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Why Courts Review Arbitral Awards

*by William W. Park**

Judicial review of arbitral awards constitutes a form of risk management. In most countries courts may vacate decisions of perverse arbitrators who have ignored basic procedural fairness, as well as those of alleged arbitrators who have attempted to resolve matters never properly submitted to their jurisdiction.[1] In some countries judges may also correct legal error[2] or monitor an award's consistency with public policy.[3]

Public scrutiny of arbitration is inevitable at the time of award recognition. Judges can hardly ignore the basic fairness of an arbitral proceeding when asked to give an award *res judicata* effect by seizing assets or staying a court action.[4]

Less evident is why the arbitral situs should necessarily monitor an award prior to an enforcement action. When the controversy is international, an arbitral situs is often chosen only for geographical convenience or procedural neutrality.[4] If a dispute involves neither property nor activity at the place of arbitration, that country might arguably dispense with allocation of judicial resources toward review of the arbitrator's decision. At least one scholar suggests complete elimination of pre-enforcement judicial review.[5]

The thesis of this modest note in honor of *Professor Böckstiegel* is that judicial review of awards at the place of arbitration usually does make sense in international arbitration. Court scrutiny of an arbitration's integrity promotes a more efficient arbitral process by enhancing fidelity of the parties' shared pre-contract expectations. In some instances review also furthers the development of commercial norms to guide business managers in planning future transactions.

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1 *See, e.g.,* UNCITRAL Model Law, Article 34; French *Nouveau code de procédure civile* (hereinafter „*NCPC*") Article 1502; German *Zivilprozessordnung* (hereinafter „*ZPO*") Article 1059; Swiss *Loi fédérale sur le droit international privé* (hereinafter „*LDIP*") Article 190; U.S. Federal Arbitration Act §10.

2 *See e.g.*, §69 of the 1996 English Arbitration Act.

3 *See* UNCITRAL Model Law, Article 34(2)(b)(ii); French *NCPC* Article 1502 (5); German *ZPO*, Article 1059 (2)2.b; Swiss *LDIP*, Article 190(2)(e).

4 *See generally W. Laurence Craig, William W. Park, Jan Paulsson*, International Chamber of Commerce Arbitration, Chapter 28 (3d ed, 2000). *See also W. Michael Reisman*, Systems of Control in International Adjudication & Arbitration 113 (1992) (distinguishing between „primary" and „secondary" control).

5 *See Philippe Fouchard, La Portée internationale de l'annulation de la sentence arbitrale dans son pays d'origine*, 1997 Rev. arb. 329, 351-352.

I. Judicial Control Mechanisms

A. Finality and Fairness

Efficient arbitration implicates a tension between the rival goals of finality and fairness. Freeing awards from judicial challenge promotes finality, while enhancing fairness calls for some measure of court supervision. An arbitration's winner looks for finality, while the loser wants careful judicial scrutiny of doubtful decisions.

Finality in arbitration enhances the political and procedural neutrality that is compromised if the winner must re-litigate the case in a public forum. Without finality, parties to international business transactions may have no reliable alternative to the uncertainty of third country courts[6] or the perceived bias of the other side's „hometown justice."[7] Absent the possibility of binding arbitration, some transactions will remain unconsummated. Others will be concluded only at increased prices, to reflect the risk of potentially biased adjudication.[8]

Procedural safeguards to promote basic fairness constitute another element in efficient arbitration. Aberrant decisions reduce community confidence in the arbitral process. Commercial actors are unlikely to feel comfortable with a dispute resolution system allowing arbitrators to decide cases by a roll of the dice, or in a way that otherwise denies due process.

Although no system will perfectly reconcile these rival goals of finality and fairness, a middle ground provides judicial review for the grosser forms of procedural injustice. To this end, legislators and courts must engage in a process of legal fine tuning that seeks a reasonable counterpoise between arbitral autonomy and judicial control mechanisms.

