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Toward a More Mature System of International Commercial Arbitration: The Establishment of Uniform Rules of Procedure and the Elimination of the Conflict of Laws Question

by Arden C. McClelland*

I. Introduction

The increased use of arbitration provisions in transnational commercial contracts has begun to produce a significant increase in arbitration cases pending world-wide. As acceptance of the arbitration system has grown and been acknowledged at the international level by governments and their court systems, many practitioners in international law are nonetheless aware of the fact that the system is still in its infancy despite the proliferation of its use.

The problem with the system is that it does not produce the predictable results that good business lawyers would like to have available for their clients. There are a number of reasons for this, some related to the infancy of the system and others related to the inherent problems caused by language barriers and national parochialism. Clearly, the growing pains caused by the recent popularity of the system will be stimuli for creative remedial steps at the national and international levels. This article focuses on an international approach to modernizing arbitration procedure and suggests changes at that level to make the arbitration system more successful for both clients and the international community as a whole.

II. The Basic Problem

The purported advantages of employing arbitration to resolve disputes arising out of contracts involving international commercial transactions make its use highly desirable. Arbitration can be relatively quick and inexpensive, and it offers the parties an opportunity to choose or develop a procedure to resolve disputes that uniquely fits their needs. At

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the international level it also offers the contracting parties of different nationalities the advantage of avoiding litigation in national courts of the opposing party.

Although such advantages make arbitration relatively desirable, certain disadvantages do exist. These drawbacks arise when local conflict of laws rules, procedures, or public policy doctrines preclude the parties from arbitrating the dispute in a manner which provides a fair hearing on the merits pursuant to the parties' choices. Examples of these problems are all too common.

One instance presenting such potential problems occurred in a dispute between an English and a German firm.¹ The arbitrator was appointed by an international body according to the agreements between the parties. The arbitrator, a Swiss national, ordered the arbitration to take place in Switzerland, a power he had under the parties' agreement. The dispute between the parties could have been resolved by English municipal law under both English and German private international law; only German law, however, would apply under the rules of Swiss private international law.

It has been suggested that the better rule in such a case is that the arbitrator should follow the law held in common by the only two legal systems of which the parties could have been aware at the time of making their agreement.² This solution, however, presents difficulties. Suppose that the English party, in order to have English substantive law applied, requested an English court to order the arbitrator to state the question of law for the court's decision.³ If the court took jurisdiction⁴ and ordered the arbitrator to state the question, and the arbitrator refused to do so, there would be grounds for finding the award invalid in English courts. There would be no such grounds in German courts since they are not subject to the case stated system of England.

Other examples which are as confusing and difficult to resolve occur frequently, and it takes little imagination to see why. Commercial transactions crossing national borders are subject to various systems of legal

¹ See Cohn, *The Rules of Arbitration of the International Chamber of Commerce*, 14 INT'L & COMP. L.Q. 132, 162 (1965).

² *Id.*

³ Section 21 of the English Arbitration Act, 14 Geo. 6, c.27 (1956), provides:

1) An arbitrator or umpire may, and shall if so directed by the High Court, state:

- a) any question of law arising in the course of the reference; or
- b) an award or any part of an award, in the form of a special case for the decision of the High Court.

⁴ See *International Tank and Pipe S.A.K. v. Kuwait Aviation Fueling Co. K.S.C.*, [1975] 1 Q.B. 224, in which the court, taking jurisdiction of a dispute between two foreign firms that had stipulated to English law governing their contract, ordered an extension of time for arbitration to occur by virtue of the authority given the court under section 27 of the English Arbitration Act, even though settlement negotiations were still going on and arbitration had not begun. The case is thoughtfully analyzed in Smedresman, *Conflict of Laws in International Commercial Arbitrations: A Survey of Recent Developments*, 7 CAL. W. INT'L L.J. 263, 270-74 (1977).

procedures, rules and policies that are often very different in effect and which can be riddled with vagaries of local practice.

As a result, the lawyer practicing in international commerce is faced with an almost impossible task when attempting to draft an arbitration clause which will be most protective of his or her client's interests. Despite decades of significant improvements in the effectiveness of the legal machinery of transnational commercial transactions, counsel's best efforts may still not anticipate all the potential legal problems. The problems that remain are due largely to the failure of the international community to face up completely to the realities of the international market and make adjustments in policy obviously necessary.

Of course, problems also arise when contracting parties give little thought to the details of their arbitration clause. They typically will add an arbitration clause at the last minute, with scant consideration given to the fact that disputes ultimately may arise and cause the arbitration clause to come into play. Problems may further arise when their arbitration agreement contains a choice of law clause designating the law of some neutral forum of which they are completely or substantially unknowledgeable.

Before discussing the changes that must be made, it will be valuable to analyze the areas of law that come into play in a typical arbitration case to determine where reform will be most useful. A better understanding of the character of international arbitration and its needs should emerge from such an analysis.

III. The Law Affecting The Arbitration Process

Even the best draftsmen of international trade contracts cannot avoid subsequent problems of interpretation. While many international commercial agreements are hundreds of pages long, questions relating to the parties' original intent and the performance thereof inevitably arise.⁵

The four basic areas of law affecting the process of arbitration are: procedural rules governing the actual arbitration; the "law of the proceedings" of the appropriate jurisdiction; the "proper law of the contract;" and applicable conflicts laws. Each is an area the practitioner must carefully consider in drafting the arbitration provisions in the underlying contract.

A. Procedural Rules

When a dispute reaches arbitration, some guidance must exist for

⁵ These questions may concern such matters as whether a carrier is liable for damages to goods or for delay in their delivery, whether an agent has gone beyond his authority, whether currency restrictions prevent the paying of an amount due under a contract, or whether a provision relieving the promisor of liability under certain conditions is valid. See Wilner, *Determining the Law of Performance in International Commercial Arbitration: A Comparative Study*, 19 RUTGERS L. REV. 646, 648 n.4 (1965) (citing G. CHESHIRE, PRIVATE INTERNATIONAL LAW 248, 249 (6th ed. 1961)).

carrying out the procedure. Arbitration may be conducted in a variety of ways, ranging from the strictly formal to the very flexible. Although not always technically qualifying as "laws," the procedural rules chosen by the parties or the arbitrators to govern the arbitration are of sufficient importance to warrant a subsequent overturning of the award in court if they are not followed.⁶

