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International Commercial Arbitration: The Contribution of the French Jurisprudence

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INTERNATIONAL COMMERCIAL ARBITRATION: THE CONTRIBUTION OF THE FRENCH JURISPRUDENCE*

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I

During the second half of this century a new form of dispute resolution—international commercial arbitration—came to maturity. The history is dramatic; the results are of great practical and theoretical importance for international commercial relations. The story begins early in the nineteenth century; the culminating events occur in the decades since the end of World War II. During this period, the characteristics needed by an effective system of international commercial arbitration were understood, generally accepted, and theoretically justified.

Private autonomy as a principle of ordering—though of course tempered by planning—remains in many societies of central importance to economic life. International commercial arbitration involves the constitution through an exercise of private autonomy of a private tribunal with its own procedural and even substantive rules of law. Acceptance of the principle of private autonomy does not ineluctably require that a legal order also accept privately created and sustained dispute-resolution mechanisms. Indeed, private ordering that occurs within the legal context of a politically and socially organized society differs in significant respects from private ordering that in a sense aspires to create its own legal order. Unlike the former, the latter displaces procedural and institutional arrangements designed to ensure the integrity of private ordering as a process. Moreover, this expression of private autonomy significantly reduces—or even removes—society's formal control over the development and adaptation of substantive rules and principles that regulate significant areas of economic intercourse.

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The use of privately created arbitral tribunals, though resting in the last analysis on practical considerations, requires theoretical explanation and justification. On both scores, French jurists and institutions have made enormous contributions. I propose to sketch the French developments with particular attention to the contribution made by the French courts through their *jurisprudence*. Their case law has been of the highest importance, comparable in significance to that which under the spacious mantle of French Civil Code article 1384(1)—liability for the act of an object under one's *garde*—gave France a regime of strict delictual liability.

For a moment at the beginning of the modern period French law embraced arbitration without reservation. In 1790, the Constituent Assembly spoke of arbitration as "the most reasonable method for terminating disputes between citizens."[1] Enthusiasm for arbitration declined somewhat in the next decade,[2] but the *Loi sur l'organisation des tribunaux* of 1800 provided in article 3 that the "right of citizens to have their controversies judged by arbitrators of their choice is in no way restricted: the decision of these arbitrators will not be subject to any review unless the contrary is expressly provided." Perhaps surprisingly in view of this background, neither the French Civil Code of 1804 nor the Code of Civil Procedure of 1806 deals generally with arbitration; the latter merely regulated compromises of existing disputes in articles 1003-1028. However, in the early decades of the nineteenth century, both French theory and practice apparently provided generous scope for arbitration clauses.[3]

Had this state of affairs continued, French law would have been well prepared to satisfy the demand that arose in the twentieth century for effective international commercial arbitration. In 1843, however, the decision of the *Cour de cassation* in *Compagnie l'Alliance v. Prunier*,[4] a case involving the validity of an arbitration clause contained in a domestic fire insurance contract, changed the situation drastically.

Since its enactment in 1806, the French Code of Civil Procedure had contained in article 1006 the following language: "an agreement of compromise that does not specify the matters in dispute and the names of the arbitrators is void." The agreements thus regulated cover disputes that have already arisen; in this context, the provision is almost self-evident and can easily be satisfied. However, the *Prunier* decision applied this language to arbitration of disputes that might arise in the future but

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1. Quoted by Hello in his conclusions in Compagnie l'Alliance v. Prunier, Cass. civ., 10 July 1843, S. 1843.I.564 at 566.

2. Id.

3. See Devill, Note to Cass. civ., 10 July 1843, S. 1843.I.561; see also J. Rubellin-Devichi, L'arbitrage: Nature juridique. Droit interne et Droit international privè 18 (1965).