6 In seeking recourse to third country courts, uncertainties result from factors such as *forum non conveniens*, lack of subject matter jurisdiction and the absence of comprehensive jurisdiction and judgments treaties. *See William W. Park*, International Forum Selection, Chapter 2 (1995); *William W. Park, When and Why Arbitration Matters*, in The Commercial Way to Justice 73 (G. Beresford Hartwell ed., 1997); *William W. Park, Bridging the Gap in Forum Selection*, 8 Trans. L. & Contemp. Probs. 19 (1998). .

7 The reality of litigation bias may be less significant than the perception that of prejudice. In federal civil actions in the United States, foreigners actually fare better than domestic parties, perhaps because fear of bias causes foreigners to continue to judgment only with particularly strong cases. *See Kevin Clermont & Theodore Eisenberg, Xenophilia in American Courts*, 109 Harv. L. Rev. 1122 (1996).

8 As between an investments in Country A for a large profit, but with a good chance that local courts will be biased, and another in Country B yielding a smaller profit, but with fair dispute resolution, many risk-averse foreign merchants will choose the lower return coupled with the fairer legal system. *See generally* William W. Park, *Neutrality, Predictability and Economic Cooperation*, 12 (No. 4) J. Int'l Arb. 99 (1995).

B. Models of Judicial Scrutiny

Several models have emerged for review of awards at the arbitral seat. The most popular gives losers a right to challenge awards only for excess of authority and basic procedural defects such as bias or denial of due process.[9] Another paradigm supplements scrutiny of an arbitration's procedural fairness with a right to appeal an award's substantive legal merits.[10]

Some countries allow a choice between these alternatives. Default rules require that litigants either „opt in"[11] or „opt out"[12] of appeal on the substantive merits of the case.[13] Certain arbitral regimes provide hybrid grounds for vacatur, such as „manifest disregard of the law"[14] or „arbitrariness",[15] which imply something beyond a simple mistake, but not necessarily clear excess of authority.

The text of the law, of course, must be read in the context of its application. Even a statute that allows challenge only for defects related to procedural regularity may allow

9 *See, e.g.*, Federal Arbitration Act §10; French *NCPC* art. 1502; Swiss *LDIP* art. 190; UNCITRAL Model Law art. 34. While these last three statutes do not enumerate bias explicitly, some of their other bases for vacatur (such as lack of due process or violation of public policy) could serve to deal with this defect.

10 *See* 1996 English Arbitration Act §§67-69. *See William W. Park, The Interaction of Courts and Arbitrators in England*, 1 Int'l Arb. L. Rev. 54 (1998), *reprinted in* 13 Mealey's Int'l Arb. Rep. 21 (June 1998).

11 For American cases allowing contractual expansion of grounds for vacatur, *see* Lapine Technology v. Kyocera, 130 F.3d 884 (9th Cir. 1997); Gateway Technologies v. MCI Telecommunications Corp., 64 F.3d 993 (5th Cir. 1995); Syncor International Corp. v. David L. McLeland, 120 F.3d 262 (4th Cir. 1997); Fils et Cables d'Acier de Lens v. Midland Metals Corp, 584 F.Supp. 240 (S.D.N.Y. 1984); New England Utilities v. Hydro-Quebec, 10 F.Supp.2d 53 (D.Mass. 1998). The opposite conclusion was suggested in Chicago Typographical Union v. Chicago Sun-Times, 935 F.2d 1501 (7th Cir. 1995).

12 *See* 1996 English Arbitration Act §69 (requiring exclusion of appeal on questions of English law).

13 For example, Switzerland offers a choice among (1) federal standards limited to procedural integrity and public policy under *LDIP* Article 190, (2) more expansive scrutiny under cantonal standards that include vacatur for „arbitrariness" under the *Intercantonal Arbitration Concordat* and (3) exclusion of all judicial scrutiny, assuming neither party has a Swiss residence or place of business, the parties may conclude an explicit exclusion agreement (*déclaration expresse/ ausdrückliche Erklärung*) under *LDIP* Article 192.