Procedural rules can govern many different matters. Among the more commonly treated are the arbitrator's general authority over the proceedings; service of process; procedures for the parties' presenting their cases, including whether they may do so with depositions instead of personal appearances by witnesses; the parties' rights of rebuttal and cross-examination; whether a particular jurisdiction's rules of evidence must apply or whether flexible rules of evidence may be used; determination of deadlines for submitting briefs and announcing the award; and the form the award should take.⁷ Arbitration associations, such as the International Chamber of Commerce (ICC) in Paris and the American Arbitration Association (AAA), are well-known sources of procedural rules.⁸ In addition, the United Nations Commission on International Trade Law (UNCITRAL) has promulgated arbitration procedural rules intentionally designed to be used by any organization.⁹ The United States Arbitration Act also provides for some arbitration procedures.¹⁰

All the rules of an arbitration association are seldom, if ever, mandatory on parties opting for the association's rules. In fact, the new rules of the ICC provide that that the association's rules may be supplemented by any rules chosen by the parties.¹¹ The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards has also given the parties' choice of procedural rules considerable importance.¹²

To the extent that the will of the parties in choosing procedural rules is honored by courts asked to enforce awards issued pursuant to arbitrations held under those rules, the international climate is well

⁶ Article V(1)(d) of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *done*, June 10, 1958, T.I.A.S. No. 6994, 330 U.N.T.S. 4739, provides that recognition and enforcement of an award may be refused if the "arbitral procedure was not in accordance with the agreement of the parties"

⁷ *See* Ehrenhaft, *Effective International Commercial Arbitration*, 9 LAW & POL'Y INT'L BUS. 1191, 1205 (1977).

⁸ *See* INTERNATIONAL CHAMBER OF COMMERCE, RULES OF CONCILIATION AND ARBITRATION (1975) [hereinafter cited as ICC RULES] and AMERICAN ARBITRATION ASS'N, COMMERCIAL ARBITRATION RULES (1977).

⁹ UNCITRAL Arbitration Rules, 31 U.N. GAOR, Supp. (No. 71), U.N. Doc. A/31/17 (1960).

¹⁰ U.S. Arbitration Act, 9 U.S.C. §§ 1-12, 201-08 (1976).

¹¹ Article 11 of the ICC RULES states:

The rules governing the proceedings before the arbitrator shall be those resulting from these Rules and, where these Rules are silent, any rules which the parties (or, failing them, the arbitrator) may settle, and whether or not reference is thereby made to a municipal procedural law to be applied to the arbitration.

¹² United Nations Convention, *supra* note 6, art. V(1)(d).

suited to successful arbitration. This is not always the case, however. The parties may agree, for instance, that arbitration shall be the exclusive method of resolving disputes which arise under a contract and that substantive rules of law and the rules of evidence shall not be strictly applied during the arbitration proceedings. If their arbitration unexpectedly becomes subject to the laws of England, which provides that English courts cannot be ousted of their jurisdiction to decide questions of law¹³ and that arbitrations shall be governed by the same rules of evidence as govern the courts,¹⁴ the intentions of the parties have been frustrated. Besides the lack of predictability in the ultimate use of the chosen procedural rules, there remains the absence of an integrated system of rules that can be routinely chosen with the confidence that all important aspects of the arbitration process will be adequately addressed. The ICC, AAA, and UNCITRAL rules all provide a starting point, but none completes the job.

The UNCITRAL rules, for instance, cover many areas in detail, such as notice of arbitration,¹⁵ appointment of arbitrators,¹⁶ statements of claim¹⁷ and defense,¹⁸ the use of experts,¹⁹ and the form and effect of the award.²⁰ However, the rules are painfully lacking in other areas. Nothing is said as to whether all witnesses must testify in person or whether affidavits and depositions are acceptable, whether cross-examination of witnesses shall be allowed as of right, whether any kind of pre-hearing discovery shall be allowed as of right,²¹ or what the order of presentation of the parties' cases at the hearing will be.

If arbitration is to be a truly efficient method of resolving parties' disputes, it must have a generally recognized procedural format that is conducive to such efficiency. Some may anticipate resistance to the establishment of the absolute right of cross-examination or to the employment of such "uniquely American" institutions as discovery, but the fact remains that some guidance is needed. However, in view of the general trends in international arbitration which have developed²² there is no reason to think that the international legal community would be adverse

¹³ Evans & Ellis, *International Commercial Arbitration: A Comparison of Legal Regimes*, 8 TEX. INT'L L.J. 17, 30 (1973) (citing I P. SANDERS, INTERNATIONAL COMMERCIAL ARBITRATION 67-69 (1958)).

¹⁴ See Cohn, *supra* note 1, at 153.

¹⁵ UNCITRAL Arbitration Rules, *supra* note 9, art. 3.

¹⁶ *Id.* arts. 6-8.

¹⁷ *Id.* art. 18.

¹⁸ *Id.* art. 19.

¹⁹ *Id.* art. 27.

²⁰ *Id.* art. 32.

²¹ *Id.* art. 24(2). This article provides:

The arbitral tribunal may, *if it considers it appropriate*, require a party to deliver to the tribunal and to the other party, within such a period of time as the arbitral tribunal shall decide, a summary of the documents and other evidence which that party intends to present in support of the facts in issue set out in his statement of claim or statement of defense. (Emphasis added).

²² See Section IV(B) *infra*.

to *some* kind of standardization of arbitral procedure, whether mandatory or only suggested. The use of a comprehensive procedure, upon which parties could justifiably rely in drafting arbitration clauses, could only help in effectuating parties' desires.

B. The Law of the Proceedings

The so-called "law of the proceedings" is the area that provides the greatest potential for effectuating or frustrating both the free will of the arbitrating parties and the goal of successful arbitration. It thus is the area that stands in most need of reform among international legal regimes. One scholar distinguishes the law of the proceedings from rules of procedure, which are "rules to guide the hearings," by defining it as: the system of law under which the arbitration is held and which determines which institutions and rules may not be disregarded, *i.e.*, the legal system of the country in which the award is considered domestic for purposes of obtaining a confirmation. . . . Thus the "law of the proceedings" is not necessarily that of the *place* where the arbitration took place. For purposes of enforcement of an award in a country where it clearly is not a domestic award, its validity under the law of the proceedings, although not under the legal system of the site of arbitration, may make such enforcement possible.²³

The purported scope of the law of the proceedings varies among the commentators.²⁴ The most useful view seems to be that it is the law which "should govern all aspects of procedure in arbitration, including the conduct of the arbitrator, and crucially, the extent of judicial supervision of the arbitration."²⁵

The importance of this view is that it provides a starting point for analyzing the fundamental question of whether the law of the proceedings has an "independent existence for conflicts purposes."²⁶ That this question causes significant problems in analysis makes it easily understandable that tremendous uncertainties are bound to exist with respect to the ultimate validity of an arbitral award in court. Full analysis of the question here is neither practical nor necessary,²⁷ but a summary of key points will be valuable.

