REV. 253 (1991); DENNIS CAMPBELL, ENFORCEMENT OF FOREIGN JUDGMENTS (1997); Note, *Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction*, 95 HARV. L. REV. 1310 (1985).

⁶⁷ See Convention Articles III and V, discussed in text corresponding to notes 34-37.

⁶⁸ Factors relevant to comity include the absence of fraud, public policy violations and conflict with a prior judgment or forum selection agreement, as well as the foreign court's impartiality, jurisdiction and granting of due process and proper notice. For U.S. law on comity, see Restatement (Third) Foreign Relations Law §§481, 482 ("impartial tribunals or procedures compatible with due process of law"); Restatement (Second) Conflict of Laws §98 ("fair trial in a contested proceeding"); Uniform Foreign Money-Judgments Recognition Act (13 U.L.A. 261) §4. Under different names, similar principles are contained in conflict-of-laws rules in France (*Cour de Cassation, Arrêt Munzer*, 7 Jan. 1964, discussed in BERNARD AUDIT, DROIT INTERNATIONAL PRIVÉ §§440-454 (2d ed. 1997), Germany (*ZPO* arts. 328, 722, 723), and Switzerland (*LDIP* art. 27). In England, foreign awards can be enforced by common law actions on a debt. See *Adams v. Cape Industries*, [1990] 1 ch. 433 (C.A) (denying enforcement of a Texas judgment due to lack of due process). Reciprocity is sometimes required. See German *ZPO* arts. 328(1) & (5) and 722-23; U.K. Foreign Judgments (Reciprocal Enforcement) Act 1933; *Hilton v. Guyot*, 159 U.S. 113, 202 (1895) (declining to recognize French judgment on the assumption that French courts did not recognize American judgments, but stating that the merits of a foreign judgment should not otherwise be tried again when there has been "opportunity for a full and fair trial abroad before a court of competent jurisdiction . . . and there is nothing to show either prejudice in the court . . . or fraud in procuring the judgment").

judgments, according them deference unless procedurally unfair or contrary to fundamental notions of justice.⁶⁹ While controversial annulments will arouse the same type of resistance as other problematic judgments,⁷⁰ there is no reason that these cases cannot be disposed of within comity's flexible framework.⁷¹

As an aspirational model, the extension of comity to foreign judgments holds both parties to the consequences implicit in selecting one arbitral situs rather than another.⁷² This can be of particular importance when annulment is followed by a second arbitration yielding a decision different from the

⁶⁹ The functional similarity between annulments and other money judgments can be illustrated by a contract interpreted under English law by a London court resulting in a judgment that "Defendant owes nothing to Claimant." Had the contract provided for arbitration in London subject to appeal on points of English law, the same conclusion would have been expressed by annulment of an arbitrator's erroneous award for claimant.

⁷⁰ One reason for American interest in a multilateral judgments treaty is that courts do not always enforce foreign judgments. *See* Hague Conference on Private International Law, Proposed Convention on International Jurisdiction and the Effects of Foreign Judgments in Civil and Commercial Matters (Working Document No. 144 E; synthesis by C. Kessedjian, 1998). *See generally* Russell J. Weintraub, *How Substantial Is Our Need for a Judgments Recognition Convention and What Should We Bargain Away to Get It?*, 24 *BROOK. J. INT'L L.* 174 (1998).

⁷¹ One intriguing variant on the good faith standard suggests that annulments be disregarded if "arbitrary or clearly erroneous." *See* Gary H. Sampliner, *Enforcement of Nullified Foreign Arbitral Awards: Chromalloy Revisited*, 14 (No. 3) *J. INT'L ARB.* 141, 161-162 (1997). The virtue of this approach is that it points toward the heart of the annulment problem: aberrant judicial behavior. Its drawback is that courts must look at an arbitration's substantive merits. For a methodology that weighs multiple factors (grounds for vacatur, party intentions, enforcement forum policies, the need for uniformity and a presumption favoring foreign judgment recognition), see Stephen Ostrowski & Yuval Shany, *Chromalloy: United States Law and International Arbitration at the Crossroads*, 73 *N.Y.U. L. REV.* 1650 (1998).

⁷² See discussion in text at notes 78-90.

first.⁷³ Unless vacatur triggers non-recognition,⁷⁴ the annulled award might receive *res judicata* effect at the place where property is located, creating a Gresham's Law of awards in which bad decisions drive out good ones.⁷⁵ Such a "first-come-first-served" rule legitimizes a race to the courthouse likely to be won by the party relying on the earlier (annulled) award. The infrequency of such conflicts, like the rarity of arbitrator corruption, does not mean they can be ignored.

If only good faith judgments will be recognized, unflattering comparisons among legal systems will sometimes be made. Yet it is difficult to see a better alternative in a heterogeneous world lacking shared traditions of judicial independence.⁷⁶

Applying a comity standard to *Hilmarton* would lead to enforcement of the second (non-annulled) award. No suggestion was made that the Geneva judiciary lacked integrity or that the cantonal arbitration statute violated international public policy. However, the fate of the award in *Chromalloy* under a comity approach would be complicated by the suspicion in some quarters that the Egyptian government exercised undue influence on the Cairo court. As in other areas of the law where

⁷³ Contrast French and English decisions in *Hilmarton*, discussed in notes 7 & 15 and corresponding text

⁷⁴ In some cases, of course, vacated award will be refused enforcement even without comity, due to overlapping grounds for annulment and non-recognition. For example, if arbitrators in New York disregard their mission, the award could be vacated under §10 of the Federal Arbitration Act; the excess of jurisdiction would also impair recognition in Paris under both *NCPC* Article 1502 and New York Convention Article V.

⁷⁵ Named for the 16th century British financier, the original Gresham's law observed that "bad money drives out good." If two coins have equal nominal value but different metal contents, the one with less precious metal remains in circulation.

⁷⁶ A different rule would normally obtain in federal systems. *See* *Fauntleroy v. Lum*, 210 U.S. 230 (1908) (interpreting the "full faith and credit" clause in Constitution Article IX).

good faith and procedural integrity are relevant, the party challenging the award would have to muster direct or circumstantial evidence of bias or other impropriety.