14 Introduced by the U.S. Supreme Court through *dictum* in Wilko v. Swan, 346 U.S. 427 (1953), „manifest disregard of the law" builds on notions of arbitrator excess of authority. *See* Advest, Inc. v. McCarthy, 914 F.2d 6, 9 (1st Cir. 1990). Evends in international arbitrations awards rendered in the United States may be vacated for „manifest disregard." *See* Alghanim v. Toys „R" Us, 126 F.3d 15 (2nd Cir. 1997). An expanded notion of „manifest disregard" has been applied in employment discrimination claims. *See* Halligan v. Piper Jaffray, 148 F.3d 197 (2nd Cir. 1998), *cert. denied*, 119 S.Ct. 1286 (1999).

15 Swiss *Concordat intercantonal sur l'arbitrage*, art. 36(f) (defining arbitrariness to include „evident violations of law or equity").

wiggle room for an overzealous judge to examine a dispute's legal merits under the guise of correcting arbitrator excess of authority.[16] Moreover, in parts of the world lacking a tradition of judicial independence, the business community may prefer no judicial review at all, taking its chances with potential arbitrator misbehavior as the lesser of two evils.

II. Situs Review

A. Historical Perspective

The proper extent of judicial review of awards at the arbitral situs has been the subject of considerable debate. Some jurists urge a relatively „delocalized" regime that imposes little or no judicial scrutiny of international arbitration,[17] while others take a more territorial approach that gives greater leeway for courts to monitor arbitrations conducted within their jurisdiction.[18]

Some countries have deliberately reduced the impact of local law on international arbitration. Until 1989, for example, most arbitrations in Switzerland were subject to the Intercantonal Arbitration Concordat, which directs arbitrators to fill procedural gaps by reference to Swiss federal law.[19] By contrast, analogous provisions of the current Swiss international arbitration law contain no such rule.[20] The ICC Rules have evolved in a similar direction. While the 1955 version of the Rules in some circumstances impo-

16 For an English perspective on the relationship between error of law and excess of jurisdiction, see *Denning*, The Discipline of the Law 74 (1979) („Whenever a tribunal goes wrong in law it goes outside the jurisdiction conferred on it and its decision is void."). *See also* Pearlman v. Keepers and Governors of Harrow School, [1978] 3 W.L.R. 736, 743 (C.A.) („The distinction between an error which entails absence of jurisdiction and an error made within jurisdiction is [so] fine . . . that it is rapidly being eroded.").

17 *See Philippe Fouchard, La Portée internationale de l'annulation de la sentence arbitrale dans son pays d'origine*, 1997 Rev. arb. 329.

18 *See Francis Mann, Lex Facit Arbitrum, in* Liber Amicorum for Martin Domke 157 (P. Sanders ed., 1967), *reprinted in* 2 Arb. Int'l 241 (1986); *Michael Kerr, Arbitration and the Courts: The UNCITRAL Model Law*, 34 Int'l & Comp. L.Q. 1, 15 (1985) („No one having the power to make legally binding decisions . . . should be altogether outside and immune from [the legal] system."); *William W. Park, Lex Loci Arbitri and International Commercial Arbitration*, 32 Int'l & Comp. L.Q. 21 (1983); William W. Park, *Duty and Diversity in International Arbitration*, 93 Am. J. Int'l Law 805 (1999).

19 Concordat Article 24 imposes the *Loi fédérale sur la procédure civile fédérale* to fill procedural lacunae in an arbitration.

20 Article 182 of the Swiss *LDIP* privé permits the parties to agree upon the rules of procedure, either directly, or by reference to the rules of an arbitration institution or a national procedural law of their choice. If rules of procedure have not been agreed upon by the parties, then to the extent necessary they may be determined by the arbitral tribunal.

sed the procedural law of the arbitral situs,[21] the current Rules grant procedural autonomy to the parties and the arbitral tribunal.[22]

This trend toward delocalization, however, does not mean that courts at the place of arbitration should never review awards. For reasons set forth below, an absence of any court scrutiny at the arbitral situs would adversely affect the victims of defective arbitrations, and in some cases the interests of the reviewing state itself.

B. Efficiency

Judicial review at the arbitral situs enhances efficient control of aberrant arbitral behavior, promoting confidence within the commercial community that arbitration will not be a lottery of erratic results. Such court scrutiny occurs relatively soon after the proceedings, when documents and witnesses are more readily available and before recollections become stale.

