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Richard J. Graving

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THE INTERNATIONAL COMMERCIAL ARBITRATION INSTITUTIONS: HOW GOOD A JOB ARE THEY DOING?

Richard J. Graving*

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(As of January 1, 1989)

I. INTRODUCTION

For many years it was fashionable to say that international commercial arbitration had come of age.¹ That is no longer an appropriate observation. By now it has entered a mature and sophisticated middle age.² Both the crises and the illusions of youth are past, and in the eyes

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1. See Paulsson, *Introduction*, 1 *ARB. INT'L* 2, 2 (1985) [hereinafter Paulsson, *Introduction*] (noting that "[t]he age of innocence has come to an end for international commercial arbitration"). See generally Aksen, *International Arbitration: Its Time Has Arrived!*, 14 *CASE W. RES. J. INT'L L.* 247 (1982) (discussing the development of international arbitration and the bright prospects for its future).

2. See De Vries, *International Commercial Arbitration: A Transnational View*, 1 *J. INT'L ARB.* 7, 19 (1984) (observing that "[a]s a substitute for national courts, arbitration has reached a peak of legal effectiveness"). The same author had earlier expressed somewhat less exuberant views. See De Vries, *International Commercial Arbitration: A Contractual Substitute for National Courts*, 57 *TUL. L. REV.* 42, 79 (1982) (noting that "international arbitration may even have reached a cyclical phase of uncritical acceptance").

of businessmen (although not necessarily their lawyers) the creature has developed an identity and ability to solve problems that match the needs of the critical role it plays in world commerce today.³

Notwithstanding the now general preference in the international arena for arbitration in lieu of litigation,⁴ there are still new developments to take into account in planning and providing for dispute resolution. The process continues to evolve. One aspect of that evolution is the emerging convergence of principles and techniques that apply to international — or, to adopt the Philip Jessup term, “transnational” — commercial arbitration.⁵ Where one arbitrates, and who administers it, matters less than it once did. The convergency is far from complete, but that is the direction in which world practice is heading.⁶

3. See Kerr, *International Arbitration v. Litigation*, 1980 J. Bus. L. 164, 164 [hereinafter Kerr, *International Arbitration*] (noting that “arbitration has become something of a forensic industry all over the world”).

4. This statement is made on information and belief and must be accepted on faith in the absence of statistics. It has been repeated with liturgical uniformity in almost everything published in recent years on international commercial arbitration. See, e.g., Kerr, *International Arbitration*, *supra* note 3, at 165 (stating that arbitration clauses are found in the vast majority of international commercial contracts); A. REDFERN & M. HUNTER, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 17 (1986) [hereinafter A. REDFERN & M. HUNTER] (noting that if the parties themselves are unable to reach agreement, arbitration is the most frequently used method to resolve the dispute); W. STRENG & J. SALACUSE, 6 *INTERNATIONAL BUSINESS PLANNING: LAW AND TAXATION* § 31.01 (1982) [hereinafter W. STRENG & J. SALACUSE] (stating that “[a]rbitration is the favored procedure for settling international business disputes”).

In this author's judgment, the Redfern and Hunter work is the most reliable and useful single-volume treatment of international commercial arbitration in the market today. *Accord* Park, Book Review, 82 AM. J. INT'L L. 616, 622-25 (1988) (stating that the authors, Redfern & Hunter, have written the best general treatment on trends in international commercial arbitration).

5. Judge Jessup developed and popularized (but did not invent) the term in his Storrs Lectures, *Transnational Law* (Yale Law School 1956), *reprinted as* P. JESSUP, *TRANSNATIONAL LAW* 2 (1956) (defining transnational law); Schachter, *Philip Jessup's Life and Ideas*, 80 AM. J. INT'L L. 878, 893 (1986) (discussing Judge Jessup's development of the term “transnational”). Judge Jessup defined the title “to include all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules that do not wholly fit into such standard categories.” H. STEINER & D. VAGTS, *TRANSNATIONAL LEGAL PROBLEMS* xix (3d ed. 1986). Not everyone fancies the term. See Mann, Book Review, 2 *ARB. INT'L* 378, 378 (1986) (reviewing *RESOLVING TRANSNATIONAL DISPUTES THROUGH INTERNATIONAL ARBITRATION* (T. Carbonneau ed. 1984), and stating, “[t]here is very strong reason to fear [the term] means nothing and is incapable of definition The word ‘transnational’ is confusing and indicates a regrettable lack of precision of thought and language such as lawyers must be expected to eschew”). Pace Professor Mann, the United Nations Centre for Transnational Corporations retains its original name.

6. This is often referred to as the “internationalization” or “denationalization” of international commercial arbitration. The international commercial arbitration bar, which includes a large number of academics, generally regards this as a desirable goal. See Lew, *Introduction*, in *CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRA-*

Responsible for much of this convergency⁷ are the major interna-

TION 1 (J. Lew ed. 1987) [hereinafter CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION] (noting that "the elimination of the restrictions and prejudices of national laws and the ability to transcend national, political and cultural differences is fundamental for the future of international arbitration"); Coulson, *The Future Growth of Institutional Administration in International Commercial Arbitration*, in THE ART OF ARBITRATION 73, 81 (J. Schultsz & A. van den Berg eds. 1982) (observing that "it may be appropriate for the leading agencies to rise above national and cultural differences in a sensible effort to accommodate to the emerging demands of the parties"); see also *infra* text accompanying notes 246-248 (noting that international arbitrators in different countries are making similar procedural and substantive decisions).

7. Another — but only *potential* — source of convergency is the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law (UNCITRAL) on June 21, 1985, and recommended to all states by the United Nations General Assembly on December 11, 1985. See *Model Law on International Commercial Arbitration*, reprinted in 24 I.L.M. 1302, 1302 (1985); 11 Y.B. COMM. ARB. 380, 380-90 (1986) [hereinafter *Model Law*] (containing the text of the Model Law); see 2 I. KAVASS & A. LIIVAK, UNCITRAL MODEL LAW OF INTERNATIONAL COMMERCIAL ARBITRATION: A DOCUMENTARY HISTORY §§ 66.0-62, 68.0-1 (1985) (compiling documents related to UNCITRAL from 1979 to the present); INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION, CONGRESS SERIES NO. 2 UNCITRAL PROJECT FOR A MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION 1 (1984) (containing a draft of the Model Law and reports on the Model Law hearings); Hoellering, *The UNCITRAL Model Law on Commercial Arbitration*, 20 INT'L LAW. 327, 338 (1986) (discussing background principles and features of the Model Law, and concluding that the Model Law will serve to make international commercial arbitration "more uniform"). So far, the Model Law has been adopted nationally only in Canada (now in all of its component jurisdictions: federal, ten provincial, and two territorial), Cyprus and Nigeria. See generally UNCITRAL ARBITRATION MODEL IN CANADA (R. Patterson & B. Thompson eds. 1987) [hereinafter UNCITRAL ARBITRATION MODEL IN CANADA] (presenting papers from a conference on the settlement of international legal disputes); Kos-Rabcewicz-Zubkowski, *International Commercial Arbitration Laws in Canada*, J. INT'L ARB., Sept. 1988, at 43, 47-49 (listing all statutory citations except for the final two: Saskatchewan, S.S. 1988, C. I-10.2; and Ontario, S.O. 1988, c.30); Gregory, *International Commercial Arbitration: Comments on Professor Graham's Paper*, 13 CAN. BUS. L.J. 42, 42 (1987-1988) (describing historical and legal background in Canada); Herrmann, *For an UNCITRAL Model Restatement of Arbitration Law in the United Kingdom*, 4 ARB. INT'L 62, 64 (1988) (the Senior Legal Officer of the UNCITRAL Secretariat in Vienna noting the adoption of the model law in Cyprus and Nigeria) (the legislation referred to is the International Commercial Arbitration Law, 1987, adopted on May 29, 1987 (Cyprus) (in English translation issued by the Cypriot Ministry of Justice); and the Arbitration and Conciliation Decree 1988, promulgated as Decree No. 11 on March 14, 1988 (Nigeria)); *Departmental Advisory Committee Report on UNCITRAL Model Law (United Kingdom)*, reprinted in 3 INT'L ARB. REP. Doc. A (March 1988) (reporting the committee's views to the Department of Trade and Industry); Report of Working Group on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (Australia) (noting the Working Group's views), reprinted in 2 INT'L ARB. REP. 656 (1987); Law Reform Commission Report on the Adoption of the UNCITRAL Model Law of Arbitration (Hong Kong) (reporting the views of the Law Reform Commission), reprinted in 3 INT'L ARB. REP. Doc. B (Jan. 1988); Washington Foreign Law Society, Report on the UNCITRAL Model Law on International Commercial Arbitration (United States), reprinted in 2 INT'L ARB. REP. 779, 779-828 (1987) (reporting the views of the Washington Foreign Law Society); Gaillard, *The UNCITRAL Model Law and Recent Statutes on Interna-*

tional commercial arbitration institutions: the International Chamber of Commerce, the American Arbitration Association, the London Court of International Arbitration, the Stockholm Chamber of Commerce, the various Swiss Chambers of Commerce, and the International Centre for Settlement of Investment Disputes (a progeny of the World Bank, officially the International Bank for Reconstruction and Development).⁸ There are others but these are the ones that set the pace.⁹ How good a job are they doing?

Before attempting an answer to that question through individual survey and collective evaluation, it would be useful to summarize the several factors that have prompted international business to rely on arbitration as the normal device for dispute avoidance and settlement.

II. THE THRESHOLD DECISION: TO ARBITRATE

It might be more precise to describe the threshold decision as whether or not to include an arbitration clause rather than whether or not to arbitrate. Inclusion of a compromissory clause to arbitrate future disputes quite often obviates the need to arbitrate. The clause has a kind of *in terrorem* effect: its mere existence tends to promote settlement short of the adversary proceedings it contemplates. Which is to say, with a touch of hyperbole, "the best arbitration clauses are never invoked."¹⁰

Arbitration in this sense means "binding" arbitration.¹¹ The award is final, not merely a preparatory step to "serious" litigation. At least that is the theory and that is the way it *ought* to be. For the most part, as shown below, that is the way it is. Other forms of alternative dispute resolution — ADR in the argot of the day — fall short of this. Concili-

tional Arbitration in Europe and North America, 2 ICSID REV. — FILJ 424, 424-38 (1987) (discussing the model law in the context of its influence on other laws currently undergoing amendment). The number of commentaries is already vast. Typical of authoritative criticism from the traditional English point of view is Kerr, *Arbitration and the Courts: The UNCITRAL Model Law*, 34 INT'L & COMP. L.Q. 1, 19 (1985) ("let us never leave arbitration as immune from judicial review, and the parties as defenseless, as they would be under the present text"). The impact of the UNCITRAL model law is not considered further in this article.

8. See *infra* Parts III-IX of text and accompanying notes (discussing each of those international commercial arbitration institutions).

9. See *List of Arbitral Institutions*, 13 Y.B. COMM. ARB. 713, 713-37 (1988) (setting forth an extensive list of arbitral institutions).

10. Lalive, *Some Threats to International Investment Arbitration*, 1 ICSID REV. — FILJ 26, 26 (1986) [hereinafter Lalive, *Some Threats*].

11. See R. COULSON, *BUSINESS ARBITRATION — WHAT YOU NEED TO KNOW* 8 (3d ed. 1986) (noting that arbitration is usually binding, in contrast to mediation, conciliation, and fact-finding); R. BERNSTEIN, *HANDBOOK OF ARBITRATION PRACTICE* 9 (1987) (noting that an arbitration decision is enforced as though it were a court order).

ation and mediation are processes that involve third-party assistance to reach settlement but are not binding on the parties.¹² The mini-trial, whose vogue is growing rapidly in the United States and now spreading to Europe (the Zurich Chamber of Commerce issued mini-trial rules in 1984), is another form of non-binding ADR. There are more.¹³ The present article is not concerned with these other — and non-binding — forms of ADR. It is concerned with arbitration “proper.”¹⁴

What then are the reasons for the acceptance of arbitration as the

12. The terms “conciliation” and “mediation” are usually used interchangeably. See G. WILNER, *DOMKE ON COMMERCIAL ARBITRATION* § 1.02 (rev. ed. 1984) (treating mediation and conciliation interchangeably); Smith, *A Warmer Way of Disputing: Mediation and Conciliation*, 26 AM. J. COMP. L. (Supp.) 205, 205 (1978) (same). Some authorities attempt a distinction but they cannot agree on what it is. Lord Wilberforce defines conciliation as the help a third party gives the contestants to reach their own agreement, while mediation involves the further step of the third party's making recommendations. Wilberforce, *Resolving International Commercial Disputes: The Alternatives*, in UNCITRAL ARBITRATION MODEL IN CANADA, *supra* note 7, at 7. Two other English authorities exactly reverse the definitions. A. REDFERN & M. HUNTER, *supra* note 4, at 20. The American Arbitration Association (AAA), employing “mediation”, and the International Chamber of Commerce (ICC), employing “conciliation”, define their respective terms in an almost identical sense, and include therein third-party recommendations and proposals for settlement. AAA COMMERCIAL MEDIATION RULES 10 (The American Arbitration Association, effective Oct. 1, 1987); ICC RULES OF OPTIONAL CONCILIATION arts. 5, 11 (The International Chamber of Commerce, effective Jan. 1, 1988). To the same effect as the ICC are the UNCITRAL RULES art. 7(4). UNCITRAL, *Report of the 13th Sess.*, 35 U.N. GAOR Supp. (No. 17) at 12-38, U.N. Doc. A/35/17 (1980). The terms have essentially identical meanings in public international law as well. Sohn, *The Function of International Arbitration Today*, 108 RECUEIL DES COURS 1, 15-20 (1963-I); cf. Bindschedler, *Conciliation and Mediation*, in 1 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 47, 49 (1981) (finding no clear distinction, but employing “mediation” for activities of states and “conciliation” for those of private persons, and regarding “conciliation” as procedurally more formal).

13. See S. GOLDBERG, E. GREEN & F. SANDER, *DISPUTE RESOLUTION* 8-9 (1985) (listing, in table form, “primary” and “hybrid” dispute resolution processes); Perlman & Nelson, *New Approaches to the Resolution of International Commercial Disputes*, 17 INT'L LAW. 215, 231-36 (1983) (listing alternative methods of dispute resolution).

14. Useful general descriptions of international commercial arbitration may be found in C. SCHMITTHOFF, *EXPORT TRADE: THE LAW & PRACTICE OF INTERNATIONAL TRADE* 574-614 (8th ed. 1986) (discussing both English and international arbitration practice); G. DELAUME, *LAW AND PRACTICE OF TRANSNATIONAL CONTRACTS* 281-349 (1988) (reviewing various aspects of transnational commercial arbitration); see also A. LOWENFELD, 1 *INTERNATIONAL ECONOMIC LAW: INTERNATIONAL PRIVATE TRADE* 85-99 (rev. 2d ed. 1988) [hereinafter A. LOWENFELD] (discussing international commercial arbitration); McClelland, *International Arbitration: A Practical Guide for the Effective Use of the System for Litigation of Transnational Commercial Disputes*, 12 INT'L LAW. 83, 83-103 (1978) (explaining how legal practitioners can use the international system successfully); Vagts, *Dispute Resolution Mechanisms in International Business*, 203 RECUEIL DES COURS 17, 62-84 (1987-III) (discussing the history and the present status of transnational arbitration). The new American Law Institute Restatement (Third) of Foreign Relations Law deals generally with the subject. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 487-88 (1987).

preferred mode? A listing with very brief comment follows:¹⁵

1. It avoids litigation in, and decision by, a biased or unfriendly foreign court. This assurance of neutrality is probably the principal advantage of arbitration.

2. It enhances the possibility of presenting one's case to experts, learned and experienced in the field involved. The *parties* choose the judge, or they choose the institution or authority that chooses the judge. With a court it is catch-as-catch-can.

3. It provides for greater flexibility of procedure. This can result from the compromissory clause itself, from the procedures prescribed by arbitral institutions, and from the decisions of arbitrators made within the usually ample scope of their authority.

4. It is private, and it more easily allows the parties to carry on their normal business, if that is their wish, while the dispute is pending resolution. This is of particular interest to foreign parties, who are accustomed to a higher level of business privacy than their American counterparts.

5. It is probably and even normally less expensive but this cannot be assured or assumed. Cost savings should not be automatically given preponderant weight in the arbitration/litigation equation. Of course individual circumstances will vary.

6. It leads to easier enforcement across national frontiers. The United States, for instance, does not have a treaty relationship with any other country on the recognition of foreign *judgments*. But under the New York Convention of 1958 it is bound with 77 other countries to mutual recognition of foreign *arbitral awards*.¹⁶

7. It can be substantially more convenient to carry out than litigation because of the international arbitration institutions now in place. It is the role and performance of these institutions that the remainder of this article examines.

15. There are about as many "lists" of advantages and disadvantages as there are articles on international commercial arbitration. See A. REDFERN & M. HUNTER, *supra* note 4, at 16-20 (listing advantages of arbitration); W. STRENG & J. SALACUSE, *supra* note 4, at § 30.06[A] (listing perceived advantages of arbitration over judicial settlement). For somewhat restrained treatment see Kerr, *International Arbitration*, *supra* note 3, at 164-65 (noting in brief the advantages of arbitration); Yates, *Arbitration or Court Litigation for Private International Dispute Resolution: The Lesser of Two Evils*, in RESOLVING TRANSNATIONAL DISPUTES THROUGH INTERNATIONAL ARBITRATION [SIXTH SOKOL COLLOQUIUM] 224, 226-32 (T. Carbonneau ed. 1984) [hereinafter SIXTH SOKOL COLLOQUIUM] (reviewing factors in the choice between litigation and arbitration). The listing in the text is the author's own arrangement of various factors.

16. See *infra* notes 18-31 and accompanying text (discussing treaties as a structural element that supports the choice of arbitration).

III. INTERNATIONAL FRAMEWORK

Three elements converge to provide the structural reason for choosing arbitration as the method for settling transnational business disputes: (a) major multilateral treaties make arbitral awards rendered in one country enforceable in others (something not generally true of judicial judgments except among member states of the European Community),¹⁷ (b) established institutions exist to administer arbitration in an expeditious, economical and neutral fashion, and (c) official rules of procedure have been developed for the conduct of arbitral proceedings that parties to contracts can adopt or that will be applicable through simple designation by the parties of an administering institution. This is the framework for the evaluation. First an overview.

A.

The keystone treaty is the UN Arbitration Convention of 1958, usually referred to as the New York Convention.¹⁸ By January 1, 1989, it

17. See European Communities Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels Convention), Sept. 27, 1968, arts. 26-30, *reprinted in* 8 I.L.M. 229, 236-37 (1969) (sometimes referred to as the European Full Faith and Credit Convention) (giving "full faith and credit" to judicial decisions among EEC members); see also A. DASHWOOD, R. HACON & R. WHITE, *A GUIDE TO THE CIVIL JURISDICTION AND JUDGMENTS CONVENTION* 35 (1986) (discussing the recognition and enforcement of judgments under the Brussels Convention); Landay, *Another Look at the EEC Judgments Convention: Should Outsiders Be Worried?*, 6 DICK. J. INT'L L. 25, 25 (1987) (stating that the EEC convention perpetuates the potential for decisions against non-members of the EEC that are based on "exorbitant" jurisdiction).

