

NOTE

**INTERNATIONAL COMMERCIAL ARBITRATION IN EUROPE:
SUBSIDIARITY AND SUPREMACY IN LIGHT OF THE
DE-LOCALIZATION DEBATE**

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I. DOES/SHOULD THE SITE OF ARBITRAL PROCEEDINGS MATTER?

It is possible to envisage an ideal world in which the country or place in which a particular arbitration is held makes no difference to the legal principles applied or the procedure followed. In such a world, the arbitral tribunal would be guided by the agreement of the parties, or failing such agreement, by its own judgement; it would decide the substantive matters in issue before it on the basis of the applicable law or legal rules or, if the parties so wished, *ex aequo et bono*;¹ and it would make an award which was enforceable on the same conditions in any state in which the losing party had assets. Moreover, its award would be the same, uninfluenced by national laws or attitudes of mind, in whichever state the arbitral tribunal happened to sit for the purpose of conducting arbitration.²

As the popularity of international commercial arbitration continues to spread,³ it appears that the time has come again to ask the question of whether the traditional goals of private systems of dispute resolution are or should be governed by systems of national law.⁴ Because every arbitral proceeding takes place *somewhere*, and is enforced *somewhere*, it is

¹ “[I]n justice and fairness; according to what is just and good; according to equity and conscience.” BLACK’S LAW DICTIONARY 557 (6th ed. 1990).

² ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 77 (2nd ed. 1991).

³ See Christine Lecuyer-Thieffry & Patrick Thieffry, *Negotiating Settlement of Disputes Provisions in International Business Contracts: Recent Developments in Arbitration and Other Processes*, 45 BUS. LAW. 577, 577-81 (1990).

⁴ The debate is decades old — should parties engaged in binding alternative dispute resolution be free to unfetter themselves from the legal norms of any particular state? For the basic context of the “de-localization” debate, see William W. Park, *The Lex Loci Arbitri*, 32 INT’L. & COMP. L.Q. 21 (1983). See also Jan Paulsson, *De-localisation of International Commercial Arbitration: When and Why it Matters*, 32 INT’L & COMP. L.Q. 53 (1983) (putting Professor Park’s examination of the *lex loci arbitri* and international commercial arbitration in the perspective of practice and principle); see generally Jan Paulsson, *Arbitration Unbound: Award Detached from the Law of its Country of Origin*, 30 INT’L & COMP. L. Q. 358 (1981).

presumed that these proceedings and awards are governed by the laws of the states where those activities take place.⁵ The goals of state laws on privatized dispute resolution would thus have a direct impact on private parties' desire for certainty.⁶

This Note will examine the continuing state of the trend toward "a-national" or "de-localized" international commercial arbitration in Europe. Section I will re-examine the arguments for and against the localization of arbitral proceedings in general. Section II will look for evidence of the movement toward de-localized arbitration as found in international arbitral conventions and the United Nations Commission on Trade Law (UNCITRAL) Model Law. Section III will review selected national arbitration laws of European nations for this trend. Section IV will examine apparent conflicts between the trend toward arbitral de-localization and the declared objectives and policies of the European Union. This section will discuss the interplay between national and E.U. policy objectives, demonstrating an apparent and surprising limit to the ability of E.U. Member States to completely de-localize arbitral proceedings.

II. THE DE-LOCALIZATION DEBATE – WHEN DOES NATIONAL LAW MATTER?

The underlying question beneath the issue of forum-specific arbitration law is whether, in the name of party autonomy⁷ and seeking higher levels of certainty, parties should be completely free to choose the forum, procedure, and substantive rules of an arbitral proceeding, without limitation by national legislation.⁸ A good starting point in addressing this question is the debate started in the 1980s, which sets out the analysis in

⁵ See W. LAURENCE CRAIG ET AL., *INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION* 443 (2d ed. 1990) (discussing traditional constraints on the choice of law of the arbitration (*lex arbitri*)).

⁶ For example, eliminating or reducing "unintended effects of unforeseen peculiarities of the municipal law of the place where a dispute happens to be heard." Jan Paulssen, *The Extent of Independence of International Arbitration from the Law of the Situs*, in *CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION* 141, 141-42 (Julian D.M. Lew ed., 1986).

⁷ Described by Professor Nygh as "a supra-national right." Peter Nygh, *Choice of and Law in International Commercial Arbitration*, 24 *F. INT'L.* 1, 2 (1997).

