1986

Private Adjudicators and the Public Interest: The Expanding Scope of International Arbitration

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> "And the King said, 'Bring me a sword.' So a sword was brought before the King. And the King said, 'Divide the living child in two, and give half to one and half to the other.' "
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> I Kings 3:24-25

INTRODUCTION

When Solomon arbitrated a child custody dispute, the baby almost perished.[1] Today's arbitrator probably could not propose such a drastic award. Yet courts may refuse to compel arbitration of some disputes for fear that societal interests may suffer a fate similar to that which would have befallen the baby under Solomon's initial judgment. The parties to the dispute are not free to compromise rights other than their own.

Legal rules that affect private commercial transactions may benefit the public as well as provide justice between disputing parties. The businessman who brings an action for treble damages for injury due to a violation of the Sherman Act, designed to preserve the free enterprise system, enforces the Act for the benefit of all society. Courts have resisted giving effect to agreements to arbitrate disputes relating to such "core" public law claims, of which antitrust actions are but one illustration, for fear that private adjudicators may under-enforce laws designed to protect all of society.[2] These "non-arbitrable" laws are often

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Thanks are due to Joe Brodley, Laurie Craig, Wayne Cross, Alan Feld, Greg Klein, Philippe Neyroud, Oliver Park, Jan Paulsson, Michael Reisman, John Townsend and Detlev Vagts for helpful comments.

1. The story does have a happy ending. The real mother's willingness to give up the child rather than see it killed permitted Solomon to make an award of the entire infant.

2. The refusal to enforce the arbitration agreement often is based on an appeal to the vague catchphrase "public policy," which overlaps, but is not necessarily co-extensive

statutory, but they need not be so.[3]

To find public law claims "non-arbitrable" because of their subject matter is only one approach to protecting the public interest in relation to arbitration of public law claims. Another approach would be to order the arbitration to go forward, reserving to the court a "second look" at the arbitral process after the award is rendered. This "second look" approach was taken in Justice Blackmun's opinion for the majority in *Mitsubishi Motors v. Soler Chrysler-Plymouth*,[4] which held that American courts must recognize an agreement to arbitrate antitrust claims, at least when they are implicated in an international, rather than domestic, transaction.

The decision in *Mitsubishi* provides a prism for separating the various themes that inhere in arbitration affecting public rights. The case supplies the occasion for examining whether the needs of the international business community for a neutral dispute resolution mechanism require a special status for transnational commercial arbitration, either with or without a "second look" at the award stage of the process.

This paper will suggest that in transnational commercial matters the international business community's need for neutral dispute resolution outweighs society's interest in supervising adjudication of public law claims. The traditional hesitation of courts to compel arbitration of public law claims should yield to a deeper concern that the refusal of American corporations to honor agreements to arbitrate may impede effective neutral dispute resolution in transnational business relations.

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with, the specific public policy defense to enforcement of foreign arbitral awards under Article V(2)(b) of the 1958 New York Arbitration Convention. *See infra* notes 56-60.

3. "Statutory right" is a problematic label. In a civil law system, contract rights may be statutory, and in a common law system "core public policies" may be embedded in common law doctrines as important as those underpinning statutes. Whether the claim is based on statute or common law is less significant than whether the enforcement of the right directly protects the interests of non-contracting parties. Reference to "statutory claims" may be shorthand for claims which cannot be abrogated consensually by the parties. This begs the question of how claims whose resolution affects principally the parties to the arbitration agreement are to be distinguished from claims whose settlement has a direct and important impact on the community at large, which includes persons not signatories to the arbitration agreement.

4. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985).

I. Of Automobiles and Antitrust

An apparently routine termination of an automobile distributorship arrangement led the United States Supreme Court, on July 2, 1985, to hold that agreements to arbitrate antitrust issues should be enforced in the context of an international transaction. Soler-Chrysler Plymouth (Soler), an auto dealer, had entered into two contracts relating to the distributorship arrangement. One contained a clause providing that disputes arising between the dealer and the manufacturer would be settled by arbitration in Japan. When Soler could not meet minimum sales commitments in its territory, metropolitan San Juan, Mitsubishi Motors, the manufacturer, brought an action in the Federal District Court for the District of Puerto Rico[5] to compel arbitration. Mitsubishi claimed to have suffered damages in storing vehicles never delivered. Soler counterclaimed with allegations of injury due to Mitsubishi's participation in a conspiracy to divide markets and to restrain trade, in violation of §1 of the Sherman Act.[6]

The background of the case was a joint venture between Chrysler Motors (Chrysler) and Mitsubishi Heavy Industries to produce cars that would be marketed through Chrysler's distribution network. Chrysler dealers outside the continental United States were to distribute vehicles manufactured by a Japanese company, Mitsubishi Motors, owned jointly by Chrysler, through its Swiss subsidiary Chrysler International S.A., and Mitsubishi Heavy Industries.

Soler entered into two contracts: (1) a "Distributorship Agreement," signed in October 1979, with Chrysler's Swiss subsidiary, and (2) a tripartite "Sales Agreement," binding not only Soler and Chrysler, but also Mitsubishi Motors, which covered the actual sale of the vehicles by the manufacturer.

The Sales Agreement contained a peculiar arbitration clause, which covered only disputes between Soler and Mitsubishi Motors, and only if arising under five of the contract's fifteen articles:

> All disputes, controversies or differences which may arise between [Mitsubishi] and [Soler] out of or in relation to Articles I-B through V of [the Sales Agreement] or for breach thereof,

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5. The action was brought under Sections 4 and 201 of the Federal Arbitration Act. 9 U.S.C. §§ 4, 201 (1982).

6. 15 U.S.C. § 1 (1980).

> shall be finally settled by arbitration in Japan in accordance with the rules and regulations of the Japan Commercial Arbitration Association.

After Soler ordered the vehicles, business declined in San Juan. Soler asked to transship the vehicles to other markets in North, Central and South America, but Mitsubishi Motors refused to permit the transshipment, purportedly out of concern for the vehicles' suitability in areas outside Puerto Rico, where heaters might be needed or where unleaded high octane fuel could not be obtained. After Soler disclaimed the order, Mitsubishi Motors filed a claim to compel arbitration, to obtain a declaration that the distributorship was terminated, and to receive what the contract called "distress unit penalties," which were liquidated damages to reimburse storage costs and interest for the 966 vehicles ordered but not shipped. These claims, as well as Soler's Sherman Act counter-claims alleging a conspiracy to divide markets, were referred to arbitration by the district court.

Thereafter, the arbitration was interrupted when the First Circuit held that the antitrust counterclaims could not be referred to arbitration because of the vital public interest in preserving free market competition through proper enforcement of antitrust laws. The First Circuit very neatly set up a single issue for appeal, rejecting arguments made by Soler based on (1) the scope of the arbitration agreement, the terms of which were found wide enough to cover statutory claims arising under the Sherman Act; (2) a Puerto Rican "unfair competition" statute, rendering null and void arbitration agreements in dealership contracts; and (3) the Federal "Automobile Dealers' Day in Court Act." Arbitration was found inappropriate only as to Sherman Act claims, and the district court was directed to consider how parallel judicial and arbitral proceedings should go forward.

The First Circuit followed the doctrine announced in 1968 by the Second Circuit in *American Safety Equipment v. J.P. McGuire*,[7] which found antitrust claims to be more than private

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7. American Safety Equipment v. J.P. McGuire, 391 F.2d 821 (2d Cir. 1968). In addition to concern for the protection of the public interest in proper enforcement of the Sherman Act, *id.* at 826, the *American Safety* decision also articulated other reasons why antitrust claims should not be arbitrable: (1) that the contract may be a "contract of adhesion," *id.* at 827; (2) that antitrust issues are prone to complication requiring a sophisticated legal and economic analysis that is "ill adapted to . . . the arbitral process . . . ," *id.*; and (3) that the arbitral tribunal would be composed of representatives of the

matters. Antitrust laws are enforced in large measure by private litigants whose claims for treble damages protect the public interest by posing a deterrent to potential violators. The core of non-arbitrability argument is that the public — which never signed the arbitration agreement — is hurt directly when a law of fundamental importance to democratic capitalism is improperly enforced. The unstated assumption is that arbitrators will be less likely than courts to interpret the law correctly, to find liability or to award treble damages. Thus, as the argument goes, just as war is too important to be left to generals, public law issues are too important to be decided by arbitrators.

The First Circuit had to reconcile its view of law and policy with the 1958 New York Arbitration Convention,[8] which requires recognition of arbitration agreements falling within its scope as long as they "concern a subject matter capable of settlement by arbitration."[9] To fit the non-arbitrability doctrine into the framework of the New York Convention, the First Circuit linked Article II, relating to enforcement of the arbitration agreement, with Article V, relating to recognition of the award. Language in Article V — "under the laws of [the enforcement] country" — permits refusal of recognition of an award if the subject matter of the difference is not capable of settlement by arbitration under the law of that country where enforcement is sought. This language was read into Article II which mandates enforcement of agreements concerning a subject matter "capable of settlement by arbitration."[10]

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business community hostile to the constraints of antitrust law, *id.*

8. Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, 21 U.S.T. 2518, T.I.A.S. No. 6997, 330 U.N.T.S. 38 [hereinafter cited as New York Convention]. United States implementing legislation Pub. L. 91-368, 84 Stat. 692, 9 U.S.C. §§ 201-08 (1982). On the New York Convention, *see generally* A.J. VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958 (1981); W. CRAIG, W. PARK, & J. PAULSSON, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION pt. 6, ch. 37 (1981), [hereinafter cited as I.C.C. ARBITRATION]; Aksen, *American Arbitration Accession Arrives in the Age of Aquarius: United States Implements United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 3 SW. L. REV. 1 (1971); McMahon, *Implementation of the United Nations Convention on Foreign Arbitral Awards in the United States*, 2 J. MAR. L. & COM. 735 (1971); Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 YALE L.J. 1049 (1961); and Von Mehren, *The Enforcement of Arbitral Awards under Conventions and United States Law*, 9 YALE J. WORLD PUB. ORD. 343 (1983).

9. New York Convention, *supra* note 8, at art. II. *See generally* A.J. VAN DEN BERG, *supra* note 8, at 56-57 (on the scope of Article II).

10. There are, of course, alternative interpretations of Article II of the New York

The Supreme Court reversed the First Circuit judgment on the issue of the antitrust counter claims, holding these claims to be arbitrable in the international case at bar, even if a contrary result would be reached in a domestic context. The case was remanded to the Court of Appeals, which on remand affirmed the judgment of the district court that had ordered Soler to submit its antitrust claims to arbitration.

In reversing the First Circuit, the Supreme Court did not deal with the New York Convention. Rather, it denied the presumption that arbitrators would not apply the Sherman Act. Justice Blackmun wrote, "[a]nd so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."[11]

In September 1984, Soler filed a petition for reorganization under Chapter 11 of the Bankruptcy Code, which provides for an automatic stay of all actions including arbitration against the bankrupt.[12] The parties returned to court in Puerto Rico to liti-

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Convention. The phrase "capable of settlement by arbitration" might refer not to the local law of the enforcement forum, but to international public policy, prohibiting, for example, arbitration of contracts to sell narcotics or to engage in "white slavery." Or, the words might refer to the policy of the proper substantive law expressly chosen by the parties or designated under appropriate conflict of law principles to govern interpretation of the contract.

11. 105 S. Ct. 3359-60 (1985). In light of this reasoning, it is puzzling that Blackmun limited his decision to international contracts. His assumption that arbitrators as well as judges can enforce public laws would seem to apply equally to domestic arbitration. The distinction between domestic and international arbitration would have made more sense in a decision based on the New York Convention.

Whether or not anti-trust issues are arbitrable in a domestic context remains an open question. *See* Michael Genna v. Lady Foot Int'l, Inc., No. 85-4372, slip. op. (E.D. Pa. Jan. 24, 1986) (stay of litigation pending arbitration of anti-trust claims in a domestic shoe store franchise; finding that the *Mitsubishi* reasoning is more compelling in a domestic context where the arbitrators "have the benefit of the American spirit of free competition"). *See also* Shamir v. Kidder Peabody, 84 Civ. 8179 (CBM) (S.D.N.Y. Mar. 12, 1986) which suggested that the Supreme Court in *Mitsubishi* held that Sherman Act claims were arbitrable even in a domestic context. *Cf.* Stendig Int'l v. B & B Italia S.p.a., 633 F. Supp. 27 (S.D.N.Y. 1986).

