

## **Attacking Arbitral Awards: Rights of Appeal and Review in International Arbitrations\*\***

Awash with feelings of good will in reaching an agreement, parties to an international commercial transaction often give little thought to the drafting of the arbitration clause,<sup>1</sup> and even less thought to the optimal site for conducting the arbitration. When the parties do consider the site, they often limit consideration to its neutrality, its general legal climate, and its status as a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention)<sup>2</sup>—the preeminent treaty governing the enforcement of foreign arbitral awards in some seventy states.

Typically, negotiating parties overlook the rights of appeal and review in the jurisdiction selected. Such rights, however, can seriously affect the finality of the arbitral award, the cost of the arbitral process (by including an appellate stage), and the speed by which the award can be enforced abroad.

First and foremost, the scope of review of an arbitral award in the chosen jurisdiction can make enforcement of the award more difficult than if the same award were rendered by the same arbitrators but in another jurisdiction with a more limited scope of review. The beauty of the New

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\*Partner, Gibson, Dunn & Crutcher, and associate member, Charter Institute of Arbitrators.

\*\*The Editorial Reviewer for this article is Rebecca Martin Seaman.

1. In addition to the place of arbitration, an arbitration clause should generally include the following: (1) the type of disputes covered by the arbitration clause; (2) the number of arbitrators; (3) the procedural rules by which to conduct the arbitration, e.g., ICC Rules of Conciliation and Arbitration; (4) the language in which the arbitration is to be conducted; and (5) the substantive law to govern the dispute. For further discussion on the content of an arbitration clause, see Golsong, *A Guide to Procedural Issues in International Arbitration*, 18 INT'L LAW. 633 (1984).

2. June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38.

York Convention is that awards rendered in member jurisdictions are easily enforced in any of the approximately seventy other signatory states, subject to the following narrowly defined challenges:<sup>3</sup>

- invalidity of the arbitral agreement;
- a violation of due process;
- the arbitrator's exceeding his authority;
- irregularity in the composition of the arbitral tribunal or the arbitral procedure;
- nonarbitrability of the dispute;
- violation of public policy; or
- failure of the award to become binding, or its suspension or setting aside in the country where made.

However, in contrast to the limited bases for challenge permitted under the first six defenses, the last defense, in effect, incorporates the entire body of review rights in the issuing jurisdiction: a successful appeal of an award in the issuing state can prevent its enforcement abroad. Specifically, under article V, section 1(e) of the New York Convention, a court can refuse recognition and enforcement of an award when "the award . . . has been set aside or suspended by a competent authority of the country in which . . . that award was made." If the scope of judicial review in the rendering state extends beyond the other six defenses allowed under the New York Convention, the losing party's opportunity to avoid enforcement is automatically enhanced: The losing party can first attempt to derail the award on appeal on grounds that would not be permitted elsewhere during enforcement proceedings.

In addition, even the mere *initiation* of an appellate or review process in the rendering state risks delay of the award's enforcement elsewhere. Under article VI of the New York Convention, recognition and enforcement may be adjourned if an *application* for setting aside or suspending the award has been made to a competent authority in the country where the award was rendered.<sup>4</sup> The greater the potential for review in the rendering jurisdiction, the greater the risk that this avenue for attack will be taken.

To assist practitioners in selecting a site that will promote finality once an award is rendered, this article examines appellate rights in six jurisdictions utilized for conducting international arbitrations: the United States,

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3. *Id.* art. V.

4. *Id.* art. VI. See *Spier v. Calzaturificio Techica S.P.A.*, 663 F. Supp. 871 (S.D.N.Y. 1987) (adjournment of enforcement proceeding abroad proper unless challenge to award in rendering jurisdiction is transparently frivolous); *Fertilizer Corp. of India v. IDI Management Inc.*, 517 F. Supp. 948 (S.D. Ohio 1981), *reconsideration denied*, 530 F. Supp. 542 (S.D. Ohio 1982). The authority in the country where enforcement is sought may, upon application, order the party resisting enforcement to give "suitable" security.

England, Australia, France, Sweden, and Switzerland.<sup>5</sup> The opportunity for the parties to waive the right of review in their contract—and thus avoid the uncertainties and costs of an appellate stage—is also explored.

## I. The U.S. Arbitration Act

The United States is occasionally overlooked as a hospitable site for international arbitrations. The Federal Arbitration Act,<sup>6</sup> however, which governs arbitrations based on a written arbitration clause in any contract evidencing, *inter alia*, a transaction involving interstate or foreign commerce,<sup>7</sup> provides a comparatively limited basis—in terms of both time and substance—for reviewing the resulting arbitral award.

### A. TIMING FOR REVIEW

Under the Act, any party, within three months after the arbitration award is filed or delivered, may apply to vacate, modify, or correct it; however, a party has one year after the award is made to apply to the appropriate court for an order confirming it.<sup>8</sup> Furthermore, courts have held that once the three-month period for noticing a motion to vacate (or modify or correct) an award has expired, a party may not make a motion to vacate as a defense to, or raise such defenses in opposition to, a subsequent motion for confirmation.<sup>9</sup>

While the right to apply to vacate an award is automatic,<sup>10</sup> an application to confirm the award is *only* possible when “the parties in their agreement have agreed that a judgment of the court shall be entered” upon the arbitration award.<sup>11</sup> U.S. courts have generally found the requisite agreement to entry of a judgment implied by the language or behavior of the parties or incorporated by reference by the parties’ selection of a set of arbitration rules that themselves provide that a judgment may be entered

5. All are parties to the New York Convention.

6. 9 U.S.C. § 1 *et seq.* (1982).

7. *Id.* §§ 1, 2. The Federal Arbitration Act also applies to written arbitration clauses in any maritime transaction. However, an argument could be made that the Federal Arbitration Act does not apply to an arbitration between two foreign parties where U.S. foreign commerce is not involved.

8. *Id.* §§ 12, 9, respectively. Further, in the event the award is considered a “non-domestic” award, *see infra* text part C, a party will have the three-year period provided under 9 U.S.C. § 207 within which to confirm it.

9. *E.g.*, *Florasynth, Inc. v. Pickholz*, 750 F.2d 171 (2d Cir. 1984), *Tokura Constr. Co. v. Corporacion Raymond, S.A.*, 533 F. Supp. 1274 (S.D. Tex. 1982). *Contra, e.g.*, *Chauffeurs Union No. 364 v. Ruan Transp. Corp.*, 473 F. Supp. 298 (N.D. Ind. 1979).

10. 9 U.S.C. §§ 10, 12 (1982).

