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Bridging the Gap in Forum Selection: Harmonizing Arbitration and Court Selection

*William W. Park**

"You shall not be partial in judgment...."

-- Deuteronomy 1:17

I. INTRODUCTION

More than one thoughtful international business manager has been haunted by the fear that foreign judges might not always respect Moses' admonition to impartiality.[1] Concern that the other side will have an unfair advantage in its home court has often driven lawyers to include in international contracts one of two forum selection devices:[2] an arbitration agreement entrusting the controversy to a private decision-maker or a court-selection clause granting adjudicatory power to courts at a designated

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1. Conversely, some lawyers have occasionally been candid enough to admit their aspirations toward a more favorable hearing before their client's own local courts. *See, e.g.*, Societé Nationale Algerienne Pour La Recherche v. Distrigas Corp., 80 B.R. 606 n.2 (D. Mass 1987) (statement of counsel). Mistrust of courts of an adversary's home jurisdiction can exist even between peoples living in the same country. *See* discussion of federal jurisdiction, *infra* note 38.

2. In its fullest sense forum selection would seem to include *all* binding contractual choices of the mechanism to decide a present or potential dispute, including *any* forum, whether public or private. Although the term "forum selection clause" has often been used to designate a choice of courts rather than arbitrators, this article, for the sake of clarity, will refer to party-selected government dispute resolution as "court-selection."

location.[3] Both mechanisms can enhance political and procedural neutrality, thereby facilitating business ventures when parties have a mutual mistrust of each other's courts and a mutual interest in locking in a predictable dispute resolution process at the time of contract signature. However, the effectiveness of the two devices can differ radically due to quite disparate statutory and treaty enforcement frameworks.

The growing disjunction between arbitration and court selection was recently underscored in *Richards v. Lloyd's of London*,[4] one of a spate of cases[5] involving forum selection clauses[6] calling for resolution in England of claims brought by American investors in the well-known Lloyd's insurance syndicates.[7] Worried that such forum selection arrangements operated as *de facto* waivers of rights under the federal securities laws, the Ninth Circuit initially refused to enforce a set of clauses granting exclusive jurisdiction to English courts,[8] rejecting a line of decisions enforcing arbitration agreements

3. Court selection mechanisms are also called jurisdiction clauses or "prorogation agreements." The term prorogation (from the French *proroger*) also covers a legislature's decision to adjourn. Prorogation of both sorts involves the notion of extension: by contract parties' attempt to extend a judge's jurisdiction, and by adjournment a parliament extends debates until a later time.

4. Richards v. Lloyd's of London, 107 F.3d 1422 (9th Cir. 1997), *reh'g, en banc, granted,* 121 F.3d 565 (9th Cir. 1997), *and op. withdrawn, substituted op., on reconsideration, en banc,* 135 F.3d 1289 (9th Cir. 1998), *petition for cert. filed,* (May 4, 1998). *See generally* Michael Novicoff, *A Funny Thing Happened on the Way to the Forum*, 20 LOS ANGELES LAW. 33 (1997).

5. For other decisions enforcing the forum selection provisions, *see* Haynsworth v. Corporation of Lloyd's, 121 F.3d 956 (5th Cir. 1997), *reh'g en banc denied,* 129 F.3d 614 (5th Cir. 1997), *and cert. denied,* 188 S.Ct. 1513 (1998); Allen v. Lloyd's, 94 F.3d 923 (4th Cir. 1996); Shell v. R.W. Sturge Ltd., 55 F.3d 1227 (6th Cir. 1995); Bonny v. Society of Lloyd's, 3 F.3d 156 (7th Cir. 1993); Roby v. Corporation of Lloyd's, 996 F.2d 1353 (2d Cir. 1993), *cert. denied,* 510 U.S. 945 (1993); Riley v. Kingsley Underwriting Agencies, 969 F.2d 953 (10th Cir. 1992), *cert. denied,* 506 U.S. 1021 (1992). At least one federal district court has criticised this trend. *See* Stamm v. Corp. of Lloyd's, No. 96-5158 (SAS), 1997 WL 438773 (S.D.N.Y. Aug. 4, 1997).

6. The "Members Agent's Agreements" in Lloyd's syndicates called for *both* arbitration in London and submission to the exclusive jurisdiction of the courts of England. See, for example, articles 15 and 18 of the agreements cited in footnotes 2 and 3 of *Riley*, 969 F.2d at 955. Presumably, the potential conflict between the arbitration and court selection provisions could be resolved by considering the jurisdictional submission which referred to the "curial" jurisdiction of the English courts to supervise the arbitration. See *Paul Smith Ltd. v. H & S Int'l Holding Inc.*, 2 LLOYD'S REP. 127, 129-30 (1991), in which Justice Steyn (as he then was) interpreted the reference to English courts (in a combined arbitration and jurisdiction clause) as indicating the law governing the arbitration in matters such as interim relief, vacancies in the arbitral tribunal, and removal of arbitrators for misconduct.

7. *See The Lloyd's Mess: When Names Are Mud,* ECONOMIST, July 27, 1991, at 17; *The Liquidity Gap at Lloyd's*, ECONOMIST, May 16, 1991, at 101.

8. The Court referred to § 14 of the 1933 Securities Act, 15 U.S.C. § 77 (1997)which provides that "any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this title or the rules and regulations of the [Securities Exchange Commission] shall be void." Independently of the other aspects of its reasoning, the Court may have confused the matters of choice of law and choice of forum. While the two issues certainly intersect, it is not self-evident why the Securities Act (the applicable law) should not

in analogous situations.[9] The court distinguished the arbitration cases on the basis that they enforced a statutory mandate — the Federal Arbitration Act[10] — rather than an "amorphous policy" favoring court selection.[11] Although the Ninth Circuit subsequently reversed its position and enforced the forum clauses,[12] the case illustrates the potential for expensive incongruity in the treatment of two functionally equivalent types of forum selection.

To bridge this gap between public and private dispute resolution, the United States might enact a statute similar to the Model International Court Selection Act ("the Act")[13] set forth in the Appendix.[14] This article will take

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be enforceable by an arbitrator (the party-selected adjudicator) in the same way as by a judge.

9. *See, e.g.*, Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974) (arbitration in Switzerland); Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, 473 U.S. 614 (1985) (arbitration in Japan).

10. 9 U.S.C. § 2 provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

11. "The Supreme Court [in the arbitration cases] chose to apply the Arbitration Act. It did not weigh reasonableness or pit amorphous policy [benign toward court selection] against a command of Congress [in the Securities Act's anti-waiver provisions]." Richards v. Lloyd's of London, 107 F.3d 1422, 1427 (9th Cir. 1997). The opinion then continued in a rhetorical question and answer format:

> Is there a significant difference between a *policy* objection to enforcement and a *statutory* obstacle to such enforcement? We believe there is . . . A *policy* objection [to the Securities Act's anti-waiver bars] represents judicial reasoning in the area where the federal statutes, if they are to the contrary, must rule. A *statutory* obstacle represents a legislative determination that is of at least equal weight with another statute. Consequently, what was decided when the Arbitration Act stood in the way of the [securities law] antiwaiver bars is not helpful when no statute stands in the way of their enforcement.

Id.

12. Richards v. Lloyd's of London, 135 F.3d 1289 (9th Cir. 1998), *petition for cert. filed* (May 4, 1998).

13. The Draft International Court Selection Act is adapted from an earlier proposal in WILLIAM W. PARK, INTERNATIONAL FORUM SELECTION 191-92 (1995).

14. Careful observers of international litigation will note, however, that even the best of statutes will not completely put arbitration and litigation on an equal footing. For the attitude of the Ninth Circuit in *Richards* tells only a portion of the forum selection story. The United States' failure to conclude any jurisdiction and judgments treaty also contributes to the poor performance of court selection clauses when compared to arbitration agreements. *See* discussion *infra* Part IIB(2). The statute would, however, at least constitute a starting point, albeit limited, from which to enhance reliability in the judicial resolution of international disputes.

the Model Act as a springboard to explore the divergent legal frameworks for enforcing choice-of-court clauses and arbitration agreements. After a brief summary of how the Act is intended to work, this article attempts to anticipate some of the objections to the Act as well as potential jurisdictional conflicts between the court allegedly designated by the contract and the court that would otherwise hear the dispute.

II. TREATIES AND STATUTES

A. The Framework for Arbitration Agreements

The New York Arbitration Convention[15] and the Federal Arbitration Act,[16] backed by a network of state and foreign arbitration acts,[17] require courts in the United States and abroad to enforce an arbitration clause and the resulting award. The Convention directs courts to refer the parties to arbitration if their contractual relationship is covered by a valid agreement to arbitrate,[18] and gives to an arbitral award covered by the Convention the same force as a domestic award.[19] The Federal Arbitration Act[20] directs that arbitration clauses "shall be valid, irrevocable and enforceable"[21] and that courts shall stay proceedings as to any issue referable to arbitration.[22] Although peculiarities of local contract law play a role in determining the validity of an arbitration clause, American case law has made it clear that states may not place special limits on the validity of an agreement to arbitrate that would not apply to contracts in general.[23]

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15. New York Convention On The Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2518, T.I.A.S. No. 6997, 330 U.N.T.S. 39 [hereinafter New York Convention].

16. 9 U.S.C. §§ 1-307 (1997).

17. *See generally,* William W. Park, *National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration,* 63 TUL. L. REV. 647 (1989).

18. *See* New York Convention, *supra* note 15, art. II.

19. *See* 9 U.S.C. § 201 (1997). The Supreme Court in *Allied-Bruce Terminex Cos, Inc. v. Dobson,* 513 U.S. 265, 267-71 (1995) held that the FAA applies to the full extent of Congressional power to regulate interstate and international commerce.

20. 9 U.S.C. §§ 1-307 (1997).

21. 9 U.S.C. § 2 (1997).

22. 9 U.S.C. § 3 (1997).

23. *See* Doctor's Assocs. v. Casarotto, 517 U.S. 681 (1996).

B. The Non-Framework for Court Selection Clauses[24]

1. No Statutes

With the exception of New York state, no American jurisdiction has a statute that treats court selection clauses as conclusive, and no federal legislation does for choice-of-court clauses what the Federal Arbitration Act does for arbitration agreements.[25] Although the United States Supreme Court has manifested a benevolent attitude toward court selection clauses,[26] its decisions say only that court selection agreements will be respected if "reasonable" by reference to a multiplicity of factors that vary from jurisdiction to jurisdiction. One lower court decision set forth nine factors relevant to the reasonableness of a jurisdiction clause, emphasizing "the totality of the circumstances measured in the interests of justice."[27] A jurisdiction clause thus constitutes only one factor to be weighed among many others in balancing the relative convenience and fairness of different litigation venues.

The situation is even more complex when one looks at state law.[28] Several

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24. *See generally* Anne E. Covey & Michael S. Morris, *The Enforceability of Agreements Providing for Forum and Choice of Law Selection*, 61 DENV. L.J. 837, 839 (1988); Francis M. Dougherty, *Validity of Contractual Provision Limiting Place or Court in Which Action May Be Brought*, 31 A.L.R. 4th 404 (1984); Michael Gruson, *Forum Selection Clauses in International and Interstate Commercial Agreement*, 1982 U. ILL. L. REV. 133 (1982); Andreas Lowenfeld, *Nationalizing International Law*, 36 COLUM. J. TRANSNAT'L L. 121 (1997); Linda S. Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 FORDHAM L. REV. 291 (1988); Linda S. Mullenix, *Another Easy Case, More Bad Law: Carnival Cruise Lines and Contractual Personal Jurisdiction*, 27 TEX. INT'L L.J. 323 (1992); Michael E. Solimine, *Forum-Selection Clauses and the Privatization of Procedure*, 25 CORNELL INT'L L.J. 51 (1992).

25. New York State courts must honor a court selection clause in a transaction involving not less than $1 million and subject to New York law. N.Y. GEN. OBLIG. LAW § 5-1402 (1) (1989) and N.Y.C.P.L.R. 327(b). For a discussion of how the New York statute has been implemented in international financial agreements, see LEE BUCHHEIT, HOW TO NEGOTIATE EUROCURRENCY LOAN AGREEMENTS 126-131 (1995).

26. *See* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991); Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22 (1988); Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972).