Situs review also enhances efficient arbitration by furthering respect for awards abroad. Without a right to have procedurally unfair awards vacated at the situs, victims of injustice must prove an award's illegitimate character *de novo* wherever it might be presented for recognition. This concern lay at the heart of France's international arbitration decree,[23] promulgated after court decisions held that French judges lacked power to vacate awards made in international arbitrations.[24] By allowing award annulment for procedural irregularity, excess of authority and violation of public policy,[25] the decree addressed fears that a complete absence of judicial control might lead foreign courts to hesitate to enforce French awards.

Perhaps the best evidence of business community desire for court scrutiny at the arbitral situs lies in Belgium's failed experiment in mandatory „non-review" of awards. Hoping that a completely *laissez-faire* system would attract arbitration, Belgium in 1985 elimi-

21 Article 16 of the 1955 ICC Rules provided that, absent the parties' choice of procedure, arbitrations were governed by the „law of procedure ... of the country in which the arbitrator holds the proceedings."

22 Article 15(1) of the 1998 ICC Rules provides that where these Rules are silent, the proceedings shall be governed „by any rules which the parties, or failing them, the Arbitral Tribunal, may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration."

23 Décret No. 81500, 12 May 1981, 1981 J. Officiel Rép. Française 13981406.

24 *See* Gen. Nat'l Maritime Transp. Co. v. Société Götaverken Arendal, 21 Feb. 1980, *Cour d'appel de Paris*, 1980 Rev. arb. 524; AKSA v. Norsolor, 9 Dec. 1980, *Cour d'appel de Paris*, 1981 Rev. arb. 306, 20 I.L.M. 887 (1981).

25 *NCPC* Article 1502 permits awards in international arbitration to be annulled for an invalid arbitration clause, irregular composition of the arbitral tribunal, excess of jurisdiction, lack of due process or violation of international public policy.

nated all motions to vacate awards in disputes between foreign parties.[26] Contrary to expectations, however, business managers turned out to be apprehensive about the new system.[27] Consequently, in 1998 the Belgian legislature enacted a new statute that now leaves a safety net of judicial review as the default rule.[28]

Although judicial monitoring of arbitration will not be completely foolproof, common sense suggests that misconduct is less likely when behavior is subject to public scrutiny and sanction. For example, the prospect of judicial review can make arbitrators more sensitive to the potential benefit in allowing testimony from a witness they might otherwise not wish to hear.

Whether the expense of procedural fairness is justified will depend on the facts of each case. Every additional witness costs time and money. Equilibrium in judicial review requires constant sensitivity to the competing concerns of winners and losers.[29]

C. Treaty Framework

Arbitration's treaty framework adds another element to our understanding of why most countries impose some form of judicial review on arbitrations conducted within their borders. The New York Arbitration Convention requires recognition of foreign awards on the same footing as domestic ones,[30] but subject to an important condition: awards vacated at the arbitral situs lose the benefit of the treaty's enforcement scheme.[31] Con-

26 *See* art. 1717(4) of Belgian *Code judiciaire* as enacted in 1985, before amendment of 19 May 1998, effective 17 August 1998.

27 See Bernard Hanotiau & Guy Block, *La loi du 19 mai 1998 modificant la législation belge relative à l'arbitrage*, 16 Swiss Bull. 528, 532 (1998).

28 Effective 17 August 1998, Article 1717 (4) of the Belgian *Code judiciaire* provides that challenge to awards must be made through an explicit statement: „*Les parties peuvent, par une déclaration expresse dans la convention d'arbitrage ou par une convention ultérieure, exclure tout recours en annulation d'une sentence arbitrale lorsqu'aucune d'elle n'est soit une personne physique ayant la nationalité belge ou une résidence en Belgique, soit une personne morale ayant en Belgique son principal établissement ou y ayant une succursale.*"

29 For somewhat divergent economic analyses of the effect of procedural safeguards on arbitration, compare Eric Posner, *Arbitration and the Harmonization of International Commercial Law*, 39 Va. J. Int. Law 647 (1999) and Keith N. Hylton, *Agreements to Waive or to Arbitrate Legal Claims: A Legal Analysis*, 8 Supreme Court Economic Review 209 (2000).