While injustice sometimes results when a court sets aside an award against a local party (as in *Chromalloy*), this danger can be minimized through the choice of a disinterested arbitral venue with limited review standards. Indeed, the arbitral venue is the one place subject to party control. Careful contract drafting permits selection of an arbitral seat in which neither side has an inside track to the courts. By contrast, the enforcement situs will often be the losing side's home country.⁷⁷

B. Enforcing Bargains

1. Implied Rules of the Road

Deference to good faith annulments often furthers the very same interests as enforcement of the arbitration agreement and award: holding the parties to their bargain. Just as an agreement to arbitrate in London means driving to hearings on the left side of the road, so it means that proceedings are subject to the English Arbitration Act.⁷⁸

Arbitration clauses implicate several related undertakings, both explicit and implicit, each of

⁷⁷ This point was noted in Jean-François Poudret, *Quelle Solution Pour en Finir avec L’Affaire Hilmarton?*, 1998 REV. ARB. 7, 22 (1998) (“[L]e juge du siège est en général plus neutre que celui de l’exequatur . . .”) as well as in Dana Freyer & Hamid Gharavi, *Finality and Enforceability of Foreign Arbitral Awards*, 13 ICSID REV. 101, 113 (1998) (“self-help is available . . . by carefully selecting the arbitral situs”).

⁷⁸ §69 of the 1996 English Arbitration Act, reprinted in 36 ILM 155(1977), allows judicial review on questions of English law if the parties have not agreed otherwise. In all events an award is subject to judicial review for arbitrator excess of jurisdiction and serious procedural irregularity. *Id.* §§ 67-68.

which must be interpreted in a way that neither ignores nor distorts the others.⁷⁹ In addition to agreeing to settle disputes privately, the parties commit themselves to a specific arbitral venue, selected by them either directly or through their chosen arbitral institution.⁸⁰ Inherent in the understanding about situs is an expectation that proceedings will be subject to that country's mandatory procedural safeguards.⁸¹

Arbitration rules and contract stipulations providing that awards will be "final and binding"⁸²

⁷⁹ For some of the principles applicable to interpreting commitments such as those inherent in arbitration clauses, see generally E. ALLAN FARNSWORTH, UNITED STATES CONTRACT LAW §6.4, at 130-35 (1991); STEVEN J. BURTON & ERIC G. ANDERSEN, CONTRACTUAL GOOD FAITH: FORMATION, PERFORMANCE, BREACH, ENFORCEMENT §1.3.8, at 16-17 (1995); 1 CHITTY ON CONTRACTS §13-006-008, at 621-624. (A.G. Guest ed., 27th ed. 1994).

⁸⁰ In some cases the parties delegate the choice of a situs, like the selection of the arbitrators, to an arbitral body.

⁸¹ For a recent articulation of this view, see in *Minmetals Germany GmbH v. Ferco Steel Ltd.* (Q.B., 20 Jan. 1999), [1999] 1 All ER (Comm) 315; reported in *The Times* (London), 1 March 1999 at 41; comment by Hong-Lin Yu, *Defective Awards Must be Challenged in the Courts of the Seat of the Arbitration -- A Step Further than Localisation?*, ARBITRATION 195 (August 1999). After a CIETAC arbitration in Beijing, the losing party was deemed to have waived its right to resist enforcement of the award in England, due to an unreasonable failure to present its case in an arbitration resumed after its initial stages. Mr. Justice Coleman wrote, "Ferco had not been unable to present its case. On the contrary ... its counsel had simply failed to take that opportunity." *Id.* at 327. His opinion continued with the *dictum*:

In international commerce a party who contracts into an agreement to arbitrate in a foreign jurisdiction is bound ... by the supervisory jurisdiction of the courts of the seat of the arbitration. If the award is defective or the arbitration is defectively conducted the party who complains of the defect must in the first instance pursue such remedies as exist under that supervisory jurisdiction. That is because by his agreement to the place in question as the seat of arbitration he has agreed not only to refer all disputes to arbitration but that the conduct of the arbitration should be subject to that particular supervisory jurisdiction.
Id. at 330-31. Comment by Hong-lin Yu, 65 ARBITRATION 195 (1999), [1999] INT'L A.L.R. 83.

⁸² See, e.g., ICC Arbitration Rules, art. 28(6) (award "binding"); LCIA Rules, §26.9 (award "final and binding"); AAA International Arbitration Rules, art. 27(1) (award "final and binding");

must be read against the background of the arbitration's legal framework. In this context, "finality" means "finality as allowed under relevant arbitration laws," which in some countries subject awards to mandatory judicial control mechanisms.⁸³ Moreover, in a world where most legal systems do *not* impose merits review, the choice of an arbitral seat that *does* monitor an arbitrator's legal error argues for an intent to select a level of judicial scrutiny different from what is available elsewhere.

Ignoring the implications of the parties' direct or indirect choice of situs permits one side to change its mind about judicial review after seeing who gets the rough edge of the bargain.⁸⁴ While many arbitration lawyers favor limited court scrutiny,⁸⁵ some business managers opt for a judicial safety

UNCITRAL Arbitration Rules, art. 32(2) (award "final and binding").

⁸³ See, e.g., *M & C Corp. v. Erwin Behr GmbH*, 87 F.3d 844, 847 (6th Cir. 1996) (stating that waiver provisions in the ICC Rules "merely reflect a contractual intent that the issues joined and resolved in the arbitration may not be tried de novo in any court" (quoting *Iran Aircraft Industries v. Avco Corp.*, 980 F.2d 141, 145 (2d Cir. 1992))), *stay denied*, 935 F. Supp. 910 (1996), *subsequent appeal*, 143 F.3d 1033 (6th Cir. 1998). See also *Iran Aircraft Industries v. Avco Corp.*, 980 F.2d 141 (2d Cir. 1992); *First National Supermarkets v. Retail Wholesale & Chain Store Employers Union*, 118 F.3d 892 (2d Cir. 1997). The 1996 English Arbitration Act allows pre-dispute waiver of appeal on points of law (§69), but not waiver of challenge for serious procedural irregularity or excess of jurisdiction (§§67-68).

⁸⁴ For analysis of when and why the law restrains people from renegeing on commitments, see E. ALLAN FARNSWORTH, *CHANGING YOUR MIND: THE LAW OF REGRETTED DECISIONS* (1998). See also Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986) (discussing the reliance, efficiency and fairness notions underlying contract enforcement).

