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Determining the Law Governing Performance in International Commercial Arbitration: A Comparative Study

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DETERMINING THE LAW GOVERNING PERFORMANCE IN INTERNATIONAL COMMERCIAL ARBITRATION: A COMPARATIVE STUDY

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INTRODUCTION

Persons entering into commercial agreements of a transnational nature have often shown a preference for the arbitration tribunal rather than the court of law as the instrument for settling disputes which may arise between them. Justification of this proclivity toward arbitration has been articulated by Dr. Martin Domke who observes that:

> Disputes between traders of different countries are just as inevitable as they are on the domestic level. Interpretation and performance of contractual arrangements are often open to differences of opinion which should be quickly decided so as to maintain amicable business relations between the parties. Speedy and impartial solutions of trade disputes can best serve the interests of the business community at large. . . . Resort to arbitration has become increasingly important in keeping the avenues of trade free of obstructive devices.[1]

The parties,[2] who may be either individuals or legal persons, such as

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1. Domke, *International Arbitration of Commercial Disputes,* in PROCEEDINGS OF THE 1960 INSTITUTE ON PRIVATE INVESTMENT ABROAD 131 (1960). In an appraisal of the value of arbitration in the transnational situation, E. J. Cohn has stated: "At the risk of being considered a heretic, I venture to suggest that an arbitration clause is a veritable necessity in every agreement between parties residing or carrying on business in different countries—so much so that a lawyer who has failed to point this out to his clients when drafting a contract, has indeed rendered a disservice to them." Cohn, *The Rules of Arbitration of the International Chamber of Commerce,* 14 INT'L & COMP. L.Q. 132, 133 (1965). See Burstein, *Arbitration of International Commercial Disputes,* 6 B.C. IND. & COM. L. REV. 569 (1965), who states that between 1947 and 1963 the annual value of American exports rose from 15.3 billion dollars to 23.2 billion, and imports from 5.6 billion to 17.0 billion. He shows similar figures for the growth of Western European trade.

2. This study is confined to contracts of private persons (i.e. individuals, partnerships, corporations and other forms of private association). However, the significant number of contracts made by private persons with public entities of all types requires mention. State trading, as commercial activity by public entities is called, is not confined to countries of any particular economic ideology, but is common nearly everywhere. The methods by which arbitration of transnational contracts made by public entities takes place is described in Domke, *Arbitration of State-Trading Relations,* 24 LAW & CONTEMP. PROB. 317 (1959). See also CARABIBER, ARBITRAGE INTERNATIONALE DE DROIT PRIVÉ 43–52, 142–47 (1960); *Permanent Court of Arbitration Rules of Arbitration and Conciliation for Settlement of International Disputes Between Two Parties of which Only One Is a State,* INTERNATIONAL COMMERCIAL ARBITRATION 37 (Indian Journal of International Law, 1964); CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES (submitted to Governments—International Bank for Reconstruction and Development

corporations, manifest their desire to employ arbitration by providing for its use in the arbitration clause of the contract.[3] It is generally agreed

(March 18, 1965)). This draft convention concerns the use of arbitration and conciliation through the establishment of an International Centre for the Settlement of Investment Disputes. Art. 1 (1). Under the Convention, nationals of contracting parties (states) will be enabled to bring claims directly against states which are parties to the Convention. Thus, arbitration of *investment* disputes will be conducted between a private party (the national of one of the contracting states) and a state. Chapter V of the Convention deals specifically with arbitration. Article 42 states: "(1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, (including the rules on the conflict of laws) and such rules of international law as may be applicable . . . (3) The provisions of paragraphs (1) and (2) shall not prejudice the power of the tribunal to decide a dispute *ex aequo et bono* if the parties so agree." Article 48 states in part: "3. The Award shall deal with every question submitted, and shall state the reasons upon which it is based." Articles 50 to 52 deal with the interpretation, revision and annulment of the award.

Economic relationships between the public entity (which may range from an autonomous public corporation to one or more of the branches of the government itself) are represented by contracts of all types which range from short-term sales agreements to long-term supply contracts, and then to regimes set up by concession agreements. Examples of arbitration pursuant to such contracts are: Alsing Trading Co. v. Greek State 23 Int'l L. Rep. 633 (1954) (supply contract), Noted in Schwebel, *The Alsing Case,* 8 INT'L & COMP. L.Q. 320 (1959); *Sapphire Arbitration,* reported in Lalive, *Contracts Between a State or a State Agency and a Foreign Company,* 13 INT'L & COMP. L.Q. 987 (1964). *Cf.* Saudi Arabia v. Arabian Am. Oil Co., 27 Int'l L. Rep. 117 (1958); Nussbaum, *The Arbitration Between the Lena Goldfields, Ltd. and the Soviet Government,* 36 CORNELL L.Q. 31 (1950); Suratgar, *The Sapphire Arbitration Award, The Procedural Aspects: A Report and Critique,* 3 COLUM. J. TRANSNAT'L L. 152 (1965). See also Carabiber, *L'arbitrage international entre gouvernements et particuliers,* 76 RECUEIL DES COURS 221 (1950). For a general study of problems relating to choice of law in contracts between public entities and private persons, see Mann, *The Proper Law of Contracts Concluded by International Persons,* 35 BRIT. YB. INT'L L. 34 (1960); Suratgar, *Considerations Affecting Choice of Law Clauses in Contracts Between Governments and Foreign Nationals,* 2 INDIAN J. INT'L L. 273 (1962). See also FATOUROS, GOVERNMENT GUARANTEES TO FOREIGN INVESTORS 232 *et seq.* (1962).

Where the "law of the proceedings" is a United States system, arbitration clauses in contracts between private persons and public entities will depend for their enforceability upon the legislative acts creating them and defining their powers. Federal agencies and corporations are not empowered to agree to extra-judicial settlement of disputes by means of arbitration, as understood in this paper. See Note, *Authority of Government Corporations to Submit Disputes to Arbitration,* 49 COLUM. L. REV. 97 (1949); Note, *Government Contracts Disputes: An Institutional Approach,* 73 YALE L.J. 1408 (1964); Lidstone and Witte, *Administration of Government Contracts: Disputes and Claims Procedures,* 46 VA. L. REV. 252 (1960). In England, the Arbitration Act, 1950, 14 Geo. 6 c. 27 § 30 provides that the Crown shall be bound by its agreements to arbitrate. In France, however, the government may not enter into an agreement to arbitrate with a private person, if the "law of the proceedings" is French. If the government enters into an agreement with a foreign private person, however, the validity of the agreement will be recognized by the courts. Carabiber, ARBITRAGE INTERNATIONALE DE DROIT PRIVÉ 69, 70 *et seq.* (1960).

3. The arbitration clause (*clause compromissoire*) is an agreement to arbitrate disputes which may arise at any point in the contractual relationship between the parties. (It is otherwise known as a future disputes clause.) The submission is an agreement made at the time of the dispute, submitting it to arbitration. For general descriptions of arbitration, see Sturges, *Arbitration—What is it?,* 35 N.Y.U.L. REV. 1031 (1960); FOUCHARD, L'ARBITRAGE COMMERCIAL INTERNATIONAL 1–48 (1965).

Variations of types of clauses and types of solutions they are to bring about has been discussed by Professor David, in the context of the problems of a definition of arbitration for purposes of international conventions. David, *Le concept d'arbitrage privé et les con-*

that such a clause, whether or not it is considered as a part of the main contract, is consensual in nature. But the significance of the agreement to arbitrate is determined by the legal nature attributed to the arbitration process by the forum in which the clause is sought to be enforced.

This article describes the influence of various types of arbitration clauses on the rules to be applied by the arbitrators in resolving disputes which arise in the interpretation and performance of the commercial contract.[4]

I. The Nature of the Problem

Generally, the system of law under which the arbitration is held will determine the rule of conflict of laws to be applied to the substance of the obligation.[5] In addition, this law of the proceedings [6] will determine the following questions:

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ventions internationales, in Etudes Juridiques Offertes a Julliot de la Morandière 147, 158 (1964). In New York, "judicial" arbitration is made possible by N.Y. Civ. Prac. Act §§ 3031–37, entitled "Simplified procedure for court determination of disputes." The parties to a contract may agree in their contract that they will submit future or existing controversies for disposition under these provisions. A judge of the Supreme Court will try the issue under greatly simplified rules. He must, it appears, apply strict rules of substantive law and a reviewing court retains full power to correct any errors of law. This study will be confined to what is known as general arbitration, and will not be concerned with "appraisal," "amiable composition," "arbitrate irrituale" and other variations of the basic concept of a judicial-like decision of issues to be solved which characterizes arbitration. Mediation, conciliation or compromise—processes which do not involve such decision making—will not be discussed. See generally Kellor, American Arbitration (1948).

4. See Cheshire, Private International Law 248, 249 (6th ed. 1961). Examples of disputes involving the "substance of the obligation" are therein provided. They include the following:

> Whether a carrier is liable for the loss of or injury to the goods or for delay in their delivery.
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> Whether the master of a ship is justified in selling the cargo at a port of distress.
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> Whether an agent has exceeded his authority.
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> Whether currency restrictions prevent the payment of the amount due under the contract.
>
> Whether a stipulation exempting the promisor from liability in certain events is effective.
>
> Whether an agreement in restraint of trade is enforceable.

(Certain commercial transactions, such as those involving the sale of real property where the principle *locus regit actum* is generally applied, are outside the sphere of contracts conflicts rules. Such transactions are included in this study only insofar as general principles of arbitration apply to them.)

5. Mezger, *The Arbitrator and Private International Law,* in International Trade Arbitration 239 (Domke ed. 1958). Professor Goldman in his 1963 lectures at the Hague Academy of International Law, entitled *Conflict of Laws In the Field of International Arbitration in Private Law,* firmly disagrees with this position.

6. A distinction must be made between (1) the *rules of procedure* which will be applied to the particular arbitration proceeding and which consist of a combination of rules to guide the hearings (some of which are chosen by the parties, limited and supplemented by those of the governing system of law) and the (2) *law of the proceedings* which is the system of law under which the arbitration is held and which determines which institutions and rules may not be disregarded, *i.e.,* the legal system of the country in which the award is considered domestic for purposes of obtaining a confirmation (or *exequatur*). Thus the "law of the proceedings" is not necessarily that of the *place* where the arbitration took

(1) Must the arbitrator give reasons for the award?
(2) Must the award be based upon substantive rules of law?
(3) To what extent is the arbitrator's decision subject to review by a court of law?

The impact of the answers on the decision-making process of the arbitrator is quite obviously considerable.

Of course, the extent to which the parties are free to choose the law of the proceedings is one of the preliminary decisions to be made by the arbitrator. The arbitrator will be aware that such a decision must conform to the public policy of the legal system whose assistance will be sought in the enforcement of the award. Proponents of the "extreme" theory argue that the parties can in fact construct a system of law to govern their contract. They attempt to employ the famous Article 1134 of the French Civil Code:

> Contracts lawfully entered into have the force of law for those who have made them.[7]

By its wording, however, the provision defeats this argument. It does not state that "every contract creates the law" between the parties, but only states that contracts which are "lawfully entered into have the force of law." [8] The arbitration award and often the arbitration agreement itself [9] may have to be enforced against a recalcitrant party, and the court will insist upon knowing under what legal system the award has been made.[10]

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place. For purposes of enforcement of an award in a country where it clearly is not a domestic award, its validity under the law of the proceedings, although not under the legal system of the site of arbitration, may make such enforcement possible. See note 10 *infra*. See Mezger, *La Jurisprudence française relative aux Sentences arbitrales étrangères et la doctrine de l'autonomie de la volonté en matière d'arbitrage internationale de droit privé*, in MÉLANGES OFFERTS À JACQUES MAURY 273, 290–91 (1960). See generally, Shalit, *Procedural Aspects of International Commercial Arbitration*, 2 INT'L L. BULL. 53 (1963); See also FOUCHARD, *op. cit. supra* note 3, at 299–301.

7. Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites. CODE CIVIL art. 1134.

8. Schnitzer, *La loi applicable aux contrats*, 44 REV. CRIT. DR. INT. PR. 459, 467 (1955).

9. The courts may be called upon, even before the arbitration has begun, to enforce the agreement by requiring that the parties arbitrate. Before or during the arbitration if one of the parties brings suit in a court of law, the other party may well ask for a stay of the suit pending the arbitration. It is readily apparent that because of the potential need to seek the assistance of various national courts throughout the arbitration process until final enforcement of the award, the avoidance of all legal systems in arbitration is rendered impossible, if only for practical reasons. See Siegert, *Universal, Regional, and National Measures to Further International Commercial Arbitration*, in INTERNATIONAL TRADE ARBITRATION 217 (Domke ed. 1958); FOUCHARD, *op. cit. supra* note 3, at 352.

10. The arbitration award is generally enforced through voluntary acceptance by the losing party. If that party refuses to abide by the findings of the award, the winning party may apply to the appropriate court, either by means of a statutory motion to confirm the award and transform it into a judgment, or through an action for judgment on the award, where such motion is not available, *e.g.*, if the award was rendered outside the state, or with respect to the United States Arbitration Act, if a motion is made to a district

The dispute over the nature of arbitration lays bare the question of whether the parties have the right to choose the law of the proceed-

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court other than the one of the district where the award was made unless the parties have indicated in their agreement that they wish the award confirmed in a particular district and have named it. See N.Y. CIV. PRAC., §§ 7510, 7514; United States Arbitration Act § 9, 43 Stat. 885 (1925), 9 U.S.C. § 9 (1958). See also Trumpy, *The Enforcement of Foreign Arbitral Awards in the United States,* 2 INT'L LAW BULL. 66 (1963).

In Tentative Draft No. 6 of the *Restatement of Conflicts (Second)*, the Reporter's note dealing with commercial arbitration, states:

> Foreign arbitration awards have been enforced almost invariably in the United States provided that (1) they were enforceable in the state of their rendition, (2) the cause of action on which they were based was not contrary to the strong public policy of the forum and (3) either the defendant or his property was subject to the judicial jurisdiction of the arbitration tribunal and the defendant was given reasonable notice of the proceeding and a reasonable opportunity to be heard.

RESTATEMENT (SECOND) CONFLICT OF LAWS § 354j, Reporter's Note (Tent. Draft No. 6, 1960).

In England, enforcement of the award may be accomplished through The Arbitration Act, 1950, 14 Geo. 6, c. 27, § 26, although it should be noted that this section of the act is most likely applicable only when the country where the award is considered domestic enforces English awards, reciprocity either by practice or treaty being necessary under § 35 of the act:

> An award on an arbitration agreement may, by leave of the High Court or a judge thereof, be enforced in the same manner as a judgment or order to the same effect, and where leave is so given, judgment may be entered in terms of the award.

Older methods of enforcement are still available. See RUSSELL, ARBITRATION 284 (17th ed. Walton 1963). The general rule on enforcement of foreign awards at common law is stated in DICEY'S CONFLICT OF LAWS 1056 (7th ed. 1958): (1) A foreign arbitration award which has been rendered enforceable by a judgment in the country where it was given may be enforced by an action as a foreign judgment. (2) A foreign arbitration award which has not been rendered enforceable by a judgment in the country where it was given may be enforced by an action at the discretion of the court if the award is: (a) in accordance with the terms of the submission agreement, (b) valid according to the law governing the arbitration proceedings, and (c) final according to the law governing the submission agreement.

The Arbitration Act, 1950, 14 Geo. 6, c. 27, § 36 provides that a foreign award as so defined shall, subject to the provisions of part II of the act, be enforceable in England either by action or in the same way as an act is enforceable under section 26. Section 35 defines "foreign award" and section 37 states the requisites necessary for enforcement:

> (1) In order that a foreign award may be enforceable under this Part of this Act it must have—
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> (a) been made in pursuance of an agreement for arbitration which was valid under the law by which it was governed;
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> (b) been made by the tribunal provided for in the agreement or constituted in manner agreed upon by the parties;
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> (c) been made in conformity with the law governing the arbitration procedure;
>
> (d) become final in the country in which it was made;
>
> (e) been in respect of a matter which may lawfully be referred to arbitration under the law of England; and the enforcement thereof must not be contrary to the public policy or the law of England.

The Arbitration Act, 1950, 14 Geo. 6, c. 27, § 37.