18. U.N. Convention on the Recognition of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38, *reprinted in* 4 Y.B. COMM. ARB. 226 (1979) [hereinafter New York Convention]. The standard work on the treaty is A. VAN DEN BERG, *THE NEW YORK ARBITRATION CONVENTION OF 1958* 338 (1981) (discussing the New York Convention from the standpoint of its application by the courts, with an emphasis on the need for uniformity of interpretation); see also Sanders, *A Twenty Years' Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 13 INT'L LAW. 269, 269-87 (1979) (describing the enforcement of foreign arbitral awards under the New York Convention). A useful and concise summary of the Convention is found in A. REDFERN & M. HUNTER, *supra* note 4, at 46-47, 343-49. A lengthy article of impressive scholarship describing the convention's law-making impact in various jurisdictions is Carbonneau, *American and Other National Variations on the Theme of International Commercial Arbitration*, 18 GA J. INT'L & COMP. L. 143, 163 (1988) (general); *id.* at 167 (France); *id.* at 173 (United Kingdom); *id.* at 177 (Canada); *id.* at 188 (United States). For issues under the Convention in United States practice, see Harnick, *Recognition and Enforcement of Foreign Arbitral Awards*, 31 AM. J. COMP. L. 703, 703 (1983) (discussing United States practice). Other treaties of historical or tangential interest such as the Geneva Protocol of 1923, the Geneva Convention of 1927, the European Convention of 1961 (Geneva), the Moscow Convention of 1972, and various Latin American conventions, are described in A. REDFERN & M. HUNTER, *supra* note

had been accepted by 78 countries, including almost all of the major trading nations of the world.¹⁹ Three more countries had signed but not yet ratified the convention.²⁰ The New York Convention imposes on its parties the obligations (a) to enforce an agreement to arbitrate unless it is found to be void,²¹ and (b) to recognize foreign awards under such agreements and enforce them by proceedings not substantially more onerous than those applicable to domestic awards.²² Exceptions to the award enforcement duty are few: invalidity of the arbitration agreement, inability of a party to present its case, nonconformance of the award or procedure with the agreement, or violation of public order by enforcement of the award.²³ The full name of the treaty is the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

The ICSID Convention of 1965, occasionally referred to as the Washington Convention, was formulated by the World Bank to provide for the resolution of legal disputes arising out of private investments.²⁴ ICSID stands for International Centre for Settlement of Investment Disputes. Its headquarters is at the World Bank in Washington, D.C. By January 1, 1989, 89 countries had accepted the treaty and eight more had signed but not yet ratified.²⁵ The dispute must be between a "Contracting State" and a "national of another Contracting State."²⁶ Arbitration is conducted under the auspices of the World Bank. Ratification of the convention does not of itself constitute consent to arbitration, but consent of a contracting state may be given in advance (a) by legislation, (b) in a separate agreement between states, or (c) in an agreement with an investor (such as a concession agreement).²⁷ A par-

4, at 43-45, 47-48.

19. *Scoreboard of Adherence to Transnational Arbitration Treaties*, NEWS AND NOTES FROM THE INSTITUTE FOR TRANSNATIONAL ARBITRATION (ITA) (January 1989) [hereinafter NEWS AND NOTES FROM THE INSTITUTE FOR TRANSNATIONAL ARBITRATION], reprinted as an annex to this article. The author is Director of ITA and prepares, with the much appreciated assistance of Theresa L. Glavin, its quarterly Scoreboard.

20. *Id.*

21. New York Convention, *supra* note 18, arts. II(1), II(3).

22. *Id.* art. III.

23. *Id.* art. V.

24. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, opened for signature Mar. 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159, reprinted in International Centre for Settlement of Investment Disputes, ICSID BASIC DOCUMENTS 11 (ICSID/15 1985) [hereinafter ICSID Convention].

25. NEWS AND NOTES FROM THE INSTITUTE FOR TRANSNATIONAL ARBITRATION, *supra* note 19 and annex to this article.

26. ICSID Convention, *supra* note 24, art. 25(1).

27. *Id.* art. 25(1); see also G. DELAUME, *supra* note 14, at 360 (enumerating the

ticular feature of an ICSID arbitration award is that it is final and binding, without exception, in contracting states.²⁸ Only a certified copy need be filed with an appropriate court for judicial recognition and enforcement.²⁹ The full name of the treaty is the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

The Inter-American Arbitration Convention of 1975, often referred to as the Panama Convention, is essentially the same as the New York Convention except (a) that when an arbitration is ordered based on an arbitration agreement, the arbitration must be conducted in accordance with the rules of the Inter-American Commercial Arbitration Commission (IACAC) in the absence of express party agreement otherwise, and (b) there is no provision for judicial enforcement of arbitration agreements in cases where a national court is already seized of an action on the same matter.³⁰ By January 1, 1989, 11 Latin American

several forms of consent).

28. ICSID Convention, *supra* note 24, arts. 53(1), 54(1).

29. *Id.* art. 54(2).

30. Inter-American Convention on International Commercial Arbitration, *opened for signature* Jan. 30, 1975, art. 3, 42 O.A.S.T.S. 1, OEA/ser. A/20 (SEPF) (1975), *reprinted in* 14 I.L.M. 336, 336 (1975), *also reprinted in* 3 Y.B. COMM. ARB. 15, 15 (1978) [hereinafter Panama Convention]; *cf.* New York Convention, *supra* note 18, art. II (3) (requiring courts of member states to enforce arbitration agreements); *see also* 1 H. SMIT & V. PECHOTA, WORLD ARBITRATION REPORTER §§ 255.1-260 (1987) [hereinafter H. SMIT & V. PECHOTA] (providing an excellent comparison of the New York and Panama Conventions).

The Inter-American Commercial Arbitration Commission (IACAC) is a private organization, founded in 1934 to promote arbitration and conciliation in the Western Hemisphere. Its Rules of Procedure are identical to those of UNCITRAL, except for minor variations and the recommended compromissory clause that expressly opts for arbitral decision *ex aequo et bono* (i.e., on general concepts of justice and fairness, rather than on technical legal rights). *See infra* notes 35-41 and accompanying text (describing the application of UNCITRAL Rules of Procedure). With headquarters in Washington, D.C., in offices provided by the 32-member Organization of American States (OAS), its primary activity at present is to promote acceptance of the New York and Panama Conventions. IACAC's function as administrator of arbitrations has so far been minimal. *See also* Eyzaguirre, *Arbitration in Latin America: The Experience of the Inter-American Commercial Arbitration Commission*, 4 INT'L TAX & BUS. LAW. 288, 289, 293, 295-96 (1986) (noting the adoption, with minor changes, of UNCITRAL's *ad hoc* rules). For fuller accounts see Norberg, *General Introduction to Inter-American Commercial Arbitration*, 3 Y.B. COMM. ARB. 1, 14 (1978) (with IACAC Rules of Procedure reprinted at 231) (concluding that widespread acceptance of the Panama Convention would bring uniformity to the Western Hemisphere); Norberg, 8 Y.B. COMM. ARB. 77, 80 (1983) (stating that uniformity has taken longer than the author originally predicted, but that it is gaining momentum); Norberg, *Inter-American Commercial Arbitration: Unicorn or Beast of Burden?*, 5 PACE L. REV. 607, 615 (1985) (noting that IACAC's Rules of Procedure are the rules that UNCITRAL recommends, with appropriate changes for the Western Hemisphere). Charles R. Norberg is the incumbent Director General of IACAC.

countries had ratified the convention; six additional countries had signed, including the United States, but not yet ratified it.³¹ The full name of the treaty is the Inter-American Convention on International Commercial Arbitration.

Annexed to this article is a schedule prepared by the author that shows the status of adherence by 172 countries to these and certain other treaties on arbitration as of January 1, 1989.

B.

There are literally hundreds of institutions throughout the world whose services are available to appoint arbitrators and to administer arbitral proceedings. Most of these institutions are affiliated with local chambers of commerce. The 1988 Yearbook of Commercial Arbitration, published by the private and prestigious International Council for Commercial Arbitration (ICCA), lists some of the institutions that deal with international arbitration in general.³² They are located in almost 50 countries. Some countries play host to several, including France with six.

The major institutions, considered in greater detail below, are these:

- International Chamber of Commerce (ICC), Paris
- American Arbitration Association (AAA), New York
- London Court of International Arbitration (LCIA), London
- Stockholm Chamber of Commerce (SCC), Stockholm
- Swiss Chambers of Commerce (Concordat Group), especially Basel, Bern, Geneva, Ticino (Lugano), and Zurich
- International Centre for Settlement of Investment Disputes (ICSID), Washington, D.C.

31. See NEWS AND NOTES FROM THE INSTITUTE FOR TRANSNATIONAL ARBITRATION, *supra* note 19, and annex to this article (listing the countries that adhere to various transnational arbitration treaties). In the case of the United States, President Reagan signed the instrument of ratification (with reservations) on November 10, 1986, but withheld deposit with the OAS (to complete ratification) until implementing legislation is enacted by Congress. Signature of Instrument, 87 DEP'T ST. BULL. 90 (Jan. 1987); President's Message of June 15, 1981 to the Senate Transmitting the Inter-American Convention on Commercial Arbitration, 1981 PUB. PAPERS 517-18 (undertaking to await enactment of legislation). The Senate consented to ratification with the following reservations on October 9, 1986: (1) reciprocity, (2) primacy of the New York Convention in case of conflict unless a majority of the parties are from OAS countries that have ratified the Panama Convention, and (3) application of IACAC Rules in effect on date of deposit unless the United States, by administrative determination, has accepted subsequent amendments. S. Res. Treaty Doc. No. 97-12, 99th Cong., 2d Sess., 132 CONG. REC. S15,773-774 (1986) (containing Senate consent with text of the three reservations).

32. See *List of Arbitral Institutions*, *supra* note 9, at 713 (providing an extensive list of arbitral institutions).

Other institutions of note are those located in Beijing, Bogota, Cairo, Cologne, Hamburg, Hong Kong, Kuala Lumpur, Los Angeles, Madrid, Melbourne, Miami, Moscow, Ottawa, Rome, Rotterdam, Tokyo, Vancouver, and Vienna.³³ Location of headquarters does not necessarily indicate venue of proceedings. The ICC, for instance, conducts arbitrations throughout the world, with only about a third in Paris.³⁴

C.

The United Nations Commission on International Trade Law (UNCITRAL) has issued Arbitration Rules for the conduct of arbitration cases that can be adopted by the parties in their contracts or that can be administered by arbitral institutions chosen by the parties.³⁵ In addition, each of the major arbitral institutions has rules of its own for the arbitrations it conducts.³⁶ Both the AAA and the LCIA will administer

33. See AAA, *Survey of International Arbitration Sites* 1 (1984) (discussing the suitability of arbitration sites such as Geneva, Hong Kong, Kuala Lumpur, London, New York, Paris, Stockholm, Vienna, and Zurich). The volume of disputes arbitrated in Moscow by the Foreign Trade Arbitration Commission (FTAC) (in December 1987 renamed the Arbitration Court at the USSR Chamber of Commerce and Industry) and the Maritime Arbitration Commission (MAC), both attached to the USSR Chamber of Commerce and Industry, has been large (from 300 to 400 cases per year), but 90% of the cases have involved Eastern Bloc parties, and although it is legally possible, no foreign citizen has ever sat as arbitrator. Hobér, *Arbitration in Moscow*, 3 ARB. INT'L 119, 121, 128 (1987) (discussing the arbitration practices of FTAC and MAC in the Soviet Union) (the commentator is with the Stockholm office of White & Case and has written his 45-page study in a generally non-partisan fashion); Lebedev, *U.S.S.R.*, II INT'L HANDBOOK COMM. ARB. 4, 4 (1985) (same); Timmermans, *The New Statute on the Arbitration Court at the USSR Chamber of Commerce and Industry*, 5 J. INT'L ARB., Sept. 1988, at 97, 97 (same); Osakwe, *The Soviet Position on International Arbitration as a Method of Resolving International Disputes*, in SIXTH SOKOL COLLOQUIUM, *supra* note 15, at 184 (same). Because of its unsuitability for genuinely "international" arbitration, Moscow is not considered further in this article. The reasons why Tokyo has not achieved a prominence in international commercial arbitration commensurate with its economic importance (an average annual caseload for the Japan Commercial Arbitration Association of only 13 for the period 1980-1987) are discussed in Sawada, *Practice of Arbitral Institutions in Japan*, 4 ARB. INT'L 120, 123, 138-39 (1988) (the reasons include a "deeply ingrained abhorrence of confrontation and the resolution of disputes through enforceable means").

34. See *infra* note 44 and accompanying text (noting the high proportion of ICC arbitrations that take place outside France).

35. UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, ARBITRATION RULES, 31 U.N. GAOR Supp. (no. 17), U.N. Doc. A/31/17 (1976), *reprinted in* 2 Y.B. COMM. ARB. 161 (1977). See generally I. DORE, *ARBITRATION AND CONCILIATION UNDER THE UNCITRAL RULES: A TEXTUAL ANALYSIS* (1986) (providing a full length treatment of UNCITRAL's arbitration rules (with rules set forth in appendix)); see also Sanders, *Procedures and Practices under the UNCITRAL Rules*, 27 AM. J. COMP. L. 453, 454-56 (1979) (discussing the scope of UNCITRAL's arbitration rules).

36. See *infra* Parts IV-IX (addressing the various institutions' rules). Each institution publishes its rules in booklet or pamphlet form. The rules are also collected in various services and so-called handbooks, but these seldom keep pace with institutional

UNCITRAL rules in place of their own if the parties so choose.³⁷ The same is true of the Stockholm Chamber of Commerce.³⁸ The ICC, however, will not administer UNCITRAL rules in place of its own, but it will act as "appointing authority" for arbitrators under UNCITRAL rules administered by others.³⁹ The differences from one set of rules to the next are not great.⁴⁰ Many, including this author, prefer the UNCITRAL rules because of their broad acceptance and because a record of decisions rendered under them is available in the reports of the Iran-U.S. Claims Tribunal at The Hague.⁴¹

This, then, is the stage and these are the actors and the scripts. There follows a second and closer look at the institutions.

IV. ICC COURT OF ARBITRATION

The Court of Arbitration of the International Chamber of Commerce (ICC) is the premier institution of international arbitration in the world today. The others fall far behind in terms of caseload and new requests for arbitration. In 1987 the ICC Court was supervising almost 700 pending cases.⁴² At the same time the American Arbitration Association, its nearest competitor in terms of volume, was han-

revisions. With respect to each institution discussed *infra*, the version of the rules referred to is indicated in the appropriate note.

37. See *infra* Parts V and VI of text and accompanying notes (discussing the AAA and LCIA).

38. See *infra* Part VII of text and accompanying notes (discussing the Stockholm Chamber of Commerce).

39. See *infra* Part IV of text and accompanying notes (discussing the ICC Court of Arbitration).

40. This has been true for some time. See Straus, *The Growing Consensus on International Commercial Arbitration*, 68 AM. J. INT'L L. 709, 711 (1974) (stating that "the multiplicity of arbitration rules and institutional arrangements, when carefully analyzed, differ very little in any essential qualities"). But differences *do* exist and these should be carefully considered in drafting the compromissory clause. See Rhodes & Sloan, *The Pitfalls of International Commercial Arbitration*, 17 VAND. J. TRANS-NAT'L L. 19, 25-28 (1984) (discussing standard arbitration clauses in contracts under AAA, ICC, and UNCITRAL rules).

41. See Holtzmann, *Some Lessons of the Iran-United States Claims Tribunal*, in PRIVATE INVESTORS ABROAD — PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS §§ 16.5, 16.14, 16.29 (J. Moss ed. 1987) [hereinafter PRIVATE INVESTORS ABROAD] (discussing the experience of the Iran-United States Claims Tribunal). The cumulative index to the first ten volumes of reports (through April 15, 1986) lists almost 500 references to the Tribunal Rules. 10 IRAN-U.S.C.T.R. 400-01 (1987). The Tribunal Rules are actually an adaptation of the UNCITRAL Rules to accommodate the continuous nature of the tribunal's function. Böckstiegel, *Applying the UNCITRAL Rules: The Experience of the Iran-United States Claims Tribunal*, 4 INT'L TAX & BUS. LAW. 266, 267-69 (1986).

42. ICC ANNUAL REPORT, 1987 24 (1987). The address of the ICC Court of Arbitration is 38 Cours Albert 1er, 75008 Paris.

dling somewhat more than 100 international arbitrations.⁴³

Although headquartered in Paris, the ICC arbitrations in 1987 took place in 24 countries (with about a third in Paris), and involved parties from 77 countries and arbitrators from 44.⁴⁴ Cases were handled under all systems of law, principally Common Law, Civil Law, and Islamic Law. They were handled in various languages, principally English, French, German and Spanish but also including Arabic and Japanese.⁴⁵ The parties themselves can determine what system of law and what language to employ.⁴⁶

The impulse for creation in 1919 of the ICC, a non-governmental organization of businessmen, came from the French Minister of Commerce, Etienne Clémentel.⁴⁷ Four years later the Court of Arbitration was founded, adopting a structure designed by Owen D. Young of the United States Chamber of Commerce, also a non-governmental organization.⁴⁸ From this initial "western" and private focus, the Court had reached the point in 1987 where one-third of ICC arbitration parties were from developing nations and one-sixth were state or state-controlled entities.⁴⁹

President of the ICC Court is Michel Gaudet, formerly chief legal adviser of the Commission of the European Economic Community and

43. Letter from AAA President Robert Coulson to author (Feb. 24, 1988) [hereinafter Coulson Letter].

44. ICC ANNUAL REPORT, 1987, *supra* note 42, at 24; Telex from ICC Court of Arbitration Secretary General Stephen R. Bond to author (Feb. 25, 1988) [hereinafter Telex] (relating that about a third of all ICC arbitrations take place in Paris).

45. Telex, *supra* note 44.

46. See ICC RULES OF ARBITRATION arts. 13(3) and 15(3) (International Chamber of Commerce, effective Jan. 1, 1988) [hereinafter ICC RULES] (noting that parties to an ICC arbitration may choose the applicable laws and languages that govern the arbitration). If the parties do not determine these matters, the arbitrator will. *Id.*; W. CRAIG, W. PARK & J. PAULSSON, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION §§ 7.03-7.04 (1984) [hereinafter W. CRAIG, W. PARK & J. PAULSSON] (same). This is the only full-length work in English on ICC arbitration. A new edition was scheduled for autumn 1988. See *infra* note 246 and accompanying text (noting that a supplemental looseleaf version is also published).

47. See W. CRAIG, W. PARK & J. PAULSSON, *supra* note 46, at xvii-xviii (discussing the creation of the ICC); Ceyrac, *Welcome Address*, in INTERNATIONAL ARBITRATION: 60 YEARS OF ICC ARBITRATION: A LOOK AT THE FUTURE 19-20 (1984) (same).

48. See W. CRAIG, W. PARK & J. PAULSSON, *supra* note 46, at xvii-xviii (discussing the origins of the ICC Court of Arbitration).

49. The one-sixth estimate is given by ICC representatives. Address by Stephen R. Bond, *Arbitration of International Commercial Disputes Under the Auspices of the International Chamber of Commerce* 5 (June 6, 1988) (unpublished speech delivered by ICC Court of Arbitration Secretary General in Beijing) [hereinafter S. Bond] (noting the one-sixth estimate). ICC representatives will frequently employ the fraction one-third in reference to state and state-controlled entities. The facile reconciliation is that one-sixth refers to parties and one-third refers to cases (in which only one of the parties is a state or state-controlled entity).

later president of both the French and the European Insurance Associations.⁵⁰ The seven vice-presidents of the Court are from Egypt, India, Lebanon, Mexico, Sweden, Switzerland, and the United States.⁵¹ There are 44 other members,⁵² all appointed by ICC "national committees" representing more than 7,000 enterprises in over 110 countries.⁵³ The Court, which meets in plenary session once a month and in three-member administrative committee twice a month, oversees the work of the arbitrators, who are appointed on a case-by-case basis. The Court is thus not a "court" in the usual sense; its role is to *supervise* arbitration rather than to *perform* it.

Balancing party autonomy with professional supervision of proceedings is the distinguishing feature of ICC arbitration. Under the ICC Rules of Conciliation and Arbitration, the parties are free to agree on their own law, to designate the members of their own arbitral tribunal, and to determine the place of arbitration.⁵⁴ If the parties fail to do so, the Court of Arbitration or the arbitrator, depending on the precise issue, steps in to supply the missing element.

The Court of Arbitration (a) screens requests for arbitration to determine if there exists a *prima facie* agreement to arbitrate, (b) approves the "Terms of Reference" prepared by the arbitrator and the parties, (c) monitors the arbitration proceedings, and (d) scrutinizes the award prepared by the arbitrator. The Terms of Reference requirement and the scrutiny of the draft award are unique to ICC arbitration.

The Terms of Reference, which define the contested issues and settle procedural details, are drawn up by the arbitrator and agreed to by the parties.⁵⁵ If one party refuses to sign, and the Court regards the Terms as adequate, the Court will set a time limit for signature by the recalcitrant party, after which the arbitration will proceed whether or not the default has been cured.⁵⁶

The advantages of the Terms of Reference requirement are said to be these: the issues are clearly defined in a single document for both the parties and the arbitrator (and for the Court of Arbitration as well); the meeting to prepare and sign the document serves the ancil-

50. Based on biographical material supplied to the author by the ICC Secretariat.

51. ICC ANNUAL REPORT, 1987, *supra* note 42, at 24.

52. *Id.*

53. Telex from Stephen R. Bond, ICC Court of Arbitration Secretary General, to author 1 (Sept. 1, 1988).

54. ICC RULES, *supra* note 46, art. 12 (providing that the parties may specify the place of arbitration).

55. *Id.* arts. 13(1) and 13(2).

