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Predestination and Swiss Arbitration Law: Geneva's Application of the International Concordat

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PREDESTINATION AND SWISS ARBITRATION LAW: GENEVA'S APPLICATION OF THE INTERCANTONAL CONCORDAT

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PREFACE

Historically, Geneva has proved an attractive site for international commercial arbitration. Today, however, Geneva's arbitral popularity is threatened by the interventionist practices of Switzerland's cantonal courts, which have liberally interpreted their powers to review and overturn arbitral awards. In an effort to prevent a decline in Switzerland's popularity as an arbitral center, Swiss jurists have recently proposed rules providing for greater arbitral autonomy in the private resolution of international business disputes. The authors analyze Swiss judicial intervention in the arbitral process, the problems inherent in such intervention, and a proposed solution to those problems.

I. INTRODUCTION

"We call predestination God's eternal decree, by which he determined with himself what he willed to become of each man."

John Calvin*

Calvin's theology lives in the arbitration law of the city once subject to his spiritual tutelage. Divine law, according to Calvin, predestined men's eternal condition to conform to the will of God. Swiss law, according to recent Swiss court decisions, predestines arbitrators' decisions to conform to the will of the local judge. The arbitrators' purported autonomy to decide the dispute reveals itself as illusory as men's vain attempts to exercise free will.

The whimsical parallel between God's eternal decree and the mandatory

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* *Institutes Of The Christian Religion (Institutio Religionis Christianae)* (1536), Book III, Chapter xxii, Section 5, translated by F.L. Battles, *reprinted in* 21 *Library of Christian Classics* (J. McNeill, ed. 1960 at 969).

norms of Swiss law suggests itself in several recent cases restricting the independence of the arbitral process in Switzerland. Cantonal courts annul awards perceived incorrect, while federal courts overturn cantonal decisions not to annul awards. Judicial intervention is most notorious through a provision of the intercantonal arbitration *Concordat* permitting annulment of "arbitrary" awards. Because of this excessive intervention, disputes are destined to be decided by judges rather than arbitrators, despite parties' agreements to the contrary.

The interventionist tendency in Geneva arbitration law contrasts with the trend toward greater arbitral autonomy in the arbitration laws of England, France and the United States. As a result, Geneva's reputation as a hospitable site for international commercial arbitration, due to its political neutrality, general serenity and the linguistic ability of its jurists, may suffer from its less welcoming legal climate.

Geneva's judicial preference for the "right result" defeats the objectives of arbitration: privacy, finality and neutrality of forum in the resolution of commercial disputes. Parties that have agreed to go before an arbitrator find themselves before a judge. The resulting uncertainty encourages parties in arbitration to renege on their agreements to arbitrate and seek judicial recourse instead.

This article examines the legal framework for Geneva arbitration, focusing on those cases in which Swiss courts have annulled international commercial arbitration awards rendered in Geneva. The Swiss judiciary's role in the arbitral process is analyzed in light of the *desiderata* of finality and privacy in arbitral dispute resolution, and the draft revision of Swiss conflict of laws rules that recognizes parties' rights in international arbitration to exclude judicial intervention. The authors conclude that greater judicial restraint in the control of international commercial arbitration in Geneva commends itself. The judge's role should not include the rectification of simple arbitrator error. Rather, it should be limited to insuring the integrity of the arbitral process and the rights of third parties.

II. THE CONCORDAT

In 1969, the French-speaking cantons of Fribourg, Vaud, Valais, Neuchâtel and Geneva drafted a uniform Swiss arbitration law based on authority of the Swiss Constitution.[1] In 1974 that draft attained the federal government's approval.[2] That law, the *Concordat*, applies to any arbitral

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[1] B. VERF., CONST., COST. FED. art. 64. The twenty-six cantons within the Helvetic Confederation retain competence over judicial organization and procedure, and the administration of justice.

[2] *Concordat Suisse Sur l'Arbitrage* (1974) [hereinafter cited as *Cdt.*] (text of *Concordat* in French, German, Italian, and English, with notes in French, German, and English by André Panchaud, published by Editions Payot, Lausanne). All

proceeding in a signatory canton.[3]

The *Concordat* applies to all arbitral procedings within a signatory canton,[4] where the parties so provide in a written agreement.[5] A "writing" is

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references concerning the law of Geneva are to the *Concordat* unless otherwise specified.

At this writing, twenty-one cantons have enacted the *Concordat*. The adhering cantons, in alphabetical order, are Appenzell-Ausserrhoden, Appenzell-Innerrhoden, Basel-Landschaft, Basel-Stadt, Bern, Fribourg, Geneva, Graübunden, Jura, Neuchâtel, Nidwalden, Obwalden, St. Gallen, Schaffhausen, Schwyz, Solothurn, Ticino, Uri, Valais, Vaud, and Zug. The remaining five non-adherents are, as of September 1, 1981, Zurich, Luzern, Glarus, Aargau and Thurgau, with ratifying legislation being prepared in Aargau and Thurgau. International Council for Commercial Arbitration (ICCA), 7 Y.B. COM. ARB. 70 (1982). For ratifying legislation, see 1981 Recueil officiel des lois et ordonnances de la Confèdèration suisse (ROLF) 984.

Zurich, the most important of the non-signatory cantons, retains its own arbitration rules under the *Zivilprozessordnung* [hereinafter cited as *ZPO*]. The *ZPO* was adopted on June 13, 1979 and became effective on Jan. 1, 1977. Sections 238-258 of the *ZPO* deal with arbitration. Whether Zurich's law represents an approach to arbitration different from the *Concordat* had been questioned by commentators. *See, e.g.*, Briner, *Switzerland*, in ICCA, 3 Y.B. COM. ARB. 181, 182-83, [hereinafter cited as Briner], and W. Park, *Judicial Supervision of Transnational Commercial Arbitration: The English Arbitration Act of 1979*, 21 HARV. INT'L L. J. 87, 111 n.160.

[3] *Cdt., supra* note 2, art. 46.

[4] *Cdt., id.* at art. 1, para. 1. Because the *Concordat* applies to any arbitral proceeding with its seat (*siège*) in a signatory canton, it explicitly recognizes the traditional doctrine of *lex loci arbitri*.

[5] *Cdt., id.* at art. 6; *ZPO, supra* note 2, § 238 I(2). Note that all arbitration in Geneva is subject to the *Concordat* which parties to arbitration may not contravene through choice of arbitration rules or institutions.

Geneva case law recognizes the doctrine of "severability." Under that doctrine, an arbitration provision in a contract remains valid despite the invalidity of the main contract. In this situation, an arbitration clause becomes void only if the clause is subject to the same infirmity as the main contract itself. Judgment of July 7, 1962, Bundesgericht, Switz. (Président du Tribunal fédéral), 88 BGE I at 100, 105; Judgment of April 12, 1945, Bundesgericht (Tribunal fédéral, 1e Section Civile) Switz., 71 BGE II at 116, 1945 JOURNAL DES TRIBUNAUX (J.T.) I at 278; Judgment of October 7, 1933, Bundesgericht (Tribunal fédéral, section de droit public), Switz., 59 BGE I at 171, 179. *Accord ZPO, supra* note 2, § 241. If for example, a contract for the purchase of a company is held void because induced by misrepresentation, an arbitration clause within that contract will not necessarily be held void. Rather, the arbitrator will decide whether the agreement to arbitrate problems arising out of the contract was itself induced by misrepresentation. Only if the arbitrator so finds will the agreement to arbitrate be held void.

The *Concordat* permits arbitration only for certain subject matters. Disputes are arbitrable only if they do not fall "within the exclusive jurisdiction of a State authority by virtue of a mandatory provision of the law." *Cdt., supra* note 2, art. 5; *Accord ZPO, supra* note 2, § 238, para. 1. As such, matters relating to labor law and social security are not arbitrable.

defined by general principles of law,[6] and may result from reference to the rules of a commerical or professional institution. In all cases, parties' statement of choice for arbitral rules must refer expressly to the arbitration agreement in those rules.[7]

The *Concordat* contains a large number of mandatory provisions that may interfere with arbitral proceedings. Fully two-thirds of the *Concordat's* forty-six articles are designated mandatory,[8] giving arbitrators and parties far less autonomy than under the laws of other major arbitral centers.[9] These mandatory provisions deal with matters such as the form of the arbitration agreement, subject matter of the arbitration, revocation of arbitral authority, and challenge of the award's validity.[10] Certain of these mandatory provi-

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[6] For example, the Swiss Federal *Code des Obligations* and the 1958 New York Arbitration Convention describe general principles of law.

[7] *Cdt., supra* note 2, art. 6, para. 2; *cf. ZPO, supra* note 2, § 238, para. 2, not requiring a written declaration of adhesion.

[8] *Cdt., supra* note 2, art. 1, para. 3.

[9] *See, e.g.*, Paris, France; London, England.

[10] "Mandatory" provisions (*dispositions imperatives*) include all or part of the following:

Article 2 (2nd and 3rd paras.) fixes the arbitral seat in absence of a choice by the parties;
Article 4 defines an arbitration agreement;
Article 5 defines subject-matter arbitrability;
Article 6 requires arbitration agreements to be specific and in writing;
Article 7 prohibits exclusion of lawyers as arbitrators;
Article 8 grants the arbitral tribunal the jurisdiction to rule on its own competence and requires any objection to competence be raised before any defense on the merits;
Article 9 allows immediate court appeal of interlocutory rulings on competence;
Article 12 provides for judicial appointment of arbitrators or of an "umpire" (*surarbitre*) in the absence of agreement by the parties;
Article 13 defines the pendency of the arbitration (*lis pendens*);
Articles 18, 19, 20, 21 and 22(2) govern challenge of arbitrators;
Article 25 defines minimum procedural fairness (the right to be heard);
Article 26 gives courts exclusive power to issue binding interlocutory orders;
Article 27 provides for judicial assistance in the taking of evidence;
Article 28 limits the third-party intervention in arbitration;
Article 29 governs interlocutory action on issues of set-off outside the arbitrators' mission and grants suspensive effect on arbitral proceedings to such interlocutory action;
Article 31 (1st para.) requires all arbitrators to participate in all arbitral deliberations and decisions;
Article 33 (1st para. a-f; 2nd and 3rd paras.) governs the form of the award;
Article 36 lists grounds for challenge of the award (*recours en nullité*);
Article 37 sets a 30 day time limit on *recours en nullité;*
Article 38 gives challenges no suspensive effect on the arbitration unless granted by the court at a party's request;

sions permit such extensive judicial intervention in the arbitral process as to undermine the autonomy of that process.