27. D'Antuono v. CCH Computax Sys., Inc., 570 F. Supp. 708, 712 (D.R.I. 1983). The factors included: (1) the contract's substantive governing law; (2) the place of execution of the contract; (3) the place of performance of the relevant transactions; (4) the type of remedies available in the designated forum; (5) the public policy of the alternate forum; (6) the location of the parties, witnesses and evidence; (7) the relative bargaining power of the parties; (8) fraud, undue influence, or "other extenuating or exacerbating circumstances;" and (9) the conduct of the parties. *Id.*

28. State law may apply not only in state courts, but also in federal courts where jurisdiction is based on diversity of citizenship between the parties. Some federal courts see enforcement of a jurisdiction clause as a matter of substantive law, requiring application of state norms in diversity cases under the principle of *Erie RR v. Tompkins*, 304 U.S. 64 (1938). *See, e.g.*, Alexander Proudfoot Co. World Headquarters L.P. v. Thayer, 877 F.2d 912 (11th Cir. 1989); *In re.* Diaz Contracting, Inc. v. Nanco, 817 F.2d 1047 (3d Cir. 1987); Farmland Indus. Inc. v.

states still refuse to enforce court selection clauses, either in general[29] or with respect to particular contracts such as franchise agreements.[30] Even if a state does accept the theoretical validity of jurisdiction clauses, courts in practice may give a clause a restrictive interpretation that vitiates its effect. Some court selection clauses have been construed as non-exclusive, therefore inviting competing actions in different fora,[31] or read to exclude actions based on extra–contractual wrongs such as deceit and unfair business practices.[32]

Subject matter jurisdictional limits may also vitiate an otherwise valid jurisdiction clause. Unless a case implicates a question of federal law, federal court power generally is limited to cases arising on the basis of diversity of citizenship. Thus, one foreigner may not normally sue another in federal courts. State courts may likewise be restrained by statutory limits on their power to hear cases.[33]

Even a court possessing jurisdiction may, as a matter of discretion, decline to hear a case on *forum non conveniens* grounds because of the

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Frazier-Parrott Commodities Inc., 806 F.2d 848 (8th Cir. 1986); Bryant Electric Co. v. Fredricksburg, 762 F.2d 1192 (4th Cir. 1985). Other courts have assumed (often with little discussion) that the matter is procedural, and that federal law applies.

29. As of this writing, court selection clauses are still generally unenforceable in Idaho, Iowa, Maine, Montana, and Texas. *See* IDAHO CODE § 29-110 (1997); McCarty v. Herrick, 41 Idaho 529 (1925); MONT. CODE ANN. § 28-2-708 (1997); State ex rel. Polaris Indus. v. Dist. Ct., 695 P.2d 471 (Mont. 1985); Davenport Mach. & Foundry Co. v. Adolph Coors Co., 314 N.W.2d 432 (Iowa 1982); Fidelity Union Life Ins. Co. v. Evans, 468 S.W.2d 869 (Tex. Civ. App. 1971); and Bartlett v. Union Mut. Fire Ins. Co., 46 Me. 500 (1859). In at least two other states the situation is somewhat ambiguous. In North Carolina, recent case law has limited the unenforceability of court selection clauses to intra-state transactions. *See* Perkins v. CCH Computax, Inc., 423 S.E.2d 780 (N.C. 1992). In Georgia, the Court of Appeals (the judicial level below the Georgia Supreme Court) has disapproved previous Supreme Court decisions holding jurisdiction clauses contrary to Georgia public policy. *See* Regency Mall Assocs. v. G.W.'s Restaurant, 444 S.E.2d 572 (Ga. Ct. App. 1994); Harry S. Peterson Co. v. National Union Fire Ins. Co., 209 Ga. App. 585 (Ga. Ct. App. 1993).

30. *See, e.g.*, Kubis & Perszyk Assocs. v. Sun Microsystems, 680 A.2d 618 (N.J. 1996) (arising under New Jersey Franchise Practices Act, and involving an ill-fated jurisdiction clause that would have sent parties to California).

31. *See* Brooke Group v. JCH Syndicate 488, 663 N.E.2d 635 (N.Y. 1996) (service of suit clause in insurance contract was permissive in nature, and did not preclude dismissal on *forum non conveniens* grounds).

32. See *Jacobson v. Mailboxes Etc.*, 646 N.E.2d 741 (Mass. 1995), in which the Massachusetts Supreme Judicial Court announced in *dictum* that it would abandon a century and a half of precedent holding court selection clauses presumptively invalid. The trial judge, however, was required to determine the "principal focus" of the plaintiff's claims (in order to avoid parallel actions for contractual and non-contractual actions), with the consequence that to the date of this writing the case has not been sent to the contractually selected forum.

33. *See* N. Y. BUS. CORP. LAW § 1314(b)(1)-(5); N.Y. BANKING LAW § 200(b) (limiting actions between two foreign entities). As discussed *infra*, the effect of these limits was to some extent mitigated by the enactment of N.Y. GEN. OBLIG. LAW § 5-1402.

location of witnesses and documents, or the drain on public resources.[34] The risk of judicial default is heightened in cross-border transactions, where disputes often lack a judicially significant connection with the potential forum.[35] Although one judge might "export" a case pursuant to a court selection clause in order to unclog the docket, judicial counterparts at the "importing" court may not be eager to increase their workload by hearing a dispute with little connection to the forum.

2. No Treaties

Court selection clauses also remain problematic due to the United States' failure to conclude any treaty, or to enact any statute, providing for the enforcement of court selection clauses or the resulting judgments when one party resists the bargained-for venue. While the absence of any court selection statute may be the result of legislative inadvertence, the American inability to conclude any foreign judgments treaty is due principally to apprehension among our allies and trading partners with respect to the peculiarities of litigation in the United States: civil juries, punitive damages, strict tort liability, and the perceived extraterritoriality of assertions of jurisdiction.[36]

Courts in some jurisdictions do of course accord American judicial decisions *res judicata* effect. Not all countries are so generous. In all events, however, recognition of American judgments remains a matter of discretion and "comity," deriving from internal law rather than international obligation.

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34. Only New York has done away with *forum non conveniens* in court-selection cases, and only within the confines of a statute covering a statutorily limited set of actions. The claim must be governed by New York law and arise out of transactions of a million dollars or more. *See* N.Y. GEN. OBLIG. LAW § 5-1402 and N.Y.C.P.L.R. 327(b).

35. *See* Universal Adjustment Corp. v. Midland Bank Ltd. of London, 184 N.E. 152, 160-61 (Mass. 1933) (holding that a claimant had no right to be heard in Massachusetts because the economic impact of the dispute was localized abroad).

36. Since June 1994 the United States has participated in a Special Commission of the Hague Conference on Private International Law considering an international convention on recognition of judgments in civil and commercial matters. The Commission includes representatives from more than thirty countries plus the European Union and several non-governmental organizations such as the International Bar Association and UNIDROIT. *See* Hague Conference on Private International Law, Recognition and Enforcement of Foreign Judgments, Synthesis on International Jurisdiction and the Effects of Foreign Judgments in Civil and Commercial Matters (Prel. Doc. 8, Nov. 1997), drafted by Catherine Kessedjian. *See also* Catherine Kessedjian, *Towards a Worldwide Convention on Jurisdiction and Enforcement*, INT'L LITIG. NEWS (I.B.A.), Aug. 1994, at 8; Andreas Lowenfeld, *Forum Shopping, Antisuit Injunctions, Negative Declarations, and Related Tools of International Litigation*, 91 AM. J. INT'L L. 314, 322 (1997); Andreas Lowenfeld, *Thoughts About a Multinational Judgments Convention: A Reaction to the von Mehren Report*, 57 LAW & CONTEMP. PROBS. 289 (1994); Arthur von Mehren, *Recognition and Enforcement of Foreign Judgments: A New Approach for the Hague Conference?*, 57 LAW & CONTEMP. PROBS. 271 (1994).

III. WHY COURT SELECTION MATTERS

A. The Special Needs of International Business

Whether justified or not, concern over litigation bias against foreigners will inevitably chill international transactions unless there exists a relatively neutral alternative to the judicial system of the potential adversary. In the international commercial arena, there exist no non-national commercial courts of compulsory jurisdiction.[37] Cross-border economic co-operation has therefore come to rely on forum selection mechanisms of a contractual nature to provide the neutrality and predictability which commercial actors in a single-country context take for granted. Contracts do not enforce themselves automatically, but need the intervention of flesh and blood adjudicators. Thus the identity of *who* interprets the agreement may be more significant than *what* the applicable law says about its construction.[38]

In a domestic transaction, litigation will usually proceed in a relatively homogeneous linguistic and procedural context, notwithstanding a court's failure to give effect to the parties' choice of forum. Proceedings will go forward in some variant of the English language according to a relatively familiar set of federal or state civil procedure rules.

On the other hand, when an international venture goes awry, the dramatically disagreeable consequences of a failed forum selection clause can include unfamiliar procedures, a foreign language, and sometimes a judge in a country without a tradition of judicial independence. The consequences to a Boston merchant of having to litigate a dispute in Atlanta are hardly comparable to the prospect of court proceedings in Algiers or Athens.

Without a relative measure of certainty in court selection, many otherwise beneficial international commercial relationships either will be concluded at higher costs, or will not be concluded at all. While some transactions may be consummated even in a climate of adjudicatory

37. The experience of the International Court of Justice (I.C.J.) in commercial matters is limited both by tradition and by jurisdictional constraints. For one commercial case that did reach the I.C.J., see *Elettronica Sicula S.P.A.* (ELSI) (U. S. v. Italy), 1989 I.C.J. 15 (July 20), reprinted in 28 I.L.M. 1109 (1989).

38. Even in commerce within the United States, the need for adjudicatory neutrality as between residents of different states seems to have been recognized in the form of federal court diversity jurisdiction, which operates to keep citizens of one state out of the potentially biased courts of their adversary's home state. See, for example, the opinion in *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 87, 3 L.Ed. 38 (1809), where Chief Justice Marshall wrote: "However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true, that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states."

uncertainty, others will not.[39] The enhancement of international economic cooperation thus argues for a more hard-and-fast approach to the enforcement of court selection clauses, notwithstanding the benefits of more flexible principles applied in a domestic context.

The reality of litigation bias against foreigners may be less significant than the perception that such prejudice exists. The consequences of imagined prejudice often will be as disruptive as the real thing, in the sense that a transaction may not go forward due to lack of confidence in the adjudicatory mechanism.

The prevalence of this fear of judicial xenophobia was underscored by a recent study of federal civil actions in the United States. The study found that foreign litigants actually fare better than domestic parties. But the most plausible explanation is distressing: foreigners' anxiety over the American civil justice system causes them to continue to final judgment only when they have particularly strong cases.[40]

As mentioned earlier, arbitration law has already recognized the international business manager's special need for reliability in dispute resolution. For example, France, Switzerland and Belgium, as well as countries that have adopted the United Nations Commission on International Trade Law (UNCITRAL) Model Arbitration Law, subject arbitral awards in international disputes to less restrictive control mechanisms and a different degree of judicial scrutiny than in domestic arbitration.[41] In the United States, case law considering cross-border dispute resolution has permitted arbitration of what might otherwise have been non-arbitrable subject matters.[42]

Some lawyers see no need for such special treatment of international arbitration.[43] Indeed, certain countries have retreated from divergent legal regimes for domestic and international arbitration,[44] fearing that distinctions

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39. On the effect of litigation risk aversion in international business, see William W. Park, *Neutrality, Predictability and Economic Co-operation*, 12 (No. 4) J. INT'L ARB. 99 (1995).

40. *See* Kevin M. Clermont & Theodore Eisenberg, *Xenophilia in American Courts*, 109 HARV. L. REV. 1120, 1122 (1996). The study analyzed federal civil cases decided from 1986-94, using a database of over 94,000 actions. *Id.*

41. *See* Chapters 28 to 34 in W. LAURENCE CRAIG, WILLIAM W. PARK AND JAN PAULSSON, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION (2d ed. 1990).

42. *See* Sonatrach v. Distrigas, 80 Bankruptcy Rep. 606 (D. Mass. 1987) (claims in bankruptcy); Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, 473 U.S. 614 (1985) (antitrust claims); and Scherk v. Alberto Culver, 417 U.S. 506 (1974) (securities law claims).

43. No less a scholar than Lord Mustill has written that he has "never understood why international arbitration should be different in principle from any other kind of arbitration . . ." *See* Michael Mustill, *Cedric Barclay Memorial Lecture No. 1*, 58 ARB. 159, 165 (Aug. 1992).

44. Under the now superseded 1979 English Arbitration Act, pre-dispute waiver of appeal on points of law was not allowed between or among residents and/or citizens of the United

based on nationality might conflict with international commitments.[45]

Yet there should no mystery about the need for a special status for international arbitration. The legal framework for dispute resolution often represents a compromise between two or more competing goals, each of which would be extended but for the other. One such objective is judicial flexibility in dealing with potentially abusive contractual choices that purport to modify the way cases are heard by otherwise competent government tribunals. A rival aim is to permit parties to international contracts to level the playing field in the event of disputes so as to reduce the risk of "hometown justice" in the other side's judicial system. One way to balance these contending policy aspirations is to provide a separate regime for international transactions, as set forth in the statute outlined in Part IV below.