11. *Id.* § 9.

upon the award.<sup>12</sup> In *Varley v. Tarrytown Associates Inc.*,<sup>13</sup> however, the Second Circuit reversed a judgment confirming an arbitral award because the court did not have jurisdiction to confirm the award when the parties did not provide in their agreement that a judgment of the court could be entered upon the award.<sup>14</sup>

## B. THE SUBSTANCE OF REVIEW

The basis on which to vacate an arbitration award under the Federal Arbitration Act is narrow. Mere errors of law or mistakes of fact are *not* grounds for vacating an award.<sup>15</sup> Rather, a court may vacate the award only upon the following limited grounds:<sup>16</sup>

- (a) . . . the award was procured by corruption, fraud, or undue means;
- (b) . . . there was evident partiality or corruption by the arbitrators. . . .;<sup>17</sup>
- (c) . . . the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced;
- (d) . . . the arbitrators exceeded their powers,<sup>18</sup> or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.<sup>19</sup>

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12. *E.g.*, *Smiga v. Dean Witter Reynolds Inc.*, 766 F.2d 698, 705 (2d Cir. 1985) (court which orders arbitration retains jurisdiction to determine motion to confirm award); *Milwaukee Typographical Union v. Newspapers, Inc.*, 639 F.2d 386, 389-90 (7th Cir. 1981); *I/S Stavborg v. National Metal Converters, Inc.*, 500 F.2d 424, 426-27 (2d Cir. 1974); *Compania Chilena de Navegacion Interoceanica, S.A. v. Norton Lilly & Co.*, 652 F. Supp. 1512, 1515 (S.D.N.Y. 1987) (language in clause that award would be "final and binding" sufficient); *Ingvald Stad v. Kings Wharf Island Enterprises*, 593 F. Supp. 997, 1002-03 (D. St. Croix 1984); *Paley Assocs. v. Universal Woolens, Inc.*, 446 F. Supp. 212 (S.D.N.Y. 1978); *see also Marine Transit Corp. v. Dreyfus*, 284 U.S. 263, 276 (1932).

13. 477 F.2d 208 (2d Cir. 1973).

14. The arbitration clause in *Varley* provided that any dispute would be settled pursuant to the rules of the American Arbitration Association (AAA), but at that time the rules of the AAA did not provide that the parties were deemed to consent to the entry of a judgment upon the award, as they do now. In *Compania Chilena de Navegacion Interoceanica, S.A. v. Norton Lilly & Co.*, 652 F. Supp. 1512, 1515 (S.D.N.Y. 1987), the court called *Varley* "highly questionable."

15. *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 203 n.4 (1956) (whether arbitrators misconstrued a contract is not open to judicial review); *Sobel v. Hertz, Warner & Co.*, 469 F.2d 1211, 1214 (2d Cir. 1972); *Reynolds Secs., Inc. v. MacQuown*, 459 F. Supp. 943, 945 (W.D. Pa. 1978).

16. 9 U.S.C. §§ 9, 10 (1982). The court may direct a rehearing if the award is vacated and the time for rendering the award has not expired. *Id.* § 10(e).

17. Mere appearance of bias that might disqualify a judge is insufficient to constitute "evident partiality." *Florasynt, Inc. v. Pickholz*, 750 F.2d 171, 173-74 (2d Cir. 1984).

18. In one case in which the record demonstrated "an unambiguous and undisputed mistake of fact *and* the record demonstrate[d] strong reliance on that mistake by the arbitrator," the arbitrator was held to have exceeded his powers. *National Post Office Mailhandlers v. U.S. Postal Serv.*, 751 F.2d 834, 843 (6th Cir. 1985).

19. An attack that the award was not mutual, final, and definite cannot be based on the contention that certain minor disputes were not specifically disposed of in the award. *Balantine Books, Inc. v. Capital Distrib. Co.*, 302 F.2d 17, 21 (2d Cir. 1962).

These grounds are similar to, and in certain respects more narrow than, those allowed to challenge enforcement of an award under the New York Convention.<sup>20</sup>

Admittedly, several additional grounds exist under the Federal Arbitration Act upon which an award can be attacked; none of them, however, creates significant opportunities for challenge not authorized by the New York Convention.

First, under the Federal Arbitration Act an award may be vacated for violating public policy<sup>21</sup> although no such reference is made in section 10 of the Act. However, this basis is consistent with the New York Convention, which provides that enforcement can be denied when contrary to public policy.<sup>22</sup>

Second, an award can be attacked under the Federal Arbitration Act for dealing with a subject that is not arbitrable.<sup>23</sup> Again, such a ground is authorized under the New York Convention.<sup>24</sup> Further, the U.S. Supreme Court has increasingly narrowed the areas that can be considered "nonarbitrable" in the context of international arbitrations. For example, in *Scherk v. Alberto-Culver Co.*<sup>25</sup> the U.S. Supreme Court distinguished its earlier holding in *Wilko v. Swan*<sup>26</sup> that claims arising under section 12(2) of the Securities Act of 1933 were not arbitrable. The Court ordered arbitration of a claim arising under the Securities Exchange Act of 1934 on the grounds the latter claim arose in the context of an international contract, thus invoking considerations and policies significantly different from the domestic context. The present trend toward narrowing the area of nonarbitrability is evidenced in *Shearson/American Express, Inc. v. McMahon*,<sup>27</sup> in which the U.S. Supreme Court upheld, even in the do-

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20. For instance, § 10(d) of the Federal Arbitration Act (arbitrators exceeded their powers) is like art. V(1)(c) of the Convention (the award deals with a difference not contemplated by the submission to arbitration). Section 10(c) (arbitral misconduct in the proceedings) is similar to art. V(1)(b) (party is unable to present his case), but in some respects § 10's language is more narrow since arbitral misconduct may not always be an element in a party's inability to present its case.

21. *Local No. P-1236 v. Jones Dairy Farm*, 680 F.2d 1142 (7th Cir. 1982); *Revere Copper & Brass v. Overseas Private Inv. Corp.*, 628 F.2d 81, 83 (D.C. Cir.), cert. denied, 446 U.S. 983 (1980); *Local Union 1160 v. Busy Beaver Building Centers*, 616 F. Supp. 812 (W.D. Pa. 1985).

22. New York Convention, *supra* note 2, art. V(2)(b).

23. *Id.* Such challenges will normally be raised in opposition to an application to compel arbitration.

24. *Id.* art. V(2)(a).

25. 417 U.S. 506, 515-20 (1974).

26. 346 U.S. 427 (1953).

27. In *Shearson/American Express, Inc. v. McMahon*, 107 S. Ct. 2332 (1987), the Supreme Court refused to extend *Swan*'s reasoning to a claim brought under § 10(b) of the Securities Exchange Act. It distinguished *Swan* on the grounds that there the Court had judged arbitration inadequate to enforce the statutory rights created by § 12(2) of the Securities Act of 1933, but that the SEC now had sufficient statutory authority to ensure arbitration was adequate to vindicate Securities Exchange Act rights in an arbitration to be conducted under

mestic context, arbitration of claims under section 10(b) of the Securities Exchange Act and the Racketeer Influenced and Corrupt Organizations (RICO) Act. Also in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*<sup>28</sup> the U.S. Supreme Court ruled that antitrust claims arising under the Sherman Act were arbitrable in the context of an international commercial transaction.