4. Cass. civ. 10 July 1843, D. 1843.I.343, S. 1843.I.561 (concl. Hello, note Devill).

did not exist when the clause was concluded. The decision rendered such clauses unenforceable because the subject matter of a possible future dispute cannot be specified. The *Cour de cassation's* typically laconic opinion indicated its fear that, if arbitration clauses were enforced, they might well be adopted quite generally and individuals "would be deprived of the guarantees that the courts afford."[5]

Seen from the perspective of 1843, effective commercial arbitration—whether domestic or international—is essentially impossible under French law. Arbitration clauses are unenforceable; no binding provision for arbitration can be made until the dispute to be arbitrated has arisen. This threshold difficulty concealed other problems that would arise should arbitration clauses become enforceable once again; problems whose resolution in certain ways would also largely or wholly undermine the effectiveness of arbitration as a dispute-resolution process. For example, is the arbitration clause separable from the underlying contract to which the clause is connected? Are arbitrators free to decide upon the scope of the authority conferred upon them by an arbitration clause? To what extent do the parties or, in their silence, the arbitrators control the arbitral procedure and the rules and principles in terms of which the dispute is to be decided? And what is the scope of the review to which an arbitral award is subjected if judicial enforcement is necessary?

In the case of non-domestic arbitrations, still further complications present themselves. In particular, are non-domestic arbitral awards to be treated for purposes of recognition and enforcement like foreign judgments; if not, how are such awards to be handled?

The stereotype of a civil law system such as that of France suggests that these issues will over time be addressed and resolved by the legislature or, at least since the Constitution of 1958 came into force, by the executive. But here, as in so many areas of French law, it was the courts, assisted by legal scholarship, that led the way.

Book IV, *L'arbitrage*, of the *Nouveau Code de Procédure Civile* now regulates in a comprehensive fashion both domestic and non-domestic arbitration. Those who are not students of French public law will be surprised to learn that Book IV was enacted by executive decree. Articles 34 and 37 of the Constitution of 1958 reduced the legislature's powers; today many matters, including large areas of civil procedure, do not, to use the language of Article 37, "fall within the domain of law" but are of "a regulatory character." The provisions of Book IV, decreed in 1980 and 1981,[6] in a very large measure accept—as prior

5. D. 1843.I at 344, S. 1843.I at 568.

6. Decree No. 80-354 of 14 May 1980, which dealt essentially with domestic arbitration, contained what are now Titles 1-4 (articles 1442-1491) of the *Nouveau Code*; Titles 5 and 6 of Book IV (articles 1492-1507), which cover "*l'arbitrage international*,"

legislative and executive action had also done—results that the courts had reached earlier in the absence of clearly relevant provisions of law and which the *doctrine* had then expounded.

The evolution that culminated in the 1981 promulgation of Book IV of the New Code of Civil Procedure began with—and must be understood in terms of—the *Prunier* decision of 1843. On *a priori* grounds one would have expected not only that the legislature would play a major role in developing, after 1843, a legal regime for arbitration but that progress would first be made with respect to arbitrations that were domestic in the double sense of taking place in France and involving internal transactions. Only later would attention turn to international arbitrations, with the recognition and enforcement of foreign awards presumably the first area to require particular attention. Such was certainly the line of development in the United States; the New York Arbitration Act of 1920[7] and the Federal Act of 1925[8] preceded by nearly half a century the 1970 United States ratification of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.[9]

Paradoxically, in France not only were the courts to be the prime agents of change, but development of an acceptable regime for international commercial arbitration long preceded a comparable accomplishment for internal commercial arbitration. The consequences of the *Prunier* rule nullifying arbitration clauses proved to be so harmful to international commercial relations[10] that by the end of the nineteenth century French courts had begun to create a distinct and special legal regime for arbitration in matters of international commerce. In this regime rules respecting the recognition and enforcement of foreign awards were only one element—and by no means the most important—among many.

II

The first step in developing for French law a special regime for international commercial arbitration could only be overturning the *Prunier* rule. As early as 1865 in *Migout v. Arguad*,[11] the Court of Appeal of Paris was prepared to hold that, where a French party had agreed that the contract containing an arbitration clause was subject to a law which considered such clauses valid, article 1006 of the French Code

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were promulgated by Decree No. 81-500 of 12 May 1981. This Decree also incorporated into the Code the provisions contained in Decree No. 80-354.