B. Arbitration's Inadequacies, Real and Imagined

Even if one admits that adjudicatory neutrality bears a special premium in international transactions, one might argue that parties to international contracts can already get a relatively neutral forum through arbitration. Why then complicate life by adding yet another law that restricts judicial discretion?

The short answer is that commercial actors do not always believe they can get what they want from arbitration. Rightly or wrongly, there is a fear among many business managers that arbitrators tend to be undisciplined wild cards, rendering "split the difference" awards that lack principle, and do for commercial controversies what Solomon threatened to do in the proverbial child custody dispute.[46] Judges are seen as more predictable and more likely to follow precedent.

The preference for courts may also be due to an information gap. Corporate lawyers who draft dispute resolution clauses often ignore both the existence of the New York Arbitration Convention and the vicissitudes of foreign litigation, while the international litigators who inherit a deal gone sour are not the ones who write the contracts.

Kingdom. The 1996 Arbitration Act contained similar provisions, which never entered into force due to a perceived conflict with obligations within the European Union. *See* Arbitration Act, S.I. 1996, No. 3146 § 3 [hereinafter English Act] (providing that the Act would come into force "except sections 85 to 87," which relate to domestic arbitration).

45. *See* Treaty on European Union, art. 6, Mar. 25, 1957, 298 U.N.T.S. 11, 1973, Gr. Brit. T.S. No. 1 (Cmd. 5179-II), *as amended by* Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719, (providing that "[w]ithin the scope of application of this Treaty . . . any discrimination on grounds of nationality shall be prohibited").

46. For Solomon's interim ruling ("Bring me a sword . . . [d]ivide the living child in two") and the more felicitous final award ("Give the living child to the first woman. . . she is its mother"), see I Kings 3:24-27.

In addition, some lawyers distrust arbitration because it lacks full appeal on the merits and formal rules of evidence. The less formalistic nature of arbitration can work against some litigants in some contexts, just as in other situations it can work in their favor. For many business conflicts, however, informal proceedings will serve the parties' true interests better than a legally flawless procedure involving costly appellate maneuvers.

Underlying these anecdotal critiques of arbitration, of course, is the assumption that the client did not get all it wanted because the arbitrator was no good, rather than due to a weak case or sloppy lawyering. But as discussed below, there are more serious critiques of arbitration.

The interaction of federal and state arbitration law comes readily to mind as the first candidate for statutory clarification. Although one result of the American Civil War is that the Federal Arbitration Act should apply even in Alabama,[47] much recent case law has obscured the role of state law,[48] particularly on matters as to which federal law is silent. While the Federal Arbitration Act will preempt application of more restrictive state arbitration law, it is not always self-evident which state law rules will be considered consistent with the goals and policies of the Federal Arbitration Act. For example, no firm consensus exists yet on whether measures of interim relief and pre-award attachment in arbitration are consistent with the New York Arbitration Convention.[49]

A deeper well of potential trouble relates to the consolidation of related claims, where problems inhere in the very architecture of arbitration, which by its nature is a consensual process. Although the rules of some arbitral

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47. *See* Allied-Bruce Terminix v. Dobson, 513 U.S. 265, 271 (1995) (rejecting the narrower construction of "interstate commerce," which would have applied the Federal Arbitration Act only to transactions in which the parties actually contemplated activities in more than one state).

48. *See* Volt Information Sciences v. Stanford, 489 U.S. 468 (1989) (holding that arbitration in California could be stayed under provisions of state law, reasoning that the parties had incorporated California arbitration law into their agreement to arbitrate). However, in *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52 (1995), the Court upheld an arbitral award for punitive damages notwithstanding that the relevant choice-of-law clause called for application of New York law, which prohibits arbitrators from awarding punitive damages. *See also* Doctor's Assocs. v. Casarotto, 517 U.S. 681 (1996) (striking down a Montana "notice statute" requiring that arbitration clauses be in capital letters on the first page of the contract, as inconsistent with "the goals and policies of the Federal Arbitration Act").

49. Some courts reason that by bargaining for arbitration the parties have implicitly excluded intervention by national courts until an award is rendered, while others view pre-award attachment as a way to maximize the efficiency of the arbitral process consistent with the parties' presumed intent. *Compare* McCreary Tire & Rubber Co. v. Ceat S.p.A., 501 F.2d 1032 (3rd Cir. 1974) (pre-award attachment denied) *with* Carolina Power & Light v. Uranex, 451 F. Supp. 1044 (N.D. Cal 1977) (pre-award attachment allowed). For a case in which pre-award attachment permitted by state legislation did not withstand a challenge based on inconsistency with the New York Convention, see *Cooper v. Ateliers de la Motobecane*, S.A., 442 N.E.2d 1239 (N.Y. 1982).

institutions provide for voluntary joinder of related arbitrations,[50] this does not obviate the need to obtain the consent of the party to be joined.[51] For better or for worse, the Federal Arbitration Act does not authorize forced consolidation of different arbitration proceedings, even if they present similar questions of law and fact.[52] Therefore, a company may be whipsawed by inconsistent results in connected contract disputes, unless arbitration takes place in a state that does provide for joinder of related claims,[53] or all the parties had the foresight to provide for consolidation in their various arbitration agreements.

Even more problematic is a dispute involving both persons who have signed an arbitration agreement and a person who has not. While courts sometimes order arbitration with respect to non-signatories (usually on theories of estoppel or fairness, when different controversies raise interconnected issues),[54] arbitrators themselves will not normally want to run the risk of having their awards vacated when on their own initiative they venture to pierce corporate veils or otherwise assert their power over non-signatories.[55]

IV. A COURT SELECTION STATUTE

A. Thumbnail Sketch

The statute set forth as an appendix to this article was inspired in part by Swiss conflict of laws principles[56] and provisions of the Brussels and Lugano Conventions.[57] It is designed to give jurisdiction clauses much of the same force now accorded arbitration agreements. The operative portion of the

50. *See, e.g.*, art. 13.1(c) of the Arbitration Rules of the London Court of International Arbitration.

51. *See generally* Sir Michael Mustill, *Multipartite Arbitrations: An Agenda for Law-Makers*, 7 ARB. INT'L 393 (1991).

52. *See* Government of United Kingdom of Great Britain v. Boeing Co., 998 F.2d 68 (2nd Cir. 1993) (denying consolidation of arbitrations with Boeing and Textron, Inc. relating to a contract with the British Ministry of Defense to develop an electronic fuel system).

53 *See, e.g.*, MASS. GEN. LAWS ch. 251, § 2A (1997), which calls for consolidation as provided in the Massachusetts Rules of Civil Procedure. Rule 42 permits joinder of actions "involving a common question of law or fact." *Compare* CA. CODE CIV. PROC. § 1281.3.

54. *See, e.g.*, J. J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A., 863 F.2d 315, 320 (4th Cir. 1988).

55. *See* First Options of Chicago v. Kaplan, 514 U.S. 938 (1995). *See also* Carte Blanche Pte., Ltd. v. Diner's Club Int'l, Inc., 2 F.3d 24 (2d Cir. 1993).

56. *See* Swiss *Loi fédérale sur le droit international privé* art. 5 (Switz.).

57. *See* Brussels and Lugano Conventions, *infra* notes 64-65.

statute takes a tripartite structure, dealing separately with (i) litigation brought in disregard of the parties' agreement, (ii) the chosen court's duty to hear a case, and (iii) recognition of the resulting judgment.

First, all courts in the United States would be required to stay actions inconsistent with a valid choice-of-court clause. Inconsistent state law would be preempted in much the same fashion that the Federal Arbitration Act generally overrides conflicting state arbitration statutes.

Second, the Act would require federal courts to hear cases pursuant to such clauses, as long as Constitutional jurisdictional requirements are met.[58] Thus a court could not decline to hear a case covered by an exclusive jurisdiction clause on the basis of *forum non conveniens*.

Finally, the statute would require recognition of judgments based on a valid choice-of-court clause. This would be consonant with the Uniform Foreign Money Judgments Recognition Act,[59] but would go further than its enactment in those states that require reciprocity in the foreign jurisdiction.[60] It would also be in line with the positions taken by the Restatement (Second) Conflicts of Law[61] and the Restatement (Third) of Foreign Relations Law,[62] which generally recognize foreign court decisions other than penal and tax judgments.[63]

As explained more fully in the annotation below, the Act excludes from its coverage contracts entirely between American residents and/or citizens. This limitation in scope should make the Act more acceptable to those who would otherwise oppose such a statute, while preserving its benefits for those who need it most.

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58. Federal court subject matter jurisdiction under Article III of the Constitution requires either diversity of citizenship (a dispute between citizens of different states or between a U.S. citizen and a foreigner) or a dispute raising a federal question. Federal courts have no power to hear disputes entirely between foreigners unless the dispute implicates issues of federal law. Resident alien individuals will be treated as citizens of the state of their domicile. *See* 28 U.S.C. § 1332(a).

59. 13 U.L.A. 261 (1962). At present, 29 states as well as the District of Columbia and the Virgin Islands have adopted the UFMJRA. Adopting states include Alaska, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, Virginia, and Washington.

60. Currently Idaho, Georgia, Massachusetts, Ohio and Texas provide lack of reciprocity as a ground for nonrecognition. *See, e.g.*, MASS. GEN. LAWS. Ch. 235, 1 23A, *as interpreted in* Desjardins Ducharme v. Hunnewell, 585 N.E. 2d 321 (Mass. 1992).

61. RESTATEMENT (SECOND) CONFLICT OF LAWS § 98.

62. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 481.

63. *See* Her Majesty the Queen in Right of Province of British Columbia v. Gilbertson, 597 F. 2d 1161, 1163 (9th Cir. 1979).

In addition, the statute should operate in conjunction with bilateral and/or multilateral treaties for the enforcement of judgments, to give to American judicial decisions an international currency abroad. To be within the realm of reality, however, such treaties might have to be limited in scope to judicial decisions based on party consent in a written court-selection clause. The widespread foreign fear of the American civil justice system with its civil juries and punitive damages make it highly unlikely that very many countries would accept a treaty that covered judgments not based on the consent of the parties. Subject to this caveat, however, there is no reason that an American court decision should not be treated as favorably as an arbitral award rendered in the United States, provided it is subject to defenses similar to those available under the New York Convention, Article V. The parallel provisions of the Brusselles[64] and Lugano[65] Conventions would provide an excellent model for such a multilateral treaty. But as Rudyard Kipling might have written, "This is another story for another day," or at least for another symposium.

B. Exegesis

1. Scope

a. International Disputes

For what might be termed political reasons, the Act limits its scope to international transactions. Many scholars mistrust binding forum selection, whether through arbitration clauses or choice-of-court agreements.[66] These thinkers thus resist limitations on judicial discretion to refuse enforcement of

64. Brussels Convention on Jurisdiction and Enforcement of Judgments, Sept. 27, 1968, *as amended*, 1990 O.J. (C 189) 1 [hereinafter Brussels Convention].

65. Lugano Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 16, 1988, 1988 O.J. (L 319) 9 [hereinafter Lugano Convention].

66. See Thomas Carbonneau, *Arbitral Justice: The Demise of Due Process in American Law*, 70 TUL. L. REV. 1945 (1996); Thomas Carbonneau, *Arbitration and the U.S. Supreme Court: A Plea for Statutory Reform* 5 OHIO ST. J. ON DISP. RESOL. 231 (1990); Thomas Carbonneau, *Arbitration as Contract: One More Word About First Options v. Kaplan*, 12 (No. 3) MEALY'S INT'L ARB. REPS. 21 (March 1997); Thomas Carbonneau, *Beyond Trilogies: A New Bill of Rights and Law Practice Through the Contract of Arbitration*, 6 AM. REV. INT'L ARB. 1 (1995); THOMAS CARBONNEAU, CASES AND MATERIALS ON COMMERCIAL ARBITRATION Ch. 7 (1997); Thomas Carbonneau, *Le Torunoi of Academic Commentary on Kaplan: A Reply to Professor Rau*, 12 (No. 4) MEALY'S INT'L ARB. REPS. 35 (April 1997); Paul Carrington & Paul Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331 (1997); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33 (1997); Richard E. Speidel, *Contract Theory and Securities Arbitration: Whither Consent?*, 62 BROOK. L. REV. 1335 (1996); G. Richard Shell, *Fair Play, Consent and Securities Arbitration: A Comment on Spiedel*, 62 BROOK. L. REV. 1365 (1996); Jeffrey W. Stempel, *Bootstrapping and Slouching Toward Gomorrah: Arbitral Infatuation and the Decline of Consent*, 62 BROOK. L. REV. 1381 (1996). *See also* Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83 (1996).

such litigation control devices. Only mischief, they would argue, comes from mandating recognition of mechanisms that lend themselves to abuse, either through imposition of a forum predisposed toward the stronger contracting party or by facilitating avoidance of mandatory public policies.