Nonarbitrability is not yet extinct as a ground for challenge, however. For example, in its recent ruling in *Shearson/American Express, Inc.*, the Supreme Court stated that it reads *Wilko v. Swan* as requiring a judicial forum "where arbitration is inadequate to protect the substantive rights at issue."<sup>29</sup> And in *Mitsubishi*, which ruled that antitrust claims were arbitrable, the Supreme Court expressly left open the issue whether antitrust claims would be arbitrable if U.S. law were not applied. The Supreme Court noted that if "the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy."<sup>30</sup> Since the arbitral tribunal may not make known its determination of the choice of law until the time of the arbitral award, the first time at which a party might attack an arbitration on the grounds of nonarbitrability may be at the time of appellate review.<sup>31</sup>

Nevertheless, in the international commercial context, the possibility of vacating an arbitral award on public policy or nonarbitrability grounds is extremely limited given the continuing narrowing of those bases under the Federal Arbitration Act.

Finally, an award may be vacated under the Federal Arbitration Act on the judicially developed ground of "manifest disregard of the law," a ground first mentioned by the Supreme Court in *Wilko v. Swan*<sup>32</sup> and not addressed by the Supreme Court again. However, the courts have been unreceptive to vacating awards on such grounds,<sup>33</sup> and, as stated earlier, mere errors of law or mistakes of fact are not grounds for vacating an

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the rules of the National Association of Securities Dealers or the New York or American Stock Exchanges.

28. 473 U.S. 614 (1985).

29. 107 S. Ct. at 2339.

30. 473 U.S. at 637 n.19.

31. Failure to raise the challenge at the earliest appropriate opportunity, however, may be deemed to waive the challenge. See *Comprehensive Accounting Corp. v. Rudell*, 760 F.2d 138 (7th Cir. 1985).

32. 346 U.S. 427, 436-37 (1953). See, e.g., *Sheet Metal Workers Int'l Ass'n Local Union No. 420 v. Kinney Air Conditioning Co.*, 756 F.2d 742, 746 (9th Cir. 1985); *Drayer v. Krasner*, 572 F.2d 348, 352 (2d Cir.), cert. denied, 436 U.S. 948 (1978).

33. See, e.g., *Brandeis Intsel Ltd. v. Calabrian Chemicals Corp.*, 656 F. Supp. 160 (S.D.N.Y. 1987).

award.<sup>34</sup> To establish "manifest disregard" the arbitrator must have correctly stated and understood, but deliberately ignored, the law.<sup>35</sup> Indeed, courts have questioned the continuing validity of this judicial ground,<sup>36</sup> and a good argument exists that a U.S. court should not attempt to apply it when the governing law of the arbitrated dispute is foreign. The difficulty of determining a manifest disregard of the law in the context of a foreign legal issue, combined with the international character of the arbitration, makes application of a nonstatutory ground undesirable.

Hence, except for a challenge of "manifest disregard of the law"—an exceedingly difficult standard to prove—review under the Federal Arbitration Act provides little scope to attack an award which could not also be successfully challenged abroad under the New York Convention.

### C. REVIEW OF NONDOMESTIC AWARDS

Intriguingly, in some circumstances an award rendered in the United States may be reviewed directly on the basis of the New York Convention, instead of the Federal Arbitration Act. Normally, the New York Convention applies to the recognition and enforcement of arbitral awards outside the rendering jurisdiction. However, by its own terms, it also applies to arbitral awards "not considered as domestic awards" in the state where recognition and enforcement are sought. Accordingly, in *Bergesen v. Joseph Muller Corp.*<sup>37</sup> the Second Circuit stated that a party with a "nondomestic award" rendered in the United States could proceed to review the award under either the Federal Arbitration Act or the New York Convention. Nondomestic awards, according to the court, included those rendered in the United States that were pronounced in accordance with foreign law or involved parties domiciled or having their principal place of business outside of the United States.<sup>38</sup>

34. See *supra* note 15. Nevertheless, "an evident material miscalculation of figures" or an "evident material mistake in the description of any person, thing, or property referred to in the award" is a basis for modification or correction. 9 U.S.C. § 11 (1982).

35. *Office of Supply, Gov't of Rep. of Korea v. N.Y. Navigation Co.*, 469 F.2d 377, 379 (2d Cir. 1972); *Refino v. Feuer Transp., Inc.*, 480 F. Supp. 562, 565 (S.D.N.Y. 1979), *aff'd*, 633 F.2d 205 (2d Cir. 1980).

36. *I/S Stavborg v. National Metal Converters, Inc.*, 500 F.2d 424, 431 (2d Cir. 1974) (discussing *Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corp.*, 274 F.2d 805, 808 (2d Cir.), *cert. denied*, 363 U.S. 843 (1960)); *Brandeis Intsel Ltd. v. Calabrian Chemicals Corp.*, 656 F. Supp. 160, 164-67 (S.D.N.Y. 1987); see also *Parsons & Whittemore Overseas Co. v. Société Générale de l'Industrie du Papier (RAKTA)*, 508 F.2d 969, 977 (2d Cir. 1974) (questioning "manifest disregard" in the international commercial context in reference to the New York Convention).

37. *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928 (2d Cir. 1983).

38. The *Bergesen* court's definition of a "nondomestic award" has been criticized. See van den Berg, *When Is an Arbitral Award Nondomestic under the New York Convention of*

In such a circumstance, the party seeking confirmation of the award would have the benefit of the three-year statute of limitations under 9 U.S.C. § 207, rather than the one-year period under 9 U.S.C. § 9. Further, in the case of a "nondomestic award" rendered in the United States, the grounds of "manifest disregard of the law" to vacate the award would be unavailable by which to challenge the award under the New York Convention.<sup>39</sup>

#### D. WAIVER OF REVIEW

Parties who wish to avoid any of the risks of review can exclude judicial review under the Federal Arbitration Act and thus enhance the finality of their award. A contractual waiver of all judicial review of the arbitration proceedings, if clear and unequivocal, is valid.<sup>40</sup> Conversely, parties may agree to expand the grounds upon which an award is reviewed.<sup>41</sup>

#### E. CONCLUSION

The selection of the United States as an arbitral site does not expand the losing party's scope for challenging the award under the New York Convention, since the grounds for vacating an award under the Federal Arbitration Act are similar to, and arguably narrower than, those for refusing recognition of an award under the New York Convention (except for the ground of manifest disregard for the law). Both the New York Convention and the Federal Arbitration Act will deny enforcement of an award that is contrary to public policy; both will reject an award made beyond the scope of the arbitration agreement; and both will refuse enforcement when there is a denial of due process (although the U.S. Act focuses on the misconduct of the arbitrators, whereas the Convention is directed at the parties' opportunity to present their case).