On other issues, judicial enthusiasm for the arbitral process seems to have been stimulated by *Mitsubishi*. Judge Weinfeld, in Development Bank of the Philippines v. Chemtex Fibers, Inc., 617 F. Supp. 55 (S.D.N.Y. 1985), issued an order compelling arbitration of civil RICO claims. (Philippine bank guaranteed loans by American corporation to Philippine corporation — claim of fraud by American lender, allegedly violating Racketeer Influenced & Corrupt Organizations Act.) In Graphic Communications Union v. Chicago Tribune, 779 F.2d 13 (7th Cir. 1985), Judge Posner was bold enough to say that in the future he may impose fines on persons who make weak applications for stays of arbitration.

12. 11 U.S.C. § 362 (1978).

gate whether the Bankruptcy Code prevails over the Arbitration Act. On April 14, 1986 the United States District Court for the District of Puerto Rico removed the reference to the Bankruptcy Court, and ordered arbitration to resume forthwith.[13]

II. SUBJECT MATTER ARBITRABILITY: CHARACTERIZING CLAIMS AND PRIORITIZING POLICIES[14]

Beyond the cheers of *Mitsubishi* by arbitration connoisseurs and the bewailing of the case by antitrust enforcers[15] lie the interests of a larger society. One approach to the task of distinguishing between those interests and claims that are negotiable, and those that are not, is the establishment of a hierarchy of values as suggested in this section.

A. Taxonomy: Non-Negotiable Public Law Claims

All laws implicate public interests, in the sense that they further societal goals, such as ensuring respect for contracts or the orderly inheritance of property. Yet some laws appear to bear upon public interests to a greater degree than others.

Private parties may negotiate away some rights by an arbitration clause or choice of law clause — even before any dispute arises[16] — and courts will enforce this bargain. The right to de-

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13. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., No. 85-838, slip. op. (D.P.R. Apr. 14, 1986).

14. For a survey of public policy issues related to arbitrability, see Sterk, *Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense*, 2 CARDOZO L. REV. 481 (1981). *See generally* Allison, *Arbitration Agreements and Anti-Trust Claims: The Need for Enhanced Accommodation of Conflicting Public Policies*, 64 N.C.L. REV. 219 (1986); Goodman, *Arbitrability and Antitrust*, 23 COLUM. J. TRANSNAT'L L. 655 (1985); and Roth, *Application of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 8 FORDHAM INT'L L.J. 194 (1985) (for a survey of the issues specifically related to antitrust).

15. *See* Becker, *Anti-trust and International Arbitration —The New American Synthesis*, INT'L BUS. LAW. 445, 447 (1985).

16. A distinction between "pre-dispute" and "post-dispute" arbitration agreements is made in many jurisdictions. For example, in England pre-dispute agreements to exclude judicial review of arbitral awards are still void as to shipping, insurance, and commodities contracts governed by English law. Court review of disputes in these areas was considered a fruitful catalyst for development of English law, long pre-eminent in maritime, insurance and commodities matters. Prohibition of pre-dispute exclusion agreements in these areas was intended to encourage fertilization of English law by the commercial community through judicially reviewable arbitration. Exclusion of appeal in these "special category" disputes is possible only after the disputes actually arise. *See* Park, *Judicial Supervision of Transnational Commercial Arbitration: The English Arbitration Act of 1979*, 21 HARV. INT'L L.J. 87, 91 (1980) (pre-1979 law).

mand payment for goods sold and delivered might, for example, be bargained away. As to other rights, however, courts hesitate to permit a waiver, before the dispute arises, of rights that implicate what might be referred to as "non-negotiable" public interests. Indeed, the vindication of some claims involves widespread effects, external to the parties, which are so significant that adjudication becomes a matter of public concern.

Disputes arising under competition law represent but one of several types of claims as to which courts have refused to compel arbitration, pursuant to an otherwise enforceable pre-dispute agreement to arbitrate.[17] With respect to commercial disputes,[18] American courts, at one time or another, have found at least a half dozen other areas of federal law to be "non-arbitrable" because of subject matter,[19] including (1) the 1933 Securities Act,[20] (2) patents,[21] (3) ERISA claims at termination of employment,[22] (4) civil claims under the Racketeer Influenced and Corrupt Organizations Act,[23] (5) bankruptcy matters as to which there is an

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17. When a party to a dispute involving non-arbitrable subject matter refuses to honor his, her or its commitment to arbitrate, courts have permitted different claims arising out of the same facts to be decided by parallel proceedings: arbitration for the arbitrable subject matter issues, and litigation in court for the non-arbitrable subject matter issues.

18. Non-commercial disputes may also be non-arbitrable, for example when they implicate civil rights or employment discrimination, or family law and child custody.

19. On subject matter arbitrability, *see generally* Hoellering, *Arbitrability of Disputes*, 41 BUS. LAW. 125 (1985); and I.C.C. ARBITRATION, *supra* note 8, at § 5.07.

Concerns related to public international law may also constitute a bar to effective arbitration. Article V(2)(a) of the New York Convention, it will be remembered, permits refusal of recognition and enforcement of an arbitral award if the subject matter of the difference is "not capable of settlement by arbitration." *See supra* note 10. This defense was invoked successfully in proceedings to enforce an award resulting from nationalization of an American oil concession by Libya. In Liamco v. Libya, 482 F. Supp. 1175 (D.D.C. 1980), the D.C. District Court refused to enforce an award in favor of the despoiled American enterprise because of the act of state doctrine, which precludes American courts from considering the validity of an act of a foreign sovereign.

The *Liamco* decision is questionable. The court was asked to enforce an award, not to pass on the validity of the foreign nationalization or the compensation therefore. The decision, vacated because of settlement between the parties, was effectively ignored six months later in the same district. In American International Group v. Iran, 493 F. Supp. 522 (D.D.C. 1980), the court enforced an arbitral award in favor of insurance companies whose business in Iran had been nationalized.

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

21. *See* cases cited in Davis, *Patent Arbitration: A Modest Proposal*, 10 ARB. J. 35 (1955). In 1982 Congress amended the patent statute to permit arbitration of validity and infringement suits. *See* 35 U.S.C. § 294 (1952).

22. *See* Amaro v. Continental Can, 724 F.2d 747 (9th Cir. 1984).

23. *See* McMahon v. Shearson/American Express, Inc., 618 F. Supp. 384 (1985); *but see contra* Ross v. Mathis, No. 84-1309, slip op. (D. Ga. Sept. 11, 1985).

automatic stay of all actions,[24] (6) the Commodities Exchange Act,[25] and (7) the Civil Rights Act.[26]

Certain areas of state law have also been non-arbitrable, including claims under franchise law,[27] not implicating interstate commerce and thus pre-empted by the Federal Arbitration Act,[28] and claims for punitive damages.[29]

The goal of these "non-negotiable" legal rules is not merely justice between the parties. They also create benefits for all of society - such as a fair stock market or an orderly way to deal with bankruptcies. For this reason, courts consider that these rules implicate what might be called "public rights."

The first refrain that appears in arguments against arbitrability of public disputes is that public dispute resolution will fertilize judicial precedent. The development of the legal system, it may be argued, requires implementation and interpretation of statutes by courts that create precedents open for all to see. However, this argument seems to put the cart before the horse. Public interpretation of statutes does create precedent that may guide businessmen. However, courts elaborate the law to deal with disputes; they do not entertain litigation in order to permit lawyers to elaborate the law.

The second and more central theme that runs through the non-arbitrability cases is a concern that society at large will be injured by arbitration of public law claims. Courts express this fear in a variety of ways. They may say that the legal and factual issues are too complicated for arbitrators; that arbitration proceedings are too informal, providing inadequate discovery; that arbitrators, like foxes guarding the chicken coop, have a pro-business bias and will under-enforce laws designed to protect the public; that arbitrators are less connected to the demo-

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24. *See* Zimmermann v. Continental Airlines, 712 F.2d 55 (3d Cir. 1983), *cert. denied*, 52 U.S.L.W. 3509 (Jan. 1984); Braniff Airways, Inc. v. United Airlines, Inc. 33 B.R. 33 (Bankr. N.D. Tex. 1983).

25. *See* Marchese v. Shearson Haydon, 734 F.2d 414 (9th Cir. 1984).

26. *See* Alexander v. Gardner-Denver, 415 U.S. 36 (1974).

27. *See* California Investment Franchise Law, CAL. CORP. CODE, § 31,512 (1970).

28. Recently, it has been held that the Federal Arbitration Act prevails over the California Investment Franchise Law, *supra* note 27. *See* Southland Corp. v. Keating, 465 U.S. 1 (1984) (involving California franchise of Texas-based owner of "Seven-Eleven" stores, holding that issues arising under State Investment Franchise Law were arbitrable).

29. Jones, *Punitive Damages in Arbitration in the U.S.A.*, 14 INT'L BUS. LAW. 188 (1986); Stipanowich, *Punitive Damages in Arbitration: Garity v. Lyle Stuart Revisited*, 66 B.U.L. REV. 953 (1986).

cratic process than judges; that lack of appeal to arbitral awards makes arbitration a "black hole" to which rights are sent and never heard from again.

No empirical evidence suggests that arbitrators are necessarily any less trustworthy or competent than judges. There may, however, be merit in holding "public law issues" non-arbitrable under a slightly different alternative analysis, which starts with a recognition that arbitrators are paid only to do justice between or among the parties before them. "Public rights" belong not to the litigants, but to society at large. Society never signed the arbitration agreement, and is not a party to the arbitration. If the arbitration, which is a consensual process, affects only the consenting adults who signed the agreement, they alone are hurt by the arbitrators' folly. But if the dispute affects the property of one who never signed the arbitration agreement, the arbitration takes on a different cast. Indeed, the right to proper enforcement of antitrust laws may be analogous to a third person's property right. Furthermore, the societal interest in the vindication of claims relating to matters such as free economic competition and the securities markets belongs not to the businessmen in the controversy, but to a community which never agreed to arbitrate.

The dozen years before the *Mitsubishi* decision saw a chipping away of the judicial resistance to arbitration of public law claims. From one perspective, the *Mitsubishi* case is merely an extension of the doctrine announced in previous cases. Specifically, prior to *Mitsubishi*, the Supreme Court held in *Sherk v. Alberto Culver*[30] that in an international contract securities law issues were arbitrable, notwithstanding their non-arbitrability in a domestic setting. *Sherk*'s special rule for cross-border transactions, justified as necessary to avoid damaging the "fabric of international commerce and trade,"[31] was a logical extension of the Court's opinion in *Bremen v. Zapata*,[32] which had been decided two years previously. In *Bremen*, the Court gave effect to a pre-dispute choice of forum clause that selected the High Court of London to decide a controversy between a German company

30. 417 U.S. 506 (1974) (contract for sale of European corporations by a German citizen to an American company pursuant to a contract signed in Austria, closed in Switzerland and providing for I.C.C. arbitration in Paris).

31. *Id.* at 517.

32. 407 U.S. 1 (1972) (towage of oil rig from Gulf of Mexico to Adriatic Sea).

and an American company.[33]

Moreover, in 1984 the Supreme Court ruled that when interstate commerce is involved, prohibitions on arbitration under state franchise laws are invalid,[34] pre-empted by the Federal Arbitration Act,[35] as are prohibitions on arbitration of state securities law claims.[36] The trend toward greater arbitrability of subject matter is also manifest in legislative measures. Congress has removed barriers to arbitration of disputes involving the validity and infringement of patents, although the decisions are not binding on third parties.[37]

B. A Hierarchy of Policies

The *Mitsubishi* case skeletonizes various rival policies, each sound and worthy of recognition by itself, yet conflicting with each other in their application. These competing themes require a hierarchical ordering so that their application to a particular controverted event may be determined. In viewing these policies, one might articulate three competing objectives: (1) freedom of

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33. *See infra* text accompanying note 131 (on forum selection clauses that designate third country courts).

34. Southland v. Keating, 104 S. Ct. 852 (1984).

35. 9 U.S.C. §§ 1-10, 201-08 (1982).

36. Dean Witter Reynolds v. Byrd, 470 U.S. 213, 105 S. Ct. 1238, 84 L. Ed. 2d 158 (1985) (investor suit of brokerage firm because securities declined in value). In a footnote the Court suggested that claims under the 1934 Exchange Act, as opposed to the 1933 Securities Act, should be arbitrable. 105 S. Ct. at 1240 n.1.