7. N.Y. Sess. Laws 1920, ch. 275.
8. Ch. 213, 43 Stat. 883 (1925).
9. 330 United Nations—Treaty Series 39 (1959).
10. See J. Rubellin-Devichi, supra note 3, at 21.
11. Cour d'appel de Paris, 11 Jan. 1865, D.1865.II.188, S.1866.II.147.

of Civil Procedure did not apply. This approach to the *Prunier* rule relies on choice-of-law mechanisms. Accordingly, when French law was applicable the arbitration clause was void.[12] Moreover, until near the end of the century, the *Cour de cassation* had not spoken authoritatively on the issue and most courts held all arbitration clauses invalid, regardless of the applicable law and "whether they were agreed to in France or abroad, by Frenchmen or by foreigners. . . ."[13]

The *ordre public* objection to the *Migout* result remained an obstacle to relaxing the *Prunier* rule by recourse to choice of law until 1899, when the *Chambre des requêtes* of the *Cour de cassation* decided *Ospina v. Ribon*.[14] A contract, containing an arbitration clause, concluded in France and there registered by three foreigners residing in Paris, was held by the Court of Appeal of Paris to be subject to the law of Columbia. The clause provided for arbitration either in Columbia or in France. The *Chambre des requêtes*, addressing the *ordre public* issue directly, concluded that "such an agreement contains nothing contrary to the *ordre public*."[15] In 1904, the *Chambre des requêtes* again took the position—this time in a matter involving enforcement of an award rendered in Belgium against a Frenchman—that article 1006 did not involve the "*ordre public*."[16]

These inroads on the *Prunier* rule all depended on a choice-of-law analysis; accordingly, they all involved, in some sense at least, international transactions. Thus, a separate and distinct legal regime for international arbitration began to emerge in French law. Inevitably, the question arose of where the line lies between national and international arbitrations. *Mardelé v. Muller*,[17] decided in 1930, illustrates the willingness of the *Cour de cassation* to give a very inclusive meaning to international transactions by bringing within that category situations in which no true choice of law issue arises.

In *Mardelé*, a French merchant had bought from a French firm 100 tons of Chilean wheat, c.i.f. Le Havre. The contract was subject to the

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12. E.g., Chemins de fer autrichiens v. Perier, Cour d'appel de Paris, 8 Nov. 1865, D.1867.II.21 at 23, S.1866.II.117 at 118.

13. J. Hamel, La clause compromissoire dans les rapports de commerce internationaux, 18 Revue de droit international privé 721, 723 (1922-23).

14. Cass. req., 17 July 1899, D.1904.I.225 (note Pic).

15. Id. at 229. Pic's Note in Dalloz to the decision (id. at 225) remarks that the *Chambre des reqûetes* "had already admitted [in 1892] without great difficulty, that a French court seized of a demand for *exequatur* of an arbitral award rendered abroad must determine its regularity under the foreign law . . . . Today the court goes much further since it allows French judges to determine the regularity, under the national law of the parties, of an award rendered between foreigners but on French soil . . . ." Id. at 228.

16. Georges Bernard v. Société la General Mercantile Company, Cass. req., 21 June 1904, D.1906.I.395, S.1906.I.22.

17. Cass. civ., 19 Feb. 1930, S.1933.I.41 (note Niboyet).

conditions of the London Corn Trade Association which provided for arbitration in London. The law of 30 December 1925, which had set aside the *Prunier* rule for commercial contracts—domestic as well as international—,did not apply to the cause, the decision in first instance having been rendered prior to the law's effective date. The Court of Appeals of Rennes considered the situation as one in which—there being no significant non-French contacts—the parties could not stipulate a foreign law.[18] Accordingly, article 1006 of the Code of Civil Procedure rendered the clause void.

The appeal court's decision was quashed by the *Chambre civile* of the *Cour de cassation*. The high Court no longer relied centrally on a choice-of-law analysis to escape the *Prunier* rule; it is enough that the situation "involves the interests of international commerce." Where such is the case,

> the nullity of the arbitration clause provided for by article 1006 of the Code of Civil Procedure not being of the *ordre public* in France, even if both parties are French they can validly derogate in a contract, whether concluded abroad or in France, from the provisions of this text and refer to a foreign law, such as English law, which considers such clauses valid . . . .[19]