⁸ Becoming in effect, an "a-national arbitration." See Hans Smit, *A-National Arbitration*, 63 *TUL. L. REV.* 629, 631 (1989).

terms of whether arbitral proceedings are, or should be, "localized" or "de-localized."⁹

The debate today is less likely to focus on whether it *should* matter where an arbitration takes place. Instead, the question today is whether it *does* matter. Issues of the stability, the level of infrastructure, travel time, and the available populace of arbitrators all have an impact on the choice of forum; but do the legal norms of a particular forum state, or even direct statutory provisions regarding arbitration matter?¹⁰ The apparent answer is *no*. The answer is less definite, however, if one views the last several decades as a gradual evolution toward a more tangible system of private international law promoted by the legislative action of nations and driven by increasingly sophisticated disputants in international commercial markets. The trend in Europe is most instructive in this regard, due in part to the activities of independent fora¹¹ sited there, as well as the growth of progressive new European national laws adopted in the last two decades.¹²

Typically, national legislation becomes a factor during the enforcement of an arbitral award.¹³ Enforceability arguments tend to favor de-

⁹ See generally Lecuyer-Thieffry & Thieffry, *supra* note 3. This debate is familiar enough to the scholarly community to warrant at least a subchapter or topic heading in any respectable book on international commercial arbitration. See, e.g., CHRISTIAN BÜHRING-UHLE, *ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS: DESIGNING PROCEDURES FOR EFFECTIVE CONFLICT MANAGEMENT* 56-57 (1996); WILLIAM W. PARK, *INTERNATIONAL FORUM SELECTION* 126-27 (1995); REDFERN & HUNTER, *supra* note 2, at 5.

¹⁰ See, e.g., UNCITRAL NOTES ON ORGANIZING ARBITRAL PROCEEDINGS § 3(a)[22], at 9, U.N. Sales No. E. 97.v.II (1996).

[V]arious factual and legal factors influence the choice of the place of arbitration, and their relative importance varies from case to case. Among the more prominent factors are: (a) suitability of the law on arbitral procedure of the place of arbitration; (b) whether there is a multilateral or bilateral treaty on enforcement of arbitral awards between the State where the arbitration takes place and the State or States where the award may have to be enforced; (c) convenience of the parties and the arbitrators, including the travel distances; (d) availability and cost of support services needed; and (e) location of the subject-matter in dispute and proximity of the evidence.

Id.

¹¹ E.g., the International Chamber of Commerce, the London Court of International Arbitration, and the Stockholm Chamber of Commerce.

¹² See *infra*, section III.

¹³ See MARK HULEATT-JAMES & NICHOLAS GOULD, *INTERNATIONAL COMMERCIAL ARBITRATION: A HANDBOOK* 7 (1996).

localization of disputes, giving arbitral awards a currency outside of the forum state or insulating them from the laws of that state.¹⁴ In the eyes of the de-localist, a nation's willingness to nullify an award frustrates the objectives of autonomous international commercial arbitration — after crafting the arbitral proceeding and engaging in a generally time-consuming and expensive endeavor, the winners might find themselves in a national court, starting over from scratch.¹⁵

Meanwhile, the interests of a nation or a third-party in the outcome of the dispute will often mandate some form of intervention.¹⁶ For instance, assuming that the typical power-disparity problem is best characterized as a third-party problem, the judicial imperative to protect the weaker party would go unapplied under the de-localist approach, leaving subsequent parties subject to an essentially hidden risk.¹⁷

At least theoretically, all arbitration is “firmly anchored in a definite legal system which will both assist and, to some degree, control it.”¹⁸ Municipal law, or the *lex loci arbitri*¹⁹ is always in place, serving as a backdrop to the private proceeding. If the parties fail to select substantive or procedural law, the *lex loci arbitri* will often be applied by the arbitrator.²⁰ Even when the parties have selected procedural and substantive

¹⁴ See William W. Park, *Text and Context in International Dispute Resolution*, 15 B.U. INT'L L.J. 191, 210 (1997).

¹⁵ See generally Shirin Philipp, Note, *Is the Supreme Court Bucking the Trend? First Options v. Kaplan in Light of European Reform Initiatives in Arbitration Law*, 14 B.U. INT'L L.J. 119 (1996) (arguing that more legal authority is needed to make arbitration decisions binding).