Rather than launch a broad assault on this paternalistic approach to forum selection, the statute aims at the type of situation where forum selection is most critical: a cross-border dispute that raises a substantial risk of ending up in a court perceived as biased by one side or the other. The model act thus proposes only a small step in the direction of enhancing forum selection reliability.

A statute that distinguishes between domestic and international litigation requires some criterion to distinguish one from the other. Two basic models might be considered for defining what exactly constitutes an international dispute: (i) a party-oriented test that looks to the residence of the litigants, and (ii) a less mechanical approach that asks whether a transaction implicates international commerce, regardless of who the parties may be.

Looking to arbitration law for analogies, both paradigms have been adopted. The party oriented test has found favor in Belgium[67] and Switzerland.[68] The approach that looks to the nature of the transaction has been enacted into the French arbitration statute.[69] The United States[70] and the UNCITRAL Model Arbitration Law take a hybrid approach.[71]

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67. *See* Belgian *Code judiciaire,* art. 1717.

68. *See* Swiss *Loi fédérale sur le droit international privé,* arts. 176 and 192.

69. *See* N.C.P.C., art. 1492 (Fr.) (referring to disputes that "implicate international commerce").

70. The United States excludes from the scope of the New York Convention contracts between American citizens. However, an agreement between American citizens will be deemed to fall under the Convention if the parties' relationship "involves property located abroad, envisages performance or enforcement abroad or has some other reasonable relation with one or more foreign states." 9 U.S.C. § 202. See *Lander v. MMP Investments,* 107 F.3d 476 (7th Cir. 1997), in which the Convention was applied between an American manufacturer and an American distributor in connection with their contract to distribute manufacturer's shampoo products in Poland. Moreover, the United States applies the New York Arbitration Convention to non-domestic awards rendered in the United States if the award was made within the legal framework of another country (i.e. foreign law) or involving parties domiciled or having their principal place of business outside the United States. *See also* Bergesen v. Joseph Muller Corp., 710 F.2d 928, 932 (2d Cir. 1983).

71. The Model Law characterizes an arbitration as international if either (i) the parties have places of business in different states, (ii) the transaction has some connection to a state other than the parties' place of business, or (iii) the parties have opted to treat their agreement as international. *See* UNCITRAL Model Law art. 1(3), U.N. Sales NO. E.95.v.18 (1994) [hereinafter UNICTRAL Model Law]. *See also* Fung Sang Trading Ltd. v. Kai Sun Sea Products Ltd., 2 WORLD ARB. & MED. REP. 329, Dec. 1991, at 329 C.H.K. S. Ct., 29 Oct. 1991; Michael Pryles, *Hong Kong Supreme Court Issues First Decision on Model Law,* 2 WORLD ARB. & MED. REP. 329 (1991).

Focus on the parties' residence would seem the optimal way to determine whether the special statutory régime should apply, for the simple reason that when parties come from different places the statute can be expected to be needed most.[72] Even if elements of a contract are to be performed abroad, the consequences of a failed forum selection clause will be less serious in disputes between residents of the same country. Suit in such cases would likely be filed at the domicile of one side or the other, which in neither case would be a foreign country.

Those skeptical of the need to give court selection clauses dispositive effect might suggest narrowing its scope even further to exclude transactions between American citizens as well as residents.[73] Not all Americans live in the United States, however. In transactions between individual United States citizens living in different parts of the world, it may make good sense to subject potential disputes to American courts. It would be ironic if the model statute denied to an American national a privilege accorded to an alien.

b. Judicial Discretion

Only federal courts are required to hear cases submitted to them under valid jurisdiction clauses.[74] States would be left free to decide whether or not their own courts could decline to hear cases on grounds of *forum non conveniens*.[75] In this respect the Act differs from Swiss legislation on the same topic, which seems to impose upon cantonal courts an obligation to accept jurisdiction under court selection clauses.[76]

The Act expressly recognizes the restraints on forum selection imposed by Article III of the United States Constitution, which puts certain cases beyond the subject matter jurisdiction of federal courts. Federal courts cannot be required to hear a dispute exclusively between aliens or citizens of the same state unless the dispute raises a question under the laws or treaties of the United States. However, the Act leaves open for judicial interpretation whether an international court selection statute could in itself serve as a

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72. The recently enacted English Arbitration Act of 1996, however, abandoned separate provisions for domestic contracts out of concern for non-discrimination obligations within the European Union. *See* discussion of English Act, *supra* note 44.

73. An earlier version of this statute took exactly that position. *See* PARK, *supra* note 13, at 191.

74. Whether or not Congress could force state courts to decide cases is not free from doubt. It is worth noting, however, that the Supreme Court has held that state courts may not decline enforcement of federal statutory rights on local policy grounds. *See* Testa v. Katt, 330 U.S. 386 (1947).

75. *See* N.Y. GEN. OBLIG. LAW § 5-1402 and N.Y. C.P.L.R. 327(b), discussed at *supra* note 25.

76. *See Swiss Loi fédérale sur le droit international privé* art. 5 (Switz).

source of federal question subject matter jurisdiction, much as the New York Convention[77] and Foreign Sovereign Immunities Act.[78]

c. Party Residence

In defining residence for individuals, the Act applies a bifurcated approach drawn from fiscal models. First, as is the case in many income tax treaties, an individual may be resident in the United States if present here at least half the year (183 days). Second, an alien will be considered a resident if he or she benefits from a permanent residence visa, similar to the so-called "Green Card Test" used in determining tax residence under the Internal Revenue Code.[79]

With respect to juridical entities, the Act also takes tax definitions as its inspiration. Corporations and partnerships will be considered American if created or organized in the United States or under the law of the United States or any state.[80] In addition, an entity will be deemed to be an American resident if its principal place of business is within the United States. Branches of foreign corporations will be treated as residents.

d. Requirement of a Writing

The draft court selection Act covers only agreements in writing,[81] thus echoing the requirement for arbitration clauses in the New York Arbitration Convention,[82] the Federal Arbitration Act,[83] and the UNCITRAL Model Law.[84] Recourse to normally competent courts[85] constitutes a right too important to

77. *See* Bergesen v. Joseph Muller Corporation, 710 F.2d 928 (2nd Cir. 1983) (interpreting 9 U.S.C. §§ 203, 207).

78. *See* Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983) (applying the Foreign Soverign Immunities Act, 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1392(f), 1441(d), 1602-11 (1982)).

79. *See* I.R.C. § 7701(b)(1)(A)(i).

80. *See* I.R.C. § 770(a)(4) and (30).

81. *See* Appendix B, Model International Court Selection Act § 1(a).

82. *See* New York Convention, *supra* note 15, art. II(1).

83. *See* 9 U.S.C. § 2.

84. *See* UNCITRAL Model Law, *supra* note 71, art. 7(2).

85. In this connection, the Swiss Constitution contains a wonderful phrase referring to one's "natural judge." *See* Federal Constitution of the Swiss Confederation, art. 58 ("Nul ne peut être distrait de son juge naturel." "Niemand darf seinem verfassungsmässigen Richter entzogen.").

relinquish by inadvertence or innuendo.[86]

A written forum selection clause does not necessarily mean a signed clause. For example, written arbitration clauses have been held to result from an exchange of telexes or telegrams, or from a sales form or a transport document that a shipper or a distributor has accepted by conduct but failed to sign.[87] In some cases the parties may orally agree to be bound by rules of a trade association with written dispute resolution procedures.[88]

2. Consumers, Employees and Informed Consent

An irony of all forum selection devices, whether arbitration clauses or choice-of-court agreements, is that the goals which justify their enforcement in one context will often call them into question in another. In a commercial contract concluded between sophisticated business managers advised by competent counsel, a forum selection clause can promote fair and efficient adjudication by permitting litigants from different countries to reduce the risk of adjudicatory bias. In a consumer or employment contract, however, the very same clause might deprive an unsophisticated individual of basic procedural safeguards, imposing a forum that is less accessible, and perhaps less sensitive to mandatory community norms such as non-discrimination laws, than would be a court at the individual's domicile. Thus, the value of freedom to choose a forum (like any liberty) must be measured against the way it operates in practice.

To reduce potential abuse of court selection clauses, the Act excludes from its scope consumer transactions and employment agreements, unless the clause is concluded after the dispute arises (when the consumer or employee will presumably be more aware of what is at stake), or unless the agreement

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86. One dissenter from this principle has been Neil Kaplan, who during his time as High Court judge in Hong Kong, decided many if not most of the early cases that arose there under the UNCITRAL Model Law. Judge Kaplan (as he then was) has written that he finds it difficult to see "why if one party is sent a contract which includes an arbitration clause and that party acts on that contract and thus adopts it without qualification, that party should be allowed to wash his hands of the arbitration clause but at the same time maintain an action for the price for the goods delivered or conversely sue for breach." Neil Kaplan, *Is the Need for Writing as Expressed in the New York Convention and the Model Law Out of Step with Commercial Practice?*, 12 ARB. INT'L 27, 29 (1996).

87. See, for example, Swiss *Tribunal fédéral* decision in *Compagnie de Navigation et Transports SA v. MSC Mediterranean Shipping Co. SA*, ATF 121 III 38 (16 January 1995) where the arbitration clause was held void in an unsigned bill of lading. *See also* Huntington Int'l v. Armstrong World Indus., 97 CV 699, E.D.N.Y., 22 October 1997 (holding that an arbitration clause in manufacturer's Terms and Conditions of Sale held binding on plaintiff sales agent although not signed by sales agent); Little v. Allstate Ins. Co., 705 A.2d 538 (Vt. 1997) (holding that an arbitration clause contained in insurance contract held valid notwithstanding Vermont statute making arbitration clauses in insurance contracts revocable).

88. For analogous dispositions in an arbitration statute see English Act, *supra* note 44, §5.

grants the consumers a right to sue and be sued at their residence (thus reducing the risk that the forum will be inherently unfair). This treatment of consumer court selection contracts accords with the protection given under the Brussels and Lugano Conventions to consumer contracts[89] and contracts of employment.[90]

The Act also makes clear that courts have power to deny enforcement of forum selection clauses in other areas when the clause is induced by fraud or coercion. The requirement that a jurisdiction clause must not be "null, void or inoperative" is reinforced by a specific exclusion from the scope of the Act for contracts that are "procured by fraud, coercion or duress." While this overlap of provisions intended to promote informed consent in forum selection clearly suffers from the lack of elegance attaching to any redundancy, the special substantive emphasis seems worth the stylistic cost.

Cases deciding analogous issues in arbitration illustrate the risks and concerns related to informed consent that are likely to arise from a court-selection statute. While some judges have subjected consumer and employment contracts to special scrutiny,[91] the results have not always been consistent. In the financial services area, for example, some courts have refused to enforce arbitration clauses in consumer loan contracts,[92] while other courts have upheld such agreements.[93] The heart of the matter seems to

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89. *See* Brussels Convention, arts. 13-15, *supra* note 64, Lugano Convention, supra note 65.

90. *See* Brussels Convention, art. 17(5), *supra* note 64; Lugano Convention, art. 9, *supra* note 65. The clause will be valid only if (a) post-dispute or (b) invoked *by the employee* to give jurisdiction to courts other than those of the defendant's domicile or the place of employment.

91. In at least one case the judge ordered discovery with respect to the adequacy of the New York Stock Exchange arbitration rules to resolve claimant's discrimination claims and the circumstances surrounding claimant's agreement to arbitration (phrased as "waiver of her rights to a federal forum"). *See* Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, 965 F. Supp. 190 (D. Mass. 1997). *See also* Margaret A. Jacobs, *Brokerage Arbitration System in Spotlight*, WALL ST. J., October 17, 1997, at B-2 (discussing Judge Nancy Gerther's order of April 23, 1997). The claimant alleged sexual harassment and discrimination.

92. *See* Geneva Bell v. Congress Mortgage, 24 Cal. App. 4th 1675 (Cal. App. 1st Dist., 1994), *ordered depublished* 30 Cal. Rep. 2d 205 (1994). The court in *Geneva Bell* refused to compel arbitration absent a "clear and informed" waiver of the right to a jury trial (homeowner claims against mortgage lenders for fraudulent business practices). *See also* Patterson v. ITT Consumer Fin. Corporation, 14 Cal. App. 4th 1659 (1993) (holding that an arbitration clause used in documentation for relatively small loans was an unconscionable limit on the borrower's opportunity to be heard); Lopez v. Plaza Fin. Co., 1996 WL 210073 (N.D. Ill. 1996) (no enforcement of arbitration agreement in installment loan).