The circuits are divided on the question of whether securities fraud claims under Rule 10(b)-5 (1934 Securities Exchange Act) are arbitrable pursuant to customer-broker arbitration agreements. The Eighth Circuit has held that arbitration may be compelled. Phillips v. Merrill Lynch, Pierce, Fenner & Smith, 795 F.2d 1393 (8th Cir. 1986). The Ninth Circuit, among others, adopts the view that customer claims arising from the broker's alleged violation of the 1934 Act are not arbitrable. Conover v. Dean Witter Reynolds Inc., 794 F.2d 520 (9th Cir. 1986). *See also* McMahon v. Shearson American Express, 788 F.2d 94 (2d Cir. 1986).

37. 35 U.S.C. § 294 (1952). Voluntary Arbitration

> (a) A contract involving a patent or any right under a patent may contain a provision requiring arbitration of any dispute relating to patent validity or infringement arising under the contract. In the absence of such a provision, the parties to an existing patent validity or infringement dispute may agree in writing to settle such dispute by arbitration. Any such provision or agreement shall be valid, irrevocable, and enforceable, except for any grounds that exist at law or in equity for revocation of a contract.
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> . . . .
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> (c) An award by an arbitrator shall be final and binding between the parties to the arbitration but shall have no force or effect on any other person.
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> . . . .

Id. (added Pub. L. 97-247, § 17(b)(1), Aug. 27, 1982, 96 Stat. 322).

contract to provide for private dispute resolution, which calls for an efficient arbitral process; (2) protection of society against under-enforcement of law by private adjudicators; and (3) meeting the needs of international trade and investment for a system of neutral non-national binding dispute resolution.

Underlying the first objective is the assumption that the enforcement of a freely accepted bargain to arbitrate — entered into by parties with equal negotiating power — will provide the business community with the benefits of confidential, economical and speedy dispute resolution. A different result might be reached in the case of "contracts of adhesion" imposed on weaker parties with little bargaining power. It may have been so in the Mitsubishi relationship with Soler, though the First Circuit based its refusal to compel arbitration on nonarbitrability of subject matter, not on the "adhesive" nature of the contract.

The second goal, protecting the public against under-enforcement of mandatory public norms, relates to a concern of many judges that arbitrators will be less likely than courts to apply our competition law correctly, or at least less likely to find liability and to assess treble damages. Incorrect application of the law may hurt those segments of society that have a stake in the outcome of the arbitration.

The final objective — meeting the needs of international commercial and investment transactions — presumes that business people will be more likely to enter into trans-border contracts, resulting in more efficient allocation of global resources, if they feel confident that potential disputes will be settled in a forum more neutral than the other party's national courts. While trans-border business will continue even if assertion of public law claims can defeat the arbitration agreement, it would seem reasonable to expect that many wealth-creating transactions might fail if business people lack confidence that they can avoid the "home town justice" of the other party's national courts.

III. The "Second Look" Doctrine

The competing interests that must be balanced when one party to a dispute resists enforcement of the agreement to arbitrate are also implicated when the arbitrator's award is presented for recognition or enforcement.

A. *Blackmun's Dicta*

Most people probably feel more comfortable in forgoing an opportunity to express themselves if they believe that at some future time they will have another opportunity to speak their minds - if they foresee a "second chance" to make their statement. Therefore, it is not surprising that the end of the majority opinion in *Mitsubishi* contains three sentences of dicta predicting that American courts will have a second bite at the arbitration apple when the time comes to enforce the award.[38] Arbitration of public law issues should be more palatable, which is to say less threatening to societal interests, if there is opportunity for judicial review after the arbitration.

This prediction of a "second look" - the "first look" having been when the court examined the parties' agreement to arbitrate for the purpose of deciding whether to compel arbitration - rests on a provision of the 1958 New York Arbitration Convention that explicitly reserves, to courts asked to enforce an arbitrator's award, discretion to refuse recognition or enforcement when this would be contrary to that forum's public policy.[39]

This vision of how the world will be on the evil day of reckoning, when the award is presented for enforcement, calls first for the observation that the award may never be presented for enforcement in the United States. For example, if Soler loses, and some of its assets are located outside of the United States, Mitsubishi could seek attachment of these assets in the foreign country where the assets have their situs.[40] The foreign court may not concern itself with the United States' "Magna Carta of free enterprise."[41] Indeed, the Sherman Act may even appear to the foreign court as a parochial American rule that runs counter to its own national competition law or policy.

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38. 105 S. Ct. at 3360. The dicta reads in part as follows:

> the national courts of the United States will have the opportunity at the award enforcement stage to ensure that the legitimate interest in the enforcement of antitrust laws has been addressed . . . [and] to ascertain that the [arbitral] tribunal took cognizance of the anti-trust claims and actually decided them.

Id.

39. See *infra* note 56 for text of this provision.

40. For example, Soler might have a claim against a foreign debtor such as a South American purchaser of vehicles. The claim (an asset for Soler) would be located — and attachable — where the debt had its situs, which under most choice of law rules would be at the debtor's residence.

41. *See* 105 S. Ct. at 3367 (Steven's dissent, quoting U.S. v. Topco, 405 U.S. 596, 610 (1972)).

In such an eventuality, the loser of the arbitration would have to test the award by bringing a post-arbitration antitrust claim before American courts, in the hope that the award, when presented as a defense, would be denied *res judicata* effect. This would not, of course, prevent the award from being recognized as a defense to enforcement in non-American jurisdictions where the losing party has assets.

Whether the "second look" means that recognition of an award may be refused merely because the arbitrator misapplies the law remains uncertain. Such a broad interpretation of the "second look" may open the door to a judicial review of the substantive legal merits of an arbitrated dispute, doing little for the advancement of the arbitral process.

If, however, the "second look" doctrine contemplates a more limited judicial role, simply a mechanical examination of the face of the award to see whether the arbitrator mentioned the Sherman Act at all, one may wonder whether the "second look" will provide an effective mechanism for judicial control. An arbitrator might mention the Sherman Act and then refuse to apply it without giving any reasons.

The "second look" doctrine is a problematic safety valve for ensuring that public law issues receive proper consideration. If it calls for review on the merits, it disrupts the arbitral process. But if it calls only for a mechanical examination of the face of the award, it may not provide an effective check on an arbitrator who mentions the Sherman Act before he proceeds to ignore it.

This uncertainty has led one commentator to refer to the "second look" doctrine as "so much Micawberism," alluding to the optimistic ne'er-do-well in Dickens' *David Copperfield* who was always waiting cheerfully "for something to turn up."[42]

B. Fitting the "Second Look" Into the Structure of the 1958 New York Arbitration Convention

The manner in which the "second look" doctrine evolves, through judicial elaboration, will have a significant impact on the vitality of the 1958 New York Arbitration Convention,[43] which provides the basic treaty framework for enforcing foreign arbitral awards. At last count, the New York Convention had

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42. Becker, *Anti-trust and International Arbitration — The New American Synthesis*, INT'L BUS. LAW. 445, 447 (1985).

43. New York Convention, *supra* note 8.

been ratified by seventy countries including the United States,[44] the Soviet Union, most Western industrialized countries,[45] and many developing nations.[46]

The Convention requires recognition of the parties' agreement to arbitrate, and recognition of the arbitrator's award. This double barrelled assault on uncertainty in dispute resolution was intended to give parties to international contracts some hope that they may avoid the "home town justice" they fear will be meted out in foreign courts. This concern may seem less significant to Americans if the alternative to United States courts is an English language proceeding before a judge in London or Toronto, than if the alternative to arbitration is a proceeding in Arabic or Farsi before a judge in Tripoli or Teheran.[47]

The starting point for fitting the "second look" doctrine into the Convention framework is Article III, which provides, "[e]ach Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon. . . ."

In its field of application, the Convention generally follows a territorial approach, looking to the locality of the arbitral proceedings, and covering awards rendered in a country other than the country where enforcement is sought.[48] The parties to the dispute need not be nationals of contracting states.[49] At least one case has held the Convention applicable to awards rendered

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44. United States implementing legislation, Pub. L. 91-368, 84 Stat. 692, 9 U.S.C. §§ 201-08 (1982).

45. Canada, previously one of the most notable abstainers among industrialized countries, recently acceded to the Convention on 12 May 1986, to take effect on 10 August 1986. On the background to the Commercial Arbitration Act and the U.N. Foreign Arbitral Awards Convention Act, see LaLonde, Buchanan, & Ross, *Domestic and International Arbitration in Quebec*, 45 REVUE DU BARREAU 705 (1985).

46. Other arbitration treaties include: Protocol on Arbitration Clauses, signed at Geneva, Sept. 23, 1923, 27 L.N.T.S. 158; Convention on the Execution of Foreign Arbitration Awards, signed at Geneva, Sept. 26, 1927, 92 L.N.T.S. 301; European Convention on International Arbitration (Geneva 1961), *infra* note 49; Panama Convention of 1975, "Inter American Convention on International Commercial Arbitration" (1956). *See* I.C.C. ARBITRATION, *supra* note 8, at 37.01-37.05; DOMKE ON COMMERCIAL ARBITRATION at § 45.03 (G. Wilner ed. 1986).

47. Another alternative might be the national courts of a third country. *See infra* text accompanying note 131.

48. Article I(1). The scope of the Convention as to arbitration agreements is less clear than its scope as to awards. *See* VAN DEN BERG, *supra* note 8, at 56-57.

49. *Compare* European Convention on International Commercial Arbitration, Apr. 21, 1961, 484 U.N.T.S. 349 [hereinafter cited as Geneva Convention of 1961].

by the United States-Iran Claims Tribunal in The Hague.[50]

The Convention's scope also extends to awards "not considered as domestic," which one American case has interpreted to include an award rendered in a dispute between foreign parties, relating to a commercial transaction occurring outside the United States.[51]

The United States has taken two reservations to the Convention, permitted by Article I(3) of the Convention itself. First, the United States applies the Convention only to awards rendered in the territory of another contracting state. This geographical reciprocity refers to the place where the award is rendered, and has nothing to do with the parties' nationalities. Second, the United States applies the Convention only to "commercial" disputes as defined under United States law.

The United States does not apply the Convention to awards or agreements arising out of legal relationships entirely between American citizens, which for a company means incorporated or having principal place of business in the United States, unless the underlying transaction involves foreign-situs property or performance of the contract abroad.[52] If the Convention does apply, then United States courts must recognize and enforce the award. The party seeking enforcement must furnish an authenticated original or certified copy of the agreement and the award.

The court can refuse recognition and enforcement only on the basis of one of the defenses enumerated in Article V of the Convention.[53] The litany of defenses begins with five procedural

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50. *Mark Dalla v. Bank Mellat* (July 26, 1985), reported in Iranian Assets Litigation Reporter (Sept. 27, 1985) (Judge Hobhouse). *See generally* Audit, *Le Tribunal des Différends Irano-Americains (1981-1984)*, 112 J. DE DROIT INT'L 791 (1985); Lanke & Dana, *Judicial Review of Awards of the Iran-United States Claims Tribunal: Are the Tribunal's Awards Dutch?*, 16 L. & POL. INT'L BUS. 755 (1984); and Stewart, *The Iran-United States Claims Tribunal: A Review of Developments 1983-84*, 16 L. & POL. INT'L BUS. 677 (1984) (on the operation of the U.S.-Iran Claims Tribunal).

51. Bergesen v. Joseph Muller Corp., 548 F. Supp. 650 (S.D.N.Y. 1982), *aff'd*, 710 F.2d 928 (2d Cir. 1983) (charter party between Norwegian ship owner and Swiss company transporting chemicals between the United States, Europe and the Caribbean. Award in favor of shipowner Bergesen. Enforcement unsuccessful in Switzerland. Bergesen petitions for "confirmation" of award in New York under the United States Arbitration Act, 9 U.S.C. § 207 (1982)).

52. 9 U.S.C. § 202 (1982). *See* Fuller v. Compagnie des Bauxites de Guinee, 421 F. Supp. 938 (W.D. Pa. 1976) (in which the court compelled arbitration of contract with a "reasonable relationship" to a foreign country).

53. The text of Article V of the New York Convention of 1958 reads as follows:

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the

defects: (1) lack of a valid arbitration agreement; (2) denial of opportunity to be heard; (3) an excess of jurisdiction by an arbitrator in deciding matters beyond the scope of the arbitration submission; (4) procedure contrary to the parties' agreement;[54] and (5) annulment of the award in the country where rendered.

The last of these procedure-related defenses might become significant in the *Mitsubishi* saga if Soler wins the arbitration, but, due to Japanese public policy or some other factor, the award is annulled by a court in Japan, the place of the proceedings. An award annulled in Japan but presented for enforcement in a country where the losing party has assets could be refused recognition because it was set aside in "the country where made."[55]

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competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

New York Convention, *supra* note 8, at art. V.