First, that arbitrating parties are generally free to choose the law governing the proceedings does not seem to be well established. Because the law of the proceedings deals with such controversial issues as whether the arbitrator must give reasons for the award, whether the award must

²³ Wilner, *supra* note 5, at 648-49 n.6.

²⁴ See Smedresman, *supra* note 4, at 267-68 for a collection of different attitudes.

²⁵ *Id.* at 268.

²⁶ *Id.*

²⁷ See *id.* at 267-91 for an excellent discussion of the issues involved in isolating the law of the proceedings from the substantive law governing an arbitration agreement's underlying contract. It is apparent that few broad conclusions can be made, either as to how the law of the proceedings of a case ought to be determined, or as to whether the law of the proceedings ought to be part of the system of law of the same jurisdiction whose the substantive law controls the underlying contract.

be based upon substantive rules of law, and to what extent the result of the arbitration is subject to judicial review,²⁸ restrictions will exist in some legal systems as to how much freedom the parties have to control these issues. For instance, English courts cannot be ousted of jurisdiction to decide questions of law,²⁹ arbitration awards in France must be accompanied with statements of the reasons on which they were based,³⁰ and in Germany, arbitration agreements must be contained in separate documents when one of the parties is a "trader of minor status."³¹ Such laws could easily be significant obstacles to effective arbitration in view of the provision of the United Nations Convention allowing the refusal of recognition and enforcement of an arbitral award when the arbitration agreement "is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made"³²

Second, the law of the proceedings may not necessarily be the same as that of the jurisdiction in which the arbitration is held, although the latter may have been the expectation of the parties. In *International Tank and Pipe S.A.K. v. Kuwait Aviation Fuelling Co. K.S.C.*,³³ two Kuwaiti firms agreed that disputes arising between them would be handled first by an engineer, with the aggrieved party having the right to take the matter to arbitration. English law governed the contract. The party losing after an engineer's resolution of a subsequent dispute sought an extension of time to invoke arbitration while settlement negotiations were pending, and consequently petitioned an English court under section 27 of the English Arbitration Act³⁴ for the extension. The ICC rules, which the parties had agreed covered the arbitration, said that the law of procedure was to be either that chosen by the parties or "the rules of the law of the country where the arbitrator holds the proceedings."³⁵ The court of appeal viewed jurisdiction as properly exercised in the case, finding that section 27 was a "statutory term" of the contract, which thus ought to be governed by English law.³⁶

One thoughtful analysis of this case³⁷ found disturbing consequences in the court's viewing the issue as one of contract interpretation because this raises the possibility of judicial supervision over an arbitration even after it has begun in another country and under that country's legal system. One then wonders what the "conceptual use" of the "law

²⁸ See Wilner, *supra* note 5, at 649.

²⁹ See Evans & Ellis, *supra* note 13, at 30 (citing 1 SANDERS, at 67-69).

³⁰ See *id.* at 45 (citing 1 SANDERS, at 55).

³¹ See *id.* at 42 (citing 1 SANDERS, at 39).

³² United Nations Convention, *supra* note 6, art. V(1)(a).

³³ [1975] 1 Q.B. 224.

³⁴ See note 3 *supra*. Section 27 authorizes a court to extend a contractual time limit according to its discretion.

³⁵ ICC RULES art. 16 (1955). See note 11 *supra* for the current rules.

³⁶ [1975] 1 Q.B. at 233.

³⁷ Smedresman, *supra* note 4, at 270-73.

of the proceeding" is when more than one jurisdiction may properly supervise the same arbitration.³⁸

To answer this question, it must first be recognized that where a transaction has multiple foreign contacts and involves parties of different nationalities, litigation in several forums is inevitable. An arbitration agreement may be part of such a case, affecting only certain parties and issues. The task of the national courts under these circumstances is to define the proper scope of their jurisdiction to affect parties and proceedings beyond those [instances] where their jurisdiction is unquestioned. *This can be accomplished partly by due regard to contractual choice of forum and arbitration clauses which seek principally to contain the litigational sprawl* (emphasis added).³⁹

Because different courts may be involved at different stages, it may be difficult to envision strict application of the doctrine that only the law of the seat of the arbitration becomes the law of the proceedings.⁴⁰ Furthermore, "the location of the arbitration may be fortuitous as simply that place where the chosen arbitrator finds it most convenient to sit" ⁴¹ It seems clear, then, that "the search for the seat of the arbitration contributes little to a determination of the law of the proceedings in all but the relatively simple case."⁴²

A third point to keep in mind is that, on top of all these other complexities, the law of the proceedings may not be that of the same jurisdiction whose law governs the interpretation of the underlying contract. Such a situation was presented in *James Miller & Partners, Ltd. v. Whitworth Street Estates (Manchester) Ltd.*⁴³ A Scottish firm contracted with an English firm on an English form contract for construction work at the English firm's Scotland plant. A subsequent dispute was arbitrated in Scotland by a Scottish arbitrator under Scottish procedures. The English party invoked section 21 of the Arbitration Act⁴⁴ to order the arbitrator to state the award in the form of a special case for the court's decision on a point of law. A majority of the House of Lords found that English law should govern the merits of the dispute, thus upholding the right to have a case stated, even though the parties had chosen, through their conduct, Scottish procedural law.

With such uncertainties concerning the law that will eventually govern an arbitration, one wonders whether the parties can reasonably expect their plans for the conduct of arbitrations under a contract to be carried out. Hence, the purported advantages of arbitration over litigation—less cost and delay, more certainty in the law applied, greater choice in the language used in the proceedings, less publicity, more flex-

³⁸ *Id.* at 271.

³⁹ *Id.*

⁴⁰ *Id.* at 274.

⁴¹ *Id.* at 275.

⁴² *Id.*

⁴³ [1970] A.C. 583, *rev'g* [1969] 1 W.L.R. 337.

⁴⁴ *See* note 3 *supra*.

ibility in procedure⁴⁵—may be more theoretical than real. The most carefully drafted arbitration agreement, combined with some good luck, is often what is necessary to succeed in carrying out the parties' wishes for an arbitration that will fit their needs. Reform in the law governing arbitration proceedings seems to be long overdue, in order to guarantee more solidly the effectuation of the parties' plans and needs.