56. *Id.* art. 13(2).

lary function of a pre-trial conference, at which issues can be narrowed or even resolved, sometimes in their entirety; and the Terms serve as a separate *compromis* to arbitrate for those jurisdictions, mostly Arab or Latin American, that prohibit an agreement to arbitrate *future* disputes.⁵⁷

Scrutiny of the arbitrator's draft award by the Court of Arbitration covers both form and substance. This is the much vaunted "quality control." The Court itself may modify the award as to form, including, *inter alia*, arithmetical calculations, internal consistency, and typographical or linguistic errors, and "without affecting the arbitrator's liberty of decision, may draw his attention to points of substance."⁵⁸ The purpose of the substantive review and "drawing attention" is to render the award as invulnerable as possible to attack in any subsequent judicial proceedings.⁵⁹ In appreciation of this, arbitrators generally pay respectful attention to the Court's comments on substance. In the rare cases — about 0.5% — when a national court has annulled an ICC award or refused to enforce it, the Court of Arbitration had generally drawn the arbitrator's attention to the relevant point. It is estimated that 90% of all awards are honored voluntarily by the losing party. Only about 5% are ever challenged in the courts.⁶⁰

Key to the operation of the ICC system is the Secretariat, composed of some 25 specialists in arbitration. The Secretary General, currently Stephen R. Bond, assigns a "team" to each case on the docket. The team, headed by an ICC "Counsel," assists the Court, the arbitrator, the parties, and the parties' counsel. The General Counsel, Guillermo Aguilar Alvarez, is responsible for legal research and information. The Secretariat is the main channel of communication between the Court and those involved directly in the arbitration.⁶¹

The ICC amended its Rules, effective January 1, 1988, with fees and

57. See W. CRAIG, W. PARK & J. PAULSSON, *supra* note 46, at 59-66, §§ 15.01-15.04 (discussing the Terms of Reference); see also Goekjian, *ICC Arbitration from a Practitioner's Perspective*, 14 GEO. WASH. U. J. INT'L L. & ECON. 407, 416-18 (1980) (noting that the Terms of Reference can also serve as a vehicle for resolving key procedural issues such as timing and manner of submitting evidence and briefs). To be of advantage the Terms of Reference should be "drafted as minutely as any contract". Goldsmith, *How to Draft Terms of Reference*, 3 ARB. INT'L 298, 299 (1987).

58. ICC RULES, *supra* note 46, art. 21.

59. See W. CRAIG, W. PARK & J. PAULSSON, *supra* note 46, § 2.03 (noting that every effort must be made "to make sure that the award is enforceable at law").

60. *Id.*

61. See S. Bond, *supra* note 49, at 9-11 (describing the structure of the Secretariat and its functions); see also Hancock, *The ICC Court of Arbitration*, 1 J. INT'L ARB. 21, 26 (1984) (stating that "[t]he Secretariat provides the institutional memory of the Court").

administrative costs that are generally considered somewhat higher than those of other institutions, although the margin is such that this might not be true in any given case.⁶²

Comparison of the major arbitral institutions *inter se* is an endeavor that is largely futile, perhaps even fatuous, and not germane to the purpose of this survey, which is to evaluate their performance *as a group*. If anything, the sharper the perceived differences among the institutions, the greater the likelihood that they are serving their collective function by providing variety of choice. There is, nevertheless, one distinction of the ICC that must be remarked: it is the most frequently and severely criticized institution in the group. Its prominence and even predominance have guaranteed it.

A fair sampling of complaints would include the following: administrative charges are too high; arbitrator fees should be based on time expended rather than amount in controversy; interest should be paid on party deposits; the selection of neutral arbitrators through the national committees unduly limits the pool of potential arbitrators; the screening of potential arbitrators is performed by administrative personnel lacking in long-term experience; the ICC relies inordinately for its arbitrators on an "in-group" of familiar figures; the rules are unnecessarily restrictive of party autonomy; the preparation of terms of reference leads to delay and premature definition of issues; and the scrutiny of draft awards is a cumbersome and less efficacious device than judicial correction of egregious abuse or error.⁶³

62. See Triebel, *ICC Rules of Arbitration and Conciliation of 1988*, 3 INT'L ARB. REP. 19, 19-28 (1988) (commenting on the ICC Rules of 1988). The minimum and maximum fee amounts for sole arbitrator at the indicated amounts in controversy (left-hand column) are as follows:

\$ 100,000	\$ 1,750 to \$ 8,000
1,000,000	7,450 to 30,000
10,000,000	21,450 to 78,000

Corresponding ICC administrative expenses are now these:

\$ 100,000	\$ 3,500
1,000,000	14,500
10,000,000	30,000

Until recently, the charges for administrative expenses covered non-arbitration expenses of the ICC that were considered beneficial to international business in general. The practice was severely criticized and stoutly defended. See Stevenson, *An Introduction to ICC Arbitration*, 14 GEO. WASH. U.J. INT'L L. & ECON. 381, 400 (1980) (discussing criticisms and defenses of the practice). Addition of this "overhead" has apparently been discontinued. Paulsson, *Arbitration Under the Rules of the International Chamber of Commerce*, in SIXTH SOKOL COLLOQUIUM, *supra* note 15, at 277-78. But the issue of no interest on deposits for costs remains. See *infra* notes 63-64 and accompanying text (discussing the amended ICC Rules and their critics).

63. See, not necessarily endorsing the criticism, Ehrenhaft, *Effective International Commercial Arbitration*, 9 L. & POL'Y INT'L BUS. 1191, 1205 (1977) (discussing

Apart from the policy of not paying interest on deposits, which is hard to defend, each of the criticisms has its reciprocal: one gets what one pays for; arbitration fees based on amount in dispute encourage expeditious handling of cases; involvement of national committees enlarges rather than reduces the pool of available arbitrators; screening of potential arbitrators by administrative staff is better than *ad hoc* screening by the parties; "in-group" is simply a pejorative term for those who have demonstrated their competence and suitability; a fair degree of precision in the rules, updated periodically in response to consumer demand, removes ambiguities and guides arbitrators who may be expert on substance but less than fully knowledgeable on procedural refinements; preparing terms of reference is procedurally economical and affords opportunity for the parties to settle in advance the less contested issues in controversy; and formal scrutiny of the draft award is the most effective way to apply the ICC's accumulated experience to assure enforceability without judicial challenge.

The critics are of two types. There are those who in the name of party autonomy would denature the essential and distinguishing ingredients of ICC arbitration. They should, to invoke ecclesiastical analogy, worship elsewhere, where the Order of Service and liturgy are more to their taste. There are others, however, who, professing the creed, would adapt it to the ever-evolving needs of transnational business. To them the ICC has been, in the main, responsive.⁶⁴ Further changes in this

Terms of Reference); Goekjian, *supra* note 57, at 416-18 (same); Paulsson, *supra* note 62, at 271 (same), 272-79 (discussing fees, costs and interest on deposits); Smit, *The Future of International Commercial Arbitration: A Single Transnational Institution?*, 25 COLUM. J. TRANSNAT'L L. 9, 18-20 (1986) (discussing selection of arbitrators), 20-22 (discussing the rules), 25-28 (discussing institutional supervision); Stevenson, *supra* note 62, at 391 (discussing the "in-group"), 396-97 (discussing terms of reference), 400 (discussing "overhead" charges). For a rather lurid account of two ICC "horror stories" see Kerr, *International Arbitration*, *supra* note 3, at 172-75 (describing one case of more than 15 years' duration involving multiple venues, laws, fora, and arbitrators of different nationalities, and another of 11 years' duration involving some five years of enforcement effort).

64. Changes made as of July 1, 1986 and incorporated into Appendix III to the Rules as of January 1, 1988 include a cap on administrative costs of \$50,500 (the cost for an amount in controversy of \$50,000,000); the substitution of a two-step deposit for costs, with 50% (25% from each party) payable when the arbitrator is seized of the case but the second 50% (again, 25% from each party) not payable until completion of the Arbitrator's Terms of Reference; and acceptability of bank guaranty when one party has fully paid in cash 100% of its half of the costs and must then cover all or part of a defaulting party's share of the deposit required (thus eliminating *pro tanto* the problem of no interest on deposits). To activate the entire process a claimant must pay \$2,000 at the time of filing that is non-refundable but creditable to the deposit for costs.

category do not want for advocates.⁶⁵

The conclusion of the authors of the standard "outside" work in English on ICC arbitration is that "although of course parties often feel they should have fared better, there is a widespread acceptance that ICC arbitral decisions generally do justice on the merits."⁶⁶

In addition to administering arbitrations under its own rules, the ICC Court of Arbitration will also act as "appointing authority" for arbitrators who are to function in an *ad hoc* context, that is, without institutional supervision, under the Arbitration Rules recommended by the United Nations Commission on International Trade Law (UNCITRAL Rules).⁶⁷

V. AMERICAN ARBITRATION ASSOCIATION

Next in order of importance, from the standpoint of international caseload, is the American Arbitration Association (AAA).⁶⁸ It is not the typical institution or center for promotion of arbitration and conduct of arbitral proceedings. Of such there are hundreds throughout the world. The AAA, which began in the typical way more than 60 years ago, has become *sui generis*.⁶⁹ It is now a vast and diverse not-for-profit private organization that in 1987 alone administered more than 52,000 arbitrations, mediations, mini-trials, and elections, drawing upon a pool of arbitrators and mediators that exceeds 60,000.⁷⁰

With headquarters in New York and branch offices in 33 cities throughout the United States, it performs its arbitration services under

65. See Triebel, *supra* note 62, at 27-28 (urging clarification on whether parties may agree to deviate from the ICC Rules and whether an arbitral tribunal may meet elsewhere than at "place of arbitration"; commenting on the elimination of reference to conflict of laws rules; stating that the winning party should be assured of collecting its legal costs); Werner, *Remuneration of Arbitrators by the International Chamber of Commerce*, J. INT'L ARB., Sept. 1988, at 135 (stating that where the amount in dispute is low, arbitrators are underpaid; that a time-spent basis should be adopted; that arbitrators should be paid as their work is performed, not when proceedings are terminated; that the Court of Arbitration should provide, at the beginning of proceedings, an estimate of probable minimum costs).

66. W. CRAIG, W. PARK & J. PAULSSON, *supra* note 46, at § 1.08.

67. See INTERNATIONAL CHAMBER OF COMMERCE, GUIDE TO ARBITRATION 54-55 (1983) (discussing the ICC as Appointing Authority under the UNCITRAL Rules). Only one request for appointment of an arbitrator pursuant to the UNCITRAL Rules was received in 1987. ICC ANNUAL REPORT, 1987, *supra* note 42, at 24-25.

68. In 1987, the AAA handled some 100-plus international cases. Coulson Letter, *supra* note 43. During the same period, the ICC processed about 700 cases. ICC ANNUAL REPORT, 1987, *supra* note 42, at 24. The headquarters of the AAA is at 140 West 51st Street, New York, N.Y. 10020-1203.

69. AAA, 50TH ANNIVERSARY 1926-1976 (1976).

70. AAA, 1985-86 ANNUAL REPORT 1-3 (1987); Coulson Letter, *supra* note 43, at 1.

a variety of rules: commercial, construction, grain, patent, real estate valuation, accident claims, and textiles.⁷¹ Of particular interest to international lawyers are the supplementary procedures for international commercial arbitration⁷² and the alternative procedures for cases it will administer under the UNCITRAL rules.⁷³ In addition to separate brochures containing its various rules, the AAA also publishes a number of other pamphlets, books and articles on the conduct of arbitration. One of exceptional value is "The Arbitrator's Role in Expediting the Large and Complex Commercial Case."⁷⁴

As the enforceability of clauses for the arbitration of future disputes has gained almost universal acceptance in the United States, and as the United States Supreme Court has continued to enlarge the range of permissible issues for arbitration (including now even such public law matters as antitrust⁷⁵ and securities regulation⁷⁶), the AAA has become the cutting edge of the movement called "alternative dispute resolution" (ADR). ADR includes mediation, conciliation, mini-trials (i.e., simulated litigation in the presence of an "adviser," who formulates non-binding recommendations for settlement based on the likely result

71. THE WORLD ARBITRATION INSTITUTE, AAA, INTERNATIONAL COMMERCIAL ARBITRATION IN NEW YORK 9-10 (J. McClendon & R. Goodman eds. 1986) [hereinafter WORLD ARBITRATION INSTITUTE]; see R. COULSON, *supra* note 11, at 1 (providing details on commercial, construction, accident claims, and textiles); G. WILNER, *supra* note 12, at § 2.02 (same). The current AAA Commercial Arbitration Rules were amended as of September 1, 1988.

72. WORLD ARBITRATION INSTITUTE, *supra* note 71, at 217-19.

73. *Id.* at 219-255.

74. Available from the AAA. It is a reprint of Poppleton, *The Arbitrator's Role in Expediting the Large and Complex Commercial Case*, ARB. J., Dec. 1981, at 6, 6-10. In spite of the title, much of the commentary and advice is applicable to cases that are not "large and complex."

75. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 614 (1985), *appeal after remand*, 814 F.2d 844 (1st Cir. 1987). Commentaries on the decision have reached torrential proportions. A convenient place to begin is Von Mehren, *From Vynior's Case to Mitsubishi: The Future of Arbitration and Public Law*, 12 BROOKLYN J. INT'L L. 583, 583 (1986) (discussing the decision of the Supreme Court in *Mitsubishi*). For an academically impressive but occasionally intemperate assault on the decision, see Carbonneau, *Mitsubishi: the Folly of Quixotic Internationalism*, 2 ARB. INT'L 116, 116-39 (1986) (stating, *inter alia*, that *Mitsubishi* contains a doctrine that "is excessive and does injustice to the domestic interest in public law by minimizing the public policy character of antitrust regulation"). For a response, analytically incisive and somewhat avuncular in tone, see Lowenfeld, *The Mitsubishi Case: Another View*, 2 ARB. INT'L 178, 179 (1986) (stating in part, "[c]omes now Professor Carbonneau, hitherto known as an internationalist, to say that the Supreme Court has blundered, seduced by 'quixotic internationalism' to arrive at an unworkable and unsound result With all respect for Professor Carbonneau, I disagree"). The Carbonneau-Lowenfeld exchange is thoughtful, constructive, and even exhilarating.

76. *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, *reh'g denied*, 108 S. Ct. 31 (1987).

of actual court litigation), and a variety of other techniques designed to facilitate fruitful negotiation and settlement.⁷⁷

International commercial arbitration is thus only a small part of the AAA's overall caseload. In 1987, 106 international cases were filed, with 44 of them in the New York office.⁷⁸ Involved in the cases were parties from Canada, West Germany, Italy, Japan, the United Kingdom, and 32 other countries.⁷⁹ Six cases involved no Americans.⁸⁰

A notable feature of AAA arbitration is that arbitrators are not required to render a "reasoned" award; that is, they do not need to write opinions explaining the reasons for their decisions unless the arbitral clause or *compromis* requires it.⁸¹ They may do so if they wish, especially if both parties request it, but the AAA discourages the practice. As explained by Robert Coulson, AAA's long-time President, "Written opinions can be dangerous because they identify targets for the losing party to attack . . . Usually the parties look to an arbitrator for a decision, not an explanation."⁸²

Unreasoned awards, however, are considered contrary to *ordre public* in some Civil Law jurisdictions and therefore unenforceable. Also, parties in international cases often expect a written opinion. As precedent an opinion can be especially useful in the case of form contracts.⁸³ To provide for this, the AAA's Supplementary Procedures for International Commercial Arbitration, first issued in 1981, declare that "[t]he AAA will make arrangements for such an opinion in consultation with

77. AAA, 1983-1984 ANNUAL REPORT 3 (1985); AMERICAN ARBITRATION ASSOCIATION, RESOLVING YOUR DISPUTES 1 (1986).

78. Coulson Letter, *supra* note 43, at 1 (reporting the number of international cases filed with the AAA in 1987).

79. *Id.*

80. *Id.*

81. WORLD ARBITRATION INSTITUTE, *supra* note 71, at 125.

82. R. COULSON, *supra* note 11, at 29. A survey of American international lawyers and business managers that the AAA conducted in 1981 indicates that this might not be entirely true of those engaged in international arbitration. Coulson, *Survey of International Arbitration*, in ARBITRATION & THE LAW, 1981 228, 243 (1981) [hereinafter Coulson, *Survey of International Arbitration*].

83. See A. REDFERN & M. HUNTER, *supra* note 4, at 294-95 (1986) (discussing the usefulness of reasoned awards); M. MUSTILL & S. BOYD, THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION IN ENGLAND 541-43 (1982) (same); Carbonneau, *Rendering Arbitral Awards with Reasons: The Elaboration of a Common Law of International Transactions*, 23 COLUM. J. TRANSNAT'L L. 579, 603-14 (1985) (same); Lew, *The Case for Publication of Arbitration Awards*, in THE ART OF ARBITRATION, *supra* note 6, at 223, 229-31 (same); Bingham, *Reasons and Reasons for Reasons: Differences Between a Court Judgment and an Arbitration Award*, 4 INT'L ARB. 141, 152-54 (1988) (stating that the parties are entitled to a reasoned decision but not a legal dissertation).

the parties and the arbitrators."⁸⁴ The Procedures do not say what happens if only one party requests the written opinion. It is understood, unofficially, that AAA practice in such cases is to allow the arbitrator to decide, after hearing argument.⁸⁵

AAA commercial arbitration is considered relatively economical and speedy, with a minimum of institutional involvement during and after the proceedings. After surveying the available institutions and rules, two authorities concluded that "international commercial arbitrations administered by the AAA, conducted under either the AAA or UNCTRAL rules and subject to U.S. arbitration laws, are [the] best . . . to provide the parties with the most efficient and effective system of alternative dispute resolution that will achieve the 'orderliness and predictability essential to any international business transaction.'"⁸⁶ This, it should be noted, is from the standard study on the subject, but of course it does not factor in the numerous special elements that will be present in any given relationship. Nationality of the parties is only one example.⁸⁷

84. AAA SUPPLEMENTARY PROCEDURES FOR INTERNATIONAL COMMERCIAL ARBITRATION Rule 7 (American Arbitration Ass'n 1986) [hereinafter AAA SUPPLEMENTARY PROCEDURES]; WORLD ARBITRATION INSTITUTE, *supra* note 71, at 219.

85. Interview with Robert Coulson, AAA President, (June 18, 1987).

86. Stein & Wotman, *International Commercial Arbitration in the 1980s: A Comparison of the Major Arbitral Systems and Rules*, 38 BUS. LAW. 1685, 1687-88 (1983). For a concise summary of American arbitration law, see Hoellering, *Provisions of U.S. Law on Arbitration Agreements*, in AMERICAN ARBITRATION ASSOCIATION, ARBITRATION & THE LAW, 1987-88, 170 (1988) (summarizing American arbitration law). In AAA practice, the fee of a party-appointed arbitrator is determined by agreement between the arbitrator and the party making the appointment. (This results from the failure of the AAA Rules to cover the subject.) Neutral arbitrators formerly served without fee in most domestic cases (at least for the first few days) but this was changed on September 1, 1988 to exclude only the first day from "appropriate" compensation. In international cases the AAA will "make arrangements . . . in consultation with the parties and the arbitrators". AAA PROCEDURES FOR INTERNATIONAL COMMERCIAL ARBITRATION Rule 50 (effective Sept. 1, 1988) [hereinafter AAA PROCEDURES] (formerly AAA Rule 51 (effective Jan. 1, 1988)); AAA SUPPLEMENTARY PROCEDURES, *supra* note 84, at 8. In the 1981 Survey conducted by the AAA, less than half the respondents indicated a specific figure for arbitrator fees (neutral and party-appointed). Of those answers, the high was \$1,020 per day and the low \$354 per day, with an average of \$670. Coulson, *Survey of International Arbitration*, *supra* note 82, at 244. The present author, without benefit of formal survey, estimates that the average for 1988 would be on the order of \$1,000 (with "bulges" of over \$2,000). AAA administrative charges (in addition to a filing fee of \$300) are, in the following selected amounts in dispute, the amounts indicated in parentheses: \$100,000 (\$1,750); \$1,000,000 (\$4,250); and \$10,000,000 (\$19,250). No fee is due on the portion of a claim exceeding \$50,000,000. In case of "extreme hardship", the AAA may defer or reduce the administrative fee. AAA ADMINISTRATIVE FEE SCHEDULE; AAA PROCEDURES, *supra*, Rule 48.

87. Objection to some aspect of United States law as the *lex arbitri* is obviously another important element. The interrelationship of federal, state, and treaty law in the

Published criticism of the AAA has been almost non-existent. What there is, is muted. There are several reasons for this. First, its performance has been unusually sensitive to the needs of a dominant and relatively homogeneous clientele, American businessmen; it changes its rules and guidelines with remarkable dispatch. Changes were promulgated twice in 1988 alone. Second, with international arbitration only a small fraction of the AAA's overall caseload (100-plus cases out of 52,000, as noted above), what institutional criticism there is has focused on its non-international affairs.⁸⁸ Third, given its highly unstructured and *laissez-faire* approach, and the corresponding enhancement of the role of individual arbitrators and particular arbitrations, it is difficult to formulate generalized weaknesses; complaints will be more discrete, more "intimate." And fourth, expectations of the parties are more clearly defined when they have already crossed the threshold of AAA selection; disappointments, and therefore criticisms, will be fewer.