54. Thus, Article V(1)(d) attaches important legal significance to procedural rules of arbitral institutions (such as the I.C.C., I.C.S.I.D., or the AAA) chosen to supervise the arbitration. *See* Fertilizer Corp. of India v. I.D.I. Management, 530 F. Supp. 542 (S.D. Ohio 1982). *See also* Maritime International Nominees Establishment v. Guinea, 693 F.2d 1094 (1982) (AAA arbitration of a dispute arising from a contract calling for I.C.S.I.D. procedure) and its Swiss sequel (Geneva cantonal Cour de Justice (8è Chambre) — No. 2514 on 13 Mar. 1986).

55. More will be said later on the influence of the national law of the country where the award is rendered. At this juncture, however, it should be noted that the English text of the New York Convention's language is not mandatory. Enforcement "may be refused," but need not be. The French text, however, differs: "La reconnaissance et

These five procedural defects must be asserted and proven by the resisting party. They permit the court to avoid becoming an instrument of unrighteousness by lending its power to the enforcement of an award that resulted from a fraudulent, unfair, or basically unjust arbitration. They are not intended to permit judicial review of the merits of the dispute.

There are two additional defenses against recognition of an arbitral award that a court may raise on its own motion, without any proof by the party resisting the award: that the subject matter is not arbitrable, and that enforcement would violate the forum's public policy. While all Convention defenses generally relate to public policy in some way, the final defense refers explicitly to the forum's public policy.[56]

At first blush, the explicit public policy "catch-all" defense seems to provide a graceful exit from awkward enforcement obligations.[57] However, the "second look" doctrine may not marry well with the New York Convention, at least if the doctrine is interpreted to permit inquiry into the legal merits of an arbitrated dispute. Merits review runs counter to the American judicial tradition that awards should not be refused enforcement merely because the judge differs with the arbitrator's legal analysis. During the quarter century since the Supreme Court decisions in the *Steelworkers Trilogy* cases,[58] courts effectively have

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l'exécution de la sentence ne seront refusées . . . qui si. . . ." ("Recognition and enforcement will not be refused . . . unless. . . .")

56. Article V(2) of the New York Convention reads as follows:

> Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
>
> (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
>
> (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

New York Convention, *supra* note 8, at art. V(2).

57. The first Article V(2) defense — lack of arbitrability of subject matter — would not have been available in *Mitsubishi*, because Blackmun found antitrust claims arbitrable. It was, however, invoked in Libyan American Oil Co. v. Socialist People's Libyan Arab Jamahirya, 482 F. Supp. 1175 (D.D.C. 1980), which was later vacated because of a settlement between the parties. The Court held that the subject matter of the arbitration — nationalization of LIAMCO's oil concession by Libya — was non-arbitrable because it involved an "act of state," the validity of which American courts would not examine. *See supra* note 19.

58. *See* United Steelworkers of America v. Am. Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. Enterprise Wheel & Car Corp. 363 U.S. 593 (1960). For a recent articulation of the principle of arbitral economy, see Sun Ship v. Matson,

been precluded from reviewing the merits of an arbitrated dispute.

United States courts generally have interpreted the public policy defense as applicable only to a breach of what the Second Circuit has called our "most basic notions of morality and justice."[59] American cases have construed the public policy defense narrowly in order to avoid disrupting the international dispute resolution process. The explicit Convention public policy defense would seem narrower than the non-Convention public policy defense courts may apply in domestic cases.[60]

Non-American cases likewise restrict the scope of the public policy defense, distinguishing between domestic public policy, *ordre public interne*, and international public policy, *ordre public international*. The demands of the latter are fewer than those of the former. The adjectives "domestic" and "international" apply not to the source of the policy but rather to their field of application.[61] Both are creatures of the forum's national legal system. For example, an award without reasons might vio-

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785 F.2d 59, 62 (3rd Cir. 1986), in which the district court's refusal to vacate an arbitral award was upheld, its review power being limited to determining "whether the parties had a fair and honest hearing on a matter within the arbitrator's authority." *Id.*

59. Parsons & Whittemore Overseas Co., Inc. v. Societe Generale (RAKTA), 508 F.2d 969, 974 (2d Cir. 1974).

60. The Southern District of Ohio held that an arbitrator's lack of independence from one of the parties does not constitute a violation of public policy. *See* Fertilizer Corp. of India v. I.D.I. Mgmt., Inc., 530 F. Supp. 542 (S.D. Ohio 1982). The Second Circuit has rejected a public policy defense based on a break in diplomatic relations between the United States and Egypt, where the contract was to be performed. *See* Parsons & Whittemore Overseas Co., Inc. v. Societe Generale (RAKTA), 508 F.2d 969, 974 (2d Cir. 1974). The Southern District of New York has suggested that duress in the formation of a contract might constitute a violation of public policy, *see* Transmarine Seaways Corp. of Monrovia v. Marc Rich & Co., 480 F. Supp. 352 (S.D.N.Y. 1979), *aff'd*, 614 F.2d 1291 (2d Cir. 1979) (duress not proven in the particular case), but that participation in the Arab boycott of Israel would not give rise to a public policy defense, *see* Antco Shipping Co. Ltd. v. Sidermar S.P.A., 417 F. Supp. 207 (S.D.N.Y. 1976). Misleading the arbitral tribunal has been found not to justify the public policy defense, although dicta in the same case says that active fraud, such as perjury, might cause enforcement of the arbitral award to violate public policy. *See* Biotronik v. Medford Medical Instrument Co., 415 F. Supp. 133 (D.N.J. 1976).

In only one published case, to my knowledge, has an award been even partially refused recognition under the public policy defense of the New York Convention's Article V(2)(b). *See* Laminoirs-Trefileries-Cableries de Lens, S.A. v. Southwire Co., 484 F. Supp. 1063 (N.D. Ga. 1980) (involving what the court deemed a penal provision of French law calling for penalties for late payment of goods).

61. *See* H. BATIFFOL & P. LAGARDE, I. DROIT INTERNATIONAL PRIVÉ §§ 366-67, at 459 (6th ed. 1974).

late French or Swiss public policy in a domestic context[62] but not in an international context.[63]

The dearth of American cases on public policy leaves much to speculation and surmise. One might suggest a tripartite classification of cases in which the public policy defense would be appropriate with respect to: (i) arbitrations involving transactions tainted in their substance, such as contracts for sale of drugs or for sale of military equipment to enemies; (ii) arbitrations to enforce contracts entered into under duress; or (iii) arbitrations in which the arbitrator is corrupt.

The contours of these categories cannot be drawn with precision. But they can be drawn narrowly. To construe the public policy broadly would seriously undermine the goal of arbitral process, which is to avoid extensive court proceedings. As the Supreme Court has recognized, "the efficacy of the arbitral process requires that substantive review at the award-enforcement stage remain minimal. . . ."[64]

C. *Elaborating the "Second Look" Doctrine*

Whether the "second look" doctrine is compatible with the New York Convention depends on what it means "to ascertain that the [arbitral] tribunal took cognizance of the anti-trust claims and actually decided them."[65] If a review on the legal merits is called for,[66] the "second look" doctrine may conflict with the New York Convention's objective of permitting parties to cross-border contracts to provide that their disputes will not end up in foreign courts. In the alternative, the words used by Blackmun in *Mitsubishi* may call for merely a mechanical inspection of the face of the award, which may not pose an obsta-

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62. *See* Art. 1471(2) of the French Noveau Code de Procedure Civile (N.C.P.C.), Decree No. 81-500, May 12, 1981 Recuil Dalloz-Sirey, *Legislation* [D.S.L.] 237, 1981 Bulletin Legislatif Dalloz [B.L.D.] 237; Art. 33(e) of the Concordat Suisse sur L'Arbitrage, *reprinted in* III INTERNATIONAL COMMERCIAL ARBITRATION pt. VII, doc. VII.J.1 (1986).

63. Art. 1495 of the French N.C.P.C. permits parties to an international arbitration to waive this requirement. On Swiss law, see *Provenda S.A. v. Alimenta*, S.A., 12 Dec. 1975, Swiss Federal Supreme Court, *Arrêts du Tribunal Fédéral Suisse* 101 la 521, in which it was held that an unreasoned English award could be enforced in Switzerland. Commentary thereon in DUTOIT, KNOEPFLER, LALIVE & MERCIER, I REPERTOIRE DE DROIT INTERNATIONAL SUISSE ¶ 345, at 319 (1982).

64. *Mitsubishi*, 105 S. Ct. at 3360.

65. *Id.*

66. For example, to determine whether the arbitrator understood and properly applied the Sherman Act as it effects trans-shipment of vehicles.

cle to a savvy arbitrator who mentions the Sherman Act before rendering an award that misapplies the Act. Under either interpretation, the "second look" doctrine would not prevent a *de facto* denial of an antitrust claim due to a lack of adequate discovery that impeded the proof of plaintiff's claim.

Under either interpretation, a written opinion by the arbitrators setting forth reasons — or "motivation," in European parlance — for the award would seem necessary. In many countries, including the United States, there may be a practice that the award announces only the result; and reasoned awards may be discouraged because they give the disgruntled loser a peg on which to hang a challenge to the award. The American Arbitration Association (AAA) President cautions that written reasoned awards are "dangerous because they identify targets for the losing party to attack."[67]

If, on the other hand, an award is rendered without a reasoned opinion, it is uncertain how the "second look" doctrine would apply. It would not be a simple task to conduct an inquiry of the face of an award with no explicit reasons.

In short, if the "second look" calls for a merits review, the arbitral process will be harmed. If a merits review is not called for the doctrine may not have much impact.

D. The Arbitrator's Double Bind

An intriguing aspect of the "second look" doctrine is the possibility of a challenge to an award that *did* take cognizance of United States antitrust claims. If the contract includes a choice of law clause explicitly selecting the law of a non-market economy with no antitrust law, the arbitrator mindful of Blackmun's dicta in *Mitsubishi* may nevertheless decide the antitrust claims according to United States antitrust law. This departure from the parties' choice of law might open the door to a challenge of the arbitral award, particularly if enforcement is sought outside the United States, under Article V(1)(c) of the New York Convention, which prohibits arbitrators from deciding matters not submitted to them, i.e., Sherman Act claims. Therefore, the arbitrator may be in a double bind, forced to navigate between

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67. R. COULSON, BUSINESS ARBITRATION: WHAT YOU NEED TO KNOW 25 (2d ed. 1982). Compare Professor Carbonneau's view of reasoned awards, in Carbonneau, *Rendering Arbitral Awards with Reasons: The Elaboration of a Common Law of International Transactions*, 23 COLUM. J. TRANSNAT'L L. 579 (1985).

Scylla and Charybdis. Refusal to consider anti-trust claims might open the door to review on a "second look;" but consideration of antitrust claims might constitute an excess of authority.

An award that ignores the parties' express choice of law might also be subject to annulment at the place where rendered. The Supreme Court in 1953 opened the door to annulment for what it called "manifest disregard" for the law,[68] a concept sufficiently broad to catch the arbitrator who applies a law other than the one selected by the parties. Analogous provisions exist in the laws of the European arbitral centers of London,[69] Paris[70] and Geneva.[71] The loser in an arbitration in which the Sherman Act was applied notwithstanding the parties' choice of a governing law, other than that of the United States, could be expected to seek annulment of the award where rendered. Annulment would make the award potentially unenforceable under the provisions of the New York Convention Article V(1)(e), which permits refusal of recognition to awards set aside in the country where made.

The arbitrator's bind is particularly poignant because no articulable test distinguishes, in a coherent and intellectually satisfying way, arbitrator error that constitutes excess of authority from error that is not reviewable. Perhaps, as Lord Denning has written, "whenever a tribunal goes wrong in law, it goes outside

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68. Wilko v. Swan, 346 U.S. 427, 436, 74 S. Ct. 182, 187 (1953). *See infra* text accompanying notes 104-05.

On manifest disregarding of the law, see Kurt Orban Co. v. Angeles Metals Sys., 573 F.2d 739, 740 (2d Cir. 1978); Drayer v. Krasner, 572 F.2d 348, 352 (2d Cir. 1978); I/S Stavborg v. National Metal Converters, Inc., 500 F.2d 424, 430 (2d Cir. 1974); Parsons & Whittemore Overseas Co. v. Societe Gen. De L'Indus. Du Papier (RAKATA), 508 F.2d 969, 977 (2d Cir. 1974); Saxis S.S. Co. v. Multifacs Int'l Traders, Inc., 375 F.2d 577, 582 (2d Cir. 1967); San Martine Co. de Navegacion v. Saguenay Terminals, Ltd. 293 F.2d 796, 801 (9th Cir. 1961); Sidarma Societa Italiana di Armamento Spa, Venice v. Holt Marine Indus., Inc., 515 F. Supp. 1302, 1305-06 (S.D.N.Y. 1981), *aff'd*, 681 F.2d 802 (2d Cir. 1981).

