1983

The Lex Loci Arbitri and International Commercial Arbitration

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THE *LEX LOCI ARBITRI* AND INTERNATIONAL COMMERCIAL ARBITRATION

By

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"There must be no Alsatia in England where the King's writ does not run."**

LUKE'S gospel reports that Jesus once declined to arbitrate a family dispute over an inheritance by asking a disgruntled sibling, "Who set me over you to arbitrate?" Private resolution of business disputes raises a related question: whence springs the arbitrator's authority to render a binding award? A company that submits a controversy to arbitration may later regret having abandoned recourse to the courts. On the day of reckoning, the sage chosen to decide the dispute may no longer seem so wise to the losing party, and the loser might consider refusing to comply with the arbitrator's decision. Some legal system, therefore, must legitimise the arbitrator's authority. Otherwise, the award remains an unenforceable conciliation attempt that the parties are free to treat as mere foreplay to litigation.

The country where the award is rendered traditionally has legitimised arbitral authority subject to conditions, in the form of mandatory procedural rules imposed on the arbitral proceedings. The proper scope of these local curial norms—commonly known as the *lex loci arbitri*—has been problematic. In England, prior to 1979,[1] national courts supervised arbitral proceedings to ensure legally correct results. According to another model, however, arbitration is subject to judicial control only to safeguard its fundamental fairness. Yet a third model would free arbitration from any constraints imposed by the legal system of the place where the award is rendered.

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**Lord Justice Scrutton, in *Czarnikow* v. *Roth, Schmidt & Co.* [1922] 2 K.B. 478, at p. 488.

1. English arbitration law was overhauled, as discussed in Part II of this Article, by the Arbitration Act 1979, effective on Aug. 1, 1979 (S.I. 1979 No. 750). On the Act's history, see 392 Parl. Deb., H.L. (5th ser.) 89 (1978); 397 Parl. Deb., H.L. (5th ser.) 434-64 (1978-79); 398 Parl. Deb., H.L. (5th ser.) 592-74, 1465-82 (1979). See also *Commercial Court Committee, Report on Arbitration,* Cmnd. 7284 (1978); Address by Lord Diplock, the Fourth Alexander Lecture, Chartered Institute of Arbitrators, London (Feb. 28, 1978), reprinted in (1978) 44 *Arb.* 107; Park, "Judicial Supervision of Transnational Commercial Arbitration Law" (1980) 21 *Harv. Int. L.J.* 87. For the most recent and authoritative treatise on English arbitration law, see M. Mustill and S. Boyd, *Commercial Arbitration* (1982).

These alternative patterns for judicial intervention implicate competing values that do not yield to facile analysis. The commercial community desires finality in private dispute resolution. Yet, national judicial systems may wish to further rival goals, such as the integrity of the adjudicatory process and respect for the rights of third parties.

Scholars and practitioners alike have questioned the traditional view that the *lex loci arbitri* governs the validity of an arbitration. Proponents of "de-nationalised" or "floating" arbitration assert that arbitral awards may be detached from the law of the country of the proceedings and yet remain enforceable.[2]

The first part of this article explores the control normally exercised over international commercial arbitration by the place of the proceedings. The second part examines the way that English arbitration law encapsulates the struggle to reconcile the rival goals of fairness and finality in private dispute resolution. The author concludes that control of international commercial arbitration by the *lex loci arbitri* commends itself if the local judge limits his role to ensuring the integrity of the arbitral proceedings and respect for the interests of third parties.

I. THE NATIONALITY OF ARBITRAL AWARDS

A. Territoriality of the Lex Arbitri

IN England prior to 1979 the High Court could force an arbitrator to submit a point of law for judicial determination under the so-called "special case" or "case stated" procedure. This practice was not introduced into Scottish law until 1972.[3] Even thereafter, the parties to an arbitration in Scotland could exclude the procedure by pre-dispute agreement between the parties. Such "ouster" of judicial jurisdiction was not possible in England.[4]

In the case of *James Miller* v. *Whitworth Street Estates*[5] an English company contracted with a Scottish construction company for work on a building in Scotland. English law governed the interpretation of the

2. Denationalised arbitration would be a more appealing prospect to this author if its proponents did not assert the legally binding character of the "a-national award". Non-binding compromise and conciliation have a long and honourable place in dispute resolution. Christians have been advised to settle disputes among themselves through the church: Matthew 18:15-17; I Corinthians 6:1-7. The Talmud suggests that litigants attempt to settle disputes by conciliation at the outset of a trial: *Code of Maimonides*, Book 14, *Book of Judges*, at 66-67 (Yale U. Press, 1949). Neither of these mediation processes, however, necessarily results in a legally enforceable award.

3. Administration of Justice (Scotland) Act 1972, s.3(1).

4. *Czarnikow* v. *Roth, Schmidt & Co.* [1922] 2 K.B. 478.

5. [1970] 1 All E.R. 796 (H.L.).

contract. Scotland, however, was the "seat" of the arbitration, where the proceedings were held. After evidence had been heard, the English company asked that the arbitrator "state a case" to the High Court. The arbitrator refused, since under the law of Scotland he was the final adjudicator of legal as well as factual questions. The House of Lords upheld the arbitrator's refusal. The arbitration was governed by the law of Scotland, the place of the proceedings, notwithstanding that English law governed the contract.

Two assumptions about the interaction of national law and commercial arbitration inhere in this decision. The first is that arbitration is controlled by some national law, a *lex arbitri.*[6] The *lex arbitri* is not necessarily the law governing the substance of the dispute, nor the procedural rules applied by the arbitrators. Rather, the *lex arbitri* governs the validity of the arbitral process itself.

The second assumption underlying *Whitworth* is that the law of the arbitration is the law of the place of the proceedings: the *lex arbitri* is the *lex loci arbitri.* Thus an arbitrator must bow to mandatory norms of the country in which he sits.[7] Parties may choose the law governing the contract. They may even choose some of the procedural rules applied by the arbitrator to a matter such as cross-examination of witnesses. They do not, however, choose the law governing the arbitration, except indirectly through choice of its *situs.*

F.A. Mann has articulated this traditional view with force, arguing that the pronouncements of an arbitral tribunal are not binding unless linked to a specific system of national law:

> Every right or power a private person enjoys is inexorably conferred by or derived from a system of municipal law which may conveniently and in accordance with tradition be called *lex fori,* though it would be more extact (but also less familiar) to speak of the *lex arbitri.*[8]

The mandatory rules imposed by the *lex loci arbitri* do not yield to neat classification. Many legal systems prohibit arbitration of disputes involving sensitive public interests, such as the protection of investors in corporate securities[9] or contracts with state agencies.[10] Some require arbitrators to

6. See, e.g., Mann, "Lex Facit Arbitrum", in *International Arbitration: Liber Amicorum for Martin Domke,* ed. P. Sanders (1967), at p. 157; Hirsch, "The Place of Arbitration and the Lex Arbitri" (1979) 34 *Arb. J.* 43.

7. For the present discussion, the place of the arbitral proceedings is assumed to be the place where the award is rendered. The parties may choose the place explicitly or delegate the choice to an arbitral institution.

8. Mann, *op. cit. supra* n. 6, at p. 159.

9. See *Wilko* v. *Swann,* 346 U.S. 427 (1953).

10. E.g. in France see Carbonneau, "The Elaboration of a French Doctrine on International Commercial Arbitration: A Study in Liberal Civilian Creativity" (1980) 55 *Tulane L.R.*, at pp. 29-30.

state the reasons for their awards,[11] or provide for the removal of arbitrators who are inept[12] or unfair.[13] A few legal systems have provided for appeal from arbitrator error on matters of law.[14]

English judges traditionally have given the *lex loci arbitri* greater significance than their French or American brethren. One Court of Appeal decision held that the selection of London as a *situs* for arbitration implied that English substantive law governed the issue of contract damages.[15] This decision contrasts with American[16] and French[17] cases that have minimised the influence of the law of the place of arbitration.

The traditional role of the *lex loci arbitri* has been questioned by scholars and practitioners who suggest that an international commercial arbitral award may "float" free from the constraints of the national law of the place of the proceedings.[18] Such denationalised arbitration, producing an "a-national" arbitral award,[19] marries well with the commercial motive behind the trend toward greater arbitral autonomy in modern arbitration law: to increase a country's attractiveness as a *situs* for arbitral proceedings.[20] This approach also permits national tribunals to concern themselves less with disputes not implicating national interests, and accommodates international business transactions in which the parties' divergent nationalities create a special need for a neutral and private forum for dispute resolution.[21]

"Denationalised" arbitration, however, has come to mean more than self-restraint by the country of the proceedings in the imposition of local procedural law. "Floating" awards, it has been argued, are and should be enforceable outside the country of proceedings despite annulment where rendered. For example, suppose arbitration is conducted in Azania, where

11. E.g. in Germany, see Bulow, Glossner and Laschet, "Arbitration in the Federal Republic of Germany," in *Arbitration in Europe* (1981), p. 83, at p. 90 (para. 3-3).

12. E.g. in England, see s. 23 of the Arbitration Act 1950, concerning arbitrator "misconduct."

13. E.g. in France, see Art. 1502(4) of the *Nouveau Code de Procédure Civile.*

14. See commentary on the "case stated" procedure in Part II of this article.

15. *Tzortzis & Sykias* v. *Monarch Lines* [1968] 1 Ll.L.R. 337 (C.A.). Sale of ship by Swedish owner to Greek buyer; Greeks wanted application of Swedish law, which permitted recovery of pre-contract expenses lost because of seller's breach; *held* that choice of London as *situs* for arbitration implied choice of English law as the proper law of the contract.

16. See e.g. *Mobil* v. *Asamera,* 43 N.Y. 2d. 276, 401 N.Y.S. 2d 186 (1977). Arbitrators had power to apply the 1975 version of International Chamber of Commerce rules rather than the 1955 version, thus there was no requirement to follow New York discovery procedures to fill gaps in ICC rules.