¹⁶ Such “mandatory rules” or “rules that cannot be contracted around” are typically found under the umbrella of a state’s “public policy.” See Yves Derains, *Public Policy and the Law Applicable to the Dispute in International Arbitration*, in *COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION* 227, 242-43 (Pieter Sanders ed., 1986) (discussing the public policy to adopt mandatory rules and distinguishing between mandatory rules of the forum and foreign mandatory rules).

¹⁷ Of arguably equal importance, the jurisprudence of the state goes uninformed as to the existence of the arbitrated issue. William W. Park, *National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration*, 63 TUL. L. REV. 647, 674 (1989).

¹⁸ See generally, e.g., REDFERN & HUNTER, *supra* note 2.

¹⁹ The law of the “seat” of the arbitration.

²⁰ Though in these circumstances it will not always be the law of the state where the arbitration occurs. See, e.g., John Y. Gotanda, *Awarding Punitive Damages in International Commercial Arbitrations in the Wake of Mastrobuono v. Shearson Lehman Hutton, Inc.*, 38 HARV. INT'L L.J. 59, 99 (1997).

law, the *lex loci arbitri* plays an important role, as it will provide the loser with possible defenses to the proceedings or the award.²¹

Since the inception of the de-localization debate, which took place shortly after the adoption of the English Arbitration Act of 1979,²² nations around the world have adopted more progressive (i.e., de-localized) arbitration models.²³ Looking within Europe, this trend is especially evident. The popular argument made in favor of de-localized legislation is that the higher the level of party autonomy supported by the forum, the more attractive the forum state will be to parties wishing to conduct business there.²⁴

Two questions arise from this contention, however: (1) whether complete party autonomy is always in the best interests of the parties, and (2) whether the adoption of de-localized arbitral legislation creates a constellation of fora that are governed by "international," or supra-national policy objectives – e.g., those of the European Union. If the latter question is answered in the affirmative, it would seem logical that E.U. Member States have de-localized arbitration laws, assured that (if only theoretically) international community norms will still provide a safety net, at least in terms of common objectives of the Member States. If this supposition is true, then it might be legitimate to declare that arbitration has gone from localized, to de-localized, to a new form of localization, where Europe becomes the new *locus arbitri*, and pan-European legal norms (both new and old) become the *lex loci arbitri*.

Still, no trend, particularly expressed across a conglomeration of fifteen nations, can be absolutely consistent. If one is to ask, "does it matter where you arbitrate in Europe?," the answer is probably *yes*.²⁵ At a minimum, all European nations have not subscribed to complete de-localization. Further, interpretations of the meaning of enforcement defenses accepted by the popular conventions on that topic vary. "Public

²¹ See, e.g., HULEATT-JAMES & GOULD, *supra* note 13, at 7 (enumerating a number procedural and enforcement defenses, including non-arbitrability of the dispute, lack of capacity to arbitrate, or serious mistakes of fact or law contributing to an improper award).

²² Arbitration Act 1979, S.I. 1979, No. 750.

²³ The 1979 act was viewed as a vast, although incomplete, improvement to the prior British arbitration law, due primarily to its effect of limiting intervention by the courts. See Symposium, Comment, *The Relaxation of Inarbitrability and Public Policy Checks on U.S. and Foreign Arbitration: Arbitration Out of Control?*, 65 TUL. L. REV. 1661, 1682 (1991) [hereinafter *Relaxation of Inarbitrability*].

²⁴ See Park, *supra* note 4, at 37-38.

²⁵ Even putting aside logistical arguments (e.g., infrastructure, availability of arbitrators, travel and communications considerations, etc. for the purposes of this evaluation).

policy,” and “arbitrability” mean different things in different nations. Thus, it makes sense to plot the Member States of the European Union along the localized/de-localized spectrum, in the hope that both the parties who seek maximum autonomy and those who seek the safety net of national protection can make an informed choice. Meanwhile, in plotting this curve, parties must acknowledge that the European Union has been relatively and uncharacteristically reticent regarding what appears to be its role as the ultimate terminus of the de-localization movement, making it difficult to predict when and where E.U. policy will serve as a supra-national ambit to party autonomy.