In France, enforcement of awards rendered within the country by lawful compulsion can take place only if the President of the Civil Court of the district within which the award was made endorses it for enforcement by order made upon application in accordance with Article 1021 of the Code of Civil Procedure. This order is usually called *ordonnance d'exequatur* (order for enforcement). The President of the Court is entitled to determine whether the award contains anything contrary to public policy. He may not enquire into the merits of the case. An award made abroad must be brought before the President of the Civil Court of the district where enforcement is to take place, or if the

ings, either specifically or by derogating from mandatory rules of a particular legal system. Sauser-Hall, in his report to the 1952 Vienna Session of the *Institut de Droit International,* described the three theories most generally advanced. The first pictures arbitration as arising from private contract, and thus as an essentially private proceeding which will be free of any system. The *théorie jurisdictionelle,* at the other extreme, conceives of arbitration as a true judicial proceeding, and thus subject to the mandatory rules of law of the *place* of arbitration. The third theory, one to which Sauser-Hall subscribes, regards arbitration as an institution *sui generis,* having characteristics of both of the other theories, with the result that only some of its elements are contractual in nature.[11]

The acknowledgment that all contracts and thus arbitration agreements must be "native" to a particular system of law is widespread.[12] What remains to be discussed is the attitude of the most prominent

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losing party is domiciled in France, before that of the district where the latter is domiciled. See GRECH, PRÉCIS DE L'ARBITRAGE COMMERCIAL 30 (1964). Robert, *France,* INTERNATIONAL COMMERCIAL ARBITRATION 241, 261, 265–66 (Sanders, rap. gen. 1956).

The issue of the finality of the award as it relates to its validity according to the "law of the proceedings" has encouraged much controversy. It is commonly held that the award must be "final" where made. In a New York case, Wallcarriers Inc. v. Trinity Corp. reported in N.Y.L.J. Feb. 27, 1961 p. 14 col. 5, Levy, J., held that the party bringing the action for enforcement of an award rendered in Denmark had not proven that the award was final with respect to that country's law. Denmark has no arbitration statute, and the step following the rendering of the award is to bring an action in court to enforce the award. See Philip, *Commercial Arbitration in Denmark,* 13 ARB. J. (n.s.) 16 (1958). *Cf.* Union Nationale des Co-operatives Agricoles de Cereales v. Robert Catterall & Co., Ltd., [1959] All E.R. 721 (C.A.), where in a similar case the award was enforced. Lord Evershed held: "This award is, to my way of thinking, final according to the bargain made and according to the law of Denmark so far as it is concerned with the problem with which we are presented." *Id.* at 726. The distinction between an award which is executory, that is, one which has complied with all formalities of the "law of the proceedings" for its rendition so that there is nothing left to be done in the arbitral process, and an award which has been executed—that is, enforced by judicial act so that nothing within the judicial system of the "law of the proceedings" remains to be done for its enforcement as a judgment—was recognized by the English Court of Appeal, but not by the New York Supreme Court. See ROBERT, ARBITRAGE CIVIL ET COMMERCIAL, 204 (1961).

11. Sauser-Hall, *L'arbitrage en droit international privé,* 44 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 416, 469 (Vienna 1952). For an excellent exposition of the third theory—arbitration as an institution sui generis—see FOUCHARD, *op. cit. supra* note 3, at 320, 351. "Certes, la nature mixte—ou hybride de l'arbitrage nous apparait indiscutable." *Ibid.* For an exposition of the theory of arbitration as purely contractual, see Pallieri, *L'arbitrage privé dans les rapports internationaux,* RECUEIL DES COURS, THE HAGUE ACADEMY OF INTERNATIONAL LAW 291 *et seq.,* especially 334 *et seq.* (vol. 1, 1935); Klein, *Autonomie de la volonté et arbitrage,* 47 REV. CRIT. DR. INT. PR. 255 *et seq.,* 479 *et seq.* (1958); KLEIN, CONSIDERATIONS SUR L'ARBITRAGE EN DROIT INTERNATIONAL PRIVÉ 181 *et seq.* (1955). On the theory of arbitration as tied to the place of arbitration (*théorie juridictionelle*) see NIBOYET, 6–2 TRAITÉ DE DROIT INTERNATIONAL PRIVÉ FRANCAIS 1981, 1985–86 (1949); See generally Arets, *Reflections sur la nature juridique de l'arbitrage,* 7 ANNALES DE LA FACULTE DE DROIT DE LIEGE 173 (1962).

12. See, *e.g.,* Etat français v. Comité de la Bourse d'Amsterdam et Mouren, Cour de Cassation, 21 juin 1950, 39 REV. CRIT. DR. INT. PR. 609 (1950), in which the court states: "Every international contract is of necessity bound to the law of a state."

commercial countries toward the power of the parties to determine the law of the proceedings, and toward the method in which this choice is made.[13] This determination is preliminary to the main problem, which is the influence of the institution of arbitration upon the legal rules applied by the arbitrator to issues arising from the interpretation and the non-performance of a contract.

II. The Arbitration Clause: Types and Treatment

The treatment of the various types of arbitration clauses under the law of England, France and the United States (under the federal law and the law of New York State)[14] will be discussed, in response to

13. This study is basically concerned with the determination of the rules of substantive law which are to be applied by the arbitrator to disputes concerning the "substance of the obligation." When making this determination the arbitrator is deemed to follow the conflict rules of the law of the proceedings to arrive at the correct rule of law, as used in the courts. However, he may be able to avoid such work if the law of arbitration of the law of the proceedings provides for an alternative to the use of substantive law as employed by the courts. It is therefore necessary to consider the effect of the intention of the parties, whether express or objectively implied, as expressed in their consensual relationship, upon a determination of the law of the proceedings as well as its effect on the substantive rules to be applied. It may be added that here the arbitrator faces a problem seldom encountered by the judge, for whom the law of the place where he sits will be the law of the proceedings. See Mezger, *The Arbitrator and Private International Law* 229, 234, in International Trade Arbitration (Domke ed. 1958).

The applicability of foreign law should be distinguished from its actual application in a particular case. The issue of whether it will be applied depends upon the ease with which foreign law may be introduced in the courts and arbitration proceedings of the various countries whose legal system will be the law of the proceedings. Although such an issue is beyond the scope of this study, it should be noted that if foreign law must be proved as fact in the courts, arbitration may be all the more advantageous. If the dispute involves a question of law which is obviously and primarily concerned with foreign law, an arbitrator who is an expert in that system of law may be utilized. Further, the rules of evidence are generally relaxed in arbitration, thus allowing the arbitrator to dispense with formal rules that a court might have to observe. See generally Sommerich & Busch, Foreign Law; A Guide to Pleading and Proof (1959); Yaseen, *Problemes Relatifs à l'application du droit étranger,* 106 Recueil des Cours 499–595 (1962).

14. New York is selected because it is the foremost commercial state in the United States and because its arbitration statute is the prototype of the "modern" arbitration statute. See generally Cook, *Recent New York Developments in Arbitration: A Comparative Glance,* Rivista dell'Arbitrato 105 (No. 3 1963).

Twenty states have enacted "modern" arbitration statutes. The position of arbitration is far different in the other states, where an arbitration clause may be revoked by a party at any time before the rendition of the award and where, therefore, an agreement to arbitrate will not be enforced by the courts. Interstate awards when confirmed and reduced to judgment, although one party did not participate after receiving notice and an opportunity to appear, (an *ex parte* award), have been enforced in states with non-modern arbitration statutes by virtue of the full faith and credit clause. See Stern, *The Conflict of Laws in Commercial Arbitration,* 17 Law & Contemp. Probs. 567 (1952); *Note, Commercial Arbitration and the Conflict of Laws,* 56 Colum. L. Rev. 902 (1956). The full faith and credit clause in not considered applicable to a foreign judgment on an award. See Standard Magnesium v. Fuchs, 251 F.2d 455 (10th Cir. 1957) (Oklahoma has *no* arbitration statute. By applying the United States Arbitration Act an *ex parte* award made abroad was enforced. Had the law of Oklahoma been applied, revocation by non-participation, would have been the holding.). Use of the United States Arbitration Act requires more than

problem situations. This treatment is designed to determine the effect that various types of specifications in the arbitration agreement, or the absence of any, will have upon the award rendered.[15]

The parties may limit the power of the arbitrator by specifying that only certain aspects of the contractual relationship be arbitrable. For purposes of this study the parties are assumed to have agreed that only questions arising from and relating to the performance, construction, and interpretation of the contract may be arbitrated. Disputes as to other aspects of their relationship, such as capacity of the parties, formal or essential validity, and arbitrability of certain subjects would be left in the hands of the courts.[16]

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meeting the requirements for invoking the jurisdiction of the federal courts, *e.g.*, Bernhardt v. Polygraphic Co. of America, 350 U.S. 198 (1956). The requisites for applying the federal statute are set out in note 17 *infra*. The Law of Arbitration of Scotland is independent of English Law. For purposes of this study, only the arbitration law of England will be dealt with. For principles of Scottish law see GUILD, LAW OF ARBITRATION IN SCOTLAND (1936).

15. Where the arbitration clause contains no more than a reference to arbitration—for the resolution of all or some disputes—the clause is generally called a "bare" or "blank" clause. This clause is distinguished from the "imperfect" clause which contains some general specifications regarding the arbitration process, namely, a choice of law or substitute, a choice of the place of arbitration, and the choice of the arbitrator and/or the administering agency. The parties may include other specifications by which they particularize their relationship, even when the law of the proceedings has been determined. Such specifications—which may be positive or negative—include the use of reasons, the availability of challenge, and the use of positive law. This article deals primarily with the first two general specifications, although mention is made of the third in the discussion of the I.C.C. clause. The choice of an arbitrator without further specification may well be assimilated to a choice of forum. See Benjamin, *European Convention on International Commercial Arbitration*, 37 BRIT. YB. INT'L L. 478, 481 (1961).

16. The problem of severability, a serious one, will not be treated in this study. It is concerned with whether the power of the arbitrator extends to the determination of the validity of the main contract. For an excellent treatment of the subject, see Klein, *Du caractère autonome de la clause compromissoire*, 50 REV. CRIT. DR. INT. PR. 499 (1961). See also Nussbaum, *"Separability Doctrine" in American and Foreign Arbitration*, 17 N.Y.U.L. REV. 609 (1940). According to the principles adhered to in England (See Powell, *The Independent Validity of Arbitration Clauses*, CURRENT LEGAL PROBLEMS (1954)), and, until recently, in France and the federal courts of the United States, the arbitration clause is considered part of the main contract. *But see* Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402 (2d Cir. 1959). In New York, *In re* Kramer & Uchittelle, Inc., 288 N.Y. 467, 43 N.E.2d 493 (1942) refused to permit severability, but the rule was obviously discarded in Exercycle Corp. v. Maratta, 9 N.Y.2d 329, 174 N.E.2d 463, 214 N.Y.S.2d 353 (1961), which permitted arbitration of a dispute in a contract attacked for lack of mutuality. *Cf.* N.Y. CIVIL PRAC. § 7503(a) where the word "valid" appears with agreement. It would seem to call for a valid arbitration agreement. The validity of the arbitration clause may be determined only by a court of law. See Moseley v. Electronic & Missile Facilities, 374 U.S. 167 (1963).

Problems of validity often arise, as in *Moseley*, as a result of the adhesive nature of the arbitration agreement. In that case the Supreme Court of the United States condemned the coercion practiced upon the economically weaker party in exacting from it agreement to a standardized clause. *Cf.* Siegelman v. Cunard, 221 F.2d 189 (2d Cir. 1935). The use of form contracts containing form clauses removes much of the choice parties might otherwise make through bargaining. See, FOUCHARD, *op. cit. supra* note 3, at 358–59. See also Wilson, *Freedom of Contract and Adhesion Contracts*, 14 INT'L & COMP. L.Q. 172, 188 (1965); Ehrenzweig, *Adhesion Contracts in the Conflict of Laws*, 53 COLUM. L. REV. 1072 (1953).

Other limits set by the parties might preclude the arbitrators from hearing questions of law, or, on the contrary, might encourage them to do so. In the case-problems to follow, no indication as to the will of the parties on this point has been expressed although it is assumed that they are interested in a just and expert determination of any disputes that may arise.

A. *The Bare Arbitration Clause*

The Clause: One of the terms of a commercial contract between nationals of two of the countries listed above [17] states, "Any dispute arising from and relating to the performance, interpretation or construction of this contract shall be settled by arbitration."

When the dispute arises, assume that it concerns a point of law and that the parties have agreed to arbitrate, whether with reluctance or not, in one or the other's home state.[18]

1. The United States

If the arbitration is held in the United States and it is determined that the law of the proceedings is that of the place of arbitration, the parties generally will not know which rules of law were applied by the arbitrator because of the solidly-entrenched judicial doctrine that the

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17. The application of federal law depends on the satisfaction of the requirements of the United States Arbitration Act, 9 U.S.C. § 2 (1958):

> A written provision in any maritime transactions or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Otherwise, the non-American party will be deemed to be dealing with the New York party under the applicable law of New York, N.Y. CIV. PRAC. art. 75. See Note, *Scope of the United States Arbitration Act in Commercial Arbitration: Problems in Federalism,* 58 NW. U. L. REV. 468 (1963).

18. If one of the parties has refused to arbitrate or has ignored the other's request, there will be a race to the courts of an appropriate jurisdiction to take advantage of the available statutory machinery. See United States Arbitration Act, 9 U.S.C. §§ 4, 5 (1958); N.Y. CIV. PRAC. §§ 7503, 7504; The Arbitration Act, 1950, 14 Geo. 6, c. 27 § 10. For France, see note 70 *infra*.

It should be noted that local notions of due process in *ex parte* proceedings may make it difficult to enforce the award in the state of the non-appearing party, if the award has been reduced to judgment. This problem is particularly acute in the United States. *E.g.,* Skandinaviska Artiebolaget v. Weiss, 226 App. Div. 56, 234 N.Y. Supp. 202 (1929) (refusal to enforce a Swedish judgment rendered upon an *ex parte* award). *Cf.* Sargant v. Monroe, 268 App. Div. 123, 49 N.Y.S.2d 546 (1944) (enforcement of an *ex parte* award made in England, although a judgment had also been rendered upon the award). For a more recent example of the developing doctrine of non-merger see Oilcakes & Oilseeds Trading Co. v. Sinason, 9 Misc. 2d 651, 170 N.Y.S.2d 378 (Sup. Ct. 1958), *infra* note 127.

arbitrator does not have to state his reasons.[19] The arbitrator may have made use of any one of the following theories to discover the law applicable to the substance of the obligation:

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19. See, *e.g.*, Wilko v. Swan, 346 U.S. 427 (1953); Bay Ridge Medical Group v. Health Ins. Plan, 22 App. Div. 2d 807, 254 N.Y.S.2d 616 (1964); Shirley Silk Co. v. American Silk Mills, 260 App. Div. 572, 23 N.Y.S.2d 254 (1940). The award in New York must conform to few rules. See Form No. 7507:1 in BENDER'S FORMS—*Civil Practice*, which is a model for awards made in New York. It provides for a description of the agreement to arbitrate, the names of the arbitrators, states that hearings were held and testimony taken, "and after full and complete consideration of all the evidence taken and briefs submitted by the attorneys for the respective parties, and a majority of the board of arbitrators having come to a decision, we do hereby render a decision and award as follows. . . ." The arbitrators present their factual conclusions and state the relief they will give. Form No. 7507:2, entitled "Short Form of Award of Arbitrators," eliminates everything but preliminary formalities and the relief granted.

A reasoned award is included in the Transcript of Record No. 5654 before the United States Court of Appeals for the 10th Circuit in Standard Magnesium Corp. v. Otto Fuchs, filed on June 13, 1957. The arbitration clause in the contract involved in that case stated:

> F) . . . all disputes arising in connection with the present contract shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the rules.

The award by the Norwegian arbitrator, appointed in accordance with the Rules of the I.C.C., takes up nine pages of the record. After stating his name and that of the parties, the arbitrator divided his award into the following parts:

> I. The Arbitrator's Mission [containing the background of the case, the arbitrator's role in it, the place of arbitration (determined to be Oslo), the use of the Rules of the I.C.C., and the issues placed before him. Here the arbitrator had to "1. decide whether the arbitration clause in the contract of 26th April/5th May 1954 binds the parties; 2.a) if not, declare he has no jurisdiction as regards the claims put forward by Fuchs; b) but if so, examine the claims made by Fuchs and award such sum or sums as he may judge fit; 3. declare who shall pay the costs and expenses of the arbitration procedure, or in what proportion the said costs and expenses are to be shared between the parties."]
>
> II. Arbitral Audience [The fact of the refusal by Standard to submit to the arbitration necessitated independent study of the issues by the arbitrator in rendering his award.]
>
> III. The Facts [a full description of the facts of the case.]
>
> IV. Conclusions
>
> A. The jurisdiction of the arbitrator
>
> Standard Magnesium Corporation has neglected to defend the case before the arbitrator appointed and has contested the validity of the arbitration clause on the ground that an award by the Arbitrator cannot be enforced in Oklahoma. The defendant has produced no evidence in support of this allegation which, moreover, is contradicted by the well established fact that foreign awards have frequently been enforced successfully in U.S. courts. . . .
>
> The parties have expressly by contract agreed to Arbitration in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce. The arbitrator cannot imagine that the law of Oklahoma forbids American businessmen to enter such an international agreement and still less allow them to disregard a signed agreement to arbitrate abroad. . . .
>
> B. The merits of the case
>
> As to the merits of the case Standard has disclaimed liability on the ground that by being represented for inspection of the goods prior to shipment Fuchs has accepted the goods. From the inspection provision included in clause 9 of the contract Standard furthermore deduces that it is not responsible for the magnesium content of the pigs being low. These objections are entirely unfounded. . . . [There follows a detailed discussion of the merits of various contentions by the parties.]
>
> Consequently, the undersigned arbitrator comes to the conclusion that, in accordance with the claims lodged by Fuchs, it is his duty: a) to rule out the objections

(a) The long-prevailing American doctrine of conflict of laws that the law of the place of performance of a contract governs interpretation and performance.[20]

(b) The newer doctrine, advanced in the *Restatement of Conflicts Second*,[21] the New York Court of Appeals,[22] and a Federal District Court,[23] applying New York conflict of laws rules, that the objectively discerned points of contact should lead to the "proper law." [24]

(c) The subjective intent of the parties theory.[25] Actually there seems to be little difference between this conflict of laws approach and that expressed by the objectivists when there has been no express indication of choice of law by the parties. The former will look to various points of the contact, such as the place of making and the place of performance, to discern the "intention of the parties," while the latter will examine the same points to arrive at an "objective determination."