17. See e.g. *Libyan Maritime Co.* v. *Gotaverken Arendal, Cour d'Appel de Paris* (Feb. 21, 1980), reprinted in (1980) 107 *J. Dr. Int.* 660 and [1980] *Revue de l'Arbitrage* 524.

18. See generally Paulsson, "Arbitration Unbound: An Award Detached From the Law of the Country of Origin" (1981) 30 *I.C.L.Q.* 358; Lalive, "Les Règles de Conflit de Lois Appliquées au Fond du Litige par L'Arbitre International Siégeant en Suisse" [1976] *Revue de l'Arbitrage* 155.

19. For an excellent survey of the concept of the "a-national award" see in A.J. van den Berg, *The New York Arbitration Convention of 1958* (1981), pp. 28-51.

20. See *infra* nn. 70-72, and accompanying text.

21. See *Scherk* v. *Alberto Culver,* 417 U.S. 506 (1974).

the award is set aside on the ground that the parties did not validly consent to arbitration. Should a court in Ruritania, where the loser has assets, nevertheless enforce the award if it comes to a different conclusion about the validity of the arbitration agreement? What if Azanian courts set aside the award for error of law, a ground for annulment unknown to Ruritanian law?

Varying degrees of floating arbitration might be contemplated. For instance, Ruritania might take the position that annulment in Azania is never relevant to enforcement in Ruritania. A less extreme position might take annulment of an award in Azania as an impediment to enforcement in Ruritania if the annulment was made for reasons considered appropriate under Ruritanian law. For example, Ruritania might accept annulment for arbitrator corruption, but not for arbitrator error of law.

Ruritanian courts, of course, may always deny recognition to an arbitration defective under their own standards. So much is accepted by both traditionalists and proponents of floating arbitration. The divisive issue is whether Ruritanian courts should also defer to Azanian nullification for violation of the latter's procedural norms.

Critical to the viability of "a-national" arbitration is the legal effect of an arbitral award not linked to a national legal system. The distinguished arbitration lawyer, Jan Paulsson, has written recently that "the binding force of an international award may be derived . . . without a specific legal system serving as its foundation."[22] Focusing on the French case of *Gotaverken* v. *Libyan General National Maritime Transport Co.*,[23] Paulsson demonstrates that an international arbitral award may be enforced even if not subject by the *lex loci arbitri* to the same appeal procedures as a domestic award.

The arbitration in *Gotaverken* involved three tankers constructed by a Swedish shipyard for a Libyan government agency. The Libyans refused delivery, *inter alia,* on the ground that ship components had been made in Israel in violation of Libyan boycott law. The arbitrators ordered the Libyans to take delivery of the vessels and to pay the outsanding portion of the price. The Libyans challenged the award, arguing that it violated the public policy (*ordre public*) of France because of its failure to respect Libyan boycott law. The Paris *Cour d'Appel* refused to hear the challenge

22. Paulsson, "Arbitration Unbound", *op. cit. supra* n. 18, at p. 368. Paulsson expressed his dangerous heresy even more boldly in his native Sweden, asserting that the legal system of the place of arbitration did not necessarily have "authority to rule on the validity of the proceedings as such — and thus the binding effect of its result: the award". See Paulsson, "France and the Arbitral Process", 1981 *Skiljedom* 40, at p. 42.

23. See *supra* n. 17.

on the ground that the award was not French. Such an award, Paulsson maintains, is enforceable "without a specific legal system serving as its foundation".

The paradox of a legal obligation independent of a legal order suggests Athena springing full-blown from the head of Zeus: a binding commitment, free from any municipal law, just appears. Grasp of Paulsson's thesis requires a conceptual leap to a document labelled "obligation" enforced without respect to whether the document constitutes a valid obligation under the legal system normally selected by the enforcement forum's choice of law principles. In other words, the document receives contractual force from the enforcement forum itself regardless of the otherwise governing law.

That Paulsson should concern himself at all with the French decision in the *Gotaverken* affair is surprising. One would expect illustration of his thesis by an award annulled under the *lex loci arbitri* but nevertheless enforced in a country where the loser has assets. In *Gotaverken,* however, France refused to annul the award. If the arbitration is detached from the country where rendered, then one would expect the nationality of the award in the minds of French judges to be of marginal importance. Inquiry would seem more properly focused on the way judges of the enforcement forum—Sweden—determine the award's validity.[24]

Paulsson's thoughtful analysis of the French court's view of the award's nationality leads one to suspect that he would not have considered the award a-national if French judges had held the contrary. This would suggest that the country of the proceedings does determine the validity of an international commercial award, in that the award will be unenforceable if annulled under the *lex loci arbitri.*

Gotaverken and its progeny lend themselves to a less radical analysis than suggested by Paulsson. An international arbitration, rather than being "detached from its country of origin," receives substantially greater autonomy, and is subject to fewer constraints, than a domestic arbitration. The award in *Gotaverken* was not annulled. Rather, the French court found the award not subject to a challenge procedure (*appel en nullité*) available only to French awards. Moreover, if the facts of *Gotaverken* are changed slightly, so that the Swedes deliver cocaine rather than tankers, one wonders whether the French court would exhibit a similar *laissez-faire* attitude towards alleged public policy violations.

24. Paulsson has done an admirable job of examining the Swedish sequel to *Gotaverken* in "The Role of Swedish Courts in Transnational Arbitration" (1981) 21 *Va.J.I.L.* 211.

Several months after *Gotaverken*, the Paris *Cour d'Appel* affirmed the vitality of the traditional role of the *lex loci arbitri* with respect to another international award. In *Berardi* v. *Clair*[25] the balance sheet of a Gabonese company was at issue, its shares having been sold by a Canadian (Berardi) to a Frenchman (Clair). The arbitrator awarded the seller 23 million French francs, and the Paris *Tribunal de Grand Instance* granted leave to enforce the award in France. Three months later, the Geneva cantonal *Cour de Justice* annulled the award as "arbitrary". The *Cour d'Appel* of Paris thereafter quashed the lower court decision, refusing recognition (*exequatur*) in France to an award set aside under the law of the place where rendered.

In both *Gotaverken* and *Berardi* v. *Clair,* the parties had stipulated arbitration under the Arbitration Rules of the International Chamber of Commerce, but with a significant difference: in *Gotaverken* the 1975 version of the Rules was applied, whereas in *Berardi* v. *Clair* the arbitration was subject to the 1955 version of the Rules. The latter provides for gaps in the procedural rules to be filled according to the law of the country in which the arbitrator holds the proceedings. The 1975 Rules, by contrast, provide for such gaps to be filled by the arbitrator. One may speculate about the enforceability of the award in *Berardi* v. *Clair* had it been rendered under the 1975 Rules. It would seem misleading, however, to suggest that such awards may be "detached" from the *lex loci arbitri.*

The present author knows of no award enforced after explicit annulment where rendered. Post-annulment recognition would, however, seem appropriate in two circumstances. The first would require that the arbitration arise under the European Convention on International Commercial Arbitration (commonly referred to as the Geneva Convention of 1961), covering disputes between nationals of different contracting States. Annulment of an award in its country of origin constitutes a ground for refusal of recognition under the European Convention only when annulment is for specifically enumerated reasons, such as the invalidity of the arbitral agreement or lack of proper notice to the parties. Thus if Canada had adhered to the European Convention, the award in *Berardi* v. *Clair*, discussed above, might have been enforceable in France, since "arbitrariness" is not a ground for annulment under the Convention.

The second situation in which one might approve enforcement of an award annulled in its country of origin is where the local judiciary is corrupt or biased. For example, a judge of a country without a tradition of judicial

25. Unpublished case No. 11542, *Cour d'Appel de Paris, 1ère Chambre*, June 20, 1980, discussed in I.C.C.A. (1982) VII *Yearbook of Commercial Arbitration* 319-21.

independence might set aside an award rendered against its own government merely to please the bureaucracy, without regard to the fairness of the proceedings. Enforcement of such an award by a country where the debtor government has assets would seem neither improper nor inappropriate.

The 1958 New York Arbitration Convention leaves open the theoretical possibility that the *lex arbitri* may be other than the law of the place of the proceedings. Under Article V(1)(e), a non-domestic arbitral award may be refused recognition on proof that it has been set aside by "a competent authority of the country in which, or *under the law of which*, that award was made." Annulment by an authority of the country "under the law of which" an award is made could be construed as a supplementary, rather than substitute, ground for refusal of recognition.

Debate over the nationality of awards is more than an academic quibble. The critical importance of the *lex loci arbitri* was strikingly illustrated by the saga of *Société Européenne d'Etudes et d'Entreprise (S.E.E.E.)* v. *Yugoslavia.*[26] Before World War II S.E.E.E. built a railroad in Yugoslavia for which it was paid in devalued French francs. A panel of two arbitrators found an implicit currency stabilisation provision and rendered an *ex parte* arbitral award in favour of S.E.E.E. in Lausanne on July 2, 1956. In an action before the cantonal court of Vaud, Yugoslavia argued that an even number of arbitrators violated mandatory dispositions of local law. The Swiss court, reasoning that the arbitration was not governed by Vaud cantonal law, refused deposit of the award and returned it to the parties.

In a subsequent action in the Netherlands to enforce the award, the Dutch Supreme Court rejected the Yugoslav argument that the award was invalid because it was not linked to any national legal system.[27] The victory of the "floating award", however, was short-lived. In a second decision the Dutch Supreme Court held that the Swiss refusal to hear the Yugoslav challenge had the same consequence as annulment of the award, which therefore was refused recognition.[28] The Dutch court considered the arbitrator's decision to constitute a Swiss award notwithstanding the Swiss court's contrary view.[29]

26. The award is published in English and in French in [1959] *Journal Droit International* 1074.

27. Decision of Oct. 26, 1973, published in [1973] *Nederlandse Jurisprudentie* 361. A French translation is published in [1974] *Revue de l'Arbitrage* 318; discussed in Batiffol [1974] *Revue de l'Arbitrage* 326; Iseman (1975) 1 *Droit et Pratique du Commerce International* 510; Int. Council Comm. Arb. (1976) I *Yearbook of Commerical Arbitration* 195.