A. *Why Localize?*

Arguments for stringent national control of arbitral proceedings look primarily to state objectives of justice and third-party control.²⁶ Thus, it is argued that, “it is in the highest interest of the State . . . to maintain the principle of judicial review of arbitration not only to develop the law, but also to ensure the administration of justice and thus to avoid the risk of arbitrariness.”²⁷

Though the benefits of international commercial arbitration are thought by many to be irrefutable, there are a number of at least theoretical pitfalls awaiting parties that prefer to engage in a system of privatized justice.²⁸ The tension caused by the inherent autonomy of systems of privatized judicial systems and the apparent need for these systems to be controlled by, and accountable to, public systems of justice was eloquently characterized in Owen Fiss’ classic article, *Against Settlement*.²⁹ The primary question is whether the goals of parties trump the public interest in objective (or at least national) justice.³⁰ Issues of power dis-

²⁶ See, e.g., Park, *supra* note 4, at 51.

²⁷ F.A. Mann, *Private Arbitration and Public Policy*, 4 CIV. JUST. Q. 257, 267 (1985).

²⁸ See, e.g., Philipp, *supra* note 15, at 120.

²⁹ See generally Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984) (discussing the tensions within the American court system and private alternative dispute resolution). Professor Fiss states:

[T]he purpose of adjudication should be understood in broader terms. Adjudication uses public resources, and employs not strangers chosen by the parties but public officials chosen by a process in which the public participates. These officials, like members of the legislative and executive branches, possess a power that has been defined and conferred by public law, not by private party agreement.

Id. at 1085.

³⁰ See W. MICHAEL REISMAN, *SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION: BREAKDOWN AND REPAIR* 107-08 (1992). Such questions are

parities between the parties, impacts on third parties,³¹ and the benefits of publicized decisions³² are generally cited reasons countering arguments for privatized justice. More generally, the concern can be summarized as one of "fairness"³³ — to both the parties and the state.³⁴ These concerns are exacerbated by the fact that most commercial arbitration is binding,³⁵ and no substantive review of the award may be available to the loser.³⁶

1. Enter National Laws Governing Arbitration

A nation's *lex loci arbitri* will often control the legal capacity of parties to arbitrate, the validity of the arbitral proceedings (including the substantive "arbitrability" of the dispute), the extent of the arbitrator's jurisdiction, and the enforceability of the award.³⁷ In a super-localized state, arbitral law would provide a number of safety nets for parties, allowing dissatisfied disputants to seek the assistance of relevant national

frequently made more difficult for national courts to decide when the law applied is one of general principles (e.g., the *lex mercatoria*).

³¹ See Park, *supra* note 4, at 51; William W. Park, *Illusion and Reality in International Forum Selection*, 30 TEX. INT'L L.J. 135, 145, 175 (1995).

³² See Roger Scotton, *Arbitration Best Avoided*, BUS. INS. (Nov. 19, 1990). Here a British insurance litigator argues, among other things, how arbitration "can keep decisions important to the market under wraps unless all parties agree to release details." *Id.*

³³ See *Relaxation of Inarbitrability*, *supra* note 23, at 1663. Further, even if the parties share an interest in complete control over the resolutions of their disputes, upon what remedies will they be able to rely if their co-disputant decides to welch on the process, either by refusing to participate in the proceedings or by failing to comply with the decision of the arbitrator(s)?

³⁴ Although some questions of fairness may be couched in terms of control and comfort with the arbitral process on the part of the judiciary. See CRAIG ET AL., *supra* note 5, at 448.

³⁵ See, e.g., Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, opened for signature, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159, art. 53(1) [hereinafter ICSID Convention]. "The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in [the ICSID] Convention." *Id.* "In matters governed by this Law, no Court shall intervene except where so provided by this law." UNICTRAL Model Law on International Commercial Arbitration, art. 5, U.N. Doc. A/40/17, Annex 1 (1985) [hereinafter UNICTRAL Model Rules].

³⁶ Particularly when judicial review is explicitly limited to procedural issues. See William W. Park, *National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration*, 63 TUL. L. REV. 647, 685 (1989).