(d) The substantive local law of the place of arbitration.[26]

(e) The arbitrator may have decided according to his own notions of justice—or what may be termed "arbitral equity." [27]

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raised by Standard and, more especially, to state that he has jurisdiction to determine the present dispute; b) to award Fuchs the sum of D.M. 51,847.92 to be paid by Standard; c) to direct Standard to pay the costs of the arbitral procedure which amounts to U.S. $ 600—d) to disallow Fuch's claim for compensation for its own expenses connected with the arbitration, since the Rules of Conciliation and Arbitration of the I.C.C. do not provide for such reimbursement (Art. 23, 2)
V. Award . . . .

Made in triplicate
Oslo, the 21st October 1955
The arbitrator
(signature)

20. See 2 BEALE, CONFLICT OF LAWS 1088 (1935); *cf.* GOODRICH, CONFLICT OF LAWS § 106, at 201 (Scoles ed. 1964).

21. RESTATEMENT (SECOND), CONFLICT OF LAWS § 332 (Tent. Draft No. 6, 1960).

22. Auten v. Auten, 308 N.Y. 155, 124 N.E.2d 99 (1954). See Ketcham v. Hall Syndicate Inc., 236 N.Y.S.2d 206, 212 (1962), *aff'd*, 242 N.Y.S.2d 182 (1963).

23. Mutual Life Ins. Co. v. Simon, 151 F. Supp. 408 (S.D.N.Y. 1957).

24. Professor Willis Reese considers that the objectively determined *proper law* approach "bids fair soon to become, if it is not so already, the majority rule in this country." Reese, *The Power of the Parties to Choose the Law Governing Their Contract*, 1960 AM. SOC'Y INT'L L. PROCEEDINGS 46, 49.

25. *Cf.* Jansson v. Swedish American Line, 185 F.2d 212 (1st Cir. 1950).

26. Professor Currie believes that a court should always apply its own law provided that the forum state has a "legitimate" interest in having its law applied. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 46–58 (1963). Professor Ehrenzweig states that the law of the forum should be applied except when application of the law of another state is required by established precedent or by compelling reasons to the contrary. Ehrenzweig, *The Lex Fori—Basic Rule in the Conflict of Laws*, 58 MICH. L. REV. 637 (1960). For a recent critique of Professor Ehrenzweig's views see Briggs, *An Institutional Approach to Conflict of Laws; "Law and Reason" versus Professor Ehrenzweig*, 12 U.C.L.A.L. REV. 29 (1964).

27. See Crane, *Arbitral Freedom from Substantive Law*, 14 ARB. J. (n.s.) 163 (1959).

The widespread practice of not stating reasons [28] has been attributed to:

> The desire of the parties to have their controversies finally determined by the arbitrator's award, leaving to ensuing court procedures only questions of bias or misconduct of the arbitrator or excess of his authority in determining an issue not properly submitted to him.[29]

However, the parties may, it appears, ask to have reasons stated for the award. Neither the New York law nor the United States Arbitration Act contains any provision precluding such a request. Although the American Standards of Commercial Arbitration provide that the parties may stipulate that reasons be given for the decision, it has been asserted that the parties to arbitration proceedings have not taken advantage of this possibility.[30]

In *In re Sussman* (Acadia Co., Inc.) [31] the court held that "the alleged failure of the arbitrators to explain the basis of the amount awarded as damages does not affect the finality and definiteness of the award." In *Lief v. Brodsky* [32] the court stated: "[A]n arbitrator should not be called upon to give reasons for his decision. Inquisition of arbitrators, for the purpose of determining the processes by which they arrived at an award, finds no sanction in law." This practice is consistent with the other widespread judicially constructed rule that:

> [T]he arbitrators, in the absence of an express requirement to the contrary . . . in the contract providing for arbitration, need not follow legal principles as stated by judicial decisions. Indeed, in many, if not most instances, the arbitrators are not lawyers and could not very well be expected to be versed in the law.[33]

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28. In fact, the American Arbitration Association discourages its arbitrators from giving reasons for their awards. See, Mentschikoff, *Commercial Arbitration,* 61 COLUM. L. REV. 846, 865 (1961); *cf.* Note, 61 HARV. L. REV. 1022, 1024 n.16 (1948).

29. Domke, *Arbitral Awards Without Written Opinions: Comparative Aspects of International Commercial Arbitration,* in XXTH CENTURY COMPARATIVE AND CONFLICTS LAW 249, 254 (1961).

30. *Id.* at 255.

31. N.Y.L.J., June 9, 1960, p. 12 col. 3. Respondent alleged that the arbitrators had exceeded their authority in rendering a monetary award, and that the award was not final enough in that it failed to give a basis for damages granted.

32. 126 N.Y.S.2d 657, 658 (Sup. Ct. 1953). See also Shirley Silk Co. v. American Silk Mills, 257 App. Div. 375, 13 N.Y.S.2d 309 (1939); *cf.* United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1959); Kanmack Mills, Inc. and Society Brand Hat Co., 134 F. Supp. 263 (E.D. Mo. 1955); Popcorn Equipment Co. v. Page, 92 Cal. App. 2d 448, 207 P.2d 647 (1949); Willow Fabrics, Inc. and Carolina Freight Carriers Corp., 20 App. Div. 2d 864, 248 N.Y.S.2d 509 (1964).

33. Publishers Ass'n v. Newspaper Union, 111 N.Y.S.2d 725, 730 (Sup. Ct. 1952); see Mole v. Queen Insurance Co., 14 App. Div. 2d 1, 3, 217 N.Y.S.2d 330, 332 (1961); Freyberg Bros. v. Corey, 31 N.Y.S.2d 10, 177 Misc. 560 (Sup. Ct. 1941). See *Note: Substantive Law in Arbitration Proceedings,* 12 U. FLA. L. REV. 93 (1959). Torano v. Motor Vehicle Acc. Indemnification Corp., 15 N.Y.2d 882, 206 N.E.2d 353, 258 N.Y.S.2d 418 (1965) is an affirmance, per curiam of a lower court decision permitting an award of $500 for the death of an insured under an uninsured motorist endorsement in an automobile liability insurance policy. Chief Judge Desmond dissented, and in discussing the facts of the case, stated: "Ordinarily,

Among the foremost exponents of arbitration are the many trade associations which provide facilities for arbitration between their members and between members and nonmembers. In a significant case the court stated:

> It may be that under the rules of the Raw Silk Association matters of strict law are subordinated to a course of dealing or to the equities of the case. . . . By the terms of the contract disputes whether of law or fact are arbitrable. Traders may prefer the decision of the arbitral tribunal to that of the courts on such questions. When they have selected their tribunal, the court ought not to interfere with them unless very substantial reasons are shown.[34]

The case of *Wilko v. Swan* [35] illustrates how well the courts recognize the fact that the application of substantive law is never assured as long as the arbitrators are under no obligation to state reasons for the award. The parties had included in their contract a clause directing that section 12(2) of the Securities Act of 1933 should be followed. The United States Court of Appeals stated that "while it may be true that arbitrators do not ordinarily consider themselves bound to decide according to legal rules, there can be no doubt that they are so bound if the arbitration agreement so provides." [36]

The United States Supreme Court,[37] though it reversed the decision,

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when parties have agreed to arbitrate instead of litigate, the award must stand regardless of errors of law or fact . . . . But this particular claimant . . . had an absolute right by statute . . . and by the insurance contract itself to such sum up to a $10,000 maximum as she was 'legally entitled to recover as damages from the owner or operator' of the 'hit and run automobile.'" *Id. at* 884, 206 N.E. 2d at 354, 258 N.Y.S.2d at 419. Desmond then observed:

> That an award like this one is to be tested by rules of law and not by the whims of a particular arbitrator follows from the holdings of this court nearly a century ago in the renowned case of Fudickar v. Guardian Mut. Life Ins. Co. (62 N.Y. 392). The opinion in Fudickar first stated the general rule that, since in the ordinary arbitration all questions of fact and law are referred generally to the arbitrator, the court possesses no general supervisory power over the awards and cannot set them aside because they are erroneous on the facts or the law. However, the opinion made it equally clear that, if it appears from the award, either by express statement or "by clear and necessary inference", that the arbitrator intended to decide according to the law but failed to do so, then the courts have full power to set aside the award for errors of law (62 N.Y., p. 401). If the courts have such a power when it appears that the arbitrator intended to decide according to law, there can be no doubt that such review power in the courts must exist where the arbitrator is required both by statute and by the contract of insurance to measure his award by applicable rules of law.
>
> No court would hesitate to set aside a jury verdict awarding $500 as wrongful death damages on facts like these. Unless the courts assert and exercise a similar power as to absurdly inadequate awards in MVAIC cases the clearly expressed legislative purpose and insurance policy agreement will be subverted.

Id. at 885–86, 206 N.E.2d at 354–55, 258 N.Y.S.2d at 420.

34. S. A. Wenger & Co. v. Propper Silk Hosiery Mills, Inc., 239 N.Y. 199, 203, 146 N.E. 203, 204 (1924). Perhaps the most startling example of arbitral freedom from substantive law is Matter of Staklinski, 6 N.Y.2d 159, 160 N.E.2d 78 (1959), where the arbitration award to enforce a contract for personal services was upheld. This would certainly not have been the outcome had the substantive law of New York been applied.

35. 201 F.2d 439 (2d Cir. 1953).

36. *Id.* at 444.

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

agreed with the Court of Appeals that the arbitrators were bound to decide in accordance with the express wishes of the parties, despite the general rule that there is no requirement that the arbitrators follow legal principles. The Supreme Court reasoned:

> This case requires subjective findings on the purpose and knowledge of an alleged violator of the Act. They must be not only determined but applied by the arbitrators without judicial instruction on the law. As their award may be made without explanation of their reasons and without a complete record of their proceedings, the arbitrators' conception of the legal meaning of such . . . requirements as "burden of proof," "reasonable care" or "material fact," . . . cannot be examined.[38]

The Court next discussed the statutory doctrine which severely limits the power of the parties to control the arbitrator's choice of legal rules. The United States Arbitration Act [39] lists the reasons for which a challenge to the enforcement of an award may be made. An honest interpretation of substantive law, when the parties expressly agree to be governed by it, in contrast to a manifest disregard of law, will not be reviewed by the courts.[40]

The limitations on the right to challenge the arbitral award are stringent both in the federal act and in the New York Civil Practice Law and Rules.[41] *Wilkins v. Allen,* which is cited in nearly all subsequent cases dealing with the subject, held that:

> Where the merits of a controversy are referred to an arbitrator selected by the parties, his determination, either as to the law or the facts is final and conclusive, and a court will not open an award unless perverse misconstruction or positive misconduct upon the part of the arbitrator

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38. *Id.* at 435–36.

39. 9 U.S.C. § 10 (1958):

> In either of the following cases the United States court in and for the district 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. . . .
>
> (c) Where the arbitrators were guilty of misconduct 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.

40. Faced with a clash of two favored policies, *i.e.,* that of encouraging arbitration as against that of utilizing § 12(2) of the Securities Act of 1933, 48 Stat. 84 (1933), 15 U.S.C. § 77l(2) (1958), for the purpose of protection, the Supreme Court held the agreement to arbitrate invalid.

41. The New York law provides that an award may be vacated for any of the following reasons:

> (i) corruption, fraud or misconduct in procuring the award; or
>
> (ii) partiality of an arbitrator appointed as a neutral . . . or
>
> (iii) an arbitrator who has exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made.

N.Y. CIV. PRAC. § 7511. Former § 1463 of the New York Civil Practice Act was essentially the same.

> is plainly established, or there is some provision in the agreement of submission authorizing it. The award . . . cannot be set aside for mere errors of judgment either as to the law or as to the facts . . ., and however disappointing it may be the parties must abide by it.[42]

In *Pine Street Realty Co. v. Coutroulos* [43] the court clarified the reason behind this limited right to appeal by stating that: "Arbitration's principal claims to merit as a means for the settlement of disputes are promptness and finality. These would be destroyed if questions of fact and of law could be reviewed as though on appeal from judicial findings."

The arbitration clause that does not include the requirement of the application of substantive law gives the arbitrator a free hand to apply any of the five rules possible for determining the law to be applied to the substance of the obligation, listed above.[44] If the clause contains no definite requirement for the stating of reasons even intentional disregard of particular rules of law may not be detected. Unquestionably, the narrow scope of appeal which the statutes offer does away completely with appeal on the merits and provides only slight hope that the provisions concerning misconduct or excess of power may be applied.[45]

Under the circumstances outlined above, there seems little chance that the inquiry into what is the law of the proceedings will be made. It is quite clear that in the absence of some expression of intent with regard to choice of law by the parties, the forum will consider its legal system as the proper law of the proceedings and will then apply notions of local law, without reference to conflicts rules.[46]

It is interesting to note that New York courts have generally refused to enforce awards made abroad pursuant to a bare arbitration clause.

42. 169 N.Y. 494, 496–97, 62 N.E. 575, 576 (1902). See Shirley Silk Co. v. American Silk Mills, 257 App. Div. 375, 13 N.Y.S.2d 309 (1939). See Sturges, *Arbitration—What is it?*, 35 N.Y.U.L. REV. 1030, 1034 (1960).

43. 233 App. Div. 404, 407–08, 253 N.Y. Supp. 174, 177–78 (1931).

44. Professor Reese has pointed out that frequently the courts change the rule itself from case to case. So, for example, New York courts formerly relied on whichever one of the four inconsistent rules as to the law governing the contract was best suited for the purpose of the particular case. This practice is not openly admitted by the courts. The particular court will simply ignore what other courts have said. Reese, *supra* note 24, at 59. See, *e.g.*, Jones v. Metropolitan Life Ins. Co., 158 Misc. 466, 286 N.Y. Supp. 4 (Sup. Ct. 1936).

45. *But see* Drug Store Employees Union v. Reid & Yeomans, Inc., 265 App. Div. 870, 37 N.Y.S.2d 911 (1942).

46. In Marchant v. Mead-Morrison Management Co., 252 N.Y. 284, 169 N.E. 386 (1928), the contract between the New York and the Massachusetts corporations was to be performed in Massachusetts. Arbitration proceedings were brought in New York, but the respondent requested that the arbitration be removed to Massachusetts. There was no clause as to the place of arbitration. The court held that the jurisdiction of the arbitral proceedings was not dependent on judicial decision regarding the intention of the parties to arbitrate elsewhere. In effect the decision was that the conflict rules of New York, in the absence of specific intent, will not operate to determine the "proper" system of law of the proceedings. Thus the "law of the proceedings" would be that of New York despite the strongest grouping of contacts away from it.

Nonenforcement has been based, however, on the issue of *judicial jurisdiction.* In *Skandinaviska Granit Aktiebolaget v. Weiss,* [47] the New York Appellate Division held that the Swedish arbitral tribunal never obtained jurisdiction over the defendant.

2. England

In England, when confronted with the bare arbitration clause, the arbitrator will have a narrower selection of doctrines in deciding what rules to apply to the dispute.[48] Moreover, the Arbitration Act of 1950 [49] does not concern itself at all with the issue of the reasoned award, but rather leaves it up to the parties to require a reasoned award. The parties in *Heaven & Kesterton Ltd. v. Sven Widaeus A/B* [50] had made a contract for the sale of lumber; the seller delivered, but the buyers alleged defects of quality and demanded damages and the right to reject certain goods. The court was unsympathetic to the plea for a statement of reasons:

> This is not an award in the form of a special case, and I am bound to say that I can see no possible reason why an umpire who has not been asked to state an award in the form of a special case should give any reasons for any part of his award, whether the substantive part or the costs part.[51]

It should be added that the rules of the leading British arbitration institutions contain no provisions requiring arbitrators to state reasons.[52]

> Ordinarily an English arbitrator considers himself as acting prudently in not giving reasons. He might thereby afford the party against whom the award is given an opportunity of taking it to the Courts to have the reasons reviewed. *If the English award has to be enforced in a country, the laws of which require the reasons for the award to be stated in it, it will be necessary for the reasons to be stated.*[53]

It is, however, the duty of the arbitrator, in the absence of an express provision to the contrary, to decide the questions submitted to him according to the legal rights of the parties, and not merely according to what he may consider fair and reasonable under the circumstances.[54]

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47. 226 App. Div. 56, 234 N.Y. Supp. 202 (1929). See also Kerr v. Tagliava, 101 Misc. 614, 168 N.Y. Supp. 697 (Sup. Ct. 1917), *aff'd,* 186 App. Div. 893, 172 N.Y. Supp. 901 (1918), *aff'd,* 229 N.Y. 542, 129 N.E. 907, *cert. denied,* 254 U.S. 645 (1920).