⁸⁵ See Ken Rokison, *Pastures New: The 1997 Freshfields Lecture*, 14 ARB. INT'L 361, 363 (1998) ("the presumed intention of the parties [is] that all aspects of the merits of their dispute should be decided by their chosen tribunal and not by the court"); Jan Paulsson, *Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment*, 9 ICC BULL. 14, 25 (May 1998), (labeling as "mythical" parties who seek merits review through choice of arbitral situs).

net against aberrant results.⁸⁶ Fairness requires respect for the degree of review imposed at the selected arbitral venue,⁸⁷ particularly since at contract signature all parties are behind a veil of ignorance about the outcome of any potential arbitration.⁸⁸

2. The Ill-Advised Business Manager

Holding business managers to the consequences of their choice of arbitral situs raises the possibility that ill-advised executives, perhaps lacking competent counsel, might be burdened with an inconvenient level of judicial review. In some instances a manager might accept an arbitration clause only on the insistence of a trading partner with superior bargaining power.

Unwise choices, however, form part of the warp and woof of commerce.⁸⁹ Contract terms often appear imprudent in hindsight, or are accepted as the price of booking a sale. Yet a sophisticated corporate executive's lack of wisdom or bargaining power rarely constitutes a valid excuse for escape from contract commitments.

⁸⁶ See Carroll E. Neesemann, *More Certainty Comes to Arbitration*, N.Y. L.J., 26 Mar. 1998, at 1, col. 2; Carroll E. Neesemann, *Party-chosen Arbitral Review Standards Can Inspire Confidence in the Process*, 5 DISP. RESOL. 18 (Fall 1998).

⁸⁷ In addition to the form of judicial review, choice of an arbitral seat implicates court selection of the arbitrators in the event of party default. See, e.g., UNCITRAL Model Law art. 11(3); English Arbitration Act §18; Federal Arbitration Act §5; Swiss *LDIP* art. 179; French *NCPC* arts. 1454, 1455.

⁸⁸ On the relationship between fairness and the parties' "veil of ignorance," see JOHN RAWLS, *A THEORY OF JUSTICE* §24, at 136 (1971).

⁸⁹ In one well known case, the business managers agreed to the ICC Arbitration Rules (which provide for waiver of appeal) while at the same time stipulating to appeal on the legal and factual merits of the case. See *Lapine v. Kyocera*, 130 F.3d 884 (9th Cir. 1997).

Choosing an arbitral situs is not unlike selecting an arbitral institution to provide rules and appoint arbitrators. A Chicago entrepreneur who contracts for arbitration under the rules of the International Chamber of Commerce (ICC) cannot disregard an unfavorable award because the ICC procedures appear idiosyncratic in comparison with more familiar American arbitral practices.⁹⁰

The law's normal response to a merchant's second thoughts about an honest bargain, whether in regard to arbitral rules or an arbitral situs, would be to leave the merchant to make better choices in the next transaction. There is no reason market forces cannot discipline the selection of arbitral venue as they do other contract terms.

C. Refusal to Vacate

When courts deny motions to vacate, how should an enforcement forum treat the decision *not* to vacate an award?⁹¹ For example, if an American judge rejects allegations that an award was procured by bribery or otherwise violates international public policy, should a London court be bound by this determination if enforcement is sought in England?

Little law exists on the *res judicata* effect of foreign refusals to vacate. Absent conflicting

⁹⁰ Unique aspects of ICC procedure include "Terms of Reference" (which sometimes bar new claims and counterclaims) and institutional scrutiny of the award (which may cause arbitrators to rethink their decision). Moreover, the ICC does not allow the "non-neutral" arbitrator common in domestic American arbitration (*see* AAA 1977 Code of Ethics for Arbitrators in Commercial Disputes, AAA Pub. No. 196-20M), but requires all arbitrators to be independent of the parties. *See* respectively Articles 18, 27 & 7 of the ICC Arbitration Rules, *discussed in* W. LAURENCE CRAIG, WILLIAM W. PARK & JAN PAULSSON, ANNOTATED GUIDE TO 1998 ICC ARBITRATION RULES (1998).

⁹¹ A different issue presents itself when the losing party in an allegedly defective arbitration simply fails to invoke remedies available in the arbitration, thereby waiving its right to challenge the award later. *See* discussion of *Minmetals v. Ferco supra* note 81.

commitments under any relevant treaties for enforcement of foreign judgments, the best approach to such "non-annulments" allows enforcement judges to make up their own minds on whether awards are defective within the context of New York Convention defenses. Comity for foreign judgments should not require violation of an enforcement forum's own public policy.

There is, of course, a lack of symmetry in deferring to award annulments but not to award confirmations. Yet the two types of judgments raise distinct considerations. A judge that defers to English vacatur of a London award does not more than leave the parties with the consequences of the chosen situs. However, for any court to enforce an award that in its opinion violates fundamental public policy norms would run afoul of its own interest in avoiding active assistance to illicit conduct. The New York Convention contemplates this double standard by providing that awards may be denied recognition if deemed defective by *either* the enforcement forum or the arbitral situs.⁹²

IV. The Role of National Arbitration Law

A. Models of Judicial Scrutiny

Framing sound policy regarding annulled awards requires an understanding of why, and on what grounds, nations monitor arbitration conducted within their borders.⁹³ Two principal models have emerged for review of awards at the arbitral seat. The most popular gives losers a right to challenge

⁹² Convention Article V(1)(a)-(d) and Article V(1)(e).

⁹³ While the New York Convention attempts to harmonize defenses to enforcement, it says nothing about correct or incorrect grounds for vacatur. On the role of arbitration law in general, see Michael Mustill, *Too Many Laws*, 63 *ARBITRATION* 248 (1997).

awards only for excess of authority⁹⁴ and basic procedural defects such as bias or denial of due process.⁹⁵ The second paradigm supplements scrutiny of an arbitration's procedural fairness with a right to appeal an award's substantive legal merits.⁹⁶

Some countries allow a choice between these alternatives, with default rules requiring that

⁹⁴ In some cases duly appointed arbitrators may overreach their mandates. In other cases, absent a valid a arbitration clause covering the controverted event, the excess of authority may be that of an unauthorized meddler.