28. Decision of Nov. 7, 1975, published in Dutch in [1976] *Nederlandse Jurisprudentie* No. 774 and in French in [1978] *Revue de l'Arbitrage* 397.

29. For a French sequel, see the recent decision of the *Cour de Cassation*, No. 882, dated Oct. 13, 1981, quashing a decision by the *Cour d'Appel* of Orléans, Dec. 13, 1979, that had refused recognition to the award (on the grounds it was "illogical and unreasonable") and remanding the request for recognition of the *Cour d'Appel* in Rouen.

B. Scope of Application of the Lex Loci Arbitri

A legal system that subjects international arbitration to its judicial control must decide which procedural norms are to be applicable. Judicial intervention might be limited to ascertaining the award's basic integrity, breached by an arbitrator who is not impartial, or who decides matters that the parties never entrusted to his adjudication. On the other hand, the courts also might concern themselves with the legal merits of the dispute. The extent of judicial control will depend upon conclusions as to whether it is more important that an arbitral award be correct, or that it be final.

Prior to 1979, English law had come down on the side of legal certainty, and attempted to ensure that all disputes decided within the borders of England and Wales would be subject to a uniform application of legal principles. Although parties to a business dispute had agreed to give the responsibility for its resolution to an arbitrator, the arbitral process still could be vitiated whenever one party, fearful of losing, decided to break its agreement to settle the dispute privately, and to try its chance instead before a judge.

This tension between legality and finality represents a rivalry between the two types of certainty: one related to the uniform application of legal norms; the other concerned with the adjudicatory forum. The value of a uniform application of legal principles perhaps is strongest when there is a danger that private dispute resolution may become a means for the strong to oppress the weak through disproportionately unequal bargaining power, or when the interests of third parties may be affected by the dispute. In such cases, courts arguably may have a duty to examine the legal substance of the dispute and other matters that bear on the award's basic integrity, such as arbitrator fraud, impartiality or excess of authority.

To put it another way, the judiciary need not concern itself with the correctness of an arbitrator's conclusions merely to ensure a correct interpretation of the parties' contract. Court intervention on the merits of a dispute voluntarily submitted to arbitration is required only if an arbitrator's decision directly implicates national or third party interests. Intervention may be justified, for example, if an arbitrator's misinterpretation of an oil supply contract would result in injury to the consumers of the fuel, or when an arbitrator's interpretation of company law frustrates a national policy of protecting the integrity of the market for corporate securities. If national policies are not implicated, courts should limit their role to ensuring that the award is not obtained through violation of fundamental norms of procedural fairness, such as arbitrator fraud, partiality or excess of authority.

International arbitration is less likely than domestic arbitration to involve such disputes. Even if it does, a national legal system still may accommodate the needs of international trade and investment by refraining from exercising supervision over the legal merits of the arbitration. The United States Supreme Court adopted such an attitude in *Scherk* v. *Alberto-Culver*,[30] a case involving allegedly fraudulent misrepresentations in the sale of stock, normally a non-arbitrable issue in the United States. The policy in favour of permitting a neutral private forum to settle international business disputes outweighed the competing consideration of protecting investors from fraud in the sale of investment securities.

Judicial control over the substantive legal issues of an international arbitration should be minimal. Parties to the dispute should have the privacy for which they bargained. In addition, arbitrators should be free of the threat of being overruled because of errors in their analysis, so that reasoned awards will be rendered more frequently, thereby contributing to the development of a modern "law merchant".[31]

Complete lack of judicial control, however, is undesirable. Even if the arbitration involves neither citizens nor interests of the forum State, national courts should ensure the integrity of awards rendered within national borders. Such awards may benefit from recognition and enforcement under the 1958 New York Convention.[32] Some parties to the Convention, including the United States, limit its application to awards rendered in the territory of another contracting State.[33] By allowing an award rendered on its territory to become binding, a State facilitates enforcement of an award, and therefore should provide a mechanism for challenging the award's procedural deficiencies.

Deficiencies in the award's integrity should be dealt with by the legal system of the place of the proceedings. Otherwise, the losing party must attack an invalid award in each of the many States where the award might be enforced against its property.[34] The contesting party should have an

30. 417 U.S. 506 (1974).

31. On the new law merchant see Goldman, "La Lex Mercatoria dans les Contrats et l'Arbitrage Internationaux: Realité et Perspectives" (1979) 106 *Journal Droit International* 475.

32. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517; T.I.A.S. 6997; 330 U.N.T.S. 38 [hereafter cited as New York Arbitration Convention]. On the New York Arbitration Convention, see generally A.van den Berg, *The New York Arbitration Convention of 1958* (1981). As of Feb. 1, 1981, 56 States including France, the UK and the USA are parties to the New York Convention. *Ibid.* at p. 410.

33. See 9 U.S.C.A. s. 201 (1979). The right of contracting parties to restrict enforcement on the basis of reciprocity is provided in Art. I(3) of the New York Arbitration Convention.

34. A.J. van den Berg *(op. cit. supra* n. 19, at p. 30) makes this point in his discussion of the applicablity of the Convention to "a-national" awards:

> [I]f in a "de-nationalised" arbitration serious procedural violations have been committed, the aggrieved party must have the right to have such award set aside.

opportunity to expose procedural irregularities at the place of the arbitration, which will normally have as great a claim as any other forum to being mutually convenient to the parties.

Proponents of "denationalised" arbitration do not necessarily contest the wisdom of such minimal control. For example, Paulsson suggests *de lege ferenda* (his own words) that the "judge at the place of the arbitration is the best-placed authority to control the award", although he would limit intervention to review of the arbitrator's compliance with minimum standards such as those embodied in "international conventions", presumably Article V (1) of the New York Arbitration Convention.[35]

C. The French Experience

THE French arbitration decree of May 12, 1981,[36] was issued in the wake of the *Gotaverken* case,[37] which had caused speculation that an arbitral award may be free from control by the country of its origin. The prospect of a-national arbitration raised concern that an award rendered in France might not receive enthusiastic recognition outside France.[38] The enforcement forum, mindful of the lack of control over the arbitration's fairness in the place of the proceedings, might subject French awards to stricter scrutiny. Grounds to refuse recognition under the New York Arbitration Convention might be construed broadly when awards are rendered under the reign of arbitral anarchy. In *Gotaverkent*, it will be remembered, the Libyan Martime Company had brought an action to set aside an arbitral award rendered in Paris, ordering the Libyans to pay the outstanding purchase price on three oil tankers constructed by a Swedish shipyard. The Paris court declined to hear the challenge to the award on the ground that it lacked jurisdiction.

The Decree of May 12, 1981, provided for limited judicial control over the integrity of international arbitration conducted in France. The *Nouveau Code de Procédure Civile* now contains the following specific grounds for challenge of an international award rendered in France:[39]

35. Paulsson, "Arbitration Unbound", *op.cit. supra* n. 18, at p. 370. See also authorities cited in *ibid.* at n. 33. Article V(1) of the Convention permits refusal of recognition, *inter alia*, on proof of the arbitrator's failure to respect his mission, lack of proper notice to the parties or improper constitution of the arbitral tribunal. Article V(2) permits refusal for violation of national "public policy".

36. Decree No. 81-500, May 12, 1981, published in the *Journal Officiel de la République Francaise,* May 14, 1981, at p. 1406. The most extensive commentary on the decree to date is that of Professor Fouchard, of the University of Paris: Fouchard, "L'Arbitrage International en France après le Decret du 12 mai 1981" (1982) 109 *Journal Droit International* 374.

37. See *supra* text accompanying n. 23.

38. See Craig, Park and Paulsson, "French Codification of a Legal Framework for International Commercial Arbitration" (1981) 13 *Law & Pol. Int. Bus.* 727, at pp. 733-734, nn. 36 and 37.

39. *Nouveau Code de Procédure Civile,* Art. 1502.

(1) If there was no valid arbitration agreement or the arbitrator decided on the basis of a void or expired agreement;
(2) if there were the irregularities in the composition of the arbitral tribunal or in the designation of the sole arbitrator;
(3) if the arbitrator has decided in a manner incompatible with the mission conferred upon him;
(4) whenever due process (literally: the principle of an adversarial process) has not been respected;
(5) if the recognition or enforcement is contrary to international public policy (*ordre public international*).

The fifth ground for challenge refers to the public policy of France, rather than an international norm. Mandatory French public policy will impose itself less extensively when the dispute has an international character.[40]

With the exception of *ordre public*, the grounds for annulment of an award under the new Decree are not dissimilar to the grounds for vacating an award provided in section 10 of the US Arbitration Act:

(a) Where the award was procured by corruption, fraud, or undue means;
(b) where there was evident partiality or corruption in the arbitrators;
(c) where the arbitrators were guilty of misconduct in refusing to postpone the hearing . . . or in refusing to hear evidence. . . .;
(d) where the arbitrators exceeded their powers. . . .

Control of an arbitral proceeding according to such standards provides the loser of an unfair proceeding the opportunity to have the award set aside where rendered. Without such norms imposed by the *lex loci arbitri*, the losing party would be required to defend against the enforcement of the award wherever he had assets. Moreover, the country of the award debtor's property may be an even more fortuitous and less acceptable forum than the country of the proceedings.

An award rendered by a corrupt arbitrator in London or Paris should be susceptible to annulment in London or Paris. Fairness dictates that the losing company not be required to defend against the enforcement of the award against its assets in Ruritania and Azania, where the local judges may be even less concerned with the dispute than those of England or France.