This is not to say that the AAA enjoys — or should enjoy — immunity. Its practice of serving as an insulating but largely ministerial mailbox between neutral arbitrators and parties, for instance, has been sharply attacked.⁸⁹ So has its requirement that an award *always* be rendered by majority, rather than permitting the neutral chairman to decide by himself in its absence.⁹⁰ It is possible, moreover, that response to more targeted criticism could lead to a larger international caseload. There are obvious limits to this. Parties from the United States are major actors in the transnational arbitral process, and the United States is not therefore a neutral jurisdiction for cases that involve them, even though all of the arbitrators may be third-country nationals.

Exemplary of AAA flexibility, and willingness to experiment if not to improvise, is the dispute resolved on September 25, 1987 between International Business Machines Corporation (IBM), the largest computer company in the world, and Fujitsu Limited, the largest computer company in Japan. The dispute involved computer software copyrights.⁹¹ The IBM—Fujitsu arbitration was unusual, and even unique,

United States is set forth with clarity and authority in the 1987 study prepared by the Washington Foreign Law Society, *supra* note 7. See also Carbonneau, *supra* note 18, at 188-238 (providing an excellent summary).

88. Perhaps one indication that the AAA's international practice is something less than high-profile is that its 1987-1988 Annual Report makes only passing reference to international arbitration. AAA ANNUAL REPORT, 1987-1988 11 (1988).

89. Smit, *supra* note 63, at 26-27 n.91, 100.

90. Smit, Book Review, 34 AM. J. COMP. L. 395, 399 n.32 (1986).

91. AAA, Order of Sept. 15, 1987, Case No. 13T-117-0636-85, at 1 (available

in many respects:

1. In the words of one arbitrator, there were "vast sums of money at issue" in a "high stakes commercial conflict" that involved "not inconsiderable cultural differences."⁹² It was a very large and complex case.
2. The arbitrators and the parties' counsel were leading figures in their fields. The focus of talent was extraordinarily intense.
3. The award, actually denominated an "order," was rendered by only two rather than three arbitrators. Originally there were three, with the two "survivors" each appointed by a different party, but by agreement the two were converted into "neutral" arbitrators without the right of individual *ex parte* communication with parties. The third arbitrator, who had been appointed by the other two, resigned to accommodate the revised structure.
4. At a certain point in the proceedings the arbitrators transformed themselves into temporary mediators and facilitated the agreement that culminated in the award they eventually issued as arbitrators. Normally, a mixture of the two roles is scrupulously avoided.⁹³
5. The arbitrators' award was not only supported by a "reasoned" opinion but both award and opinion were made public through press conference announcement. An arbitrators' report, moreover, was published in full-page advertisements in *The New York Times* and *The Wall Street Journal* (September 15, 1987) and in Japanese translation in *Nihon Keizai Shimbun* and *Asahi Shimbun* (September 18, 1987).
6. The award retained for the arbitrators an important continuing function for up to 10 years and jurisdiction to arbitrate disputes for 15 years. The award was as much a beginning as an ending.
7. In effect, the award, and the rules and procedures established under it, will constitute the applicable intellectual property law for the parties, regardless of any copyright decisions of United States or Japanese

from the AAA). For brief but authoritative description of the case, see Coulson, *Significance of the IBM-Fujitsu Software Award*, in *ARBITRATION & THE LAW* (1987-1988) 224 (1988) [hereinafter Coulson, *IBM-Fujitsu Award*] (describing the case). An implementing order, specifying dollar amounts to be paid by Fujitsu to IBM, was issued on November 29, 1988. Markoff, *Software Arbitration Ruling Gives IBM \$833 Million From Fujitsu*, *N.Y. Times*, Nov. 30, 1988, at 1; Miller, *Fujitsu's Payments to IBM to Resolve Software Battle Will Total \$833.2 Million*, *Wall St. J.*, Nov. 30, 1988, at A3 (characterizing the arbitrators' approach as "maverick" and a radical departure from the usual ways of resolving business disputes).

92. AAA Press Release, Sept. 15, 1987 (remarks of Prof. Robert H. Mnookin).

93. The September 1, 1988 AAA Rules, for the first time, contemplate inclusion of a mediation "segment" if parties agree, but the mediator must not be an arbitrator appointed to the case. AAA RULE 10 (1988) (*in fine*). Presumably the parties can agree otherwise, as they did in *IBM-Fujitsu*. Coulson, *IBM-Fujitsu Award*, *supra* note 91, at 224.

Courts. The very difficult question of which elements of a computer operating system program represent "expression" protected under copyright law and which elements represent unprotected "ideas" will be determined, for purposes of the ongoing IBM—Fujitsu relationship, by the arbitrators and not by the courts. The problem is one that courts have only begun to address.

8. The celerity of resolution was remarkable, even for arbitration. Elapsed time from demand for arbitration to issuance of the award was 26 months. From first hearings to award was only 19 months. The arbitrators accomplished this by avoiding "becoming engulfed in an extensive adjudicatory fact-finding process with respect to hundreds of programs."⁹⁴ Such a process would have risked "missing the forest for the trees."⁹⁵ For the arbitrators, the parties, and the parties' customers, the future mattered more than the past.

The AAA and its leadership, as the foregoing illustrates, are both creative and aggressive. The President, Robert Coulson, is a well-known and well-traveled figure in international arbitration circles. He joined the AAA in 1963 and has been its full-time President since 1972. A graduate of Yale University (1950) and Harvard Law School (1953), he is a member of the International Council for Commercial Arbitration (ICCA) and the author of numerous works on arbitration and alternative dispute resolution.⁹⁶ The chief legal authority for the AAA is General Counsel Michael F. Hoellering, a graduate of Columbia Law School (1959) and frequent speaker and writer on international arbitration.⁹⁷

VI. LONDON COURT OF INTERNATIONAL ARBITRATION

Arbitration in London, like the hymn-book of the Anglican Church, is "Ancient & Modern Revised." Ancient because as early as the twelfth century English courts were refusing to hear cases that parties had already submitted to arbitration.⁹⁸ Modern because, when England became the center of world trade in the nineteenth century and "[d]isputes to be settled by arbitration in London" became the shortest

94. AAA, Opinion of Arbitrators of Sept. 15, 1987, Case No. 13T-117-0636-85, at 11 (available from the AAA).

95. *Id.*

96. Based on biographical material supplied to the author by the AAA.

97. *Id.* Since 1981 the AAA General Counsel's annual report has been published under the title *Arbitration & the Law*, followed by the year. A separate section is devoted to international arbitration. See *supra* notes 82, 86 (citing to ARBITRATION & THE LAW).

98. G. WILNER, *supra* note 12, at Practice Guide § 82.03.

and most widely used arbitration clause in international commerce, Parliament responded in a series of statutes that culminated in the Arbitration Act 1950, the basis of today's arbitral regime in England and Wales.⁹⁹ And Revised because the Arbitration Act 1979 offers the possibility, through "exclusion agreements," of providing a process that is perhaps the most autonomous — that is, unfettered by judicial review — in the world.¹⁰⁰ The Swiss have now decided to challenge London on this.¹⁰¹

Authoritative estimates place the number of international arbitrations conducted annually in the United Kingdom at more than 10,000, mostly in London.¹⁰² This is by far the greatest number for any venue in the world. Many of these arbitrations are performed for their members by professional bodies and trade associations. There are, however, three institutions whose work solely or principally concerns commercial arbitration: the London Maritime Arbitrators Association (successor in 1960 to the Baltic Exchange Panel of Arbitrators), the Chartered Institute of Arbitrators (founded in 1915), and the London Court of International Arbitration (so styled since 1981 but founded 89 years earlier as the London Chamber of Arbitration).¹⁰³

The London Court of International Arbitration (LCIA) is probably the oldest arbitration institution in the world. Formerly managed by

99. J. Steyn, *England*, in INTERNATIONAL HANDBOOK OF COMMERCIAL ARBITRATION 1-2 (1988).

100. See Schmitthoff, *The United Kingdom Arbitration Act 1979*, 5 Y.B. COMM. ARB. 231, 233-37 (1980) (outlining the main reforms introduced by the 1979 Act); see Crawford & Feldman, *American Perceptions of London as a Situs for International Commercial Arbitration*, 2 ARB. INT'L 232, 232 (1986) (discussing the Act); Jarvin, *London as a Place for International Arbitration*, 1 J. INT'L ARB. 59, 59 (1984) (same). But cf. Samuel, *Developments in English Arbitration Law Since the 1984 Antaios Decision*, 5 J. INT'L ARB. 9, 33 (Sept. 1988) (stating that "English law is still trying to untangle itself from the consequences of a history of tight court control in this area"). For a negative view of the Arbitration Act 1979 see Smedresman, *The Arbitration Act, 1979*, 11 J. MAR. L. & COM. 319, 319 (1980) (stating that the Arbitration Act 1979 is a "half-hearted statute" that will probably not attract arbitration to England).

101. See *infra* Part VIII (describing arbitration in Switzerland). An even greater statutory challenge to London, not considered in this article, is that from Belgium, which in 1985 simply excluded the jurisdiction of Belgian courts when none of the parties have a Belgian contact. Judicial Code art. 1717(4), reprinted in 25 I.L.M. 725, 726 (1986). See Paulsson, *Arbitration Unbound in Belgium*, 2 ARB. INT'L 68, 68 (1986) (stating that "Belgium . . . has gone the whole route").

102. J. Steyn, *supra* note 99, at 3. The figure of 10,000 for only "international" arbitrations is based on a telephone conversation with LCIA Registrar B.W. Vigrass on October 15, 1987 [hereinafter Vigrass, Telephone Interview].

103. J. Steyn, *supra* note 99, at 2-4; see also R. BERNSTEIN, *supra* note 11, at 367-68 (describing the English institutions involved in international arbitration). Headquarters of the LCIA is (since December 1987) at 30-32 St. Mary Axe, London EC3A 8ET.

the Chartered Institute of Arbitrators (CIARB), but now independent,¹⁰⁴ its President is Lord Justice Michael R.E. Kerr of the Court of Appeal. Chief Executive and Registrar is B.W. Vigrass. General sponsorship of the LCIA rests with representatives of CIARB, the London Chamber of Commerce and Industry, and the Corporation of the City of London.¹⁰⁵ Current international caseload of the LCIA is about 60 cases per year.¹⁰⁶ This is little more than one-half the caseload of the American Arbitration Association (AAA) in New York and less than one-tenth that of the International Chamber of Commerce (ICC) in Paris.¹⁰⁷

The LCIA acts as appointing authority for arbitrators and as arbitration administrator. It may do both or one and not the other, either under its own 1985 Rules or under the Arbitration Rules of UNCITRAL.¹⁰⁸ It will administer arbitrations anywhere in the world, although about 80% take place in London.¹⁰⁹ Support services available at London's International Arbitration Centre, 75 Cannon Street, London EC4N 5BH, in the financial district, include courtrooms, conference rooms, secretarial and clerical assistance, and telephone and telex facilities.¹¹⁰

CIARB is a critical ingredient in the functioning of the LCIA. While it no longer manages the LCIA as one of its activities, its basic function is to train arbitrators for service on some 38 different panels of arbitrators, whose members are drawn from a variety of disciplines and specialized fields.¹¹¹ Its membership is about 6,700, with one-third

104. Letter from K.R.K. Harding, CIARB Secretary, to author (Dec. 17, 1987). The change in relationship has generally not been remarked, even with the removal of the LCIA headquarters from Cannon Street to St. Mary Axe in December 1987. CIARB, however, continues as a co-sponsor of the LCIA, and the relationship remains functionally close. THE LONDON INTERNATIONAL ARBITRATION TRUST LIMITED, ARBITRATION IN LONDON 5 (1983) [hereinafter ARBITRATION IN LONDON].

105. ARBITRATION IN LONDON, *supra* note 104, at 5.

106. Vigrass, Telephone Interview, *supra* note 102.

107. See *supra* notes 42, 78 and accompanying text (discussing the number of cases that the ICC and AAA conduct).

108. LONDON COURT OF INTERNATIONAL ARBITRATION, SERVICES FOR ARBITRATION UNDER THE UNCITRAL ARBITRATION RULES.

109. Vigrass, Telephone Interview, *supra* note 102.

110. ARBITRATION IN LONDON, *supra* note 104, at 9-10. LCIA administrative charges include an initial filing fee of £200 and thereafter a rate per hour specified from time to time by the LCIA. On January 1, 1985, the hourly rate was £50. Arbitrator fees are calculated as a function of time: from £300 to £1,250 per day for meetings and hearings, and £60 to £250 per hour for other work on the arbitration. LCIA Rule 18.1 and LCIA SCHEDULE OF COSTS (effective Jan. 1, 1985). These rates were still in effect as of October 1, 1988. Letter from B.W. Vigrass, LCIA Registrar, to author (Oct. 3, 1988).

111. See Vigrass, *The Training of Arbitrators at the Institute of Arbitrators*, 4

based overseas in some 85 different countries.¹¹² Through basic and advanced examinations held twice a year, or arbitral experience validated as equivalent, members are qualified for Associate or Fellowship grade status.¹¹³ Of the 6,700 members, 1,800 are Fellows.¹¹⁴ CIARB has published the quarterly journals *Arbitration* since 1954 and *Arbitration International* since 1985. Their headquarters is at the International Arbitration Centre in Cannon Street. K.R.K. Harding is Secretary.

London's traditional popularity as a venue for international arbitration began to erode in the 1970s, with the trend accelerating in 1973 when the Court of Appeals in *The Lysland* ruled, in effect, that an arbitrator had to submit to the courts a "special case" if there existed a substantial and clear-cut point of law to be resolved.¹¹⁵ The special case procedure, unknown in the Civil Law system and in the United States, involved the arbitrator's finding the facts but leaving open the award to await the court's decision on a point of law. The result was (a) a backlog of hundreds of arbitrations and (b) the rejection of London for Paris, New York, Geneva, Zurich, and elsewhere by those unwilling to endure an arbitral process that had become merely a rehearsal for court litigation.¹¹⁶

The London malaise was addressed, dramatically, by the Arbitration Act 1979. It abolished the special case procedure and replaced it with a rigidly controlled and limited procedure for appeal on points of law, but only with leave of the High Court (a court of first instance).¹¹⁷ Discretion to grant leave was then narrowed in "guidelines" issued by the

Y.B. COMM. ARB. 380, 381-82 (1979) [hereinafter Vigrass, *The Training of Arbitrators*] (discussing the function of the CIARB).

112. Telex from K.R.K. Harding, CIARB Secretary, to author (Oct. 15, 1987) [hereinafter Harding Telex].

113. See Vigrass, *The Training of Arbitrators*, *supra* note 111, at 382-85 (discussing the training and examination aspects of the CIARB).

114. Harding Telex, *supra* note 112.

115. Much has been written on the background to the Arbitration Act 1979. The best and most authoritative is Kerr, *Statutes: The Arbitration Act 1979*, 43 MOD. L. REV. 45, 45-49 (1980) [hereinafter Kerr, *Statutes*] (discussing the background of the Arbitration Act 1979); see also Shenton & Toland, *London as a Venue for International Arbitration: The Arbitration Act 1979*, 12 L. & POL'Y INT'L BUS. 643, 650 (1980) (pointing out that the special case procedure was causing international businesses to hold arbitrations elsewhere); Park, *Judicial Supervision of Transnational Commercial Arbitration: The English Arbitration Act of 1979*, 21 HARV. INT'L L.J. 87, 97-107 (1980) (considering the effects of the Arbitration Act 1979 on English arbitral practice).

116. See Kerr, *Statutes*, *supra* note 115, at 46-47 (noting the backlog resulting from the special case procedure and parties' unwillingness to submit to arbitration over which a court could have "the last word").

117. *Id.* at 49-50.

House of Lords in *The Nema* (1981) and *The Antaios* (1984).¹¹⁸

More importantly for transnational arbitration, the 1979 Act permitted the parties to contract out of even this limited a review by means of an "exclusion agreement." Now parties to international contracts may, unless they are all "domestic," adopt such a clause at any time, before or after a dispute arises.¹¹⁹ Excepted are maritime, commodity, and insurance disputes, in which case the exclusion must *follow* commencement of arbitration.¹²⁰ Excepted from the exception are contracts in which a choice of law other than England and Wales is expressed.¹²¹ The only ground for judicial review remaining is "misconduct" of arbitrators and arbitrations, that is, "infringements of the rules of natural justice."¹²²

The exclusion agreement may be incorporated by reference. For this purpose reference to the 1985 Rules of the LCIA (Article 16.8) or the ICC Rules of Arbitration (Article 24.2) is sufficient.¹²³ Article 24.2 of the ICC Rules, which is substantially the same as Article 16.8 of the LCIA Rules, provides:

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

Notwithstanding the exclusion of judicial review, the English courts play a procedurally supporting role in arbitration: by appointing or re-

118. *Antaios Compania Naviera S.A. v. Salen Rederierna A.B. (The Antaios)* 3 ALL E.R. 229 (1984); *BTP Trioxide, Ltd. v. Pioneer Shipping, Ltd. (The Nema)* 2 LLOYDS REP. 239 (1981). For criticism of the two decisions see Kerr, *Commercial Dispute Resolution: The Changing Scene*, in LIBER AMICORUM FOR LORD WILBERFORCE 111, 125-26 (M. Bos and I. Brownlie eds. 1987) (stating that "[t]hey clearly went much further than the draftsmen [of the 1979 Act] intended or dared"). Regarding *The Nema*, see Berggren, *Judicial Implementation of the United Kingdom's Arbitration Act, 1979*, 24 HARV. INT'L L.J. 103, 122-43 (1983) (noting that the decision of the House of Lords regarding *The Nema* was the first attempt of the courts to establish guidelines for the implementation of the Arbitration Act 1979).

119. ARBITRATION ACT 1979, § 3(1) (1979).

120. *Id.* § 4(1)(c)(i). For severe criticism of these provisions, see Smedresman, *supra* note 100, at 329-31 (stating that, of the 1979 Act's provisions, these are "the least satisfactory in policy and language").

121. ARBITRATION ACT 1979, § 4(1)(c)(ii).

122. See M. MUSTILL & S. BOYD, *supra* note 83, at 602-04 (including conscious disregard of the law, for whatever motive, as such infringement). Arbitration Act 1950 § 23(2) provides that the High Court may set aside an award when an arbitrator "has misconducted himself or the proceedings." The statute itself does not define misconduct. Cf. 2 HALSBURY, LAWS OF ENGLAND § 622 (4th ed. 1973) (listing ten examples of "misconduct"); Second Cumulative Supplement 1988, § 622 (listing examples).

123. See A. LOWENFELD, *supra* note 14, at 90-91 (noting cases that uphold exclusion based on reference to institutional rules).

placing an arbitrator, preventing the disposal of assets, and assuring compliance with an arbitrator's orders.¹²⁴

The 1985 Rules of the LCIA, replacing those of 1981, which in turn replaced those of 1978, are designed to promote party autonomy and to maximize the jurisdiction and powers of the arbitrators.¹²⁵ Most of their provisions can be waived by agreement of the parties. There are rebuttable presumptions in favor of London as the venue and a sole arbitrator rather than a three-member panel.¹²⁶ They permit the LCIA, and the arbitrators themselves where appropriate, to deal severely with dilatory tactics.¹²⁷ Awards must be "reasoned" but are not subject to LCIA review.¹²⁸

For those with the negotiating luxury of preferring one institution to another, the pre-eminence of London as a venue, both historical and contemporary, offers something of a dilemma: do the formulations and usages of the past, so carefully confected and so expertly measured *to the needs of London* by an arbitration bar and commercial judiciary of outstanding quality, embody the world-view required for truly *transnational* dispute resolution? Succinctly, is England's insularity as rhetorical as it is geographical? The question must be put this way in assessing the LCIA even though a number of its cases are heard abroad. Philosophy is no respecter of national frontiers.

Tracking the fate of the Arbitration Act 1979 in the courts provides an answer, albeit partial. At almost each juncture the courts have responded affirmatively to what is taken as the spirit of the 1979 Act.¹²⁹ Acceptability of the standard ICC and LCIA clauses on finality of award as exclusion of judicial review is one example.¹³⁰ Another is the discretionary inclination announced by the Court of Appeal not to order security for costs against a foreign claimant when the parties have agreed to exclude resort to this device or adopted a comprehensive arbi-

124. J. STEYN, *supra* note 99, at 17-20.

125. See Hunter & Paulsson, *A Commentary on the 1985 Rules of the London Court of International Arbitration*, 10 Y.B. COMM. ARB. 167, 167-68 (1985) (discussing changes made by the 1985 Rules of the LCIA that give parties the greatest possible freedom to agree upon the conduct of the proceedings, and, should the parties fail to agree, giving the tribunal wide discretion to conduct the proceedings in the way it considers most efficient and effective).