93. *See* Badie v. BNA, (Cal. Super. Court, San Francisco, No. 944916), *decided* 18 August 1994; *bench opinion discussed in* 63 BNA's Banking Report 293 (29 August 1994) and 5 World Arb. and Mediation Rep. (BNA) 231 (October 1994); Meyers v. Univest Home Loan, No. C-93-1783 MHP, 1993 WL 307747 (N.D. Cal. Aug. 4, 1993) (consumer loan), McCarthy v. Providential Corp., No. C-94-0627 FMS, 1994 WL 387852 (N.D. Cal. July 19, 1994) (senior citizen "reverse mortgage").

be whether such arbitration agreements are genuinely consensual.[94]

Cases struggling with arbitration in non-financial consumer transactions have reached similarly inconsistent results, sometimes holding arbitration clauses void for lack of informed consent,[95] while other times recognizing the clause.[96] At least two cases have enforced arbitration clauses packaged in boxes of mail-order goods.[97]

Employment contracts, particularly when implicating charges of discrimination, have supplied a fruitful ground to test the validity of arbitration agreements.[98] Likewise, malpractice claims against hospitals and

94. On "unconscionable" contract terms, *see generally* RESTATEMENT (SECOND) of CONTRACTS § 208, and U.C.C. § 2-302. In one case, borrower's counsel remarked that arbitration "is like sex: it's great if both parties consent, but can't be allowed if one party is forced into taking part." *Consumer Arbitration*, 4 World Arb. and Mediation Rep. (BNA) 192, 193 (1993) (quoting Patricia Sturdevant, attorney for the plaintiffs in Badie v. Bank of America. Attorney Sturdevent applied her comment generally to "ADR" (alternative dispute resolution), a broad category that includes "arbitration" as well as other alternatives to judicial dispute resolution).

95. *See* Prudential Ins. Co. of America v. Lai, 42 F.3d 1299 (9th Cir. 1994), *cert. denied*, 516 U.S. 812 (1995) and Renteria v. Prudential Ins. Co. of America, 113 F.3d 1104 (9th Cir. 1997). Both cases involved sexual harassment and discrimination claims by employees who signed "AU-4" forms (Uniform Application for Securities Industry Registration) on taking employment at securities firms. Courts held that there was no knowing waiver of the right to litigate statutory claims, notwithstanding arbitration clauses contained in the forms.

96. *See* Rojas v. TK Communs., 87 F.3d 745 (5th Cir. 1996) (sexual harassment claim held arbitrable); Stedor Enterprises Ltd. v. Armtex, 947 F.2d 727 (4th Cir. 1991) (enforcing an arbitration agreement in fabric sale confirmation even though document unread and unsigned); Golenia v. Bob Baker Toyota, 915 F. Supp. 201 (S.D. Cal. 1996) (claim under Americans with Disabilities Act held arbitrable); Johnson v. Hubbard Broadcasting, 940 F. Supp. 1447 (D. Minn. 1996) (arbitration agreement enforceable against former employee who brought race discrimination claim); Wilson v. Kaiser Found. Hospitals, 141 Cal. App. 3d 891 (3d Dist. 1983) (holding enforceable an arbitration clause in a medical agreement concerning a claim for prenatal injuries by a child who became member of health plan at birth).

97. *See, e.g.*, ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996) (terms of arbitration clause inside software box); Hill v. Gateway 2000, 105 F.3d 1147 (7th Cir. 1997), *cert. denied*, 118 S. Ct. 47 (1997) (dealing with an arbitration clause in box containing computer ordered by mail and not returned within thirty days; court stated that "a contract need not be read to be effective." *Id.* at 1148, *cert. denied*, 118 S. Ct. 295 (1997)).

98. *See* Pryner v. Tractor Supply Co., 109 F.3d 354 (7th Cir. 1997) (discrimination claims related to race and age arbitrable, but only if a worker agrees individually; union cannot through collective bargaining agreement consent to arbitration of statutory rights claims); Cole v. Burns Int'l. Sec. Services, 105 F.3d 1465 (D.C. Cir. 1997) (racial discrimination claim subject to arbitration, but employer may not require employee to pay arbitrators' fees). *See also* Prudential v. Lai *and* Renteria v. Prudential, *supra* note 95. For background on arbitration of employment claims, see *Gilmer v. Interstate/Johnson*, 500 U.S. 20 (1991), allowing arbitration of age discrimination claims and *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), finding that an employee may litigate discrimination claim notwithstanding arbitration clause in collective bargaining agreement. Among the grounds on which the Supreme Court in *Gilmer* distinguished *Gardner-Denver* was that the latter case involved a collective bargaining agreement (rather than an individual employment contract) which did not authorize the union to resolve statutory discrimination claims; in other words, consent to arbitration of the claim was lacking.

other health care organizations have fertilized legal development in this area.[99] In all events, the voluntary nature of forum selection agreements tends to be a highly fact-specific matter.[100]

Courts have also looked to see that the contractually designated arbitral process is fundamentally fair. A self-administered dispute resolution system allowing inordinate delay,[101] and an arbitral régime requiring a disproportionately high filing fee,[102] have been held unenforceable.

In Europe, statutory consumer protection regulations[103] have been applied to both pre-dispute and post-dispute arbitration agreements.[104] These regulations invalidate unfair contract terms which, depending on the circumstances, can include provisions that were not individually negotiated and which, to the consumer's detriment, cause a "significant imbalance in the parties' rights and obligations."[105] Similar restrictions designed to protect

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99. *See* Wheeler v. St. Joseph Hosp., 63 Cal. App. 3d 345, (4th Dist. 1976) (arbitration agreement not enforced); Madden v. Kaiser Found. Hosp. 552 P.2d 1178 (Cal. 1976) (reversing order denying arbitration and remanding for further proceedings); Colorado Permanente Med. Group v. Evans, 926 P.2d 1218 (Colo. 1996) (HMO arbitration clause unenforceable for failure to comply with statutory form requirement).

100. *See generally* Randy Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986); Randy E. Barnett, *Conflicting Visions: A Critique of Ian MacNeil's Relational Theory of Contract*, 78 VA. L. REV. 1175 (1992) (discussing consent in contract). On consent to arbitration agreements in a labor contract, see Stephen Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83 (1996).

101. *See* Engalla v. Permanente Med. Group Inc., 938 P.2d 903 (Cal. 1997), *rev'g* 43 Cal. Rptr. 2d 621 (Cal. App. 1995). A malpractice claim against a health care provider in the Kaiser group was subject to an arbitration clause. However, the *ad hoc* nature of the arbitration (which left administration to the parties rather than an independent institution) tended to cause delay favoring the defendant health care provider. The trial court had found fraud in the inducement, allowing the deceased patient's heirs to rescind the agreement to arbitrate. The Court of Appeals' decision reversing the trial court was itself reversed by the Supreme Court of California, which remanded the case back to the trial court after finding that the habitual delays in the process constituted evidence of fraud by Kaiser.

102. *See* Teleserve Systems Inc. v. MCI Telecomm. Corp., 230 A.D. 2d 585 (4th Dep't 1997). MCI had entered into an agreement with Teleserve to serve as agent in marketing its services. The court found unconscionable an agreement that included a clause providing for arbitration under the rules of the Washington, D.C. based "Endispute" organization (in Washington, D.C.), which required a filing fee based on the amount in dispute, which in the case at bar would have amounted to $204,000 on claimant's request for $40,000,000 in compensatory damages.

103. *See, e.g.*, Council Directive 93/13/EEC of 5 April 1993, 1993 O.J. (L 95) 29 (on unfair terms in consumer contracts).

104. For the extension of these regulations to arbitration in England, see English Act, ch. 23, *supra* note 44.

105. U.K. Unfair Terms in Consumer Contracts Regulations S.I. 1994, No. 3159, §§ 3, 4. Consumers include individuals acting for purposes outside their business. *See id.* § 2. One schedule to these Regulations contains an illustrative list of contract terms that may be regarded as unfair, and therefore non-binding. This list includes an oddly worded reference to

consumers have been written into jurisdiction and judgments treaties[106] and some national statutes.[107] Moreover, some nations limit the use of both arbitration agreements[108] and court selection clauses[109] in contracts not concluded between "merchants," a term of art including persons contracting in a commercial capacity.

The United States lags behind its European trading partners in statutes that address the matter of arguably abusive arbitration clauses. This lack of any comprehensive consumer or employee protection scheme for arbitration in the United States[110] has led to a lively dialogue among American scholars concerning the fairness of voluntary arbitration agreements,[111] particularly in securities transactions[112] and employment contracts.[113] Some scholars have

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terms that require consumers to "take disputes exclusively to arbitration not covered by legal provisions," Sched. 3.1(q). It is not immediately clear what is meant by this curious phraseology which was lifted verbatim from the European Directive whose mandates were implemented by the British rules.

106. *See, e.g.*, Brussels Convention, *supra* note 64; Lugano Convention, *supra* note 65.

107. Swiss statute provides for the unenforceability of court selection clauses that "abusively" deny the protection of Swiss law, and gives consumers a right (not waivable until after a dispute has arisen) to sue a supplier either at the consumer's residence or the supplier's place of business. *See Loi fédérale sur le droit international privé*, arts. 5(2) and 114.

108. *See, e.g.*, FRENCH C. CIV. art. 2062 (Fr.) (generally prohibiting a pre-dispute arbitration clause (*clause compromissoire*). Compare provisions allowing post-dispute agreements to arbitrate (*compromis*) (C. CIV. art. 2060) (Fr.), as well as pre-dispute arbitration between merchants (*commerçants*) (C. COM. art. 631) (Fr.).

109. *See* FRENCH N.C.P.C. art. 48 (Fr.), art. 48, (prohibiting court selection clauses unless concluded between *commerçants*); German art. 38 ZPO, (invalidating forum selection clauses (*Gerichtsstandsklausel*) except between merchants (*Kaufleute*)).

110. In both the House and the Senate, however, bills are currently being considered to curb "involuntary application of arbitration" to employment discrimination claims. *See* Civil Rights Procedures Protection Act of 1997, which would *inter alia* make the Federal Arbitration Act inapplicable to any claim of discrimination based on race, color, religion, sex, national origin, age or disability. *See* S. DOC. NO. 63, 105th Cong. (1997); H.R. DOC. No. 983, (1997).

111. *See* THOMAS CARBONNEAU, CASES AND MATERIALS ON COMMERCIAL ARBITRATION Ch. 7 (1997); Tom Carbonneau, *Le Tornoi of Academic Commentary On Kaplan: A Reply to Professor Rau*, MEALY INT. ARB. REP., Vol. 12, No.4, April 1997, and MEALY'S INT'L ARBITRATION REPORTS Vol. 12, No. 3, March 1997; Thomas Carbonneau, *Arbitral Justice: The Demise of Due Process in American Law*, 70 TUL. L. REV. 1945 (1996); Thomas Carbonneau, *Beyond Trilogies: A New Bill of Rights and Law Practice Through the Contract of Arbitration*, 6 AM. REV. INT. ARB. 1 (1995); Thomas Carbonneau, *Arbitration and the U.S. Supreme Court: A Plea for Statutory Reform*, 5 OHIO ST. J. ON DISP. RES. 231 (1990); Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331 (1997).

112. *See* Richard E. Speidel, *Securities Arbitration: A Decade After McMahon: Contract Theory and Securities Arbitration: Whither Consent?*, 62 BROOK. L. REV. 1335 (1996); Richard Shell, *Fair Play, Consent and Securities Arbitration: A Comment on Speidel*, 62 BROOK. L. REV. 1365 (1996); Jeffrey W. Stempel, *Bootstrapping and Slouching Toward Gomorrah: Arbitral Infatuation and the Decline of Consent*, 62 BROOK. L. REV. 1381 (1996).

referred to proceedings under pre-dispute agreements to arbitrate as "compelled arbitration,"[114] implying lack of informed consent notwithstanding contract signature. And at least one Supreme Court Justice has labeled arbitration as "[d]espotic decision making."[115] These thinkers thus resist limitations on judicial discretion to refuse enforcement of such litigation control devices, arguing that only mischief comes from recognizing a dispute resolution mechanism that may impose a forum predisposed toward the stronger contracting party, or facilitate avoidance of mandatory public policies.

The real terms of the debate might best be framed as whether public policy should allow *pre-dispute* consent to arbitration. The opportunity to seek justice in otherwise competent courts, it might be argued, is more fundamental than other contract terms, and thus should be non-waivable until *after* a controversy has arisen, when parties better understand specifically what is at stake. When a contract contains both an 8.75% mortgage rate and a renunciation of the mortgagee's right to her day in court, an argument can be made that the latter term should be unenforceable unless accepted after the contours of a precise dispute appear on the near horizon.