The most problematic form of judicial intervention under the *Concordat* stems from its provisions permitting judges to set aside arbitral awards as "arbitrary."[11] The *Concordat* defines arbitrary awards in two ways: awards constituting "a clear violation of law or equity,"[12] and awards based on findings "manifestly contrary to the facts."[13] Geneva judges have liberally interpreted the *Concordat's* vague definitions of "arbitrary" acts.

III. Application of the Concordat by the Cantonal Court

Although an arbitration agreement normally bars judicial action on the merits of the dispute or appeal of the award,[14] the *Concordat* permits significant recourse to the courts that may not be excluded by agreement of the parties.[15] The *Concordat* provides three main avenues of intervention in arbitral awards by the cantonal court: challenge of the arbitrator or the arbitral tribunal as a whole (*"récusation"*);[16] application for judicial review of the award itself (*"recours en révision"*);[17] and, action for annulment of the award (*"recours en nullité"*).[18] Where a party succeeds in its challenge on any of these grounds, the arbitral award may be set aside or revised.[19]

Article 39 allows the court to remit an award to the arbitrators for correction;
Article 40 provides that the court upholding a challenge may annul all or part of the award and remit it to the arbitrators for rehearing;
Article 41 governs judicial review (*révision*) on grounds of fraud or new evidence;
Article 42 sets a time limit on application for *révision;*
Article 43 provides for remand of the award to the arbitrators if the *révision* is granted;
Article 44 defines procedures for judicial declaration of enforceability;
Article 45 defines jurisdiction of the cantonal courts; and
Article 46 stipulates the *Concordat* supersedes all prior cantonal arbitration law in the signatory cantons.

A survey of these provisions indicates that many of them relate merely to matters of fairness or common sense.

[11] In French, German and Italian, the three official languages of the *Concordat,* the terms are respectively, *arbitraire, willkurlich,* and *arbitrario. Cdt., supra* note 2, art. 36(f).

[12] *Cdt., id.* at art. 36(f). Equity here is equated with fairness, and not the technical meaning of that term in English law.

[13] *Id.*

[14] "Appeal" (*appel*) in civil law systems implies a hearing on the facts as well as the law. "Recourse" (*recours*), on the other hand, involves only a review of the law. *See* SCHLESINGER, COMPARATIVE LAW at 424.

[15] *Accord, ZPO, supra* note 2, § 255.

[16] *Cdt., supra* note 2, arts. 18-23.

[17] *Cdt., id.* at arts. 41-43.

[18] *Cdt., id.* at arts. 36-40.

[19] Note that the *Concordat* permits interlocutory appeals on certain of these

A. *Methods of Cantonal Court Intervention in Arbitral Awards*

1. Récusation: Challenge of the Arbitral Tribunal[20]

The Constitutional guarantees of equal treatment before the law[21] and the right to be heard by an impartial judge[22] are the bases for *récusation.* Considerable case law affirms the principle that arbitrators, as well as any organization designated to appoint them, must be independent of the parties.[23] Therefore, grounds for *récusation* include an arbitrator's relationship to a party or a party's representative by blood, marriage, adoption, or business links.[24]

Challenge of an arbitrator before the cantonal court may result in his

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matters. Under the *Concordat,* arbitrators have the authority to rule on their own jurisdiction in either an interlocutory or final decree. *Cdt., supra* note 2, art. 8, para. 1. All exceptions to arbitral jurisdiction must be raised before any argument on the merits of the dispute, by an interlocutory plea to the competent court. *Cdt., id.* at art. 8, para. 2; art. 9, and art. 36(b). Arbitrators' decisions on matters such as their own competence and the validity of arbitration agreements or main contracts, are subject to immediate appeal. *Cdt., id.* at art. 9.

[20] For a more detailed discussion of *récusation,* see Caprez, *Le Concordat Sur l'Arbitrage,* 72 Schweizerische Juristen-Zeitung (SJZ) 233 (1976) [hereinafter cited as Caprez] and B. DUTOIT, F. KNOEPFLER, P. LALIVE, & P. MERCIER, 1 REPERTOIRE DE DROIT INTERNATIONAL PRIVE SUISSE 276-87 (1982) [hereinafter cited as DUTOIT].

[21] B. VERF., CONST., COST. FED. art. 4.

[22] *Id.* at art. 58.

[23] *See* DUTOIT, *supra* note 20, at 276-81.

[24] *Cdt., supra* note 2, art. 18 and notes thereto; *ZPO supra* note 2, § 244, para. 2. The entire arbitral tribunal is subject to challenge if one of the parties is found to have exercised overriding influence on the appointment of its members.

The *Concordat* provides challenge to an arbitrator be made at the outset of arbitration or as soon as the objecting party becomes aware of grounds for removal. *Cdt., supra* note 2, art. 20. The cantonal court may revoke the arbitrator's authority on any of the grounds for challenge specifically enumerated or on other "valid grounds," *id.* at art. 22, such as undue delay in carrying out the arbitral mission, *id.* at art. 17, by the terms of the arbitration agreement. *Cdt., id.* at art. 29.

However, an arbitral tribunal may consist entirely of nationals of a party's home country or domicile. DUTOIT, *supra* note 20, at 277. When execution of a foreign award is sought in Switzerland, of course, the composition of the arbitral tribunal that rendered it is subject to challenge only for violation of Swiss public policy (*ordre public*). *Id.* at 278. Thus the federal court has upheld foreign awards rendered by the arbitral tribunals of organizations, professional associations, and state institutions (for example Czechoslovakia) to which only one of the parties belongs. *Id.* at 279.

Parties may also challenge arbitrators' jurisdiction (*récusation*) on the basis of bias, criminal record, or any other ground for removal of federal judicial officials. *See* Articles 22 and 23 of the *Bundesgesetz über die Organisation der Bundesrechtspflege (loi fédérale d'organisation judicaire)* of 16 Dec. 1943 [hereinafter cited as *BGB OJF*].

removal if "objection [is] made before any issue is raised on the merits, or as soon as the requesting party has knowledge of the grounds for objection."[25] Because parties have a constitutional right to an impartial arbitrator, courts have liberally interpreted this time limit in claimant's favor. Courts will not normally deprive a party of its right to challenge an arbitrator "so long as the challenge is presented at a time when it will not greatly interfere with the carrying out of the proceedings."[26] However, courts will reject as untimely a challenge to even a partial arbitrator if a party clearly knows of the partiality at the outset but delays challenge until he loses arbitration on the merits.[27]

2. Recours en Révision: Review of the Award for Fraud or New Evidence

Parties may seek *révision* of an arbitral award by the cantonal court on two grounds: 1) that the award was affected by criminal acts, such as fraud; or 2) that the award was rendered in ignorance of important evidence existing prior to the award which the claimant could not present during the proceedings.[28] Parties seeking *révision* must apply for review within sixty days of claimant's knowledge of grounds for review, and no later than five years after notification of the award.[29] If the action for review succeeds, the cantonal court must remit the award to the arbitral tribunal for rehearing.[30]

Case law on *révision* for criminal acts is sparse. However, in unpublished cantonal court opinions,[31] the cantonal court in Geneva has held that it may review arbitral cases allegedly tainted by criminal acts only where those acts have been proven in a criminal trial prior to the *révision*. This prohibition applies "unless the criminal jurisdiction was itself unable to rule on the commission of the infraction, such as where defendant is deceased or has become incompetent."[32] Where a party seeks *révision* claiming the arbitral award was rendered in ignorance of important evidence, he must prove he

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[25] Such removal is called *révocation*. *Cdt., supra* note 2, art. 20.

[26] DUTOIT, *supra* note 20, at 283, summarizing a holding in Judgment of November 22, 1972, Bundesgericht (Tribunal fédéral), Chambre de droit public (Switz.), 95 Semjud. 257 (1973).

[27] Judgment of January 7, 1969, Tribunal de 1e Instance (République et Canton de Genève) 1969 REVUE ARBITRAGE 108, *cited in* DUTOIT, *supra* note 20, at 285.

[28] *Cdt., supra* note 2, art. 41. *ZPO, supra* note 2, § 293 is comparable, though more generally stated.

[29] *Cdt., supra* note 2, art. 42. *Cf. ZPO, supra* note 2, § 293 granting ninety days.

[30] *Cdt., supra* note 2, art. 43.

[31] Eurosystem hospitalier en faillite v. S.A. Servicios Profesionales Construcciòn, and Société Générale de Banque S.A. v. Servicios Profesionales Construcciòn, [hereinafter cited as *ESH en faillite* and *SGB SA*, respectively]. Judgments of October 14, 1981, Cour de Justice Civile (République et Canton de Genève [1981], (unpublished), *cited in* DUTOIT, *supra* note 20, at 360-63.