126. LCIA RULES arts. 3.2 and 7.1.

127. LCIA RULES art. 13.

128. LCIA RULES art. 16.1.

129. As expressed by one commentator, the text of the 1979 Act is less important than the context of its application. Park, *Arbitration in International Business*, 39 BUS. LAW. 1782, 1792 (1984).

130. See text accompanying and immediately following note 123, *supra* (discussing the acceptability of standard ICC and LCIA clauses).

tral regime, such as the ICC's, that clearly does not contemplate it.¹³¹ The scope of this latter dispensation remains unclear, however, and controversial.¹³²

In evaluating the English cases and published commentaries since 1979, it is important to segregate the issues that can be excluded from judicial review from those that cannot. Many of the criticisms directed at the scope of judicial review on the merits, for instance, are simply irrelevant in the presence of an exclusion agreement. Under the *Nema* and *Antaios* guidelines a court may grant leave for appeal to resolve a novel or potentially far-reaching point of law, especially with respect to standard clauses. But neither the guidelines nor the opportunity "to enrich English law and promote uniformity" obtain when the parties have agreed to exclude judicial review.¹³³

The lure of London, and of the LCIA, for parties from Common Law jurisdictions is evidently great. Legal tradition, common language, and cultural heritage combine to enhance its otherwise favorable attributes. Civilians and others from non-Common Law jurisdictions, however, may suffer from a certain free-floating anxiety about a context that at times may appear parochial or ethnocentric.¹³⁴ The treatment

131. *Bank Mellat v. Helsinki Techniki S.A.*, 3 ALL E.R. 428 (1983). *But see* K/S A/S Bani and K/S A/S Havbulki v. Korea Shipbuilding and Engineering Corp., 2 LLOYD'S REP. 445 (1987) (allowing buyers' application for security for costs).

132. Compare Samuel, *supra* note 100, at 22-23 (favoring security for costs) with Jarvin, *supra* note 100, at 60, 64-71 (generally opposing security for costs) and Crawford & Feldman, *supra* note 100, at 237 (not taking a position but indicating that security for costs *could* be a "disincentive" to the choice of London).

133. The quoted language is from Crawford & Feldman, *supra* note 100, at 236. The authors regard review for this purpose as an infringement of party autonomy "permitting the appropriation for a public purpose of an aspect of the parties' private dispute." Samuel, *supra* note 100, at 33, concluded in 1988 that "English law is still trying to untangle itself from the consequences of a history of tight court control." *But see* Jaffe, *The Judicial Trend Toward Finality of Commercial Arbitral Awards in England*, 24 TEX. INT'L L.J. 67, 77-86 (1989) (noting that the courts have returned to a middle way between arbitral autonomy and legal certainty). All three commentaries are referring to review on the merits, which by agreement the parties can exclude.

134. 2 J. WETTER, *THE INTERNATIONAL ARBITRATION PROCESS* 243 (1979). *See generally* Jarvin, *supra* note 100 (evaluating London as an international arbitration site). Professor Lalive of Geneva has expressed the notion this way:

Some of you may recall that, a few years ago, in another London conference, I observed with typical lack of tact that, for some of my English friends, the *ideal* international arbitration seemed to be arbitration in London by parties represented by English counsel arguing before English arbitrators applying English law and supervised by English judges! And a similar remark could doubtless be made in my own country. While this may admittedly be a good solution in some cases, I venture to think that, for most parties, it would hardly be a true and satisfactory international arbitration.

Lalive, *International Arbitration — Teaching and Research*, in *CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION*, *supra* note 6, at 19. *Cf.* Kerr, *supra* note 7, at

for this is at hand: exclusion of judicial review, adoption of institutional rules, specification of foreign substantive law, and selection of arbitrators sophisticated in the ways of genuinely international arbitration, with which London abounds. Choosing London as a venue may call for more thought and attention than choosing, say, among Paris, Stockholm or Zurich, but the compensating advantages are there to make it well worth the additional effort.¹³⁵

VII. STOCKHOLM CHAMBER OF COMMERCE

Sweden, a place-name almost synonymous with neutrality, is now — it is fair to say — the preferred third-country venue for arbitration of *East-West* commercial disputes.¹³⁶ And for transnational commercial disputes in general, regardless of political context, Stockholm is regarded as fully competitive with Geneva, London, New York, Paris, and Zurich.¹³⁷

The leading center for institutional arbitration in Sweden is the Arbitration Institute of the Stockholm Chamber of Commerce (SCC).¹³⁸ The SCC Institute will act as administrator or as appointing authority only.¹³⁹ It does not itself act as an arbitral tribunal, nor are awards

15-16 (stating that “[Our] system is our bulwark against corruption, arbitrariness, improper conduct and — where necessary — sheer incompetence. . .”).

135. A. LOWENFELD, *supra* note 14, at 91 (including footnote “x,” describing a leading example of review by the courts on the basis of the importance of the point of law at issue).

136. The characterization of “preferred” is based upon the estimated number of current East-West contracts containing SCC compromissory clauses as compared with those specifying other third-country venues, principally Austria and Switzerland. Indicative is the official — and unique — blessing given to Stockholm by the AAA, the USSR Chamber of Commerce and Industry, and the China Council for the Promotion of International Trade. *See infra* notes 144-48 and accompanying text (discussing the use of Sweden for East-West commercial arbitration).

137. This is necessarily a highly subjective judgment, but it is based on the author’s more than 35 years of experience in negotiating contracts with compromissory clauses. It should be noted that the IXth [quadrennial] International Arbitration Congress of the International Council for Commercial Arbitration (ICCA) will be held in Stockholm in 1990. Previous congresses were held in Paris, Rotterdam, Venice, Moscow, New Delhi, Mexico City, Hamburg, and New York. Sanders, *Welcoming Address*, in INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION, CONGRESS SERIES No. 3 11 (1986).

138. STOCKHOLM CHAMBER OF COMMERCE, *ARBITRATION IN SWEDEN* 5-6 (2d ed. 1984) [hereinafter *ARBITRATION IN SWEDEN*]. This work, the only full-length treatment of the subject in English, was written principally by Dr. J. Gillis Wetter of the Stockholm office of the New York law firm, White & Case; *see also* Wetter, *Sweden as the Location of International Arbitration Proceedings*, in PRIVATE INVESTORS ABROAD: PROBLEMS AND SOLUTIONS 223 (V. Cameron ed. 1977) (evaluating Sweden as an arbitration forum). The address of the SCC is P.O. Box 16050, S-103 22 Stockholm.

139. RULES OF THE ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF

rendered by arbitrators subject to its approval, either as to substance or as to procedure. The parties may specify that the applicable rules shall be those of the SCC Institute, revised as of January 1, 1988, replacing those of 1976.¹⁴⁰ Or they may specify other rules instead, such as those

COMMERCE § 1 (effective Jan. 1, 1988) [hereinafter SCC RULES]. An English translation of the SCC Rules is published by the SCC in separate pamphlet form. It also constitutes an appendix to the SCC pamphlet ARBITRATION UNDER THE RULES OF ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE: AN INTRODUCTION (1988). The translation of the SCC Rules is reprinted in 2 INT'L ARB. REP. 882 (1987).

140. See Wetter, *Institutional Arbitration in Sweden: A Guide to Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce*, ARB. J., June 1988, at 5 (describing briefly the 1988 Rules, with text annexed). The 1976 rules may be found in Appendix 6 of ARBITRATION IN SWEDEN, *supra* note 138, at 211. Among the changes made by the new SCC Rules are these:

(a) Elimination of the old rule 5 reference to the applicability of the Swedish law of arbitration. The mandatory provisions of law apply in any event, but problems concerning the non-mandatory provisions (gap-fillers or *ius dispositivum*) are removed, and there is now no impediment to the use of Stockholm rules at some venue other than Sweden. According to Ulf Franke, Secretary of the Stockholm Institute, extension of the rules to non-Swedish arbitrations was a "strong reason" for the deletion. Telephone interview with Ulf Franke, Secretary of Stockholm Institute (Apr. 12, 1988).

(b) Changes paralleling the following articles of the UNCITRAL Arbitration Rules (with SCC Rule equivalents in parentheses): 9 (disclosure by arbitrators of possibly disqualifying circumstances, Sec. 6); 20 (amendments to claims and defenses, Sec. 19); 28 (continuance of proceedings in event of party default, Sec. 23); 30 (waiver of procedural defects by absence of timely objection, Sec. 24); and 37 (issuance of additional awards, Sec. 31). See Franke, *SCC Arbitration Goes Further International*, INT'L ARB. REP., Mar. 1988, at 22, 22-24 (discussing the 1988 SCC Rules of Arbitration and the differences between the old and new rules).

(c) Inclusion of a stricter standard on assessment of costs to the losing party, requiring payment of all costs by the loser "unless the circumstances call for a different result" (Sec. 29). Old rule 19 provided merely that the award would state "if and to what extent" the loser would bear the victor's costs. As a matter of actual practice the costs, which include legal fees, have usually been assessed in accordance with the stricter standard anyway, by analogy to the Swedish Procedural Code of 1948. ARBITRATION IN SWEDEN, *supra* note 138, at 135-36.

(d) Issuance of a scale for the calculation of compensation to the Institute and guidelines for the deposit of security for costs, including both compensation to the Institute and fees for arbitrators. By combining both compensation and fees, and converting Swedish kroner to United States dollars at 6.15 to 1.00, the approximate rate of exchange on December 30, 1988, the author calculates that the minimum and maximum deposits for the indicated amounts in controversy (left-hand column) are now as follows:

\$ 100,000	\$ 9,276 to \$ 19,065
1,000,000	27,602 to 64,715
10,000,000	58,618 to 166,504

The foregoing contains components for Institute compensation as follows:

\$ 100,000	\$ 2,069
1,000,000	8,354
10,000,000	13,545

According to Franke, the components for arbitrators' fees (first table minima and maxima minus second table figures) should be reduced to one-third for purposes of compar-

issued by UNCITRAL.¹⁴¹ In either case the SCC Institute will perform the necessary administrative functions.

The board of the SCC Institute is composed of three members and three deputy members. The Chairman, since January 1987, has been Judge Birgitta Blom, President of the Court of Appeal (Svea Region) in Stockholm. By tradition the president of that tribunal is the highest ranking jurist in Sweden. The Secretariat of the Institute is headed by Ulf Franke, author and frequent speaker at international arbitration conferences. The main function of the Secretariat is to assist in the practical arrangements for arbitration, including information, secretarial and other services, and premises (which can be the SCC building in Stockholm).¹⁴²

The average international caseload of the SCC Institute is fifteen cases per year. This does not include the approximately thirty international cases since 1977 in which it has acted *only* as appointing authority.¹⁴³

Official recognition of Stockholm's suitability in an East-West framework came with an exchange of letters in January of 1977 among the USSR Chamber of Commerce and Industry, the AAA, and the SCC.¹⁴⁴ Known as the US-USSR Optional Clause Agreement, the three institutions approved for optional use a model arbitration clause providing for arbitration to take place in Sweden under the Arbitration Rules of UNCITRAL, with the SCC having the authority to appoint the presiding arbitrator from a distinguished panel of eighteen members approved in advance by the USSR Chamber and the AAA.¹⁴⁵

To mid-1988 there had been only two arbitrations actually conducted pursuant to the Optional Clause Agreement. Both were settled, one in

ison with institutions, such as the ICC, whose tables list the ranges for sole arbitrator. Telephone interview with Ulf Franke, Secretary of Stockholm Institute (Apr. 12, 1988).

141. A footnote to Sec. 1 of the SCC Rules states that "[t]he Arbitration Institute of the Stockholm Chamber of Commerce has adopted Conciliation Rules and Rules for Procedures under the UNCITRAL Arbitration Rules."

142. Based on material supplied to the author by the SCC Institute.

143. Telex from Ulf Franke, Secretary of Stockholm Institute, to author (Sept. 1, 1988) [hereinafter Franke Telex].

144. See ARBITRATION IN SWEDEN, *supra* note 138, at 203 (containing letters at Appendix 5 from the USSR Chamber of Commerce and Industry, AAA, and SCC regarding the designation of Sweden for East-West commercial arbitration).

145. The US-USSR Optional Clause Agreement was the subject of numerous articles, for the most part descriptive only. From an analytical standpoint, in this author's opinion, the most useful is Lebedev, *The 1977 Optional Clause for Soviet American Contracts*, 27 AM. J. COMP. L. 469, 469 (1979) (discussing general aspects of the optional arbitration clause and specific problems connected with the application of UNCITRAL Rules within the sphere of national arbitration law).

1982 and the other in 1984.¹⁴⁶ Two of the negotiators of the agreement, A.P. Belov of the Soviet Union and Gerald Aksen of the United States, have said that extensive adoption of the optional clause — the exact figures are unknown — has promoted settlement of differences and prevented disputes from developing into formal procedures. This explains the small number of actual arbitrations.¹⁴⁷

Dramatic confirmation of Sweden's status in East-West affairs came with the 1984 agreement between the SCC and the China Council for the Promotion of International Trade. It has been estimated that there are now "thousands" of contracts between Chinese and Western parties that include an SCC Institute arbitration clause providing for application of SCC Rules. Three cases (between United States and Chinese parties) were pending as of September 1988.¹⁴⁸

Key aspects of Swedish arbitration are the following:

- Sweden has ratified the New York Convention, so that awards are widely enforceable elsewhere.¹⁴⁹

- The Swedish Arbitration Act of 1929 and the Swedish Foreign Arbitration Agreements and Awards Act of 1929, both as amended, govern arbitrations in Sweden.¹⁵⁰ They contain few "mandatory" rules. Most provisions are excludable and will apply only when parties have omitted incorporating the rules, such as those of the SCC Institute or UNCITRAL. An especially lucid analysis of the relationship between the UNCITRAL rules and Swedish law has been made by Professor Sergei N. Lebedev, another of the Soviet negotiators of the US-USSR Optional Clause Agreement.¹⁵¹

- Swedish law does not mandate an award "with reasons" but both the SCC Institute and the UNCITRAL rules do require a reasoned award.¹⁵²

- Intervention by Swedish courts in the arbitral process is at a minimum. Results of that process are overturned only if the procedure followed by the arbitral tribunal is contrary to the parties' agreement or if it otherwise fails to meet minimum standards of fairness. Errors in the application of substantive law, which can be non-Swedish, or in the

146. Franke Telex, *supra* note 143.

147. Interview with Messrs. Belov and Aksen (AAA luncheon, New York, May 6, 1986).

148. Franke Telex, *supra* note 143.

149. New York Convention, *supra* note 18. Swedish ratification was deposited Jan. 28, 1972.

150. See ARBITRATION IN SWEDEN, *supra* note 138, at 172 (setting forth the texts of the two laws).

151. Lebedev, *supra* note 145, at 472-75.

152. SCC RULES, *supra* note 139, at § 28; UNCITRAL RULES art. 32(3).

determination of facts, are not grounds for setting aside arbitral awards.¹⁵³

The authoritative work on Swedish arbitration is *Arbitration in Sweden*, published by the Stockholm Chamber of Commerce (276 pages).¹⁵⁴ The introduction to this edition highlights one of the questions frequently raised about Swedish arbitration: which provisions of Swedish law are mandatory and which are merely gap-fillers. Legislation is silent on the point. The first edition (1977) attempted to indicate the mandatory provisions by italics.¹⁵⁵ The attempt was abandoned for the second edition because of the interpretive difficulty involved and because of disagreement among the commentators.¹⁵⁶ There may be less to this problem than meets the eye. Very few of the provisions are mandatory, in any event, and those that are, are thoroughly expectable and "mainstream" in effect.¹⁵⁷ The new SCC Rules, moreover, untie SCC arbitration from Swedish non-mandatory law as a gap-filler, thus permitting SCC arbitration outside Sweden, under non-Swedish arbitral law.¹⁵⁸

Selection of the SCC would appear in most cases to be the exercise of a Hobson's choice,¹⁵⁹ the only viable alternative for an East-West, or possibly North-South, transaction or relationship.¹⁶⁰

VIII. SWITZERLAND

Switzerland is the quintessence of neutrality. So devoted is it to preserving this posture that, in an excess of caution, it has not even joined the United Nations. It does, however, enjoy "permanent observer" sta-

153. See ARBITRATION IN SWEDEN, *supra* note 138, at 144-56 (discussing the grounds for reversal of an arbitral decision); Paulsson, *The Role of Swedish Courts in Transnational Commercial Arbitration*, 21 VA. J. INT'L L. 211, 226 (1981) (noting that the arbitral tribunal's determination of all substantive issues is final). Awards may be challenged only for procedural defects. *Id.*

154. See *supra* note 138 and accompanying text (discussing ARBITRATION IN SWEDEN).

155. ARBITRATION IN SWEDEN, *supra* note 138, at 6 n.3.

156. *Id.*

157. Lebedev, *supra* note 145, at 472-74; Böcksteigel, *The Relevance of National Arbitration Law for Arbitrations Under the UNCITRAL Rules*, 1 J. INT'L ARB. 223, 233 (1984).

158. See *supra* note 140 (discussing the new SCC Rules and removal of referral to non-mandatory provisions). Old rule 5 (of 1976), repealed in 1988, provided as follows: "The Swedish law of arbitration shall apply with the additions and modifications stated in these Rules." ARBITRATION IN SWEDEN, *supra* note 138, at 212.

159. Thomas Hobson (1544-1631), an English liveryman of Cambridge, reportedly gave his customers the "choice" of the horse nearest the stable or none at all. RANDOM HOUSE DICTIONARY (2d ed. unabridged 1987).

160. 2 J. WETTER, *supra* note 134, at 243.

tus, is party to the International Court of Justice, and is headquarters — in Geneva — for several specialized agencies of the United Nations. At the same time, it has one of the most refined legal systems and sophisticated cadre of lawyers in the world.¹⁶¹

For these reasons and many more, including its polyglot population and perhaps even the quality of its hotels, Switzerland has become the venue *par excellence* for third-country arbitration.¹⁶²

The vast majority of international cases are conducted in English. Many are also held in French or in German, and some in Italian or in Spanish.¹⁶³ French, German, and Italian are the official languages of the country. Authoritative estimates place the number of international arbitrations conducted annually in Switzerland at a figure approaching 300.¹⁶⁴ Awards rendered in Switzerland are readily enforceable in at least 77 other countries under the New York Convention.

In recent years the popularity of Switzerland for arbitration has suffered somewhat from what many regard as excessive judicial intervention.¹⁶⁵ Local cantonal courts have annulled arbitral awards and the Federal Tribunal, the court of last resort, has overturned cantonal decisions not to annul.¹⁶⁶ This will now be changed under a sweeping restructuring and revision of Swiss arbitration law.

The new Swiss International Arbitration Law (SIAL) will apply whenever the arbitration is international, that is, whenever at least one of the parties does not have its domicile or habitual residence in Switzerland.¹⁶⁷ The effective date was fixed by the Federal Council (execu-

161. R. SCHLESINGER, H. BAADE, M. DAMASKA & P. HERZOG, *COMPARATIVE LAW* 546 (5th ed. 1988).

162. R. DAVID, *ARBITRATION IN INTERNATIONAL TRADE* 101 (1985).

163. SWISS ARBITRATION ASSOCIATION, *INTERNATIONAL ARBITRATION IN SWITZERLAND* 6 (2d ed. 1986).

164. Telex from Professor Pierre Lalive, President of Swiss Arbitration Association, to author (Jan. 12, 1988) [hereinafter Lalive Telex].

165. Karrer, *Switzerland's New Law is Modern, Liberal and Pragmatic*, *INT'L ARB. REP.*, Jan. 1988, at 21, 23 (referring to Switzerland's reputation for judicial intervention). See generally Blessing, *The International Arbitration Law in Switzerland*, 5 *J. INT'L ARB.*, June, 1988, at 9, 12 (at 75 pages, excluding English translation of SIAL, this was by far the most ambitious commentary in English to be published by December 1988).

166. See Neyroud & Park, *Predestination and Swiss Arbitration Law: Geneva's Application of the Intercantonal Concordat*, 2 *B.U. INT'L L.J.* 1, 11-23 (1983) (criticizing cantonal and federal court interference with arbitral decisions).