The *Mardelé* case effectively frees international commercial arbitration from the shackles of the *Prunier* rule. If the case law from *Miguad v. Arguad* to *Mardelé* had only this significance, the episode—though of historical importance—would be of relatively little contemporary interest. After all, article 631 of the *Code de commerce* had been amended in 1925 to provide that "parties may, when they contract, agree to submit to arbitration" the following classes of controversies "when they arise": disputes respecting engagements and transactions between traders, merchants, and bankers; disputes between partners respecting a commercial partnership; and all disputes between partners respecting commercial acts (*actes de commerce*) regardless whether domestic or international commerce be in question.[20]

But the *jurisprudence* that culminated in *Mardelé* also implied ideas and techniques that were to continue to shape the French law's handling and understanding of international commercial arbitration. In particular, this case law strongly suggests that various aspects of the legal regime applicable to domestic arbitrations do not apply to arbitrations which

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18. Société Muller v. Mardelé, Cour d-appel de Rennes, 26 July 1926, 22 Revue de droit international privé 523, 526-527 (note Niboyet).

19. S.1933.I.41.

20. Amendment of article 631 was triggered by France's signature of the Geneva Protocol on Arbitration Clauses of 24 Sept. 1923. See I J. Hamel & P. Lagarde, Traité de droit commercial no. 70 (1954).

involve the interests of international commerce. The *jurisprudence* further intimates that certain of the rules and principles governing the regime applicable to international commercial arbitrations need not flow from rules and principles found in a national law. Particular rules and principles of a non-national character can be developed to take into account the special qualities and requirements of international commercial arbitration as a dispute-resolution process.

The position that article 1006 of the Code of Civil Procedure does not implicate the "*ordre public*" clearly involves the first of these two propositions. Both before and after article 1006 was moderated by amending article 631 of the Commercial Code, party agreement could not set aside the article in domestic arbitrations. The article's rule was mandatory. Of course, this mandatory character need not prevent a party stipulation for a foreign law that accepts arbitration clauses; the forum's "*ordre public international*" can well differ from its domestic *ordre public*. The analysis depends, however, on the proposition that in the circumstances the forum allows, as a matter of choice of law, stipulation for a foreign law. But does the *Mardelé* case involve a situation in which party stipulation for a foreign law is permitted? Is the case not better understood as allowing parties, in view of the importance of arbitration for contracts involving the interests of international commerce, to derogate from the mandatory domestic rule contained in article 1006 regardless whether, for other aspects of the transaction, the parties could escape the application of mandatory domestic rules?

The second proposition—that the rules that apply to international commercial need not be contained in any national law—was relied upon in 1975 by the Court of Appeal of Paris in yet another decision[21] involving the validity of an arbitration clause. There the court held that "in view of the autonomy in an international contract (*contrat international*) of a clause providing for arbitration, the clause is valid independent of a reference to any national law (*valable indépendamment de la réference à toute loi étatique*)."[22]

III

Once the validity of arbitration clauses in contracts involving the interests of international commerce is established, two further issues of crucial importance arise: First, is the arbitration clause separable from the contract in which it is contained or to which it is connected? Second, are the arbitrators judges of the validity and scope of the arbitration

21. Menicucci v. Mahieux, Cour d'appel de Paris, 13 Dec. 1975, 65 Revue critique de droit international privé 507 (note Opettit) (1976).

22. Id. at 509.

clause from which their authority derives? Both these issues are important. If the arbitration clause is not separable or if the arbitrators cannot pass on the validity and scope of the clause, delaying tactics can render arbitration largely ineffective.

In *Société Gosset v. Société Carpelli* the *Court de cassation* dealt with the separability issue. In this 1963 decision, the *Chambre civile* took the position that

> in international arbitration matters, the arbitration agreement, whether concluded separately or included in the juristic act to which it relates, always presents, except in exceptional circumstances which are not alleged in the instant case, a complete juridical independence (*une complète autonomie juridique*), which prevents the arbitration agreement from being affected by the possible invalidity of the other act . . . .[23]

The separability issue in *Gosset* arose in connection with an effort by an Italian company to enforce in France an award rendered in Italy against a French company. However, the Court's approach indicates that the result would have been the same if the issue had arisen in connection with a party's effort to challenge an international arbitration proceeding in France on the ground that, the underlying contract being void, the arbitration clause necessarily falls. *Gosset* thus recognized for purposes of French law an institutional characteristic vital to international commercial arbitration, namely, the autonomy or separability of the arbitration clause.