[32] *ESH en faillite, cited in* DUTOIT, *supra* note 20, at 361.

was unaware of the evidence during arbitral proceedings and that such ignorance was reasonable.[33] If claimant did have knowledge of the decisive facts, he must show he was unable, despite all diligence during the arbitration, to present evidence on these facts.[34]

3. Recours en Nullité: Setting Aside and Remitting Awards

Article 36 of the *Concordat* provides nine grounds for annulment of an arbitral award.[35] Arbitral decisions are subject to actions for nullification (*"recours en nullité"*) where the arbitral tribunal: 1) was improperly constituted; 2) erred as to its jurisdiction; 3) ruled on matters not submitted to it; 4) violated a party's due process rights;[36] 5) awarded a party something not claimed; 6) made an "arbitrary" award;[37] 7) ruled after expiration of its mission; 8) did not respect the provisions of the form of the award; or 9) fixed arbitrators' fees at a manifestly excessive level.[38] Article 36 is mandatory[39] and thus not waivable by the parties, either expressely in the arbitration

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[33] *ESH en faillite, cited in* DUTOIT, *id.* at 362.

[34] *Id.* The court also emphasized that *révision* should not be confused with an action for nullification: *révision* does not allow the presentation of new arguments or new interpretation of facts already in evidence.

[35] The parties to an arbitration agreement are free to stipulate their own contractual avenues of appeal, in addition to those guaranteed by the *Concordat*. Any such private remedies must be exhausted before a party may challenge the award in court. *Cdt., supra* note 2, art. 37, para. 2.

[36] *Cf. ZPO, supra* note 2, § 281, providing for *recours en nullité* for violation of mandatory rules of procedure.

[37] *Cf. ZPO, supra* note 2, § 281, providing for *recours en nullité* against awards which are arbitrary, based on findings contrary to the facts, or in clear violation of the law.

Under the *Concordat,* the moving party has the burden of establishing that aspects of the award are tainted with arbitrariness. Judgment of March 17, 1973, *Cour de Justice* (République et Canton de Genève) (unpublished) *cited in* Caprez, *supra* note 20, at 234-35. Under the *Concordat's* Article 33, *Cdt., supra* note 2, art. 33, para. 1(e), the parties may waive their right to know the reasons for a given decision. The Vaud court has recently held that such a waiver does not imply a waiver of the right to challenge for arbitrariness. Masnata v. Wurlod, Judgment of July 1, 1975, Chambre de Recours (Canton de Vaud), *cited in* Jolidon, *Les motives du recours en nullité selon le Concordat Suisse sur L'Arbitrage,* [1979] BERNER FESTGABE ZUM SCHWEIZERISCHEN JURISTENTAG, 1979 at 335 [hereinafter cited as Jolidon]. A minority view, *see* DUTOIT, *supra* note 20, at 353, would forbid parties to waive their right because without the arbitrator's reasoning, it is not possible to specify how the arbitrator has been arbitrary. Judgment of September 5, 1974, Kantonsgericht, II. Zivilkammer (Canton de St. Gall), 72 Schweizerische Juristen Zeitung (SJZ) 903 (1976), *cited in* DUTOIT, *supra* note 20, at 353.

[38] *Cdt., supra* note 2, art. 36(a)-(d), (g)-(i). These grounds are treated at some length in DUTOIT, *supra* note 20, at 343-59 and in Jolidon, *supra* note 37, at 311.

[39] *Cdt., supra* note 2, art. 1, paras. 1 and 3.

agreement or by reference to institutional rules stipulating the award be final or without appeal.[40]

The action for annulment of an arbitral award on grounds of arbitrariness under Article 36(f) is the *Concordat's* most potentially intrusive provision. That provision opens arbitral proceedings to the possibility of almost unlimited judicial intervention, defining arbitrary awards as those either based on "findings . . . manifestly contrary to the facts appearing on the file" or constituting "a clear violation of law or equity."[41] Federal constitutional decisions indicate a decision is arbitrary "when it seriously violate[s] a clear and undisputed judicial norm or when it contradicts in a shocking manner the concept of justice."[42] In spite of these definitions, the *Concordat's* Article 36(f) arbitrariness standard is vague. Article 36(f) has thus been subject to different interpretations.

The cantonal court in Vaud has provided helpful guidelines for the interpretation of the *Concordat's* arbitrariness provisions, stating "the facts on the file" are only those which may be considered proven and uncontradicted by the evidence in the record,[43] and not those subject to weighing or interpretation by the arbitrator.[44] In practice, however, the Vaud court may not be following their strict standards for intervention for arbitrariness. They occasionally find awards arbitrary for defects that might more properly

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[40] DUTOIT, *supra* note 20, at 336, cites a series of decisions by the cantonal court of Vaud which affirm the right to challenge awards in court despite ouster clauses in the arbitration agreement, most recently in the Judgment of February 13, 1981. Court decisions—whether from the same or another canton—are not binding as precedents. They are nonetheless highly persuasive in interpreting a *Concordat* whose function is that of a Uniform Act. For a detailed discussion of the extensive case law of Vaud on the *Concordat*, see *L'application du Concordat Intercantonal sur l'Arbitrage par le Tribunal Cantonal Vaudois: Dix Ans de Jurisprudence*, 129 J.T. III (Special issue) (1981 No. 3). Note, however, that under a draft revision of Swiss federal conflict of law rules waiver of the right to request annulment is allowed in international arbitration involving no Swiss parties. (*Bundesgesetz über das internationale Privatrecht*) (*loi fédérale sur le droit international privé*) art. 180 [hereinafter cited as *Projet de Loi*] (Authors' translation). The *Projet de Loi* is published in French and German with an accompanying Commission report by Frank Vischer and Paul Volken, in 12 SCHWEIZER STUDIEN ZUM INTERNATIONALEN RECHT (ETUDES SUISSES DE DROIT INTERNATIONAL) (1978) [hereinafter cited as Vischer & Volken]. *See infra* discussion in Section III of text.

[41] *Cdt., supra* note 2, art. 36(f). "Equity" is used to mean "fair" or "just" rather than its technical sense in English.

[42] Gunn v. Pluss, Judgment of October 14, 1981, Cour de Justice (République et Canton de Genève), *excerpted in* 104 Semjud. 31-32 1982.

[43] Bayerische Motoren Werke AG v. SFAM France SA, Judgment of March 21, 1978, Tribunal cantonal (Canton de Vaud), *cited in* DUTOIT, *supra* note 20, at 354, and Jolidon, *supra* note 37, at 327. *Accord* Judgment of October 28, 1975, Tribunal cantonal (Vaud), *cited in* DUTOIT, *supra* note 20, at 353-54.

[44] *BMW v. SFAM France, cited in* Jolidon, *supra* note 37, at 327.

have been covered by other Article 36 grounds. For example, the Vaud court has equated a gap or omission (*"lacune"*) in the award with a manifest contradiction of the facts, holding such a gap "arbitrary" under Article 36(f).[45] Such a defect might more properly be attacked under Article 36(c), arbitral failure to rule on an item of the claim.[46]

Differences in the interpretation of Article 36(f) may also be caused by nuances in the text of various languages. For instance, the French version of Article 36(f) holds an award arbitrary when it "constitutes (*constitue*) an obvious violation of law or equity." The German and Italian versions' requirements for arbitrariness, however, are more modestly satisfied if the award "contains" (*enthält, contiene*) such a violation. Pierre Jolidon has commented:

> [I]t is perhaps only a question of simple lack of terminological cohesion. But such an imprecision of vocabulary often implies a confusion over the notions to which it applies, and is likely, taken alone, to lead practitioners to errors and to useless quarrels over interpretation.[47]

The Article 36(f) use of the terms "law" and "equity" also has created much debate.[48] Observors have suggested that "law" may refer to natural law, Swiss law, the law of the arbitration, or the law applicable on the merits. Cantonal courts have varied opinions on this issue. One cantonal court has concluded that although the *Concordat* was deliberately vague, the relevant "law" in international arbitration is the law governing the merits of the dispute, which is not necessarily the law of the arbitral seat.[49] Commentators[50] and courts have disagreed on the meaning of "equity." Courts in

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[45] Allan v. Rychetski, Judgment of January 30, 1979, Tribunal cantonal (Canton de Vaud), *cited in* DUTOIT, *supra* note 20, at 354. In this case, a gap or omission (*lacune*) in the award is equated in Vaud with a manifest contradiction of the facts and is held arbitrary.

[46] *See Cdt., supra* note 2, art. 36(c). The Vaud court has also held that major mathematical errors in the award make it void for arbitrariness, Judgment of September 23, 1981, Tribunal cantonal (Canton de Vaud) (unpublished), *cited in* DUTOIT, *supra* note 20, at 354, puzzling some commentators who felt the court should first have used its Article 39 power to return the award to the arbitrator for correction. *See* DUTOIT, *supra* note 20, at 354.

[47] Jolidon, *supra* note 37, at 327. (Authors' translation from the French).

[48] *See, e.g., L'Arbitrage International Privé et la Suisse,* Colloque des 2 et 3 avril 1976, organisé par le Département de Droit International Privé de la Faculté de Droit de Genève [hereinafter cited as Colloque], *cited in* Jolidon, *supra* note 37, at 328.

[49] Judgment of November 29, 1977, Tribunal cantonal (Canton de Vaud), *cited in* Jolidon, *supra* note 37, at 328. Vaud has also held that "law" under Article 36(f) does not necessarily include case law, unless the award "manifestly and seriously violates a clear and undisputed judicial principle." Judgment of October 18, 1975, Tribunal cantonal, Chambre des recours (Canton de Vaud), *cited in* Jolidon, *supra* note 37, at 328. (Authors' translation from the French). Pierre Lalive has also taken this view. P. Lalive, *Débats du Colloque,* 120-21, *cited in* Jolidon, *supra* note 37, at 328 n.43.