See also the recent case Sea Dragon, Inc. v. Gebr. Van Weelde Scheepvaartkantoor, 574 F. Supp. 367 (S.D.N.Y. 1983), concerning a charter contract between a Dutch charterer and a Panamenian ship owner. In an award to the owner, the arbitrator ignored a Dutch sequestration. *Id.* at 369. The court implied that review for "manifest disregard of the law" was implicit in section 10(d) of the U.S. Arbitration Act, since an award that disregards the law exceeds the authority of the arbitrators. The court vacated the award because of the disregard of the Dutch order. *Id.* at 373.

69. *See infra* text accompanying notes 106-113. The existence of a valid "exclusion agreement" would of course raise the issue of whether the disregard of the chosen law constituted "misconduct."

70. *See infra* text accompanying notes 114-15.

71. *See infra* text accompanying note 119.

the jurisdiction conferred upon it. . . ."[72] Yet, to find all arbitral errors reviewable would defeat the goal of arbitration — to stay out of court.

Lack of an intellectually satisfactory standard to distinguish different types of arbitrator error need not prevent courts from attempting the distinction.[73] Although there is no bright line test to prevent indirect review of the merits of the dispute through the vehicle of judicial scrutiny of arbitrator excess of authority, courts nevertheless have made, and must continue to make, some attempt at determining matters of degree.[74]

Ultimately, courts must walk an intellectually disquieting tightrope. On the one hand, review must be limited so as not to frustrate the purpose of the parties when they signed the agreement, though not when it later went sour for one of them, which was to avoid litigation. On the other hand, courts should deal with situations where there is a fundamental discord between how the arbitrator decided the dispute and how the arbitrator had been authorized by the parties to decide it.[75] Therefore the arbitrator may face a dilemma when the parties choose to subject their contract to a foreign legal system with a competition law different from that of the United States. Does the arbitrator apply the foreign law and make the award subject to attack under Blackmun's "second look" doctrine? Or does the arbitrator apply American antitrust law and render the award subject to attack for "manifest disregard" of the law selected by the parties?

IV. Choice of Law and Imperative National Norms[76]

The public interest may be affected by private adjudication

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72. A. Denning, The Disciple of the Law 74 (1979).

73. *See* Park, *The Lex Loci Arbitri and International Commercial Arbitration*, 32 Int'l & Comp. L.Q. 21, 48-51 (1983).

74. *See, e.g.*, Saxis S.S. Co. v. Multifacs Int'l Traders, Inc., 375 F.2d 577 (2d Cir. 1967); Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corp., 274 F.2d 805 (2d Cir. 1960); Swift Indus., Inc. v. Botany Indus., Inc., 466 F.2d 1125 (3d Cir. 1972).

75. For example, the sale of apples pursuant to a contract containing an arbitration agreement which vaguely covers disputes arising from the "sale of fruit" may cover oranges as well as apples, but would not cover greeting cards. The harder case might be walnuts, which like apples, satisfy the botanical definition of fruit (the mature ovary of a plant) but not the common concept.

76. On choice of law in arbitration of transnational business disputes, see generally, Lando, *The Law Applicable to the Merits of the Dispute*, 2 Arb'n Int'l 104 (1986); J. Lew, Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards ch. X (1978); I.C.C. Arbitration, *supra* note 8, pt. 5, ch. 28.

not only when courts decide whether an issue is arbitrable, but also when the arbitrator decides what law is applicable. Once the court has determined that arbitration can proceed, the application of substantive law becomes critical. In areas such as currency controls, trade embargo, boycott, competition and bribery, mandatory rules may apply to an international relationship irrespective of the law that otherwise governs the relationship. The imposition of these imperative provisions, or *lois de police*, depends on whether the arbitrator applies, as to certain issues, a law other than the one chosen by the parties or selected under otherwise applicable choice of law rules.

The application of these norms also depends on the attitudes of the court called on to enforce the award. The enforcement forum may refuse to enforce an award even if the issues of the case are arbitrable. Contemplating such an eventuality led the court in *Mitsubishi* to announce what might be called a "prospective waiver" doctrine.

The majority in *Mitsubishi* warns that the court would condemn, as against public policy, a choice of forum clause that operates in tandem with a choice of law clause as a "prospective waiver" of the right to pursue statutory remedies for antitrust violations.[77] Therefore, it may be assumed, for example, that United States courts will not enforce an arbitration clause in a contract to fix prices in Boston with a choice of law clause calling for interpretation of the contract according to a legal system with no equivalent of an antitrust statute. However, the extent of application of the "prospective waiver" doctrine is not clear. Open questions remain. Is an arbitration agreement invalid if the related choice of law clause refers to a legal system with antitrust laws different from our own? How significant must the difference be before the "prospective waiver" doctrine applies? Is the arbitration clause invalid even if the contract has a significant link to the foreign country whose law is chosen?

The "prospective waiver" doctrine echoes existing conflicts of law principles that already limit party autonomy. Specifically, the Second Restatement of Conflict of Laws sets forth a principle intended to prevent evasion of mandatory public policy of the normally applicable law.[78]

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77. 105 S. Ct. at 3359 n.19 (majority opinion). The Court, perhaps naively, assumed that the arbitrators would apply American antitrust law despite the choice of law clause designating Swiss law.

78. The Second Restatement on Conflicts sets forth the following principle concern-

The British perspective is not dissimilar, in that it recognizes that courts will not give effect to a choice of law clause if it was chosen to avoid mandatory provisions set forth by the forum with which the contract had its closest connection. The noted Oxford and Cambridge don, J.H.C. Morris, states:

> [N]o court, it is believed, would give effect to a choice of law (whether English or foreign) if the parties chose it in order to avoid the mandatory provisions of the system of law with which the contract had its closest and most real connection. . . .[79]

Continental scholars have also elaborated a doctrine to deal with what in French is referred to as *fraude à la loi*.[80] French doctrine calls for recognition of peremptory rules, *lois de police*, of a foreign law otherwise applicable to a transaction.[81] However, it is worthy of note that the leading French expert on the doc-

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ing attempts to evade mandatory public policy of the normally applicable law:

§ 187. Law of the State Chosen by the Parties

* * * *

(2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless . . .

* * * *

(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971).

79. J.H.C. MORRIS, CONFLICT OF LAWS 217 (2d ed. 1980) (discussing the *Vita Foods* case [1939] 1 A.C. 361, and citing *Helbert Wagg & Co. Ltd's Claim* [1956] ch. 323, 341). Furthermore, according to Morris:

> [N]o one can maintain that parties who really contract under one law can by pretending that they are contracting under another law, render valid an agreement which the former law treats as invalid. Hence, the court will not necessarily regard an express choice of law as being the governing consideration where a system of law is chosen which has no real or substantial connection with the contract looked upon as a whole. The reason is that the lack of connection may be evidence of an evasive intent.

Id. at 218. Morris, however, notes that in no reported cases have English courts actually refused to give effect to express choice of law clauses.

80. *See* B. AUDIT, LA FRAUDE A LA LOI §§ 495-502 (1974), dealing with "l'application des lois impératives du for et la fraude a la loi étrangère." *Id.* at 389-97.

81. *See* P. MAYER, DROIT INTERNATIONAL PRIVÉ §§ 122-31, at 102-11 (2d ed. 1983); Mayer, *Les Lois de Police*, 108 J. DU DROIT INT'L 277 (1981); Mayer, *Mandatory Rules of Law in International Arbitration*, 2 ARB. INT'L (1986).

trine of foreign *lois de police* has expressed doubt about the legitimacy of application of a nation's competition law extraterritorially, to cover contracts entered into outside national borders merely because of effects inside the territory.[82]

The Rules of the International Chamber of Commerce provide reason to suspect that arbitrators would not violate the mandatory public policy norms of the place of contract performance. Article 26 of the I.C.C. Rules expressly calls upon the arbitrator to "make every effort to make sure that the award is enforceable."[83] Commentators have noted the arbitrator's obligation to protect the reputation of the arbitral process, which should lead him to refuse to allow arbitration to be used "to evade the relevant policies of those countries which have an interest in the subject matter of the dispute. . . ."[84]

It follows that a party who assented to a choice of the law of Ruritania would not necessarily be stopped from asserting later that the law of the United States — the place of performance — was the appropriate law to govern resolution of its claims. Respect for parties' choice of forum does not necessarily carry with it a respect for their choice of law if the latter is intended to violate mandatory rules of countries with a close connection to performance of the contract, or imperative norms of "international public policy," as would, for example, contracts to bribe high government officials.[85]

Within the framework of the New York Convention, public policy has a less obvious role with respect to scrutiny of the agreement to arbitrate, than with respect to enforcement of the award. Article II of the Convention, which requires courts to recognize and enforce arbitration agreements unless "null and void," says nothing about a "public policy" defense to enforcement of the agreement.[86] Therefore, it may not be a simple exer-

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82. Mayer, *Les Lois de Police, supra* note 81, § 48, at 323.

83. International Chamber of Commerce Rules of Conciliation and Arbitration, art. 26, *reprinted in* I.C.C. ARBITRATION, *supra* note 8, app. II, at 12.

84. *See* Lando, *The Lex Mercatoria in International Commercial Arbitration*, 34 INT'L & COMP. L.Q. 747, 766-67 (1985).

85. *See* I.C.C. Award No. 1110, 15 Jan. 1963, discussed in I.C.C. ARBITRATION, *supra* note 8, pt. 2, ch. 5, § 5.07, at 25, in which Swedish Judge Lagergren declined jurisdiction to arbitrate to bribe an Argentinian official, which he deemed *contra bonos mores*.

86. *Article II*

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3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbi-

cise to fit into the language of the New York Convention these principles relating to mandatory public policy norms.

V. Public Policy at the Place of the Proceedings

A. *Article V(1)(e) of the New York Convention*

An award applying the Sherman Act in disregard of the parties' express choice of non-American law — a possibility raised by footnote 19 of the majority opinion in *Mitsubishi* — would be vulnerable to attack under the laws of the place where rendered.[87] If annulled by a court in the place of the proceedings and subsequently presented for enforcement in a country where the losing party has assets, such an award would be subject to challenge under Article V(1)(e) of the New York Convention, which permits refusal of enforcement of an award set aside in the country where rendered. The Convention language is permissive, not mandatory, allowing courts to refuse recognition, but not requiring them to do so.

The national law applicable to the validity of the overall arbitral proceedings is not necessarily the same as the law applicable to the merits of the dispute, or the law that the arbitrator applies to procedural matters arising internally during the proceedings. An arbitrator sitting in Geneva might interpret a contract according to English law, and apply American rules of evidence. But the challenge of the award in Geneva by the dissatisfied party would be made according to mandatory provisions of Swiss law. The domestic law of the place where the award is made is often referred to as the *lex loci arbitri.*[88]

The award annulled under the law of the place of the proceedings may still be presented for enforcement before a court in another country where the losing party has attachable assets. However, that other court would be entitled to refuse recognition and enforcement of the award, even if it came to a different conclusion about the propriety of annulling the award than did

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tration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

New York Convention, *supra* note 8, at art. II.

87. *See supra* text accompanying notes 68-71.

88. *See* Park, *supra* note 73. For contrasting views of more eminent lawyers on the subject of the *lex loci arbitri*, see Craig, *International Ambition and National Restraint, reprinted in* I.C.C. Arbitration, *supra* note 8, app. 7, at 19-51; Paulsson, *Arbitration Unbound: Award Detached From the Law of its Country of Origin*, 30 Int'l & Comp. L.Q. 358 (1981).

the court of the place where the award was made. For example, the arbitrator's excess of jurisdiction might be apparent to a judge in Geneva, where the award was rendered, but not to a judge in New York, where the loser had assets. Yet the judge in New York might still defer to the Geneva judge and refuse enforcement of the award.