The *Gosset* decision rests on two tendencies already seen in the *Mardelé* decision: the emergence of a special regime for international commercial arbitrations—at the time the separability principle was not accepted for domestic arbitrations[24]—and the abandoning of a choice-of-law approach in favor of the creation of a special substantive rule applicable to the particular issue without regard to the forum's choice-of-law rules generally applicable to the cause.[25] The French system applies the separability rule to every international commercial arbitration; a choice of law in the ordinary sense is, therefore, never required.

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23. Cass. Ch. civ. 1st sec., 7 May 1963, D.1963.J.545 (note Robert).

24. See B. Goldman, Règles de conflict, règles d'application immédiate et règles matérielles dans l'arbitrage international, in Travaux du comité français de droit international privé (1966-1969) 119, 135 (1970).

25. It is interesting that the separability problem was also resolved by judicial decision under the U.S. Federal Arbitration Act. The problem arose here, of course, in the context of a federal system. The question whether federal or state law applied to the issue had, therefore, to be faced. However, the landmark decisions present interesting analogies to *Gosset*. See Prima Paint v. Flood & Conklin, 388 U.S. 395 (1967); Robert Lawrence Co. Inc. v. Devonshire Fabrics, Inc., 271 F.2d 402 (2d Cir. 1959).

A second institutional requirement for effective international arbitration—one closely connected with the separability question—is the arbitrators' power to judge the validity and scope of the arbitration clause from which they derive their authority. The issue is often given a weighty German label: *Kompetenz-Kompetenz*. In 1957 the Court of Appeal of Paris held that

> when the parties have formally attributed competence to the arbitrators alone to decide on the validity of . . . [the arbitration] clause, . . . such an attribution, which is not contrary to any principle of the *ordre public*, takes the place of the law for the parties . . . and cannot be derogated from . . . [; were the rule otherwise, a party in bad faith to the arbitration could] paralyze the proceeding. . . .[26]

It is not clear from this decision whether the result applies to all—or only to international—arbitrations.[27] The Court does not invoke in the 1957 decision the involvement of the interests of international commerce although the arbitration was under the Rules of the International Chamber of Commerce. In his *conclusions* Avocat Général Desangles had argued, *inter alia*, that—as an international contract was involved—there was no reason why the parties should not be able to employ the International Chamber of Commerce Rules which give the arbitrators *Kompetenz-Kompetenz*.

IV

At the same time as a special general regime was thus being developed for international commercial arbitration, the *jurisprudence* also established a special regime for the recognition and enforcement of non-domestic awards. Treating these awards like foreign judgments would have drastically reduced their value in France. However, more was involved. As we shall see, the theoretical basis for the special regime provided for recognition and enforcement of foreign awards came to have great significance for fundamental problems respecting the law applicable to procedural and substantive issues in international commercial arbitrations.

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26. Jules Buck et Louis Dolivet v. Eddie Constantine et Gaston Terminet, dit Allain, Cour d'appel de Paris, 22 Jan. 1957, D.1957.J.566 (note J.R.), J.C.P.1957.II.10165 (concl. Desangles, note Motulsky).

27. The question of the status of the *Kompetenz-Kompetenz* principle with respect to domestic arbitrations appears to have remained unsettled until the promulgation in 1980 of what are now articles 1465 and 1466 of the New Code of Civil Procedure. See T. Carbonneau, The Reform of the French Procedural Law on Arbitration: An Analytical Commentary on the Decree of May 14, 1980, 4 Hastings Int. & Comp. L. Rev. 275, 298-300 (1981).