[50] *See* DUTOIT, *supra* note 20, at 352-53 and Jolidon, *supra* note 37, at 330-31.

Geneva and Vaud[51] have generally agreed that arbitrariness for violations of equity may only be invoked if the arbitrator was empowered under Article 31 to rule as *amiable compositeur, i.e.,* to decide according to his own notions of fairness. A distinctly minority view maintains that "equity" as used in Article 36(f) envisages more than the exceptional *amiable composition* cases.[52] This view supposes that the concept expands, rather than limits, the grounds for *recours en nullité,* and empowers the court itself to consider equity in addition to the law.

B. *Cantonal Court Interference With Arbitral Decisions*

The ambiguity inherent in Article 36(f) has enabled courts to use liberally their review power to overturn arbitral awards.[53] Indeed, while Swiss courts seem constrained by federal precedent placing rather strict limit on the power of the judiciary to review arbitral awards on the merits, they have in fact subjected Swiss arbitration to a high degree of judicial intervention.

Federal court decisions suggest that simple errors in the stating of facts or the application of law or equity do not satisfy Article 36(f)'s requirements for appeal.[54] The Geneva court has recently reaffirmed the frequently repeated view that to be attacked as arbitrary the award must "seriously violate a clear and undisputed legal norm or principle or contradict in a shocking manner the sentiment of justice."[55] To be set aside, the award must be so

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[51] *See, e.g.,* Société d'Etudes et de diffusion de procédés et de brevets, SA ("SEDIPROB") v. Girod, Judgment of February 22, 1979, Cour de Justice (République et Canton de Genève), *excerpted in* 102 Semjud. 14 (1980). *Accord* Judgment of October 28, 1975, Tribunal cantonal, Chambre des recours (Canton de Vaud), *cited in* DUTOIT, *supra* note 20, at 352-53, Caprez, *supra* note 20, at 235, and Jolidon, *supra* note 37, at 330-31.

[52] *See, e.g.,* Caprez, *supra* note 20, at 235.

[53] Swiss scholars agree, *see, e.g.,* DUTOIT, *supra* note 20, at 351, Caprez, *supra* note 20, at 234, and Jolidon, *supra* note 37, at 324, that the *Concordat's* definition of arbitrariness under Article 36 corresponds with that of federal case law on Article IV of the Swiss Constitution under which arbitrariness is a violation of the constitutional guarantee of equality before the law. B. VERF., CONST., COST. FED. art. 4 (Switz.). The Court of Justice of Geneva follows the federal case law, *see, e.g.,* Judgment of June 25, 1980, Tribunal fédéral, Chambre de droit public (Switz.) (unpublished), *cited in* DUTOIT, *supra* note 20, and Judgment of September 28, 1977, Tribunal fédéral, Chambre de droit public (Switz.), 103 BGE Ia at 356, and agrees with the cantonal court of Vaud. *See, e.g.,* Judgment of October 28, 1975, Tribunal cantonal, Chambre des recours (Canton de Vaud), *cited in* DUTOIT, *supra* note 20, at 351, holding that the *Concordat* is to be interpreted in the light of federal definitions of arbitrariness of Article IV of the Federal Constitution.

[54] *See, e.g.,* Jolidon, *supra* note 37, at 324.

[55] Judgment of October 14, 1981, Cour de Justice (République et Canton de Genève), *excerpted in* 104 Semjud. 31, 32 (1982). *See also* Judgment of February 22, 1979, Cour de Justice (République et Canton de Genève), *excerpted in* 102 Semjud. 24

arbitrary as to act to the detriment of one of the parties. The Vaud and Bern courts have further held that Article 36(f) requires proof of arbitrariness in the result and not merely the reasoning of the award.[56] Under this view, Article 36(f) is insufficient grounds for attack so long as the result of the award is supportable.[57]

Despite these apparent limits, courts in Geneva have construed as "arbitrary" reasonable arbitral decisions based on complicated facts. These courts have thus paved the way for extensive judicial annulment of arbitral awards. Three cases are illustrative here. In one case the cantonal court in Geneva interpreted its rôle narrowly, upholding an arbitral award against a charge of arbitrariness. Upon review, the federal court overturned as arbitrary the cantonal court decision, thereby indicating its preference for cantonal court intervention in arbitration proceedings. In the other two, the cantonal court in Geneva adopted a more interventionist view, reversing a substantial part of an arbitral award for arbitrariness. That decision was upheld on review to the federal court.

The first case, *Bucher-Guyer v. Meiki,*[58] involved a dispute over royalties in a breach of a 1965 licensing agreement. Meiki, a Japanese manufacturer of plastic-making machines, had granted Bucher-Guyer, a Zurich company, an exclusive license to manufacture and sell certain of Meiki's machines in Europe. The contract included an initial royalty provision set at four percent of net sales of all Meiki products manufactured and sold by Bucher. Bucher agreed to manufacture the machines "strictly in accordance with Meiki's designs and specifications" and with Meiki's technical assistance.[59] In addition, the contract provided that any dispute be settled by arbitration in Geneva under the Rules of the International Chamber of Commerce.

The terms of the contract were not met. The high production costs of Meiki's designs made marketing in Europe difficult. Bucher, therefore, began selling a modified model. Bucher later informed Meiki: 1) of the

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(1980); Judgment of October 31, 1979, Cour de Justice (République et Canton de Genève) (unpublished).

[56] Judgment of July 1, 1975, Tribunal cantonal (Canton de Vaud), *cited in* DUTOIT, *supra* note 20, at 352, and Judgment of July 7, 1975, Cour d'Appel (Canton de Berne) (unpublished), *cited in* Jolidon, *supra* note 37, at 325 n.39. Geneva does not appear quite so willing to save an arbitrarily reasoned award. In overturning an award as arbitrary, the Geneva court has rejected a plea to substitute acceptable reasoning to support the award. Judgment of October 31, 1979, Cour de Justice (République et Canton de Genève) (unpublished), *aff'd in* Judgment of April 23, 1980, slip op., Tribunal fédéral, 1ère cour de droit public (Switz.) (unpublished).

[57] Jolidon, *supra* note 37, at 325, n. 39.

[58] Judgment of May 30, 1975, Cour de Justice Civile (République et Canton de Genève) (unpublished), *rev'd. in part* Judgment of March 17, 1976, Bundesgericht (Tribunal fédéral, Chambre de droit public) (Switz.), 102 BGE 1a at 493; ICCA, 5 Y.B. COM. ARB. 220 (1980) (Summary in English). (Facts *summarized in* English, ICC Award in Case No. 2114, ICCA, 5 Y.B. COM. ARB. 186 (excerpt)).

[59] ICCA, 5 Y.B. COM. ARB. at 186 (1980).

non-suitability of Meiki's machines for the European market; and 2) that Bucher had thus been forced to design a machine in which only a small remaining number of parts followed the Meiki design. Bucher proposed paying the four percent royalty on these parts only, rather than on the full net sales. Meiki refused the modification, demanding full royalties. When these demands were not met, Meiki terminated the licensing agreement alleging Bucher's material breach. The parties then sought arbitration.[60]

The arbitrator rendered an award in favor of Meiki, finding Bucher violated the terms of the contract. In addition, the arbitrator found Bucher acted in bad faith by continuing to request and receive Meiki's blueprints, information and assistance, after Bucher decided to change Meiki's specifications but before so informing Meiki.[61] The arbitrator thus ordered Bucher pay Meiki both the full royalty of four percent of net price for all machines in question sold between 1969 and 1972,[62] and the arbitration costs and filing fees.[63] In addition, the arbitrator prohibited Bucher's use of any information acquired in any way from Meiki. Finally, the arbitrator ordered Bucher not disclose, reveal, sell, or otherwise convey any Meiki "know-how" to any person or allow it to be used.[64] These prohibitions applied provided the information was *not* already within the public domain.[65] This public domain limitation did not apply, however, to Bucher's manufacture and sale of machines already within the public domain.

Bucher requested the arbitral award be set aside as "arbitrary," arguing the award suffered from inconsistency. Bucher pointed to those parts of the award allowing Bucher to use, sell or disclose information obtained from Meiki if that information has entered the public domain. Bucher contrasted those sections of the award with others prohibiting absolutely Bucher's use of components based on Meiki's design, regardless of whether they had fallen into the public domain. Arbitrariness, Bucher argued, resulted from this apparent contradiction.

The cantonal court in Geneva disagreed, finding the arbitrator's reasoning not sufficiently questionable to render the award arbitrary.[66] The cantonal court did not consider the arbitrator's varying treatment of information and

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[60] Arbitration insued in Geneva before a single arbitrator, a Canadian appointed by the International Chamber of Commerce (ICC) Court of Arbitration. The parties agreed to the application of Swiss federal choice of law rules. *Id.* at 189. The arbitrator found the contract governed by the Swiss Civil Code since Switzerland was the place of contract performance. *Id.*

[61] "[W]ithin record time," wrote the arbitrator, ". . . the defendant [Bucher], which has never manufactured this type . . . of machine, came up with its own machine." I.C.C. Case No. 2114, *summarized in* ICCA, 5 Y.B. COM. ARB. 186, 190 (1980).

[62] These royalties amounted to about 1 million Swiss francs.

[63] 5 Y.B. COM. ARB. 186, 191 (1980).

[64] *Id.* at 192.