³⁷ See Lecuyer-Thieffry & Thieffry, *supra* note 3, at 599.

courts.³⁸ Issues of tribunal and personal competence, the willingness for parties to participate in the arbitral process, remedies for abuses of discretion on the part of the arbitrators, and nullification of unfair awards would be provided for in an extremely localized arbitration statute. The state, then, promotes arbitration, but assumes control of the process to ensure that national policies and concepts of justice are the foundation for arbitral proceedings.³⁹

2. Historic Localization

The concept of a *lex loci arbitri* assumes that, although the parties may determine the substantive and procedural law to be applied in a dispute, the state controls the proceedings through its arbitration law.⁴⁰ A good example of the localization tradition was the English requirement of the "special case" or "case stated" procedure in arbitration.⁴¹ This procedure, dropped by the English Arbitration Act of 1979, not only provided for the English High Court to hear challenges to any award granted in England, but also provided for the uniquely English concept that the arbitral proceedings could be challenged *before* the arbitral forum had reached a conclusion, termed the "consultative case."⁴² This procedure required the arbitrator to submit questions of law to the High Court, resulting in a remand back to the arbitral forum with instructions on how to proceed. Further, finalization of the award was also dependent on the approval of the High Court.⁴³

Following the same logic, localization would also provide that, even though English law might be the proper law of contract, if Scotland is the situs of the arbitration, Scottish concepts of a proper determination of the

³⁸ Even in localized proceedings, the question is often how much "assistance" is appropriate. *See id.* at 615.

³⁹ Park, *supra* note 4, at 30. "Even if the arbitration involves neither citizens nor interests of the forum State, national courts should ensure the integrity of awards rendered within national borders." *Id.*

⁴⁰ *See generally id.* at 23 (describing the concept of *lex loci arbitri*); CRAIG ET AL., *supra* note 5, at 450 (describing *lex loci arbitri*).

⁴¹ *See* Park, *supra* note 4, at 33. The procedure was derived from the Common Law Procedure Act of 1854, and established as a court-sponsored intervention by the Arbitration Act of 1889. *See id.* at 33 n.41.

⁴² *See id.* at 33-34.

⁴³ The High Court was authorized to direct post-award actions, including special cases, remission, setting aside of awards, and alternate reliefs. *See* English Arbitration Act, 1950, 14 Geo. 6, ch. 27, §§ 21-25 (Eng.).

dispute should prevail over those of England.⁴⁴ Similarly, a nation might validate an award which was nullified under another nation's laws, if it would be recognizable under its own laws.⁴⁵ Therefore extreme localization leads to circumstances where the validity of the arbitral proceedings is dependent on the laws of the forum state and the enforceability of the award is dependent on the laws of the state where the winner attempts to collect. Under the perspective of extreme localization, a state retains the power to control the outcome and effectiveness of arbitral disputes, on the basis of its own legislative concepts of the validity of the proceedings.

B. *Why De-localize?*

The primary rationales for de-localization of international commercial arbitration track arguments made in favor of party autonomy.⁴⁶ In general – rather than concerning themselves with abstract notions of justice in dispute resolution – parties seek complete autonomy, or certainly very high levels of it, in the arbitration process as the most efficient means of settling the dispute.⁴⁷

As the “cornerstone of international arbitration,”⁴⁸ party autonomy would seem to equate to predictability,⁴⁹ a fundamental rationale for international arbitration.⁵⁰ Parties want to predict and structure the risks facing them, and do not want to be hampered with (1) great divergences in the laws by which their obligations and rights will be judged, or (2) the possibility that the loser in a dispute will be able to unravel a desir-

⁴⁴ Such was the decision in 1969, affirmed by the House of Lords. See *Whitworth Estates v. Miller*, 2 All E.R. 210, 210 (Eng. C.A.) (1969) (where a Scotch arbitrator refused to “state his case” to the English high court, which the High Court ultimately found to be a valid exercise of the Scotch *lex loci arbitri*. (Manchester) Ltd.).

⁴⁵ As did the French court of appeals in *Norsolor v. Pabalk* in 1984. See Cass. le civ., Oct. 9, 1984, 10 Recueil Dalloz-Sirey [D.S. Jur.] 101.

⁴⁶ See, e.g., Karl-Heinz Bockstiegel, *The Role of Party Autonomy in International Arbitration*, 52 DISP. RESOL. J. 24, 25 (1997) (equating party autonomy to the commercial freedom to contract).

⁴⁷ *Id.*

⁴⁸ See Gotanda, *supra* note 20, at 59.

⁴⁹ See Park, *supra* note 31, at 135.