48. Perry v. Stopher, [1959] 1 Weekly L.R. 415–20 (C.A.).

49. The Arbitration Act, 1950, 14 Geo. 6, c. 27.

50. [1958] 1 Weekly L.R. 248 (Q.B.).

51. *Id.* at 252. *Cf.* Smeaton Hanscomb & Co. v. Sasson I. Selty Son & Co., [1953] 1 Weekly L.R. 1481 (Q.B.) (dealing with the special case stated).

52. Domke, *Arbitral Awards Without Written Opinions, supra* note 29, at 254.

53. Macassey, *England,* in INTERNATIONAL COMMERCIAL ARBITRATION 83 (rap. gen. Sanders 1956) [hereinafter cited as HANDBOOK]. (Emphasis added.) See generally, CHITTY, CONTRACTS 741–70 (22d ed. 1961).

54. David Taylor & Son Ltd. v. Barnett Trading Co., [1953] 1 Weekly L.R. 562 (C.A.).

This duty is generally considered to be implied in a submission to arbitration.[55] The cases generally relate to specific statutory rules of law, but extension has been made to discretionary rules of law. Today, when faced with a rule of law upon which the judge would have a choice of alternatives, the arbitrator, too, must decide within the bounds set by the alternatives.[56]

Despite these restrictions upon the arbitrator, statutory limitations on challenges to his decision are quite severe. Section 23 of the Arbitration Act of 1950 states:

> Where an arbitrator or umpire has misconducted himself or the proceedings, or an arbitration or award has been improperly procured, the High Court may set the award aside.[57]

These are the only reasons for which the Act permits a challenge. Intentional disregard of the law is such misconduct on the part of the arbitrator as to justify setting the award aside.[58] Naturally, without a reasoned award to provide evidence of intentional disregard, such a challenge would be difficult to sustain.

The institution of the special case stated [59] does much to mitigate

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55. See Russell, *supra* note 9, at 137; Macassey, *England,* in HANDBOOK 65.

56. Chandris v. Isbrandtsen-Moller Co., [1951] 1 K.B. 240, 260, 261 (C.A. 1950); Stotesbury v. Turner, [1943] K.B. 370; N. V. Vulcaan v. Mowinckels Rederi A/S, [1938] 2 All E.R. 152 (H.L.). No case has been found which directly holds that the arbitrator is bound to use the same substantive rules of law that the courts would have applied, although it seems consistent to expect that in such a case the court would not enforce the award.

57. The Arbitration Act, 1950, 14 Geo. 6, c. 27 § 23(2).

58. Darlington Waggon v. Harding, [1890] 7 T.L.R. 106.

59. Control over the arbitration process is maintained through the use of the special case whereby the courts determine questions of law arising in the arbitration. A special case, when stated, during the arbitration proceeding is set down for hearing before a single judge in court. An appeal from the decision of the judge on the case stated lies to the Court of Appeal but only by leave of the High Court or of the Court of Appeal.

Under § 21(1)(b) of the Arbitration Act an arbitrator may, or may be ordered by the court to state his award or any part of it in the form of a special case for the court to decide. The arbitrator usually proceeds in the following way: "The following question of law is left for the decision of the Court . . . . If the Court decides this question in the affirmative the award is as follows: If within . . . weeks after this award is taken up by a party to the arbitration, the case stated therein is not set down for hearing by the Court, I award as follows . . . ." See HANDBOOK 69. For a recent criticism of the special case stated see Sanders, *Should England Maintain the Court Control by Means of the Special Case Stated?* 4 RASSEGNA DELL' ARBITRATO (1964).

In the United States, some state arbitration statutes provide for an equivalent to the institution of the special case stated. For example, the Connecticut statute provides:

> Section 52-415. . . . At any time during an arbitration, upon request of all the parties to the arbitration, the arbitrators or an umpire shall make application to any designated court, or to any designated judge, for a decision on any question arising in the course of the hearing, provided such parties shall agree in writing that the decision of such court or judge shall be final as to the question determined and that it shall bind the arbitrators in rendering their award. An application under this section may be heard in the manner provided by law for the hearing of written motions at a short calendar session or otherwise as the court or judge may direct.

CONN. GEN. STAT. REV. § 52-415 (1958).

There have been relatively few cases brought under the statute. See Murov v. Lumbermens

the harsh limitation on the right to challenge. A question of law when it arises is decided by a regular court of law in summary proceedings. Nevertheless, the solution of the dispute remains in the hands of the arbitrator and within the framework of the arbitration process. The arbitrator will act on the decision of the court only as to the particular point of law decided by it. The applicable statutory language is found in section 21 of the Arbitration Act of 1950:

> (1) An arbitrator or umpire may, and shall if so directed by the High Court, state—
>
> (a) any question of law arising in the course of the reference; or
>
> (b) an award or any part of an award, in the form of a special case for the decision of the high court.[60]

An arbitrator may properly refuse to state a case; but he must then give the party desiring it a reasonable opportunity to apply to the court for an order directing him to state the case.[61]

The way is thus open for the dissatisfied party to bring the question of law to the court, either by by-passing the arbitrator, or, in effect, asking that his decision be reversed. The danger remains that if a case is stated during the arbitration, and the court meanwhile announces its decision on the point of law, the arbitrator may disregard the court's ruling. This is, of course, more likely if the contract did not require a reasoned award.

In the past the courts exercised the power to set aside an award for errors in law appearing on the face of the award,[62] but only where the parties refused to consent to the arbitrator's stating a special case. Since 1934 no such consent has been required and consequently the power of the courts has not been used. If the parties to the dispute had specifically put a question of law before the arbitrators there would be no recourse at all from the award.[63]

As a result of the considerable power given to the parties by the institution of the special case stated, the arbitrator usually pays close attention to the courts in determining what system of substantive law will be applied to the dispute. His choices consist of (a) application of the substantive law of England, and (b) application of the contracts conflicts rules of England to determine the "proper law."

Mutual Casualty Co. (application of arbitrator for decision under § 52-415) No. 122341, Superior Court, Fairfield County, January 4, 1965.

60. The Arbitration Act, 1950, 14 Geo. 6, c. 27 § 21.

61. Ellenbogen, *English Arbitration Practice*, 17 LAW & CONTEMP. PROB. 658, 663 (1952); Russell, *Arbitration*, *supra* note 9, at 190, 314. See Willers & Co. v. Nathan & Co., 30 Lloyd's List L.R. 208 (C.A. 1928). An arbitration agreement may not preclude the parties from applying to the court for an order directing a case to be stated. Such a clause will be void as against public policy. Czarnikov v. Roth, Schmidt & Co., [1922] 2 K.B. 478 (C.A.).

62. Absalom Ltd. v. Great Western Garden Village Soc'y, [1933] A.C. 592.

63. See Wulf v. Dreyfus, [1917] 86 L.J.K.B. (n.s.) 1368; Government of Kelantan v. Duff Dev. Co., [1923] A.C. 395, 409.

The English courts have long applied the "proper law of contracts" rule to cases where no particular law has been chosen, and where the dispute relates to what Professor Cheshire calls "the substance of the obligation." [64]

Professor Graveson has summarized clearly the English concept of the "proper law," which can be termed the system of law whose rules will be applied to determine the obligations arising from the contract. He states that the recognition of the proper law depends upon the intention of the parties, ascertained objectively and judicially. When no intention has been expressed, the court will deduce, from the terms of the contract and surrounding circumstances, what must have been the intention of the parties, viewed as reasonable men.[65]

This definition is obviously meant to be a compromise between the objective school headed today by Cheshire and the subjective school among whose strong adherents one finds E. J. Cohn.[66] Both look to the various acts of the parties, the former to establish the legal system with which the contract has the most substantial connections, and the latter to establish from these acts what the parties actually meant to specify.

The relevant factors which serve to show the most substantial contacts [67] or to indicate the intention of the parties have been compiled by Cheshire. The importance of any one of these factors will vary with the type of contract. Cheshire relies heavily on the *Assunzione* [68] case to prove that the English courts will look only to the objectively determined points of connection between the system of law and the contract. However, close reading of the case reveals that when no intention as to the governing law has been expressed, "the court has to impute an intention, or to determine for the parties what is the proper law which as just and reasonable persons, they ought or would have intended if they had thought about the question when they made the contract." Courts have utilized both theories, and it seems that in the absence of a choice of law clause, the result will be similar whether one or the other theory is used.[69]

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64. CHESHIRE, PRIVATE INTERNATIONAL LAW 248 (6th ed. 1961).

65. Graveson, *The Proper Law of Commercial Contracts,* in CONFLICTS OF LAWS AND INTERNATIONAL CONTRACTS 1 (Summer Institute on International and Comparative Law, U. of Mich. Law School 1949) [hereinafter cited as MICH. SUMMER INSTITUTE].

66. See Cohn, *The Objectivist Practice on the Proper Law of Contract,* 6 INT'L & COMP. L.Q. 373 (1957).

67. These facts include: domicile of parties, the national character of a corporation and place of principal business, the *lex loci contractus,* the *lex loci solutionis,* the style of drafting (language), the stipulation which is valid under one law and void under the other, and the nature of the subject matter or situs. CHESHIRE, *op. cit. supra* note 64; see also de Vries, *Choice of Language in International Contracts,* in INTERNATIONAL CONTRACTS: CHOICE OF LAW AND LANGUAGE 14 (Reese ed. 1962).

68. [1954] P. 150 (C.A. 1953).

69. The number of contacts that a particular system of law has with the contract can be said either to demonstrate the implied intention of the parties or to provide a logical reason for attaching the contract to the system of law, without specific regard for the

There is no indication, however, either in the cases or in treatises and articles, that the determination of the "proper law" extends to a similar determination of the law of the proceedings. It would appear that if the arbitration takes place in England, English statutory and judicial rules will be applied, as will English conflict of laws doctrines.

3. France

If the bare arbitration clause is to be applied in France, a submission (*compromis*) must be made before the arbitration can proceed.[70] Article 1006 of the *Code of Civil Procedure* provides that:

> The *compromis* will designate the issues in controversy and the names of the arbitration on pain of invalidity.[71]

When the *compromis* has been reached the arbitration may begin.[72] The arbitrator is bound to give reasons for his determination pursuant to Article 14 of the *Code of Civil Procedure*.[73] The award must contain reasons, that is, the statement of reasons which justify the decision which will be taken.[74]

Unless the parties designate in the *compromis* that they wish the arbitration to be converted into a proceeding *ex aequo et bono* by requiring the arbitrators to act as *amiables compositeurs,* the arbitrators will decide according to the normal rules of law.[75] If the arbitration is

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subjective intent of the parties. Objective: Bonython v. Commonwealth of Australia, [1951] A.C. 201 (P.C.) (Austl.); Tomkinson v. First Pennsylvania Banking & Trust Co., [1960] 2 Weekly L.R. 969 (H.L.). Subjective: Rex v. International Trustee for Bondholders A/G, [1937] A.C. 500 (1936); Jacobs v. Credit Lyonnais, 12 Q.B.D. 589 (C.A. 1884); The Metamorphosis [1953] 1 Weekly L.R. 543 (P.). See also Zivnotenska Banka Nat'l Corp. v. Frankman, [1949] 2 All E.R. 671 (H.L.).

70. The right to arbitrate future disputes dates to the Law of 31 December 1925. The requirements that the contract be commercial in the sense applied in the Commercial Code was relaxed in the Law to allow for contracts "relatives aux actes de commerce entre toutes personnes." BULL. LEGISLATIF 912–13 (Dalloz 1925). An arbitration clause in a contract, not considered an "acte de commerce" where one of the parties is not a "merchant" (here between a private person and a company), is not enforceable. Martin v. Cie Ass. l'Equite, Cour de Cassation, 2 déc. 1964, [1965] REVUE DE L'ARBITRAGE 17.

71. Le compromis designera les objects en litige et les noms des arbitres a peine de nulité. Art. 1006, CODE DE PROCÉDURE CIVILE.

72. If one of the parties refuses to agree to a *compromis,* the demanding party may obtain the designation of an arbitrator on behalf of the party who refuses to name one. Cie d'Assurances l'Alsacienne v. Lamiot, Cour de Cassation, 22 jan. 1946, D.1946.239. *Cf.* Menoudji-Films, Marceau Kleber Films v. Productions Roitfeld S.A.R.L., Cour d'Appel de Paris 26 fév. 1959, [1959] REVUE DE L'ARBITRAGE 87.

73. Domke, *Arbitral Awards Without Written Opinions,* in LEGAL ESSAYS IN HONOR OF HESSEL E. YNTEMA 250 (1961). See Cour de Cassation, 3 nov. 1960, [1961] Revue de l'Arbitrage 14 (award was annulled as contrary to *ordre public* because reasons were not given).

74. ROBERT, GUIDE PRATIQUE DE L'ARBITRAGE 23 (1958). Even when the arbitrator is acting as an *amiable compositeur,* recent cases have held him to the duty of giving reasons. Zafiropulo v. Lambert, Cour d'Appel de Paris, 11 avril 1957, [1958] REVUE DE L'ARBITRAGE 21.

75. Article 1019, CODE DE PROCÉDURE CIVILE. The parties may decide to make use of a type of arbitration called *amiable composition* whereby the arbitrator is freed from all

to be a "general" one the arbitrator must follow all legal rules, even the non-mandatory ones.[76]

The right of the dissatisfied party to challenge the arbitral award is guaranteed by Article 1023 of the *Code of Civil Procedure.* As a matter of fact, even if no appeal would have been possible had the case been conducted before a court of law, the award may be appealed to a competent court.[77] It thus appears likely that the arbitrator will observe the French conflict of laws rules.

Where no express choice of law has been articulated by the parties, the cases today may follow the rule expressed in *Société de Fourrures Renel v. Allouche:*

> [I]n the absence of an express statement on their part it is a matter for the Court which determines the merits of the case to decide according to the nature of the agreement and the circumstances of the case what law should govern the relations of the contracting parties.[78]

This formulation comes very close to that of the *Restatement of Conflicts Second* and to the view of the English objectivists. There is no mention made of the "implied" intention of the parties. Professor Batiffol has advanced a similar theory, which will be discussed in the next section.[79]

Dr. Delaume, in his comparative study of United States and French Private International law, states that French courts usually declare that they decide according to the "presumed intention" of the parties, although it is clear that in most cases the solution is the result of the court's independent judgment and the application of the relevant conflict of laws rules.[80] He notes that the conflicts rules most frequently

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requirements of the law and decides *ex aequo et bono.* Article 1019, CODE DE PROCÉDURE CIVILE. The arbitrator is never freed, however, from the duty of rendering a reasoned award.

76. Robert, *France* in HANDBOOK 255.

77. Robert, ARBITRAGE CIVIL ET COMMERCIAL 218–20 (1961). Robert states that the men who drafted the Code were anxious to preserve the right of appeal to the parties, and yet they realized that among the purposes of arbitration are speed and decisiveness. They arranged for the parties to be able to renounce the right of appeal in the *compromis.* (Article 1010, CODE DE PROCÉDURE CIVILE).

78. Cour de Cassation, 6 juillet 1959, 48 REV. CRIT. DR. INT. PR. 708 (1959), 90 JOURNAL DE DROIT INTERNATIONAL 476 (1960).

79. BATIFFOL, TRAITÉ ÉLÉMENTAIRE DE DROIT INTERNATIONAL PRIVÉ 620–24 (3d ed. 1959); see Cie française de l'Afrique Occidentale v. Sté du Haut-Ogouée, Cour de Cassation, 24 avril 1952, 41 REV. CRIT. DR. INT. PR. 502 (1952). The court used both Professor Batiffol's theory of "localization" of the contract and the subjectivist theory of the presumed intention of the parties. In the note following the case, Motulsky states that he rejoiced over the fact that "localization" had been used and this decision demonstrated the actual state of French positive law. The case reminds one of the Assunzione in that it demonstrates that, in France as well as elsewhere, the two theories may bring about the same result (where the parties have not expressed their intention).