[65] *Id.*

[66] *Id.* at 220, 223 (1980).

machines within the public domain as a grave violation of uncontradicted legal principles or shockingly contrary to sentiments of justice. On appeal, the federal court found the cantonal court decision on the arbitral award was itself arbitrary on this point, and reversed and remanded the case.[67]

The second case, *Société Tunisienne d'Electricité et du Gaz (STEG) v. Société Entrepose,*[68] *(Entrepose)*, involved a construction contract between a French company, Entrepose, and a Tunisian state agency, STEG, for a three hundred kilometer natural gas pipeline. The contract provided disputes be arbitrated before the International Chamber of Commerce, (ICC), and Tunisian substantive law be applied in such arbitration. Entrepose failed to meet the contract's construction deadline and demanded damages totaling over ten million French francs, claiming STEG's actions precluded Entrepose's fulfillment of the contract.[69] Entrepose thereafter sought arbitration.[70]

On certain procedural issues, the cantonal court found for STEG, holding STEG had been denied its "rights to be heard"[71] on the issue of damages of over FF 1,000,000 ordered by the arbitrator against STEG for Entrepose's costs in maintaining idle work crews in Tunisia during delays. The cantonal court thus held the arbitral award arbitrary.[72]

More important than the proceedural issues, however, is the cantonal court's treatment of the alleged substantive errors. The arbitrator found for Entrepose citing STEG's: 1) failure to acquire land needed by Entrepose for work sites along the route of the pipeline;[73] 2) failure to supply Entrepose with necessary timely administrative permits;[74] 3) withholding of reimbursement for expenses and taxes incurred by Entrepose;[75] and 4) failure to supply certain construction equipment necessitated by severe weather conditions.[76] The arbitrator found STEG's last omission most weighty, issuing a

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[67] *Id.*

[68] Judgment of October 31, 1979, Cour de Justice Civile, 3e Section, No. 320 (République et Canton de Genève) (unpublished).

[69] *Id.*, slip op. at 3.

[70] Entrepose initially sought arbitration in 1973. STEG vigorously resisted arbitration over several years on a variety of grounds including pendency of an eventually unsuccessful interlocutory appeal to the Tunisian courts. *Id.*, slip op. at 6.

[71] *See Cdt., supra* note 2, art. 25.

[72] *STEG v. Entrepose, supra* note 68, slip op. at 72-73. The Court found the arbitral tribunal's failure to consider STEG's evidence on this issue to violate the *Concordat's* Articles 25(a) and 36(f). *Id.* Noting that the party involing Article 36(f) must normally establish that the award "is based on an interpretation or understanding manifestly unsupportable by the law," *id.*, slip op. at 57, the cantonal court nonetheless shifted this burden to Entrepose requiring it to prove the award was reasonable. *See Cdt., supra* note 2, art. 33, para. 1(e).

[73] *Id.*, slip op. at 60.

[74] *Id.*, slip op. at 62.

[75] *Id.*, slip op. at 77-80.

[76] *Id.*, slip op. at 20 and 66-68.

damage award against STEG of FF 4,321,871[77] out of a total award of FF 8,598,432 plus interest and costs.[78]

The arbitrator's finding that STEG had failed to supply certain construction equipment necessitated by severe weather conditions was the basis for the cantonal court's interference with and overturning of the arbitral award. During arbitration, Entrepose had claimed damages for delays caused by a lack of special equipment and by severe rain, specifically charging STEG liable for its failure to supply a loading crane. STEG responded that under Tunisian law it was not responsible for damages whose cause was beyond its control. The arbitrator, using discretion granted him by the Tunisian *Code des Obligations,*[79] agreed with STEG and based the damage figure soley on an assessment of STEG's fault in failing to supply certain other equipment not required by the unforeseen weather conditions. The cantonal court in Geneva held, however, that the cited provision in the Tunisian Code was insufficient support for the award. The award was thus arbitrary because it violated a "clear and undisputed legal norm or principle."[80] In so holding, the cantonal court seemed to disregard its observation that "arbitrariness does not arise from the mere fact that another solution would be conceivable or even preferable."[81] The cantonal court ruling in favor of cantonal court interference with arbitration was upheld on appeal to the federal court.[82]

In *Berardi v. Clair,*[83] discussed in more detail later, the balance sheet of a Gabonese company was at issue. The company's shares had been sold by a Canadian (Berardi) to a Frenchman (Clair). The arbitrator awarded the seller 23 million French francs. The Geneva cantonal *Cour de Justice* later annulled the award as "arbitrary," substituting its own conclusions about the balance sheet's accuracy for those of the arbitrators.

The practical effect of the annulment was felt in Paris, where three months

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[77] The United States dollar value of the award at the time of its issuance was $1,000,000.

[78] *STEG v. Entrepose, supra* note 68, slip op. at 20.

[79] "Damages are the affected loss that the creditor has sustained and the gain of which he is deprived which are the direct consequence of the inexecution of the obligation. Interpretation of special circumstances in each individual case is left to the discretion [literally, prudence] of the Tribunal; it must evaluate differently the measure of damages according to whether it is a question of the debtor's fault or his fraud." *Code des Obligations (CO)* art. 278, para. 1 (Tunisia), *cited in* Judgment of October 31, 1979, slip op. at 67, Cour de Justice (République et Canton de Genève), (Authors' translation from the French).

[80] *STEG v. Entrepose, supra* note 68, slip op. at 55, 3e Section.

[81] *Id.*, slip op. at 55.

[82] For a discussion of the Federal court decision in *Entrepose,* see *infra* text accompanying notes 109-12.

[83] Berardi v. Clair, Judgment of April 23, 1980, Bundesgericht (Tribunal fédéral, 1ère Cour de droit public), (Switz.) (unpublished), *aff'g sub nom.*, Clair v. Berardi, Judgment of Oct. 31, 1979, Cour de Justice (République et Canton de Genève) (unpublished).

earlier the *Tribunal de Grande Instance* had granted leave to enforce the award. On learning of the award's annulment, the *Cour d'Appel* of Paris quashed the lower court's decision. The parties had stipulated arbitration under the 1955 version of the Rules of the International Chamber of Commerce, which provides that gaps in the procedural rules be filled according to the law of the country of the proceedings. The 1975 Rules, by contrast, provide for such gaps to be filled by the arbitrator. The *Cour d'Appel* noted that the 1955 Rules created an attachment of the proceedings to Swiss law. However, the court rested its decision on Article V(1)(e) of the New York Convention, permitting refusal of recognition to awards set aside by a competent authority of the country where rendered. Although the language of Article V(1)(e) is permissive rather than mandatory ("recognition . . . may be refused") the Court considered itself obligated to refuse recognition: "execution of the award *must* be refused upon proof that the award has been set aside. . . ." ("l'execution d'une sentence arbitral *doit* être refusée lorsque la preuve est fournie que la sentence a été annullée . . . .").[84]

The cantonal court decisions in *Entrepose, Berardi,* and *Bucher-Guyer* may raise doubt as to the practical effect of declarations of Swiss courts purporting to protect arbitration from judicial interference on the merits of disputes. In *Entrepose* and *Berardi,* the federal court on appeal affirmed the cantonal court's interference in the arbitral decision, finding the cantonal court's substitution of its own interpretation of Tunisian law quite proper as was the overturning of the award as arbitrary. Similarly, the federal court in *Bucher-Guyer* encouraged cantonal court interference with the merits of arbitral decisions in holding the cantonal court should have overturned the arbitral award as arbitrary because of the arbitrator's varying treatment of information and machinery. One may question whether such interference in the merits of arbitral awards is appropriate in light of the fact that in both cases there existed reasonable grounds for the arbitrators' decisions.

IV. Federal Judicial Intervention

In theory, the Swiss federal court respects the independence of the arbitral process.[85] A survey of Swiss federal court decisions reviewing arbitral awards, however, indicates that federal courts have not always respected this principle.

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[84] *Id.*, slip op. at 6.

[85] The federal court may determine only whether the cantonal court has performed its task of examining the award for arbitrariness in a manifestly unjustifiable manner. *Thönen v. Niederer, cited in* Dutoit, *supra* note 20, at 367.

A. *Procedures for Federal Court Challenge*

Parties may seek federal court intervention in Swiss arbitration following cantonal court review by challenge of the cantonal judge's decision.[86] A cantonal decision is subject to federal challenge only when final, unless an interlocutory cantonal decision would cause irreparable damage to a party.[87]

1. Challenges to the Cantonal Judges' Decision on the Arbitral Award

Challenges to the cantonal decision on the arbitral award take the form of *recours de droit public* heard by the Administrative and Constitutional Chamber (*cour de droit public*) of the federal court. Through *recours en reforme,* parties challenge cantonal action for violation of federal statutory law.[88] The federal court does not generally accept a *recours en reforme* to an arbitration.[89]

The frequently successful route for federal challenge to the cantonal judges' decision on the arbitral award is the *recours de droit public.*[90] This

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[86] The Swiss federal court may hear appeals from decisions or decrees of the cantonal courts. *BGB (OJF), supra* note 24, art. 84, para. 1. There is no procedure for direct appeal of an arbitral award to a non-cantonal tribunal. Note that an arbitral decision rendered by a judge acting as an arbitrator is of course a private award, not a public decree. DUTOIT, *supra* note 20, at 364. For a discussion of the freedom of sitting judges to serve as arbitrators in Switzerland, see Wenner, *Swiss Judges as Arbitrators or as Nominators for Arbitrators,* 35 ARB. J. 22 (1980).

Note that in both types of federal court appeals, parties are challenging only the cantonal court's interpretation of an arbitral decision and not the arbitral decision itself.

[87] A party's claim that a cantonal court challenge will delay the final award and thereby increase the cost of arbitration is not sufficient grounds for an interlocutory appeal to the federal court. *BGB (OJF), supra* note 24, art. 87, *cited in* Briner, *Switzerland* (update of National Report), ICCA, 7 Y.B. COM. ARB. 70, 73 [hereinafter cited as Briner Update]; DUTOIT, *supra* note 20, at 366-67.