Before considering the regime developed by the courts for the recognition and enforcement of foreign arbitral awards in France, a word is needed respecting the position taken by the French system regarding the recognition and enforcement of foreign judgments. Until 1964, in general recognition could be refused to a foreign adjudication if the French judge considered that "on any point of either fact or law, the judgment was incorrect (*a été mal jugé*)."[28] When *révision au fond* was undertaken, the practical result was close to a categorical refusal to recognize and enforce the judgment; in essence, relitigation was required.[29] After the *Cour de cassation*, in *Munzer v. Munzer*,[30] gave the quietus to *révision au fond* in 1964, recognition was somewhat facilitated, but it was still necessary to establish, *inter alia*, that the foreign court had applied the law indicated by *French* choice-of-law rules or, if it had not, that the law actually applied was the same in substance as the law indicated by those rules.[31]

Application of these rules to the recognition and enforcement of foreign awards would have subjected them to a degree of judicial control not compatible with the efficiencies that help to make arbitration an attractive dispute-resolution process. "What would become of the expeditious and economic justice that the parties preferred? The parties . . . would fall under the jurisdiction of a foreign judge before whom the questions, once resolved, will be reopened and again discussed. . . ."[32] Moreover, use of a choice-of-law test might have called into question the large freedom to determine the law governing their transaction that parties to international commercial arbitration came to enjoy.[33]

By the beginning of the twentieth century there was substantial authority to the effect that the rules applicable to the recognition and enforcement of foreign judgments did not apply to foreign awards. The Court of Appeal Douai spoke, in a decision of 10 December 1901, of a "*jurisprudence constante*"—an established case law—to this effect.[34] The result reached, though significant, is of less importance than the reasoning upon which the result rests. The court explained that awards

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28. H. Batiffol, Traité élémentaire de droit international privé no. 759 (3d ed. 1959).

29. There were some advantages over a fresh-start litigation. See id. no. 765.

30. Cass. civ., 7 Jan. 1964, J.C.P.1964.II.13590 (note Ancel).

31. For a brief discussion in English of the French position, see A. von Mehren & D. Trautman, The Law of Multistate Problems 856-59 (1965). A full discussion is contained in II H. Batiffol & P. Lagarde, Droit international privé nos. 713-737-3 (7th ed. 1983).

32. A. Weiss, de l'exécution des sentences arbitrales étrangères en France, 2 Revue de droit international privé 34, 45 (1906).

33. See infra pp. 1057-1058.

34. Liquidation Max Jacques et comp., Cour d'appel de Douai, 10 Dec. 1901, D.1903.II.129, at 130 (note).

"are . . . only the execution of a mandate. . . ."[35] The court thus emphasized the contractual character of arbitration. A jurisdictional theory of arbitration is also possible. This latter view asserts that the arbitrator, like the judge, ultimately draws his power and authority from the national law in force at the seat of the adjudication. This is not the place to discuss the confrontation between the contractual and the jurisdictional theories, the effort to combine the two,[36] and the emergence in recent decades of an autonomous theory[37] of arbitration. One can perhaps generalize that contemporary thinking—certainly, in France—tends to combine the contractual and autonomous theories and sees them as mutually reenforcing.

As early as 1914, the *Cour de cassation* held that foreign arbitral awards were not subject to *révision au fond*.[38] The 1914 decision rests on the "contractual character" of the arbitration and of the award which "issues from . . . [the parties'] contract. . . ."[39] In 1928, pronouncing again on the issue, the *Cour* reached the same result.[40] The explanation given ran in terms of a contractual theory of arbitration. "[It is not for the courts] to review the substance of an award, thus ignoring the legal effects of the contract by virtue of which the award was rendered."[41] The annotator in Dalloz, viewing arbitration as jurisdictional in nature, disapproved of the result reached by the court. He saw no reason to treat foreign arbitral awards differently from foreign judgments so far as *révision au fond* is concerned. Indeed, the reasons for *révision* are stronger in the case of awards: "[They] emanate from ordinary persons designated as arbitrators by the parties. If it appears necessary to protect the losing party against the error or partiality of foreign judges . . . it is just to accord the same protection where foreign arbitral awards are in question . . . ."[42] However, despite its plausibility, this argument did not prevail.

In 1937, though in a different context, the *Cour de cassation* in a cautious formulation again reaffirmed the contractual theory. The issue

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35. Id. at 130.

36. For example, Professor Sauser-Hall's mixed or hybrid theory. See 47(2) Annuaire de l'Institut de droit international 398-400 (1958).