80. DELAUME, AMERICAN–FRENCH PRIVATE INTERNATIONAL LAW 121 (2d ed. 1961). See cases cited therein at 121. By "relevant conflict of law rules," Delaume evidently means the traditional rules.

applied, both in France and in the United States, look to the *lex loci contractus* or to the *lex loci solutionis.*[81] One should feel encouraged, however, by such recent cases as *Fourrures Renel v. Allouche.*[82] The picture painted by Dr. Delaume invites comparison with the equally confusing canvas described by Professor Rabel in his account of the state of contract conflicts rules in the United States.[83]

Nevertheless, it seems reasonably accurate to state, although no case law has been found to bolster this view, that the arbitrator applies the French conflicts rules at the risk of having the award anulled if he has not complied. Mezger, in his recent work on this subject, reminds the reader that conflict of laws rules are mandatory in all legal systems and are thus binding on the arbitrator.[84] In France, the courts are apt to be particularly well informed as to the basis of the arbitral determination.

Despite the trend toward an equivalent of the "proper law" doctrine, no case has been found in which there is even an intimation that the "law of the proceedings" should be determined according to the "proper law" method.

4. Summary and Issues of Enforcement

In the states discussed, a result of the contract neither indicating the law to govern the contractual relationship nor specifying a particular system of law to underlie the contract is that neither party will have much of an idea as to which substantive law will govern his obligations. Indeed, the rules applied by the arbitrator may not have much to do with the substantive law as recognized and applied by the courts. Nor can the defeated party, if he is a foreigner, hide behind the frontier of his country. Often enough, the award will be enforced against him at home even if not all the mandatory rules described above are followed. This is particularly true in France where the clear distinction made between domestic public policy and international public policy permits the enforcement of foreign awards which would not be recognized if domestic.[85] In addition, the right to challenge the enforcement

81. The first has been more popular in France. Thus references made to nationality, domicile or other determining factors are frequently made by way of dictum only, the law applicable being or coinciding with the *lex loci contractus* or the *lex loci solutionis.*

82. Cour de Cassation, 6 juillet 1959, 48 REV. CRIT. DR. INT. PR. 708 (1959), 90 JOURNAL DE DROIT INTERNATIONAL 476 (1960).

83. 2 RABEL, CONFLICT OF LAWS: A COMPARATIVE STUDY 451–52 (2d ed. 1947).

84. Mezger, *The Arbitrator and Private International Law,* in INTERNATIONAL TRADE ARBITRATION 229 (Domke ed. 1958).

85. See Holley, *Enforcement of American Awards in France,* 14 ARB. J. (n.s.) 83, 89–92 (1959). See also Broutchoux v. Elmassian, Cour de Cassation, 14 juin 1960, [1960] Revue de l'Arbitrage 97, where the court held that "the absence of stated reasons in a foreign arbitration award is not in itself contrary to French international public policy." See also Klein, *Autonomie de la volonté et arbitrage,* 47 REV. CRIT. DR. INT. PR. 255, 270 (1958).

In Gerstle v. Sté Merry Hull et Cie., Cour d'Appel de Paris, 30 mai 1963, [1963] Revue

of the foreign award is much more limited in France than is the right to appeal in domestic cases.[86]

The adherence of both France and England to the Geneva Convention of 1927 on the Execution of Foreign Arbitral Awards has facilitated the reciprocal enforcement of awards, and the 1958 United Nations Convention for the Recognition and Enforcement of Foreign Arbitral Awards will contribute to effective enforcement of awards rendered abroad.[87] The United States has never acceded to any of these multinational conventions.

The federal courts and the courts of New York have recognized most foreign awards brought into the United States despite the fact that neither the federal nor the New York arbitration statute contains any provision regarding such enforcement.[88] The factor of public policy, recognized even in the United Nations convention, is probably the strongest impediment to more widespread enforcement. However, for a party or a corporation with extensive interests in several states recognition and enforcement of an award in any one of the states would be sufficiently damaging even if the courts of the other states, including the one where the arbitral tribunal sat, were to refuse to recognize the award for public policy reasons.[89]

The clause, even as a bare arbitration clause, will be sufficiently effective to permit arbitration of a dispute relating to performance in all three legal systems studied. It is often said that most bare arbitration clauses are really an after-thought, put in as boiler-plate.[90] The party envisioning itself as the possible defendant might do well not to commit itself to an arbitration, possibly held within some other system of law,

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de l'Arbitrage 93, J.C.P. (Juris Classeur Périodique) 1963, II. 13338, the court accepted the argument made by the respondent that the mandatory provision for a *compromis* and for a reasoned award in French arbitration law was not applicable when the award had been rendered elsewhere (in this case in New York and under New York law). However, the court did not exclude all right to appeal an award rendered abroad. If the award is contrary to the international public policy (*ordre public international*) of France, an appeal is possible. The Cour d'Appel reversed a decision by the lower court not to hear opposition to the application for an *exequatur*. The appellant here had opposed the granting of an *ordonnance d'exequatur* on the award on the ground that the arbitrators had exceeded their authority in making the award. See Mezger, *Enforcement of American Awards in France*, 17 ARB. J. (n.s.) 74 (1962).

86. Bredin, *The Paralysis of Foreign Arbitral Awards Through the Abuse of Remedies*, 89 J. DE DROIT INTERNATIONAL 638, 649–51 (1962). The author cites a decision of the Cour de Cassation of 3 November, 1960 in which the court stated that the Cour d'Appel of Caen "has lawfully held that a foreign arbitral award cannot be submitted to French judges by way of an appeal."

87. Pisar, *The United Nations Convention on Foreign Arbitral Awards*, 1959 J. BUS. L. 219.

88. Domke, *The Enforcement of Foreign Arbitral Awards in the United States*, 13 ARB. J. (n.s.) 91, 93–97 (1958). See also Bresch, *The International Enforcement of English Arbitral Awards*, 2 BUS. L. REV. 98 (1955).

89. *E.g.*, Skandinaviska Granit Aktiebolaget v. Weiss, 226 App. Div. 56, 234 N.Y. Supp. 202 (1929).

90. Maw, *Conflict Avoidance in International Contracts*, in INTERNATIONAL CONTRACTS: CHOICE OF LAW AND LANGUAGE 33 (Reese ed. 1962).

utilizing the mandatory rules of that system, and subject to rules governing the performance of the transaction which the party did not contemplate.

B. *The Choice of Law Clause*

The parties have *added* a phrase to the bare arbitration clause to the effect that: "All disputes shall be settled according to the laws of *X*." [91]

The law chosen by the parties may be that of the system of either of the parties or that of another state having no connection with them.[92] Three reasons that lead individuals to choose a law unconnected with the law of the parties have been advanced. The parties may choose the law of a third state:

> 1. In order to guard themselves against undue interference with the performance of the contract. The economic control put on the seller by the government might be a shelter for him not to perform. The parties might then seek a *free economic system.*
> 2. In order that a *"neutral" system* may prevail.
> 3. In order that a *"strong" system,* one with well-developed rules, may prevail.[93]

1. United States

In the United States, where each state has its own conflict of laws rules, the effect of a designation of a governing law in a contract will

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91. It is submitted that the effect of this choice-of-law clause which is found in the arbitration clause is the same as one which the parties could have placed in another part of the contract (a choice-of-law clause independent of the arbitration clause). A clause which states: "arbitration proceedings to be governed in accordance with the law of X" appears a rather clear attempt, whether successful or not, to choose a law of the proceedings. Such a clause coupled with a choice-of-law elsewhere in the contract would seem to be consistent. However, it would not seem logical to infer that a choice-of-law for the settlement of disputes is an effort to choose the law of the proceedings merely because it is found within the arbitration clause. There is, of course, the possibility that the contract could contain two inconsistent choice-of-law clauses, one in the arbitration clause and the other in another part of the contract. It may be argued then that the choice in the arbitration clause was meant to concern only the law of the proceedings. See FOUCHARD, L'ARBITRAGE COMMERCIAL INTERNATIONAL 362 (1965). (The author states that the parties may choose one system of law for procedure and another for the substantive part of the dispute.)

92. It is possible for the parties to specify public international law as the law governing the substance of the obligation. The effect of such a reference in a contract between private persons, with respect to enforcement of the award in national courts and the issue of the existence of sufficiently detailed contract rules of public international law, is beyond the scope of this article. However, this choice-of-law possibility in contracts between private and public entities is of considerable importance. See note 13 *supra*. See generally FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 170, 173–75, 176 (1964). Although Professor Friedmann does not expressly suggest the use of public international law, his discussion of the development of an international commercial law as a branch of public international law might well be extended to include commercial relations between private persons.

93. Cohn, *supra* note 66, at 389. (Emphasis added.)

depend upon the local rules of the particular state. In New York, as in other states, the freedom of the parties to choose the governing substantive law, at least with respect to performance, has been accepted [94] with the proviso that there should be some reasonable relationship between the law chosen and the contract.[95] The reasonable relation may be shown when the law of the domicile of one of the parties is specified,[96] and is nearly always acceptable when either the *lex loci contractus* (law of the place of contracting) or the *lex loci solutionis* (law of the place of performance) is chosen. But when the law chosen apparently has little contact with the contract the courts will probably not recognize it.[97]

Professor Reese has expressed doubts as to the usefulness of restricting the parties' choice to laws which have *some connection* with the contract.[98] He would only require that there be some reasonable *basis* for making the decision. This freedom is stressed in matters which Professor Reese finds within the normal contractual powers of the parties, which include rules of interpretation, sufficiency of performance, and excuse for non-performance (frustration and impossibility).[99]

94. *But see,* Haag v. Barnes, 9 N.Y.2d 554, 175 N.E.2d 441, 216 N.Y.S.2d 65 (1961) where the New York Court of Appeals declared: "The agreement, in so many words, recites that it 'shall in all respects be interpreted, construed and governed by the laws of the State of Illinois' . . . . But, even if the parties' intention and the place of the making of the contract are not given decisive effect, they are nevertheless to be given heavy weight in determining which jurisdiction 'has the most significant contacts with the matter in dispute.' " The court found that objectively determined contacts in the case also clearly pointed to Illinois law. It is, however, significant that the last sentence of the quote above was taken by the court from Auten v. Auten, 308 N.Y. 155, 124 N.E.2d 99 (1954), in which no express choice of law had been made. This case then takes as its foundation principles announced in a situation where the parties had not announced a choice of law. Further, it is entirely consistent with the concept of "localization" advanced by Professor Batiffol, *op. cit. supra* note 79. The impact of the case has apparently not diminished pressure for full "autonomy of wills," particularly in the commercial context.

95. See A.S. Rampell, Inc. v. Hyster Co., 3 N.Y.2d 369, 381, 165 N.Y.S.2d 475, 486, 144 N.E.2d 371, 379 (1957): "Oregon law controls the construction of this agreement, since the parties intended it to be applicable and it has a *reasonable relation* to it . . . ." (Emphasis added). *Cf.* 2 BEALE, CONFLICT OF LAWS 1079 (1935). See also 2 RABEL, *op. cit. supra* note 83, at 404.

96. Born v. Norwegian America Line, Inc., 173 F. Supp. 33 (S.D.N.Y. 1959).

97. E. Gerli & Co. v. Cunard S.S. Co., 48 F.2d 115 (2d Cir. 1931) (public policy rejection of choice of law). *Cf.* Hal Roach Studios, Inc. v. Film Classics, Inc., 156 F.2d 596 (2d Cir. 1946) (the same court which had insisted on non-recognition in *Gerli* did so in this case. The court stressed that its ordinary conflicts solution, *lex loci solutionis,* was inapplicable because there were multiple places of performance.).

98. Reese, *The Power of the Parties to Choose the Law Governing Their Contract,* 1960 AM. SOC'Y INT'L LAW PROCEEDINGS 54. See Siegelman v. Cunard White Star, Ltd., 221 F.2d 189 (2d Cir. 1955) (The law of neither the *lex loci contractus* nor the *lex loci solutionis* was specified. However, there was no public policy barrier here, unlike *Gerli.*).

99. During the course that Professor Reese gave at the 1964 Session of the Hague Academy of International Law he stated that the problem of party autonomy arises with respect to only a relatively small number of questions. The parties' will is supreme in most areas of contract law. He observed that, in these areas, rules are designed to fill gaps in a contract which the parties could themselves have filled, if they had thought about it,

In addition to the reasonable relationship limit, the courts will deny effect to the choice of law if the contract was procured by misrepresentation, duress, or mistake.[100] Of course, the extensive limitations of public policy will be employed to safeguard the state's interests.[101] There seems to be no doubt that, in the courts of New York and elsewhere, the determination of the extent of the freedom of the parties, the "autonomy of wills," rests within the legal system of the forum.[102]

Since an express choice of law by the parties means that they rely on the substantive law of the chosen state,[103] the courts may require its application by the arbitrators.[104] Of course another clause requiring reasons to be stated should be added if the narrow review power of the court is to be used to determine whether the chosen law was applied.

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by an explicit contractual provision. This is true of rules relating to interpretation, to conditions precedent and subsequent, to excuses for non-performance including the effects of impossibility. The courts will give effect to a contractual provision, explicit in its terms, which deals with such matters. He concluded that there is no reason why the parties, instead of regulating such matters in an explicit manner in their contract, cannot generally provide a shorthand device. This device is to stipulate that the law of a particular state shall be applied. American courts have never doubted this principle when they had this problem squarely in mind.

100. Rowland v. Old Dominion Building & Loan Ass'n, 115 N.C. 825, 18 S.E. 965 (1894). This is the venerable case in which the judge remarked: "Calling it a Virginia contract does not make it one." *Id.* at 831, 18 S.E. at 967.

101. Reese, *supra* note 98, at 55. It is upon this last limitation that one may distinguish the *Gerli* case from Siegelman v. Cunard White Star, Ltd., 221 F.2d 189 (2d Cir. 1955).

102. The New York court in Landerton Co. v. Public Serv. Heat & Power Co., 118 N.Y.S.2d 84 (Sup. Ct. 1952), was asked to confirm an award and to restrain the respondent from instituting a suit in New York. The arbitration agreement provided that Connecticut law should govern. When a dispute arose, the Connecticut party called for arbitration in his state. Some of the hearings were held in New York (for the arbitrator's convenience), but the parties had agreed that Connecticut law would still govern. The New York court considered the entire proceeding subject to the law of Connecticut and suggested that the resulting award "should be the subject of enforcement . . . in that state." *Id.* at 86. Any encouragement that one might derive from the thought that the New York court permitted Connecticut law to govern even though the agreement, made in New York, resulted in some part of the arbitration in New York, is quickly dispelled. The court gave no encouragement to the "autonomy of wills" doctrine. This doctrine would have been vindicated only if the entire arbitration had been held in New York and had later been enforced by the New York courts using the Connecticut legal system as the "law of the proceedings."

103. Generally, when a choice of law is made local substantive law is meant. To apply the whole law of the system chosen, "would also introduce the uncertainties of conflict of laws into the case and thus serve to defeat the objectives of certainty and predictability which application of the law of the parties' choice is designed to achieve." Reese, *The Power of the Parties to Choose the Law Governing Their Contract, supra* note 24, at 55. See FOUCHARD, L'ARBITRAGE COMMERCIAL INTERNATIONAL 360 (1965). Fouchard states that where the parties have chosen a substantive law, the arbitrator can well dispense with the problem of applying conflicts rules. However, often "the parties, preoccupied primarily with the technical, commercial or financial content of their contract, will neglect to adopt a national law . . . ."

104. See Wilko v. Swan, 201 F.2d 439, 444 (2d Cir.), *rev'd*, 346 U.S. 427 (1953), where the court stated: "[W]hile it may be true that arbitrators do not ordinarily consider themselves bound to decide strictly according to legal rules, there can be no doubt that they are so bound if the arbitration agreement so provides."

2. England

The English arbitrator may well pay great attention to the words of Professor Cheshire (who is not himself a believer in *complete* autonomy of wills):

> [O]nce a contract has been validly created according to the law to which objectively it belongs there is . . . no objection to allowing full scope to the free will of the parties. . . . It would seem indeed, that where the law expressly chosen by the parties has been accepted by the courts as entitled to govern the substance of the obligation . . . there has always been some factual connexion . . . between the contract and the country of the chosen law. Nevertheless, the prevailing opinion is that no such connexion is necessary, except where the issue relates to the creation of a binding obligation.[105]

Professor Cheshire is, it would seem, ready to admit that the *Vita Food Products, Inc. v. Unus Shipping Co.*[106] case would be correct if applied to the "substance of the obligation." He maintains, however, that there are certain aspects of the contractual relationship that cannot be governed by the will of the parties.[107] The validity of a contract is perhaps his prime example. Actually, except for the *Vita Foods* case, the law has favored Cheshire's theory.[108] The objective theory offers no resistance, however, to the autonomy of wills when the choice of law is as to *performance*.[109]

The discussion on the question of validity reveals the narrow scope of the power of the parties to choose the law governing the contract. This power is contingent upon the determination by the English judge that substantial contacts for the choice exist. There seems to be no way to refer the whole contract to another law of the proceedings [110] as might have been contemplated by the parties when they expressed their choice.[111]

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105. CHESHIRE, *op. cit. supra* note 64, at 250.

106. [1939] A.C. 277.