The British Parliament, when overhauling English arbitration law in 1979, debated the nature of several other policies justifying judicial intervention in the arbitral process. This debate provides the occasion for a deeper case study into the competing goals that affect the scope of arbitral autonomy.

40. See H. Batiffol and P. Lagarde, *Droit International Public* (6th edn. 1974), *Tome I*, at p. 459, para. 366. On the requirement that an international award respect French *ordre public international*, see P. Fouchard, *L'Arbitrage Commercial International* (1965), ss. 515-528.

II. THE PRISM OF ENGLISH ARBITRATION LAW

THE recent history of English arbitration law presents a paradigm of a national legal system attempting to reconcile the rival desiderata of justice and finality. Like a prism, discussion of these developments may serve to separate the themes inhering in the complicated interaction between judge and arbitrator.

A. The "Special Case": The Uniqueness of English Procedure

FOR almost a hundred years prior to 1979, commercial arbitration in London had been subject to the so-called "special case" or "case stated" procedure by which a party could compel an arbitrator to submit a point of law to the High Court.[41] Submission of the legal issue during the proceedings was called a "consultative case". Submission at the end of the proceedings was referred to as stating a case in the form of "alternate awards".[42]

The uniqueness of English law (and the law of those Commonwealth countries following the English model) lay not in the right to appeal the arbitrator's conclusions on matters of law, but rather in the timing of the appeal *before* formal delivery of the arbitrator's award. This pre-award appeal meant that the arbitrator's decision might be refused recognition and enforcement in a country in which the debtor had assets because the award in the form of a special case might not be deemed "binding" under the 1958 New York Convention.[43] If the arbitrator had stated a "consultative" special case, the judge decided the legal issue and then remitted the case to the arbitrator; if the arbitrator had made alternate awards, the court had to choose between one or the other. Until the High Court had answered the legal question stated by the arbitrator, there was no final award in a legal sense, even though courts in practice might refer to the arbitrator's preference or informal decision as his award. Questions of fact were outside

41. A voluntary special case procedure originally applied to commercial arbitration under the Common Law Procedure Act 1854. Courts were given power to order statement of the case by the Arbitration Act 1889.

42. Arbitration Act 1950, s.21.

43. See Art. V(1)(e). The Convention does not settle whether an award is "binding" before appellate review. In *Libyan Maritime Co.* v. *Gotaverken Arendal AB*, Swedish Supreme Court Decision No. SO 1462, Aug. 13, 1979, the Supreme Court of Sweden held that a pending challenge to the award in the *Gotaverken* case, discussed *supra* text accompanying n. 23, did not constitute a ground for refusal of enforcement of the award in Sweden. See Paulsson, "The Role of Swedish Courts in Transnational Commercial Arbitration" (1981) 21 *Va. J. Int.L.* 211, at pp. 236-37.

the scope of the court's authority. The line between fact and law, however, was thin; courts had wide discretion to find legal elements in most issues.[44]

Statement of the case was not always beneficial to the requesting party. In one amusing Court of Appeal case, *Ismail* v. *Polish Lines*,[45] a claimant actually succeeded in reducing the amount of his recovery by insisting on a special case. In *Ismail,* potatoes were shipped from Egypt to England and had rotted during transit due to improper loading. The arbitrator was willing to award two-thirds of the sum claimed as damages by the shipper, one Dr. Ismail. The shipper, however, wanted it all and insisted on statement of a case. His stubbornness was costly. The Court of Appeal decided that Dr. Ismail was estopped from receiving anything because his brother had been at the loading dock in Alexandria, exhorting the ship's captain to pack the potatoes tighter.

In 1922, when the Court of Appeal held that the supervisory jurisdiction of English courts could not be abrogated by contract, any escape from judicial review was foreclosed. Referring to a part of London near Fleet Street that had been a sanctuary for criminals,[46] Lord Justice Scrutton declared: "There must be no Alsatia in England where the King's writ does not run."[47] The Court of Appeal thus considered it contrary to English public policy to condone any "erroneous administration of the law".[48]

The highwater mark of court intervention came in 1973, in a case frequently referred to as the "*Lysland*", named after the ship involved.[49] The Court of Appeal reasoned that agreements to arbitrate disputes in London were made under the assumption that legal issues could be referred to judicial determination. Lord Denning ordered the case to be stated over the arbitrator's objection, and set forth a tripartite test for determining when arbitrators should be forced to state a special case in the future. The point of law, said Denning, should be:[50]

> . . . real and substantial and such as to be open to serious argument and appropriate for decision by a court of law . . .;
> . . . clear cut and capable of being accurately stated as a point of law . . .;
> (and) . . . of such importance that the resolution of it is necessary for the proper determination of the case.

44. See *Bunge* v. *Kruse* [1976] 1 Ll.L.R. 357 (1975 case). Sale of soya bean meal to Belgian buyer (Bunge SA) by German seller, frustrated by 1973 US grain export embargo; Grain and Feed Trade Association (GAFTA) finding of "accord and satisfaction" in settlement agreement held to be matter of law, not fact, on case stated by GAFTA Board of Appeal.

45. [1976] 1 Q.B. 893 (C.A.).

46. See Plucknett, *Concise History of the Common Law* (5th edn. 1956), p. 431.

47. *Czarnikow* v. *Roth, Schmit & Co.* [1922] 2 K.B. 478, at p. 488.

48. *Ibid* at p. 489.

49. *Halfdan Grief & Co. A/S* v. *Sterling Coal & Nav. Corp.* [1973] 1 Q.B.843 (C.A.).

50. *Ibid.* at pp. 861-62.

Thereafter, arbitrators apparently feared that denial of an application made by a party to state the case, other than the most frivolous requests, could be considered arbitrator "misconduct", a ground upon which an award might be set aside.[51]

One consequence of the special case procedure was that it prevented an arbitrator in England from deciding according to his own concept of equity and fairness,[52] or as *amiable compositeur*.[53] The arbitrator was required to apply a "fixed and recognisable system of law".[54]

B. The Call for Reform

LEGAL scholars, legislators, and judges criticised the case stated procedure, alleging that it provided a delaying tactic for undeserving parties who feared they were about to lose an arbitration on the merits and wanted to put off the day of reckoning.[55] The arbitrator was required to prepare the consultative questions of alternative awards; the High Court had to hold a hearing that might involve full argument; and appeal might be taken to the Court of Appeal, and thence to the House of Lords. Meanwhile, by virtue of the delay, the unmeritorious party received the equivalent of an interest-free loan in the amount of the unpaid award.[56]

The conception of the 1979 reform[57] might be set on February 28, 1978, when Lord Diplock delivered the Fourth Annual Alexander Lecture to the Institute of Arbitrators, entitled "The Case Stated—Its Use and Abuse".[58] Diplock described the problem just mentioned: that unscrupulous parties had used the case stated procedure to delay payment of their contractual obligations. Five months later, a Commercial Court Committee,[59] chaired

51. See Commercial Court Committee Report, *supra* n.1, at p. 6, para. 12.

52. See Schmitthof, "The Supervisory Jurisdiction of English Courts", in *International Arbitration: Liber Amicorum for Martin Domke*, ed. P. Sanders (1967), p. 289, at p. 298.

53. On *amiable composition*, see generally E. Loquin, *L'Amiable Composition en Droit Comparé et International* (1980).

54. *Orion Cia* v. *Belfort Matts* [1962] 2 Ll.L.R. 257, at p. 264 (dispute over quota shares in reinsurance treaty).

55. See parliamentary debates, *supra* n. 1. See also Commercial Court Committee Report, *supra* n. 1, at p. 8, Diplock, *op.cit. supra* n. 1, and 397 Part. Deb. at col. 437.

56. For examples of the types of cases stated, see the author's survey in Park, "Judicial Supervision of Transnational Commercial Arbitration: The English Arbitration Act of 1979" (1980) 21 *Harv. Int. L.J.* 87, at p. 95 and Annex.

57. Reform had been considered unsuccessfully in 1927 (*Report of the Committee on the Law of Arbitration*, Cmnd. 2817) and 1962 (*Commercial Court Users Conference Report*, Cmnd 1616, para. 30).

58. Alexander Lecture, *supra* n. 1.

59. The statutory establishment of the Commercial Court in 1970 (Administration of Justice Act 1979, s. 3), recognised a practice inaugurated in 1895 by resolution of the Queen's Bench Division of the High Court whereby cases on a "commercial list" were assigned to High Court judges with special expertise in commercial matters.

by then High Court Justice, John Donaldson (now Master of the Rolls), issued a report recommending abolition of the special case procedure.[60]

The Commercial Court Committee also recommended abolition of another High Court procedure: the power to set aside an award for "error of law on its face".[61] This procedure had made arbitrators hesitant to deliver reasoned awards for fear that they would be quashed.[62]

The Commercial Court Committee proposed a more restricted judical review procedure. Awards would be final when rendered, and the right of appeal to the High Court would be limited to legal questions that might substantially affect the rights of the parties. The court was to be given the power to impose conditions on the granting of leave to appeal—such as a deposit—which would reduce frivolous appeals. There would continue to be a procedure that roughly approximated the old "consultative case" in situations in which this procedure would result in "substantial savings in cost to the parties".[63] Moreover, the Committee recommended that the right to appeal from the High Court to the Court of Appeal be limited to questions of general importance to the relevant trade or industry.

The Committee considered what it called the "entrenchment" of judicial review—in other words, the prohibition on contractual exclusion of court supervision.[64] The Committee indentified four classes of disputes that might require different treatment: domestic disputes (where both parties were British and the contract was governed by British law);[65] international disputes (where at least one party was foreign); disputes governed by foreign law; and the so-called "special category disputes", arising out of insurance, maritime and commodities contracts. The Committee recommended that parties should always have the right to exclude judicial review after a dispute has arisen, but that contractual exclusion of judicial review of future disputes be permitted only for international contracts and contracts governed by foreign law. For the latter, exclusion would be automatic, and also rather academic, since proof of foreign law is treated in England not as a legal issue, but as proof of a fact and not subject to judicial review.[66]

60. In 1977 a Commercial Court Committee was created to link the users of the Court and the Court itself. Committee members include representatives of London's merchants, bankers, and arbitrators, as well as the six Commercial Court Judges who serve *ex officio*.