C. *The Proper Law of the Contract*

In the *James Miller* case discussed above,⁴⁶ the House of Lords acknowledged that the law governing the arbitration procedure could well be different from that governing the merits of the dispute arising under the contract, the "proper law of the contract."⁴⁷ In *International Tank*,⁴⁸ the possibility arose that, although English law governed the contract, the courts of other jurisdictions could supervise the arbitration at different stages of its proceedings. These cases indicate quite clearly the concept of the independence of the existence of the substantive law governing the interpretation of the contract.⁴⁹

The well-known "choice of law clause" in an arbitration agreement⁵⁰ is a common way for the parties to select the law that will govern disputes under their contract. They may choose the law of either of their native countries, or they may select a third state's law.⁵¹ However, this selection is often done with little regard for the consequences of the decision. "At the proverbial handshake concluding negotiations, problems are given the back of the hand,"⁵² and parties assume that in the event their disputes do go to arbitration, there will be no obstacle to the application of their choice of law.⁵³

⁴⁵ See Ehrenhaft, *supra* note 7, at 1191-95.

⁴⁶ See text accompanying notes 43-44 *supra*.

⁴⁷ [1970] A.C. at 587.

⁴⁸ [1975] 1 Q.B. 224.

⁴⁹ More difficult to conceptualize is the independent existence of the law of the proceedings, discussed in detail in Smedresman, *supra* note 4, 265-91.

⁵⁰ *E.g.*, "[A]ll disputes going to arbitration under this agreement shall be settled according to the laws of _____."

⁵¹ They may choose the third state's law to secure the benefit of a "neutral" system of law or to benefit from the better developed rules of a strong system. Cited in Wilner, *supra* note 5, at 669, Cohn, *The Objectivist Practice on the Proper Law of Contract*, 6 INT'L & COMP. L.Q. 373, 389 (1957).

⁵² Ehrenhaft, *supra* note 7, at 1191.

⁵³ In McClelland, *International Arbitration: A Practical Guide to the System for the Litigation of Transnational Commercial Disputes*, 17 VA. J. INT'L L. 729, the problem is said to originate in part from the habits of counsel:

Most arbitration clauses are drafted by commercial lawyers whose skills are in contract negotiation rather than litigation. As a result, the emphasis is generally on the enforceability of the contract rather than the effectiveness of the arbitration clause. A commercial lawyer may insert a standard "boiler plate" provision for arbitration in every contract he drafts, with some variations depending on the amount of negotiation demanded on this issue. Although the contract may be enforceable, all too often little thought is given by the practitioner to the utility of the elements of the arbitration agreement.

Id. at 739-40.

Parties sometimes think that making a choice of law is simpler than defining the arbitrator's authority in their agreement, but the consequences of their choice may prove to be far more complex than anticipated. The conflict of laws rules of the law chosen may require the application of another system's law, or the chosen system's law may be too foreign to be applied in the forum of the arbitration.⁵⁴ One writer cautions against using a choice of law clause at all because the chosen law, even if applicable, may require the observance of vague trade practices or set up arbitrary rules such as the number of days a buyer has to inspect goods to keep his right of rejection.⁵⁵ Choice of law clauses also may reduce the speed and efficiency of an arbitration, hence raising its costs as well as increasing the likelihood that the ensuing award will be set aside because the arbitrator erred in his or her interpretation of the chosen law.⁵⁶ Other difficulties include a choice of law that invalidates part or all of the contract or the making of inconsistent choices.⁵⁷

Of course, if sufficient expertise can acquaint the parties with all relevant aspects of the chosen forum's law, a choice of law clause governing procedural and substantive matters can avoid being subject to these problems. When that is the case, a choice of law clause provides just the kind of certainty and efficiency that is needed in international commerce. When such expertise is not available, other alternatives should be explored.

D. Conflicts Laws

The conflicts laws applied to an arbitration are tied up with the law of the proceedings and the substantive law of the contract inasmuch as they will determine which law of the proceedings and which substantive law will actually govern. Separate treatment is given conflicts laws here, however, to aid in the analysis of the whole picture of law affecting the arbitration.

In the United States, the Uniform Commercial Code allows the parties to choose the law of a state or nation that "bears a reasonable relation" to the transaction.⁵⁸ The Restatement (Second) of Conflict of Laws provides that in the absence of effective choice by the parties, "the rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties"⁵⁹ under certain stated principles.

English conflicts law has been analyzed as being concerned with the

⁵⁴ Ehrenhaft, *supra* note 7, at 1209-10.

⁵⁵ *Id.* at 1210.

⁵⁶ *Id.* at 1210-11.

⁵⁷ Comment, *Choice of Law for International Contracts: An American Critique*, 2 TEX. INT'L L. J. 227, 232-33 (1960).

⁵⁸ U.C.C. § 1-105(1) (1972).

⁵⁹ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(1) (1971).

“intention of the parties, ascertained objectively and judicially,”⁶⁰ as well as the points of contact between the contract and a system of objective substantive law.⁶¹ France has been said to follow something close to the English “objectivist” view, looking, in the absence of the express intention of the parties, at the nature of the agreement and the circumstances of the case.⁶²

A well-stated summary of the state of conflicts rules, at least in these three jurisdictions, concludes:

There seems to be little doubt that, in the United States and in England, despite an explicit choice of law by the parties, the conflicts rules of the forum . . . will determine the effect of the choice made. A close analysis of the French cases seems to reveal that a reference of some sort has been made to French law before the choice is given effect. *Thus, there seems no way to free the parties' choice of law from undergoing the scrutiny of the forum's conflicts rules.*

If the *conflicts* rules of the system of law chosen are applied, rather than its *substantive* law, the result will be just that uncertainty which the autonomy of wills theory attempts to resolve. If the parties mean that the choice of law is in fact the choice of a law of the proceedings, more than simply problems of performance will be involved. The underlying system of law will become that chosen by the parties.⁶³

The morass of uncertainty created by the conflicts rules affecting international commercial transactions seems almost inescapable under the status quo. All the analysis that the human species is capable of performing⁶⁴ seems inadequate to draft arbitration agreements invulnerable to this uncertainty. The fault, however, does not lie in the conflicts rules themselves. They serve a substantial purpose in the jurisdictions in which they were designed, and they no doubt developed in many cases with the careful attention of the best legal minds. The problem comes from their application to arbitration in the international market. National conflicts rules simply do not properly address themselves to international commerce, which depends for its development on an attitude of international cooperation, and which can only suffer from a strict upholding of parochial values. At this point then, an analysis of the proper nature of arbitration in transnational commercial transactions would be most useful.