⁵⁰ Actually, the rationales cited most frequently are “certainty” and “predictability.” but the use of these terms in conjunction with each other seems oxymoronic. If certainty could be achieved, one would not need predictability. And if predictability is an overarching goal, certainty would seem to have been surrendered in advance.

able outcome by calling on the national courts to interfere with the proceedings, or perhaps even nullify them.

Since arbitration is a fundamentally legal process, the party autonomy is highest where the states do not limit the ability of the parties to dictate choice of law and forum via contract.⁵¹ By retaining complete control over choices of procedural and substantive law, arbitrators, and situs of the proceedings, parties would presumably be able to secure an outcome that is both mutually agreeable and as predictable as possible.⁵² The highest levels of party autonomy could then reasonably be expected in countries where "interference by the local judiciary" would be strictly limited to the contractual specifications of the parties.⁵³

1. Legislating Autonomy

Party autonomy, however, is grounded in the fact that every arbitral proceeding takes place somewhere, and the legal and political authorities of that place are likely to have an interest in the outcome of legal proceedings affecting the citizenry (personal or corporate) within its jurisdiction. Meanwhile, the balance between party autonomy and vital juridical interests,⁵⁴ public policy, and the pursuit of objectively just outcomes,⁵⁵ does not always pit private interests against those of the state.⁵⁶ Certain autonomy-limiting measures serve the purpose of protecting the interests of the parties.⁵⁷

⁵¹ Parties will not only select the forum and arbitrators, but will also select the procedural and substantive laws governing the resolution of the dispute. See Paulsson, *De-localisation of International Commercial Arbitration*, *supra* note 4, at 56.

⁵² See Julia A. Martin, Note, *Arbitrating in the Alps Rather Than Litigating in Los Angeles: The Advantages of International Intellectual Property-Specific Alternative Dispute Resolution*, 49 STAN. L. REV. 917, 928 (1997) ("Arbitration not only offers the prospect of speedier and cheaper resolution, it also can provide greater predictability regarding time and cost. Businesses need to know when a dispute is likely to be decided").

⁵³ CRAIG ET AL., *supra* note 5, at 440.

⁵⁴ See OKEZIE CHUKWUMERUJE, CHOICE OF LAW IN INTERNATIONAL COMMERCIAL ARBITRATION 202 (1994)

⁵⁵ See generally Fiss, *supra* note 29, at 1085-87 (discussing justice rather than peace in the context of comparing adjudication to dispute resolution).

⁵⁶ See, e.g., Park *supra* note 17, at 674.

⁵⁷ See Martin, *supra* note 52, at 954.

As it turns out, states have not only been supportive of enhancing party autonomy, but they have also been surprisingly willing to relinquish court control over the arbitral process if parties so desire.⁵⁸

2. De-localization via International Accords & Rules

Over the past several decades, the concept of de-localization has had a dramatic impact on the international accords which govern arbitral proceedings and awards. Though early conventions clearly favor state control, latter conventions and declarations demonstrate a willingness to balance individual objectives against those of the state.

The desire to fix proceedings to the state is evidenced by the language of the Geneva Protocol of 1923, whereby the arbitral procedure and the constitution of the arbitral tribunal were "governed by the will of the parties and by the law of the country in whose territory the arbitration takes place."⁵⁹ Similar language is found in the Geneva Convention for the Execution of Foreign Arbitral Awards of September 26, 1927,⁶⁰ which had the effect of mandating that the constitution of the tribunal and the arbitral procedures be in conformity with the law of the place of arbitration—that it be governed by the *lex loci arbitri* of the situs.⁶¹

A further localization existed in the language of the Geneva convention which required that an award be *final* under the laws where the arbitration took place.⁶² This had the effect of forcing courts to review the validity of an award – not only in terms of its own domestic law, but also in terms of the laws of the forum state.⁶³ Thus, the Geneva agreements prescribed not only a localization, but also a multiple-localization⁶⁴ –

⁵⁸ See *Relaxation of Inarbitrability*, *supra* note 23, at 1662-63.

⁵⁹ Protocol on Arbitration Clauses, Sept. 24, 1923, 27 L.N.T.S. 258, No. 678.

⁶⁰ Article 1(c) provides that for recognition or enforcement it shall be necessary: "[t]hat the award has been made by the Arbitral Tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure;" Convention on the Execution of Foreign Arbitral Awards, Sept. 26, 1927, 92 L.N.T.S. 302, No. 2096.