167. See Karrer, *supra* note 165, at 21 (describing SIAL's application to "international" arbitration). The Swiss Arbitration Association has prepared, in accordance with past practice, a semi-official English translation. *BULL. SWISS ARB. A.* Oct. 1988, at 185. This will eventually be published in all of the standard reference works on international arbitration. An unofficial English translation previously prepared and published is by Robert Briner, Pierre Karrer and Marc Blessing. Briner, Karrer &

tive authority) at January 1, 1989.¹⁶⁸ The final text had been approved by the Swiss Parliament on December 18, 1987, and published in the federal gazette on January 12, 1988.¹⁶⁹

A singular — and salutary — departure from pre-1989 law is the provision in SIAL that if neither of the parties has its domicile, its habitual residence, or a business establishment in Switzerland, the parties may, by express agreement, exclude all judicial review of the award unless enforcement is sought in Switzerland.¹⁷⁰ A Zurich firm

Blessing, *Final Text of the Swiss Federal Statute on Private International Law, Twelfth Chapter: International Arbitration*, INT'L ARB. REP. Feb., 1988, Doc. Sec. A [hereinafter Briner Translation], reprinted in 13 Y.B. COMM. ARB. 446 (1988)]. A third translation is by Charles Poncet and Emmanuel Gaillard. Poncet & Gaillard, *Translation of Chapter 12 of the Swiss Statute on Private International Law*, 27 I.L.M. 43 (1988) [hereinafter Poncet & Gaillard, *Translation*]. A fourth is essentially by Adam Samuel. 4 ARB. INT'L 21 (1988). The Swiss Arbitration Association translation is based on the Briner-Karrer-Blessing and Samuel translations, with suggested changes by Professor Clive Schmitthoff, Humphrey Lloyd, Michael Schneider and Professor Claude Reymond. 3 SWISS BULLETIN, *supra*, at 184. For an expectably well-focused description of SIAL by the President of the Swiss Arbitration Association, see Lalive, *The New Swiss Law on International Arbitration*, 4 ARB. INT'L 2, 6 (1988) [hereinafter Lalive, *The New Swiss Law*]. But see Gaillard, *A Foreign View of the New Swiss Law on International Arbitration*, 4 ARB. INT'L 25, 25-27 (1988) (expressing doubts about certain aspects of SIAL).

168. BULL. SWISS ARB. A., Dec. 1988, at 340.

169. See Karrer, *supra* note 165, at 21, 21 (noting the passage of SIAL); *Legislative Update*, INT'L ARB. REP., May 1988, at 17 (same); Lalive Telex, *supra* note 164 (same); see also BULL., SWISS ARB. A., Mar. 1988, at 1, 13-31 (containing reprints of the full texts of SIAL in French, German, and Italian).

170. SWISS INTERNATIONAL ARBITRATION LAW art. 192 [hereinafter SIAL]. The official French version, in BULL. SWISS ARB. A., *supra* note 169, and the semi-official English translation, SWISS BULLETIN, *supra* note 167, are as follows:

Official French

1. Si les deux parties n'ont ni domicile, ni résidence habituelle, ni établissement en Suisse, elles peuvent, par une déclaration expresse dans la convention d'arbitrage ou un accord écrit ultérieur, exclure tout recours contre les sentences du tribunal arbitral; elles peuvent aussi n'exclure le recours que pour l'un ou l'autre des motifs énumérés à l'article 190, 2e alinea.

2. Lorsque les parties ont exclu tout recours contre les sentences et que celles-ci doivent être exécutées en Suisse, la convention de New York du 10 juin 1958 pour la reconnaissance et l'exécution de sentences arbitrales étrangères s'applique par analogie.

Semi-Official English (SWISS ARB. A.)

1. Where none of the parties has its domicile, its habitual residence, or a business establishment in Switzerland, they may, by an express statement in the arbitration agreement or by a subsequent agreement in writing, exclude all setting aside proceedings, or they may limit such proceedings to one or several of the grounds listed in article 190, paragraph 2.

2. Where the parties have excluded all setting aside proceedings and where the awards are to be enforced in Switzerland, the New York Convention of 10 June, 1958 on the Recognition and Enforcement of Foreign Arbitral Awards shall apply by analogy.

The key phrase, "exclure tout recours contre les sentences du tribunal arbitral,"

has already rendered the opinion that Article 24.2 of the ICC Rules probably does not of itself constitute such an "express" agreement.¹⁷¹ Prudence would seem to require explicit reference to Swiss law.

The SIAL, in addition to permitting non-Swiss adversaries to exclude judicial "appeal," provides that the arbitration agreement may be made by telegram or telex;¹⁷² that it is "severable" from the main contract for purposes of determining its validity;¹⁷³ that it is valid if it conforms either to the law chosen by the parties or to the law applicable to the dispute or to Swiss law;¹⁷⁴ that the arbitrators themselves shall rule on their own jurisdiction;¹⁷⁵ that the arbitral tribunal shall apply the substantive law chosen by the parties, or in the absence of a choice, the rules of law that have the "closest connection" with the subject matter of the dispute — American lawyers will recognize this as the "most significant relationship" test;¹⁷⁶ and that the arbitral tribunal shall apply the procedural rules chosen by the parties, or in the absence of a choice, the rules determined by the tribunal "either directly, or by reference to a law or to arbitration rules."¹⁷⁷ The latter provision was included by the Swiss parliament only late in 1987, elimi-

caused obvious difficulties for the translators. It was variously rendered as "waive fully the action for annulment against the awards" (Briner-Karrer-Blessing); "waive their right to challenge an arbitral award before the Swiss courts" (Poncet-Gaillard); "exclude all right to bring proceedings to set aside the arbitral award" (Samuel); and "exclude all setting aside proceedings" (Swiss Arbitration Association). The rather elaborate and even awkward circumlocutions for "tout recours" are due no doubt to the desire to make clear that, in accordance with SIAL article 192(2), there is in fact non-waivable "recourse" (in the broad and non-juridical English sense) in the event judicial enforcement of the award is sought in Switzerland. Poudret, *Les recours au Tribunal fédéral suisse en matière d'arbitrage interne et international*, BULL. SWISS ARB. A., Mar. 1988, at 33, 50. Judicial review can thus be fully (or partially) excluded in Switzerland *qua* situs of arbitration, but not as to situs of execution. This is merely "filling the gap" to match the conditions in any other country party to the New York Convention. Lalive, *The New Swiss Law*, *supra* note 167, at 20. One *lacuna* not filled results from the article 192(2) reference only to "all" right when compared with the article 192(1) additional faculty of excluding only *some* of the grounds of review. It seems likely that a Swiss court would, in spite of the literal terms of article 192(2), apply the New York Convention criteria *pro tanto* to a case of partial exclusion. Gaillard, *supra* note 167, at 31; Blessing, *supra* note 165, at 76. Procedures for judicial review under the Concordat (see text accompanying notes 165-66, *supra* and notes 184, 189-191, *infra*) are described in Neyroud & Park, *supra* note 166, at 5-23.

171. See Karrer, *supra* note 165, at 24 n.8 (noting that "Switzerland does not follow the Belgian model reading an exclusion agreement into *all* international arbitrations"); Lalive, *The New Swiss Law*, *supra* note 167, at 19 (same); see text following note 123 *supra* (quoting the wording of ICC RULES, art. 24.2).

172. SIAL, *supra* note 170, art. 178(1).

173. *Id.* art. 178(3).

174. *Id.* art. 178(2).

175. *Id.* art. 186(1).

176. *Id.* art. 187(1).

177. *Id.* arts. 182(1) and 182(2).

nating the draft bill's reference to cantonal procedural law as subsidiarily applicable by analogy.¹⁷⁸ The arbitral tribunal may render an award *ex aequo et bono* if the parties have so agreed.¹⁷⁹ That is, with party concurrence, it may decide on the basis of general principles of justice, without reference to specific rules of law. Awards must be "reasoned" but, according to a prominent Swiss attorney, the parties may agree otherwise.¹⁸⁰

An innovation meriting special attention is the SIAL provision that if a state or state-controlled entity is a party to arbitration, it cannot rely on its own law to contest arbitrability or its own capacity to be party to an arbitration.¹⁸¹ Bad faith could estop the private party from relying on this,¹⁸² but the provision, unique to Switzerland, should deter state parties from interposing some of the more egregious preliminary objections of the recent past.¹⁸³

The SIAL's recognition of party autonomy for international cases is in striking contrast to the underlying arbitral regime of the Concordat (see below), fully two-thirds of whose 46 articles are designated as "mandatory."¹⁸⁴ The SIAL is mostly *ius dispositivum*. It fills the gaps the parties could have filled themselves.

The SIAL is actually only one part — Chapter 12 — of a massive new codification known as the Federal Law on Private International Law (Conflict of Laws).¹⁸⁵ It was Chapter 11 before the last-minute renumbering of chapters and articles. The full conflicts statute covers not only international arbitration but jurisdiction, recognition and enforcement of foreign judgments, and choice of law (for torts, contracts,

178. See *New Swiss Arbitration Law Final Following Changes*, INT'L ARB. REP., Oct. 1987, at 702, 702 (discussing the modified provision).

179. SIAL, *supra* note 170, art. 187(2).

180. *Id.* arts. 189(1), 189(2). Blessing, *supra* note 165, at 65, 66.

181. SIAL, *supra* note 170, art. 177(2).

182. Lalive, *The New Swiss Law*, *supra* note 167, at 9-10.

183. Lalive, *Some Threats*, *supra* note 10, at 30-33.

184. Reymond, *The New Swiss Uniform Arbitration Act and International Commercial Arbitration*, 7 GA. J. INT'L & COMP. L. 85, 87 (1977). The text of the semi-official Swiss Arbitration Association English translation of the Concordat may be found in 2 H. SMIT & V. PECHOTA, *supra* note 30, at 2543; see also Briner, *Switzerland*, in INT'L HANDBOOK COMM. ARB. 1, 2 (1988) [hereinafter Briner] (describing Swiss arbitral procedure).

185. See Poncet & Gaillard, *Translation*, *supra* note 167, at 37 (including an "introductory note" to their English translation of SIAL); see also Samuel, *The New Swiss Private International Law Act*, 37 INT'L & COMP. L.Q. 681, 689-92 (1988) (examining Chapter 12 of SIAL). A provision of importance to international arbitration in the new Federal Law on Private International Law that is not included in Chapter 12 (articles 176-194) is article 7, which provides that a Swiss court shall decline jurisdiction of a matter covered by a valid arbitration agreement. SWISS ARB. A., Oct. 1988, at 195 (English translation).

property, succession, domestic relations, and companies).¹⁸⁶ The comprehensive effort began officially with a committee of experts in 1973.¹⁸⁷ One commentator, now a member of the International Law Commission, has said that "rarely has a piece of national legislation been drafted with the care and skill invested" in the preparation of the new conflicts statute.¹⁸⁸

Until SIAL went into effect, Swiss arbitration was governed in the main by the Intercantonal Arbitration Convention of 1969 (Concordat), which contains a uniform text of cantonal arbitration law adopted by 25 of Switzerland's 26 cantons, including Geneva, Basel, Bern, Vaud (Lausanne), Ticino (Lugano) and, since 1985, Zurich.¹⁸⁹ The Concordat is not applicable in one of the cantons representing about 4.6% of the population: Lucerne, whose own non-unified rules on arbitration are set forth in its cantonal code of civil procedure.¹⁹⁰ The Concordat and the one non-unified cantonal code will apply even now if (a) the arbitration is not international or (b) the parties have agreed to exclude SIAL.¹⁹¹

Final adoption of SIAL involved problems not often encountered elsewhere. It is only one segment of a much grander project of codification. The legislation must be redacted with meticulous exactitude in the three official languages of the country. (Language breakdown of the population is 65% German, 18% French and 12% Italian.)¹⁹² And during the 90 days following publication of a law, 50,000 voters or eight cantons can demand a referendum; in such event a national majority of voters must approve.¹⁹³ For SIAL the 90-day period, after

186. See McCaffrey, *The Swiss Draft Conflicts Law*, 28 AM. J. COMP. L. 235, 241 (1980) (discussing the provisions of the proposed Swiss Federal Law on Private International Law).

187. *Id.* at 239-40.

188. *Id.* at 284.

189. See Briner, *supra* note 184, at 2 (listing 24 cantons that have accepted the uniform text of cantonal arbitration); BULL. SWISS ARB. A., Dec. 1988, at 340 (listing the canton of Thurgau).

190. *Id.* at 2. The percentage of population represented by the non-unified canton of Lucerne was calculated from the cantonal population figures set forth in 17 ENC. BRIT. (MACRO) 874 (1976). Arbitration publications available in the United States during late 1988 listed the number of non-unified cantons as four, including (in addition to Lucerne) Aargau, Glarus, and Thurgau. According to the Swiss Arbitration Association, however, Aargau and Glarus adopted the Concordat effective January 1, 1988 and May 3, 1987, respectively, and Thurgau approved the Concordat on October 30, 1988. BULL. SWISS ARB. A., Mar. 1988, at 32; BULL. SWISS ARB. A., June 1988, at 123; BULL. SWISS ARB. A., Dec. 1988, at 340.

191. SIAL, *supra* note 170, arts. 176(1) and 176(2).

192. UNITED STATES CENTRAL INTELLIGENCE AGENCY, 1988 WORLD FACTBOOK 227 (1988).

193. REDDEN, 4 MOD. LEG. SYSTEMS CYCLOPEDIA 282-83 (1984). This is the so-

brief tolling for late publication of the Italian language version, expired on May 4, 1988.¹⁹⁴

Switzerland has no national arbitration institution of its own. Arbitrations in Switzerland may be conducted by the parties under (a) *ad hoc* rules established by the parties or issued by the arbitrators; (b) pursuant to the UNCITRAL rules; (c) by the ICC Court of Arbitration in accordance with its own rules; or (d) in accordance with procedures prescribed by cantonal chambers of commerce. Most prominent in the latter category is the Zurich Chamber of Commerce, which has been involved in administering arbitrations since 1911 (Rules of 1985 and "International" Rules of 1989).¹⁹⁵ Others are the Geneva Chamber of Commerce and Industry (Directives of 1980);¹⁹⁶ and the Chambers of Commerce of Basel (Rules of 1981), Bern (Rules of 1969), and Ticino (Lugano) (Rules of 1982).¹⁹⁷

Switzerland is thus a microcosm of the world institutional scene. Just about any combination of rules, venue and institutions is possible. With a new law on international arbitration that was carefully crafted to optimize party autonomy and to attract increased arbitration business to Switzerland, it appears almost certain that Switzerland will retain its ranking as the jurisdiction of preference for neutral-country arbitration.

The Swiss Arbitration Association provides information and coordinates public relations.¹⁹⁸

called "optional referendum." One supposedly current compilation of constitutions and one supposedly current digest of foreign law misstate these requirements as 30,000 voters. The 50,000 figure from Redden in the text is correct. Letter from Professor Lalive, President of the Swiss Arbitration Association, to author (Dec. 4, 1987).

194. See *Legislative Update*, *supra*, note 169 at 17 (discussing that the deadline passed, and no further changes may be made); BULL. SWISS ARB. A., Dec. 1988, at 340.

195. Blessing, *The Zurich Mini-Trial Procedure*, J. INT'L ARB., Mar. 1985, at 67 (noting that the Zurich Chamber of Commerce has existed since 1911); 2 INT'L COMM. ARB. (Schmitthoff ed. 1986) Doc. IV.B(k) 1.1; INT'L ARB. REP., Nov. 1988, Doc. B (setting forth the International Arbitration Rules effective Jan. 1, 1989).

196. See J. INT'L ARB., Apr. 1984, at 73, 77 (setting forth the Directives of the Geneva Chamber of Commerce and Industry of 1980).

197. 2 INT'L COMM. ARB., *supra* note 195, Docs. IV.B (k/1.1) (Basel); IV.B (k/2.1) (Berne); and IV.B (k/3.1) (Ticino). Swiss chambers of commerce generally charge a fee for initiating arbitration and permit the arbitrators to charge "according to their efforts." There is no administrative fee as such. Briner, *supra* note 184, at 16. In Zurich, the initiating fee can vary between 100 and 500 Swiss Francs. *Id.* Arbitrator fees usually correspond to the basic fee schedules for lawyers set by the canton. *Id.* Zurich Rules 39 and Explanations and Directions 12, in 2 INT'L COMM. ARB., *supra* note 195, Doc. IV. B(k) 1.1.

198. For possible use of the Swiss Arbitration Association as a model for an international informational agency, see *infra* note 258. The address of the Swiss Arbitration Association is P.O. Box 4182, CH-4002 Basel.

IX. ICSID

The World Bank-sponsored International Centre for Settlement of Investment Disputes (ICSID) in Washington, D.C., is the most innovative and at the same time the most widely "recognized" of all transnational arbitral institutions. The multilateral treaty creating it has now been accepted by 89 countries, with another eight that have signed but not yet ratified it.¹⁹⁹

All regions of the world, as well as the main forms of economic activity, are represented. Notable "absentees" are Argentina, Australia, Brazil, Canada, China, India, Mexico, Poland, and Spain.²⁰⁰ It is understood that acceptance is now under active consideration in Australia, China, and Poland.²⁰¹

Unlike other arbitral institutions, ICSID's jurisdiction is limited to only one kind of case: "investment" disputes between a state and a national of another state.²⁰² Thus excluded are disputes between governments, disputes wholly between private parties, and disputes between a state and one of its own nationals, except in the case of a locally organ-

199. *Scoreboard of Adherence to Transnational Arbitration Treaties (as of January 1, 1989)*, NEWS AND NOTES FROM THE INSTITUTE FOR TRANSNATIONAL ARBITRATION (Annex to this article). The seat of ICSID is at the headquarters of the World Bank, 1818 H Street, N.W., Washington, D.C. 20433.

200. *Id.*

201. Commonwealth Attorney-General's Department Review of Developments in International Trade Law, Bicentennial International Trade Law Conference in Canberra, Nov. 4-6, 1988, at 17 (Australia); see Speech of ICSID Secretary-General Ibrahim F. I. Shihata, *ICSID and the Italian Arbitration Association*, 1 (Oct. 20, 1988) (referring to China and Poland) (unpublished) (on file with The American University Journal of International Law & Policy).

202. ICSID Convention, *supra* note 24, art. 25(1). Arbitration of disputes involving a government or government-controlled entity present special problems, such as arbitrability, sovereign immunity from jurisdiction, sovereign prerogatives, applicable law, effect of "stabilization clauses," scope of *force majeure* attributable to the state, and enforceability (including attachment and execution). See generally CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION, *supra* note 6, at 241-373 (containing articles by Cahier, Herrmann, Carver, Simmonds, Cremades, Lalive, Ball, Delaume, Fox, Melis, Saleh, Coulson, Bernini, and Van den Berg); G. DELAUME, *supra* note 14, at 351-97 (discussing the elements of arbitrating state contract disputes); Delaume, *State Contracts and Transnational Arbitration*, 75 AM. J. INT'L L. 784, 810 (1981) (noting the imprecision of rules governing this area); Delaume, *ICSID Arbitration and the Courts*, 77 AM. J. INT'L L. 784, 802-03 (1983) (concluding that the theoretical problem of sovereign immunity has lost a great deal of its practical significance in view of actual experience). The special problems can be practical as well as legal. Lalive, *Arbitration with Foreign States or State-Controlled Entities* 6-7 (speech presented at the Annual Symposium of The Southwestern Legal Foundation's International and Comparative Law Center, June 23, 1988) (to be published in PRIVATE INVESTORS ABROAD: PROBLEMS AND SOLUTIONS (1988)). K.-H. BÜCKSTIEGEL, *ARBITRATION AND STATE ENTERPRISES* 21-23 (1984). For a Swiss attempt to deal with some of these problems, see text accompanying notes 181-183 *supra*.

ized entity when, because of its foreign control, the host state has agreed to treat it as a national of another state. "Investment" is not defined in the treaty but has been broadly construed in ICSID practice: it includes not only traditional contributions of capital but also service contracts and transfers of technology.²⁰³

The full name of the ICSID Convention is the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. It was opened for signature in 1965, in Washington, D.C., and is sometimes also known as the Washington Convention. The preamble to the ICSID Convention places the arbitration and conciliation services of ICSID in a broader context of promoting private international investment for purposes of economic development.²⁰⁴

For the 20-plus years of ICSID's existence the total number of cases submitted to it is 25 (including two for conciliation).²⁰⁵ Almost half have led to amicable settlement or were discontinued. Two awards have been annulled by *ad hoc* committees of ICSID acting under Article 52 of the Convention (see below). Maximum caseload during the twelve months ending June 30, 1988 was 11.²⁰⁶ Although the total number of cases registered by ICSID is small in comparison with other arbitral institutions, experts estimate that ICSID arbitration clauses have now been included in more than a thousand contracts involving billions of dollars in foreign investment.²⁰⁷

Notable features of ICSID arbitration are these:

203. Delaume, *ICSID Arbitration*, in CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION, *supra* note 6, at 23, 26 [hereinafter Delaume, *ICSID Arbitration*]. The literature on ICSID is extensive and is listed in Document ICSID/13 (1985). Because of their authors' positions with the World Bank over the years, articles by Aron Broches, Georges R. Delaume, Heribert Golsong, and Ibrahim F.I. Shihata may be taken as semi-official. A recent article of outstanding quality and utility, published after the ICSID bibliography, is Broches, *Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution*, 2 ICSID REV. — FILJ 287 (1987); see also Shihata, *The Settlement of Disputes Regarding Foreign Investment: The Role of the World Bank, with Particular Reference to ICSID and MIGA*, 1 AM. U.J. INT'L L. & POL'Y 97 (1986) (describing the role of ICSID and MIGA); Broches, *The Experience of the International Centre for Settlement of Investment Disputes*, in AMERICAN SOCIETY OF INTERNATIONAL LAW, INTERNATIONAL INVESTMENT DISPUTES: AVOIDANCE AND SETTLEMENT 75 (S. Rubin & R. Nelson eds. 1985) (same); see also Sutherland, *The World Bank Convention on the Settlement of Investment Disputes*, 28 INT'L & COMP. L.Q. 367, 368-70 (1979) (offering an earlier treatment of special merit).