Complicating matters in the United States is a Supreme Court decision holding that state law may not impose on arbitration agreements requirements inapplicable to other contracts.[116] Consumer finance agreements, particularly credit card contracts, often provide that they may be altered upon written mailed notice to the consumer unless objection is made within a specified period, such as thirty days. A state law requiring an arbitration clause to be signed by both parties would arguably subject arbitration agreements to greater restrictions than applicable to other contracts, and thus run afoul of the Supreme Court ruling.[117]

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113. *See generally* Ware, *supra* note 100.

114. *See* Schwartz, *supra* note 66.

115. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614, 657 (1985) (Stevens, J., dissenting).

116. *See* Doctor's Assocs. v. Casarotto, 517 U.S. 681 (1996), discussed *supra* notes 23 and 48, where the Court held the Federal Arbitration Act to pre-empt a state notice requirement stipulating that arbitration clauses had to be on the first page of a contract.

117. This is exactly what happened in *Christine Williams v. Direct Cable and Beneficial Nat'l Bank*, a decision in which an Alabama Circuit Court granted a motion to compel arbitration pursuant to a "mail out change" to a credit agreement on the theory that to refuse enforcement to the modification would "place arbitration contracts in an inferior position to other contracts." CIV.A.97-009, (Ala. Cir. Ct. 13 Aug. 1997).

3. Subject Matter

The Act applies to any dispute of a "pecuniary nature." Thus non-property questions such as child custody are beyond the scope of the Act. In this respect the Act takes its inspiration from the innovative definition of arbitrability in the Swiss conflict-of-laws code.[118]

4. Exclusivity or Non-exclusive Jurisdiction

Not all agreements granting decision-making authority to a designated court impose jurisdictional exclusivity. Some jurisdiction clauses seek only to avoid later arguments that a particular court has no power to hear the case. In other words, the clause is intended to get the parties into at least one acceptable jurisdiction, but not necessarily to foreclose other options. The non-exclusivity of such forum selection clauses may be either unilateral or bilateral. For example, financial institutions sometimes require borrowers to bring litigation at the bank's domicile, while reserving the right to pursue debtors in any otherwise competent court.

Under American law, whether a clause is exclusive (mandatory) or nonexclusive (permissive) will depend on the intent of the parties as determined by the language and context of the agreement.[119] Some decisions have stated that forum selection clauses will be enforced as exclusive only if containing specific words to that effect,[120] while others have taken the opposite view.[121] Wisdom, therefore, calls for parties seeking exclusivity to provide that "all disputes shall be decided exclusively by" or "any claim shall be subject to the exclusive jurisdiction of" courts at the desired location.

Human nature being what it is, however, not all forum selection language will be clear. The Act therefore creates a presumption that a jurisdiction clause will be exclusive unless the contrary has been clearly stated. This default rule assumes that the special need for predictability in international

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118. *See* Swiss *Loi fédérale sur le droit international privé*, art. 177.

119. *See, e.g.*, Furry v. First Nat'l Monetary Corp., 602 F. Supp. 6 (W.D. Okla 1984); Central Coal Co. v. Phibro Energy, Inc., 685 F. Supp. 595 (W.D. Va. 1988) (both holding the relevant forum selection clauses to be exclusive). *Cf.* Heyco, Inc. v. Hayman, 636 F. Supp. 1545 (S.D.N.Y. 1986); Leasing Serv. Corp. v. Patterson Enters, Ltd., 633 F. Supp. 282 (S.D.N.Y. 1986); and First Nat'l City Bank v. Nanz, Inc., 437 F. Supp. 184 (S.D.N.Y. 1975) (all holding the relevant clauses to be mere nonexclusive consents to jurisidction).

120. *See, e.g.*, John Boutari & Sons, Wines & Spirits, S.A. v. Attiki Importers & Distributors, 22 F.3d 51 (2d Cir. 1994), (quoting Docksider Ltd. v. Sea Tech., 875 F. 2d 762 (9th Cir. 1989)); Utah Pizza Serv., Inc. v. Heigel, 784 F. Supp. 835 (D. Utah 1992).

121. *See* Central Coal Co. v. Phibro Energy Inc., 685 F. Supp. 595, 598 (W.D.Va. 1988) (finding the clause exclusive the court said "[i]f the parties wished [the clause] to be permissive, they should have drafted it so that that interpretation would be clearly evident").

business argues for the exclusivity of a court selection clause.[122] In other words, staying out of the "wrong" court will be as important as giving power to the "right" court. Under the Act, therefore, if a Swiss bank and its Boston depositor agree to the jurisdiction of courts in Geneva, the Bostonian could not normally bring suit in Massachusetts, absent clear language indicating that the Swiss forum was just one of several alternative litigation venues.

When court selection clauses are governed by foreign law, an argument might be made that they should be interpreted according to that applicable law. Under this approach, a clause contained in a contract to be construed under the English law would be exclusive or non-exclusive, valid or invalid, depending on what a court in England would find. Such conflict-of-law claims are likely to be complex, and might be best adjudicated on a case-by-case basis.

5. Mandatory Norms

The Act echoes the "prospective waiver" dictum of the landmark decision in *Mitsubishi Motors v. Soler Chrysler-Plymouth*,[123] to the effect that a forum selection clause will not be enforceable if it operates in tandem with a choice-of-law provision so as to defeat mandatory norms of the place of contract performance. The genesis of this rule lies in the ingenuity of lawyers who (understandably perhaps) wish to give their clients a better shot at avoiding public policy limits on their behavior. For example, lenders might subject a loan to the law of a country without a usury statute and also provide for arbitration of disputes with the borrower under the auspices of an institution known to appoint arbitrators untroubled by excessive interest charges.[124] Whether or not such contract choices will prevail depends in large measure on how arbitrators and judges balance party autonomy against the application of laws implicating vital national interests.

Laws touching critical public policies have received considerable attention in the context of antitrust, blockades, nationalization, currency controls,

122. *See* Swiss *Loi fédérale sur le droit international privé*, art. 5 (providing that "[a]bsent a stipulation to the contrary, the choice of forum is exclusive." (Sauf stipulation contraire, l'élection de forum est exclusive./Geht aus der Vereinbarung nichts anderes hervor, so ist das vereinbarte Gericht ausschliesslich zuständig)).

123. 473 U.S. 614 (1985).

124. Differences in statutes of limitations or the validity of exculpatory clauses provide other illustrations. In *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), the American party's decision to ignore the contractually chosen forum in London commended itself (for the American side) because the contract included language purporting to exculpate the Germans from liability for damage to the rig. *See id.* at 8 and nn. 8-9 (noting that English courts would uphold the exculpatory clause, thereby "deny[ing] Zapata relief to which it was 'entitled'"). The Americans assumed that the exculpatory language had more chance of being upheld by an English court than an American one. In *Zapata*, the Supreme Court found the choice-of-law variation irrelevant to international towing contracts. *Id.* at 15-16.

bankruptcies, securities regulation, environmental protection and boycotts. Sometimes described as "police laws" (*lois de police*[125]), or "mandatory norms," these laws supplant the otherwise applicable legal system in order to protect social and economic policies of a country with an arguably greater interest in the relevant conduct, usually the place of contract performance or other economic activity.

At least one national statute[126] and four international treaties deal explicitly with mandatory norms.[127] The most important of these is the 1980 Rome Convention on the Law Applicable to Contractual Obligations, which provides for recognition of the mandatory rules of a legal system other than of the normally applicable law.[128]

While judges can hardly ignore the public norms of the communities that pay their salaries, the extent to which courts may or must apply mandatory rules of a foreign forum is open to question. From the parties' perspective, the recognition of a mandatory norm would arguably constitute an excess of authority, contrary to the mission conferred by the parties. The power of the chosen court, like that of an arbitrator, derives principally from the parties' contract, which instructed the chosen tribunal to apply the contractually designated substantive law.

On the other hand, the international currency of a judgment or award requires that judges and arbitrators be sensitive to the public policies of legal orders enforcing their decisions. Otherwise the judgments and awards risk non-recognition.[129]

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125. *See, e.g.*, Pierre Mayer, *Les lois de police étrangéres*, 1981 J. DUDROIT INT'L 277; *See generally* BERNARD AUDIT, DROIT INTERNATIONAL PRIVÉ 92-113 (1991); Thomas G. Guedj, *The Theory of the Lois de Police, A Functional Trend in Continental Private International Law--A Comparative Analysis With Modern American Theories*, 39 AM. J. COMP. L. 661 (1991).

126. *See* Swiss *Loi fédérale sur le droit international privé*, art. 19.

127. *See* European Convention on Law Applicable to Contractual Obligations, opened for signature June 19, 1980, 10 I.L.M. 1492; Hague Convention of 14 March 1978 on Law Applicable to Intermediary Agreements and Agency; Hague Convention on the Law Applicable to Trusts and on their Recognition, done Oct. 20, 1984, U.N.T.S., *reprinted in* 23 I.L.M. 1389 (1984); Hague Convention of 30 October 1985 on the Law Applicable to International Agreements for the Sale of Goods 1489 U.N.T.S. 3, brought into force April 11, 1980.

128. Article 7 of the European Convention, *supra* note 127, provides:

> When applying under this Convention the law of a country, effect may be given to mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

129. In some cases the arbitrator's own conscience or respect for international public order could impel departure from the parties' will. For example, an arbitrator might disregard a choice-of-law clause that led to enforcement of a contract for the sale of illegal drugs or payment of a

Courts in the United States have explicitly recognized the application of mandatory norms in an arbitral context. One Supreme Court case even interpreted the choice-of-law clause so as to infer the parties' assent to application of a law other than the one specified in the contract. In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*,[130] the Court deemed American antitrust law to displace the parties' unambiguous selection of Swiss law.[131]

V. AGENDA FOR FUTURE DISCUSSION: ANALOGIES FROM ARBITRATION

Even the best of statutes will not solve all problems. If jurisdiction clauses gain the same statutory currency as arbitration agreements, the ingenuity of the bar can be expected to bring to court selection many of the quarrels now known in actions to enforce arbitration agreements and awards.

The party resisting a judgment based on a contract's alleged jurisdictional stipulation may claim that a foreign judge overstepped the bounds of the powers conferred by the alleged court selection clause. In addition, if the chosen court finds the principal contract illegal or invalid (for example, by reason of fraud in the inducement), the argument might well be made that the court's adjudicatory power, derived from the contract itself, was retroactively destroyed.

No federal statute or treaty provides a jurisprudential foundation for resolving such problems. However, case law and statutes do deal with analogous questions in the context of an arbitration agreement. The following two sections discuss some of these analogies from arbitration as they may be helpful to scholars and judges grappling with similar issues in the context of court selection.

A. Jurisdictional Matters

While the parties to a court selection clause expect the contractually-selected court to be the sole adjudicator of the merits of the dispute, the same cannot necessarily be said about the limits of the chosen court's own power. Imagine, for example, that a claim is brought in a foreign court on the basis of a jurisdiction clause which the defendant says is invalid. Should the party resisting the foreign proceeding be able to go to court in the United States at the outset of the proceedings to request an anti-suit injunction,[132] or to bring a

bribe; alternatively, the arbitrator might decline jurisdiction to decide a dispute arising under such a contract.

130. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614 (1985).

131. The court obtained from the claimant's counsel a stipulation to the effect that the Sherman Act applied to the defendant's antitrust counterclaim. *See id.* at 637 n.19.

132. *See, e.g.*, Andreas Lowenfeld, *Forum Shopping, Antisuit Injunctions, Negative Declarations and Related Tools of International Litigation*, 91 AM. J. INT'L L. 314, 322 (1997).

competing claim? Or must the defendant wait until a foreign judgment is rendered, and then resist its enforcement? If a foreign judgment has already been issued, what (if any) deference should a court being asked to enforce the judgment show to the foreign judge's jurisdictional finding? What if the court selection clause itself is not contested, but rather the foreign court is accused of deciding matters not submitted to it? What if the foreign court ignored the parties' mandate about applicable substantive law? As discussed below, such questions in arbitration (with "arbitrator" substituted for "foreign court") are usually analyzed according to a set of notions referred to as *compétence-compétence.*

1. Compétence-Compétence

The concept referred to as *compétence-compétence* (literally "jurisdiction concerning jurisdiction") links together a constellation of disparate notions about when arbitrators can rule on the limits of their own power.[133] In its simplest formulation, *compétence-compétence* means no more than that arbitrators can look into their own jurisdiction without waiting for a court to do so. In other words, there is no need to stop arbitral proceedings to refer a jurisdictional issue to judges.[134] However, under this brand of *compétence-compétence,* the arbitrators' determination about their power would be subject to judicial review at any time,[135] whether after an award is rendered[136] or when a motion is made to stay court proceedings or to compel arbitration.[137]

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133. *See generally* Carlos Alfaro & Flavia Guimarey, *Who Should Determine Arbitrability?,* 12 ARB. INT'L 415 (1996); William W. Park, *The Arbitrability Dicta in First Options v. Kaplan: What Sort of Kompetenz-Kompetenz Has Crossed the Atlantic?,* 12 ARB. INT'L 137 (1996).