37. One of the first articulations of the autonomous theory is in B. Goldman, Les conflits de lois dans l'arbitrage international de droit privé, Académie de droit international, 1963-II Recueil des cours 347, 372-380 (1964) ("toute recherche d'un systéme de rattachment correspondant à la nature de l'arbitrage international débouche sur l'inélictable necessité d'un système autonome, et non national" Id. at 380); see also P. Fouchard, L'arbitrage commercial international 7-12 (1965).

38. Salles v. Hale et Cie, Cass. req., 8 Dec. 1914, D.1916.I.194, 10 Revue de droit international privé 433 (1914).

39. D.1916.I at 195.

40. Société des Fils Crémades v. Lindsay, Cass. req., 9 July 1928, D.1928.I.173 (note Crémieu), S.1930.I.17 (note Niboyet).

41. D.1928.I at 175, S.1930.I at 19.

42. Note Crémieu, D.1928.I.173 at 174.

in *Roses v. Moller et Cie*[43] was whether the *exequatur* for a foreign award could—like that for a domestic award—be given by the president of the tribunal acting alone rather than by the full court. In holding that the president could act alone, the *Cour de cassation* noted that "arbitral awards have for their basis a submission (*compromis*) of which they form an integral part and whose contractual (*conventionnel*) character they share . . . ."[44] The reporting judge suggested a more practical explanation for the result: the interest in expedition is served by allowing the president to act alone.[45]

V

A discussion of still other contributions of the French courts in the field of international commercial arbitration would require more time for exposition than is available. But brief mention should be made of the line of decisions,[46] culminating in *Trésor public v. Galakis*,[47] decided in 1966, which held that the prohibition of French law against the State agreeing to arbitration did not apply to an international contract "concluded for the needs of, and under conditions conforming to the usages of, maritime commerce . . . ."[48] The way in which this case law developed parallels that of the decisions earlier in the century dealing with the validity of arbitration clauses contained in international contracts. In both areas, the earlier decisions explain the result through a choice-of-law analysis. The later decisions—*Galakis* and *Mardelé*—omit any requirement that the contract be subject to a law that permits the result. In *Galakis* as in *Mardelé*, the *Cour de cassation* simply considers the prohibition at issue incompatible with the type of contract in question.[49]

VI

Not only the courts, but also the legal scholars—*la doctrine*—made invaluable contributions to creating and grounding a legal regime that rendered international commercial arbitration an attractive and effective

43. Cass. req., 27 July 1937, D.1938.I.25 (rapport Castets), S.1938.I.25 (note).

44. D.1938.I at 28, S.1938.I at 26.

45. D.1938.I at 27.

46. Société Myrtoon Steam Ship v. Agent Judiciare du Trésor, Cour d'appel de Paris, 10 April 1957, J.C.P.10078 (note Motulsky) (French State bound by arbitration clause in a charter party involving "les intérêts du commerce international" and subject to English law which recognizes a State's agreement to arbitrate); O.N.I.C. v. Capitaine du S.S. San Carlo, Cass. 1st Ch. civ., 14 April 1964, D.1964.J.637 (note Robert), S.1964.J.93 (note Plancqueel) (essentially the analysis used in Myrtoon Steam Ship).

47. Cass. 1st Ch. civ., 2 May 1966, D. & S.1966.J.575 (note Robert).

48. Id. ("un contract international passé pour les besoins et dans des conditions conformes aux usages du commerce maritime").

49. See Note Robert, id. at 576.

dispute-resolution process. Private institutions also played a vital role. In particular, the International Chamber of Commerce (ICCI) created in 1922 at Paris a Cour d'arbitrage for disputes arising in international commerce. The ICC Rules of Conciliation and Arbitration have for many decades been very widely used for international arbitrations. The ICC also played a leading part in bringing into being the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.

The last—and most remarkable—characteristic of the legal regime recognized by French law for international commercial arbitration results from the collaboration of these three agents: courts, scholars, and private institutions. I refer to the acceptance—now confirmed by Titles 5 and 6 of Book IV of the New Code of Civil Procedure—of the proposition that international arbitrations can be very largely detached from any Austinian legal order. In other words, international commercial arbitrations—at least in the French view—can be, juridically speaking, non-national or anational; arbitral procedures and the substantive issues to be resolved can be governed by rules that need not derive from any national legal system. For example, "general principles of law" can control both procedural and substantive issues. And the *lex mercatoria* can be invoked.