107. *Cf.* Cohn, *supra* note 66, at 389. See Mann, *The Proper Law of the Contract,* 3 INT'L L.Q. 60 (1950). *But see* Morris, *The Proper Law of a Contract: A Reply,* 3 INT'L L.Q. 197 (1950). See also Wolff, *Some Observations on the Autonomy of Contracting Parties in the Conflict of Laws,* TRANS. GROT. SOC'Y 142 (1949).

108. The Fehrmann, [1958] 1 All E.R. 333. Lord Denning observed: "I do not regard the choice of law in the contract as decisive. I prefer to look to see with what country is the dispute most closely concerned." *Id. at* 335. See 7 INT'L & COMP. L.Q. 599 (1958). See also *In re* Wagg & Co., [1956] 1 Ch. 323.

109. See CHESHIRE, *op. cit. supra* note 64, at 249–51.

110. It will be remembered that the "law of the proceedings" signifies the basic system within which the arbitration takes place, that system which gives it its status. Complete "autonomy of wills" would mean that the parties have the right not only to choose within the area normally reserved to the parties, or even certain other rules surrounding the contract-making process (such as the capacity of parties and validity) but also the entire system of law whose rules would be considered as enveloping the entire transaction. See generally Reese, *supra* note 98.

111. The *Vita Foods* case, however, not only permitted a full choice of law as to the validity of the contract and the "substance of the obligation" but also considered that the

3. France

The French arbitrator [112] faces little difficulty when this version of the clause is stipulated. The court decisions have given full rein to the choice of law made by the parties, subject to a few specific limitations (principally those of *fraude à la loi* and *ordre public*). The celebrated case of 5 dècembre 1910 was the first to announce that "the law applicable to contracts, whether with regard to their formation or to their effect and conditions, is that adopted by the parties." [113] Batiffol states that the majority of decisions are so oriented.[114] His theory of *localization* which approximates that of Cheshire,[115] would not automatically enforce the intention of the parties, but would treat their express intent as one of the contacts (*indice*), albeit the most decisive one. The judge would then apply the forum's conflicts rule to place the contract within the law of the country with the most substantial number and quality of contacts.[116]

The strongest limitation on this freedom of the parties is embodied in the doctrine of *fraude à la loi*. It prevents the parties from stipulating another system of law which would save the contract from being voided for contravening some important domestic rule of law. But this limitation, called "fraudulent evasion" [117] by Rabel, has been declining in French law. The *Cour de Cassation* has recognized the validity of contracts made by Frenchmen who stipulated that a foreign law was to govern, when "interests of international commerce come into play." [118] Batiffol concludes: "Of course, the remedy of *fraude à la loi* remains to guard against a purely artificial localization meant to elude a legal prescription." [119]

The actual extent to which the courts have adhered to the express intentions of the parties is demonstrated by the well-known case of

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law of the proceedings had been chosen by the party in that it had applied that system of law's conflicts rules. The most damaging qualification that can be made of the case is that the Privy Council here decided in favor of the application of English law. That law had been chosen in a contract for the shipment of goods between Newfoundland and New York, and the original suit was brought in Nova Scotia. The Canadian court applied the English conflicts rules to learn how the validity of the bills of lading were affected by Newfoundland acts. It seems likely that the English courts would not be so ready to decide that the "law of the proceedings" is not English law in a case where the chosen law is foreign. [1939] A.C. at 292.

112. It is assumed that the arbitrator is in charge of what is termed in France "judicial" arbitration, and is not acting as an *amiable compositeur*.

113. Cour de Cassation, 5 décembre 1910, 1911 Sirey. 1.129.

114. BATIFFOL, *op. cit. supra* note 79, at 619.

115. CHESHIRE, *op. cit. supra* note 64, at 216.

116. Batiffol, *Public Policy and the Autonomy of the Parties*, in MICH. SUMMER INSTITUTE 76. See also BATIFFOL, *op. cit. supra* note 79, at 620, 624.

117. 2 RABEL, *op. cit. supra* note 83, at 400.

118. Mardelé v. Muller, Cour de Cassation, 19 fév. 1930, S. 1933. I. 41 note Niboyet; Dambricourt v. Rossart, Cour de Cassation 27 jan. 1931. S. 1933. I. 41 note Niboyet.

119. BATIFFOL, *op. cit. supra* note 79, at 627. It must be remembered that *fraude à la loi* is a rule of French law.

Monier v. *S.A.R.L. Scali frères.*[120] The relevant clause provided for "arbitration in Paris solely under English jurisdiction." The contract had been made between two Frenchmen and was to be performed in France. The *Cour d'Appel de Paris* held that the parties had in fact transformed the contract into an English one in those aspects stipulated in the contract. Thus, for those purposes English law was the law of the proceedings. No mention was made of the conflicts rules to be applied to the performance of the contract, but this seems normal enough since the agreement adds that the arbitrators will adjudicate according to English law, "as much with regard especially to admissibility as to substance." [121] The indication is, however, that French courts will go so far as to permit the parties to hold an arbitration in Paris while at the same time considering that the law of the proceedings is that chosen by the parties.[122]

It would be interesting to see whether the French courts would actually look to the conflicts rules of the chosen law to determine whether the arbitrator in Paris has been accurate in his choice of the substantive law.[123]

4. Conclusions on Choice of Law

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

If the *conflicts* rules of the system of law chosen are applied, rather than its local *substantive* law, the result will be just that uncertainty which the autonomy of wills theory attempts to resolve.[124] If the parties mean that the choice of law is in fact the choice of a law of the proceedings, more than simply problems of performance will be involved. The underlying system of law will become that chosen by the parties.

However, it seems safe to say that the *Monier* case is not representative of the case law in the United States or England, where a choice of law clause will result in the application of the local substantive law of the legal system chosen—provided that the conflicts rules of the forum

120. Cour d'Appel de Paris, 5 juillet 1955, 45 REV. CRIT. DR. INT. PR. 79 (1956).

121. *Ibid.* Appeal was granted as if the arbitration had been French. In a note to the case Dr. Mezger exclaimed: "La realité depasse la fiction . . . ." *Id.* at 80.

122. See notes 138–43 *infra* and accompanying text.

123. See Klein, *supra* note 85, at 270, 280.

124. Reese, *supra* note 98, at 55.

permit this. The trend in France appears to be in favor of allowing complete autonomy of the parties as exemplified by the *Monier* case.

C. *The Choice of Forum Clause*

The Clause: The arbitration clause in the contract contains one of the following:

(1) "Arbitration according to the rules of *X* Trade Association."
(2) "Arbitration in *X* (city)."
(3) "Arbitration in *X* or *Y* (cities)."

The case law in this section is largely a result of stay of action proceedings in favor of arbitration elsewhere, and proceedings for the enforcement of awards made pursuant to such a clause. The three examples shown above will be treated interchangeably since they seem to represent the same basic wish on the part of the parties—that is, to hold the arbitration under a certain law of the proceedings by physically removing the arbitration proceeding to the chosen place.

1. United States

The Court of Appeals of New York was confronted with an arbitration clause in which the parties agreed that all differences arising thereunder should be "arbitrated at London pursuant to the arbitration law of Great Britain." The main contract had been concluded in the United States and was to be performed within its borders. When a dispute arose the American defendant refused to arbitrate and an award *ex parte* was handed down by the English arbitrator. These facts describe the important *Gilbert v. Burnstine* case in which the court enforced the award, stating:

> Defendant's agreement without reservation to arbitrate in London according to the English statute necessarily implied a submission to the procedure whereby that law is there enforced. Otherwise the inference must be drawn that they never intended to abide by their pledge.[125]

The court further held that enforcement of the award was in no way contrary to the public policy of the forum. The problem of notice was handled by stating that it accorded with English rules, to which the parties had subjected themselves. It is not clear what importance should be attached to the pronouncement that since the parties had subjected themselves only to the British Arbitration Act they might not be bound to submit to the "entire *corpus juris* as developed by the British Courts." [126] The *Gilbert v. Burnstine* case has been followed in federal and other state courts in addition to New York courts.[127]

125. 255 N.Y. 348, 354, 174 N.E. 706, 707 (1931).
126. *Id.* at 358, 174 N.E. at 709.
127. Standard Magnesium Corp. v. Fuchs, 251 F.2d 455 (10th Cir. 1957); Oilcakes & Oil-

In numerous instances United States courts have been asked to stay a court action pending an arbitration pursuant to an arbitration clause similar to this version of the clause. In *Fox v. The Giuseppe Mazzini* [128] the parties (American and Italian) provided in a shipping contract: "arbitration to be settled in London." The court held that section 3 of the United States Arbitration Act applied to arbitration abroad so that it had a positive right to stay the action. It concluded that there was nothing in the contract from which it could be determined that the parties meant that any law other than English law was to be applied.[129]

In *Amtorg Trading Corp. v. Camden Fibre Mills, Inc.,* [130] an agreement to arbitrate before the Foreign Trade Commission of the All Union Chamber of Commerce of the U.S.S.R. was found to be enforceable, although in an earlier inter-state case a Pennsylvania court, which held that an agreement to arbitrate in New York was to be enforced in accordance with the Pennsylvania Arbitration Statute,[131] took notice of the fact that the New York courts were not enforcing such agreements. There has obviously been a radical change of attitude in New York.

This short review of the cases reveals the lengths to which the courts will go to effectuate the will of the parties in choosing a foreign law of the proceedings. There seems to be no suggestion in the United States that the clause itself be subjected to the conflicts rules of the domestic courts.

There is strong support for the assertion that when the parties choose a site for the arbitration they also choose the *local substantive* law of that legal system.[132] Professor Reese argues that:

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seeds Trading Co. v. Sinason Teicher Inter Am. Grain Corp., 9 Misc. 2d 651, 170 N.Y.S.2d 378 (1958) (English arbitration award was separated from the judgment and recognized. This was necessary since the English court had no *in personam* jurisdiction over the defendant); Sargant v. Monroe, 268 App. Div. 123, 49 N.Y.S.2d 546 (1944).

128. 110 F. Supp. 212 (E.D.N.Y. 1953).

129. International Refugee Organization v. Republic S.S. Corp., 93 F. Supp. 798 (D. Md. 1950), concerned an arbitration clause which provided that, "[D]isputes arising under this agreement shall be referred to arbitration in London . . . . [T]he interpretation of the agreement shall be governed by the law of England." *Id.* at 799. The court granted the stay and explained that its inability, under the United States Arbitration Act, to force arbitration abroad did not limit the power it was exercising.

130. 304 N.Y. 519, 109 N.E.2d 606 (1952).

131. Nippon Ki-Ito Kaisha, Ltd. v. Ewing-Thomas Corp., 313 Pa. 442, 170 Atl. 286 (1934).

132. "It is widely held that the parties who have chosen a place of arbitration have thus impliedly agreed on the applicability of both the procedural and substantive law of that place." EHRENZWEIG, CONFLICT OF LAWS 540 (1962). *Cf.* In Application of Doughboy Indus. Inc., 17 App. Div. 2d 216, 233 N.Y.S.2d 488 (1962), an interstate case involving a New York seller and a Wisconsin buyer, Breitel, J. stated:

> The parties have not argued which law, that of New York or elsewhere, should be applied in this case, but have assumed that it is the law of New York. This assumption is followed here, in the absence of contrary suggestion by either of the parties. The assumption, moreover, is supported by the fact that the arbitration clause provided for arbitration in the City of New York; required the parties' consent to jurisdiction

> . . . provision by parties that arbitrations shall take place in a certain state is persuasive evidence of intent on their part that the local law of the state should govern the contract as a whole. This is true not only because the provisions shows that the parties had this particular state in mind; it is also true because the parties must presumably have recognized that arbitrators sitting in that state would have a natural tendency to apply its local law.[133]

He does, however, limit his discussion to the problems of validity and procedure of the arbitration proceeding so that one is not certain whether he would also apply local law to determine questions relating to performance of the contract. It is assumed that the local substantive laws of the place chosen or at least its conflicts rules would be applied by arbitrators as well as by the courts.

2. England

Because of London's dominant role as the world's commercial center, a great many contracts have contained clauses calling for arbitration in that city. Such a clause might specify that the arbitration be held by the London Corn Trade Association (or any of numerous similar trade organizations), or by the Court of Arbitration of the London Chamber of Commerce. It might merely call for "Arbitration to be held in London."

In the leading case of *N.V. Kwik Hoo Tong Handel Mattschappij v. Finlay & Co.*[134] the plaintiffs had been Glasgow merchants and the defendants had been brokers doing business in Java. Each of the three contracts for the purchase by plaintiffs from defendants of sugar to be shipped from Java to Bombay contained the following clause: "Any dispute arising out of this contract is to be settled by arbitration before London brokers in the usual manner." The defendants argued that the proceedings were not governed by English law and that therefore the English rule providing for exterritorial service was not applicable to them. Lord Dunedin held that:

> What the parties here did was to submit their possible disputes to a forum which was an English forum, and that they, therefore impliedly consented that the law which was to regulate the decision was the law of that forum. That does not mean that everything that would have to be decided would necessarily be decided by English law. It means that the *underlying* law was the law of England. . . .[135]

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of the State and Federal courts sitting in the State of New York; the buyer's offer was orally accepted in New York; and, assuredly, the arbitration agreement, if effective, would be governed by the law of New York.

17 App. Div. 2d at 221 n.2, 233 N.Y.S.2d at 494 n.2.

133. RESTATEMENT (SECOND), CONFLICT OF LAWS § 354*h*, comment at 217 (Tent. Draft No. 6, 1960).

134. [1927] A.C. 604.

135. *Id.* at 608. (Emphasis added.)

Professor Cheshire is convinced that, since English law is still committed to the principle that *qui elegit judicem elegit jus,* it will be applied even if the parties specify that another law is to govern performance.[136]

While an English court will usually enforce an award made abroad, it will not necessarily stay an action brought in England in defiance of an agreement to arbitrate abroad. The English court is given discretion to continue the suit if it has jurisdiction over the other party and if the ends of justice will be better served by trial in England.[137]

3. France

The French courts have also enforced awards rendered pursuant to the present version of the clause. In *Stè Goldschmidt v. Stè Vis et Zoon* [138] (Dutch and French firms), fifty tons of cocoa were sold and the contract was made in conformity with the form contract of the Cocoa Association in London. The clause stated: "[A]ll disputes arising from the present contract will be settled by arbitration, in conformity with the rules . . . of the Cocoa Association of London." When, at the time of enforcement in France, the losing parties protested, arguing that the award violated many French mandatory rules of procedure, the court answered that since the parties had agreed to the rules of the Association calling for arbitration in London, they had, "in the clearest fashion, manifested their common will to adopt as the law of the arbitration, English law, that is to say that which, moreover, governs the substance of their contract." [139]

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136. As authority for this, Cheshire cites *Finlay* and Hamlyn & Co. v. Talisker Distillery, [1894] A.C. 202. See Graveson, in MICH. SUMMER INSTITUTE 15.

The English courts have enforced awards made pursuant to arbitration agreements which specified the place of arbitration. In Norske Atlas Ins. Co. v. London General Ins. Co., [1927] 43 T.L.R. 541, the marine policy contained a clause calling for arbitration in Norway. The policy was valid under Norwegian law and invalid under English law. The arbitration was held in Norway and the English court enforced the finding of validity. In Bankers & Shippers Ins. Co. v. Liverpool Marine & Gen. Ins. Co., 24 Lloyd's List L.R. 85 (1926), arbitration was to be held in New York and the arbitrators were to abstain from following strict rules of law. In an action to enforce the award in England the House of Lords stated that, "there is no dispute as to the law applicable to the contract; it is by common consent the law of New York." *Id.* at 86.

137. The Athenee, (1922) 11 Lloyd's List L.R. 6 (Arbitration clause: disputes to be brought before the Marseilles tribunal of Commerce). *Cf.* The Cap Blanco, (1913) p. 130. See CHESHIRE, PRIVATE INTERNATIONAL LAW 222 (6th ed. 1961).

138. Cour d'Appel de Paris, 9 déc. 1955, [1955] REVUE DE L'ARBITRAGE 101.

139. *Id.* at 103. In a similar case, Société Costa de Marfil, Naviera v. Cie Marchande de Tunisie, Grande Instance de la Seine 23 fév. 1961, [1961] REVUE DE L'ARBITRAGE 25, the court held that since the parties contracted for arbitration in London and since French conflicts rules contain the principles of the autonomy of the parties, ". . . the result is that the parties thus intended to subject the arbitration to English law." See Cie Marchande de Tunisie v. Societé de Marfil, Cour d'Appel de Paris, 27 mars 1962, [1962] REVUE DE L'ARBITRAGE 45; Elmassian v. Broutchoux, Cour d'Appel de Nancy, 29 janvier 1958, [1958] REVUE DE L'ARBITRAGE 122.

The *Cour de Cassation* has also refused to hear cases because of arbitration agreements specifying a choice of the place of the proceedings. In *Société Legay v. Capitaine le S/S. Carruth,*[140] a charter-party was concluded between American and French corporations. Arbitration was to be held in New York. The goods were lost subsequently, and an action upon them was brought in the French courts. The court hearing the case held that the parties were bound by the arbitration clause and that the dispute fell within the jurisdiction of the arbitrators in New York.