B. Berardi v. Clair

The French case *Berardi v. Clair*[89] presents an example of the influence of the law of the place of the proceedings. In this case, there had been arbitration in Switzerland of a dispute concerning the accuracy of the balance sheet of a company whose shares were sold by a Canadian to a Frenchman. The arbitrator rendered an award in favor of the Canadian seller against the French buyer. The Paris *Tribunal de grande instance* granted leave to enforce the award in France. Three months later, the cantonal *Cour de justice* in Geneva annulled the award as "arbitrary" under Article 36(f) of the Swiss inter-cantonal arbitration concordat.[90] The Paris *Cour d'appel* then quashed the lower court decision, refusing recognition in France of an award set aside under the law of the place where rendered. The French court apparently believed, perhaps erroneously, that the Convention required refusal.[91]

A different result would have been obtained had the arbitration been within the scope of the European Convention on International Commercial Arbitration,[92] often called the Geneva Convention of 1961, to distinguish it from another Geneva Arbitration Convention signed in 1927. Article 9 of the Geneva Convention permits refusal of recognition because of foreign annulment only if annulment was for specific enumerated grounds,

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89. Judgment of June 20, 1980, Cour d'appel, Paris (unpublished opinion), *reprinted in* II INTERNATIONAL COMMERCIAL ARBITRATION: NEW YORK CONVENTION pt. V, §§ 111.2-111.6 (G. Gaja ed. 1984) [hereinafter cited as I.C.A. N.Y. CONVENTION].

90. Judgment of Oct. 31, 1979, Cour de Justice, Geneva (République et Canton de Genève) (unpublished).

91. The court said "l'exécution d'une sentence arbitrale 'doit' être refusée." I.C.A. N.Y. CONVENTION, *supra* note 89, at § 111.5. It is important to note the difference between the English and French texts of Article V(1) of the New York Convention. The former is permissive, not mandatory, and begins, "Recognition and enforcement of the award may be refused. . . ." The latter reads, "La reconnaissance et l'exécution ne pourront être refusées. . . que si. . . ." ("Recognition and enforcement cannot be refused . . . unless. . . .")

92. Geneva Convention of 1961, *supra* note 49.

such as lack of notice to parties or the invalidity of the agreement.[93] "Arbitrariness" is not one of these enumerated grounds. The European Convention applies to agreements and awards based on contracts between persons residing in states that have adhered to the Convention. Since Canada was not a party to the European Convention, its provisions did not apply in *Berardi v. Clair*. Had Canada been a party to the European Convention, the award in *Berardi v. Clair* should have been enforced in Paris.

C. *SPP v. Egypt: A Tale of One Day in Two Cities*

Recent Dutch and French cases involving an aborted construction project near the Pyramids also illustrates the influence of the law of the place of arbitration. In *Southern Pacific Properties (Middle East), Ltd. v. Arab Republic of Egypt*,[94] an award for more than $12 million had been rendered against Egypt by an arbitral tribunal sitting in France. On the 12th of July 1984, the award was both annulled by a court in Paris[95] and recognized by a court in Amsterdam which did not know of the French annulment.[96] One can only speculate as to what the result would have been if the French decision had come a day earlier or the Dutch decision a day later. The Paris annulment led the parties to agree to stay further proceedings in the Netherlands until disposition of the appeal to the annulment in France.

D. *"Delocalization"*

Considerable ink has been spilled by scholars and practitioners on annulment of awards under the law of the place of the arbitration, and the propriety of another country recognizing such nullification by refusing to enforce the annulled award.[97]

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93. Geneva Convention of 1961, *supra* note 49, at art. XX.

94. *See infra* notes 95-96.

95. Judgment of July 12, 1984, Cour d'appel, Paris, *reprinted in* 23 I.L.M. 1049-61 (E. Gaillard trans. 1984).

96. Judgment of July 12, 1984, District Court, Amsterdam, *reprinted in* 24 I.L.M. 1042-45 (A.J. van den Berg trans. 1985).

97. *See* Paulsson, *Delocalisation of International Commercial Arbitration: When and Why it Matters*, 32 INT'L & COMP. L.Q. 53 (1983); P. FOUCHARD, L'ARBITRAGE COMMERCIAL INTERNATIONAL § 508 (1965); Lalive, *Les Règles de Conflict de Lois Appliquees au Fond du Litige par L'Arbitre International Siegeant en Suisse*, REVUE DE L'ARBITRAGE 155 (1976). *But see* Mann, *Lex Facit Arbitrum*, in INTERNATIONAL ARBITRATION: LIBER AMICORUM FOR MARTIN DOMKE 157 (P. Sanders ed. 1967); Park, *supra* note 73.

For reasons of geographical convenience, the parties may chose to arbitrate in a city like Geneva, yet not wish to be subject to mandatory norms of Swiss procedure, such as the availability to losing parties of a challenge of the award based on its alleged "arbitrariness." As a result, many practitioners and scholars in Continental Europe have argued for a "delocalized" arbitration system in which the award "drifts" free of such restraints of the national law of the place where it was rendered.[98] These lawyers argue that enforcement should not be denied *merely* due to annulment in the country of origin.

No national judiciary, however, has ever completely thrown off the shackles of territoriality by enforcing an award explicitly annulled where rendered. In theory, this could happen within the New York Convention framework, and should happen in the right circumstances under the 1961 European Convention.[99] But theory has not yet become practice.

As a matter of policy, a defective award annulled in the country where rendered should be subject to challenge of some sort, so that the losing party need not necessarily defend against enforcement everywhere he or it has assets. Few arbitration lawyers would welcome an end to all influence of the *lex loci arbitri.* Yet few want its mandates applied as rigorously or extensively to international arbitration as to domestic arbitration. The best view seems to be that local courts should annul an award only if the arbitral process violates minimum international standards of procedural fairness.[100] In particular, a company that never signed the arbitration agreement should have a chance to litigate that issue at the outset.[101] For example, an arbitrator may render an award against both the subsidiary and the parent corporation in a dispute with respect to which only the subsidiary signed the arbitration agreement. Local courts of the place of arbitration would be justified in setting aside such an award as

98. *See* Park, *supra* note 73.

99. *See supra* text accompanying notes 92-93.

100. *See, e.g.,* Art. 1502 of the French Nouveau Code de Procedure Civile (N.C.P.C.), Decree No. 81-500, May 12, 1981, 1981 D.S.L. 237, 240, 1981 B.L.D. 237, 240, discussed *infra* at text accompanying note 114.

101. For a case involving arbitration agreements and related corporate entities, see Dale Metals Corp. v. Kiwa Chemical, Indus. Co., Ltd., 442 F. Supp. 78 (S.D.N.Y. 1977). On problems related to piercing the corporate veil, see generally, P. BLUMBERG, THE LAW OF CORPORATE GROUPS: PROCEDURAL PROBLEMS IN THE LAW OF PARENT AND SUBSIDIARY CORPORATIONS (1983); P. BLUMBERG, THE LAW OF CORPORATE GROUPS: BANKRUPTCY LAW (1985).

to the parent. It would seem unfair that the parent be required to defend against enforcement of the award in the many countries where it has assets, at least if the parent cannot be held liable for the debts of the subsidiary on an alter ego or agency theory.

Many major arbitral centers have fewer grounds for annulment of awards in international, rather than domestic, arbitration. Reforms in England in 1979 and in France in 1981 have been well-publicized in the competition for the income from "invisible exports" in the form of fees to arbitrators and lawyers. Yet some degree of control remains. Only Belgium seems to have relieved its courts completely of the power to review awards in arbitrations between foreign parties.[102]

Enforcement of an award annulled in its country of origin would seem appropriate only where the local judiciary that annulled the award is corrupt, or where the award was set aside for reasons so peculiar to the local law of the place of the proceedings that non-recognition would defeat the goals of the New York Convention. For example, it would seem wrong to give effect to an annulment by a judge who was paid by one of the parties to do so, or to refuse to recognize an award annulled because the local law provided that all arbitrators must sign the arbitral award. A judge of a forum where the losing party has assets might enforce such awards although they had been annulled where rendered.

E. Illustrative National Legal Systems

Before concluding this section, it may be useful to present a brief comparison of the legal provisions under which local courts may annul awards rendered in arbitral proceedings in England, France, Switzerland or the United States.

1. The United States

A United States District Court may annul an award rendered in the United States under Section 10 of the United States Arbitration Act which, to the extent not in conflict with the provisions of the New York Convention, continues to have residual application.[103] These grounds for annulment permit

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102. *See* Paulsson, *Arbitration Unbound in Belgium*, 2 ARB. INT'L 68 (1986).

103. Section 10 provides:

In either of the following cases the United States court in and for the dis-

American courts to control the basic integrity of the arbitral process in cases where one of the parties feels that the procedure was not what he, she, or it bargained for in the agreement to arbitrate. In particular, Section 10(d) permits an order vacating an award where the arbitrator was in excess of his or her authority. One Supreme Court opinion contains dicta interpreting Subsection 10(d) to include annulment for "manifest disregard of the law."[104] "Manifest disregard" of the law is a concept that is fuzzy at best. It clearly presupposes "something beyond and different from a mere error of the law or failure on the part of the arbitrators to understand and apply the law."[105] However, few cases involve an arbitrator ignoring the correct governing law. Thus "manifest disregard" remains a concept with uncertain meaning, but which indicates more than a mere mistake in the

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trict wherein the award was made may make an order vacating the award upon the application of any party to the arbitration —

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

9 U.S.C. § 10 (1947).

It is unlikely that there would be conflict with the New York Convention if the award is made in the United States, because it would not be a "foreign" award covered by the Convention. An award rendered in the United States might conceivably be a "non-domestic" award, but the judicial elaboration of this concept is too sketchy to permit general conclusions about what awards rendered in the United States will be domestic or non-domestic. *See* Bergesen v. Joseph Muller Corp., 710 F.2d 928 (2d Cir. 1983). *See supra* note 51 and accompanying text (for a discussion of this case).

104. *Wilko v. Swan*, 346 U.S. at 436. *See supra* note 68.

105. Saxis S.S. Co. v. Multifacs Int'l Traders, Inc., 375 F.2d 577, 582 (2d Cir. 1967) (quoting San Martine Co. de Navigacion v. Saguenay Terminals, Ltd., 293 F.2d 796, 801 (9th Cir. 1961), the court refused to apply the concept of "manifest disregard"). *See also* Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corp., 274 F.2d 805, 808 (2d Cir. 1960) (court refused to apply the "manifest disregard" concept to the facts at issue). In only one reported case, to my knowledge, did the court actually strike down an award that did not "draw its essence" from the parties' agreement. *See also* Swift Indus., Inc. v. Botany Indus., Inc., 466 F.2d 1125 (3d Cir. 1972). It is uncertain whether "manifest disregard" has worked its way into the defenses permitted under Article V of the New York Convention. *See* Parsons & Whittemore Overseas Co. v. Societe Gen. De L'Indus. Du Papier (RAKATA), 508 F.2d 969, 977 (2d Cir. 1967).

interpretation of the law.

2. England[106]

The 1979 English Arbitration Act[107] replaced an old procedure for appeal of questions of law to the High Court, called the "case stated" procedure, with a more limited right of appeal for arbitrator error of law.[108] With leave of the High Court, appeal may be taken if the legal question "could substantially affect the rights of one or more of the parties."[109]

In international arbitration it is possible to exclude the right of appeal by an "exclusion agreement" in the principal contract itself. In a "non-domestic contract," where at least one of the parties is not British, parties may agree in writing to preclude the courts from hearing appeals or providing interlocutory rulings on questions of law. The High Court has held that reference to the I.C.C. Arbitration Rules (of which Article 24 precludes appeal) constitutes the incorporation of a valid "exclusion agreement."[110]

The 1979 Act did not repeal the High Court's residual statutory power to remit awards for reconsideration by the arbitrator and to set aside an award for arbitrator "misconduct" under Section 23(1) of the 1950 Act. In judicial decisions rendered before 1979, the term "misconduct" was interpreted to apply to "procedural errors and omissions by arbitrators who are doing their best to uphold the highest standards of their profession.[111] Thus there is still the possibility for English courts to remit or to set aside awards, despite an exclusion agreement.

Recent English case law, however, suggests a trend toward judicial respect for the independence of the arbitral process.[112]

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106. *See generally* M. MUSTILL & S. BOYD, COMMERCIAL ARBITRATION (1982) (on English arbitration law).

107. Arbitration Act of 1979, cl. 42, *reprinted in* 49 HALSBURY'S STATUTES OF ENGLAND 59 (R. Mangal & E.Z. Durbin ed., 3d ed. 1980) [hereinafter cited as Arbitration Act of 1979].

108. *See* Park, *Judicial Supervision of Trans-national Commercial Arbitration: The English Arbitration Act of 1979*, 21 HARVARD INT'L L. J. 87 (1980).

109. Arbitration Act of 1979, *supra* note 107, at cl. 42, § 1(I)(4).

110. Arab African Energy Corp. v. Olie Produkten Nederland BV, [1983] Com. L.R. 195.

111. *See* 1978 Commercial Court Committee Report on Arbitration (CMND. 7284), ¶ 17, at 17.