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1958? 6 PACE L. REV. (1985). Dr. van den Berg concludes, based on the legislative history and text of the Convention, that a nondomestic award is one made in the rendering state that is governed, by agreement, by the arbitration law of another country.

39. *Brandeis Intsel Ltd. v. Calabrian Chemicals Corp.*, 656 F. Supp. 160, 167 (S.D.N.Y. 1987); see also *Parsons & Whittemore Overseas Co. v. Société Générale de l'Industrie du Papier (RAKTA)*, 508 F.2d 969, 977 (2d Cir. 1974). Indeed, one could argue that if the New York Convention applies, no inconsistent provision of the Federal Arbitration Act should. See 9 U.S.C. § 208. Further, where the foreign commerce of the U.S. is not involved, the Federal Arbitration Act may not be applicable in any event.

40. The intention to waive all judicial review must be clear. *Aerojet-General Corp. v. American Arbitration Ass'n*, 478 F.2d 248, 251-52 (9th Cir. 1973) ("Ordinary language to the effect that the [arbitrator's] decisions shall be 'final and binding' has been held not to preclude some judicial review.')

41. *In re Fils et Cables d'Acier de Lens*, 584 F. Supp. 240 (S.D.N.Y. 1984).



Further, the U.S. courts have adopted a very strict reading of the grounds for vacating an arbitration award.<sup>42</sup> Admittedly, the judicial development of the standard of manifest disregard of the law, as a basis to vacate an award, provides a ground for challenge not sanctioned under the New York Convention. However, U.S. courts have virtually always rejected it when raised; it would normally be difficult to establish since the reasons for an award are not required to be set forth under U.S. law; and finally, it would probably be found unavailable as a basis for challenge in the case of a nondomestic award.

## II. England

Arbitrations in England are governed by the English Arbitration Acts of 1950, 1975, and 1979. Prior to the enactment of the 1979 Act, judicial review of arbitrations in England was extensive, partly owing to the philosophy that such review provided greater certainty and predictability in the arbitral decision. The 1979 Act attempted to reform and limit judicial review in England (while retaining some of its benefits) on the grounds that extensive judicial review affected the speed and finality of the arbitral decision. The 1979 Act reformed judicial review in three principal respects: (1) judicial review was limited, (2) the "case stated" procedure was abolished, and (3) judicial review could be waived by means of an exclusion agreement entered by the parties.

### A. SCOPE OF JUDICIAL REVIEW

Perhaps the greatest reform under the Act is its limitation on appeal rights. Prior to the 1979 Act, and in contrast with the scope of challenge under the New York Convention and the Federal Arbitration Act, the English courts could set aside any arbitral award based on an erroneous conclusion of fact or law. Under the 1979 Act, the English courts, specifically, the High Court, no longer have jurisdiction to set aside or remit an award on the basis of "errors of fact or law on the face of the award."<sup>43</sup> Instead, the High Court may confirm, vary, or set aside an arbitration award on the basis of any question of law only if certain conditions are satisfied.<sup>44</sup> First, an appeal may be brought only upon all the parties' consent or upon leave of the court.<sup>45</sup> Second, to grant leave, the High

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42. *E.g.*, *Sperry Int'l Trade, Inc. v. Government of Israel*, 532 F. Supp. 901, 905 (S.D.N.Y.), *aff'd*, 689 F.2d 301 (2d Cir. 1982).

43. Arbitration Act, 1979, § 1(1).

44. *Id.* § 1(2).

45. *Id.* § 1(3).

Court must conclude that "the determination of the question of law concerned could substantially affect the rights of one or more of the parties to the arbitration agreement."<sup>46</sup> Finally, the court may make leave conditional upon the appellant's satisfaction of any conditions the court deems appropriate.

Hence, any appeal must be agreeable to all parties or be of such a material nature that leave of the court is appropriate. In the latter instance, such leave can be conditioned upon protective measures, such as the payment of security to enhance the prevailing party's opportunity to enforce the award after appeal, if the award is upheld.

If a party wishes to appeal from the High Court's decision, the High Court or the Court of Appeal must grant leave to appeal and the High Court must certify that the question of law is either one of general public importance or that it should be considered for some other special reason.<sup>47</sup>

Prior to the 1979 Act, the power of the English courts to set aside any arbitral award based on an erroneous conclusion of fact or law resulted in a reluctance by English arbitrators to give reasons for their awards. Yet, various countries required reasoned awards.<sup>48</sup> Under the 1979 Act, upon application by any party and with all the parties' consent or leave of the Court, the High Court may order the arbitrator to state the reasons for the award, to assist a court's review of any question of law arising thereunder.<sup>49</sup> The High Court, however, may not make this order unless one of the parties gave the arbitrator notice that a reasoned award would be required, or a "special reason" for the absence of such notice exists.<sup>50</sup>

## B. REVIEW OF PRELIMINARY POINTS OF LAW

In another departure from the past, under section 2 of the 1979 Act, the High Court can determine any preliminary points of law arising during the course of the arbitration only if either the arbitrator or all of the parties consent.<sup>51</sup> In such cases, the court must first satisfy itself that the pre-

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46. *Id.* § 1(4). The question must be one of "practical importance—not an academic point—nor a minor point." *Pioneer Shipping Ltd. v. B.T.P. Tioxide Ltd. (The Nema)*, [1980] 3 W.L.R. 326, 335 (C.A.).

47. Arbitration Act, 1979, § 1(7). Interpretation of a clause in a standard form contract which is likely to come up again may well be an issue of general public importance. *Pioneer Shipping Ltd. v. B.T.P. Tioxide, Ltd.*, [1980] 3 W.L.R. 326, 335 (C.A.).

48. COMMERCIAL COURT COMMITTEE, REPORT ON ARBITRATION (presented to Parliament July 1978).

49. Arbitration Act, 1979, § 1(5).

50. *Id.* § 1(6). A genuine misunderstanding may be such a special reason. See *Mondial Trading Co. GmbH v. Gill & Duffus Zuckerhandelsgesellschaft GmbH*, [1980] 2 Lloyd's Rep. 376.

51. Arbitration Act, 1979, § 2(1).

liminary question of law is one upon which leave to appeal would likely be granted, thus incorporating the requirement that the determination of the question substantially affect the rights of one or more of the parties.<sup>52</sup> Finally, the court must conclude that the determination of the preliminary point could produce substantial savings in costs to the parties.<sup>53</sup>

### C. WAIVER OF RIGHT TO REVIEW

A principal advantage of the English reforms is that for most international arbitrations parties may exclude in advance the right of appeal by entering into a written exclusion agreement by which judicial review is precluded<sup>54</sup> (except to correct misconduct on the part of the arbitrators or improper procurement of the award<sup>55</sup>). An exclusion agreement can exclude judicial review (except for misconduct or improper procurement), judicial determination of preliminary points, and even an order for a reasoned award.<sup>56</sup>

The right to enter into an exclusion agreement, however, depends upon the type of arbitration involved. If the arbitration agreement is domestic, an exclusion agreement is valid only if it is entered into *after* the arbitration's commencement or the question of law arises.<sup>57</sup> Even if an arbitration agreement is not domestic, if the dispute falls within the High Court's admiralty jurisdiction or arises out of an insurance or commodity contract, the exclusion agreement has no effect unless it was entered into after the arbitration's commencement or if the award or question of law relates to a contract expressly designating the governing law as other than the law of England and Wales.<sup>58</sup> An exclusion agreement is a nondomestic arbitration agreement<sup>59</sup> that does not fall within the foregoing special categories—that is, most international commercial arbitrations—is effective regardless of when it was entered or which law governs the agreement.<sup>60</sup>

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52. *Id.* § 2(2)(b).