30 Convention Article III. At present the Convention applies in one hundred and twenty (120) countries. In some cases this deference is conditioned on a principle of territorial reciprocity, by which foreign awards are enforced only if rendered in another Convention country. See Convention Article I (3). Thus the winner of an arbitration in Iran (which to date has not adhered to the Convention) could not use the Convention to enforce its award in the United States, which has taken the reciprocity reservation to the Convention's application.

31 Other defenses allow courts to reject awards tainted with excess of authority and procedural irregularity (Convention Article V(1)(a)-(d) deal with invalid arbitration agreements, lack of due process, arbitrator excess of authority and irregular composition of the arbitral tribunal) and/or public policy violations. Convention art. V(2).

vention Article V(1)(e) permits recognition and enforcement to be denied to awards set aside in the country where made.[32] Thus the duty to enforce foreign awards operates in tandem with a discretion to refuse enforcement to vacated decisions.

The Convention says nothing about proper or improper annulment standards, leaving each country free to establish its own grounds for vacating awards made within its territory.[33] A national arbitration statute may impose judicial review for whatever grounds the legislators consider appropriate, or for no grounds at all.

The seat of an arbitration, therefore, plays a vital role in vesting an award with presumptive validity. By the way it exercises its annulment power, the arbitral situs either grants or denies awards their international currency.

A nation's support of the arbitral process, by allowing awards to be made within its borders, arguably carries with it a duty to monitor the quality of decisions benefitting from the treaty scheme. Consequently, any country serving as the place of arbitration can be expected to provide for annulment of awards proven to be biased, capricious or in excess of the arbitrators' authority.

Without some such judicial review, victims of procedural irregularity would be seriously handicapped in resisting defective awards, always having to run from country to country to oppose invalid decisions. For the defendant, this might mean resisting asset attachment in multiple jurisdictions where property is located. For the claimant, there would be the equally daunting task of showing that the vacated award did not have a

32 The treaty's French text lends itself to a more forceful interpretation, providing that „recognition and enforcement will not be refused unless the award . . . was annulled where rendered" *(La reconnaissance et l'exécution de la sentence ne seront refusées que si la sentence . . . a été annulée ou suspendue)*. The Chinese, Russian and Spanish versions seem to comport with the permissive English. *See* Richard W. Hulbert, *Further Observations on Chromalloy: A Contract Misconstrued, a Law Misapplied, and an Opportunity Foregone*, 13 ICSID Rev. 124, 144 (Spring 1998); *Jan Paulsson, May or Must Under the New York Convention: An Exercise in Syntax and Linguistics*, 14 Arb. Int'l 227, 229 (1998).

33 By contrast, Article 9 of the European Arbitration Convention (Geneva, 21 Apr. 1961, 484 U.N.T.S. 349), which supplements the New York Convention among residents of member states, allows non-recognition for award annulment only if the annulment was based on standards that track the first four defenses to foreign award enforcement: absence of an arbitration agreement, lack of opportunity to present one's case, excess of jurisdiction and irregular composition of the arbitral tribunal. Accordingly, courts in Germany could refuse comity to a French annulment of a Paris award for violation of „international public policy," not among the approved defenses. From a policy perspective, this approach is problematic in its indiscriminate mixing of both good and bad review standards. While some annulments falling outside the approved grounds impede arbitration (for instance, requiring all arbitrators to sign an award, giving dissenter a tool to sabotage proceedings) others (such as monitoring arbitrator bias and clear legal error) often further legitimate interests of the regulating state and the parties.

res judicata effect that barred enforcement of the result in a subsequent arbitral proceeding.[34]

Vacatur at the arbitral situs will not in all cases uproot the defective decision. In some places judges have disregarded annulments, relying on the Convention's permissive language (award enforcement „may" be refused) as well as Convention Article VII which in some circumstances permits national law to override more restrictive Convention terms.[35] The emerging trend, however, seems to be toward the more sensible practice of granting comity to foreign annulment decisions.[36]