112. See the discussion by David Shenton in proceedings of A.B.A. Litigation Section, Atlanta, Aug. 2, 1983, as cited by Margaret Rutherford in 52 ARB. 38, 39-42 (1986), and by Martin Hunter, *Arbitration Procedure in England*, 1 ARB. INT'L 82, 97 (1985).

Nonetheless, the legal correspondent of the Financial Times has commented that "No manner of legislation, however, will remove . . . the professional zeal of London solicitors and barristers who transplant into arbitration proceedings the habits acquired in the courts."[113]

3. France

International arbitral awards rendered in France may be set aside by French courts on the basis of grounds specifically enumerated in a decree issued in May 1981[114] that permits annulment to insure observance of minimum standards of honesty and integrity of proceedings.[115] Specifically, the Decree provides for annulment if there was no valid arbitration agreement or the arbitrator decided on the basis of a void or expired agreement; there were the irregularities in the composition of the arbitral tribunal or in the designation of the sole arbitrator; the arbitrator has decided in a manner incompatible with the mission conferred upon him; due process (literally: the principle of an adversarial process) has not been respected.

Finally, there may be annulment if the award's recognition or enforcement would be contrary to international public policy, *ordre public international.* This last ground for challenge refers to the public policy of France, rather than a public international norm. However, the public policy of France imposes itself less intrusively when the dispute has an international, rather than domestic, character.

4. Switzerland

A uniform Swiss arbitration law, referred to as the Concordat,[116] has been accepted by all cantons except Lucerne, Glaris, Argovie and Thurgovie.[117] Two-thirds of the Concordat's forty-

113. *See* Herman, The Financial Times, Oct. 20, 1983, at 38, cols. 5-8.

114. Decree No. 81-500, May 12, 1981, 1981 Recuil Dalloz-Sirey, *Legislation* [D.S.L.] 237, 1981 Bulletin legislatif Dalloz [B.L.D.] 237.

115. On French arbitration law, see generally J. ROBERT & T. CARBONNEAU, THE FRENCH LAW OF ARBITRATION pt. 2, ch. 8 (1983). *See* Craig, Park, & Paulsson, *French Codification of a Legal Framework for International Commercial Arbitration: The Decree of May 12, 1981,* 13 L. & POL. INT'L BUS. 727 (1981).

116. Concordat Suisse sur L 'Arbitrage, *reprinted in* III INTERNATIONAL COMMERCIAL ARBITRATION pt. VII, doc. VII.J.1 (1986).

117. *See* P. JOLIDON, COMMENTAIRE DU CONCORDAT SUISSE SUR L'ARBITRAGE 53 (1984). Zurich is the most recent adherent to the Concordat.

six articles are designated as mandatory. The "mandatory" provisions, *dispositions imperatives*, apply notwithstanding the parties' desire to tailor the arbitral proceedings otherwise.[118]

Some mandatory provisions are merely matters of fairness or common sense, such as the requirements that the arbitral tribunal be properly constituted, and that the arbitrators respect the jurisdiction conferred upon them by the parties. One mandatory provision, however, permits court review of the legal merits of the arbitrated dispute. Specifically, Article 36(f) gives judges the power to set aside awards that they consider "arbitrary," defined as constituting a "violation of law or equity" or based on findings "manifestly contrary to the facts."[119] Action for nullification, *recours en nullité*, is brought before the cantonal court of the seat of the arbitration.

VI. The Next Confrontation: The Bankruptcy Code

Another confrontation in the area of arbitrability is likely to involve the Bankruptcy Code[120] which provides for an automatic stay of actions against companies that have filed for the protection of the bankruptcy court.[121] In *Mitsubishi*, when the Supreme Court referred Soler to arbitration with respect to its Sherman Act counterclaims, Soler had already filed a petition for reorganization under Chapter 11 of the Bankruptcy Code. As a result, the parties went back to court in Puerto Rico, litigating whether the New York Convention prevails over the Bankruptcy Code. On April 14, 1986 the District Court removed the reference to the bankruptcy court and ordered arbitration in Japan.[122]

The Circuits are divided on whether the Bankruptcy Code or the Convention prevails as to international arbitration. In at

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118. *See* Neyroud & Park, *Predestination and Swiss Arbitration Law: Geneva's Application of the Intercantonal Concordat*, 2 B.U. Int'l L.J. 1, 4 (1983); I.C.C. Arbitration, *supra* note 8, pt. 5, ch. 32, § 32.08, at 102 n.178.

119. Art. 36(f) permits annulment "lorsque la sentence est arbitraire parce qu'elle repose sur des constatations manifestement contraires aux faits ou parce qu'elle constitue une violation évidente du droit ou de l'équité."

120. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549. Concerning the interplay between the New York Convention and the Bankruptcy Code, see Westbrook, *The Coming Encounter: International Arbitration and Bankruptcy*, 67 Minn. L. Rev. 595 (1983).

121. 11 U.S.C. § 362 (1978).

122. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., No. 85-538, slip op. (D.P.R. Apr. 14, 1986).

least five cases, courts have either ordered arbitrations to proceed or refused to stay arbitral proceedings, even though one of the parties had filed under the Bankruptcy Code.[123] In another case, a bankruptcy court in Texas decided that the Bankruptcy Code should prevail.[124] How the Supreme Court ultimately decides the issue may depend on the posture of the case — whether or not the bankrupt party is the plaintiff or the defendant, and whether the foreign arbitration has already begun. A certain *dépeçage* — splitting of issues — may also be involved. For example, the question of damages, but not the priority of claims among creditors, might be held arbitrable.

Domestic cases in which the Bankruptcy Code prevails over the federal Arbitration Act do not address the concerns and policies of the New York Convention. Therefore, it would not be surprising to see an evolution of special rules, similar to those for securities and anti-trust law, applied to the Bankruptcy issues arising from international transactions. If antitrust claims possessing a "constitutional quality"[125] are arbitrable, it would not be unreasonable to expect a similar principle for claims against a bankrupt.

VII. Justifying a Double Standard of Arbitrability

A. *The Special Needs of International Business*

In an international context, dramatically disagreeable consequences can result from an unenforceable arbitration agreement. Unenforceability may mean not just litigation in Louisville rather than arbitration in Albany, but perhaps proceedings in Arabic before a judge in Tripoli or in Jeddah rather than before an English-speaking arbitrator in Stockholm or Geneva. Imagine a Libyan enterprise contracting with a New York enterprise under an agreement that provides for arbitration of disputes in Paris under International Chamber of Commerce

123. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., No. 85-538, slip op. (D.P.R. Apr. 14, 1986); Quinn v. C.G.R., 48 B.R. 367 (D. Col. 1985); Hart Ski Mfg. Co. v. Maschinenfabrik Hennecke, 711 F.2d 845 (8th Cir. 1983); Fotochrome, Inc. v. Copal Co., Ltd., 517 F.2d 512 (2d Cir. 1975); Société Nationale Algérienne Pour La Recherche, La Protection Le Transport et La Transformation des Hydrocarbures v. Distrigas, No. 86-2014-Y (D. Mass. Mar. 17, 1987).

124. Braniff Airways, Inc. v. United Air Lines, Inc., 33 B.R. 33 (Bankr. N.D. Tex. 1983).

125. *See* Brodley, *Limiting Congolmerate Mergers: The Need for Legislation*, 40 Ohio St. L.J. 867, 867 n.2 (1979).

(I.C.C.) Rules. Nothing would have stopped the parties from excluding local statutory claims from the scope of the arbitration agreement, but they decided not to do so. When the contract became onerous for the Libyan corporation, it asserted a Libyan "statutory claim" before a Libyan court, which in turn refuses on public policy grounds to give effect to the agreement to arbitrate. The American company had expected that the dispute be arbitrated in Paris rather than litigated in Tripoli, as the Libyans had expected arbitration in Paris rather than litigation in New York. Both sides would be more than distressed to see these expectations defeated by assertions of statutory counterclaims.

Parties to international transactions should be able to bargain for an arbitration procedure that reduces the risk of potentially hostile "hometown justice" in the other party's national courts. If this goal can be defeated by asserting a local statutory right, then parties to international transactions will be denied the opportunity to provide with any certainty for a neutral dispute resolution process. The absence of this reasonable certainty of a neutral forum may impede or distort international trade and investment, resulting in a less efficient exploitation and allocation of global resources.

Our legal concepts and practice tend to be exported, serving as examples to foreign courts. If the American business community is not made to honor its arbitration bargains, foreign judges may refuse to enforce arbitration agreements and awards against their own nationals, and thus cause American exporters and multinationals to suffer.

Billions of dollars of international trade and investment beg for an effective neutral dispute resolution process. Admittedly, many transactions will be concluded regardless of whether the parties expect dispute resolution to be neutral. But some may not. Uncertainty whether the neutral adjudicatory process, bargained for at the outset of a contractual relationship, will indeed be implemented in the event of a dispute cannot be other than an obstacle to a cross-border business transaction.

B. Society's Interest in Enforcing the Law

Society's interest in assuring vindication of statutory rights should not be disregarded lightly. Concern that arbitrators will be less likely than judges and juries to enforce the law properly may not be entirely misplaced. The arbitrator is paid to consider

the interests of the parties. He may also consider public or societal interests affected by the outcome of the dispute, but this is not the arbitrator's principal job.

Because public law claims can be the object of a private settlement does not necessarily mean they should be capable of resolution by an arbitrator. Settlement occurs *after* the dispute arises, and the amount received in settlement presumably would roughly equal the amount received in litigation, discounted for reduced legal fees. The parties would evaluate their legal chances of success in litigation before settling. On the other hand, because the arbitration clause frequently is included in the main contract and signed before the dispute arises, this clause permits little or no informed evaluation of claims, as no claims have arisen. Furthermore, a pre-dispute agreement may bargain away rights as yet unknown through waiver of liability as to unidentified future offenses. As a result, the public interest in proper enforcement of the law may be frustrated. In at least two capacities the public may suffer when antitrust laws, for example, are under-enforced: *qua* consumer (affected by the particular controverted transactions) and, more generally, *qua* beneficiary of the political liberty and economic efficiency furthered by the free enterprise system.[126]

C. Society's Interest in Efficient Transnational Dispute Resolution

Assuring vindication of public law claims is not society's only concern, however. The competing public interest in permitting development of a neutral transnational dispute resolution system may outweigh the concern for vindication of public law claims by judges rather than arbitrators. In domestic transactions, the imperative of a neutral forum does not present itself with the same force as in a transnational context. The public interest in protection from under-enforcement or misinterpretation of public law issues, which prevails when the transaction is purely domestic, may be outweighed by the interest in permitting a neutral private adjudicatory process when the transaction crosses national boundaries. For an American enterprise, the

126. In articulating the community/societal interests affected one must identify assumptions about the free enterprise system and the objectives of the antitrust laws. Do we want a free market efficiency for economic reasons? Or is our motivation political, to avoid the untoward consequences of undue concentrations of power and wealth?

consequences of finding oneself not before an I.C.C. appointed arbitrator but before Greek, Libyan or French courts, with proceedings in the language not of the playwright Shakespeare, but perhaps of the playwrights Molière or Sophocles or of the prophet Mohammed, are more dramatic than the consequences of ending up in court in New York rather than in an American Arbitration Association (AAA) arbitration.

Even if arbitrators do not apply the Sherman Act as well as judges, a special rule of arbitrability for the international realm would be justified under a hierarchy of societal policies that take into account the peculiar need for neutrality in resolution of international contracts disputes. The relative weights one gives to these competing considerations — proper enforcement of the law and neutrality of forum — is obviously a matter on which reasonable folks may differ. Fostering an efficient arbitral process, necessary to freedom to contract for private adjudication, may be outweighed by the goal of protecting the public against under-enforcement of public law statutes. However, the protection of the public against under-enforcement may be outweighed by the goal of increased certainty of neutral dispute resolution for trans-border business. The assumptions of *American Safety* need not be denied; but in a transnational rather than domestic context, the special need for a neutral forum presents an additional overriding consideration.

A double standard for domestic and for international arbitration presupposes a rigorous *triage* to separate international disputes from those disputes that, due to their predominantly local flavor, ought not to benefit by special treatment. The appropriate test for characterizing transactions as "international" is open to debate. At least two definitional models present themselves. Under English law, courts look to the nationalities of the parties in order to characterize an arbitration agreement as domestic or international.[127] The less mechanical French model

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127. Under English law an international arbitration agreement is defined in the negative as one that is not "domestic." A "domestic" agreement is also defined as an agreement to which neither,

(a) an individual who is a national of, or habitually resident in, any State other than the United Kingdom, nor

(b) a body corporate which is incorporated in, or whose central management and control is exercised in, any State other than the United Kingdom, is a party at the time the arbitration agreement is entered into.