61. Arbitration Act 1950, s. 22.

62. See Commercial Court Committee Report, *supra* n. 1, at pp. 8-9 (paras. 25-31).

63. *Ibid.* at p. 10 (para. 36).

64. See *Czarnikow* v. *Roth, Schmit & Co.* [1922] 2 K.B. 478.

65. All United Kingdom residents—including those in Scotland and Northern Ireland—were included, although the Act applies only to arbitrations conducted in England and Wales.

66. See A. Dicey and J. Morris, *Conflict of Laws* (9th edn. 1973), pp. 1124-33, citing *Ottoman Bank of Nicosia* v. *Chakarian* [1938] A.C. 260, at p. 279 (P.C.).

Entrenchment of review for domestic contracts rests on a concern for parties with limited bargaining power or sophistication. It is a prophylactic rule intended to prevent the unwilling renunciation of recourse to courts because of a stronger party's threat of refusal to deal with a weaker party who did not agree to arbitration.

An entirely different consideration, however, preoccupied the Committee in its treatment of disputes arising from maritime, insurance and commodities agreements. In these areas, English law had been the world's pre-eminent and preferred law—or so said the Committee, which felt that judicial review of such cases would be fruitful to the continued development of English law.

Finally, the Committee recommended a cosmetic change in the term "misconduct"—for which an arbitrator might be removed, or his award set aside.[67] Such an opprobrious term was deemed objectionable to describe procedural errors and omissions. The Committee did not recommend abolition of the High Court's right to remove an arbitrator or set aside an award for such errors or omissions, but merely found the terminology offensive.

The Committee did not recommend curtailment of the High Court's general right to remit awards to the arbitrators.[68] This is rather surprising in light of the design of the Act. The power to send an award back to the arbitrator seems to be a weapon for judicial intervention as formidable as the power to force the arbitrator to state a case.

Eight months after the Committee's Report, Parliament enacted the Arbitration Act 1979, which became effective for all arbitrations commencing on or after August 1 of that year.[69] The Act modifies, but does not supersede, the Arbitration Act of 1950. The Bill originally had been introduced into the House of Lords, where extensive debate went on during late 1978 and early 1979. Following announcement of the May General Election, the Bill was rushed through the House of Commons on the night of April 2, and received the Royal Assent on April 4.

Commerical as well as legal concerns motivated Parliament. The Act was viewed as a way to increase London's importance as a *situs* for transnational arbitration. During the parliamentary debates, Lord David Hacking, who had practised law in New York, recounted in the House of

67. Arbitration Act 1950, s. 23.

68. *Ibid.* s. 22.

69. S.I. 1979 No. 750 (The Arbitration Act 1979 (Commencement) Order 1979). Parties to an arbitration commencing before Aug. 1, 1979, may agree in writing that the provisions of the Act shall apply to an arbitration already in force.

Lords that parties to international contracts were discouraged from choosing London as the *situs* for arbitration because of the case stated procedure.[70] Lord Cullen of Ashborne ventured an estimate that a new arbitration law might attract to England as much as £500 million a year of "invisible exports", in the form of fees for arbitrators, barristers, solicitors, and expert witnesses.[71] The reform's utility for marketing London as a *situs* for arbitration was also noted by the candid Lord Lloyd of Kilgerran, a patent barrister, who declared that "[t]he main object of this Bill is to attract arbitration to London".[72]

Parliament evinced special concern that London should be more extensively used as a *situs* for the resolution of so-called "supra-national" disputes, especially those arising from contracts entered into by governments of developing nations, for public works such as the construction of airports or harbours, or for the exploitation of natural resources.[73] These nations are sensitive to the publicity, and the perceived affront to sovereignty, in submitting their disputes to the jurisdiction of courts of another country. No consensus of opinion exists on whether arbitration involving a sovereign State may be removed from the control of the *lex loci arbitri*.[74] Presumably, however, a more autonomous arbitral process would be viewed as an attractive alternative to litigation before foreign courts.

The extent to which the Act will have this desired effect is open to question, however, since the governments of many developing nations, particularly in Latin America and the OPEC countries, have manifested some mistrust of arbitration taking place outside their borders [75] The well-known "Calvo doctrine" requires that foreigners submit disputes arising out of State contracts to resolution by local courts. Prohibitions on non-national arbitration of State contracts have appeared in the constitutions of

70. 392 Parl. deb., *supra* n. 1, at cols. 89-95.

71. 392 Parl Deb., *supra* n. 1, at col. 99.

72. 398 Parl Deb., *supra* n. 1, at col. 536. See also the remarks of the Lord Chancellor in 397 Parl Deb., *supra* n. 1, at col. 441: "It is important that the City of London . . . not be hampered in the maintenance and expansion of [its] important and historical role in arbitration matters."

73. See comments of Lord Hacking at 392 Parl. Deb., *supra* n. 1, at col. 89; Lord Diplock, Alexander Lecture, *supra* n. 1, at p. 112; Commercial Court Committee Report, *supra* n. 1, at p. 12 (para. 45).

74. Compare the award in *BP* v. *Libya,* Oct. 10, 1973 (1979) 53 I.L.R. 297 (award rendered under national law of place of arbitration) with awards in *Saudi Arabia* v. *Aramco* (1963) 27 I.L.R. 117 and *Texaco Overseas Petroleum Co./California Asiatic Oil Co.* v. *Libya* (1978) 17 I.L.M. 3; (1979) 53 I.L.R. 389 (arbitrators held that jurisdictional immunity of State precludes subjecting proceeding to *lex loci arbitri*).

75. See generally, McLaughlin, "Arbitration and Developing Countries" (1979) 13 *Int. Law* 211; Delvolvé, "Arbitration and Public Policy in Developing Countries", in *Arbitration and the Licensing Process,* eds. R. Goldscheider & M. de Hass (1981), at p. 6-103.

El Salvador, Mexico, Nicaragua, Peru and Venezuela,[76] in the statutes of Colombia, Chile and Argentina,[77] and in the treaty establishing the Andean Common Market.[78] Latin American countries generally have not adhered to the 1958 New York Convention.

Oil-exporting nations manifested a similar hostility to non-local arbitration in a 1967 OPEC resolution providing that "disputes arising between a Government and operator shall fall exclusively within the jurisdiction of competent national courts . . ."[79] The "Group of 77" at the United Nations Conference on Trade and Development (UNCTAD) articulated their aversion to arbitration in Article 2(2)(c) of the Charter of Economic Rights and Duties of States, which provides that controversies arising out of nationalisation of foreign-owned property shall be settled by tribunals of the nationalising State.[80] The UNCTAD Draft Code of Conduct on Technology Transfer, as initially drafted by the Group of 77, contained similar language.[81]

Black African nations do not seem to share Latin American attitudes.[82] This difference may be due in part to the fact that many African legal systems are patterned on French or British models. Many African countries have ratified the 1958 New York Convention and the World Bank's Convention on the Settlement of Investment Disputes.[83]

Historical perspective may be useful to an understanding of developing nations' mistrust of transnational arbitration. The intervention that industrialised nations historically exercised on behalf of their nationals frequently involved arbitration perceived as consciously or unconsciously partial to economically dominant countries.[84]

76. See Wesley, "The Procedural Malaise of Foreign Disputes in Latin America: From Local Tribunals to Fact Finding" (1975) 7 *Law & Plcy. Int. Bus.* 813, at p. 820.

77. Mexico restricts the effect of its constitutional Calvo clause to ownership of land and concession rights.

78. Art. 51 of the Common Regime for the Treatment of Foreign Capital and Concerning Trademarks, Patents, Licences and Royalties.

79. OPEC Resolution XVI-90, reprinted in (1968) 7 *Int. Legal Mats.* 1183.

80. See Park, "Legal Issues in the Third World's Economic Development" (1981) 61 *B.U.L.R.* 1321, at pp. 1326-30.

81. The UNCTAD Draft Code of Conduct on Technology Transfer is reprinted in (1980) 19 *Int. Legal Mats.* 773. See Code Appendix D, *ibid* at p. 807, for the "Group of 77" proposal.

82. See Tiewul and Tsegah, "Arbitration and the Settlement of Commercial Disputes: A Selective Survey of African Practice" (1975) 24 *I.C.L.Q.* 393.

83. See list of signatories to the Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) printed at 9 U.S.C.A. s. 201, and list of Contracting States and Signatories to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (575 U.N.T.S. 159), International Center for Settlement of Investment Disputes, ICSID/3/Rev.2.

84. One might suppose that there would be greater Third World resistance to the rules of institutions dominated by one national group, such as the American Arbitration Association or the London Court of Arbitration, than to those of more international institutions, such as UNCITRAL, ICSID and the International Chamber of Commerce.