53. *Id.* § 2(2)(a).

54. *Id.* § 3(1).

55. Jurisdiction to correct misconduct or set aside an improperly procured award is provided for in the Arbitration Act, 1950, § 23, which the 1979 Act does not modify. Misconduct can include an award made in excess of the arbitrator's jurisdiction. See A. WALTON, *RUSSELL ON THE LAW OF ARBITRATION* 481 (19th ed. 1979).

56. Arbitration Act, 1979, § 3(1).

57. *Id.* § 3(6). A "domestic" arbitration agreement is an agreement that provides for arbitration in the United Kingdom and to which all the parties are United Kingdom nationals or residents at the time the arbitration agreement was entered. In the case of a corporate entity, it must have been incorporated in, or its central management and control have been exercised in, the United Kingdom at the time of the agreement. *Id.* § 3(7).

58. *Id.* § 4(1).

59. See note 57.

60. *Id.* § 3(1) and (6).

Can a written agreement simply providing for arbitration under the rules of conciliation and arbitration of the International Chamber of Commerce (ICC) Court of Arbitration constitute an exclusion agreement? After all, ICC article 24 provides that the parties are deemed to have waived their right to any form of appeal.<sup>61</sup> In *Arab African Energy Corp. v. Olieprodukten Nederland B.V.*<sup>62</sup> the Queen's Bench Commercial Court concluded that an arbitration agreement governed by ICC rules incorporated article 24 of the ICC rules and thereby constituted a valid waiver of the right to appeal. The court concluded:

Arbitration "according" I.C.C. rules must in my judgment mean "in conformity with" them.

\*\*\*Sec. 3(1) of the 1979 Act does not require the overt demonstration of an intention to exclude the right of appeal. True it is, that formerly the Court was careful to maintain its supervisory jurisdiction over arbitrators and their awards. But that aspect of public policy has now given way to the need for finality. . . . In my judgment, the phrase "an agreement in writing . . . which excludes the right of appeal" is apt to apply to an exclusion agreement incorporated by reference.<sup>63</sup>

Nevertheless, neither the waiver provision in the ICC rules nor an exclusion agreement eliminates the right to appeal on the basis of arbitrator misconduct.<sup>64</sup>

#### D. FINALITY OF AWARDS

One final advantage to arbitration in England is that once an arbitration award is rendered, it is immediately enforceable.<sup>65</sup> Since the New York Convention provides that recognition and enforcement of an award can be refused where "the award has not yet become binding on the parties,"<sup>66</sup> finality upon an award's rendition is critical to speedy enforcement. The Commercial Court Committee, in its *Report On Arbitration* to the British

61. ICC Rules art. 24 provides:

1. The arbitral award shall be final.

2. 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.

62. [1983] 2 Q.B. 419.

63. *Id.* at 423. Compare this with the European Court's decision that the mere incorporation by reference of a document is insufficient to constitute an agreement in "writing" for the purposes of jurisdictional clauses under the EEC Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters of 1968. Kerr, *The Arbitration Act 1979*, 43 MOD. L. REV. 45, 53-54 (1980).

64. Arbitration Act, 1979, § 1(1) does not purport to void Arbitration Act, 1950, § 23(2), relating to misconduct; therefore, an exclusion agreement, which only waives rights to appeal under §§ 1 and 2 of the 1979 Act, would not apply to § 23.

65. M. MUSTILL & S. BOYD, *COMMERCIAL ARBITRATION* 569 (1982).

66. New York Convention, *supra* note 2, art. V(1)(e).

Parliament, was of the opinion that under the 1979 reforms "every award would be a final award and immediately enforceable as such, subject only to the right of the Court in appropriate cases to impose a stay of execution pending an appeal."<sup>67</sup> When a stay pending appeal is granted such that enforcement can be denied under the New York Convention, leave to appeal can be conditioned upon the payment of security,<sup>68</sup> thus discouraging meritless appeals designed for delay.

#### E. CONCLUSION

The advantages under the 1979 reform of the English Arbitration Acts are twofold. First, parties that seek finality and enforceability upon the rendition of an award can enter into an exclusion agreement. Such an agreement minimizes the bases for judicial review and avoids an appellate stage's inevitable impact on enforcement abroad. Second, when review is not excluded, although the scope for attack is broader than that allowed under the New York Convention, the court has discretion to condition leave to appeal upon the payment of security or some other protective measure. Such provisions reduce the risk that a losing party can delay execution abroad by appealing the arbitration award at home.

### III. Australia

Australia has no national statutory procedure for international arbitrations. New South Wales, Victoria, Western Australia, Tasmania, South Australia, and the Northern Territory, however, have enacted the Australian Uniform Commercial Arbitration Act.<sup>69</sup> The provisions for judicial review in the Uniform Act essentially mirror those in England's Arbitration Act of 1979.

Like the 1979 Act, subject to the judicial review specifically authorized, under the Uniform Act, an Australian court may not remit or set aside an award on the ground of an error of fact or law on the face of the award.<sup>70</sup> Instead, like the English Arbitration Act of 1979, any question of law can be appealed only with the consent of all parties or leave of the court. The latter, in turn, depends upon whether the question of law is one that could substantially affect the rights of one or more parties.<sup>71</sup> The Australian court may also determine a preliminary point of law on the

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67. COMMERCIAL COURT COMMITTEE, *supra* note 48, at 9.

68. Arbitration Act, 1979, § 1(4).

69. It has also been assented to by the Australian Capital Territory. There are some differences, however, among parallel provisions in the Act as adopted in the various states.

70. Commercial Arbitration Act, § 38(1).

71. *Id.* § 38(2), (4).

basis of the same standards set forth in the 1979 English Arbitration Act.<sup>72</sup> Likewise, the parties may enter into an exclusion agreement to exclude the right of appeal,<sup>73</sup> although an Australian court may still set aside an award on the basis of arbitrator misconduct or where the award is improperly procured.<sup>74</sup>

Accordingly, when an exclusion agreement is entered, the scope to challenge an arbitral award rendered in Australia is narrow. Like England, when there is no exclusion agreement, the grounds to attack an award are broader than those authorized by the New York Convention. Unless the arbitration agreement shows a contrary intention, the arbitration award rendered in those jurisdictions subject to the Act is final and binding,<sup>75</sup> and can be enforced abroad unless set aside or suspended in Australia on the same grounds as authorized in England.