⁶¹ See ALBERT JAN VAN DEN BERG, *THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION* 9 (1981).

⁶² See *id.*

⁶³ Equating to "double *exequatur*." *Id.* According to van den Berg, "the drafters of the New York Convention effected this by providing that the award must be 'binding' on the parties, avoiding the more demanding term 'final' as used in the Geneva Convention." (emphasis added). *Id.*

⁶⁴ As opposed to Professor Mayer's term *multi-localization*, referring to de-localized (independent) arbitration. See Pierre Mayer, *The Trend Towards Delocalisation in the Last 100 Years*, in *THE INTERNATIONALISATION OF INTERNATIONAL ARBITRATION: THE*

courts were forced to apply the *lex arbitri* of both the forum state and the state in which the award would be enforced.

A response to what some felt to be the unworkable nature of these agreements⁶⁵ came in the form of the 1958 New York Convention on the Recognition and Enforcement of Arbitral awards.⁶⁶ The enactment of this convention marked a turn toward increasingly de-localized international commercial arbitration.⁶⁷ Under the convention, only operational formalities are specified.⁶⁸ Meanwhile, broader procedural provisions still allow a state to inject its own systemic priorities into proceedings.⁶⁹ Most important, though, are the provisions which allow national courts to review two critical defenses: (1) arbitrability of the subject matter and (2) public policy of the state.⁷⁰ These two critical defenses⁷¹ present a dovetail be-

LCIA CENTENARY CONFERENCE 37, 46 (Martin Hunter et al. eds., 1995). The term in the text refers to simultaneous localization (as in the case of the Geneva agreements). *See id.* at 45-46.

⁶⁵ *See* VAN DEN BERG, *supra* note 61, at 9.

⁶⁶ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention]. Note that the New York Convention is supplemented by the European Convention on International Commercial Arbitration of 1961, Feb. 9, 1968, 484 U.N.T.S. 349 (Geneva), but is only applicable to the nationals of Member States and has enjoyed a very limited effect on national practice. *See* generally REDFERN AND HUNTER, *supra* note 2, at 465-66 (1991) (discussing the purpose and limitations of this convention).

⁶⁷ As evidence of its pessimism for arbitration, England did not ratify the New York Convention until 1975. *See* Arbitration Act, 1975, S.I. 1975, No. 1662.

⁶⁸ For instance, the party applying for recognition or enforcement must supply the authenticated original award or a certified copy thereof. *See* New York Convention, art. IV(1)(a), *supra* note 66, at 2520. If the award was not rendered in the enforcing state's language, a certified translation must also be included. *See id.*

⁶⁹ Under the New York Convention, recognition and enforcement may be refused only if the party against whom recognition or enforcement is sought can prove:

- Incapacity of the parties or invalidity of the arbitration agreement,
- Improper notice or other lack of due process,
- An award beyond the scope of the agreement to arbitrate,
- Improper arbitral procedure or composition of the arbitral board, or
- That the award has been set aside or suspended or is otherwise not binding.

Id. art. V(1).

⁷⁰ Recognition or enforcement may be refused if:

- The subject-matter of the difference is not capable of settlement by arbitration under the law of that country; or

tween the international conventions and national localization via arbitral laws (as well as common law decision and administrative regulations).

Questions of arbitrability and public policy vary from nation to nation. The issue of arbitrability is basically a question of competence or jurisdiction to hear the dispute.⁷² Classic bars on arbitrability are found in areas where national priorities are felt to be too important to be left to privatized justice.⁷³ In the pre-award stage, the defense would seek to enjoin the arbitrator from hearing the dispute and reaching a decision on the merits.⁷⁴

Most important in the context of the European Union is the 1961 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels Convention).⁷⁵ The Brussels Convention provides (1) uniform rules on jurisdiction⁷⁶ and (2) the recognition and enforcement in any Member State of judgments rendered by

The recognition or enforcement of the award would be contrary to the public policy of that country.

Id. art. V(2).

⁷¹ See Julian D.M. Lew, *Determination of Arbitrators' Jurisdiction and the Public Policy Limitations on that Jurisdiction*, in CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION 73, 74 (Julian D.M. Lew ed., 1986).

⁷² See *Relaxation of Inarbitrability*, *supra* note 23, at 1664.