Arbitration Act of 1979, cl. 42, § 3.(I)(7), *reprinted in* HALSBURY'S STATUTES OF ENGLAND 59, 63 (R. Mangal & E.Z. Durbin ed., 3d ed. 1980).

considers an arbitration international if it implicates the interests of international commerce.[128] The more flexible Gallic model commends itself as an inspiration for the elaboration of an American method of characterizing disputes as "international."[129]

D. *Neutral National Courts*

An arbitration agreement, of course, is but one form of forum selection clause. A second option is dispute resolution by a foreign national court, which may appear less threatening to public interests than arbitration. A foreign national court, it might be argued, is more like the domestic court that would otherwise hear the claim. Indeed, its open proceedings are subject to appellate review and public scrutiny.

Similarities may be superficial, however. Not all national judicial systems are the same. Judges in countries that lack a tradition of judicial independence may be less like American judges than arbitrators convened under the rules of an institution such

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An arbitration agreement is thus non-domestic if at least one of the parties is foreign. The scope of inquiry in England is limited to the parties' residence and nationality, not to the nature of the commercial relationship or the governing substantive law.

The recent Belgian arbitration law also looks to the nationality of the parties. *See* Paulsson, *supra* note 102, at 68.

See also the Swiss Federal draft revised codification of conflict of law rules, which would permit waiver of the right to appeal in an arbitration in which neither party is a Swiss resident. The Swiss draft law is discussed in Neyroud & Park, *supra* note 118, at 23-26.

128. The French Arbitration Decree of 1981 provides: "Est international l'arbitrage qui met en cause des intérêts du commerce international." *See* Art. 1492 of the French Noveau Code de Procedure Civile, (N.C.P.C.), Decree No. 81-500, May 12, 1981, 1981 [D.S.L.] 237, 240, 1981 [B.L.D.] 237, 240. *See generally* P. Fouchard, *Quand un arbitrage est-il international?*, REVUE DE L'ARBITRAGE 59, 71-74 (1970) (on the traditional French doctrine of international arbitration).

129. The American statute implementing the 1958 New York Convention includes within its scope commercial relationships between American citizens only if the contract involves foreign property, requires performance abroad, or has a reasonable relationship with a foreign country. 9 U.S.C. § 202 (1976).

The New York Convention covers foreign arbitral awards and arbitral awards "not considered as domestic" under the law of the recognition forum. New York Convention, *supra* note 8, at art. I(1). For an American interpretation of what it means for an award to be "not domestic," see Bergesen v. Joseph Muller Corp. 548 F. Supp. 650 (S.D.N.Y. 1982), *aff'd*, 710 F.2d 928 (2d Cir. 1983). *See supra* note 51 (for a discussion of *Bergesen*).

With respect to arbitration agreements, as contrasted with awards, the Convention is not explicit as to its scope. *See generally* A.J. VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION § I-2, at 56-71 (1981) (on the application of the Convention to arbitration agreements).

as the I.C.C. or the London Court of International Arbitration (LCIA). An I.C.C. arbitral tribunal may be less subject to inappropriate political pressure, or more sensitive to the legitimate American public policies, than the national courts of many countries.

Concern for judges' national predispositions may prevent the parties from agreeing on a national court to hear their dispute. Industrialized countries may feel uncomfortable before Third World judges, and developing nationals with or without Marxist governments may resist reference to capitalist courts of former colonial powers.[130]

Moreover, the parties may not be certain in advance of a dispute that a given foreign national court will accept jurisdiction. National attitudes toward forum shopping differ. Some courts will not accept jurisdiction of disputes between foreign parties when there is no connection between the dispute and the forum selection. For example, the New York Business Corporation Law and the New York General Obligation Law limit the right of a foreign corporation to bring an action against another foreign corporation, even if both have signed an otherwise valid submission to the jurisdiction of New York Courts.[131]

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130. On attitudes of developing countries toward arbitration, see Wilner, *Acceptance of Arbitration by Developing Countries*, in RESOLVING TRANSNATIONAL DISPUTES THROUGH INTERNATIONAL ARBITRATION (T. Carbonneau ed. 1984).

131. Section 1314 of New York Business Corporation Law in relevant part provides:

> (b) Except as otherwise provided in this article, an action or special proceeding against a foreign corporation [not formed under the laws of the United States and maintaining an office in New York] may be maintained by another foreign corporation . . . in the following cases only:
>
> (1) Where it is brought to recover damages for the breach of a contract made or to be performed within this state, or relating to property situated within this state at the time of the making of the contract.
>
> (2) Where the subject matter of the litigation is situated within this state.
>
> (3) Where the cause of action arose within this state. . . .
>
> (4) Where . . . a non-domiciliary would be subject to the personal jurisdiction of the courts of [New York].
>
> (5) Where the defendant is a foreign corporation doing business or authorized to do business in the state.

N.Y. BUS. CORP. L. § 1314 (McKinney 1986).

The effect of Section 1314 was modified in 1984 by Section 5-1402 of the N.Y. General Obligation Law:

> [A]ny person may maintain an action or proceeding against a foreign corporation, non-resident, or foreign state where the action or proceeding arises out of or relates to any contract, agreement or undertaking for which a choice of New York law has been made . . . and which (a) is a contract, agreement or undertaking, contingent or otherwise, in consideration of, or relating to any obligation arising out of a transaction covering in the aggregate, not less than one

E. Contemplating Alternatives

Assessing the societal interest in arbitration as a viable dispute resolution option depends on the alternatives one may contemplate. Businessmen who regret their decision to arbitrate when they view the alternative of American courts forget that they were motivated to agree to arbitration by a vision of foreign courts. The arbitration agreement is usually drafted into the principal contract out of concern that it will be too late to avoid foreign courts after a dispute arises.

The argument for international arbitration is not that it avoids cost and delay, for the process is usually long and expensive. Rather, the justification is that parties to a dispute that crosses national boundaries need a non-national mechanism for resolution of the controversies. A third nation's courts are not always an option, either because of uncertainty that the courts will accept jurisdiction of a dispute with no connection to the forum state, or because the courts of nations which were formerly colonial powers are unacceptable to developing nations, whose courts in turn are not acceptable to the Western multinational.

Although arbitration may not be a first choice for dispute resolution, it frequently imposes itself on a transaction for want of another alternative for parties that have rejected both nonbinding mediation and national judges. To make the arbitral system work, both sides must have a reasonable certainty that the agreement will be enforced. This larger view of the function of transnational arbitration argues for limiting the opportunities of American parties to assert local statutory claims or counterclaims in order to avoid the consequences of their commitments.

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million dollars, and (b) which contains a provision or provisions whereby such foreign corporation or non-resident agrees to submit to the jurisdiction of the courts of this state.

N.Y. GEN. OBLIG. L. § 5-1402 (McKinney Supp. 1987).

Therefore, a French corporation and a British corporation still could not select New York courts if they wanted application, for example, of Swiss law, or if the dispute was for $900,000.

Not all national courts take such a restrictive attitude. English courts, for example, have shown themselves open to adjudication of disputes between foreign parties concerning controversial events occurring abroad. In a dispute arising from a collision between Dutch and Belgian vessels in Belgian waters, the eminent Lord Denning ruled that the English Admiralty Court could accept the election of one of the parties to bring an action *in rem* in England. "You may call this 'forum shopping' if you please," wrote Denning, "but if the forum is England, it is a good place to shop in, both for the quality of the goods and the speed of the service." The Atlantic Star, 1 Q.B. 364, 382 (C.A. 1973).

If the American judiciary contributes to an erosion of the international business community's confidence in the arbitral process, American corporations will be the losers when the shoe is on the other foot and foreign courts imitate American practice to deny enforcement of the bargain for the more neutral forum afforded by arbitration.

CONCLUSION

The dissent by Justice Stevens in *Mitsubishi* expresses concern that enforcing commitments to arbitrate may dispatch American citizens "to a foreign land in search of an uncertain remedy for the violation of a public right."[132] Paradoxically, an even more uncertain remedy in a foreign court may be exactly the fate of American business if arbitration agreements are not enforced. The alternative to arbitration depicted by Stevens in the penultimate sentence of his dissent is "consideration of a fully developed record by a jury instructed by a federal judge."[133] Justice Stevens' view of the alternatives, however, might be somewhat incomplete. Another alternative is the specter that haunted the businessman when he signed the arbitration agreement: disposition of disputes by a foreign judge in a foreign language.

Arbitration abroad is rarely as good as hauling the opposing party before one's own hometown judges, but usually it is better than appearing before the opposing party's national courts. Requiring American businessmen to honor their agreements to arbitrate international contract disputes is a necessary step in building a binding neutral dispute resolution system that will enable Americans to avoid foreign courts.

The majority in *Mitsubishi* has reached the right result in holding antitrust claims arbitrable in an international context. However, its suggestion that courts later examine arbitral awards to determine whether public law claims were addressed may be open to question. A "second look" at the arbitral process might open the door to a merits review that would render the arbitration little more than a precursor to litigation.

The majority in *Mitsubishi* limited its decision to international contracts. The limitation, even if desirable does not necessarily follow from Justice Blackman's assumption that arbitra-

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132. 105 S. Ct. 3374 (1985).
133. *Id.*

tors as well as judges can enforce public laws. This assumption would seem to apply equally to domestic arbitration.

The distinction between domestic and international arbitration would seem to flow more logically from a decision based on the policies underlying the New York Convention, to which nations adhere in the hope of assuring for their nationals the opportunity to contract out of the home-town justice of foreign courts. A special rule for international disputes makes arbitration available to parties doing business across national boundaries, but not in a purely domestic context. In the latter domestic context, the need for a neutral forum is not as acute as in international transactions, and non-arbitrability is justified to protect public interests implicated in the dispute.

In international contract disputes, the need for a neutral forum justifies a departure from standards applied to domestic transactions.[134] Domestically nurtured concerns for proper enforcement of public law claims may have to yield to a larger concern that international trade and investment not be frustrated because of routine refusal to honor commitments to arbitrate international contracts disputes.

In a purely domestic context, an unenforceable arbitration clause may mean adjudication in Los Angeles rather than in Boston. As disquieting as the prospect of California justice may be to a New Englander, an unenforceable arbitration agreement can give rise to even more apprehension in an international context, where judicial proceedings may be in a foreign language and in a country where xenophobia or political influence make a fair trial questionable.

Arbitration is not a *summum bonum*, however, and it seems appropriate to give some discretion to the judge called upon to enforce the agreement to arbitrate. The New York Convention may be too blunt an instrument, with the result that its signatories take lightly their international commitments. The Convention contains no explicit escape hatch whereby a judge may distinguish a contract between two sophisticated multinationals from a contract of adhesion imposed on a small local merchant

134. At least one friend of arbitration, the distinguished scholar Professor Thomas Carbonneau, has expressed a divergent view. Professor Carbonneau, in *Mitsubishi: The Folly of Quixotic Internationalism*, 2 ARB. INT'L 116 (1986), argues that the *Mitsubishi* decision moves international arbitration toward "a realm of 'a-national' lawlessness." *Id.* at 136.

with little bargaining power.[135] Indeed, one troubling aspect of the *Mitsubishi* case is that Soler was just the type of company in need of the paternalistic legislation represented by the Automobile Dealer's Day in Court Act. A special, more liberal, rule for international transactions should be applied only to cases in which there has been a freely bargained-for waiver of rights.

The *raison d'etre* for commercial arbitration in transactions that go beyond our national frontiers is the search for a delocalized dispute resolution in a neutral forum. If American corporations can escape their bargained-for, but inconvenient, arbitration commitments by alleging violations of statutory rights, foreign corporations will attempt to follow suit. The resulting lack of confidence in a neutral adjudicatory process will not enhance the role of international trade and investment in the process of global wealth production and distribution. Rather, an ineffective arbitral system may produce a dramatic irony in which the American businessman is hauled before a foreign judge less appealing to him than the transnational arbitral tribunal whose jurisdiction he first accepted but later sought to avoid. Commerical self interest, as well as fairness, argue for requiring Americans to respect commitments made in the world marketplace.

135. Only by reading Convention Article II to imply an escape hatch based on the law of the forum, as suggested by the First Circuit (*see supra* text accompanying note 10), can the New York Convention permit the fine tuning needed to accommodate concerns related to protecting weaker parties.

Appendix: The Structure of the Mitsubishi Joint Venture