⁹⁵ *See, e.g.*, Federal Arbitration Act §10; French *NCPC* art. 1502; Swiss *LDIP* art. 190; UNCITRAL Model Law art. 34. While these last three statutes do not enumerate bias explicitly, other bases for vacatur could serve to deal with this defect. For example *LDIP* includes in its list of award defects both unequal treatment of the parties (art. 190(2)(d)) and violation of public policy (art. 190(2)(e)).

⁹⁶ *See* 1996 English Arbitration Act §§67-69. *See* William W. Park, *The Interaction of Courts and Arbitrators in England*, [1998] INT'L ARB. L. REV. 5, reprinted in 13 MEALEY'S INT'L ARB. REP. 21 (June 1998).

litigants either "opt in"⁹⁷ or "opt out"⁹⁸ of appeal on the substantive merits of the case.⁹⁹ Certain arbitral regimes provide hybrid grounds for vacatur, such as "manifest disregard of the law"¹⁰⁰ or

⁹⁷ For American cases allowing contractual expansion of grounds for vacatur, *see* *Lapine Technology v. Kyocera*, 130 F.3d 884 (9th Cir. 1997); *Gateway Technologies v. MCI Telecommunications Corp.*, 64 F.3d 993 (5th Cir. 1995); *Syncor International Corp. v. David L. McLeland*, 120 F.3d 262 (4th Cir. 1997); *Fils et Cables d'Acier de Lens v. Midland Metals Corp.*, 584 F.Supp. 240 (S.D.N.Y. 1984); *New England Utilities v. Hydro-Quebec*, 10 F.Supp.2d 53 (D.Mass. 1998). The opposite conclusion was suggested in *Chicago Typographical Union v. Chicago Sun-Times*, 935 F.2d 1501 (7th Cir. 1995), which states that federal court review power cannot be created by contract. *See generally* Hans Smit, *Contractual Modification of the Scope of Judicial Review of Arbitral Awards*, 9 AM. REV. INT'L ARB. 147 (1997); Andreas F. Lowenfeld, *Can Arbitration Coexist with Judicial Review?*, ADR CURRENTS, Sept. 1998, at 1; Alan S. Rau, *Contracting Out of the Arbitration Act*, 8 AM. REV. INT'L ARB. 225 (1997). Compare the position in France, where courts have voided arbitration clauses attempting to include appellate review procedures other than as provided by the NCPC. *See* *Diseno v. Société Mendes*, 27 Oct. 1994, *Cour d'Appel de Paris*, 1995 REV. ARB. 263. *See generally* PHILIPPE FOUCHARD ET AL., TRAITÉ DE L'ARBITRAGE COMMERCIAL INTERNATIONAL §1597, at 931 nn. 142-46 (1996).

⁹⁸ *See* 1996 English Arbitration Act §69 (requiring exclusion of appeal on questions of English law).

⁹⁹ Switzerland offers a choice among federal standards (limited to procedural integrity and public policy under *LDIP* Article 190), more expansive scrutiny under cantonal standards (including vacatur for "arbitrariness" under Article 36(f) of *Concordat intercantonal sur l'arbitrage*) and exclusion of all judicial scrutiny (assuming neither party has a Swiss residence or place of business, the parties may conclude an explicit exclusion agreement (*déclaration expresse/ ausdrückliche Erklärung*) under *LDIP* Article 192). *See generally* PIERRE LALIVE ET AL., DROIT DE L'ARBITRAGE INTERNE ET INTERNATIONAL EN SUISSE (1989). *See also* *Belgian Code judiciaire*, art. 1717, discussed in notes 111-113 and corresponding text.

¹⁰⁰ Introduced through *dictum* in *Wilko v. Swan*, 346 U.S. 427 (1953), "manifest disregard of the law" may (depending on perspective) either incarnate arbitrator excess of authority or serve as a back door to merits review of awards "contrary to the plain language" of the contract. *See* *Advest, Inc. v. McCarthy*, 914 F.2d 6, 9 (1st Cir. 1990). Awards in international arbitrations in the United States may be vacated for "manifest disregard." *See* *Alghanim v. Toys "R" Us*, 126 F.3d 15 (2nd Cir. 1997). An expanded notion of "manifest disregard" has been applied in employment discrimination claims. *See* *Halligan v. Piper Jaffray*, 148 F.3d 197 (2nd Cir. 1998), *cert. denied*, 119 S.Ct. 1286 (1999). *See generally* Barry Garfinkel & Rona Shamoan, 3 ADR CURRENTS, Dec. 1998, at 1; Norman Poser, *Judicial Review of Awards: Manifest Disregard of the Law*, 64 BROOK. L. REV.

"arbitrariness,"¹⁰¹ implying something beyond a simple mistake but not necessarily clear excess of authority.

In assessing a national legal system, the winner will look for finality, while the loser will want careful judicial consideration of questionable aspects of the decision. Although no system will reconcile perfectly these rival goals, a middle ground can provide judicial review for the grosser forms of procedural injustice.

The text of the law, of course, must be read in the context of its application. Even a statute that limits judicial review to procedural irregularity may allow wiggle room for an overzealous judge to examine a dispute's legal merits under the guise of correcting an arbitrator's excess of authority.¹⁰² Moreover, in parts of the world lacking a tradition of judicial independence, the business community may prefer no judicial review at all, taking its chances with potential misbehavior by arbitrators as the lesser of two evils.

471 (1998).

¹⁰¹ Swiss *Concordat intercantonal sur l'arbitrage*, art. 36(f) (defining arbitrariness to include "evident violations of law or equity").

¹⁰² See, e.g., Kenneth R. Davis, *When Ignorance of the Law Is No Excuse: Judicial Review of Awards*, 45 BUFF. L. REV. 49, 126, 138 (1997) (suggesting that mistakes of law can constitute excess of authority). See also *Inter-City Gas v. Boise Cascade*, 845 F.2d 184 (8th Cir. 1988). In England, Lord Denning reversed otherwise unappealable decisions by reasoning that since judges are not authorized to make mistakes, in so doing they exceed their power. See DENNING, *THE DISCIPLINE OF THE LAW* 74 (1979) ("Whenever a tribunal goes wrong in law it goes outside the jurisdiction conferred on it and its decision is void."). See also *Pearlman v. Keepers and Governors of Harrow School*, [1978] 3 W.L.R. 736, 743 (C.A.) ("The distinction between an error which entails absence of jurisdiction and an error made within jurisdiction is [so] fine . . . that it is rapidly being eroded.").