⁶⁰ Wilner, *supra* note 5, at 664 (quoting Graveson, *The Proper Law of Commercial Contracts*, in CONFLICT OF LAWS AND INTERNATIONAL CONTRACTS 1 (Summer Institute on International and Comparative Law, U. of Mich. Law School 1949)).

⁶¹ Smedresman, *supra* note 4, at 296-97.

⁶² Wilner, *supra* note 5, at 666 (citing *Societe de Fourrures Revel v. Allouche*, Cour de Cassation, 6 juillet 1959, 48 REV. CRIT. DR. INT. PR. 708 (1959)).

⁶³ *Id.* at 674.

⁶⁴ Excellent work has been done in the field. See, e.g., *American Critique*, *supra* note 57; Ehrenhaft, *supra* note 7; Lando, *The Substantive Rules in the Conflict of Laws: Comparative Comments from the Law of Contracts*, 11 TEX. INT'L L.J. 505 (1976); Smedresman, *supra* note 4; Wilner, *supra* note 5.

IV. The Proper Nature of International Commercial Arbitration

A. *The United Nations Convention and the Public Policy Defense*

The United Nations Convention⁶⁵ is perhaps the most significant development in the international legal community in modernizing the law of international commercial transactions. Following two earlier international agreements dealing with the same subject,⁶⁶ the United Nations Convention provides for more certain and expedient recognition and enforcement of arbitral awards sought to be validated in the ratifying nations.⁶⁷

Article V of the Convention sets forth five conditions under which recognition and enforcement of the award may be refused upon proof of the conditions by the party against whom the award is invoked.⁶⁸ It also sets out two conditions under which recognition and enforcement may be refused by the enforcing authority under its own motion.⁶⁹ Criticisms have been leveled at various provisions in Article V, and these should be consulted for a fuller understanding of the article's "loopholes."⁷⁰ Discussion here is limited to the issues raised by the public policy defense contained in Article V(2)(b), because that provision and its interpretations provide a basis for more fully understanding the nature of the arbitration process in the international arena.

Article V(2)(b) provides that recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that "[t]he recognition or enforcement of the award would be contrary to the public policy of that country."⁷¹ Little debate occurred in the drafting of this provision, and a decision not to add the phrase "or with fundamental principles of the law" following the words "public policy" indicates that "public policy" was intended to have a broad meaning.⁷²

It was initially thought that the provision would be a significant

⁶⁵ See note 6 *supra*. For a varied treatment of the Convention see Achebe, *The United States Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958: Implications for United States Investors in Nigeria*, 9 TEX. INT'L L.J. 157 (1974); Comment, *United Nations Foreign Arbitral Awards Convention: United States Accession*, 2 CAL. W. INT'L L.J. 67 (1971); Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 YALE L.J. 1049 (1961).

⁶⁶ Geneva Protocol on Arbitration Clauses of Sept. 24, 1923, 27 L.N.T.S. 157; Geneva Convention of Sept. 26, 1927, on the Execution of Foreign Arbitral Awards, 92 L.N.T.S. 301.

⁶⁷ The weaknesses of the earlier agreements are discussed in Evans & Ellis, *supra* note 13, at 52-53.

⁶⁸ United Nations Convention, *supra* note 6, art. V(1)(a)-(e).

⁶⁹ *Id.* art. V(2)(a), (b).

⁷⁰ See, e.g., Smedresman, *supra* note 4, at 326-28, who states that art. V(1)(a) of the Convention "may lead to fortuitous results as well as encourage forum shopping" *Id.* at 327; Evans & Ellis, *supra* note 13, at 55, saying the Convention's "system is exposed to the vagaries of law among the states"

⁷¹ See Quigley, *supra* note 65, at 1070.

⁷² *Id.* at 1070-71.

obstacle to enforcement of arbitral awards,⁷³ but now it is generally agreed that the force of the provision has been considerably lessened due to a series of decisions in U.S. courts interpreting the extent of the public policy issue.⁷⁴ Regardless of what courts of the United States hold, however, the fact remains that countries which have not passed on the issue may interpret "public policy" as broadly as they may see fit to further their national interests. A better understanding of the scope of "public policy" of a nation in the context of international commercial transactions may dictate a more limiting definition of the Convention's public policy defense.

The leading case of *Scherk v. Alberto-Culver Co.*⁷⁵ is very useful in providing such an understanding. The respondent, a multinational U.S. firm, purchased three firms incorporated in Germany and Liechtenstein from the petitioner, a German national. Negotiations on the contract occurred in the United States, Germany, and England; the contract was signed in Austria; and Switzerland was the site of the closing. The agreement warranted that Scherk's trademarks were unencumbered. A shortage in the inventory of those trademarks was later discovered, but Scherk would not accept Alberto-Culver's offer to rescind the agreement. Alberto-Culver sought to avoid an agreement to arbitrate future disputes by alleging that the warranties concerning the trademarks violated the antifraud provisions of the 1934 Securities Exchange Act.⁷⁶

A previous case⁷⁷ had held that an agreement to arbitrate disputes under a contract to purchase securities is unenforceable under section 14⁷⁸ of the 1933 Securities Act, which was interpreted to void agreements precluding access to the federal courts. The United States Supreme Court found the earlier case inapplicable in *Scherk*, because the facts portrayed an international scenario which demanded different treatment. The Court noted that the contract was concerned with the sale of corporations "organized under the laws of and primarily situated in European countries, whose activities were largely, if not entirely, directed to European markets."⁷⁹ Furthermore, the Court said, "we cannot have trade and commerce in world markets and international waters exclusively on

⁷³ See Wilner, *supra* note 5, at 668. "The factor of public policy . . . is probably the strongest impediment to more widespread enforcement [of arbitral award]." *Id.* Even now, it is seen as "likely to be the battleground on which the conflict over party autonomy for procedural law will be waged." Smedresman, *supra* note 4, at 278.

⁷⁴ See Ehrenhaft, *supra* note 7, at 1199-1200; Comment, *The Public Policy Defense to Recognition and Enforcement of Foreign Arbitral Awards*, 7 CAL. W. INT'L L.J. 228 (1977); Note, *Judicial Interpretations of Foreign Arbitral Awards under the U.N. Convention*, 8 L. & POL'Y INT'L BUS. 737 (1976).

⁷⁵ 417 U.S. 506 (1974).