Arbitration agreements may also be resisted because they serve to stabilise contract terms that governments of developing countries wish to renegotiate. The multinational enterprise may respond to an attempted renegotiation by instituting arbitration, thereby bringing adverse publicity, and perhaps even an enforceable award, against the government.[85]

The developing nations' hostility to arbitration may have an echo in the resistance of Western firms to arbitration in the Third World. In part, this may be due to logistical considerations.[86] More significant, however, is the concern that a developing nation might set the award aside and thus render it potentially unenforceable under the 1958 New York Convention.[87]

C. The Arbitration Act 1979

THE 1979 Act abolished the special case, along with the common law jurisdiction of the High Court to set aside or remit an award for error of law on its face,[88] replacing these procedures with a more limited right of appeal to the High Court.[89] Awards are now final, and thus enforceable immediately, even if appeal is allowed later. Appeal may be made only with the consent of the opposing party[90] or with leave of the court[91] which will not be granted unless the determination of the legal question "could substantially affect the rights of one or more of the parties".[92] The court has discretion to attach conditions to its leave to appeal; for instance, it may require security for enforcement of the award.[93] The High Court decision may be taken to the Court of Appeal only if the High Court has certified that there exists a matter of "general public importance".[94]

The High Court may order an arbitrator to state the reasons for his decision if a party so requests before the decision,[95] or if there are "special reasons" why such a request was not made.[96] A question of law arising during the proceedings can be referred to the court for interlocutory

85. Arbitration agreements are particularly significant as waivers of sovereign immunity. See Delaume, "State Contracts and Transnational Arbitration" (1981) 75 *Am.J.Int.L.* 794.

86. For example, Paris and London would generally be considered more convenient than Cairo or Kuala Lumpur.

87. Art. V (1)(e), New York Arbitration Convention, *supra* n. 32.

88. Arbitration Act 1979, s. 1(1).

89. *Ibid.* s. 1(2).

90. *Ibid.* s. 1(3)(a).

91. *Ibid.* s. 1(3)(b).

92. *Ibid.* s. 1(4).

93. *Ibid.* s. 1(4) See e.g. *Mondial Trading* v. *Gill & Dreyfus* [1980] 2 Ll.L.R. 376.

94. *Ibid.* s. 1(7).

95. *Ibid.* s. 1(6).

96. These "special reasons" are not defined by the Act.

clarification in a manner similar to the former "consultative case" on request by the arbitrator or all parties".[97]

The Act's most significant provision with respect to international arbitration is its authorisation of "exclusion agreements",[98] ousting the High Court of some of its supervisory function, but not its powers to remit an award to the arbitrator[99] or to set aside an award for arbitrator "misconduct".[100] Agreement to exclude judicial intervention may always be made after arbitration has begun. However, parties to international agreements have the right to contract out of judicial review of future disputes by a clause in the principal contract itself. In what the Act calls "non-domestic" contracts,[101] parties may agree in writing to abrogate three types of court intervention:[102] appeal to the High Court;[103] the court's power to order reasoned awards;[104] and the right to apply for interlocutory clarification of a question of law.[105] All of these procedures are still open to the parties through joint action,[106] but cannot be required where one of the parties resists and a valid exclusion agreement exists.[107]

The Act expressly makes exclusion agreements effective as a bar to court intervention when there are allegations of fraud between the parties.[108] Absent an exclusion agreement, the High Court would be able to stay any arbitration in which one of the parties is accused of fraud,[109] in order to give criminal courts the opportunity to deal with the fraud.[110] Application of exclusion agreements to inter-party fraud prevents a party from hindering the arbitration by an allegation of fraud.

Dishonesty or corruption on the part of an arbitrator, of course, remains subject to court jurisdiction. Courts may deal with arbitrator misconduct by setting aside the award,[111] remitting the award for reconsideration,[112] or

97. *Ibid.* s. 2(2)(a).
98. *Ibid.* s. 3.
99. S. 22(1) of the Arbitration Act 1950.
100. *Ibid.* s. 23(2).
101. Arbitration Act 1979, s. 3(6)-(7).
102. *Ibid.* s. 3(6).
103. *Ibid.* s. 1(3)(b).
104. *Ibid.* s. 1(5)(b).
105. *Ibid.* s. 2(1)(a).
106. *Ibid.* ss. 1(3)(a), 1(5)(a) and 2(1)(b) are unaffected by exclusion agreements.
107. The validity of the exclusion agreement will depend on whether the contract is "domestic" or "non-domestic": 1979 Act, s. 3(6).
108. *Ibid.* s. 3(3).
109. Arbitration Act 1950, s. 24(2).
110. On inter-party fraud, see R. Gibson-Jarvie and G.Hawker, *Guide to Commercial Arbitration Under the 1979 Act* (1980), pp. 28-29.
111. S. 23 of the Arbitration Act 1950 covers arbitrator "misconduct".
112. Arbitration Act 1950, s.22.

revoking the authority of the arbitrator.[113] The Act expressly limits the right to oust the court's jurisdiction except with respect to the three enumerated powers of answering interlocutory questions of law, hearing appeals and requiring reasoned awards.[114] Thus, English judges might exercise their former interventionist habits by breathing new life into residual powers under the 1950 Arbitration Act. The context of the prevailing judicial attitude may therefore be more important than the text of the statute.

Exclusion agreements are intended for what Lord Diplock referred to with the neologism "one-off" contract: an agreement negotiated on an *ad hoc* basis for one transaction only.[115] The "one-off" contract presumably is negotiated at arm's length by parties with relatively equal bargaining power, making it unnecessary to provide a non-waivable right of judicial review to protect the weak or unsophisticated against unconscionable demands for relinquishment of their legal rights.

An international arbitration agreement is defined in the negative as one that is not "domestic". A "domestic" agreement is also defined in negative terms as an agreement to which neither

(a) an individual who is a national of, or habitually resident in, any State other than the United Kingdom, nor
(b) a body corporate which is incorporated in, or whose central management and control is exercised in, any State other than the United Kingdom,

is a party at the time the arbitration agreement is entered into.[116]

An arbitration is thus non-domestic if at least one of the parties (or the *situs* of the proceedings) is foreign. An arbitration agreement, however, might be domestic even if the contract is governed by foreign law.

Compared with the French concept of an international arbitration, the English definition of a non-domestic agreement appears somewhat mechanical. The scope of English inquiry is limited to the parties' residence and nationality. The more nuanced Gallic approach, however, considers the economic character of the entire controverted transaction. The 1981 French Arbitration Decree[117] defines an international arbitration as one that

113. *Ibid.* s. 23. On the way that English judges deal with arbitrator prejudice, see Shenton, "Arbitral Impartiality: The Attitude of the English Courts" (1980) 8 *Int. Bus. Lawyer* 76.

114. Arbitration Act 1979, s. 3(4).

115. See the Lord Chancellor's statements in 397 Parl. Deb., *supra* n. 1, at cols, 438-39; Commercial Court Committee Report, *supra* n. 1, at p. 7. The term "one-off" was used by Lord Diplock in the Alexander Lecture, *supra* n. 1, at p. 112, to refer to an agreement negotiated *ad hoc*, as opposed to a standard form agreement.

116. Arbitration Act 1979, *supra* n. 1, s. 3(7).

117. Decree No. 81-500, May 12, 1981, published in *Journal Officiel de la République Francaise*, May 14, 1981, at p. 1406.

"implicates international commercial interests",[118] leaving it to the courts to decide what this means.[119] The American notion of an international arbitral agreement or award falls somewhere between the French and English concepts.[120] The American statute implementing the 1958 New York Convention excludes from the Convention's coverage an agreement or award arising out of a relationship entirely between American citizens, but the statute includes within its scope commercial relationships between American citizens if the contract involves foreign property, requires performance abroad, or has a reasonable relationship with a foreign country.

In domestic disputes,[121] an exclusion agreement may be entered into only after the arbitration has begun.[122] Although the Act applies only to arbitrations taking place in England and Wales,[123] the concept of a "domestic" agreement includes one entered into by a Scots and/or a Northern Irish party.[124] Reluctance to permit "ouster" of the judiciary's supervisory jurisdiction in domestic disputes apparently arose from a desire to protect the British from other British who might try to use heavy negotiating techniques, or refusals to deal, in order to impose exclusion clauses.[125]

Pre-dispute exclusion agreements are void as to the so-called "special category" contracts identified by the Commercial Court Committee in the areas of shipping,[126] insurance,[127] and commodities.[128] Special category international contracts may include pre-dispute exclusion agreements only if governed by foreign law,[129] which is normally considered to be a matter of fact anyway[130] and thus not subject to judicial review. This concept of a "foreign" agreement relates to the proper law of the contract rather than to the parties' residence or nationality.

118. *Nouveau Code de Procédure Civile*, Art. 1492.

119. The concept of international arbitration that evolved in French case law prior to the 1981 Decree includes considerations such as execution and performance of the contract and the residence and nationality of the parties. See Delaume, "What is an International Contract? An American and Gallic Dilemma" (1979) 28 *I.C.L.Q.* 258.

120. 9 U.S.C. s. 202.

121. Arbitration Act 1979, s. 3(7).

122. *Ibid.* s. 3(6).

123. *Ibid.* s. 8(4).

124. *Ibid.* s. 3(7).

125. See e.g. Lord Diplock's statement in 397 Parl. Deb., *supra* n. 1, at col. 450; Commercial Court Committee Report, *supra* n. 1, at p. 112. A party with limited bargaining power might be compelled to renounce protection of the courts under the duress of losing business.

126. Arbitration Act 1979, s. 4(1)(a).

127. *Ibid.* s. 4(1)(b).

128. *Ibid.* s. 4(1)(c).

129. *Ibid.* s. 4(1)(ii).

130. See Dicey and Morris, *Conflict of Laws* (9th edn. 1973), pp. 1124-33. S. 4(1)(ii) of the 1979 Act thus seems merely cosmetic, perhaps the result of a fear that outsiders would not understand English law.

In an opinion rendered in the first case to reach the House of Lords under the 1979 Act,[131] Lord Diplock stated that prohibition on pre-dispute exclusion of judicial review of special category disputes was intended to encourage the fertilisation of English law by the commerical community through judicially reviewable arbitrations. In his words, it was:[132]

> to facilitate the continued performance by the courts of their useful function of preserving, in the light of changes in technology and commercial practices adopted in various trades, the comprehensiveness and certainty of English law as to the legal obligations assumed by parties to commercial contracts of the classes listed, particularly those expressed in standard terms. . . .