D. The Vitality of Substantive Law

One school of thought supports mandatory judicial review of a dispute's legal merits as a way to fertilize the development of substantive legal principles, at least when disputes implicate interpretation of the forum's substantive law. The assumption behind such „merits review" is that court cases create precedents that provide behavioral rules to guide business conduct outside a particular dispute.[37] Litigation to review the merits of an award creates a publicly available „legal capital" of new rules to meet changing commercial circumstances.[38] While arbitration also creates precedent when arbitrators write reasoned awards that are subsequently published, such *lex mercatoria* is less accessible given the duty of confidentiality covering much arbitration.[39]

34 *See Hilmarton v. OTV, Cour de cassation*, 1997 Rev. arb. 376 (an award vacated in Switzerland granted *exequatur* in France). For earlier decisions in the *Hilmarton* matter, see *Cour d'appel de Paris*, 1993 Rev. arb. 300, confirmed by *Cour de cassation*, 1994 Rev. arb. 327 (recognizing the vacated award) and *Cour d'appel de Versailles*, 1995 Rev. arb. 639 (upholding a decision by the *Tribunal de grande instance de Nanterre* recognizing a second award rendered after annulment of the award recognized earlier in France).

35 In the United States, *see* Chromalloy Aeroservices v. Egypt, 939 F.Supp. 907 (D.D.C. 1996) (enforcing an award vacated in Egypt) . See also contribution to this *Festschrift* by Professor Andrea Giardina.

36 *See* Baker Marine Ltd. v. Chevron Ltd., 191 F.3d 194 (2nd Cir. 1999); Spier v. Calzaturificio Technica, S.pA., 71 F.Supp. 2d 279 (S.D.N.Y. 1999), motion for reargument denied, 77 F.Supp. 2d 405 (S.D.N.Y. 1999), reargument den., No. 86 Civ. 374 (CSH) (23 Nov. 1999). *See generally, William W. Park, Duty and Discretion in International Arbitration*, 93 Am. J. Int'l Law 805 (1999).

37 Under the „public law model" of litigation, cases guide future transactions of non-litigants. *See* Robert G. Bone, *Lon Fuller's Theory of Adjudication and the False Dichotomy Between Dispute Resolution and Public Law Models of Litigation*, 75 B.U. L. Rev. 1273 (1995). For discussion of analogous notions in connection to resolution of disputes arising from internet sales, see Michael Schneider & Christopher Kuner, *Dispute Resolution in International Electronic Commerce*, 14 J. Int'l Arb. 5 (Sept. 1997).

38 In the United States, one influential proponent of this perspective argues that the law should discourage settlement as well as arbitration agreements. *See* Owen Fiss, *Against Settlement*, 93 Yale L.J. 1073 (1984).

39 *Thomas Carbonneau* (ed.), Lex Mercatoria and Arbitration (1990).

These concerns once led England to restrict waiver of appeal on points of English law in admiralty, commodities and insurance arbitrations. It was felt that English law had a certain preeminence in these areas,[40] which to be maintained required new judgments covering new commercial controversies.

As England was abolishing the right of appeal in such „special category" disputes, securities arbitration in the United States was illustrating the possible utility of such review. Since the United States Supreme Court upheld the arbitrability of customer claims against brokerage houses,[41] there has been a decided decrease in the number of court decisions dealing with broker-customer relations, and a resulting freeze in the relevant law.[42]

The negative effect of unreviewed awards on legal development is particularly worrisome with respect to domestic consumer transactions, where American arbitral awards traditionally do not state reasons and are not published.[43] Arguments in favor of mandatory merits review seem stronger for routine domestic transactions than in an international context, where the parties' interest in procedural neutrality often outweighs benefits derived from using commercial disputes to develop substantive national law.

III. The Specificity of International Arbitration

A. Separate Regimes for Domestic and International Arbitration

Constructing an optimum legal framework for arbitration requires statutory distinctions between various sorts of disputes. Arbitration is not a homogeneous adjudicatory tool, operating with equal effect in consumer sales, employment contracts and international commercial transactions.