⁷⁶ Securities Exchange Act of 1934, § 10, 15 U.S.C. § 78j (1976); Rule 10b-5, 17 C.F.R. § 240.10b-5 (1979).

⁷⁷ *Wilko v. Swan*, 346 U.S. 427 (1953).

⁷⁸ Securities Act of 1933, § 14, 15 U.S.C. § 77n (1976).

⁷⁹ 417 U.S. at 515.

our terms, governed by our laws and resolved in our courts."⁸⁰ Thus, the public policy of taking domestic disputes under the securities laws to litigation was insufficiently strong in *Scherk* to require parties to go to court over similar disputes arising in international commerce.

The U.S. Court of Appeals for the Second Circuit followed this principle with strong language:

To read the public policy defense as a parochial device protective of national political interests would seriously undermine the Convention's utility. This provision was not meant to enshrine the vagaries of international politics under the rubric of "public policy." Rather, a circumscribed public policy doctrine was contemplated by the Convention's framers and every indication is that the United States, in acceding to the Convention, meant to subscribe to this supranational emphasis.⁸¹

The doctrine emerging from these cases indicates that principles of domestic policy and political practice ought not to interfere with the activity of international commerce. Indeed, this sphere of international commerce may have its own "public policy," the support of which may be in the best interests of the separate nations. It is perhaps for this reason that it has been suggested that arbitrators, because they are not required to effectuate the interests of any nation, are in a better position than national courts to determine which nation's public law ought to apply, and if not, then they ought to be free "to articulate notions of policy relevant to the practice of international trade and commerce"⁸²

Although this is an excellent suggestion, its attainment will be precluded as long as rigid laws concerning conflicts and arbitral procedure prevent contracting parties from choosing the governing substantive and procedural law, or from choosing to keep their arbitrations free from the strictures of domestic legal systems. The status quo probably will be perpetuated so long as a more progressive attitude toward international commercial arbitration is not reflected in the language of such agreements as the United Nations Convention.

Indeed, the basic characteristics of arbitration—its emphasis on voluntary choice, its potential of yielding relatively rapid and inexpensive resolution of disputes, and its flexibility to work under different procedures—demand that courts have a hands-off attitude toward the conduct of arbitrations when the parties have freely and clearly spoken as to how they want their arbitrations run. To a large extent, this attitude is prevalent. But, changes are nevertheless in order.

[T]he fact remains that the only way by which arbitration will be freed from the conflicts rules of the law of the proceedings is through interna-

⁸⁰ *Id.* at 519, (quoting *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1971)(upholding an agreement that the contracting parties would litigate their disputes in a foreign country having no connection with the underlying contract)).

⁸¹ *Parsons Whittimore Overseas Co. v. Societe Generale de l'Industrie du Papier*, 508 F.2d 969, 974 (2d Cir. 1974).

⁸² *Smedresman*, *supra* note 4, at 346.

tional agreements. Such agreements must, of course, limit the ability of the enforcing state to nullify the award The public policy knife of the place of enforcement must be dulled, if not removed altogether. This factor and others like it, inherent in national sovereignty, render ineffectual efforts to internationalize arbitration. The parties may submit to the rules of the I.C.C., but eventually the I.C.C. itself must deliver the arbitration to one of the existing systems of law whose rules will take control and which will thus become the law of the proceedings.⁸³

B. Toward an Internationally Accepted Law of Arbitration

Article V(1)(d) of the United Nations Convention embodies the principle of autonomy of wills when it allows a court to refuse to recognize and enforce an arbitral award if the procedure followed "was not in accordance with the agreement of the parties." In requesting that the Convention be held, the ICC⁸⁴ envisioned an award of an internationally accepted character—"one from the multiplicity of national formal and procedural requirements, and based entirely on the principle of autonomy of the wills of the parties."⁸⁵ It is clear from the foregoing that this character of international arbitral awards has not yet emerged, and there are those who would prefer that it never does.⁸⁶

One scholar has suggested that in practical terms, an arbitration law of international character has already begun to develop, one in which arbitrators avoid choice of law questions completely by relying on general principles of international commercial transactions, along with a perhaps unspoken reliance on trade usage and customs.⁸⁷ This creates no cause for alarm so long as decisions are carefully reasoned, in that the success of arbitration indicates that "arbitral panels have assumed the role of equity courts of international trade, dispensing a form of justice more closely attuned to the needs of businessmen than that which ordinary litigation is believed to supply."⁸⁸

Another writer suggests that wise parties will seek to have their arbitrators act in such a fashion. He suggests that they stipulate in their arbitration clause that arbitration of disputes arising from their contract

⁸³ Wilner, *supra* note 5, at 686-87 (footnote omitted).

⁸⁴ For a discussion of the background of the Convention, see Quigley, *supra* note 65, at 1059-60.

⁸⁵ Smedresman, *supra* note 4, at 275 (citing Carabiber, *Conditions of Development of International Commercial Arbitration*, INTERNATIONAL TRADE ARBITRATION 149, 155-56 (Domke ed. 1958)). See also Ehrenhaft, *supra* note 7, at 1219: "[o]ne of the primary objectives of the U.N. Arbitration Convention was to give arbitral awards an independent status in law, thereby removing many of the obstacles that previously had confounded parties seeking to enforce awards." (Footnotes omitted).

⁸⁶ See, e.g., Cohn, *supra* note 1, at 162.

⁸⁷ Smedresman, *supra* note 4, at 299. Cohn, *supra* note 1, at 162, disagrees with this notion: "[t]he arbitrators cannot determine the law which is applicable unless they make use of a legal system containing precise and specific rules on the choice of law problem. To refer them to the 'generally recognized rules of private international law' means giving them stones in lieu of bread."

⁸⁸ Smedresman, *supra* note 4, at 300.

will not be resolved by strict applications of substantive bodies of law.⁸⁹ One reason for doing this, in addition to the advantages of avoiding the pitfalls of conflict of laws rules, is that the contract itself is sufficient to resolve disputes. It normally sets out a substantive "law" to govern resolution of the dispute by detailing the rights and duties of the parties and telling what constitutes performance and what excuses nonperformance.⁹⁰

It may well be, as these writers suggest, that an equitable approach to resolution of disputes under arbitration is the better practice and is the practice that in fact is most often applied. The problem remains, however, that recourse to such an approach, or any other approach chosen by the parties for that matter, must be guaranteed support from the courts in order to be completely successful. This will not occur until the international community agrees to a stronger policy of recognition of arbitral awards.