B. The Interests At Stake

The extent and timing of judicial review of awards at the arbitral situs implicate a long-standing debate. French academics have urged adoption of a relatively delocalized regime, with the arbitral situs imposing little or no judicial scrutiny of international arbitration.¹⁰³ British and American jurists tend to advocate a more territorial approach, with greater leeway for courts to monitor arbitrations conducted within their jurisdiction.¹⁰⁴

While court scrutiny incident to award enforcement is uncontroversial (judges can hardly attach assets without first examining the piece of paper to be enforced), it is less obvious why there should be review *before* a motion is made to recognize an award, at least when the arbitration involves neither property nor activity at the arbitral situs. In this context, concern for the independence of international dispute resolution has led one of France's leading arbitration scholars to suggest complete elimination of pre-enforcement judicial review.¹⁰⁵

¹⁰³ See Berthold Goldman, *Les conflits de lois dans l'arbitrage international de droit privé*, 109 II RECUEIL DES COURS 347, 379-380, 479-480 (1963) ("Unless one adopts the irrational and unjustifiable system of attaching the arbitral process to its seat . . . any search for a way of grounding the arbitration in some system leads one unavoidably to the need for an autonomous non-national system."); Philippe Fouchard, *La Portée internationale de l'annulation de la sentence arbitrale dans son pays d'origine*, 1997 REV. ARB. 329, discussed in note 105 and corresponding text.

¹⁰⁴ See Francis Mann, *Lex Facit Arbitrum*, in LIBER AMICORUM FOR MARTIN DOMKE 157 (P. Sanders ed., 1967), reprinted in 2 ARB. INT'L 241 (1986); Michael Kerr, *Arbitration and the Courts: The UNCITRAL Model Law*, 34 INT'L & COMP. L.Q. 1, 15 (1985) ("No one having the power to make legally binding decisions . . . should be altogether outside and immune from [the legal] system."); William W. Park, *Lex Loci Arbitri and International Commercial Arbitration*, 32 INT'L & COMP. L.Q. 21 (1983); William W. Park, *National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration*, 63 TUL. L. REV. 647 (1989).

¹⁰⁵ See Philippe Fouchard, *La Portée internationale de l'annulation de la sentence arbitrale dans son pays d'origine*, 1997 REV. ARB. 329, 351-352. Fouchard admits the proposal's

Although conceptually and administratively simple, the elimination of all pre-enforcement judicial review would be unwise. As discussed below, the absence of any court scrutiny at the arbitral situs would adversely affect both the victims of defective arbitrations and the interests of the reviewing state itself.

1. Efficiency

By serving as the seat of an arbitration, a nation vests an award with presumptive validity under the New York Convention, thereby granting arbitrators power to create legal consequences throughout the world. Such support of the arbitral process arguably carries with it a duty to vacate biased or capricious decisions so that victims of irregularity may better resist defective awards.¹⁰⁶

Even in a world without the New York Convention, judicial review at the arbitral situs makes sense as an efficient way to control aberrant arbitral behavior, increasing the commercial community's confidence that arbitration will not be a lottery of erratic results. Court scrutiny relatively soon after the proceedings permits the creation of a record when documents and witnesses are still available and before recollections become stale.

radical nature by observing, "That which is most bizarre is not necessarily most illogical" (*La plus saugrenue n'est pas la plus illogique.*). *Id.* at 351. For an earlier incarnation of his views on the subject, see PHILIPPE FOUCHARD, *L'ARBITRAGE COMMERCIAL INTERNATIONAL* 22-23 (1964), in which he urges that particularities of national norms and conflict-of-laws rules should no longer play any role in international arbitration.

¹⁰⁶ Convention Article V(1)(e) permits non-recognition of an award set aside where "made," which will normally be the designated seat of proceedings, notwithstanding the place of signature or location of hearings. However, in *Hiscox v. Outhwaite*, [1991] A.E.R. 641, an award signed in Paris was considered made in France although the arbitral seat for purposes of appeal remained in England. The result would be different under England's 1996 Arbitration Act.

Review at the situs also enhances the efficiency of arbitration by furthering respect for awards abroad. This concern lay at the heart of France's international arbitration decree,¹⁰⁷ promulgated after French courts held that they lacked power to vacate awards made in international arbitrations.¹⁰⁸ By allowing award annulment for procedural irregularity, excess of authority and violation of public policy,¹⁰⁹ the decree addressed fears that a complete absence of judicial control might lead foreign courts to hesitate to enforce awards made in France.

Without a right to have procedurally unfair awards vacated at the situs, victims of injustice must prove an award's illegitimate character *de novo* wherever it might be presented for recognition. To be effective, of course, situs review must operate in tandem with comity toward foreign annulments, thus linking debate on the role of the arbitral situs with the problem of annulled awards.¹¹⁰

Perhaps the best evidence that some court scrutiny is needed at the arbitral situs lies in Belgium's failed experiment in mandatory "non-review" of awards. Hoping that a completely *laissez-faire* system would attract arbitration, Belgium in 1985 eliminated all motions to vacate awards in

¹⁰⁷ Décret No. 81-500, 12 May 1981, 1981 J. OFFICIEL RÉP. FRANÇAISE 1398-1406.

¹⁰⁸ See Gen. Nat'l Maritime Transp. Co. v. Société Götaverken Arendal, 21 Feb. 1980, *Cour d'appel de Paris*, 1980 REV. ARB. 524; AKSA v. Norsolor, 9 Dec. 1980, *Cour d'appel de Paris*, 1981 REV. ARB. 306, 20 I.L.M. 887 (1981).

¹⁰⁹ *NCPC* art. 1502 (permitting awards in international arbitration to be annulled for invalid agreement, irregular composition of the arbitral tribunal, excess of jurisdiction, failure to respect due process or violation of international public policy).