The limited court scrutiny suitable to controversies among sophisticated business managers may not always be appropriate to transactions in which abusive procedures may more easily be imposed on ill-informed individuals. Many observers rightly see an agreement to waive access to otherwise competent courts as qualitatively more signi-

40 1979 Arbitration Act §4 (abrogated in 1996), *discussed in William W. Park, Judicial Supervision of Transnational Commercial Arbitration*, 21 Harv. Int'l L.J. 87 (1980).

41 *See* Shearson/American Express v. McMahon, 482 U.S. 220 (1987) (fraud claims under Exchange Act §10b and Rule 10b-5); *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477 (1989) (Securities Act §12(2) claims).

42 *See Alan R. Palmiter*, Securities Regulation §11.2.5, at 344 (1998).

43 For a comparison of the situation with respect to international commercial awards, see *W. Laurence Craig, William W. Park & Jan Paulsson*, International Chamber of Commerce ch. 19 (2nd ed. 1990). *See also* 1 ICC Arbitral Awards 1971-85 (Sigvard Jarvin & Yves Derains eds., 1990); 2 ICC Arbitral Awards 1986-90 (Sigvard Jarvin et al. eds., 1994); 3 ICC Arbitral Awards 1991-95 (Jean-Jacques Arnaldez et al. eds., 1997).

ficant than other contract terms, such as price or interest rate, thus calling for a greater degree of court scrutiny.[44]

In this connection, one of the principal drawbacks of the legal framework for arbitration in the United States is that the Federal Arbitration Act subjects most arbitration to a single statute.[45] Consequently, anti-abuse measures aimed at potentially unfair consumer and employment arbitration inhibit private international dispute resolution conducted in the United States.[46] No separate legal framework meets the need for a more neutral playing field in cross-border litigation, where the perception of judicial bias can cause productive transactions to falter. By contrast, international arbitration regimes of differing kinds have been enacted *inter alia* in Belgium, France, Switzerland and Hong Kong.[47] And within the European Union, a distinction is made between consumer and non-consumer transactions.[48]

As a matter of policy, any statute on international arbitration should make clear that narrow review standards cover awards in cross-border disputes, regardless of whatever protective regime applies in domestic arbitration. Consumer and employment contracts, as well as agreements with small businesses, should be explicitly excluded from the statute's scope,[49] thus reducing the type of conflict that has sometimes arisen when international arbitration statutes were not clear about the scope of their coverage.[50]

44 *See Paul D. Carrington & Paul H. Haagen, Contract and Jurisdiction*, 1996 Sup. Ct. Rev. 331 (1996).

45 While collective bargaining arbitration rests on its own statutory basis, *see* 29 U.S.C. § 185, the U.S. Supreme Court has held that the Federal Arbitration Act applies to almost all other contracts that in any way involve interstate commerce. *See* Allied-Bruce Terminix v. Dobson, 513 U.S. 265 (1995). State statutes fill gaps in federal arbitration law only if consistent with the latter's general purposes. The Federal Arbitration Act's exclusion of „contracts of employment" has been narrowly interpreted to cover only contracts to transport goods or provide services directly in foreign or interstate commerce.

46 For example, courts have ordered costly discovery about the fairness of institutional arbitration rules used in employment arbitration. *See* Rosenberg v. Merrill Lynch Pierce, 965 F.Supp. 190 (D. Mass. 1997), *aff'd on other grounds*, 170 F.3d 1 (1st Cir. 1999).

47 *See e.g.*, Belgian *Code judiciaire* Article 1717 (4); French *NCPC* Articles 14421507; Hong Kong Arbitration Ordinance (Laws Chapter 341), Part IIA (§§ 34A – 34D); Swiss *LDIP* Chapter 12.

48 European Council Directive 93/13/EEC (5 April 1993), Official Journal No. L95 (21 April 1993) at 29.

49 Consumer contracts include agreements with individuals related to property, services or credit, unless within the scope of an individual's profession. For an example of existing restrictions on arbitration clauses in consumer contracts, *see* EU Council Directive 93/13/EEC, 1993 O.J. (L95) 29. France also prohibits pre-dispute arbitration clauses except in contracts between merchants. *See* Code civil art. 2061; Code de Commerce art. 63.