The Act is silent on incorporation of exclusion agreements by reference to institutional arbitration rules. Thus the effect of reference to the International Chamber of Commerce Arbitration Rules is problematic. Article 24(2) provides:

> By submitting the dispute to arbitration by the International Chamber of Commerce, the parties shall be deemed to have undertaken to carry out the resulting award without delay and to have waived their right to any form of appeal insofar as such waiver can validly be made.

The intent is clear, but the language does not fit neatly into the terms of section 3 of the Act. The London Court of Arbitration suggests in the preface to its International Arbitration Rules that parties wishing to exclude judicial review should explicitly "agree to exclude any right of application or appeal to the English courts in connexion with any question of law arising in the course of the arbitration or with respect to any award made".

The benefits of English *lex loci arbitri* include the power of the High Court to compel obedience to interlocutory orders, as well as to empower arbitrators so to do. This assistance may not be abrogated by an exclusion agreement. The High Court or the arbitrator may order the examination of witnesses, enforce discovery of documents, or extend the time for filing a claim.[133]

Finally, it should be noted that the Act would not affect arbitration conducted by the World Bank's International Center for the Settlement of Investment Disputes (ICSID). The ICSID Convention itself excludes

131. *Pioneer Shipping* v. *B.T.P. Tioxide ("The Nema")* [1981] 3 W.L.R. 289.

132. *Ibid.* at p. 302.

133. See Arbitration Act 1979, s. 5; Arbitration Act 1950, ss. 12 and 13. For a recent example, see *Consolidated Investment and Contracting Co.* v. *Saponaria The Virgo Shipping Co.* [1978] 3 All E.R. 988 (C.A.). Cargo owners "soothed into inactivity" by shipowner's insurers were allowed an extension of time to bring the arbitration.

judicial review,[134] as does the treaty establishing the Hague tribunal for the settlement of US-Iranian claims.[135]

D. Judicial Attitudes toward Arbitral Autonomy

THE text of the 1979 statute may be less important than the context of its application. Old habits die hard. In one recent case, for example, Lord Denning argued that an award should be remitted to an arbitrator who had not understood that "the strict rules of the common law courts [concerning interest on late demurrage] . . . do not govern the practice of arbitrators".[136] The contradiction startles: a local judge tries to intervene in the arbitral process to ensure its detachment from local procedure.

Two recent decisions of the House of Lords, however, indicate a developing judicial respect for arbitral autonomy. In the first case, *Bremer Vulkan* v. *South India Shipping,*[137] a dispute arose over several vessels built by a German shipyard for an Indian shipowner. The 1979 Act did not apply in *Bremer Vulkan,* since the arbitration had been commenced prior to August 1, 1979—the effective date of the Act. Nevertheless, the approach of the House of Lords in *Bremer Vulkan* comports with the *laissez-faire* spirit of the Act, in that a lower court was instructed not to interfere with an arbitration.

West German law was applicable to the merits of the controversy, but the parties submitted the dispute, concerning alleged defects in the vessels' construction, to a London arbitrator. For a five-year period after the arbitrator's appointment in 1972, neither the arbitrator nor the parties did very much. The German shipyard finally requested—and was granted—an injunction against further arbitral proceedings, on the ground that the Indian shipowner's dilatory conduct had made it impossible to marshal evidence for a proper hearing. In affirming the injunction, the Court of Appeal construed the arbitration agreement to contain an implied covenant

134. Convention on the Settlement of Investment Disputes between States and Nationals of Other States (575 U.N.T.S. 159), Arts. 53 (finality of award) and 54 (contracting States to enforce award as if a judgment of domestic court). The Arbitration (International Investment Disputes) Act 1966 provides explicitly that the Arbitration Act of 1950 does not apply (with two exceptions) to ICSID arbitral proceedings. See s. 3(2) of the Arbitration Act 1966. On the ICSID Convention, see generally Delaume, "State Contracts and Transnational Arbitration" (1981) 75 *A.J.I.L.* 748.

135. Part II, Article IV(3) of the Agreement of Jan. 19, 1981. See generally Audit, "Les 'Accords' d'Alger du 19 janvier 1981 tendant au Règlement des Differends entre les Etats-Unis et l'Iran" (1981) 108 *Journal Droit International* 713.

136. *Tehno-Impex* v. *Gebr van Weelde Scheepvartkantoor* [1981] 2 All E.R. 669, at p. 679; Lord Denning's view was a dissent.

137. [1981] 1 All E.R. 289 (H.L.).

to proceed with dispatch, and deemed the High Court to have inherent power to restrain arbitration where a claimant's delay was such as would have allowed dismissal of an action at law for "want of prosecution".[138]

In a three-to-two decision, the House of Lords held that a party's delay was a matter to be dealt with by the arbitrator, not a judge. Accordingly, the High Court was held to lack authority to restrain the proceedings. The irony of the decision is that arbitral autonomy was protected in an instance in which the High Court was attempting to prevent the parties from dragging their feet, one of the most common complaints voiced about international commercial arbitration.

In his opinion for the majority, Lord Diplock was careful to distinguish the High Court's limited powers in a private consensual arbitration from its possibly more extensive powers in reviewing arbitration conducted pursuant to statute.[139] This distinction is significant because of the predisposition of English judges to intervene in statutory arbitral proceedings under the guise of correcting excess of authority even as against express parliamentary prohibition of judicial review.[140] The Rt. Hon. Sir John Donaldson, former chairman of the Commercial Court Committee, has also emphasised the less extensive judicial power to review consensual as opposed to statutory arbitrations.[141]

The Nema, the first case under the 1979 Act to reach the House of Lords,[142] involved a cargo vessel that had been chartered for seven voyages to haul titanium slag from Canada to Europe. Strikes in Quebec prevented loading after the first trip, and the shipowner asked to cancel the charter and to take possession of the vessel. The parties appointed the arbitrator in mid-August 1979, only a couple of weeks after the Act's effective date. Agreeing with the owner, the arbitrator found that the charterparty and its several addenda had been "frustrated"; the dissatisfied charterer then appealed under the new review procedure. The High Court found the charterparty was not frustrated and ordered the *Nema* to return to Canada to pick up another load of titanium slag. The matter then went to the Court of Appeal and the House of Lords, both of which held that the arbitrator's

138. [1980] 1 All E.R. 420 (C.A.).

139. [1981] 1 All E.R. 289, at pp. 295-96. See also *Paal Wilson & Co. A/S* v. *Partenreederei Hannah Blumenthal, The Hannah Blumenthal* [1983] 1 All E.R. 34, in which the House of Lords unanimously affirmed its decision in *Bremer Vulkan.*

140. See discussion of the *Anisminic* and *Harrow School* cases *infra* text accompanying nn. 159-65.

141. Address by Sir John Donaldson entitled "Judicial Review of Awards", delivered at the conference "Forum London", Sept. 23, 1981.

142. *Pioneer Shipping* v. *B.T.P. Tioxide ("The Nema")* [1981] 3 W.L.R. 392. The guidelines for granting leave to appeal, set forth by Lord Diplock in *The Nema* case have been considered recently in *Italmare Shipping* v. *Ocean Tanker* [1982] 1 W.L.R. 158 and *BVS* v. *Kerman Shipping* [1982] 1 W.L.R. 166.

conclusion about the frustration of the contract should have been accepted—even though, as Lord Denning put it, "in strict law the *Nema* should have waited (in Quebec)—queuing up there— until the strike ended".[143] According to Lord Denning, the arbitrator's decision should be disturbed only if it is one "such that no reasonable arbitrator could reach", or if the arbitrator "misdirected himself in law".[144] The latter criterion implies that the arbitrator looked to the wrong legal standard, not merely that he misapplied appropriate principles.

Lord Diplock examined the 1979 Act's legislative history, in particular its preoccupation with London's attractiveness as a *situs* for the resolution of disputes arising from the "one-off" contract.[145] He stressed the parliamentary intent to accord *Laissez-faire* treatment to "one-off" contracts, and said that review should be granted only when it appears "upon a mere perusal of the reasoned award itself without the benefit of adversarial argument that the meaning ascribed to the clause to be construed by the arbitrator is obviously wrong . . . that there was (not) more than one possible view as to [its] meaning".[146] Lord Diplock further remarked: ". . . to exemplify what is meant by the convenient neologism 'a one-off case' it would be hard to find a better exemplar [than the *Nema* case]."[147] Surprisingly, the charterparty of the *Nema* was on a standard form. The clause to be construed was "one-off", however, because it was negotiated to amend a contract for a single voyage to accommodate seven.[148]

The statute circumscribes the High Court's discretion to grant leave to appeal from an arbitrator's award to questions of law that "could substantially affect the rights of one or more of the parties" to the arbitration.[149] According to Lord Denning, this means it must be a "point of practical importance—not an academic point".[150] Lord Denning did not say how judges should distinguish "practical" from "academic" legal issues—if such can be done. Presumably, this would require a *de minimus* amount to be set, depending on the controversy. For example, £1000 might be "substantial" in a small arbitration but not in a large one.

143. [1980] Q.B. 547; [1980] 3 W.L.R. 326; [1980] 3 All E.R. 117.
144. [1980] 3 W.L.R. 326, at p. 337.
145. See Alexander Lecture, *supra* n. 1.
146. [1981] 3 W.L.R.292, at p. 303.
147. *Ibid.* at p. 297. Earlier in his opinion Lord Diplock had said: "If ever there were a case which . . . ought never to have been allowed to get any further than the arbitrator's award, this was one": *Ibid.* at p. 295.
148. See opinion by Lord Roskill, *ibid.* at pp. 305-06.
149. Arbitration Act 1979, s. 1(4).
150. [1980] W.L.R. 326, at p. 335.