¹¹⁰ On the delocalization debate, see discussion at notes 103-05 and corresponding text.

disputes between foreign parties.¹¹¹ Contrary to what had been expected, however, the law created more anxiety than comfort,¹¹² and a new statute now leaves a safety net of judicial review as the default rule.¹¹³

2. Fertilization of Local Law

Where local law governs the interpretation of a contract, one school of thought supports mandatory judicial review as a way to fertilize the development of the forum's substantive legal principles. The assumption is that court cases create precedents that provide behavioral rules to guide the conduct of business outside a particular dispute.¹¹⁴ For this reason England once restricted waivers of appeal on points of English law in admiralty, commodities and insurance arbitrations (where English law enjoys a certain preeminence),¹¹⁵ which permitted these areas of the law to be fertilized with

¹¹¹ See art. 1717(4) of Belgian *Code judiciaire* as enacted in 1985, before amendment of 19 May 1998, effective 17 August 1998.

¹¹² See Bernard Hanotiau & Guy Block, *La loi du 19 mai 1998 modifiant la législation belge relative à l'arbitrage*, 16 SWISS BULL. 528, 532 (1998).

¹¹³ Effective 17 August 1998, Article 1717 (4) of the Belgian *Code judiciaire* provides that challenge to awards must be made through an explicit statement: "*Les parties peuvent, par une déclaration expresse dans la convention d'arbitrage ou par une convention ultérieure, exclure tout recours en annulation d'une sentence arbitrale lorsqu'aucune d'elles n'est soit une personne physique ayant la nationalité belge ou une résidence en Belgique, soit une personne morale ayant en Belgique son principal établissement ou y ayant une succursale.*"

¹¹⁴ Under the "public law model" of litigation, cases guide future transactions of non-litigants. See Robert G. Bone, *Lon Fuller's Theory of Adjudication and the False Dichotomy Between Dispute Resolution and Public Law Models of Litigation*, 75 B.U. L. REV. 1273 (1995).

¹¹⁵ 1979 Arbitration Act §4 (abrogated in 1996), discussed in William W. Park, *Judicial Supervision of Transnational Commercial Arbitration*, 21 HARV. INT'L L.J. 87 (1980).

judgments covering modern commercial controversies.

As England was abolishing the right of appeal in these "special category" disputes, securities arbitration in the United States was illustrating the need for such safeguards. Since the U. S. Supreme Court upheld the arbitrability of customer claims against brokerage houses,¹¹⁶ there has been a decided decrease in court decisions dealing with broker-customer relations, and a resulting freeze in the relevant law.¹¹⁷ The crippling effect on legal development is particularly worrisome with respect to domestic consumer transactions, as the corresponding American arbitral awards traditionally do not state reasons and are not published.¹¹⁸

V. Separating Domestic and International Arbitration

A. An International Arbitration Act for the United States

Arbitration is not an all-terrain vehicle. Different arbitration statutes may be needed for different types of disputes. In particular, the limited court scrutiny suitable for arbitration among international business managers may not be optimum in consumer and employment transactions, with their special

¹¹⁶ See *Shearson/American Express v. McMahon*, 482 U.S. 220 (1987) (fraud claims under Exchange Act §10b and Rule 10b-5); *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477 (1989) (Securities Act §12(2) claims).

¹¹⁷ See ALAN R. PALMITER, *SECURITIES REGULATION* §11.2.5, at 344 (1998).

¹¹⁸ For a comparison of the situation with respect to international commercial awards, see W. LAURENCE CRAIG, WILLIAM W. PARK & JAN PAULSSON, *INTERNATIONAL CHAMBER OF COMMERCE* ch. 19 (2nd ed. 1990). See also 1 *ICC ARBITRAL AWARDS 1971-85* (Sigvard Jarvin & Yves Derains eds., 1990); 2 *ICC ARBITRAL AWARDS 1986-90* (Sigvard Jarvin et al. eds., 1994); 3 *ICC ARBITRAL AWARDS 1991-95* (Jean-Jacques Arnaldez et al. eds., 1997).

risk that abusive arbitral procedures will be imposed on commercially weaker parties.¹¹⁹

Nevertheless, the United States subjects most arbitration to a single statutory framework.¹²⁰

Consequently, anti-abuse measures aimed at potentially unfair consumer and employment arbitration hang like Damoclean swords over private international dispute resolution conducted in the United States.¹²¹

¹¹⁹ Most observers rightly see an agreement to waive otherwise competent courts as qualitatively more serious than other contract terms, such as price or interest rate. On the perceived abuse of employment arbitration, see *Renteria v. Prudential Ins.*, 113 F.3d 1104 (9th Cir. 1997); *Prudential Ins. v. Lai* 42 F.3d 1299 (9th Cir. 1994). See generally *Gilmer v. Interstate/Johnson Lane*, 500 U.S. 20 (1991); *Wright v. Universal Maritime Services*, 119 S.Ct. 391 (1998); Stephen J. Ware, *Employment Arbitration & Voluntary Consent*, 25 HOFSTRA L. REV. 83 (1996). For similar concerns about consumer arbitration, see *Badie v. Bank of America*, 79 Cal. Rptr. 2d 273 (1998); *ITT Cons. Fin. Corp. v. Patterson*, 18 Cal. Rptr. 2d 563 (1993); *Teleserve Sys. v. MCI*, 659 N.Y.2d 658 (N.Y. App. Div. 1997); *Brower v. Gateway 2000*, 676 N.Y.S.2d 569 (A.D. 1st Dept. 1998); *Randolph v. Green Tree Financial Corp.* (11th Cir. No. 98-6055, June 23, 1999), 12 FLA. L. WKLY. FED. C 964 (refusing to enforce an arbitration clause failing to provide "minimum guarantees" permitting a borrower to enforce statutory rights under the Truth in Lending Act); *Symposium on Arbitration in the Securities Industry*, 63 FORDHAM L. REV. (1995); Lisa Myers, NBC Nightly News, 14 July 1999 <<http://www.msnbc.com/news/289800.asp>> (report on arbitration of credit card disputes).

¹²⁰ While collective bargaining arbitration rests on its own statutory basis, see 29 U.S.C. § 185, the U.S. Supreme Court has held that the Federal Arbitration Act applies to almost all other contracts that in any way involve interstate commerce. See *Allied-Bruce Terminix v. Dobson*, 513 U.S. 265 (1995). State statutes fill gaps in federal arbitration law only if consistent with the latter's general purposes. See Alan S. Rau, *The UNCITRAL Model Law in State and Federal Courts: The Case of Waiver*, 6 AM. REV. INT'L ARB. 223 (1995); Alan S. Rau, *Does State Arbitration Law Matter At All?*, ADR CURRENTS, June 1998, at 19. The Federal Arbitration Act's exclusion of "contracts of employment" has been narrowly interpreted to cover only contracts to transport goods or provide services directly in foreign or interstate commerce. See, e.g., *Dickstein v. DuPont*, 443 F.2d 783 (1st Cir. 1971).