50 *See Meglio v. Société V2000, Cour de cassation*, 1997 Rev. arb. 537, note E. Gaillard; 1998 Rev. Crit. Dr. Int'l Privé 87, note V. Heuzé (holding that French resident's purchase of limited series Jaguar escaped restrictions on consumer arbitration).

B. Appropriate Review Standards

The UNCITRAL Model Law might serve as a useful starting point for developing grounds for judicial review of awards in an international dispute.[51] Several modifications are in order, however.

First, no reference should be made vacatur on grounds of „public policy," a chameleon-like concept that risks misapplication when refracted through parochial cultural lenses.[52] While public policy analysis is unavoidable when judges seize property, such a malleable notion is unnecessarily dangerous when no enforcement is requested. If German and Italian companies choose New York to arbitrate a dispute that has no effect in the United States, American judges can safely leave to European colleagues the task of deciding whether the award is compatible with public policy.[53]

Second, arbitrator bias and corruption should be included explicitly as grounds for annulment. The Model Law contains no reference to annulment for partiality, and thus public policy must be pressed into service to deal with defective awards rendered by biased arbitrators. A direct approach to the problem would be superior.

Finally, parties should be given options either to contract out of all review or to contract into review on the merits of the dispute. While in domestic transactions good arguments can be made for uniform arbitration régimes, the special needs of international business call for greater freedom of contract.

C. Criteria for Defining „International" Arbitration

Characterization of a transaction as international or domestic might be made according to two principal criteria: the nature of the transaction[54] or the parties' residences.[55] For

51 Article 34 of the Model Law allows award vacatur for (i) invalidity of the agreement, (ii) lack of proper notice, (iii) excess of arbitral jurisdiction, (iv) irregular composition of the arbitral tribunal, (v) non-arbitrable subjectmatter and (vi) conflict with public policy.

52 *See, e.g.*, Laminoirs-Trefileries-Cableries de Lens, S.A. v. Southwire Co., 484 F.Supp. 1063 (N.D. Ga. 1980) (where the court vacated application of a French interest rate in a Franco-American contract).

53 Similar arguments might be made with respect to vacatur for excess of authority and violation of due process; however, the more circumscribed nature of these procedural defects make them less likely to cause mischief.

54 French *NCPC* Article 1492 defines arbitration as international if it „implicates international commerce." *See also* U.S. Federal Arbitration Act, 9 U.S.C.§ 202, which excludes from the scope of the New York Convention agreements entirely between American citizens *unless* „the relationship involves property located abroad or envisages performance or enforcement abroad." In Lander v. MMP, 107 F. 3d 476 (7th Cir. 1997), this provision was applied to bring within the Convention an arbitration in New York between two American corporations who had contracted to distribute shampoo products in Poland.

55 *See, e.g.*, Swiss *LDIP* Articles 176 & 192.

example, international arbitration could be defined to include an arbitration between parties with residences in different countries, or one in which when the transaction implicates cross-border trade, finance and investment.[56] Citizenship might also be used as a criteria, assuming this would not conflict with treaty prohibitions on nationality-based discrimination.[57]

As between these approaches, a residence-based seems most sensible. The special status of international arbitration justifies itself as a way to promote neutrality in dispute resolution among commercial actors from different countries. Difficult linguistic and procedural issues are more likely to arise when business managers from one nation must sue contracting parties abroad, not when they have litigation with compatriots concerning goods destined for export.

56 The UNCITRAL Model Law in §1(3) adopts both tests, characterizing arbitration as international if the parties' places of business are in different states or the transaction has a connection to a state other than the parties' places of business. In addition, the Model Law allows parties to opt to treat their agreement as international.

57 In England, the 1979 Arbitration Act prohibited pre-dispute waiver of appeal on points of English law in contracts among residents and/or citizens of the United Kingdom. Similar provisions were originally contained in §87 of the 1996 Arbitration Act, but never entered into force due to a perceived conflict with Article 12 (formerly Article 6) of the Treaty on European Union, which forbids discrimination on the grounds of nationality.