However, unlike the 1979 English Arbitration Act, Australian awards governed by the Uniform Commercial Arbitration Act must include a statement of reasons unless the parties otherwise agree in writing.<sup>76</sup> While this provision may increase the risk of an appellate finding of a basis for overturning the award when the parties have not entered into an exclusion agreement, in general, the standards of review of arbitration awards governed by Australia's Uniform Commercial Arbitration Act are the same as in England.

#### IV. France

France adopted a new code governing international commercial arbitration by decree promulgated on May 12, 1981.<sup>77</sup> Under French cases decided prior to the new code's promulgation, the French Court of Appeal had held that French courts lacked jurisdiction to hear challenges to international arbitral awards through a direct appeal, even though the arbitration was held in France.<sup>78</sup> Under the 1981 Decree, the French Court of Appeal may now set aside an international arbitral award rendered in France in an action for annulment on the following grounds:

- the award was made in the absence of an arbitration agreement or in reliance on a void or expired arbitration agreement;

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72. *Id.* § 39.

73. *Id.* § 40.

74. *Id.* § 42.

75. *Id.* § 28.

76. *Id.* § 29.

77. An international arbitration is defined as an arbitration "which deals with international commercial interests." CODE DE PROCÉDURE CIVILE [C. PR. CIV.] art. 1492. Hence, even arbitration between two French companies could be international if the subject matter in dispute deals with an international matter.

78. See Judgment of Feb. 21, 1980, Cour d'appel, Paris, 1980 Recueil Dalloz, Dalloz-Sirey, *Jurisprudence*, [D.S. Jur.] 568.

- the arbitral tribunal was improperly constituted or the sole arbitrator improperly appointed;
- the arbitrator did not comply with the mission conferred upon him;
- the parties have not been treated on an equal footing; or
- recognition or execution is contrary to international public policy.<sup>79</sup>

Hence, international arbitral awards rendered in France are not easily challenged. Indeed, the grounds to challenge international awards are more limited than those available in a French domestic arbitration. For example, a French domestic award may be attacked on grounds of public policy (*ordre public*). An international award, however, even if in violation of French domestic public policy, may be attacked only if it is contrary to "international" public policy.<sup>80</sup> Likewise, France has no requirement that an international award be rendered on the basis of a reasoned opinion, in contrast to domestic awards.<sup>81</sup> On the other hand, a challenge to an international arbitral award based on the failure of the arbitrator to comply "with the mission conferred upon him" does not simply cover those circumstances in which the arbitrator has determined an issue not submitted to him. Such grounds may include the arbitrator's application of law other than that chosen by the parties.<sup>82</sup>

Nonetheless, the grounds for challenging an award rendered in France are more limited than those for reviewing international arbitral awards rendered in England or Australia (in those cases in which the parties have not entered into an exclusion agreement).

That is not to say, of course, that a prevailing party seeking judicial recognition of an award rendered in France takes little risk. Under French law, a party has one month after service of the award to bring an action for annulment. Similarly, when the prevailing party seeks judicial recognition in France, a party can challenge the ensuing decision to grant recognition or execution upon the same grounds as an action to set aside the award<sup>83</sup> if brought within one month following service of the decision.<sup>84</sup> Execution of the award is suspended during the one-month period as well as the period of the challenge.<sup>85</sup> Hence, a challenge by the losing party can suspend the award, and thus can affect the enforcement of the award under the New York Convention, which under article V(1)(e) pro-

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79. C. PR. CIV. arts. 1502, 1504.

80. *Id.* art. 1502.

81. Craig, Park & Paulsson, *French Codification of Legal Framework for Int'l Commercial Arbitration*, 13 LAW & POL. INT'L BUS. 727, 740 (1981); VII DERAINS YEARBOOK: COMMERCIAL ARBITRATION 11 (1982).

82. DERAINS, *supra* note 81, at 11.

83. C. PR. CIV. arts. 1502, 1504.

84. *Id.* art. 1503.

85. *Id.* art. 1506; Craig, *supra* note 81, at 741.

vides that a foreign court can refuse enforcement on the grounds that the award has been suspended.

Nonetheless, in the leading case of *General National Maritime Transport Co. v. Gotaverken Arendal Aktiebolag*,<sup>86</sup> a case that predates the enactment of France's international arbitration code, the Swedish Supreme Court held that a mere challenge to an arbitral award rendered in France was not sufficient grounds for refusing enforcement in Sweden. The Swedish Supreme Court noted that the arbitration in France in that case was conducted in accordance with the ICC rules, which provide that the award shall be final. The Court construed section 7 of the Swedish Act concerning Foreign Arbitration Agreements and Awards (which is like the New York Convention's article V) to require that a foreign authority must set aside or suspend enforcement of the award in order for the Swedish courts to refuse enforcement. The mere challenge to the award in France did not have that effect. Although section 9 of the Foreign Arbitration Agreements Act provided that the Swedish court could postpone its decision when a party has *applied* to set aside the award in the state where rendered, the Supreme Court declined to do so. Whether such a decision is still valid in the face of the automatic stay provisions under the new French code is open to question.

All in all, however, review of international arbitral awards rendered in France is quite limited. Selection of a French arbitral site therefore will not result in any expansion in the scope for challenge of an award beyond that expected under the New York Convention.

## V. Sweden

Swedish arbitration law is found in the Arbitration Act of 1929 and the Act concerning Foreign Arbitration Agreements and Awards of 1929, as amended.<sup>87</sup> The scope of review under Swedish law is somewhat broader than that in France or the United States, but less so than that in England or Australia where an exclusion agreement is not entered.

Under the Arbitration Act of 1929, unless otherwise agreed, an arbitral decision is final and binding. No appeal is permitted on the merits, whether

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86. Judgment of Aug. 13, 1979, Sup. Ct., Swed. The decision is translated into English in Paulsson, *The Role of Swedish Courts in Transnational Commercial Arbitration*, 21 V.A. J. INT'L LAW 211, 244-48 (1981).