134. *See, e.g.,* Christopher Brown Ltd. v. Genossenschaft Oesterreifchischer Waldbesitzer, 1 Q.B. 8. (1953); 1996 English Act § 30, *supra* note 44.

135. The same English Act that in § 30 provides for arbitrators to determine their own jurisdiction as a preliminary matter also permits judicial challenge of any jurisdictional determination. *See* English Act, *supra* note 44, § 67. It also provides for stay of litigation only if the court is satisfied that the arbitration agreement is not "null and void, inoperative or incapable of being performed." *Id.* § 9.

136. *See* discussion, *infra* note 142, of Vekoma v. Maran Coal Co., Swiss *Tribunal fédéral,* Civ. Div. I, 17 Aug. 1995, *reprinted in* 14 ASA BULLETIN 673 (1996) (holding that courts in Switzerland will examine the arbitrators' jurisdictional determinations *de novo).*

137. *See, e.g.,* Three Valleys Municipal Water District v. E.F. Hutton, 925 F.2d 1136 (9th Cir. 1991) (holding that the court should determine whether contracts were void because of signatory's lack of power to bind principals). See also *Compagnie de Navigation et Transports v. Mediterranean Shipping Co.,* ATF 121 II 38 (16 January 1995), where the Swiss *Tribunal fédéral* called for a full examination of the scope of the arbitration clause before stay of judicial proceedings in favor of an arbitration outside of Switzerland, while admitting that in a domestic arbitration the court might be limited to a "*prima facie* review" of the arbitration agreement's validity.

French law goes further and delays court review of arbitral jurisdiction until *after* an award is rendered. If an arbitral tribunal has already begun to hear a matter, courts must decline to hear the case. When an arbitral tribunal has not yet been constituted, court litigation will go forward only if the alleged arbitration agreement is clearly void (*manifestement nulle*).[138]

To some extent, what is at issue here is the timing of judicial scrutiny. Going to court at the beginning of the proceedings can save expense for a defendant improperly joined to the arbitration. On the other hand, judicial resources may be conserved by delaying review until the end of the process, when the parties may have settled.[139]

In the United States, the notion of an "agreement to arbitrate arbitrability" has recently emerged to echo the doctrine of *Kompetenz-Kompetenz* which was once applied in Germany.[140] As discussed below, the Supreme Court has suggested that in some situations what the Court called "the arbitrability question itself" (i.e., the arbitrator's power to hear a matter) may be bindingly submitted to arbitration, in which case the courts must defer (give "considerable leeway") to arbitrators' jurisdictional decisions.[141]

2. A Tale of Three Cities

In the real world, the jurisdiction of an arbitrator or foreign judge is rarely put to the test in extreme situations such as forged signatures or contracts made with a gun at the head. Rather, questions and fact patterns are usually subtle. Which of several claims are "related to" a contract? Should a parent company be joined to a proceeding, either on an estoppel theory or as the alter ego of the subsidiary? Was the claim brought within the requisite contractual time period? Does a course of conduct or trade practice lead to an implied arbitration clause?

Such jurisdictional matters have been examined in recent litigation in Switzerland, the United States and Germany. As examined in this section,

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138. *See* art. 1458 of the N.C.P.C. (Fr.).

139. Article 16 of the UNCITRAL Model Law constitutes what some see as a compromise, by providing for arbitral determination of jurisdiction in the form of an interim award, but giving the disappointed party only thirty (30) days to challenge such an award. *See* UNCITRAL Model Arbitration Law, *supra* note 71.

140. German case law traditionally used the term *Kompetenz-Kompetenz* to describe an arbitral tribunal's power to rule on its own jurisdiction without subsequent judicial review. *See* PETER SCHLOSSER, DAS RECHT DER INTERNATIONALEN PRIVATEN SCHIEDSGERICHTSBARKEIT § 556 (1989). Adoption of the UNCITRAL Model Law in Germany changed this situation. *See Entwurf eines Gesetze zur Neuordnung des Schiedsverfahrensrechts*, July 1995, at 132; Klaus-Peter Berger, *Implementation of the UNCITRAL Model Law in Germany*, 13 INT'L ARB. REP. 38, 44-45 (Jan. 1998).

141. *See* First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 948 (1995).

they provide a comparative perspective on increasingly frequent problems. Common to all such situations is the principle that the parties' intent remains the polar star for analysis of jurisdictional conditions to arbitration or court selection.

a. Lausanne: Vekoma v. Maran Coal

In *Vekoma v. Maran Coal Company*,[142] the Swiss *Tribunal fédéral* invoked Article 190 (2) (b) of the Swiss Conflict of Laws Code (*Loi fédéral sur le droit international privé*, hereinafter *LDIP*) to annul the award of an International Chamber of Commerce arbitral tribunal that had declared itself to have jurisdiction notwithstanding defendant's argument that the arbitration had not been brought within the contractually stipulated time limits. The background of this case involved a Dutch company that had undertaken to ship coke to an American coal corporation pursuant to a contract subject to Swiss law. Any dispute was to be resolved by ICC arbitration in Geneva, subject to the condition that the claim be filed "within thirty days after it was agreed that the difference or dispute cannot be resolved by negotiation."

Controversy led to an arbitration claim filed in May 1992, resulting in an award for the claimant. The defendant challenged the award on the basis that the claim was not brought within the requisite contractual period of thirty days from breakdown of negotiations. The jurisdiction of the arbitrators depended on the timeliness of the claim, which in turn depended on how one interpreted the communications between the parties: i.e., when was there an "agreement to disagree," so as to trigger the thirty day period? In the claimant's view, adopted by the arbitrators, settlement negotiations had broken down only in April, and therefore the arbitration was timely.

The defendant took the position (with which the *Tribunal fédéral* agreed) that failure to settle occurred in January, when a letter from claimants met with silence.[143] In finding for the defendant, the *Tribunal fédéral* held it had

142. Transport en Handelsmaatschappij "Vekoma" B.V. v. Maran Coal Co., decision of Civil Division I, 17 August 1995, *reprinted in* 14 (No. 4) ASA BULLETIN 673 (1996), (commentary by Philippe Schweizer). ICC Arbitration No. 7565/BGD. *See generally*, Paul Friedland, *The Swiss Supreme Court Sets Aside an ICC Award*, 13 (No. 1) J. INT'L ARB. 111 (1996) (suggesting that the *Tribunal fédéral* improperly substituted its own view on the facts for that of the arbitral tribunal); Pierre Karrer & Claudia Kölin-Nauer, *Is There a Favor Iurisdictionis Arbitri?*, 13 (No. 3) J. INT'L ARB. 31 (1996) (suggesting that the *Tribunal fédéral* should have given "somewhat more" deference to the arbitral tribunal's findings); François Knoepfler & Philippe Schweizer, *Jurisprudence suisse en matire d'arbitrage international*, 1996 REVUE SUISSE DE DROIT INTERNATIONAL ET DROIT EUROPÉEN 573 (describing the court's reasoning as "unnecessarily subtle" -- *inutilement subtil*).

143. The Americans had sent a settlement offer in January 1992, asking for a reply no later than January 17. When no response was forthcoming from the Dutch, the Americans then sent a reminder notice three months later, to which the Dutch did reply (in the negative) on 13 April. A claim was filed with the ICC on 11 May.

power to review the jurisdictional decision of the arbitral tribunal *de novo*, without the type of deference to the arbitral findings that would normally be accorded a decision on the merits. The *Tribunal fédéral* then went on to find that the arbitration clause had lapsed by the time the claim was filed several months later.

The reasoning of the *Tribunal fédéral* is complicated by the fact that it rests in large part on a distinction between fact and law.[144] The court deemed its review function to be more limited with respect to matters of fact than law.[145] In this connection, the *Tribunal fédéral* said that the parties' might have accepted that negotiations failed as a matter of either actual fact or legal norm (*"tatsächlich oder normativ"*).[146] Finding that the claimant ought to have concluded from the defendant's silence that its January settlement offer had been refused, the court implied as a matter of law that negotiations had failed.

While the *Tribunal fédéral*'s view that its review function is limited to issues of law is understandable with respect to lower (i.e., cantonal) court decisions, it poses certain analytic paradoxes with respect to an arbitrator's jurisdictional decisions. An excess of jurisdiction would seem to be an excess of jurisdiction whether based on the wrong facts or the wrong law.[147] Yet *Tribunal fédéral* review will normally be exercised in the latter case but not the former. *De lege ferenda*, it might be proposed that the right question with respect to judicial review should be whether the arbitrators' mistake concerns only the merits of the case (and is thus not reviewable), regardless of whether the mistake relates to law or to fact.[148]

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144. Karrer & Kölin-Nauer, *supra* note 142, state that "When the Swiss Federal Supreme Court reviews a decision of an arbitral tribunal on its jurisdiction, it still fully reviews questions of law. By contrast, findings of fact by an arbitral tribunal are reviewable only where they are based on procedural errors which are themselves reviewable under Article 190, subsection 2, letter d of the PIL Statute [relating to equal treatment and right to be heard] and possibly letter e [public policy]."

145. *See* ASA BULLETIN, *supra* note 142, & 3 at 676-77.

146. *Id.* & 3(c) at 678.

147. For example, an arbitral tribunal might take jurisdiction over a parent corporation on the erroneous assumption that through its subsidiary the parent had entered into an arbitration agreement. The error might result from an incorrect understanding of the law (legal grounds for piercing the corporate veil) or the facts (capacity in which an individual signed the agreement), or both.

148. See, e.g., PIERRE LALIVE, JEAN-FRANÇOIS POUDRET & CLAUDE REYMOND, LE DROIT DE L'ARBITRAGE INTERNE ET INTERNATIONAL EN SUISSE 439 (1989), to the effect that *"De manière plus générale, nous pensons qu"il convient de distinguer... selon que l'examen [of the Tribunal fédéral] porte sur les motifs de recours prévus a l'article 190(2), auquel cas il est illimité...."* ("In general, we believe one should distinguish . . . cases in which [court] scrutiny relates to grounds for challenge in Art. 190(2) [of the arbitration law, relating to arbitral jurisdiction], in which instance review should be unlimited.").

b. Boston: PaineWebber v. Elahi

Certain arbitration rules provide for disputes to be brought within a fixed term after the controverted events.[149] The complexity of the issues raised by such arbitral preconditions are best illustrated by one of the cases that held them to be for arbitrators rather than courts. In *PaineWebber v. Elahi*[150] a brokerage company moved to stay litigation with respect to a customer's claim for losses sustained by reason of unsuitable and speculative investments sold by the broker. The applicable arbitration rules of the National Association of Securities Dealers (NASD) as then in force required an arbitration to be filed within six (6) years from the date of the event that triggered the claim.

The brokerage firm argued that time limits were for the courts, while the customer wanted time limits to be decided by the arbitrators. The reasons are not difficult to understand. Brokers normally try to arbitrate rather than go to court, in order to reduce or to avoid the generous punitive damages for which American juries have become famous, the assumption being that arbitrators are more "reasonable" that juries. However, brokerage firms generally want time bars determined by courts. Presumably arbitrators will be more likely than courts to find jurisdiction, since arbitrators get paid if they hear a dispute.

No consensus yet exists on the matter of whether courts or arbitrators should determine if time limits have been met.[151] Some decisions—including *Elahi*—have held time bars to be a matter for arbitrators,[152] while others have

149. See Rule 10304 (formerly Section 15) National Association of Securities Dealers Code of Arbitration, providing that "no dispute, claim or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim or controversy." *See generally* Sean Costello, *Time Limits Under Rule 10304 of the NASD Code of Arbitration Procedure: Making Arbitrators More Like Judges or Judges More Like Arbitrators*, 52 BUS. LAW. 283 (1996); David Rivkin, *Courts Differ on Arbitrability of Time Limitations*, ADR CURRENTS (A.B.A., Autumn 1996) 21. Under a recently proposed change in the NASD rules the six year eligibility rule will be suspended for a three year period. *See* REPORT OF THE ARBITRATION POLICY TASK FORCE TO THE BOARD OF GOVERNORS NATIONAL ASSOCIATION OF SECURITIES DEALERS ("Ruder Report," so named for Task Force Chairman David Ruder), Fed. Sec. L. Rep. (CCH) &85,735, Section V(B) (March 16, 1996).

150. 87 F.3d 589 (1st Cir. 1996).

151. The Third, Sixth, Seventh, Tenth, and Eleventh Circuits have considered time limits contained in arbitration rules to constitute a jurisdictional prerequisite to arbitration, to be determined by courts. The First, Second, Fifth, Eighth, and Ninth Circuits have held the matter to be for the arbitrator. *See* Elahi, 87 F.3d at 596-99 (summarizing cases).