Furthermore, the French arbitrators have participated in the type of arbitration here described. In *Sociétés S.E.P.I.C. v. United Artists Corp.*[141] a contract for the distribution of a film in England contained a clause conferring jurisdiction upon French arbitrators and judges thus revealing, the court concluded, the common intention of the parties to refer to French law. The court stated that:

> [I]t must be deduced from this that the parties, in choosing the judges of one of the countries concerned have in that way chosen the law usually applied by these judges.

It is quite evident that the court also made use of the substantive law of France in its opinion. Both the court and M. Batiffol [142] examined the other points of contact in the contract. Batiffol seems pleased by what he calls the first clear decision on this point. It appears likely that in the future the rule in France will treat the submission of a case to French arbitrators as a submission to French local law as well.[143]

4. Summary

Sanders sums up in a few words the practice of the countries studied.[144] He thinks that the choice of a certain tribunal or a certain territorial site, such as London, indicates "in a rather obvious fashion that the parties have wanted to subject their contract to the law of this country." Is it possible that they wish arbitrators, often non-lawyers, to apply foreign law? [145] It seems clear that the law applied is the *local substantive law* and not the *whole law* (including conflict of laws rules).

If by choosing the place of arbitration one is taken to have chosen its legal system as the law of the proceedings, recourse is lost to the

140. Cour de Cassation, 3 mai 1957, 46 REV. CRIT. DR. INT. PR. 495 (1957).
141. Cour d'Appel de Paris, 21 juillet 1950, 41 REV. CRIT. DR. INT. PR. 706 (1952).
142. BATIFFOL, *op. cit. supra* note 79.
143. See BATIFFOL, *op. cit. supra* note 79, at 651–52.
144. Sanders, *Arbitrage commercial international,* NETH. INT'L L. REV. 220, 226 (1956).
145. See Yntema, *Autonomy on the Choice of Law,* 1 AM. J. COMP. L. 341, 352 (1952). See also Klein, *supra* note 85, at 281. Klein, who is an opponent of the jurisdictional approach, admits that when a choice of a place of permanent arbitration is made, localization cannot be contested.

law of any other state, much less to the arguments of the proponents of the contractual theory of arbitration. One has to live, therefore, with such rules and institutions as the very limited review of awards in the United States, the special case stated in England, and the necessity for a *compromis* in France.

D. *Choice of Forum and Law Clause*

The Clause: The parties may add one of the following to the "bare" arbitration clause:

(1) "Arbitration in *X* according to the laws of *X*."
(2) "Arbitration in *X* according to the laws of *Y*."

According to Cheshire once the place of arbitration has been chosen, it is unnecessary to add a clause submitting the contract to the law of the same place; such attribution is automatic.[146]

The real problem occurs when as in *Monier v. S.A.R.L. Scali frères,*[147] the parties specify "arbitration in *X* according to the law of *Y*." In this case the parties had selected Paris as the place of arbitration but specified that the English legal system was to be the law of the proceedings. The French arbitrator applied English law to the disputes. M. Carabiber asks whether autonomy of the wills can manifest itself even against the mandatory rules of the state which is the seat of the arbitration.[148] This question would be crucial if the arbitration agreement sought to cover matters declared inarbitrable by the dictates of the international public policy of the site of the arbitration (whose legal system would ordinarily be the law of the proceedings.) Such a problem did not arise in the *Monier case.*[149]

It may be concluded that, in choosing the site of arbitration, one generally chooses a law of the proceedings, while the effect that will be given to a choice-of-law clause depends, with rare exceptions, on the underlying law—that is, where the arbitration takes place. Here again the choice of law clause is dependent upon the conflicts rule of the forum for its effectiveness.

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146. International Refugee Organization v. Republic S.S. Corp., 189 F.2d 858 (4th Cir. 1951) (arbitrators in London; interpretation of the contract was governed by the law of England).

147. Cour d'Appel de Paris, 5 juillet 1955, 45 REV. CRIT. DR. INT. PR. 79 (1956).

148. CARABIBER, L'ARBITRAGE INTERNATIONAL DE DROIT PRIVÉ 92 (1960).

149. In this case the parties were allowed every possible advantage. The "law of the proceedings" became English. However, the more liberal rules of appeal found in France were applied. No similar case has been discovered in England or the United States. Mezger states that there are only two French cases applying similar liberal rules. What would the French court have done if the subject matter of the contract had been illegal under French law?

E. *Choice of the Rules of the International Chamber of Commerce* [150]

The Clause: "Arbitration according to the rules of the International Chamber of Commerce." [151]

The court of arbitration in Paris, the administrative agency of the International Chamber of Commerce (I.C.C.), will designate an arbitrator from a third state when the dispute is brought before it by parties of different states. Unless the parties have made an express choice of forum, the court in Paris will designate an arbitrator, and the place he chooses to sit will be considered the place of arbitration. Sanders points to a case where a dispute arose between Dutch and Goan companies.[152] The court of Paris designated an English barrister to sit as arbitrator. He used English statutory procedural rules even though I.C.C. rules had been chosen, and English substantive law was applied even though there had been no *voluntary* contact with England (such as the designation of England by the parties as the place of arbitration).

The advantage of using the basic rules of the I.C.C. is that it removes the arbitration from the sphere of national sentiment.[153] However, if the parties are at all interested in keeping some control over a process that may well result in dire consequences for them, they would be well advised to include a choice-of-site-of-arbitration clause in the arbitration provision of the contract.[154]

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150. Parties to a commercial contract may submit their arbitration clause to the rules of one of many agencies which administer arbitration. Some of these agencies are confined to a particular place, thus rendering the choice of particular rules of one—an express choice of forum. Other agencies such as the International Chamber of Commerce contain rules permitting choices of forum and law by the parties. The American Arbitration Association and its affiliates is the major arbitration agency in the Western Hemisphere. For a discussion of the American Arbitration Association see Mentschikoff, *Commercial Arbitration,* 61 COLUM. L. REV. 846, 856–69 (1961). For a general description of the arbitration process under rules of arbitration agencies see, Benjamin, *A Comparative Study of International Commercial Institutional Arbitration in Europe and in the United States of America,* 2 HANDBOOK 351. For a critique of institutional arbitration, see Kronstein, *Arbitration is Power,* 38 N.Y.U.L. REV. 661, 679, 690–99 (1963).

151. The arbitration clause recommended by the ICC states: "All disputes arising in connection with the present contract shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the Rules." See RULES OF CONCILIATION AND ARBITRATION, THE INTERNATIONAL CHAMBER OF COMMERCE (brochure); GUIDE TO I.C.C. ARBITRATION (pamphlet), International Chamber of Commerce (February 1963). For a definitive study of the I.C.C. process see Cohn, *The Rules of Arbitration of the International Chamber of Commerce,* 14 INT'L & COMP. L.Q. 132 (1965).

152. Sanders, *Arbitrage commercial international, supra* note 144, at 226.

153. In fact, the courts in the United States will enforce awards made pursuant to the application of the Rules of the International Chamber of Commerce. Standard Magnesium Corp. v. Fuchs, 251 F.2d 455 (10th Cir. 1957). The same appears to be true for French and English courts.

154. Wallcarriers Inc. v. Trinity Corp., N.Y.L.J. Feb. 27, 1961, p. 14 col. 5, provides an example of the danger to effective enforcement posed by an "imperfect" arbitration clause. The lack of general specifications permitted holding the arbitration under a "law

III. The Theory of Arbitration and Contract Conflicts Rules

If one places present judicial practice face to face with the theories of the nature of arbitration (described by Professor Sauser-Hall and listed at the beginning of this study) it is possible to argue that the jurisdictional theory dominates.[155] The arbitration process is then considered to be purely procedural, with the law of the place of arbitration as the law applicable to every aspect of the arbitration. The conflicts rules of a forum may permit full autonomy of the wills. Therefore, in a case such as *Monier v. S.A.R.L. Scali frères,*[156] the law of England was applied to the dispute. The parties had stipulated that English law should govern certain portions of their agreement, and the court approved of the arbitrator's actions in following the dictates of the parties. This approval was given in spite of the fact that several French

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of the proceedings" whose lack of specific rules made enforcement impossible in New York. *Cf.* Kronstein, *Arbitration is Power,* 38 N.Y.U.L. Rev. 661, 692 (1963) (justification for use of the ICC rules with no further general specification).

155. This characterization is consistent with the treatment of arbitration in the United States. If arbitration is by nature remedial then, although the arbitrator will look to the law of the forum (place where the arbitration takes place) to determine whether the process itself is consistent with the laws and practices of that state, once the process is deemed approved the arbitrator will proceed to make use of the other legal institutions of that state. It is at this point that the conflicts rules will be put to use. Under this theory if the state within which the arbitration takes place treats all problems under domestic law, the arbitrator will follow that rule.

There has been a tendency in the United States to treat arbitration as a more or less contractual institution. This view, which has long been the rule in England and France, does not subject the *enforceability* of the agreement to the local rules of the forum, but refers it to the conflicts rules of the forum. The public policy of the forum or of the "law of the proceedings" may play a part in the recognition of the enforceability of the arbitration. However, the legal rules which will govern the substance of the main contract are still subject to the conflicts rules of the forum. While arbitration is treated as contractual from the point of view of enforceability, the law that will govern performance is still made to submit to the conflicts rules of the law of proceedings.

The determination of both is now in the hands of the conflicts rules of the place of arbitration. The admission that arbitration is contractual is not taken back, but the freedom newly given to the determination of enforceability results in no gains in other respects. The forum retains extensive powers over the proceedings. What emerges is a "mixed" institution having both remedial and contractual characteristics. Sauser-Hall conceives of arbitration as a "mixed" institution because the parties are permitted to indicate a choice of the law according to which the award will be made. This choice can only be exercised within the limits permitted by the conflicts rules of the *place* of arbitration. It seems that what Sauser-Hall described is nothing more than the traditional jurisdictional (remedial) theory. See *Réflexions sur la nature juridique de l'arbitrage,* 7 Annales de la Faculté de Droit de Liege 173 (1962).

It is submitted that a re-evaluation of the theory of the nature of arbitration is urgently needed. See *supra* note 11; see Fouchard, *op. cit. supra* note 103, at 363. For the problem as seen in the United States, namely procedure versus substance, see Stern, *The Conflict of Laws in Commercial Arbitration,* 17 Law & Contemp. Prob. 567, 569 (1952); Note, *Commercial Arbitration and Conflicts of Laws,* 56 Colum. L. Rev. 902 (1956). See also Lorenzen, *Commercial Arbitration—International and Interstate Aspects,* 32 Yale L. J. 716, 757–62 (1934). The treatment of the nature of arbitration in the United States is largely concerned with interstate and federal-state problems.

156. Cour d'Appel de Paris, 5 juillet 1955, 45 Rev. Crit. Dr. Int. Pr. 79 (1956).

mandatory rules of a procedural nature were not observed. However one should be aware that the court was conscious that no important French conflicts rule was being violated by its decision.

The fact that the court did not use one of the well-known theories of conflicts of laws tests does not mean that it had relinquished its power to apply the appropriate conflicts rules to the case. The test that measures the reasonable relationship between the contract and the legal system chosen is merely one of the many ways in which control may be exercised by the judicial bodies over the law of the proceedings, or by the courts of the place of enforcement when the award is carried abroad.[157] The stipulation of the parties is always dependent upon the controlling legal system's conception of the extent to which the parties to a contract should be free to specify the applicable law.[158]

As a matter of fact, the choice of the law of the proceedings—through an express choice of the place of arbitration—has been given full effect by the systems of law examined here. This is demonstrated by the stays of judicial proceeding in favor of arbitration elsewhere. Further the practice has been to tie in, implicitly, a choice of law to the choice of the place of arbitration, although the reasoning for this is not always in terms of the autonomy of wills.[159]

The idea that a choice of a site is implied by an express choice of law or through the existence of a number of contacts, including the *lex solutionis,* is not recognized. However, if the parties designate some arbitration agency which they wish to take charge of any possible arbitration, the choice of the institution will be deemed a choice of either a permanent seat or of its rules which provide for arbitration elsewhere.

The situation that best demonstrates the relative strengths of a choice of law and a choice of site in the arbitration clause occurs when both are expressly stipulated, and the choices lead to the application of opposing systems of law. No doubt, the choice of site clause will be respected and the arbitration will take place where specified. The conflicts rules of this chosen law of the proceedings will now determine whether the choice of law ought to be given effect, and the other rules of the legal system, such as public policy, will also come into play. Professor Cheshire intimates that in England the local substantive law will be utilized despite an express choice of law.[160]

The considerations outlined above and dealt with in more detail in the main part of this article lead to the conclusion that the best choice-of-law clause is expressed in terms of a choice of site of the arbitration. However, the parties may have reasons for not choosing a particular

157. See Note, *Conflict of Laws: "Party Autonomy" in Contracts,* 57 COLUM. L. REV. 553 (1957).

158. KLEIN, CONSIDERATION SUR L'ARBITRAGE EN DROIT INTERNATIONAL PRIVÉ 246, 247 (1955).

159. See Sanders, *supra* note 144, at 226–27.

160. CHESHIRE, *op. cit. supra* note 137, at 222.

place: for example, the institutions of the law of the proceedings may not be advantageous to the parties. It may be inconvenient for them to conduct their arbitration away from their place of business.

As long as the parties express their wishes in the form of a choice of law, the effectiveness will be determined by the controlling system of law. The conflicts rules may render the choice ineffectual. Rules of law, including those determining whether reasoned awards are to be required and the scope of appeal, may well contribute to an unclear and unhappy result. The party, anxious to have a particular law applied, will be well-advised to include a proviso requiring reasons to be stated. If the arbitration is held in the United States or in England, he will be able to appeal only if the error in law appears on the face of the award.[161] The situation is not so critical in England because of the "special case stated."

The conflicts rules of the systems of law examined will usually give some weight to the express choice of law of the parties. In the United States, while the use of substantive law by the arbitrators is optional, an express stipulation of a choice of law should be observed. With respect to the bare arbitration clause, it should be emphasized that, while an express choice of law will be tested by the conflicts rules of the law of the proceedings, the lack of any expression of preference by the parties will result in an independent determination of the applicable law by the court. The court will actually be constructing the regime rather than putting limitations upon the one chosen by the parties. Often, the tendency of the arbitrator will be to apply the law with which he is most familiar, and the lack of some indication by the parties will only strengthen this tendency. Indeed, many courts have been known to prefer to use the local law whenever not absolutely forced to apply the law of another jurisdiction.

The purely contractual notion of the nature of arbitration would result in the problem discussed recently by Professor Batiffol. He finds difficulty in identifying the state whose conflicts rules the given arbitrator should follow. Since the arbitrator does not render justice in the name of any state he cannot be held to follow the conflicts rules of any one state more than those of another.[162]

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161. See RUSSELL, ARBITRATION 314, 322 (17th ed. 1963).

162. Batiffol, *L'arbitrage et le conflits de lois,* [1957] REVUE DE L'ARBITRAGE 110, 111. *Cf.* FOUCHARD, *op. cit. supra* note 103, at 378 *et seq.* The author discusses the theory and technique of free choice of a system of conflict of laws by the arbitrator. Fouchard gives examples of I.C.C. awards where the arbitrators did not confine themselves to the conflict of laws rules of a particular country. A 1959 arbitration demonstrates the technique used by such arbitrators in arriving at the applicable conflicts rules. First, he looked for a national conflict of laws system called for by the will of the parties (autonomy of wills approach). He compared it to general principles of conflict of laws (through a comparative law study—international standard approach, it is assumed) and found no clash. He then looked at the circumstances surrounding the case, finding the parties' implicit choice (proper law approach). *Id.* at 389–90, 392–94.

IV. The European Convention on International Commercial Arbitration of 1961

Professor Batiffol may have been alluding to the European Convention on International Commercial Arbitration of 1961 when he made the above comment.[163] This Convention, which was opened to the signatures of all European countries and which came into force in January 1964,[164] is the first [165] international agreement to take up the question of the law applicable to the substance of commercial contracts made between individuals of various countries.

Article I settles the contractual character of the institution of arbitration; procedure and award are implicitly deemed to owe their existence to the functioning of the arbitration contract. The stage is set for Article VII, which several prominent writers find to be one of the most novel arrangements of the Convention.[166]

The text [167] assures the absolute autonomy of the parties when they

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163. Convention Européene Sur l'Arbitrage Commercial International, 1961, United Nations Document E/ECE 423; 50 Rev. Crit. Dr. Int. Pr. 431–38 (1961). See generally Benjamin, *The European Convention on International Commercial Arbitration, supra* note 15.