Agreements and drafts on arbitration involving the international community are rather common. The United Nations Convention is one example. Others include the European Convention on International Commercial Arbitration of 1961,⁹¹ the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States,⁹² the 1964 Uniform Law on the International Sale of Goods,⁹³ and UNCITRAL's 1977 Draft Convention on the International Sale of Goods.⁹⁴ Another agreement completing the job begun by the United Nations Convention seems to be in order now. It is to this point that this analysis now turns.

V. A New International Legal Regime Concerning Arbitral Procedure And the Recognition And Enforcement of Foreign Arbitral Awards

A. Theory

Three theories of arbitration have been advanced: (1) that arbitration arises from private contract and thus is essentially a private proceeding that ought to be free from the strictures of external legal systems; (2) that arbitration is essentially a judicial proceeding subject to the legal rules of the place of the arbitration; and (3) that arbitration has characteristics of both the other theories, with only some of its elements being

⁸⁹ Ehrenhaft, *supra* note 7, at 1211-12.

⁹⁰ *Id.*

⁹¹ See Wilner, *supra* note 5, at 685-87.

⁹² March 18, 1965, [1966] 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 160.

⁹³ Convention Relating to a Uniform Law on the International Sale of Goods, *done* July 1, 1964, [1972] Gr. Brit. T.S. No. 74 (md. 5029), with Annex 1, Uniform Law on the International Sale of Goods, *reprinted in* 13 AM. J. COMP. L. 453 (1964).

⁹⁴ Report of the United Nations Commission on International Trade Law on the Work of Its Tenth Session (New York, 23 May - 17 June 1977), 32 U.N. GAOR, Supp. (No. 17) 42, U.N. Doc. A/32/17. See Comment, *United Nations Commission on International Trade Law: Will a Uniform Law in International Sales Finally Emerge?* 9 CAL. W. INT'L L. J. 157 (1979).

contractual.⁹⁵ The third theory is clearly the prevalent view and is the source of the problem discussed herein. It is all too often a difficult task to guarantee that certain elements of the arbitration will be treated as "contractual" by the courts. Because clear guidelines are not always available to tell contracting parties which aspects of future arbitrations are subject to legal strictures and which aspects are open to negotiation, some guesses have to be made. There is no reason that this situation has to continue.

With greater emphasis on the theory that arbitration is essentially a private process which follows an agreed-upon procedure to interpret the scope of the rights set out in an agreed-upon contract, international commercial arbitration has a much greater chance to live up to its full potential. Many nations have been reluctant during the development of international commercial arbitration to give contracting parties a completely free rein in the structuring of their arbitrations due to certain fears of loss of control over various types of conduct. The policy of preventing "judicial ouster" of jurisdiction has largely subsided,⁹⁶ but public policy concerns about litigating the complex issues involved in such matters as anti-trust and patent cases threaten the validity of arbitral awards rendered in arbitration touching on these matters.

*Hanes Corporation v. Millard*⁹⁷ is an interesting case in point, recently decided in the Court of Appeals for the District of Columbia Circuit. The French assignors of an expired U.S. patent invoked arbitration with the ICC to collect unpaid royalties due under the assignment contract from their assignee, Hanes Corporation. Hanes sought a declaratory judgment on two issues: that the patent did not cover the products for which royalties were sought, and that a U.S. statute of limitations barred the assignors' claims. The court of appeals reversed the district court by holding that the statute of limitations question was contractual in nature and, thus, subject to arbitration.

The court took a different view of the question involving the patent. It was reticent to allow an arbitration panel to pass on "complex and difficult questions in applying an extremely technical body of law. . . . [T]he expertise of arbitrators has always lain in resolving, perhaps by way of compromise, contractual disputes rather than in interpreting the import of complicated federal legislation."⁹⁸ One analysis of this case⁹⁹ compares it with the *Scherk*¹⁰⁰ case, discussed above, in that both cases dealt with the conflict between international arbitration and a U.S. pol-

⁹⁵ Sauser-Hall, *L'arbitrage endroit international privé*, 44 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 416, 469 (Vienna 1952), cited in Wilner, *supra* note 5, at 651.

⁹⁶ Courts in England still may not be ousted of jurisdiction to determine questions of law by arbitration. 1 SANDER, *supra* note 13, at 67-69, cited in Evans & Ellis, *supra* note 13, at 30.

⁹⁷ 531 F.2d 585 (D.C. Cir. 1976).

⁹⁸ *Id.* at 593.

⁹⁹ Smedresman, *supra* note 4, at 340-41.

¹⁰⁰ *Scherk v. Alberto-Culver Co.*, 417 U.S. 50 (1974). See text accompanying notes 75-80 *supra*.

icy of confining disputes involving federal legislation to U.S. courts:¹⁰¹

The claims in *Hanes* were primarily contractual ones incidentally involving the scope of the underlying patent. The court need not have been drawn into the case law involving arbitrability of patent validity; instead a *Scherk*-type analysis of the contracts that the dispute has with the jurisdictions involved would have been more appropriate. *Hanes* demonstrates how arbitrability restrictions permit United States parties to race into United States courts with pleadings which frame the case around nonarbitrable issues.¹⁰²

This discussion is extremely persuasive and makes it clear that, as in the case of the "ordinary" international commercial contract, the public policy defense should not prevail in cases of international commercial contracts involved issues of complex legislation. To be effective, then, an international legal system governing the effectuation of commercial arbitration need do little to restrict complete autonomy of wills.

B. Basic Structure

The best means of bringing about the reforms advocated here is an international convention subscribing to a law of the proceedings that the participating nations agree to apply to the recognition and enforcement of arbitrations involving a foreign national party. Parties should be free to choose a domestic law of the proceedings, but since parties often neglect to make a choice of law regarding either procedure or substance in an arbitration, this new law of the proceedings should apply when no specific choice is made. Furthermore, when no choice of substantive law is made, this new convention should specify that the resolution of the substantive issues be based on the contract language, the applicable usages and customs of trade, and what is equitable under the circumstances, including the accepted principles of international commercial transactions.¹⁰³ When a choice of substantive law is made, ratifying nations should be bound to honor the choice and be prevented from using their conflicts rules to cause another jurisdiction's law to govern.

Nations ratifying this convention should agree to enforce its provisions regardless of whether the parties to the arbitration are nationals of other ratifying nations; all that should be necessary is that the arbitration proceed "under" the new convention. This means that the parties, nationals of different countries, did not stipulate to a choice of procedural or substantive law, and the arbitration was held in a ratifying nation. Of course, the parties may stipulate specifically that the new law apply.