204. ICSID Convention, *supra* note 24, at preamble.

205. ICSID 1988 ANNUAL REPORT 4 (1988).

206. *Id.*

207. Pirritwitz, *Annulment of Arbitral Awards under Article 52 of the Washington Convention on the Settlement of Disputes Between States and Nationals of Other States*, 23 TEX. INT'L L.J. 73, 75 (1988).

1. By acceptance of the Convention a state does not automatically consent to ICSID arbitration.²⁰⁸ Consent of a member state may be granted in advance by legislation, in a separate agreement between states, or in an agreement with the investor (such as a concession, economic development, joint venture, or service agreement).²⁰⁹ Once consent is given by both parties it may not be withdrawn unilaterally.²¹⁰

2. ICSID awards, if not annulled internally, are final in and of themselves. They are not subject to judicial review in any member state.²¹¹ By treaty an ICSID award is considered a final judgment in every such state, a treatment that was original when conceived and that is still unique. Not even the doctrine of sovereign immunity is a defense to enforcement against a state, although actual execution still depends on the provisions of local law in this regard.²¹²

3. Consent to ICSID arbitration excludes all other remedies,²¹³ including diplomatic protection (a species of Calvo Clause),²¹⁴ except that (a) informal diplomatic exchanges to facilitate settlement are permitted;²¹⁵ (b) a state may require exhaustion of local remedies as a condition to its consent;²¹⁶ and (c) the ICSID Arbitration Rules permit parties to stipulate in the agreement recording their consent that resort may be had to national courts for provisional measures such as attachment.²¹⁷

4. The parties have unlimited freedom to establish the rules of law to be applied, but *in the absence of such agreement* the ICSID arbitrators are to apply the law of the state party to the dispute (including its conflict of laws rules) and "such rules of international law as may be applicable."²¹⁸ The latter half of this formulation has led to much theoretical dispute. One view, set forth in the most authoritative work on the ICSID Convention, written by the then General Counsel of the World Bank and principal draftsman of the Convention, is this:

My submission as to the relationship between the law of the host State and international law in the second sentence of 42(1) is as follows. The Tribunal will

208. ICSID Convention, *supra* note 24, art. 25(1).

209. G. DELAUME, *supra* note 14, at 360.

210. ICSID Convention, *supra* note 24, art. 25(1).

211. *Id.* arts. 53(1), 54(1).

212. *Id.* arts. 54(3), 55.

213. *Id.* art. 26.

214. *Id.* art. 27(1). As to the Calvo Clause, see L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, *INTERNATIONAL LAW: CASES AND MATERIALS* 1064-68 (2d ed. 1987).

215. ICSID Convention, *supra* note 24, art. 27(2).

216. *Id.* art. 26.

217. ICSID RULES OF PROCEDURE FOR ARBITRATION PROCEEDINGS 39(5).

218. ICSID Convention, *supra* note 24, art. 42(1).

first look at the law of the host State and that law will in the first instance be applied to the merits of the dispute. Then the result will be tested against international law. That process will not involve the confirmation or denial of the validity of the host State's law, but may result in not applying it where that law, or action taken under that law, violates international law. In that sense, as I suggested earlier, international law is hierarchically superior to national law under Article 42(1).²¹⁹

This view appears to have been accepted. See paragraphs 69 and 70 of *Klöckner v. Cameroon, Decision of Ad Hoc Committee (1985)*.²²⁰

Organs of ICSID are the Administrative Council, consisting of one representative from each member (usually its designee as World Bank governor), and the Secretariat.²²¹ The Secretary-General is the principal officer of ICSID.²²² Incumbent Secretary-General is Ibrahim F.I. Shihata, Vice President and General Counsel of the World Bank, with LL.B. and LL.M. degrees from Cairo University and an S.J.D. from Harvard Law School.²²³ Senior Counsel to ICSID for more than 20 years was Georges R. Delaume, author of a widely cited multi-volume treatise on transnational law²²⁴ and of innumerable articles on investment law.²²⁵ Present Senior Counsel for ICSID is Antonio R. Parra.²²⁶

The ICSID Convention and the ICSID Arbitration Rules grant broad autonomy to the parties and the arbitrators to determine their own procedures. Only a few of their procedural provisions are mandatory, and these are mostly designed to prevent frustration of the arbitral process (e.g., there must be an uneven number of arbitrators).²²⁷ When arbitrators are appointed by ICSID rather than the parties they are drawn from an approved ICSID panel of arbitrators, which, in addition to professional and moral qualifications, must reflect the principal legal systems and main forms of economic activity in the

219. Broches, *The Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 136 RECUEIL DES COURS 331, 392 (1972-II).

220. *Klöckner v. Cameroon, Decision of Ad Hoc Committee*, 1 ICSID REV. — FILJ 89, 112 (1986) (stating that principles of international law have a dual role in this respect: "complementary," and "corrective" if a state's law does not conform to international law).

221. ICSID Convention, *supra* note 24, arts. 3 and 4.

222. *Id.* art. 11.

223. Based on biographical material supplied to the author by the World Bank.

224. G. DELAUME, *TRANSNATIONAL CONTRACTS (1977)* (with supplements). This is not to be confused with the single-volume work cited in note 14 *supra*.

225. See *supra* note 203 and accompanying text (discussing Doc. ICSID/13 and other pertinent materials).

226. Based on information supplied to the author by the World Bank.

227. See Delaume, *ICSID Arbitration, supra* note 203, at 33 (discussing the arbitral process of ICSID).

world.²²⁸ The venue of ICSID proceedings is legally irrelevant but, in practice, it has been divided about equally between Washington, D.C. and European cities.²²⁹ Awards must be "reasoned."²³⁰

To the approval of some, the disapproval of others and the consternation of many, two awards rendered by ICSID arbitral tribunals have been annulled by internal ICSID *ad hoc* committees under Article 52 of the Convention.²³¹ Applications for two more annulments were filed in March and July 1988. The latter was in a case whose "final" award had been annulled once already, thus involving the parties in a *fourth* proceeding on the same set of facts.²³² Grounds for annulment are both narrow and serious.²³³ In the two cases the *ad hoc* committees con-

228. ICSID Convention, *supra* note 24, arts. 14(1), 14(2). Arbitrators receive a flat fee for each day of hearings or related work and a *per diem* allowance for living expenses away from home. ICSID ADMINISTRATIVE AND FINANCIAL REGULATIONS, 14(1), *reprinted in* ICSID BASIC DOCUMENTS, Doc. ICSID/15 at 41 (1985) [hereinafter ADMINISTRATIVE AND FINANCIAL REGULATIONS]. The current amounts are 600 special drawing rights (SDRs) and \$115, respectively (although the latter is higher for some locations such as Geneva, London, New York, Paris, Stockholm, and Zurich at \$170, and Washington, D.C. at \$150; and an alternative "mixed rate" is available under which the arbitrator claims 50% of the *per diem* plus actual hotel room cost). ICSID Schedule of Costs, January 1985 (arbitrator fees); ICSID announcement, Sept. 15, 1988 (*per diem* rates); ICSID Guidelines for Reimbursement of Travel and Subsistence Expenses (undated) (full and mixed *per diem* rate procedures). An SDR is an International Monetary Fund unit of measure that varies daily, based on weighted exchange rates for the U.S. dollar, Deutsche mark, French franc, Japanese yen, and pound sterling. Between 1984 and 1987, it oscillated in U.S. dollar equivalents between \$.98 and \$1.42. In July 1988 it was \$1.37. *See* monthly IMF, International Financial Statistics, Introduction and Table A of Exchange Rates. It is ICSID's practice to request, from time to time, cover for estimated expenditures. ADMINISTRATIVE AND FINANCIAL REGULATIONS, *supra*, 14(3)(a). It is often said that ICSID's charges are less than other institutions because it is subsidized by the World Bank. Delaume, *ICSID Arbitration*, *supra* note 203, at 23. This, of course, does not take into account the problem of annulment. *See infra* notes 231-238 and accompanying text (discussing annulment).

229. Delaume, *ICSID Arbitration*, *supra* note 203, at 33.

230. ICSID Convention, *supra* note 24, art. 48(3).

231. ICSID, 1986 ANNUAL REPORT 4 (1986) [hereinafter ICSID, 1986 ANNUAL REPORT]. Klöckner v. Cameroon, Decision of Ad Hoc Committee, 1 ICSID REV — FILJ 89, 112 (1986); Amco Asia v. Indonesia, 1 INT'L ARB. REP. 649 (1986), *reprinted in* 25 I.L.M. 1439, 1439 (1986).

232. Maritime Int'l Nominees Establishment (MINE) v. Repub. of Guinea (registered March 28, 1988). ICSID 1988 ANNUAL REPORT 4 (1988). Klöckner v. Cameroon (registered July 1, 1988). NEWS FROM ICSID, July 1, 1988, at 8.

233. ICSID Convention, *supra*, note 24, art. 52(1) provides:

Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:

- (a) that the Tribunal was not properly constituted;
- (b) that the Tribunal has manifestly exceeded its powers;
- (c) that there was corruption on the part of a member of the Tribunal;
- (d) that there has been a serious departure from a fundamental rule of procedure; or

cluded that the arbitrators had exceeded their powers by failing to apply the proper law, and had failed to state sufficient reasons to justify their legal conclusions.²³⁴ The neutral presidents of the two committees and the two tribunals are household names in transnational arbitration: Professor Pierre Lalive of Geneva annulling Dr. Eduardo Jiménez de Aréchaga of Montevideo (*Klöckner v. Cameroon* in 1985) and Professor Ignaz Seidl-Hohenveldern of Vienna annulling Professor Berthold Goldman of Paris (*Amco Asia v. Indonesia* in 1986). The Secretary-General of ICSID, who has not commented on the merits of the annulments, has expressed the hope that recourse to annulment proceedings will remain, as originally conceived, a narrow exception to the finality of ICSID awards.²³⁵ Both cases were re-submitted and a second award was rendered by a different panel in *Klöckner* in January 1988.²³⁶ Then the second award became the object of an application for annulment.²³⁷ In *Amco*, a different panel, chaired by Professor Rosalyn Higgins of London, rendered a decision on jurisdiction in May 1988.²³⁸

It borders on axiom to observe that ICSID arbitration is preferable to any other when its jurisdictional requirements can be met. Enforceability of awards under the ICSID Convention, World Bank resources and subsidized costs to the parties, and involvement of ICSID's highly trained and dedicated staff (some of it on loan from the World Bank)

(e) that the award has failed to state the reasons on which it is based.

Id.

234. *Amco Asia Corp. v. Indonesia*, Decision of Ad Hoc Committee, 1 INT'L ARB. REP. 649, 674 (1986), reprinted in 25 I.L.M. 1439 (1986); *Klöckner v. Cameroon*, Decision of Ad Hoc Committee, 1 ICSID REV. — FILJ 89, 93 (1985).

235. ICSID, 1986 ANNUAL REPORT, *supra* note 231, at 4. He has also said that "if parties dissatisfied with awards regularly seek annulment such a practice may put in doubt the features which make ICSID arbitration an attractive means of settling investment disputes." ICSID, Report of the Secretary-General to the Administrative Council Sept. 27-29 (Berlin), at 3 (1988). For similar comment by a leading arbitration practitioner, see Craig, *The Uses and Abuses of Appeal from International Arbitration Awards*, in PRIVATE INVESTORS ABROAD, *supra* note 41, at §§ 14.49-14.56 (stating that appeals should not be overused); Redfern, *ICSID - Losing Its Appeal?*, 3 ARB. INT'L 98, 118 (1987) (same); Feldman, *The Annulment Proceeding and the Finality of ICSID Arbitral Awards*, 2 ICSID REV. — FILJ 85 (1987) (stating that the over-use of appeal is contrary to "the trend in international arbitration law to recognize the finality of arbitral awards . . ."); Pirrwitz, *supra* note 207 at 114-16 (declaring that the benefits of ICSID arbitration outweigh any criticisms with regard to awards and procedural safeguards).

236. As yet unpublished, *Klöckner v. Cameroon* (Resubmitted case), Award (January 26, 1988). ICSID 1988 ANNUAL REPORT 6 (1988).

237. *Klöckner v. Cameroon*, (registered July 1, 1988, NEWS FROM ICSID, July 1, 1988, at 8).

238. See *Amco Asia v. Indonesia*, (Resubmitted case), Decision on Jurisdiction, INT'L ARB. REP., June 1988, at A1, A26, reprinted in 27 I.L.M. 1281, 1281 (1988) (ruling that the Tribunal continues to have jurisdiction *ratione personae* over the now dissolved Amco Asia).

assure a level of efficacy unequalled elsewhere. Potential abuse of the internal annulment procedure, however, requires a caveat. The signs are disquieting but the returns are not yet in. The *ad hoc* committees in the third and fourth annulment proceedings have an opportunity to clarify matters,²³⁹ but amendment of the ICSID Rules may be the only solution.²⁴⁰

ICSID also administers the so-called Additional Facility for disputes involving a state and a national of another state that are not covered by the Convention.²⁴¹ Awards in such cases are enforceable only under national law, not under the Convention. A number of bilateral investment treaties contemplate possible recourse to the Additional Facility.²⁴²

239. See *supra* note 232 (referring to the third and fourth annulment proceedings). The committee in MINE is composed of Professor Sompong Sucharitkul of Thailand, President; Judge Kéba MBaye of Senegal; and Aron Broches of the Netherlands, the former Vice President and General Counsel of the World Bank and former Secretary-General of ICSID. 5 NEWS FROM ICSID 9 (Summer 1988). The second committee in *Klöckner* is composed of Professor Sucharitkul, President; Judge MBaye; and Professor Andrea Giardina of Italy. *Id.* at 8. Professor Sucharitkul, who has served as Thailand's ambassador to some 10 countries over the past 20 years, is a Barrister-at-Law of the Middle Temple in London and holds the following degrees: B.A., M.A. and D. Phil., Oxford; Docteur en Droit, Paris; and LL.M., Harvard. He was a member of the International Law Commission for 10 years and has been visiting professor or lecturer at law schools throughout the world. ASSOCIATION OF AMERICAN LAW SCHOOLS, DIRECTORY OF LAW TEACHERS, 1987-88 773 (1987); biographical material supplied to the author by the World Bank.

240. The possibility of this was suggested by Secretary-General Shihata in ICSID 1988 ANNUAL REPORT 4 (1988). Redfern, *supra* note 235, at 118, suggests amending the ICSID Convention, but the article 66(1) requirement of unanimity would seem to make this an unrealistic proposition, especially for a treaty with 89 parties. Amendment of the ICSID Rules, however, requires only a two-thirds majority vote of the Administrative Council (composed of one member from each contracting state). ICSID Convention, *supra* note 24, arts. 4(1), 6(1). The efficacy of proceeding by rule, however, has been questioned, and with obvious reason. Gaillard, *Some Notes on the Drafting of ICSID Arbitration Clauses*, 3 ICSID REV. — FILJ 136, 142-143 (1988) (how can changed wording "prevail over the text of the Convention to prevent a full application of Article 52?"). Any dispute about the propriety of proceeding by way of Rules amendment would be resolved by the International Court of Justice. ICSID Convention, *supra* note 24, art. 64. Yet another possibility would be for parties to waive resort to annulment proceedings, or at least to a second round of annulment proceedings, at the time of granting consent to ICSID arbitration. The philosophy of party autonomy embodied in the ICSID Convention would appear sufficiently strong to overcome any argument that article 52 is *jus cogens*.

241. ICSID Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings, Doc. ICSID/11/Rev. I (1986); see Broches, *The 'Additional Facility' of the International Centre for Settlement of Investment Disputes (ICSID)*, 4 Y.B. COMM. ARB. 373, 373-79 (1979) (discussing the additional facility); Cf. Golsong, *A Guide to Procedural Issues in International Arbitration*, 18 INT'L LAW. 633, 634-35 (1984) (describing the additional facility as "obsolete and therefore useless").

242. Delaume, *ICSID Arbitration*, *supra* note 203, at 38.

X. FINAL COMMENTS AND CONCLUSIONS

In the years following World War II, as arbitration was growing in stature and in strength, much was written and said about (a) where to arbitrate, (b) institutional arbitration versus *ad hoc* arbitration (that is, arbitration managed by the parties themselves and according to their own rules), and (c) which institution to select if the arbitration was to be "institutional."

A checklist of "place" factors prepared by the World Arbitration Institute of New York, promoting New York as a venue, contained the following:

- Is the country a party to one or more of the international arbitration conventions?
- What are the mandatory legal requirements that cannot be waived by the parties?
- What are the limitations, if any, on arbitrable subject-matter?
- Are there limitations on arbitrators' powers?
- What is the extent of court interference in, or court assistance to, arbitration?
- Are awards binding and readily enforceable?
- Is there review or appeal of awards? What are the grounds for setting aside or modifying awards?
- Are competent arbitrators readily available?
- Are there arbitral institutions available for administration of arbitration?
- What languages can easily be used?
- Are there local lawyers with experience in international arbitration and commerce available?
- Are there facilities such as hearing rooms, reporters, and competent translators and interpreters readily available?
- Are travel and telephone/telex communications readily available in and out of that country?
- What are the immigration, customs, currency exchange, and tax provisions?
- What are the relative costs of arbitrators, administration, lawyers, reporters, and other services and facilities in that country?²⁴³

Almost every one of these items can be resolved to the maximum beneficial extent possible by entrusting the administration of the arbitration to one of the major institutions, the ones just reviewed. Their

243. WORLD ARBITRATION INSTITUTE, *supra* note 71, at 6. The World Arbitration Institute defines itself as a "program" of the American Arbitration Association. *Id.* at Foreword.

rules and practices have become more and more similar with the passing of time and the accumulation of experience. The differences that exist are not "transcendental." And when there are differences, a party is not likely to know in advance which rule or practice will favor his cause in any given controversy. Finally, the rules are generally flexible enough to accommodate the engrafting of specific party-inspired rules that are felt necessary to meet special concerns.

Ad hoc arbitration nevertheless remains a possibility. It can be fashioned more closely to the needs of special circumstances, and it can be more economical in time and money if the parties expect a continuing relationship and are working together in a spirit of cooperation. But it requires considerably more skill to structure, and it means that if one of the parties is recalcitrant at the outset, there is no arbitral tribunal in existence and no set of rules to cover the situation except the provisions of applicable law. The advantage in time and money can also be illusory. A leading Paris-based authority has opined that "ad hoc proceedings arranged outside an institutional framework generally turn out to be frighteningly expensive."²⁴⁴

Ad hoc arbitration functions best in the hands of specialists and then only when the proceedings are under way. A particularly apposite example of successful *ad hoc* arbitration was that between the government of Kuwait and American Independent Oil Company (AMOCO) in 1982.²⁴⁵ In that leading case, as in several other *ad hoc* oil concession arbitrations, the draftsmen of the *compromis* had the "benefit" of an already existing dispute. It is substantially — and dangerously — more difficult to provide for details when they are merely contingencies among a plethora of possibilities. It is submitted that when the problems of the future can only be generalized, it is safer to stay with the rules that have been generalized, i.e., those of the major institutions or UNCITRAL, fine-tuned by the parties as desired.