164. The European Convention entered into force on 7 January 1964. The following states have ratified it: Austria (March 1964); Bulgaria (May 1964); Byelorussian S.S.R. (October 1963); Czechoslovakia (November 1963); Federal Republic of Germany (October 1964); Hungary (October 1963); Poland (September 1964); Romania (August 1963); Ukrainian S.S.R. (March 1963); U.S.S.R. (June 1962); Yugoslavia (September 1963). U.N. Doc. ST/LEG/3 Rev. 1. 11/2/65. Rules were drawn up by the Work Group conforming to the mandate given them by the Committee of the Economic Commission for Europe. These rules are purely optional with the parties who want to use them, without engaging the respondability of the governments whose experts drew them up. Report on the Eighth Session of the Work Group on Arbitration of the EEC, [1963] Revue de l'Arbitrage 63, 64.

165. See Protocol on Arbitration Clauses (Geneva 1923), Great Britain T.S. No. 4 of 1925; International Convention on the Execution of Foreign Arbitral Awards (Geneva 1927), Great Britain T.S. No. 28 of 1930; Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), United Nations T.S. vol. 330 p. 3, E/CONF. 26/8/Rev. 1. Many bilateral commercial treaties have included references to arbitration but the terms have been vague and have dealt primarily with enforceability. No bilateral treaty has been found which deals with the law to be applied to the substance of the contract. A typical treaty dealing generally with arbitration is the Convention of Establishment between the United States of America and France (1959) art. III para. 2 T.I.A.S. No. 4625.

166. Robert, *La convention européene sur l'arbitrage commercial signée à Genève le 21 avril 1961,* Recueil Dalloz 33, 180 (1961).
Klein states that, "[w]ith article VII, the drafters of the European Convention attacked a very interesting question, but one which is generally neglected in legal literature. It concerns the determination by the arbitrators of the law governing, not arbitral procedure, but the merits of the dispute." Klein, *La convention européene sur l'arbitrage commercial international,* 51 Rev. Crit. Dr. Int. Pr. 621, 631 (1962). See also Kronstein, *Arbitration is Power, supra* note 154, at 693.

167. Article VII:

Applicable Law

1. The parties shall be free to determine, by agreement, the law to be applied by the arbitrators to the substance of the dispute. Failing any indication by the parties as to the applicable law, the arbitrators shall apply the proper law under the rule of conflict that the arbitrators deem applicable. In both cases the arbitrator shall take account of the terms of the contract and trade usages.

express their choice of law. The choice may not be modified or disregarded by the conflicts rules of any of the signatories in whose territory the arbitration may take place. The express choice of law by the parties is freed from the restrictions of the conflicts rules of the law of the proceedings.

However, where there has been no designation by the parties, the arbitrators will apply the conflict of laws rules of the legal system they judge most appropriate in order to determine the applicable substantive law. There seems to be a recognition of the need to apply a well-developed system in order to arrive at the applicable law. The conflicts rules are, after all, a product of the thinking of jurists for the last few hundred years.

Professor Batiffol's problem remains: The conflict rules may point to the applicable substantive law, but how is the arbitrator to choose the most appropriate system of conflicts rules?[168] He is armed with the terms of the contract and commercial practice, but one wonders whether these are sufficient for him to be successful in his choice. Can these tools fashion a system with some consistency? The planners of the Convention may have wanted *ad hoc* decisions in every case, but the merits of such arrangements can easily be disputed.

Within the choice given to him, the arbitrator has the power to choose a system which is more or less favorable to the theories of the "proper law." While the arbitrator is put in an awkward position when no express intention exists, the parties are freed from obedience to the conflicts rules of the place of arbitration. It is nevertheless recognized that there should be some check on the determination of the arbitrators when the parties have not provided it themselves. Great emphasis is placed on the value of commercial practice in states with mature legal systems; one wonders whether the drafters have shown too much faith in the existence of such practice.

Whether this Convention succeeds or not, the fact remains that the only way by which arbitration will be freed from the conflicts rules of the law of the proceedings is through international agreements.[169] Such agreements must, of course, limit the ability of the enforcing state to nullify the award, as does the 1961 Convention.[170] The public policy knife of the place of enforcement must be dulled, if not removed altogether. This factor and others like it, inherent in national sovereignty,

168. *Cf.* Draft European Convention providing a Uniform Law on Arbitration, (adopted by Committee of Experts, March 1964, Council of Europe) EXP/Arb. (64)4. "Article 21. Except where otherwise stipulated, arbitrators shall make their award in accordance with the rules of law." "Article 22. . . . 6. The reasons for an award shall be stated."

169. Robert, *supra* note 166, at 33.

170. Article IX sets the limits for annulment of awards. Annulment of the award by the courts of the state where the arbitration was held, or any other state, must be disregarded unless the reasons conform to Article IX.

Article VIII states that the parties are presumed to want a reasoned award. They must stipulate expressly if they prefer an award without reasons (*motifs*). *Supra* note 163.

render ineffectual efforts to internationalize arbitration. The parties may submit to the rules of the I.C.C., but eventually the I.C.C. itself must deliver the arbitration to one of the existing systems of law whose rules will take control and which will thus become the law of the proceedings.

V. Substantive Law and Arbitral Equity

The Clause: The arbitration clause may contain the following stipulation: "All disputes shall be settled in accordance with arbitral equity." [171]

In some countries, such as the United States generally, this type of clause merely affirms what the arbitrators would ordinarily do.[172] Freedom from the use of substantive law, discussed elsewhere in this article, is an important rule in the systems of law in the United States, and it is reinforced by certain other rules and by several institutions.

In France such an arrangement would, after the signing of the *compromis,* render the arbitration an *amiable composition,* which is in fact quite similar to arbitration in the United States. In England, however, it would be impossible by agreement to avoid substantive law.

Freedom from substantive law has been advanced as a method of eliminating problems such as those involved in the employment of conflict of laws rules. In addition, it is argued that permitting the arbitrators to decide according to what is termed "arbitral equity" is more consistent with the purposes of arbitration.[173]

If these statements are correct, and the practice in the United States assumes that they are, the parties ought not to be interested in the decision-making process. The application of substantive law merely leads to complexities that arbitration seeks to avoid. Among the reasons usually given for preferring arbitration to the legal machinery available are the following:

(a) Desire for privacy;
(b) Availability of expert deciders;

171. The decision *ex aequo et bono* by judges and arbitrators is well known in public international law. Article 38 of the Statute of the International Court of Justice sets out the sources from which the Court is to draw rules of international law. However, it also states: "2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono,* if the parties agree thereto." STAT. INT'L CT. JUST. art. 38, para. 2. For a thorough discussion of the use of equity in international law, see JENKS, PROSPECTS OF INTERNATIONAL ADJUDICATION 316–427 (1964).

172. A few arbitration statutes prescribe that the arbitrator must "follow the law." The Pennsylvania statute provides that the court shall make, "[A]n order modifying or correcting the award . . . where the award is against the law . . . ." PA. STAT. ANN. tit. 5, § 171(d) (1963). The statute contains no provision regarding reasoned awards. See Sturges, *Arbitration—What Is It?,* 35 N.Y.U.L. REV. 1030, 1034 (1960).

173. For an outstanding general survey see Cohn, *Commercial Arbitration and the Rules of Law, A Comparative Study,* 4 U. TORONTO L.J. 1 (1941).

(c) Avoidance of possible legal difficulties with the nature of the transaction itself;
(d) Random acceptance by many businessmen of the idea that arbitration is faster and less expensive than court action.[174]

With the possible exception of the third reason given above, it seems reasonable to expect that the purposes of arbitration may be adequately carried out through the use of either substantive law or arbitral equity. If the arbitration is to be concerned with technical matters, such as quality determination, then the use of an expert in the field is obviously the most effective way of arriving at the most just solution. However, if the dispute involves questions of law, there must be further consideration of the suitability of an expert in the technical field before such a choice is made. The expert in grains should not be held responsible for a thorough knowledge of law, and his lack of competence in law should not be an excuse to permit him to give a random opinion about matters essentially legal, disguised as arbitral equity.[175]

One is reminded, in this connection, of the *Lena Goldfields* [176] arbitration in which a mining professor, chosen because of his technical abilities, was called upon to decide crucial questions of international law. Apparently, he finally felt compelled to call for assistance from some quarter in order to arrive at a just and legally viable decision. This is not to say that every arbitration will involve complex legal issues, but it does seem that the parties would have more confidence if they knew that safeguards had been erected to provide fairness of decision through the use of an expert in law, *i.e.*, the lawyer.

But the use of the expert, unschooled in the law, has been eloquently defended in a recent study:

> The courts are faced with a paradox in assessing the role of the arbitrator . . ., [A]t one and the same time he is recognized as an expert and as a mere neophyte. His expertise stems from his special knowledge in his chosen field.
> The arbitrator may be an authority on international trade, a person informed concerning the vagaries of building construction or a merchant in the textile business. There the courts accord him his due. But

174. Mentschikoff, *Commercial Arbitration, supra* note 28, at 847.

175. See Sirefman, *In Search of a Theory of Arbitration,* 15 ARB. J. (n.s.) 27 (1960).

> It is more reasonable to assume that arbitration is better suited to a dispute which is grounded not so much in the violation of the letter of some rules or some law *per se,* as in the more indistinct area of personal grievance and discord, i.e. where application of the letter of the law does not provide a meaningful solution. A secondary area would be one where there is no adequate remedy at law or in equity . . . The ideal arbitration setting occurs when the arbitrator has before him, and has the power to consider, the fact, the atmosphere of which the claim is a part, and the ultimate impact which his award will have on the day to day continuity of business activities. In such a setting arbitration performs a socially useful function.

Id. at 34.

176. See Nussbaum, *The Arbitration between the Lena Goldfields, Ltd. and the Soviet Government,* 36 CORNELL L.Q. 31–33 (1950).

> in the area of his ignorance—the law—the judges unrealistically have sought to hold him to a proper application of legal principles, many of which he knows not. Yet it is submitted that a just result can be achieved by the arbitrator without the observance of legal intricacies and, as the orbit of judicial control has become smaller this has been recognized. *Our law rests on basic tenets of right and wrong controlling the actions of all of mankind; these principles carry over into the market place and are applied by an arbitrator as they are by a judge, only in a different manner.*[177]

Do the parties always benefit when the arbitrator disregards the "intricacies" of the law? A series of steps taken by a party may have been planned based on close consultation of the appropriate laws. The arbitrator may completely defeat the party's expectations by deciding that an approach different from that followed by the law is more just.[178]

What amounts to a compromise has been proposed by Crane who maintains that arbitral equity is really an independent system of substantive rules which is more suitable for commercial arbitration since it consists of only commercial law. He does admit that ordinary substantive law should be disregarded only to the extent that arbitrators give weight to non-legal factors such as business ethics, thus avoiding the legal loopholes that might render a legal decision unjust.[179]

Mr. Crane's firm denunciation of the *ex aequo et bono* nature of *amiable composition* is another indication of his moderate views concerning arbitral freedom from substantive law. What is not clear is whether the American arbitrator does in fact follow these suggestions or whether he strikes out on his own every time.[180] It seems illogical that men without training in law have not only the power to make use of rules of substantive law but also the power to decide when the law is not "just" or "equitable." [181]

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177. Jalet, *Judicial Review of Arbitration: The Judicial Attitude,* 45 CORNELL L.Q. 519, 557 (1960). (Emphasis added.)

178. Other arguments advanced in favor of the application of substantive law are the following: superiority of the substantive law over the private law of the individual arbitrator; freedom from substantive law is unnecessary because of the wide scope of equity available to the judges; people submit to arbitration primarily for the determination of facts and have no intention to give up the protection of the law; enforcement of awards in the United States and especially abroad is rendered easier; arbitrary findings and compromises are discouraged. See Crane, *Arbitral Freedom from Substantive Law,* 14 ARB. J. (n.s.) 163, 165–67 (1959).

179. Crane, *supra* note 178, at 171.

180. *Id.* at 177; *L'amiable composition dans les arbitrages anglais,* [1955] REVUE DE L'ARBITRAGE 38. See Note, *Predictability of Result in Commercial Arbitration,* 61 HARV. L. REV. 1022, 1033 (1948).

181. In a study of the actions of arbitrators in the United States, Professor Soia Mentschikoff reports that eighty percent of the arbitrators asked thought that they *should* reach their decision within the context of the principles of substantive law; however, ninety percent believed that they were free to ignore these rules whenever they thought that a more just decision could be reached by doing so. Mentschikoff, *Commercial Arbitration,* 61 COLUM. L. REV. 846, 860 (1961). Use of arbitral equity is not confined to non-lawyers. Attorney-arbitrators may, and do make use of it rather than of substantive law,

This is the state of law in the United States to which the parties to an arbitration may introduce themselves through an appropriate clause. It is submitted that the purposes of arbitration are better served through the use of substantive rules of law and through the use of lawyers and judges.

Attempts by the parties to limit the scope of the issues to be submitted to arbitration will generally be unsuccessful. If they state that only technical matters are to be dealt with by arbitration the problem of characterization becomes one deserving of the attention of the lawyer.

Even if the parties specifically state their wish to have the decision rendered according to substantive law, the lack of a reasoned award will often defeat their intent. One of the most pursuasive arguments for the rule against the stating of reasons is that non-lawyers cannot write opinions of law that will be defendable in court actions. This argument seems to be still another urgent reason for participation by lawyers in the arbitral process.

Opponents of a rule requiring the arbitrator to indicate the law used and the arguments that were pursuasive to him argue that a reasoned award brings about a wider right of appeal which they consider incompatible with arbitration. Such an argument does not seem valid. It is true that parties are interested in speed and finality, but will a party be willing to lose a substantial amount of money just so that a question may be settled in a hurry? He may be even more reluctant to hurry if he is convinced that he is in the right. Assuming that the parties and the arbitrators acted in good faith, and the arbitrators are qualified to render the decision, there seems to be no reason why the number of appeals should rise appreciably. Only in the case of serious disagreement would the parties go to court. At such a point in their relationship they should, it is submitted, have recourse to a court of law.

The institution of the special case appears to operate with much success in England. It seems to answer many needs in that it provides judicial answers to legal questions, and yet it leaves the technical questions to the experts. There is no necessity to insist upon lawyers as arbitrators, but the parties are confident that matters of law will not be decided *ad hoc*.[182]

Perhaps the most serious criticism that one might level at the practice of abandoning substantive law relates to the problems peculiar to international arbitration. What will the arbitrators do when the parties are from states whose commercial practice differs? Will a choice of law clause be translated by the arbitrator into a choice of a particular

although it would seem that they would be likely to be influenced by their legal training. The basic issue, then is whether the strict use of law is more desirable, and if so, whether attorney–arbitrators (or judges) should be used to decide legal questions.

182. See Domke, *Arbitral Awards Without Written Opinions,* in LEGAL ESSAYS IN HONOR OF HESSEL E. YNTEMA 256 (1961).

set of commercial customs? How will the arbitrator in London be able to learn what the commercial custom is in Argentina, in a case involving English and Argentinian parties? Will he be likely to disregard the international nature of the arbitration and apply the local commercial rules? He may, of course, make use of conflicts rules, but as a non-lawyer he will find them difficult to understand. The arbitrator is in the same difficulty here as he is under the 1961 Convention. He must apply commercial custom to arrive at the appropriate commercial practices. Unlike the arbitrator under the Convention, he does not have to justify his choice. The American arbitrator is likely to use whatever rules and customs are familiar to him.

Making full use of the legal system of the state and thus of its conflicts rules may cause many difficulties and may even lead to unforseen results.[183] However, unless an international commercial law can be proved to exist,[184] and unless parties are always willing to rely on the arbitrator's ability to apply the best possible rule, non-use of substantive rules of law will nearly always result in unpredictable solutions. The argument here is not made against an international commercial law, but against a series of unconnected decisions in the absence of international rules.

VI. Conclusion

An examination of the practice of states demonstrates that a foolproof clause does not exist. This much is clear: the parties must decide in advance how much control they prefer to have over the arbitration. The amount and scope of control depends upon their ability to choose the law of the proceedings, which in addition to questions of procedure and enforceability, will determine the particular rules concerning the *substance of the obligation* to be used. Such determination is in turn made by looking to the law of the proceedings for rules revealing the extent to which use is made of judicially accepted rules of substantive law, of reasoned awards, and of appeals against the award. Once this decision is made, the parties should arrange for appropriate express stipulations to be placed within the contract.

183. See generally, Maw, *Conflict Avoidance in International Contracts,* in International Contracts: Choice of Law and Language 28–30 (Reese ed. 1962).

184. See The Sources of The Law of International Trade (Schmitthoff ed. 1964). Part Three of this volume, which is composed of papers by contributors to and participants at the Colloquium on the New Sources of the Law of International Trade (London, 1962) is entitled, "The Autonomous Law of International Trade—Its Possibilities and Limitations." *Id.* at 103–224. Compare the concept of international commercial law as a branch of public international law, *supra* note 92, but note that the thrust of the latter is aimed at contractual relations between public and private persons, while the former visualizes a set of rules free of particular municipal systems and of conflicts of laws problems but within the private law sphere.