In Allan v. Rychetski, Judgment of December 4, 1979, Bundesgericht, Switz., 105 BGE Ib at 431, (1980) 70 Praxis des Schweitzerischen Bundesgerichts 737, *cited in* DUTOIT, *supra* note 20, at 366-68, the federal court reaffirmed its prior decisions on the nature of "irreparable damage." To be irreparable, the damage must be incapable of subsequent reversal, even by an eventual final award in the claimant's favor. *See* DUTOIT, *id.* at 366. The mere possibility of such harm establishes grounds for appeal but the damage must be of a legal, rather than factual nature. DUTOIT, *id.* at 367.

[88] *See, e.g.,* Jugomineral v. Grillo Werke AG, Judgment of March 17, 1975, Bundesgericht (Tribunal fédéral, 1ère Cour Civile), (Switz.), 101 BGE II at 168, 1975 J.T. I at 629; [1976] 103 JOURNAL DU DROIT INTERNATIONAL [J. DR. INT.] [Clunet] 729 (dismissing a *recours en reforme* as inadmissible on a question of arbitration law).

[89] *See* DUTOIT, *supra* note 20, at 364-65.

[90] Recours de droit public is a form of *cassation.* In civil law jurisdictions following the French model, *cassation* is a form of review distinct from appeal (*appel*). *Appel* may involve review of the facts as well as law, and the taking of new evidence.

type of appeal is available where the cantonal court violates: 1) constitutional rights (applicable in all trial type procedures including arbitration); 2) an intercantonal *Concordat*; 3) an international treaty to which Switzerland is a party; or 4) its jurisdictional powers.[91] In all cases of *recours de droit public* appeals, the decision of the cantonal court may be remanded for rehearing.

2. Challenge to the Cantonal Judges' Execution of the Arbitral Award

The most significant number of federal appeals in such cases alleges cantonal court "arbitrariness".[92] In these appeals, federal court review is in theory limited to the cantonal court's decision; the federal court may not review the arbitral award itself.[93] The federal court is empowered to determine only whether the cantonal court has performed its task of examining the award for arbitrariness in a manifestly unjustifiable manner.[94] In practice, however, the federal court does not adhere to these jurisprudential limits on review. Instead, it examines the merits of awards when it chooses.

The federal court's tendency to examine the merits of the awards may be an unavoidable result of its power to overturn cantonal courts for arbitrariness. To determine cantonal court arbitrariness, the federal court must examine the subject matter of cantonal decisions, the arbitral award, for evidence of arbitrariness. Only after so doing are judges able to rule on the reasonableness of the cantonal court's decision.

B. *Federal Case Law Illustrating Federal Court Intervention*

Swiss case law suggests that the federal court is predisposed to intervene and overturn arbitral awards in two ways. First, the federal court overturns

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The *Cour d'Appel* may choose to revise the lower court judgment itself or to remand it for a new trial. In contrast, the *Cour de Cassation* reviews only strictly defined questions of law and is not empowered to enter its own decision. If the *Cour de Cassation* rules for the appellant, the case is remanded for a new trial. For further treatment of *cassation* and *appel*, see A. VON MEHREN & J. GORDLEY, THE CIVIL LAW SYSTEM (2d ed. 1977) at 102-08.

[91] *BGB (OJF)*, *supra* note 24, art. 84, para. 1. For the German text and an English translation of Art. 84, para. 1., see *Switzerland* (Court Decisions), ICCA, 6 Y.B. COM. ARB. 151, 152 n. 5 (1981). Federal courts will hear such appeals only where fault is attributed to the cantonal court rather than the arbitral tribunal.

[92] "Arbitrariness" in cantonal court decisions, is a violation of Article IV of The Swiss Constitution. B. VERF., CONST., COST. FED. art. 4.

[93] *See* DUTOIT, *supra* note 20, at 367-68, Caprez, *supra* note 20, at 236. In Thönen v. Niederer, Judgment of March 8, 1974, Bundesgericht, Switz. (unpublished), *cited in* DUTOIT, *supra* note 20, at 367, the Court professed to be "doubly restrained" in such a case.

[94] The federal court may determine only whether the cantonal court has performed its task of examining the award for arbitrariness in a manifestly unjustified manner. *Thönen v. Niederer, cited in* DUTOIT, *supra* note 20, at 367. (Authors' translation from the French).

cantonal court decisions upholding awards. Second, the federal court upholds cantonal court decisions overturning awards.

1. Federal Court's Overturning Cantonal Court Affirmation of Arbitral Awards

Federal court willingness to overturn a cantonal decision upholding an arbitral award is illustrated in *Bucher-Guyer v. Meiki Co. Ltd. (Bucher-Guyer).*[95] As discussed earlier, Meiki claimed Bucher-Guyer used know-how acquired under license from Meiki in contravention of the parties' licensing agreement and Federal Law on Unfair Competition.[96] The arbitrator ruled in favor of Meiki. That decision was affirmed by the cantonal court. However, on review, the federal court reversed and remanded the cantonal court judgment affirming the arbitral award.

The federal court reviewed the arbitrator's reasoning, examining his interpretation of the Federal Law on Unfair Competition, as well as his interpretation of the case law under the statute. The federal court criticized the cantonal court's failure to consider defects in the arbitrator's decision.

In judging the propriety of the cantonal court's action, the federal court examined the merits of the arbitral decision. The federal court first examined the arbitrator's finding that Bucher violated its "obligation of good faith" by continuing to acquire information from Meiki.[97] The federal court held the award arbitrary because neither the arbitrator nor the cantonal court explained how the obligation of good faith applied to the case.[98] The federal court felt the arbitrator's use of the "good faith obligation" required explanation because that obligation is subjective by nature and lacks a "clear and undisputed legal norm or principle."[99] The federal court's reasoning here yields a highly interventionist approach contrary to the federal court's stated preference for limited intervention.[100] Indeed, the court's reasoning suggests that it will set aside awards as arbitrary where the arbitrator's award is based on incomplete reasoning not clarified by the cantonal court even though that reasoning may be correct.

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[95] Judgment of March 17, 1976, Bundesgericht (Tribunal fédéral, Chambre de droit public) (Switz.), 102 BGE Ia at 493 (*Bucher-Guyer v. Meiki*); 1979 J.T. I at 63; [1977] 98 Semjud. 176; ICCA, 5 Y.B. COM. ARB. 220-24 (1980) (Summary in English), *rev'g in part* Judgment of May 30, 1975, Cour de Justice (République et Canton de Genève) (unpublished).

[96] *Loi fédérale sur la concurrance déloyale* du 30 septembre 1943 [hereinafter cited as *LCD*].

[97] *LCD, id.* at art. 1, para. 2. For a factual discussion of Bucher's continued use of Meiki information, see *supra* text accompanying notes 61-66.

[98] *Bucher-Guyer v. Meiki, supra* note 95, 102 BGE Ia at 506.

[99] *See, e.g.*, Judgment of October 31, 1979, Cour de Justice (Genève), slip op. at 55 and cases as cited.

[100] *See Thönen v. Niederer, supra* note 93.

The federal court in *Bucher-Guyer* also ruled the arbitrator improperly interpreted the major case law on the subject.[101] This ruling is questionable for two reasons. First, case law is subject to varying reasonable interpretations. As such, federal courts should defer to arbitral interpretations of case law unless those interpretations are based on a clear and manifest error or create a shockingly unjust result.[102] Second, federal court failure to defer to arbitral interpretations results in unnecessary intervention in Swiss arbitration.

2. Federal Court Willingness to Uphold Cantonal Reversal of Arbitral Awards

The federal court has demonstrated a willingness to uphold cantonal court decisions overturning arbitral awards. Four years after *Bucher-Guyer,* the federal court considered two cases that illustrate a predisposition to accept judicial intervention in Swiss arbitration.

Berardi v. Clair,[103] as discussed earlier, involved the sale of company shares from a Canadian (Berardi) to a Frenchman (Clair). The contract provided for the parties' purchase and transfer of shares in installments through a nominee in Paris. In the course of the transfer, Clair claimed the company's annual report contained misrepresentations that fraudulently induced purchase of the company's shares. Clair invoked the arbitration clause of the sales agreement, demanding modification of the agreement and damages from Berardi. Berardi claimed that he was absolved from liability because the report had been approved by a vote of the stockholders. An arbitral tribunal ruled in favor of Berardi, finding the stockholders' ratification of Berardi's actions freed Berardi of liability in a suit by Clair. The arbitrator thus dismissed all claims by Clair. The cantonal court reversed the arbitrator's decision for arbitrariness.[104]

The federal court in the *Berardi* appeal[105] upheld the cantonal court's decision to annul the arbitral award. In so doing, the federal court affirmed

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[101] The federal court found most damaging the "contradiction" resulting from a failure to include a necessary phrase in a non-monetary part of the award. The arbitrator had prohibited use of the licensor's know-how subject to the reservation that such know-how not be in the public domain. *Bucher-Guyer v. Meiki, supra* note 95, 102 BGE Ia at 493, 506-08. The arbitrator neglected to add a similar limitation on the prohibition of use of components based on the licensor's design. Under the federal court's interpretation of case law, this "contradiction" was fatal to the cantonal judgment in spite of the fact that the arbitrator's award could be construed to contain a limitation on the prohibition of use of the components, and thus non-contradictory.

[102] *See Cdt., supra* note 2, art. 36(f).

[103] *Berardi v. Clair, supra* note 83.

[104] Clair v. Berardi, Judgment of October 31, 1979, Cour de Justice Civile (République et Canton de Genève) (unpublished).