The theoretical justification for these propositions is the non-jurisdictional nature of international arbitration. Unlike the national judge, the arbitrator's authority does not derive from—nor is his ultimate responsibility to—the State. Accordingly, unlike a national judge, an arbitrator has no *lex fori* even for procedure and choice of law. In these matters as in all else, his authority derives, at least in first instance, from party agreement and his ultimate responsibility is not to a State but to the parties. The contractional theory of arbitration, itself issue of the encounter between the *Prunier* decision and the practical requirements of international commerce, has in turn produced this strange fruit.

Time does not permit reflections on the interaction among the *jurisprudence*, the *doctrine*, and the positions on these matters taken by the International Chamber of Commerce. It can be noted that the current (1975) version of the ICC's Rules of Conciliation and Arbitration provides in Article 11 that:

> 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.

Article 13(3) further provides:[50]

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50. The UNCITRAL Arbitration Rules, adopted by Resolution 31/98 of the General

> The parties shall be free to determine the law to be applied by the arbitrator to the merits of the dispute. In the absence of any indication by the parties as to the applicable law, the arbitrator shall apply the law designated as the proper law by the rule of conflict which he deems appropriate.

In 1981, the evolution in French law that began in 1843 came full circle with the promulgation of Titles 5 and 6 of Book IV, *L'arbitrage*, of the New Code of Civil Procedure. Article 1496 directs the arbitrator in an "*arbitrage international*" to "decide the controversy under the rules of law (*droit*) that the parties have chosen; in the absence of such a choice, under the rules that he considers appropriate." This article extends to all substantive questions (*questions de fond*) that can arise in the course of the arbitration and permits not only the choice of a national law or laws but of "rules of law." In effect the parties are free " to make a mixture and thus to escape from all mandatory rules of all the national laws (*législations*) concerned except the French rules respecting *l'ordre public international* which will intervene at the latest when one of the parties requests in France recognition or execution."[51] Clearly the scope thus given to party autonomy is very broad and includes the possibility of stipulating for rules—such as general principles of law—that do not derive from national legal systems.[52] The parties can choose for "themselves the rules that seem to them the most appropriate for their relationship."[53] The jurisdictional theory of the nature of arbitration is thus vigorously rejected.

The acceptance by the 1981 decree of the *contractual* nature of arbitration is also seen in the fact that a foreign decision annulling or suspending an award—even an award rendered on the foreign court's territory—poses no legal impediment to the award's recognition or enforcement in France. Accepting the contractual conception of arbitration, Book IV need not assign importance to the validity *vel non* of an award in its State of origin.[54] Reliance on the contractual theory further makes it possible to treat, as Title 6 of Book IV does, recognition and enforcement of international arbitral awards on virtually the same basis regardless whether the award is rendered in France or abroad.

Assembly on 15 December 1976, contain in articles 15(1) and 13(3) provisions essentially comparable to articles 11 and 13(3) of the ICC Rules.

51. P. Bellet & E. Mezger, L'arbitrage international dans le nouveau code de procédure civile, 70 Revue critique de droit international privé 611, 631 (1981).

52. P. Fouchard, L'arbitrage en France après le décret du 12 mai 1981, 109 Journal de droit international 394, 395 (1982).

53. Id. at 396.

54. See P. Bellet & I. Mezger, supra note 51, at 648-49. On this point Book IV differs significantly from Article V of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

The 1981 decree thus bears witness to the rich and varied contributions of the French *jurisprudence* to international commercial arbitration. On the practical level, a legal regime was created that satisfied the requirements for effective arbitration of international commercial disputes. On the theoretical level, such seminal ideas as special substantive rules for international matters and an effective dispute-resolution process that does not emanate from—nor depend upon—an Austinian sovereign were conceived and given expression.

These French developments may well constitute the most creative and probing contemporary experimentation and reflection respecting the nature of—and the characteristics required by—an effective dispute-resolution process for international commercial activities. In all this, the French courts have played—and doubtless will continue to play—a pervasive and crucial role. Here, as in a number of areas of French law, their *oeuvre* overshadows by far that of the legislature or the executive.