Such a convention should operate to give greater judicial support to the arbitration process than before. Arbitration agreements freely entered into ought to be specifically enforceable in all ratifying nations,¹⁰⁴

¹⁰¹ Smedresman, *supra* note 4, at 341.

¹⁰² *Id.*

¹⁰³ See Ehrenhaft, *supra* note 7, at 1211; Smedresman, *supra* note 4, at 300. See also text accompanying notes 84-90 *supra*.

¹⁰⁴ Under the United States Arbitration Act, *supra* note 10, § 4, aggrieved parties may

and principles of comity ought to require other nations, even if they have not ratified the convention, to recognize orders for specific enforcement issued elsewhere. The law ought to require the courts of ratifying nations to stay proceedings in their courts when the dispute is "referable to arbitration"¹⁰⁵ under an agreement between the parties. Judicial intervention during the arbitration proceedings to determine the scope of the arbitrator's power under the agreement or to determine the arbitrability of the issues is a potential problem, but with the enactment of the provisions proposed here, the risk of the harm of this problem outweighing the other benefits is minimal.

The core of this proposed convention is the automatic recognition and enforcement by ratifying nations, and, it is hoped, by others as well, of arbitral awards rendered in proceedings conducted pursuant to the convention. The only exception should be a narrowly defined public policy consideration, one limited to protecting the litigation of matters of extreme national interest that go far beyond matters merely contractual in nature.¹⁰⁶

C. *Procedural Rules*

The proposed convention should also require the courts of ratifying nations, upon petition, to order the carrying out of the elements of the agreed procedure, whether it consists solely of the rules of an arbitration association, a tailor-made procedure, or a combination of institutional and party-drafted rules. As discussed earlier, however,¹⁰⁷ institutional rules are severely lacking, requiring the parties to spend valuable time during contract negotiation setting out detailed arbitration procedures if they wish to be assured that a hearing will be conducted in a manner they consider fair.

Thus, the internationally accepted law of the proceedings being advocated here cannot succeed in its objective unless parties can routinely call on an arbitration procedure that is also internationally accepted. The UNCITRAL rules seem best designed for this type of expansion; it thus is recommended that they be redrafted to set out a clear arbitration procedure from beginning to end.

This does not mean that the rules must set out a strict format approaching court room formality. This conceivably could be self-defeating. But certain basics must be addressed. The rules must set out a generally accepted order of proof for the parties to follow; they must set out certain rights in a hearing, *e.g.*, the right of cross-examination or impeachment; they must set forth some kind of policy on the presentation

petition a United States court for an order directing arbitration when the arbitration agreement provides for arbitration in the domain of the court's jurisdiction.

¹⁰⁵ *Cf.* United States Arbitration Act, *supra* note 10, § 3.

¹⁰⁶ *See* Smedresman, *supra* note 4, at 340. *See also* text accompanying notes 97-102 *supra*.

¹⁰⁷ *See* discussion in Section II(A) *supra*.

of evidence, *e.g.*, that strict evidentiary rules will not be followed, but that evidence must be reliable and relevant; and they must set out some kind of policy on the use of substantive law that is acceptable to the international legal community under current views of international arbitration.¹⁰⁸ Additionally, these rules should set out strict timetables for each step in the proceeding in order to ensure that each arbitration will move swiftly to conclusion.

D. Implementation

The drafting of this new legal regime will best be done in a United Nations conference such as the one which drafted the United Nations Convention.¹⁰⁹ The success of that Convention attests to the receptivity of the nations to international documents drafted within that institution, at least on this subject matter. Although perhaps a bit slow in its first years to pick up some of its most important present adherents, the United Nations Convention has now been ratified by the major trading nations, including the United States,¹¹⁰ Great Britain,¹¹¹ and almost all socialist countries,¹¹² whose domestic systems of arbitration differ significantly from those in western Europe and the United States.¹¹³

The new convention could be viewed as amendatory to the earlier United Nations Convention, having the purpose of completing the job begun by it. Now that the bold steps it has taken have proved to be in the right direction, international cooperation in continuing the progress that that convention made should be substantial.

VI. Conclusion

The process of arbitration has made the business of carrying on the activity of transnational commercial transactions infinitely easier. Arbitration presents a potentially quick and low-cost alternative to the drudgery, uncertainty, and expense of litigating transnational commercial disputes. The benefits of arbitration are significantly less when the drawbacks of litigation are allowed to creep into the arbitration process. This occurs when nations use their courts to interfere with what should be, for the most part, a private procedure.

¹⁰⁸ Article 33 of the UNCITRAL Rules, *supra* note 9, requires the use of some jurisdiction's substantive law, chosen either by the parties or the arbitral tribunal, unless the parties specify that the tribunal decide "as *amiable compositeur*." The article requires the tribunal to consider the terms of the contract and the usages of the trade in all cases. It could be that this policy, or one very much like it, is most appropriate for the suggested new regime.

¹⁰⁹ See note 6, *supra*.

¹¹⁰ Act of July 31, 1970, Pub. L. No. 91-368, 84 Stat. 692 (codified at 9 U.S.C. §§ 201-08 (1976)).

¹¹¹ Arbitration Act, 1975, c.3.

¹¹² Of the socialist states, only the Peoples' Republic of China, Vietnam and Albania are not parties to the Convention. See Orban, *The Challenge to the Enforcement of Socialist Arbitral Awards*, 17 VA. J. INT'L L. 375, 378 (1977).

¹¹³ *Id.*

The abundance of rules and policies with respect to arbitration among the commercial nations makes it exceedingly difficult for the legal practitioner in international commercial transactions to draft arbitration agreements that adequately protect clients' interests. All too often, choice of law clauses are frustrated by complex conflict of laws rules, and even when those clauses are effectuated, arbitrary rules of commercial practice may unexpectedly alter the most careful of plans.

Parties to arbitration in the international commercial arena ought to be more protected in their choice of the legal rules or equitable considerations that will resolve their disputes. Clearly, the only way to do this is through international agreement. The legal regime set forth provides the framework for a suggested answer to the problem. It proceeds on the theory that international commercial arbitration has grown into a program that warrants its own legal protections, that is already governed to some degree by its own doctrines of equity and fairness, and that it ought not to be interfered with at all by individual nations, save in the most extreme circumstances.

The citation of the numerous authorities in this article indicates that these ideas are not original, nor are they particularly new. They are, however, ideas demanding greater action than before. It is hoped that this effort will spur some of that needed action.