244. Paulsson, *supra* note 62, at 275-76. The other material in this paragraph is drawn principally from A. REDFERN & M. HUNTER, *supra* note 4, at 8-9, 37-41, 113-15 (inclining subtly but detectably toward *ad hoc* arbitration); see also W. STRENG & J. SALACUSE, *supra* note 4, at § 30.06[B][2]; Stevenson, *supra* note 62, at 386-88 (discussing the difficulties of *ad hoc* arbitration in comparison with the institutional method); and G. BORN & D. WESTIN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS: COMMENTARY AND MATERIALS 614 (1989) (to be published; from final galley proofs) (stating that "most experienced international practitioners prefer the more structured, predictable character of institutional arbitration, at least in the absence of unusual circumstances").

245. Redfern, *The Arbitration Between the Government of Kuwait and Aminoil*, 1984 BRIT. Y.B. INT'L L. 65, 65; Young & Owen, *Valuation Aspects of the Aminoil Award*, in 4 THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW 3 (R. Lillich ed. 1987).

More important than the rules themselves, which after all allow a very wide discretion to the parties and to the arbitrators, are the actual practices of arbitrators. Very little has been written on this. In fact there is almost nothing beyond mere anecdote. But one experienced international arbitrator, Professor Andreas Lowenfeld of New York University Law School, has published an unusually thoughtful account of his experiences.²⁴⁶ His conclusion is that, *in practice*, international arbitrators are tending to make the same substantive and procedural decisions whatever their location and whatever their institutional sponsorship. There may be differences on such things as discovery, which American litigators favor and almost everyone else views with reserve, including the British, but even as to this the process of convergence proceeds apace. After a comprehensive working group study of the question in 1986 at the VIIIth International Arbitration Congress of the International Council for Commercial Arbitration (ICCA), the lead commentators, Judge Howard Holtzmann of the Iran-U.S. Claims Tribunal and Professor Giorgio Bernini of Bologna University, came to the same conclusion.²⁴⁷ It should be added that costs are generally no exception to this process of convergence.²⁴⁸

246. Lowenfeld, *The Two-Way Mirror: International Arbitration as Comparative Procedure*, 7 MICH. Y.B. INT'L LEG. STUDIES 163-85 (1985), reprinted in W. CRAIG, W. PARK & J. PAULSSON, *supra* note 46, at App. VII (the supplemented Oceana Publications Inc. loose-leaf version of the work referred to in *supra* note 46); *see also* Lowenfeld, *Singapore and the Local Bar: Aberration or Ill Omen*, J. INT'L ARB., Sept. 1988, at 71, 74-75 (noting that "there is a customary law of international arbitration").

247. The working group's study consisted of a hypothetical case to be administered under various legal systems, and is reported at INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION, CONGRESS SERIES NO. 3, *supra* note 137, at 19-171. The Holtzmann-Bernini conclusion (at page 171) was: "This comparative analysis indicates that there has been a gradual internationalization of practice, that traditionally sharp lines of division between legal systems are yielding to a process of harmonization, that there are now more basic similarities than differences"

248. *See supra* notes 62 (discussing costs of the ICC), 86 (discussing costs of the AAA), 110 (discussing LCIA costs), 140 (discussing the SCC), 197 (discussing Swiss costs) and 228 (discussing ICSID). Meaningful comparison of overall costs is virtually impossible, even though attempts have been made. *See generally* Branson & Tupman, *Selecting an Arbitral Forum: A Guide to Cost-Effective International Arbitration*, 24 VA. J. INT'L L. 917 (1984) (comparing ICC, ICSID and UNCITRAL); Stein & Wotman, *supra* note 86, at 1722-24 (comparing ICC, AAA, LCIA and UNCITRAL). Consider: (a) administrative expenses and arbitrator fees are calculated on disparate bases (amount in dispute, time spent, reasonability); (b) wide discretion is allowed in fixing amounts within the prescribed brackets, which themselves are quite ample; (c) even the brackets may be exceeded, upwards or downwards, in some cases; (d) the number of arbitrators will affect the calculation and not necessarily in direct proportion; (e) arbitrators' out-of-pocket expenses are difficult to gauge in advance; (f) overall cost includes a party's direct costs as well, and these comprise such major items as travel for hearings and translations of documents and testimony; (g) devotion of time is itself a cost that will vary with the actual pace of proceedings; (h) overall cost also

A final point remains: should the arbitration clause include the designation of a venue?²⁴⁹ Without institutional administration this is, of course, vital. But *with* it the rules universally provide for determination by the institutions or by the arbitrators in the absence of party choice.²⁵⁰ So it is not essential, but is it advisable? To this one must respond with the militarily oracular advice that it depends on the circumstances and the nature of the terrain. A good case can be made either way, and the authorities in fact have done just that.²⁵¹ They are not in agreement, although the normal human preference for instant certainty leads more often than not to specification than to suspense.²⁵² The point is that it is perfectly reasonable to leave the matter for institutional determination. If the arbitrators are to be trusted to render a fair award, and by hypothesis they are, then all the more reason they can be trusted to make a fair determination of locale.

How good a job, then, are the major international commercial arbitration institutions doing? For the group the answer is, very well indeed. Both their rules and their practices are promoting a beneficial convergency in substance and procedure, while still preserving the distinct features that will lead clients and their lawyers to select one rather than another. They are continually adapting to the evolving needs of their constituents. Through their performance and their programs they are making of arbitration what William James called "a live option,"²⁵³ accessible to just about anyone who can copy or ration-

includes legal fees, which may or may not be allocated wholly or partially to the "loser"; and (i) post-award proceedings may arise either by way of judicial recourse or internal annulment and possible re-filing (as with ICSID). A concrete case will of course narrow the range of permutations, but even here it is with trepidation that one ventures a preference based solely on cost. In general, and in view of the particular services that each has to offer, it seems fair to conclude that the institutions are competitive, one with another.

249. See Park, *National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration*, 63 TUL. L. REV. 647, 680 (1989) (stating that "[t]he vital role of the arbitral situs in the viability of international arbitration derives in large measure from the enforcement scheme of the New York Arbitration Convention.").

250. E.g., ICC RULE 12, AAA RULE 11, LCIA RULE 7.1, SCC RULE 14(b) (providing for determination by institution or arbitrators of a venue in the absence of a choice by the parties).

251. See Holtzmann, *The Importance of Choosing the Right Place to Arbitrate an International Case*, in PRIVATE INVESTORS ABROAD 183, 190 (V. Cameron ed. 1977) (explaining that there are differences of opinion on the question, but expressing his own preference for specification).

252. Address by Stephen R. Bond, *How to Draft an Arbitration Clause* 10 (June 6, 1988) (unpublished speech of ICC Court of Arbitration Secretary General) (noting that in 57% of the cases filed with the ICC in 1987, the arbitration clause specified the city or country).

253. W. JAMES, *THE WILL TO BELIEVE AND OTHER ESSAYS* 2-4 (1917).

ally adapt one of their model compromissory clauses.

This assessment is no more universal than the institutions are perfect. Professor Hans Smit, for instance, the Director of the Parker School of Foreign and Comparative Law at Columbia University, and co-editor of the highly useful loose-leaf service *WORLD ARBITRATION REPORTER*,²⁵⁴ is not so sure that the present institutions can meet the need he perceives for improvements, especially in the selection of arbitrators.²⁵⁵ For this reason and others he proposes "a single global institution that would make uniformly improved processes and facilities available anywhere in the world."²⁵⁶ Existing institutions would become simply "branches."²⁵⁷ But notwithstanding the trenchancy of his comments, and the prestige of their author, it is not clear to this observer how such an ecumenical conglomerate, with its attendant layer of bureaucracy, could accomplish anything more than the current institutions appropriately directed and managed.²⁵⁸

Heading in precisely the opposite direction is Professor Richard Buxbaum of the University of California (Berkeley), who favors a centrifugal dispersion: "if international commercial arbitration is to remain legitimate and useful, the diffusion and decentralization of what are still fairly centralized centers of activity will be necessary."²⁵⁹ While such a development — and it appears to be taking place, although recently at a decelerating pace — increases the range of optional modalities available for dispute resolution, it is difficult to see how it would improve the *quality* of institutional performance. Quite likely the reverse.

254. See *supra* notes 30, 184 (referring to the *WORLD ARBITRATION REPORTER*).

255. Smit, *supra* note 63, at 15-20, 30-32.

256. *Id.* at 28.

257. *Id.* at 30.

258. In fact, Professor Smit suggests that if the existing institutions will not join together in a cooperative effort to create a single institution, then the ICC should take that initiative alone. *Id.* at 30. This would seem like giving it the alternatives of either (a) radically reforming its own format, or (b) giving aid and comfort to its competitors, who offer a different style and *modus arbitri*. In this writer's view, most of Professor Smit's requirements could probably be met by current institutions plus an inter-institutional clearing house for data on available and potential arbitrators. What comes to mind as a model is the skeletally staffed but remarkably efficient Swiss Arbitration Association in Basel. See *supra* notes 195-98 and accompanying text (discussing the Swiss Arbitration Association). For a measured consideration of institutional "networking" and bilateral agreements between institutions, see Coulson, *Agreements between Arbitration Institutions — Potential for Control: Dangers of Abuse*, in *INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION, CONGRESS SERIES NO. 1, NEW TRENDS IN THE DEVELOPMENT OF INTERNATIONAL COMMERCIAL ARBITRATION AND THE ROLE OF ARBITRAL AND OTHER INSTITUTIONS* 33 (1983).

259. Buxbaum, *Introduction to Symposium on Resolving International Commercial Disputes*, 4 *INT'L TAX & BUS. LAW.* 205, 207 (1986).

What of the future? The area for further development would seem to lie less with the institutions *qua* institutions than with the quality of the arbitrators they supply and with the quality of the counsel the parties supply. Regardless of its aegis, whether institutional or *ad hoc*, an international arbitration is worth no more than the arbitrators and counsel who conduct it.²⁶⁰ Practical, formal, and widespread training of these is a need that to date has been largely neglected.²⁶¹ Meeting it should be the next item on the agenda of international arbitration.

260. Lalive, *International Arbitration — Teaching and Research*, in CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION, *supra* note 6, at 17.

261. One of the reasons for this neglect is a belief by some arbitration proponents that the right of parties to appoint arbitrators guarantees acceptable quality. Transcript of Symposium on Alternative Dispute Resolution, comments of AAA President Robert Coulson and Associate Dean Frank E.A. Sander, 35th Reunion of Harvard Law School Class of 1953, at 18-20 (1988) (copy on file with The American University Journal of International Law & Policy). A difficulty with this notion is that parties are not always in a position to know, or to evaluate if they do know, the background, experience, and past performance of potential arbitrators. Some sort of accreditation in the style of the Chartered Institute of Arbitrators (CIARB) in London would appear to be a desirable development. *See supra* notes 111-14 and accompanying text (discussing CIARB training, examination, and accreditation). Recognition is due, however, to the efforts of the ICC and AAA in their on-going programs of seminars and specialized sessions. *See* ICC 1987 ANNUAL REPORT 27 (1987) (stating that 1,000 persons attended its programs for arbitrators during the year); Derains, *The Future of ICC Arbitration*, 14 GEO. WASH. U.J. INT'L L. & ECON. 437, 441 (1980) (describing ICC educational programs); Coulson, *supra* note 6, at 75. The American Bar Association also offers occasional "institutes" on the subject. *See* AMERICAN BAR ASSOCIATION (DIVISION OF PROFESSIONAL EDUCATION), INTERNATIONAL LITIGATION AND ARBITRATION: PRACTICAL APPROACHES AND CONSIDERATIONS (1987) (consisting of a two-volume work of almost 1,400 pages). Unfortunately, some of the entries consist of outlines only, rather than full manuscripts. Of particular interest is the first academic educational program, offered since 1985 by Centre for Commercial Law Studies, Queen Mary College, University of London. The school awards a postgraduate Diploma in Arbitration Law for a full-time course of one year, consisting of two compulsory subjects in international arbitration (substance and procedure) and two optional subjects in related topics. Prospectus for Academic Session 1988/89, at 59-62. *See* Lew, *School of International Arbitration, London*, J. INT'L ARB., Sept. 1988, at 127, 129-33. (discussing the School of International Arbitration, authored by the head of the School of International Arbitration). Address for the Centre is 339 Mile End Road, London E1 4NS.

ANNEX: ITA Scoreboard of Treaty Adherence (As of January 1, 1989)

N.Y. = UN Arbitration Convention of 1958.
Ratifications, accessions and successions: 78;
signatures only: 3.

ICSID = Convention on the Settlement of Investment
Disputes of 1965.

Ratifications, acceptances or approvals: 89;
signatures only: 8.

MIGA = Convention Establishing the Multilateral
Investment Guarantee Agency of 1985.
Ratifications, acceptances or approvals: 48;
signatures only: 24.

I/A = Inter-American Convention on International
Commercial Arbitration of 1975.
Ratifications: 11; signatures only: 6.

USBIT = U.S. Bilateral Investment Treaties.

OPIC = Agreements supporting programs of
U.S. Overseas Private Investment
Corporation.

Symbols for adherence status are explained at
end of table.

Changes since October 1, 1988:

Dominica acceded to UN(NY) Convention
on October 28, 1988.

Burkina Faso ratified MIGA Convention on
November 2, 1988.

Cameroon ratified MIGA Convention on
October 7, 1988.

Finland ratified MIGA Convention on
December 28, 1988.

Kenya ratified MIGA Convention on
November 28, 1988.

Mauritius signed MIGA Convention on
November 4, 1988.

Nation	N.Y. ¹	ICSID ²	MIGA ³	I/A	USBIT ⁴	OPIC ⁵
Afghanistan		R				IO
Albania						
Algeria						NP
Andorra						
Angola						
Antigua and Barbuda					NP	R
Argentina	S					R
Australia	R	S				
Austria	R	R				IO
Bahamas						R
Bahrain	R		R			R
Bangladesh		R	R		S	R
Barbados		R	R			R
Belgium	R	R				IO
Belize		S				R
Benin	R	R	S			R
Bhutan						
Bolivia			S	S		R
Botswana	R	R				R
Brazil				S		R
Brunei						
Bulgaria	R					
Burkina Faso	R	R	R			R
Burma						
Burundi		R			NP	R
Byelorussian SSR	R					
Cambodia (Kampuchea)	R					
Cameroon	R	R	R		S	R
Canada ⁶	R		R*			
Cape Verde						R
Central African Republic	R	R				R
Chad		R				R
Chile	R		R	R		IO
China (People's Republic)	R		R		NP	R
Colombia	R		S	R		R
Comoros		R				

Nation	N.Y.	ICSID	MIGA	I/A	USBIT	OPIC
Congo		R	S			R
Costa Rica	R	S		R	NP	R
Cuba	R					IO
Cyprus	R	R	R			R
Czechoslovakia	R					
Denmark ⁷	R	R	R*			IO
Djibouti	R					R
Dominica	R		S			R
Dominican Republic				S		R
Ecuador	R	R	R	S		R
Egypt	R	R	R		S	R
El Salvador	S	R		R		R
Equatorial Guinea			S			R
Ethiopia		S				R
Fiji		R	S			R
Finland	R	R	R*			IO
France ⁸	R	R	S*			IO
Gabon		R			NP	R
Gambia		R				R
German Democratic Republic	R					
Germany, Federal Republic ⁹	R	R	R*			IO
Ghana	R	R	R			R
Greece	R	R	S			R
Grenada			R		S	R
Guatemala	R			R		R
Guinea		R				R
Guinea-Bissau						R
Guyana		R	S			R
Haiti	R	S	S		S	IO
Holy See (Vatican City)	R					
Honduras		S		R	NP	R
Hungary	R	R	R			
Iceland		R				
India	R					R
Indonesia	R	R	R		NP	R
Iran						IO
Iraq						
Ireland	R	R	S*			R
Israel	R	R				R
Italy	R	R	R*			IO
Ivory Coast		R	R			R
Jamaica		R	R			R
Japan	R	R	R*			
Jordan	R	R	R			R
Kenya		R	R			R
Kiribati						NP
Korea (Democratic People's Republic)						
Korea (Republic)	R	R	R			R
Kuwait	R	R	R			NP

Nation	N.Y.	ICSID	MIGA	I/A	USBIT	OPIC
Laos						IO
Lebanon						R
Lesotho		R	R			R
Liberia		R				R
Libya						
Liechtenstein						
Luxembourg	R	R				IO
Madagascar	R	R	R			R
Malawi		R	R			R
Malaysia	R	R			NP	R
Maldives						
Mali		R				R
Malta			S			R
Mauritania		R				R
Mauritius		R	S			R
Mexico	R			R		
Monaco	R					
Mongolia						
Morocco	R	R	S		S	R
Mozambique						R
Nauru						
Nepal		R				R
Netherlands ¹⁰	R	R	R*			IO
New Zealand ¹¹	R	R				
Nicaragua				S		IO
Niger	R	R				R
Nigeria	R	R	R			R
Norway	R	R	S*			IO
Oman			S			R
Pakistan	S	R	R			R
Panama	R			R	S	IO
Papua New Guinea		R				R
Paraguay		R		R		IO
Peru	R					IO
Philippines	R	R	S			R
Poland	R					
Portugal		R	R			R
Qatar						R
Romania	R	R				IO
Rwanda		R			NP	R
St. Christopher and Nevis			S			R
St. Lucia		R	R			R
St. Vincent and the Grenadines						R
San Marino	R					
Sao Tome and Principe						R
Saudi Arabia		R	R			R
Senegal		R	R		S	R
Seychelles		R				
Sierra Leone		R	S			R

Nation	N.Y.	ICSID	MIGA	I/A	USBIT	OPIC
Singapore	R	R				R
Soloman Islands		R				NP
Somalia		R				R
South Africa	R					
Spain	R		R			IO
Sri Lanka	R	R	R		NP	R
Sudan		R	S			R
Suriname						
Swaziland		R				R
Sweden	R	R	R*			
Switzerland	R	R	R*			
Syria	R					R
Taiwan						R
Tanzania	R					R
Thailand	R	S				R
Togo		R	R			R
Tonga						R
Trinidad and Tobago	R	R				R
Tunisia	R	R	R			R
Turkey		S	R		S	R
Tuvalu						NP
Uganda		R				R
Ukrainian SSR	R					
Union of Soviet Socialist Republics	R					
United Arab Emirates		R				NP
United Kingdom ¹²	R	R	R*			IO
United States of America ¹³	R	R	R*	S	N/A	N/A
Uruguay	R		S	R	NP	R
Vanuatu			R			
Venezuela				R		IO
Vietnam						IO
Western Samoa		R	R			R
Yemen Arab Republic			S			R
Yemen, People's Democratic Republic						
Yugoslavia	R	R				R
Zaire		R	S		S	R
Zambia		R	R			R
Zimbabwe						

Notes: (1) Automatically applicable to metropolitan and overseas constituent territorial subdivisions *but not* automatically applicable to overseas dependent territories. More important overseas coverage is noted at appropriate entry. Consult UN or ITA for doubts. Under Art. I(3), 49 states have made "reciprocity reservation" and 28 states have made "commercial reservation". (2) Automatically applicable to metropolitan and overseas constituent territorial subdivisions *and* to overseas dependent territories unless specifically excluded. All current exclusions are noted at appropriate entry. (3) Asterisk (*) after symbol indicates capital-exporting country per Schedule A to the Convention. (4) A bilateral investment treaty will be listed as being ratified only when it has been ratified by both signatories. (5) OPIC agreements are regarded as inoperable ("IO") when, for one reason or another, OPIC is not currently making future commitments as to that country (but see Notes 8, 10, 11 and 12 for local exceptions). (6) N.Y.: includes federal, all 10 provincial and both territorial jurisdictions (see Art. XI). (7) N.Y.: includes Faroe Islands and Greenland. (8) N.Y.: includes, *inter alia*, French Guiana, French Polynesia, Guadeloupe, Martinique, Mayotte, New Caledonia, Reunion, and St. Pierre and Miquelon. OPIC operable in French Guiana. (9) N.Y. and ICSID: includes West Berlin. (10) N.Y.: includes Aruba and Netherlands Antilles. OPIC operable in Aruba and Netherlands Antilles. (11) ICSID: excludes Cook Islands, Niue and Tokelau. OPIC operable in Cook Islands. (12) N.Y.: includes Bermuda, Gibraltar, Guernsey, Hong Kong, Isle of Man and Cayman Islands. ICSID: excludes British Indian Ocean Territory, Pitcairn Islands, British Antarctic Territory and Sovereign Base Areas of Cyprus. OPIC operable in Northern Ireland and Anguilla. (13) N.Y.: includes, *inter alia*, Puerto Rico and U.S. Virgin Islands.

Symbols:

S: Signed but not ratified
 R: Ratified or accepted
 NP: Negotiations pending

Sources:

Interviews January 11 to 23, 1989, with Mr. Antonio R. Parra and Mr. Leigh P. Hollywood, World Bank; Mr. John Zylman, Office of the Legal Adviser, U.S. Department of State; Mr. Lorin Weisenfeld, Overseas Pri-