87. The discussed provisions of Sweden's Arbitration Act of 1929 apply to Swedish awards. An award is considered "Swedish" if it is rendered in Sweden despite the fact that the parties are foreign residents or the transaction has no connection with Sweden or Swedish law. STOCKHOLM CHAMBER OF COMMERCE, ARBITRATION IN SWEDEN § 7.1, at 161 (2d ed. 1984) [hereinafter ARBITRATION IN SWEDEN].



as to findings of fact or substantive law.<sup>88</sup> Even the offer of false evidence, or the discovery of new evidence is insufficient to challenge an award successfully.<sup>89</sup>

However, an award can be challenged based on procedural or form defects. Defects are of two basic types: those that render an award "void" and those that render it "voidable." An award is "void" if (a) there was no valid arbitration agreement, (b) the award was not put in writing or signed by the arbitrators, (c) the decision involved a nonarbitrable issue, or (d) when the award was given, the question involved was the subject of a pending court action.<sup>90</sup>

An additional basis for challenge is that the award is "so obscure as to make enforcement impossible."<sup>91</sup> Because such an award is unenforceable by definition, it is "void."<sup>92</sup> When the award is "void" in part and for that reason the balance of the award cannot be enforced, then the award is deemed "void" in its entirety.<sup>93</sup>

An award may also be set aside when it is not void, but "voidable." In such a case, the party challenging the award must bring an action to set aside the award within sixty days from the time that it received an original or certified copy of the award.<sup>94</sup> Otherwise, the award becomes valid and enforceable (unless it is "void") despite the existence of grounds for challenge. An award may be challenged as "voidable" when:

- the arbitrators went beyond the matters submitted to them,<sup>95</sup> or rendered an untimely award;
- a decision was rendered in a case in which arbitration proceedings should not have taken place in Sweden;<sup>96</sup>

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88. *Id.* § 1.1. If the arbitration agreement does *not* provide for appeal of the award, the parties are "deemed to have consented to abide by it." If the arbitration agreement does provide for a right of appeal, the Arbitration Act of 1929 does not apply to that agreement. Arbitration Act, *supra* note 87, § 2.

89. Paulsson, *supra* note 86.

90. Arbitration Act, *supra* note 87, § 20.

91. *Id.* § 22.

92. ARBITRATION IN SWEDEN, *supra* note 87, § 5.2.2 at 146. An example of an "obscure" award, cited in ARBITRATION IN SWEDEN, is an award that could not be enforced because it ordered payment of interest at a specified rate but failed to state the principal upon which the interest was based.

93. Arbitration Act, *supra* note 87, § 20.

94. *Id.* § 21.

95. If the arbitrators go beyond the prayers for relief, they have exceeded their authority, although this might also be treated as a procedural irregularity. ARBITRATION IN SWEDEN, *supra* note 87, § 5.3.2.1, at 148.

96. An arbitration cannot be instituted under the 1929 Act against any party who is a resident outside Sweden and not subject to the jurisdiction of the Swedish courts unless the arbitration agreement so provides or the arbitrators are granted the power to decide to hold the proceedings in Sweden. Arbitration Act, *supra* note 87, § 4.

- the arbitrator was disqualified or not properly appointed;<sup>97</sup> or
- any other procedural irregularity occurred, through no fault of the challenging party, which “in probability” may be assumed to have influenced the decision.<sup>98</sup>

The Swedish Arbitration Act does not require that the arbitrators give reasons for their award. The common practice, however, is for Swedish arbitrators to give reasons.<sup>99</sup>

Accordingly, because awards rendered in Sweden cannot be legally challenged with regard to substantive errors of law or fact, challenges are limited. The result is to reduce the risk that the award will be set aside. Nevertheless, the right to challenge an award on the basis of a procedural irregularity arguably makes the scope of review in Sweden greater than that allowed in France. The right to challenge an award owing to procedural irregularities may be waived, however, if the party, while aware of the irregularities, took part in the proceedings without objection.<sup>100</sup> In the event of an irregularity, a party may object and withdraw from the proceedings or continue in the proceedings under protest.<sup>101</sup>

Moreover, when neither party to the arbitration in Sweden is Swedish, differences of opinion exist as to the right to challenge an award. The Stockholm Chamber of Commerce has stated that acceptance of the jurisdiction of the Swedish courts should be implied whenever the arbitration takes place in Sweden. Others have argued that an arbitral award rendered in Sweden between two foreigners has no nationality and therefore the Swedish courts have no interest in assuming jurisdiction.<sup>102</sup> According to this argument, the parties must raise their challenges in any enforcement action taken abroad to enforce the award pursuant to the grounds authorized under the New York Convention (where applicable). In any event, the argument is largely academic. Given the limited bases for challenge under Swedish law, the scope of review of an arbitral award rendered in Sweden is quite similar to that allowed under the New York Convention.

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97. Although rule 13 of the Stockholm Chamber of Commerce (SCC) Rules provides its own procedure for deciding upon an objection to disqualify an arbitrator, a party may still set aside an award under the Swedish Arbitration Act even if the claim had been rejected earlier by the SCC. ARBITRATION IN SWEDEN, *supra* note 87, § 5.3.2.4, at 149.

98. Arbitration Act, *supra* note 87, § 21.

99. ARBITRATION IN SWEDEN, *supra* note 87, § 5.3.3, at 156.

100. *Id.* § 4.6.5, at 134. The SCC Institute requires that reasons be stated in the award. SCC rule 19.

101. ARBITRATION IN SWEDEN, *supra* note 87, § 4.6.5, at 134. Mere participation in the proceedings will not amount to a waiver, absent the party's knowledge of the irregularity. *Id.* § 5.3.3, at 156. On the other hand, a party may lose the right to challenge the irregularity if the party negligently fails to become aware of it. Paulsson, *supra* note 86, at 227.

102. Paulsson, *supra* note 80, at 232–33.

## VI. Switzerland

Until the new Swiss International Arbitration Law goes into effect in the second half of 1988, Swiss arbitration law is contained in the International Arbitration Convention of 1969 (the *Concordat*) to which most Swiss cantons are signatories.<sup>103</sup> This section describes judicial review under the *Concordat* and under the new Swiss law, which will apply to any international arbitration.

Under the *Concordat*, a party may bring an action to annul an arbitral award within thirty days of the notification of the award<sup>104</sup> only on procedural or jurisdictional grounds, with one exception: Under Swiss law, an award can also be annulled (or amended) if the award "is arbitrary in that it was based on findings which were manifestly contrary to the facts appearing on the file, or in that it constitutes a clear violation of law or equity."<sup>105</sup> Hence, a party may challenge an award where the findings can be shown to be manifestly incorrect, or even where the result, although factually correct, is inequitable.

The other narrow grounds for annulment under the *Concordat* are:

- the arbitral tribunal was not properly constituted;
- the arbitral tribunal erroneously declared itself to have or not to have jurisdiction;
- the tribunal pronounced on points not submitted to it or failed to make a determination on one of the items in the claim;
- there was a breach of a party's right to be heard (further defined in article 25);
- the arbitral tribunal awarded to one of the parties something more or different from that claimed, without authorization;
- the arbitral tribunal made its award after expiration of the time limit imposed on it in which to accomplish its mission;
- the requirements for the content of an award (set forth in article 33) were not obeyed<sup>106</sup> or the order was unintelligible or contradictory; and
- the fees of the arbitrators were manifestly excessive.<sup>107</sup>

Despite somewhat broader grounds for challenge than in Sweden or France, the *Concordat* expressly provides that the institution of an action to annul an award shall not have the effect of suspending it, although the

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103. The *Concordat* is not applicable in four cantons: Aargau, Glarus, Lucerne, and Thurgau. The other 22 of Switzerland's 26 cantons, including Geneva, Basel, and (since 1985) Zurich are signatories.