E. Excess of Authority

THE distinction between the judge who corrects fundamental procedural unfairness, and the judge who imposes his own conclusions on the merits of the dispute, stubbornly resists intellectually satisfactory articulation. As mentioned above, the 1979 Act did not repeal the High Court's statutory powers to remit awards for reconsideration by the arbitrator and to set aside an award for arbitrator "misconduct".[151] According to the Commercial Court Committee, the term "misconduct" covers "procedural errors and omissions by arbitrators who are doing their best to uphold the highest standards of their profession".[152]

One type of "misconduct" that may be significant is the rendering of an award in excess of the arbitrator's authority. Commercial arbitration is a consensual process, and thus an arbitrator has only the power granted him by the parties.[153] An award that exceeds the arbitrator's authority may be no different from one rendered in the absence of a valid arbitration agreement as to the controverted issue. Two merchants may agree that an arbitrator will settle disputes arising out of the sale of apples; but they have not thereby accepted arbitration for a later contract to sell walnuts. If the arbitration agreement vaguely refers to sales of "fruit", however, the scope of the arbitral mission will depend on whether "fruit" includes only apples, or whether the word is used with its botanical meaning to include the contents of any seed plant's developed ovary, including walnuts. Judges in other countries have had to struggle with the thin line between error of law and excess of authority.[154] English courts prior to 1979 paid less attention to this difficult issue in the context of commercial arbitration, since all questions of law could be reviewed by the special case procedure.

Lord Denning has stated: "Whenever a tribunal goes wrong in law, it goes outside the jurisdiction conferred on it and its decision is void . . ."[155] Thus the future of commercial arbitration in England may depend on how English judges face the elusive distinction between an error of law, which may be removed from judicial scrutiny, and arbitrator excess of authority, which presumably may not be removed from review. To illustrate, assume that a licence provides for payment of royalties on the first of the year in default of which the licensor may cancel the licence, and that the licence is

151. Arbitration Act 1950, s. 22 and s. 23 respectively.
152. Commercial Court Committee Report, *supra* n. 1, at p. 17 (para. 67).
153. For a general discussion of excess of authority, see W. Reisman, *Nullity and Revision* (1971).
154. See Park, *op. cit. supra* n. 1, at p. 101.
155. Denning, *The Discipline of the Law* (1979), at p. 74.

in fact cancelled for late payment. Assume further that the cancellation gives rise to an arbitration, and the licensor is found liable for wrongful termination of the licence. If no justification for late royalty payment exists under the applicable law, the arbitrator has interpreted the contract erroneously. It is equally arguable, however, that the arbitrator has done something more: he has modified the contract's payment date. Unless this power to modify the contract was given to the arbitrator by the submission agreement,[156] he has acted improperly. It remains to be seen whether High Court judges would use the power to remit an award[157] or the catch-all prohibition of arbitrator "misconduct"[158] to review such an award for arbitrator excess of authority.[159]

Two cases may illustrate a reasoning by which English judges might ignore exclusion agreements, as they have ignored unequivocal parliamentary prohibitions on review of statutory arbitration and lower court decision. These so-called "ouster clauses" were vitiated by the Court's view that error of law constituted excess of authority.

One ouster clause received short shrift from the House of Lords in *Anisminic Ltd* v. *Foreign Compensation Commission,*[160] a case dealing with a compensation claim for manganese mines lost during the 1956 Suez crisis. Proof that the claimant and any successors in title were British nationals was a prerequisite for compensation. The Foreign Compensation Commission returned a negative finding on this point. The relevant statute had declared: "The determination by the [Foreign Compensation] Commission of any application made to them . . . shall not be called in question in any court of law."[161] Despite this clear statutory prohibition on judicial review of the Commission's decisions, the House of Lords reversed the Commission. Lord Pearce declared the Commission's decision a nullity, saying: "[W]hile engaged on a proper enquiry, the tribunal . . . may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction [and] would cause its purported decision to be a nullity."[162]

In the case of *Pearlman* v. *Keepers and Governors of Harrow School,*[163]

156. For example, the arbitrator may have been given the power of *amiable composition* discussed at *supra* n. 30.

157. Arbitration Act 1950, s. 22.

158. *Ibid.* s. 23.

159. In this part of the article, excess of arbitral "authority" and excess of arbitral "mission" are used interchangeably.

160. [1969] 2 A.C. 147.

161. Foreign Compensation Act 1950, s. 4(4), cited in the *Anisminic case* [1969] 2 A.C. 147, at p. 224.

162. [1969] 2 A.C.147, at p. 195.

163. [1978] 3 W.L.R. 736 (C.A.).

Lord Denning refused to give effect to another ouster clause: "[N]o judgment [of the county court] shall be removed by appeal, motion, certiorari or otherwise into any other court whatever . . ."[164] A tenant (Mr. Pearlman) sought the right to purchase his house under the Leasehold Reform Act of 1967. The right to purchase existed only for dwellings with a taxable value falling below a statutory ceiling, which could be increased to take into account "structural alterations" made by the tenant. Mr. Pearlman claimed that a new central heating system was just such a "structural alteration", and thus raised the value ceiling. The county court determined it was not. The Court of Appeal reversed, holding that the erroneous determination about the heating system was also an error as to the lower court's jurisdiction. Lord Denning gave the following explanation:[165]

> [T]he distinction between an error which entails absence of jurisdiction—and an error made within the jurisdiction—is very fine. So fine indeed that it is rapidly being eroded . . . By holding that [the heating system] was not a structural alteration . . . or addition [the judge] deprived himself of jurisdiction to determine [other] matters.

These two cases must be considered with great caution, since they dealt with the review of statutory arbitration and lower court decisions which admittedly rest on a different foundation than review of private consensual dispute resolution. Lord Diplock[166] and Sir John Donaldson[167] have both made this point forcefully. The *Anisminic* and *Harrow School* cases, however, show a judicial boldness relevant to review of commercial arbitration. Judges straining for the "right result" in a case may find a broad definition of excess of authority to be a convenient path. While arbitration lawyers can only welcome the comforting assurances of the English bench and bar that judicial prerogatives will not be abused, specific limits on judicial intervention may nevertheless be appropriate.

Limits on judicial review are most problematic with respect to the judge's role as interpreter of the limits of the arbitral mission. *Quis custodiet ipsos custodies?* One French case has drawn the line between error of law and excess of authority by reference to the arbitrator's intent. Only an intentional disregard of an arbitrator's mission is considered a reviewable excess of authority. In *Agence de Diffusion et de Publicité* v. *Société*

164. County Courts Act 1959, s. 107, cited in the *Harrow School case* [1978] 3 W.L.R. 736 (C.A.).

165. [1978] 3 W.L.R. 736, at pp. 743-44.

166. *See* Lord Diplock's opinion in *Bremer Vulkan* v. *South India Shipping* [1981] 1 All E.R. 289, at pp. 295-96.

167. Address by Sir John Donaldson entitled "Judicial Review of Awards: Finality v. Legality" delivered as part of conference, "Forum London", Sept. 23, 1981. For a commentary on the conference, see Shenton, "Forum London" (1982) 10 *Int. Bus. Law* 59.

Coopérative d'Etudes et de Librairie, an advertising agency sued a publisher whose advertising it had managed.[168] The arbitrator awarded damages (*"indemnité de clientèle)* according to trade practice rather than law. The court held that by intentionally ignoring the law, in favour of custom, the arbitrator had arrogated to himself the powers of *amiable compositeur*, to decide according to his concept of fairness rather than the law. Since the powers of *amiable compositeur* had not been granted by the parties, the arbitrator acted outside the scope of the submission agreement, rendering the award void.

III. CONCLUSION

"THE test of a first-rate intelligence," wrote the American novelist F. Scott Fitzgerald, "is the ability to hold two opposed ideas in the mind at the same time, and still retain the ability to function."[169] Elaboration of an appropriate standard of interaction between judge and arbitrator requires a similar capacity to accept seemingly inconsistent principles: the law must be applied correctly; yet adjudication must be binding. The commercial community's need for finality in private dispute resolution competes with the desirability of uniform application of law.

Wisdom dictates that the State of arbitration exercise some control over the integrity of the proceedings and the interests of third parties. *Prima facie* validity is accorded foreign arbitral awards under the 1958 New York Arbitration Convention. Fairness requires that a procedurally defective arbitration be susceptible to being annulled at the place where rendered. The loser should not be forced to litigate issues such as arbitrator corruption in all States where it has assets. Nor should an award benefit from the presumptive validity accorded by the New York Convention when there exists a fundamental disaccord between how the arbitrator decided and how the parties to the dispute authorised him to decide. Control by the *lex loci arbitri*, however, should be limited to ensuring respect for traditional standards of fairness, the limits of the arbitral mission and the rights of third parties.

English arbitration law still leaves the High Court with powers wide enough to justify almost any intervention in the arbitral process, despite an

168. *Cour de Paris (1ère Chambre Supplémentaire)* Feb. 4, 1966, reprinted in [1966] *Revue de l'Arbitrage* 27. See Mezger, "La Distinction entre l'Arbitre dispensé d'observer la Règle de Loi et l'Arbitre statuant sans Appel", in *Liber Amicorum for Martin Domke, supra* n. 6, p. 184.

169. Fitzgerald, *The Crack-Up* (1936), reprinted with other short stories in 1977 (Penguin) at p. 39.

"exclusion agreement". There are no specific guidelines for the circumstances justifying exercise of these powers. The arbitrator is left between the Scylla of ill-defined autonomy and the Charybdis of unknown judicial supervison. There is much to commend replacing the High Court's power to set aside awards on the vague ground of arbitrator "misconduct" with challenges of awards for enumerated procedural deficiencies.[170] Admittedly, rules flexible enough to be useful may not deter an aggressive judge straining to impose his view of the "right result" in a controversy. Nevertheless, guidelines would provide arbitration lawyers with a welcome measure of predictability as to the grounds for remitting and annulling awards.

170. Similar grounds for challenge of awards are now contained in the law of France (Art. 1502 and 1504, *Nouveau Code de Procédure Civile)* and the United States (s. 10 of the US Arbitration Act, 9 U.S.C.A s. 10).