[105] *Berardi v. Clair, supra* note 83, slip op. at 7.

the implication in *Bucher-Guyer*[106] that defectively reasoned awards will fail. The federal court stated that cantonal courts may either substitute acceptable reasoning for defectively reasoned arbitral decisions, or set aside such defectively reasoned awards as arbitrary.[107] After affirming the cantonal court's reversal of the arbitral award, the federal court suggested strict limits on its right to overturn a cantonal court's decision to annul an award, stating "[t]he jurisdiction of the Federal Court, called on to examine the application of Article 36(f) of the *Concordat,* is . . . restrained with regard to the arbitral award: it must examine only whether the cantonal court failed in an unendurable fashion in its duty to examine if the award is tainted with arbitrariness."[108] In so doing, the federal court limited its power to examine details of the arbitral decision on the merits to situations where the cantonal court insufficiently considered the issue of arbitrariness.

The federal court's approach in *Berardi* is instructive and important in its willingness to defer to cantonal court decisions overturning arbitral awards as arbitrary. Other federal court decisions have followed this approach,[109] affirming cantonal court decisions to overturn arbitral awards. The court defers to cantonal findings of defectively reasoned awards even though there may be acceptable reasoning for the arbitral award.

In the second case, *Société Entrepose v. Société Tunisienne d'Electricité et du Gaz,*[110] *(Entrepose),*[111] the federal court acted in accordance with its decision in *Berardi.* Affirming the cantonal court decision, the federal court again demonstrated its deference to cantonal court intervention annulling an arbitral award. This ruling was made despite the court's recognition of

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[106] *Bucher-Guyer v. Meiki, supra* note 95, 102 BGE Ia at 493, 506-08.

[107] The federal court stated, "[t]he cantonal court applying Article 36(f) of the *Concordat may* substitute new reasons for the arbitrary reasoning of the arbitral tribunal. . . but it is not *obliged* to do so." *Berardi v. Clair, supra* note 83, slip op. at 7. (emphasis added) (Authors' translation from the French).

[108] *Id.,* slip op. at 6 (Authors' translation from the French), interpreting B. VERF., CONST., COST. FED. art. 4. The double obstacle to arbitrariness provided in Article IV of the Constitution was criticized in the federal sequel to *Entrepose, supra* note 68. Société Entreprose v. Société d'Electricité et du Gaz, (*Entrepose*), Judgment of November 26, 1980: Bundesgericht (Tribunal fédéral, 1ère Cour de droit public), (Switz.), (unpublished), *cited in* DUTOIT, *supra* note 20, at 368.

[109] See Jolidon, *supra* note 37, at 325 for a discussion of the case law in Bern and Vaud illustrating federal court willingness to defer to cantonal court decisions overturning arbitral awards as arbitrary.

[110] *Supra* note 108. For a discussion of the facts, see text accompanying notes 68-70.

[111] Both parties to the cantonal court's decision in *Société Tunisienne d'Electricité du Gaz v. Société Entrepose, supra* note 68, appealed that decision to the federal court. Each party alleged constitutional rights violations under *recours de droit public. BGB (OJF), supra* note 24, art. 84, para. 1. See *supra* text accompanying notes 90-91 for a discussion of *recours de droit public.* The federal court joined the two appeals in *Entrepose, supra* note 108.

grounds upon which the cantonal decision could have been reversed. Indeed, the federal court explicitly recognized that they could have interpreted the statute of limitations as precluding cantonal review. The court stated, however, it would not overturn a cantonal decision as arbitrary on a procedural technicality where the cantonal error was on the side of caution.[112]

The federal court in *Entrepose* denied both parties' challenge of "arbitrariness" on the merits. The court rejected outright Entrepose's assertions that: 1) the cantonal court erred in finding the arbitrator failed to consider relevant evidence; and 2) the cantonal court's award was unnecessarily low because based on insufficient reasoning. The court also rejected the claims of the Société Tunisienne d'Electricité et du Gaz' (STEG) that: 1) the cantonal court erred in failing to find the arbitral award violated STEG's right to be heard; and 2) the arbitral award lacked sufficient reasoning. The federal court held STEG estopped in these challenges because it had consistently declined to present its evidence to the arbitrator.[113]

In each of the above cases, the federal court has shown a lack of deference for arbitral decisions and a predisposition to impose its will on arbitral awards. Not surprisingly, federal court respect for cantonal decisions depends on the cantonal courts' deference to the arbitral process. Where cantonal courts overturn arbitral awards as arbitrary, federal court decisions seem quite willing to defer to cantonal reasoning. For instance, in *Berardi* and *Entrepose,* the federal court refused to engage in independent analysis, accepting the cantonal courts' decisions to overturn the arbitral award. However, where cantonal courts have upheld arbitral awards, the federal court is likely to independently analyze the awards and overturn them as arbitrary. This situation is illustrated by cases like *Bucher-Guyer* where the federal court looks behind the cantonal court's decision, substituting its own conclusions for those of the cantonal court.[114]

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[112] *Entrepose, supra* note 108, slip op. at 22-23.

[113] *Id.* at 17-20.

[114] The high degree of judicial intervention in Switzerland is due in large part to the federal court's determination that arbitration is governed by procedural rather than contract law. Jörg v. Jörg, Judgment of May 28, 1915, Bundesgericht (Tribunal fédéral 1ère Section civile), 41 BGE II at 534; 1915 J.T. I at 610. The federal court overturned its earlier view that arbitration was a private contractual matter governed by federal law. The court held the arbitral agreement a contract of procedure rather than substantive law because the parties had accepted a dispute resolution mechanism replacing the courts. *See* DUTOIT, *supra* note 20, at 254. This holding, placing arbitration within the jurisdiction of the cantons, has been repeatedly upheld since 1915.

The view that procedural law governs arbitration has been strongly criticized by some commentators. *See, e.g.,* P. Lalive, *Chronique de la Jurisprudence Suisse: Jugomineral v. Guillo-Werke A.G.,* [1976] 103 J. DR. INT. [Clunet] 729, 730-32 [hereinafter cited as P. Lalive on *Jugomineral*]. The power that this procedural view gives to the cantonal courts of the seat of arbitration is especially troublesome in international arbitration, where the arbitral proceedings are held in a jurisdiction with no

In *Berardi, Entrepose,* and *Bucher-Guyer,* the federal court's deference or lack thereof, to the cantonal courts' decisions indicates a lack of respect for arbitral independence and a predeliction for judicial interference in spite of seemingly limited jurisdiction.

V. THE DRAFT REVISION OF FEDERAL CONFLICTS LAW

A commission of experts has recently prepared a revised codification of conflict of law rules, which the Swiss (as in Continental legal systems generally) refer to as "private international law."[115] Title Eleven of the *Projet de Loi* includes provisions on international arbitration[116] limiting court intervention in international commercial arbitral proceedings conducted within Switzerland.[117] The *Projet de Loi* attempts to alleviate some

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legal contracts to the dispute. In a series of cases involving execution of foreign awards in Switzerland, the federal court has recognized the importance of the contractual view of international arbitration, giving effect to the will of the parties. *See, e.g.,* Judgment of July 1, 1970, Bundesgericht (Tribunal fédéral, Cour de droit public), Switz., 96 BGE I at 334, 1972 J.T. I at 27; Judgment of May 3, 1967, Bundesgericht (Tribunal fédéral, Chambre de droit public), (Switz.), 93 BGE I at 265; 1968 J.T. I at 217; ICCA, 1 Y.B. COM. ARB. 200 (1976) (Summary in English); Judgment of January 25, 1967, (Bundesgericht Tribunal fédéral, Chambre de droit public), (Switz.), 93 BGE I at 49, 1968 J.T. I at 215, 89 Semjud. 433 (1976). This debate over judicial interventionism has led to an effort to reform the Swiss law of arbitration as to proceedings with an international character.

[115] *Projet de Loi, supra* note 40. For a discussion in English of the *Projet de Loi* as a whole, see McCaffrey, *Swiss Draft Conflicts Law,* 28 AM. J. COMP. L. 235 (1980).

[116] *Projet de Loi, supra* note 40, Title 11, arts. 171-72.

[117] Title Eleven of the *Projet de Loi* applies to all international arbitration with its "seat" in Switzerland. *Projet de Loi, supra* note 40, art. 171. Article 171 defines international arbitration as involving at least one party "whose domicile, habitual residence, or place of business is outside of Switzerland." *Id.* at para. 1. This domicile oriented characterization of international arbitration is comparable to that in English arbitration law requiring at least one foreign party. Arbitration Act, 1979, c. 42, § 3(7). By contrast, French arbitration law focuses on the subject matter of the arbitration, defining arbitration as international if it implicates international commercial interests." Decree No. 81-500 of May 12, 1981, art. 1492, [1981] Journal Officiel de la République Française (J.O.) 1398, 1402 (Fr.).