152. *See, e.g., id.* at 601 (citing language in Section 35 of the NASD Code of Arbitration Procedure providing for arbitrators to "interpret and determine the applicability of all provisions under this Code").

held interpretation of these limits to be for courts.[153]

To understand how the First Circuit in *Elahi* arrived at the conclusion that time limits are a question for arbitrators, one must start with its sometimes confusing use of the expression "arbitrability issue."[154] This term is used to indicate a question that touches arbitral jurisdiction (rather than the merits of a dispute), which the parties normally intended for the courts alone to decide.

The Court began by presuming the parties' intent was *not* "to submit to arbitration any issue other than the existence and scope of the agreement to arbitrate." One might have thought, therefore that it would be for courts to examine whether preconditions to arbitration had been fulfilled at the moment one party wished to rely upon the arbitration clause, since non-fulfillment would normally taint the validity of the clause.

The *Elahi* court, however, engaged in a problematic characterization trick that may well obfuscate sound analysis. The Court stated that time bars do not relate to jurisdiction at all, thus removing the question from court scrutiny.[155]

By citing the "arbitrability *dictum*" of the Supreme Court decision in *First Options,*[156] the First Circuit implied not only that arbitrators would have the first word on the matter of time bars, but also the last. Under its analysis, a question which is not an "arbitrability issue" would normally be a matter of the merits in the dispute, on which arbitrators' decisions are final.

There are those who will see the *Elahi* decision as an exercise in presuming one's own conclusion. If the contract intended to give the arbitrator power to decide preconditions to arbitration, then why put preconditions into the contract at all? Sound legal analysis requires reconciliation of competing contract provisions, making sense of one term without ignoring another. If a contract provided for "arbitration under the rules of the American Arbitration Association," it is hardly conceivable that a claimant who filed an action with the International Chamber of Commerce rather than the American Arbitration Association could give AAA-appointed arbitrators the power to bootstrap themselves into a job.

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153. *See, e.g.*, Merrill Lynch v. Cohen 62 F.2d 381 (11th Cir. 1995).

154. The term "arbitrability issue" is borrowed from the U.S. Supreme Court's decision in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

155. "The presumption we adopt today [that time bars are for arbitrators] is about *whether* an issue is one of 'arbitrability' [while the Supreme Court's presumption in *First Options*] was about *who decides* issues that have been classified as 'arbitrability issues.'" *Elahi*, 87 F.3d at 599. The court concluded by citing Section 35 of the NASD arbitration rules, allowing the arbitrator to interpret the applicability of all provisions under the [NASD Arbitration] Code, as an indication of an intent to arbitrate time limits.

156. *See* First Options, 514 U.S. 938.

Courts in the United States have also struggled with analogous issues related to statutes of limitations. Some decisions have held that statute-of-limitations questions are for judges when hearing a motion to compel arbitration, but for arbitrators when hearing the underlying substantive claim.[157] This approach assumes that there are two separate time limits: one applicable to the principal agreement (to buy, sell, license, lease or lend) and one applicable to the agreement to arbitrate the dispute. The main agreement is covered by the statute of limitations contained in its applicable law clause, or in the law otherwise governing its interpretation. On the other hand, a motion to compel arbitration implicates the relevant arbitration statute.[158] In addition, some courts have held that the arbitrator's power to decide statute of limitations matters is governed by the contractual choice-of-law clause,[159] while others have excluded time limits from the scope of the applicable substantive law.[160]

c. Berlin: Implied Arbitration Clauses?

In an intriguing case the highest court in Germany decided that it was possible, at least in theory, that an arbitration clause might be implied in a contract through trade usage. The *Bundesgerichtsfhof* decision of December 3, 1992[161] involved a sale of several thousand sheepskins arranged though an exchange of telegrams. After cancelling the contract, the buyer sued for reimbursement of the payments made. The seller requested arbitration, according to the alleged practice in the hide and skin trade.[162]

The court found that trade usage alone could constitute evidence of a mutual intent to arbitrate.[163] The judicial reasoning is interesting. Rather

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157. *See* National Iranian Oil v. Mapco Int'l Inc., 983 F.2d 485, 491 (3d Cir. 1992); Avant Petroleum, Inc. v. Pecten Arabian, Ltd., 696 F. Supp. 42 (S.D.N.Y. 1988).

158. *See* National Iranian Oil, 983 F.2d at 487-94. Since the FAA does not specify a statute of limitations, the court reasoned that it must borrow the most analogous one from state law under the conflict of laws principles of the state in which the court sits.

159. *See* Smith Barney, Harris Upham & Co. v. Luckie, 647 N.E.2d 1308 (N.Y. 1995) (noting that N.Y. C.P.L.R. 7502 permits statute of limitations to be decided by courts).

160. *See* PaineWebber, Inc. v. Bybyk, 81 F.3d 1193, 2000 (2d Cir. 1996) (interpreting U.S. Supreme Court Analysis in Mastrobuono v. Shearson Lehman Hutton, 514 U.S. 52 (1995)).

161. BGHZ, Urt. V. 3.12.1992, III ZR 30/91. *See* 1993 DEUTSCHE ZEITSCHRIFT FUR WIRTSCHAFTSRECHT 465, with commentary by Klaus-Peter Berger.

162. The seller referred to the arbitration provisions in the standard form "International Hide & Skin Contract No. 2," to which reference apparently had been made in one of its letters, although never accepted by buyer.

163. The New York Convention requirement that an arbitration clause be in writing was not fatal to the argument that an agreement to arbitrate could be implied from trade usage, since the Convention by its own terms allows recognition of provisions of more favorable domestic

than finding merely that an arbitration clause in one document could be incorporated by reference to another (not a novel concept), the court seems to have gone further and suggested that a commercial practice itself is enough to create a duty to arbitrate. Since the *Bundesgerichtshof* does not itself deal with issues of fact, the case was remanded to the lower court for a determination of whether in the sheepskin trade there existed a commercial practice of arbitration as alleged by seller.

B. Separability

Imagine that on the basis of a court selection clause a party-selected judge has found the principal contract invalid. Will this necessarily invalidate of the jurisdiction agreement itself? In connection with arbitration clauses, this question has been dealt with through the principle "separability" (sometimes called "autonomy"), by which the validity of an arbitration clause is determined independently from the validity of the basic commercial contract in which it is encapsulated. Established either by case law or by statute in most national arbitration laws,[164] the separability doctrine permits arbitrators to invalidate the main contract (e.g., for illegality or fraud in the inducement) without the risk that their decision will call into question the validity of the arbitration clause from which they derive their power. In other words, the separability doctrine gives arbitrators the tool with which to do their job, by fully examining the parties' agreement. Moreover, separability requires courts, when determining whether an arbitration should go forward at all, to look only to the validity of the arbitration agreement.[165]

There would seem to be no reason why separability notions applied to jurisdiction clauses should not also apply when courts are determining whether to give *res judicata* effect to a foreign judgment based on the clause in question. Conceptualizing the jurisdiction clause as separate from the main agreement would also become relevant when a judge is asked to hear a case in violation of an agreement between the parties entrusting the matter to another court. Thus, the validity of the court selection clause would depend only on the clause itself. For example, a memorandum of intent might refer

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law. Article VII 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 . . . of the country where such award is sought to be relied upon." *See* New York Convention, *supra* note 15.

164. In the United States, see *Prima Paint Corporation v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967); in France, see Arrét Gosset, Cour de cassation, 1ere civ., 7 May 1963, *discussed in* PHILIPPE FOUCHARD, EMMANUEL GAILLARD & BERTHOLD GOLDMAN, TRAITÉ DE L'ARBITRAGE COMMERCIAL INTERNATIONAL (1996); in England, see English Act § 7, *supra* note 44; in Switzerland, see LDIP art. 178(3), *supra* note 56. *See also* UNCITRAL Model Law, *supra* note 71, at art. 16(1).

165. *See* Republic of Nicaragua v. Standard Fruit Co., 937 F.2d 469 (9th Cir. 1991) (involving an arbitration agreement in a "Memorandum of Intent").

interpretation of the parties' relationship there under to a particular court. This allocation of competence should be respected (assuming the court selection clause was not otherwise defective) even if one side argued that the memorandum itself was non-binding. In other words, it would be for the party-selected court to look at the other sections of the memorandum to determine whether it was or was not binding.

Separability, however, says nothing about the validity of the arbitration clause itself, or by whom this validity is to be determined,[166] a matter examined above in the discussion of *compétence-compétence*. The fact that an arbitration clause *might* be valid notwithstanding infirmities in other terms of the contract does not mean that the clause necessarily *will* be valid, or that an arbitrator's erroneous decision on the clause's validity will escape judicial scrutiny. Separability and *compétence-compétence* intersect only in the sense that arbitrators who rule on their own jurisdiction will look to the arbitration clause alone, not to the entirety of the contract. The organization of some arbitration statutes puts separability and *compétence-compétence* side by side.[167] Other statutes, however, maintain a clear-cut distinction between the two doctrines.[168]

For example, an agreement between an American multinational and a business consultant might provide for the latter's assistance in obtaining an engineering contract in the Middle East. The Americans might resist paying the consultant on two grounds: (i) the person who signed the agreement allegedly on their behalf was not authorized to do so; and (ii) contract payments were earmarked to bribe government officials.

Separability notions would permit the arbitrators to find the main contract invalid (due to its illegal object of bribery), without thereby destroying their power to render an award pursuant to the arbitration clause. The separability doctrine would not, however, make the arbitration agreement itself valid if the individual who signed the agreement had no power to do so.

In turn, *compétence-compétence* principles would permit the arbitrators to examine the power of the person who signed the contract (although perhaps subject to subsequent court challenge). But under *compétence-compétence* principles standing alone, without the sister doctrine of separability, the

166. Misunderstanding on the operation of separability, along with confusion about the meaning of *compétence-compétence*, sometimes has led commentators to question the social value of these doctrines, from concern that they may serve as roads to an arbitrator's improper arrogation of power. *See* Ware, *supra* note 100.

167. *See* UNCITRAL Model Law, *supra* note 71, art. 16(1).

168. *See, e.g.*, English Act, *supra* note 44, which at § 7 says that an arbitration agreement "shall not be regarded as invalid, non-existent or ineffective because [another agreement of which it forms a part] is invalid, or did not come into existence," but gives the arbitral tribunal power to rule on its own power (subject to judicial scrutiny) in § 30.

arbitrators could not declare the main contract void for illegality without thereby undermining their jurisdiction to do so.

VI. CONCLUSION

Notwithstanding the benevolent attitude toward court selection clauses evidenced by the trend of modern judicial decisions, the United States lags behind many of its trading partners in the enforceability of agreements to resolve international commercial disputes in contractually designated courts. Unlike Western Europe, where court selection clauses are enforced through treaty and statute, no American jurisdiction gives dispositive effect to such clauses.

The reliability of court selection clauses in the United States compares unfavorably both to the treatment given such agreements in other nations and to the implementation of arbitration agreements within the United States itself. The Federal Arbitration Act and the New York Arbitration Convention provide for the mandatory recognition of an agreement to arbitrate and the resulting award. No analogous treaty or statute gives similar force to jurisdiction clauses before American courts. Rather, a discretionary approach to enforcement of court selection rests on *forum non conveniens* notions, with the consequence that arbitration clauses will often outperform agreements to submit commercial controversies to party-chosen courts.

The draft Model International Court Selection Act set forth in the Appendix to this article aims to promote greater even-handedness in forum selection. Replacing the patchwork of American rules on jurisdiction clauses, the statute would apply only to international agreements. Federal courts would be required to hear cases pursuant to court selection clauses as long as the dispute fell within the subject matter limits of Article III of the Constitution. In consumer transactions and contracts of employment the statute would apply only when consumers or employees are given an option to sue and to be sued at their domicile. Moreover, the Act would not apply to court selection clauses that operate in tandem with choice of law clauses to defeat fundamental public norms of the United States or the place of contract performance.

Underlying the Court Selection Act is the assumption that commercial actors are more likely to commit themselves to productive economic cooperation when confident that controversies will be resolved in a fair forum. While judicial discretion to disregard inconvenient court selection clauses may have merit in domestic transactions, a more automatic approach to enforcement of such clauses commends itself in international transactions, given the special need to reduce the fear of bias in cross-border adjudication.

Over time, court selection will likely be plagued by jurisdictional questions similar to those that now affect arbitration. In particular, one court

may be asked to determine what deference (if any) it should give to jurisdictional findings of another court on matters such as the validity and scope of the court selection clause and the impact of trade usages in forum selection. In all of these areas, judicial responses will be guided and enriched by the extensive case law and commentary dealing with analogous issues arising in commercial arbitration.