104. *Concordat Suisse sur L'Arbitrage* (1969), art. 37.

105. *Concordat* art. 36(f).

106. However, the parties may waive the requirement that the reasons for the award be given. *Concordat* art. 33(e).

107. *Concordat* art. 36.

judicial authority “may grant it such effect” upon request.<sup>108</sup> Hence, the risk that a party’s initiation of an action to annul an award would provide grounds for a competent authority abroad to refuse or delay enforcement under article V(1)(e) of the New York Convention is minimized.

Once the Swiss judicial authority has heard the parties concerning an action to annul the award, it may remit the award to the arbitral tribunal and provide a period for amendment or supplementation of the award.<sup>109</sup>

Separately, the *Concordat* provides for review of an award on the following grounds:

- a. . . . it was affected by deeds which are punishable according to Swiss law. . . .
- b. . . . it was given in ignorance of important facts in existence prior to the award or of evidence of decisive importance, and it was impossible for the claimant to present such facts or evidence during the proceedings.<sup>110</sup>

An action for such review must be brought within sixty days of the date on which the claimant becomes aware of the grounds for review, but no later than five years after notification of the award.<sup>111</sup>

Hence, in several areas—the arbitrary character of an award, or the discovery of new evidence which could not have been earlier presented—Swiss law under the *Concordat* provides broader grounds for challenge than in the U.S., France, or Sweden.

However, the new Swiss International Arbitration Law (found in chapter 12 of the new Swiss Federal Law on Private International Law) changes all this. The final text of the new Swiss Law was approved by the Swiss Parliament on December 18, 1987. It is expected to become effective during the second half of 1988.

The new Swiss International Arbitration Law applies to all international arbitrations, that is, arbitrations where one of the parties does not have its domicile or habitual residence in Switzerland. After the new law goes into effect, the *Concordat* will apply if the arbitration is not international or the parties agree to exclude the new law.

The new law makes significant and salutary changes to the scope of judicial review of international arbitral awards rendered in Switzerland. First, under the new law, an international arbitral award may be attacked only on the following grounds:

- When a sole arbitrator has been improperly appointed or when an arbitral tribunal has been improperly constituted.

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108. *Concordat* art. 38.

109. *Concordat* art. 39.

110. *Concordat* art. 41.

111. *Concordat* art. 42.

- When the arbitral tribunal has wrongly declared itself to have or not to have jurisdiction.
- When the arbitral tribunal has made a ruling which goes beyond the issues for which it was seized or when it has failed to decide one of the issues of the arbitration petition.
- When the equality of the parties or their right to be heard has not been respected.
- When the award is incompatible with public policy.<sup>112</sup>

Hence, the grounds for challenge under the new Swiss law correspond closely with the bases set forth under the New York Convention, and indeed are somewhat more narrow in certain respects. The more expansive challenges permitted under the *Concordat* are omitted.

Another improvement of the new law is its express provision that “[a]n award is final from the time that it is rendered.”<sup>113</sup> This, of course, enhances enforcement under the New York Convention, since article V, section 1(e) allows a challenge in the event of a failure of the award to become binding.

Finally, in the case where both parties are foreign, Swiss law now permits the parties to waive their right to appeal, in whole or in part. Article 192(1) provides:

If both parties have neither their domicile, nor their habitual residence, nor an establishment in Switzerland, they may by an express declaration in their arbitration agreement or subsequent written agreement, waive all rights to appeal the awards of the arbitral tribunal; they may also waive appeal for any or all of the grounds listed in Article 190(2).

The question will undoubtedly arise whether ICC article 24 of the Rules of Conciliation and Arbitration of the International Chamber of Commerce will be deemed to constitute a waiver of all rights to appeal when the parties agree to conduct their arbitration pursuant to the ICC rules. Although that article provides that the parties are deemed to waive their right of appeal, does incorporation of that article by reference to the ICC rules in a contract constitute an express declaration in the arbitration agreement to waive all rights of appeal? That will depend upon the extent to which any such waiver must be knowing, deliberate, and voluntary.

If all rights to appeal are waived and the award is nonetheless to be enforced in Switzerland, the New York Convention is to be applied by analogy.<sup>114</sup>

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112. Swiss International Arbitration Law art. 190(2). This has been translated from French to English by Nancy Jackson of my office. The official English text was not available as the proofs of this article went to the printer.

113. *Id.* art. 190(1).

114. *Id.* art. 192(2).

Hence, Switzerland has reconciled the scope of its challenges to international arbitral awards with the New York Convention. Its new law largely eliminates the discrepancy between the Convention and the law of judicial review in the rendering jurisdiction.

## VII. Conclusion

The extent to which a party can attack an international arbitral award in the rendering jurisdiction can have an obvious impact on the finality, expense and enforcement of the award. Surveying the various jurisdictions discussed, the right to challenge an international arbitral award would appear to be most limited in Switzerland (under its new law), and France, followed by Sweden. Switzerland under the *Concordat*, England, and Australia would appear to be the most liberal with respect to the grounds upon which a party can challenge an award. The United States falls between these two groups, but its scope of review is substantially similar to that allowed in France and Sweden. Moreover, in the case of a U.S. arbitration, where neither party to the arbitration is a U.S. national, at least one court has ruled that any resulting award is "nondomestic" under the New York Convention. In such a case, it could be argued that the grounds for challenge are only those under the New York Convention and not those under the Federal Arbitration Act—although even the court in *Bergesen v. Joseph Muller Corp.*<sup>115</sup> did not go that far.

Of course, limits on judicial review does not qualify one jurisdiction as better than another. The disadvantage of additional cost and delay in a jurisdiction that has a greater scope for judicial review is outweighed by the restraint on arbitrary decision making which expanded review imposes. On that basis, a jurisdiction which grants parties the right to decide in advance upon the desired scope of judicial review is optimal. Under the Federal Arbitration Act, the new Swiss International Arbitration Law, the English Arbitration Acts, and the Australian Uniform Commercial Arbitration Act, the right to challenge an award can be expressly waived. Hence, those jurisdictions do grant the contracting parties the opportunity to choose between arbitral finality and restraint on arbitral decision making.

Still, this is not a perfect world, and parties do not have perfect foresight. Rare is the contract which has a provision for every eventuality. Although those parties which select arbitration for the purpose of avoiding the expense and uncertainty of their subjection to their adversary's court system would be well advised to limit the scope of judicial review, this is not always possible. Where only a brief arbitration clause is possible,

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115. 710 F.2d 298 (2d Cir. 1983).

the selection of arbitrator(s), the arbitral rules and the site will be the three most critical decisions made. Ironically, if the right of review is not carefully considered in connection with the designation of the arbitral site, the original purpose of agreeing to arbitration can be significantly undermined.