The procedural provisions of the *Projet de Loi* are not unlike those of the *Concordat.* For instance, under both the *Concordat* and the *Projet de Loi* parties have the option of designating the arbitral procedure, either directly or by reference to the rules of a designated organization, *Cdt., supra* note 2, art. 6 and art. 24, para. 1; *Projet de Loi, supra* note 40, art. 175, para. 1, subject to certain mandatory procedural normative dispositions. *Cdt., supra* note 2, art. 25; *Projet de Loi, supra* note 40, art. 175, para. 1 and arts. 175-80. In addition, under both the *Concordat* and the *Projet de Loi,* the arbitral tribunal is to designate procedural rules if the parties fail to do so. *Cdt., supra* note 2, art. 24, para. 1; *Projet de Loi, supra* note 40, art. 175, para. 2. Absent designation of rules by either the parties or the arbitrator, the *Concordat*

of the problems arising under the *Concordat*, by striking a balance between respect for parties' need for finality in private dispute resolutions and the maintenance of a minimum but indispensable degree of judicial control.[118]

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stipulates application of the Federal Act on Civil Procedure by analogy, *Cdt., supra* note 2, art. 24, para. 2, while the *Projet de Loi* would apply by analogy the cantonal law of the arbitral seat, *Projet de Loi, supra* note 40, art. 175, para. 2, which, in twenty-one of the cantons would include the *Concordat*. The parties may, under either system, authorize the arbitrator to rule as *amiable compositeur*. *Cdt., supra* note 2, art. 31, para. 3; *Projet de Loi, supra* note 40, art. 175, para. 3. The arbitrator under the *Projet de Loi* would be able to seek judicial assistance, as under the *Concordat*. *Cdt., supra* note 2, arts. 3 and 27; *Projet de Loi, supra* note 40, art. 176. Title Eleven of the *Projet de Loi* briefly summarizes in one Article, Article 170, the most important areas of possible judicial assistance, which the *Concordat* covers in six articles, *Cdt., supra* note 2, arts. 18-23: denomination, exclusion, removal and replacement of arbitrators, as well as the extension of their mandate. Both laws provide for the optional deposit of the award with the appropriate court of the arbitral seat. *Cdt., supra* note 2, art. 44; *Projet de Loi, supra* note 40, art. 181. However, the *Projet de Loi* adds an important new international arbitration alternative permitting arbitral tribunals to issue certificates equivalent to the award's deposit with the court. *Projet de Loi, supra* note 40, art. 181, para. 2. This provision simplifies the various cantonal procedures and fee schedules for deposit and certification of enforceability.

The *Projet de Loi's* limits of arbitrability also differ somewhat from the *Concordat's*. For instance, the *Concordat* provides, with certain exceptions, that "arbitration may relate to any right to which the parties may freely dispose." *Cdt., supra* note 2, art. 5. By contrast, the *Projet de Loi* provides only property-related claims may be subject to international arbitration, "Toute cause qui est de la nature patrimoniale." *Projet de Loi, supra* note 40, art. 172, para. 1. This proposed limitation is designed to protect states' direct interest in non-property rights. Vischer & Volken, *supra* note 40, at 361.

The *Projet de Loi* recognizes the increasing importance of international arbitration between private corporations and foreign states. It thus expressly provides that a state party to an arbitral agreement "may not invoke its own law to contest the arbitrability of the dispute covered by the arbitral agreement." *Projet de Loi, supra* note 40, art. 172, para. 2. By contrast, the *Concordat* places no limits on states concluding arbitration agreements.

The *Projet de Loi* is similar to the *Concordat* in requiring the arbitration agreement to be in writing. *Cdt., supra* note 2, art. 6; *Projet de Loi, supra* note 40, art. 173, para. 1. Yet, the *Projet de Loi* resolves the controversy left open by the *Concordat's* Article 6 as to whether an exchange of telegrams or telexes may constitute a valid writing. *See* Briner, *supra* note 2, at 185. (Briner suggests that such an exchange is not a valid contract under the *Concordat*). The *Projet de Loi* expressly validates an agreement either signed by the parties *or* "contained in an exchange of letters, telegrams, or telexes." *Projet de Loi, supra* note 40, art. 173, para. 1. An arbitration agreement is valid under the proposed revision so long as it satisfies the conditions of either the law chosen by the parties to govern the principal contract, or Swiss law. *Projet de Loi, supra* note 40, art. 173, para. 2.

Three of the *Projet de Loi's* provisions are particularly relevant here: 1) a provision limiting parties' right to court challenge of the arbitral award; 2) a provision limiting parties' right to court challenge of arbitrator competence; and 3) a provision empowering parties to waive their right to court challenge.

A. *Limiting Parties' Right to Challenge of the Arbitral Award*

The *Projet de Loi* limits to two the grounds for challenge of an international arbitral award rendered in Switzerland: 1) denial of justice (*déni de justice*); and 2) arbitrariness (*arbitraire*).[119] The first ground covers mandatory procedural protections, providing appeal where these protections are violated. The second ground covers the content of the awards, providing challange for arbitrariness as required by the special needs of international arbitration. The *Projet de Loi* requires designation of a single court in each canton to hear all *recours en nullité*.[120]

B. *Parties' Right to Challenge of Arbitral Competence*

The *Projet de Loi* provides, like the *Concordat,*[121] that the arbitral tribunal may rule on its own competence subject to an interlocutory appeal.[122] To prevent abuse, the *Projet de Loi* checks this challenge in two ways. First, it requires parties contesting arbitral competence to raise objections before presenting any arguments on the merits of the case.[123] Second, Article 178 of the *Projet de Loi* requires each canton to designate a single competent authority to decide challenges to arbitral jurisdiction.[124]

C. *Party Waiver of the Right to Challenge Awards*

The *Projet de Loi's* most far-reaching proposal empowers parties to waive by written agreement their right to judicial recourse.[125] This provision stands in sharp contrast to the *Concordat's* absolute prohibition on waiver of parties' right to judicial challenge,[126] which has permitted abusive delay and overburdened the court system.

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[118] Vischer & Volken, *supra* note 40, at 360.

[119] *Projet de Loi, supra* note 40, art. 179.

[120] *Id.*

[121] *Cdt., supra* note 2, art. 8.

[122] *Projet de Loi, supra* note 40, art. 178, paras. 1 and 2.

[123] *Projet de Loi, supra* note 40, art. 177, para. 1; *cf. Cdt., supra* note 2, art. 8, para. 2.

[124] *Projet de Loi, supra* note 40, art. 178, para. 3.

[125] *Projet de Loi, supra* note 40, art. 180, para. 1.

[126] *See supra* text accompanying notes 7-10.

In an attempt to permit maximum arbitral independence and relieve courts of unnecessarily heavy caseloads, Article 180 permits contractual exclusion of challenge of an award where neither party is a domiciliary, habitual resident or owner of a place of business in Switzerland.[127] The limitations in the waiver provision appear mandated by Article IV of the Swiss Federal Constitution.[128] In keeping with this provision, the *Projet de Loi* provides waiver only where neither of the parties may be considered Swiss.[129] This waiver ensures that Swiss courts are not burdened with ruling on dilatory appeals having no real link with Switzerland.[130]

As with the other *Projet de Loi* proposals, Article 180 serves to limit excessive judicial intervention now existing under the *Concordat*. In so doing, the *Projet de Loi* may better protect the effectiveness of Swiss arbitration, thereby preserving the attractiveness of Switzerland as a site for international arbitration. The international commercial community can only welcome the *Projet de Loi's* attempts to protect the autonomy of the arbitral process.

VI. CONCLUSION

Judicial annulment of arbitral awards rendered in Geneva diminishes the city's attractiveness as a site for the non-judicial resolution of international business disputes. Businessmen seeking finality and privacy in commercial arbitration have been surprised and dismayed to find that the Intercantonal Arbitration *Concordat* permits judges to set aside awards they perceive as containing errors of fact or law. This is particularly so because the cantonal *Cour de Justice* possesses powers wide enough to justify almost any intervention in the arbitral process. No specific guidelines delineate the circumstances justifying exercise of the court's powers to annul an award as "arbitrary," "contrary to facts," or a "violation of law or equity."[131]

Patriotic Swiss jurists occasionally dismiss objections to Swiss judicial intervention as "biased," "not objective," and "dictated by particular interests."[132] Recent case law, however, provides cause for some skepticism as to this defensive attitude. In the cases of *Entrepose, Bucher-Guyer,*

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[127] *Id.* This provision for ouster of court supervision departs from that of the English Arbitration Act of 1979, permitting ouster "with some exceptions" when at least one of the parties is foreign. Arbitration Act, 1979, c. 42, §§ 3(6)-(7) and 4(1).

[128] B. VERF., CONST., COST. FED. art. 4.

[129] Note that agreement to waive appeal for nullification of the award is not equivalent to a complete abandonment of all court recourse. Claims of denial and arbitrariness may still be raised when execution is sought. *See* Vischer & Volken, *supra* note 40, at 364, commenting on *Projet de Loi, supra* note 40, art. 180, para. 2.

[130] *Id.*

[131] *Cdt., supra* note 2, art. 36(f).

[132] *See* Budin, *Arbitration in Switzerland* in ARBITRATION AND THE LICENSING PROCESS (R. Goldschrerber & M. de Haas, eds. 1981), at 5-113. *See also* Reymond,

and *Berardi v. Clair,* courts interfered with awards containing neither shocking violations of fundamental legal principles nor flagrant disregard of facts. Arbitrators had made honest decisions on difficult issues arising from complex fact patterns. By substituting their conclusions for those of the arbitrators, courts substantially reduced the autonomy of the arbitral process.

Renunciation of recourse to judicial evaluation of the legal and factual merits of the controversy is implicit in most agreements to arbitrate. Unless the parties agree to court scrutiny of the merits of their disputes, the judiciary should limit its role to ensuring respect for the procedural fairness of the arbitration, the rights of third parties and the integrity of the arbitrator's respect for his mission. Courts that disregard this choice risk emasculating the arbitral process and defeating its goals of adjudicatory privacy and finality.

Calvin may have been correct that man is predestined to conformity to the divine will. It need not follow, however, that the decisions of international commercial arbitrators sitting in Geneva similarly must be subject to the will of the temporal judge. Parties to international arbitration should not be free to treat arbitration as mere foreplay to court proceedings.

Problèmes Actuels de L'Arbitrage Commercial International, 40 REVUE ECONOMIQUE ET SOCIALE 5 (1982), alleging that Swiss judges have shown restraint in the exercise of their power to set aside "arbitrary" awards: "Jusqu'ici les tribunaux cantonaux ont fait un usage à just titre parcimonieux de leur pouvoir de déclarer une sentence arbitraire." *Id.* at 8.