¹²¹ For example, courts have ordered costly discovery about the fairness of institutional arbitration rules used in employment arbitration. See *Rosenberg v. Merrill Lynch Pierce*, 965 F.Supp. 190 (D. Mass. 1997), *aff'd on other grounds*, 170 F.3d 1 (1st Cir. 1999). See also discussion of vacatur for "manifest disregard of the law" at note 100.

A separate legal framework for international arbitration, along lines already adopted in other jurisdictions,¹²² would meet the need for a more neutral playing field in cross-border litigation, where the perception of judicial bias can cause productive transactions to falter.¹²³ An international statute would also permit broader reform than simply removing consumer and employment arbitration from the scope of the Federal Arbitration Act, which would otherwise still have to address domestically nurtured concerns.¹²⁴ In addition, repackaging the law of private dispute resolution into clearer language and a more orderly structure can be expected to reduce transaction costs in choosing an arbitral venue.¹²⁵

B. Review Standards

In the United States, an international arbitration act at the federal level would first make clear that narrow review standards cover awards in cross-border disputes,¹²⁶ regardless of whatever

¹²² See legislation in Belgium, France and Switzerland, discussed respectively in notes 113, 107 and 99. See also Hong Kong Arbitration Ordinance, Hong Kong Laws ch. 341, part IIA §34A-D, which for international arbitration incorporates the UNCITRAL Model Law.

¹²³ See discussion at notes 29-30.

¹²⁴ Such domestic concerns are discussed in *National Conference of Commissioners on Uniform State Laws, Proposed Revisions of the Uniform Arbitration Act* (Denver, July 1999). See also Stephen J. Ware, *Default Rules from Mandatory Rules: Privatization of Law Through Arbitration*, 83 MINN. L. REV. 703 (1999); Michael Scodro, *Arbitrating Novel Legal Questions: A Recommendation for Reform*, 105 YALE L.J. 1927 (1996).

¹²⁵ Making the United States a more user-friendly place to arbitrate would also increase invisible exports in the form of work for local arbitrators, lawyers and experts.

¹²⁶ The statute would complement Federal Arbitration Act Chapters II and III, which deal with enforcement and confirmation (but not vacatur) of awards covered by the New York Convention, *supra* note 2, and the Inter-American Convention on Commercial Arbitration (Panama 1975), 14 I.L.M. 336 (1975).

protective regime applies in domestic arbitration. Consumer and employment contracts, as well as agreements with small businesses, would be explicitly excluded from the statute's scope,¹²⁷ thus reducing the type of conflict that has sometimes arisen abroad when international arbitration statutes were not clear about their coverage.¹²⁸

Grounds for vacatur might be patterned on those of the UNCITRAL Model Law,¹²⁹ but with several modifications. First, arbitrator bias and corruption should be included explicitly as grounds for annulment.¹³⁰ Second, no reference should be made to "public policy," a chameleon-like concept that risks misapplication when refracted through parochial cultural lenses.¹³¹ Finally, parties might be given

¹²⁷ Consumer contracts include agreements with individuals related to property, services or credit, unless within the scope of an individual's profession. For an example of existing restrictions on arbitration clauses in consumer contracts, *see* EU Council Directive 93/13/EEC, 1993 O.J. (L95) 29. France also prohibits pre-dispute arbitration clauses except in contracts between merchants. *See* CODE CIVIL art. 2061; CODE DE COMMERCE art. 63.

¹²⁸ *See Meglio v. Société V2000, Cour de cassation*, 1997 REV. ARB. 537, note E. Gaillard; 1998 REV. CRIT. DR. INT'L PRIVÉ 87, note V. Heuzé (holding that French resident's purchase of limited series Jaguar escaped restrictions on consumer arbitration).

¹²⁹ Article 34 of the Model Law allows award vacatur for (i) invalidity of the agreement, (ii) lack of proper notice, (iii) excess of arbitral jurisdiction, (iv) irregular composition of the arbitral tribunal, (v) non-arbitrable subject-matter and (vi) conflict with public policy.

¹³⁰ Since the Model Law contains no explicit reference to bias, public policy must be pressed into service to deal with arbitrator bias and corruption.

¹³¹ *See, e.g., Laminoirs-Trefileries-Cableries de Lens, S.A. v. Southwire Co.*, 484 F.Supp. 1063 (N.D. Ga. 1980) (where the court vacated application of a French interest rate in a Franco-American contract). While public policy analysis is unavoidable when judges seize property, such malleable notions are unnecessary where no enforcement is requested. For example, if French and British companies choose Boston to arbitrate a dispute that has no effect in the United States, then unless one side seeks to enforce the award locally, American judges can leave to colleagues abroad the task of deciding whether the award is compatible with European competition law. Similar arguments might be made with respect to vacatur for excess of authority and violation of due process; however,

explicit options either to contract out of all review or to contract into review on the merits of the dispute.

The statute should also codify basic notions of arbitration procedure now hidden in a maze of often inconsistent cases that delight those wishing to sabotage an arbitration. In particular, the statute should allow arbitrators to rule on their own jurisdiction as a preliminary matter, and should confirm that arbitration clauses remain effective notwithstanding the invalidity of other contract provisions.¹³² Other areas in need of clarification include the interaction of federal and state arbitration law,¹³³ pre-award attachment,¹³⁴ consolidation of proceedings,¹³⁵ the validity of attempts to expand judicial review by

the more circumscribed nature of these procedural defects make them less likely to cause mischief.

¹³² These principles of "*com petence-comp tence*" and "separability" are discussed in William W. Park, *Determining Arbitral Jurisdiction: Allocation of Tasks Between Courts and Arbitrators*, 8 AM. REV. INT'L ARB. 133 (1997). See also Antonias Dimolitsa, *Autonomie et "Kompetenz-Kompetenz,"* 1998 REV. ARB. 305 (1998).

¹³³ Compare *Volt v. Stanford*, 489 U.S. 468 (1989) (arbitration in California stayed under provisions of state law on assumption that the parties had incorporated California arbitration law into their agreement); *Mastrobuono v. Shearson Lehman Hutton*, 517 U.S. 681 (1995) (upholding award for punitive damages notwithstanding choice-of-law clause designating state law that prohibited such awards); *Doctor's Association v. Casarotto*, 514 U.S. 52 (1996) (striking down Montana notice statute requiring arbitration clauses to be in capital letters on the first page of the contract).

¹³⁴ Compare *McCreary Tire & Rubber v. CEAT*, 501 F.2d 1032 (3rd Cir. 1974) (pre-award attachment denied); *Carolina Power & Light v. Uranex*, 451 F.Supp. 1044 (N.D. Cal. 1977) (pre-award attachment allowed); *Cooper v. Ateliers Motobecane*, 57 N.Y.2d 408 (1982) (pre-award attachment permitted by state legislation held inconsistent with the New York Convention).

¹³⁵ The Federal Arbitration Act does not authorize forced consolidation of different proceedings, even if they present similar questions of law and fact. See *United Kingdom v. Boeing*, 998 F.2d 68 (2nd Cir. 1993) (denying consolidation of arbitrations with Boeing and Textron, Inc. relating to contract with the British Ministry of Defense to develop an electronic fuel system).

contract¹³⁶ and the allocation of jurisdictional functions between judges and arbitrators.¹³⁷

C. What Makes Arbitration International?

Some nations have retreated from separate legal frameworks for domestic and international arbitration, fearing that such distinctions conflict with treaty prohibitions on nationality-based discrimination.¹³⁸ These concerns (whether or not justified) might be met by characterization methods that look to the nature of the transaction¹³⁹ or the parties' residences.¹⁴⁰

¹³⁶ Compare *Chicago Typographical Union v. Chicago Sun-Times*, 935 F.2d 1501 (7th Cir. 1995) (stating that federal court review power cannot be created by contract), with *Lapine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884 (9th Cir. 1997) (parties permitted to expand scope of judicial review), and *Gateway Technologies v. MCI Telecommunications Corp.*, 64 F.3d 993 (5th Cir. 1995) (court allows *de novo* review of issues of law according to parties' agreement).

¹³⁷ See *First Options of Chicago v. Kaplan*, 514 U.S. 938 (1995) (suggesting in *dictum* that in some cases courts must defer to arbitrators' decisions on their jurisdiction). See generally William W. Park, *The Arbitrability Dicta in First Options v. Kaplan*, 12 ARB. INT'L 137 (1996). In particular, the circuits are split on whether time limits contained in arbitration rules constitute a jurisdictional prerequisite to be determined by courts. See cases summarized in *PaineWebber v. Elahi*, 87 F.3d 589 (1st Cir. 1996).

¹³⁸ In England, the 1979 Arbitration Act prohibited pre-dispute waiver of appeal on points of English law in contracts among residents and/or citizens of the United Kingdom. Similar provisions in §87 of the 1996 Arbitration Act never entered into force due to a perceived conflict with Article 6 (to be renumbered to Article 12 pursuant to the Treaty of Amsterdam, see OFFICIAL JOURNAL C340, at 185 (1997)) of the Treaty on European Union, which forbids "discrimination on the grounds of nationality."

¹³⁹ French *NCPC* Article 1492 defines arbitration as international if it "implicates international commerce."

¹⁴⁰ See, e.g., Swiss *LDIP* arts. 176, 140, 192.

As between these approaches,¹⁴¹ a residence-based test seems more sensible.¹⁴² The special status of international arbitration justifies itself as a way to promote neutrality in dispute resolution among commercial actors from different countries. Difficult linguistic and procedural issues are more likely to arise when Boston merchants sue buyers in Beijing or Cairo than when they bring litigation in Chicago against an American supplier of goods destined for export.

Conclusion

Constructing an efficient framework for arbitration requires legislators and courts to engage in a process of legal fine tuning that balances a winner's concern for finality against a loser's desire for procedural safeguards. While a golden mean will remain elusive, national arbitration law can seek a reasonable counterpoise between arbitral autonomy and judicial control mechanisms.¹⁴³

To this end, the United States should adopt an international arbitration act making clear that the protective review standards appropriate for domestic disputes will not affect cross-border arbitration. This statute should also clarify, with respect to international commercial disputes, critical issues such as

¹⁴¹ The UNCITRAL Model Law in §1(3) adopts both tests, characterizing arbitration as international if the parties' places of business are in different states or the transaction has a connection to a state other than the parties' places of business. In addition, the Model Law allows parties to opt to treat their agreement as international.

¹⁴² The statute might cover disputes of a pecuniary nature unless entirely among American residents. Corporations and partnerships would be considered U.S. residents if organized under American law, or if they have a principal place of business in the United States. A U.S. branch of a foreign corporation would be considered a U.S. resident. An individual would be considered a resident if physically present in the United States more than 183 days during any calendar year.

¹⁴³ See, e.g., Klaus-Peter Berger, *The Implementation of the UNCITRAL Model Law in Germany*, 13 MEALEY'S INT'L ARB. REP. 38, 39 (Jan. 1998).

the relationship between federal and state arbitration law and the contours of an arbitrator's right to determine his or her own jurisdiction.

Not all nations, however, follow this ideal. Weighing arbitration's costs and benefits differently, some countries impose court scrutiny of a dispute's legal merits, while others allow waiver of all pre-enforcement review. If business managers choose to arbitrate in such jurisdictions, there is no reason to disregard the implications of these choices in an attempt to squeeze the entire world into the same Procrustean arbitral mold. Should commercial actors find a country's review standards burdensome or inadequate, the market will direct their next arbitration to a place more compatible with the desired level of judicial control.¹⁴⁴

Recognition of vacated awards should depend not on the nature of the annulment standard, but on whether the annulment was made in good faith and comports with fundamental notions of justice. The touchstone for deference to court judgments about arbitration, as to arbitral awards themselves, lies in the absence of fraud and undue influence, and conformity with basic notions of international public policy.

¹⁴⁴ One is reminded of Justice Holmes's comment that "[t]he most enlightened judicial policy is to let people manage their own business in their own way, unless the ground for interference is very clear." *See Dr. Miles Medical Co. v. John D. Park & Sons*, 31 U.S. 373, 386 (1911) (Holmes, J., dissenting).