⁷³ See Werner F. Ebke & Mary E. Parker, *Foreign Country Money-Judgments and Arbitral Awards and the Restatement (Third) of the Foreign Relations Law of the United States: A Conventional Approach*, 24 INT'L LAW. 21, 52-53 (1990) (describing U.S. case law that acknowledged the ever-increasing national dependence on the international economy). These areas are, among others, anti-trust law, bribery and corruption, currency controls, boycott, and environmental protection. See Lew, *supra* note 71, at 78; Pierre Mayer, *Mandatory Rules of Law in International Arbitration*, 2 ARB. INT'L 274, 275 (1986); see generally INTERNATIONAL COMMERCIAL ARBITRATION IN NEW YORK (J. Stewart McClendon & Rosabel E. Everard eds., 1986).

⁷⁴ Though this is generally limited by the doctrine of competence-competence (*Kompetenz-Kompetenz*) referring to the ability of arbitrators to rule on their own jurisdiction over a party or dispute. See generally William W. Park, *Bridging the Gap in Forum Selection: Harmonizing Arbitration and Court Selection*, 8 TRANSNAT'L L. & CONTEMP. PROBS. 19, 46 (1998). Also, an Injunction might be sought on the basis that the arbitration agreement was somehow invalid. See Smit, *supra* note 8, at 636. Some states, (e.g., France) interpret competence-competence to preclude injunctive relief for questions of validity, waiting until a decision has been reached by the arbitrator before hearing the challenge. See Park, *supra* note 14, at 202.

⁷⁵ Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, as amended, 1990 O.J. (C 189) [hereinafter Brussels Convention].

⁷⁶ *Id.*, Title II.

the courts of other Member States, with very limited review by the court in which enforcement is sought.⁷⁷ Community citizens and artificial persons enjoy the benefits of the Brussels Convention's enforcement provision.⁷⁸ Nothing would prevent an American company or individual, for example, from obtaining the enforcement of a judgment in a member-state where the loser has assets in another Member State.⁷⁹

C. *UNCITRAL Model Rules*

The most significant step toward de-localization at the national level has come from the Model Rules developed by UNCITRAL and adopted in 1985.⁸⁰ Unlike the New York or Geneva Conventions, the Model Rules were intended as new a *lex loci arbitri* for any state which decided to adopt it.⁸¹ Thus, the provisions of the Model Rules do not generally apply if the arbitration takes place in a foreign forum.⁸² However, courts of Model Rules states must refer a dispute to arbitration even if the place of arbitration is outside that state's territory.⁸³ Such courts must recognize and enforce an arbitral award "irrespective of the country in which it was

⁷⁷ *Id.*, Title III.

⁷⁸ *Id.*, Title.II, § 1, art. 2.

⁷⁹ See, e.g., John P. Fitzpatrick, *The Lugano Convention and Western European Integration: A Comparative Analysis of Jurisdiction and Judgments in Europe and the United States*, 8 CONN. J. INT'L L. 695, 697-99 (1993) (describing the harmonizing effects of the Brussels and Lugano Conventions on interstate jurisdiction in Europe). The Lugano Convention, established by the Member States of the European Free Trade Association, "has extended the well established rules of the Brussels Convention (including the case law of the ECJ) to EFTA countries." John P. Fitzpatrick, *The Future of the North American Free Trade Agreement: a Comparative Analysis of the Role of Regional Economic Institutions and the Harmonization of Law in North America and Western Europe*, 19 HOUS. J. INT'L L. 1, n.403 (1996).

⁸⁰ The UNCITRAL Model Law was drafted by the United Nations Commission on International Trade Law (UNCITRAL) and adopted by the United Nations General Assembly in December 1985. G.A. Res. 40/72, U.N. GAOR, 40th Sess., Supp. No. 53, at 308, U.N. Doc. A/40/53 (1985), App. Doc. 7.

⁸¹ MARTIN HUNTER ET AL., *THE FRESHFIELD'S GUIDE TO ARBITRATION AND ADR*, 32 (Kluwer 1993). Although, in the case of Europe, it would seem that the Model Law has been more inspirational than legally effective. As of this point, only Scotch and British arbitration laws have been largely based on the Model Law.

⁸² See UNCITRAL Model Rules, *supra* note 80, art. 1(2). "The provisions of this Law, except articles 8, 9, 35, and 36, apply only if the place of arbitration is in the territory of this State." *Id.*

⁸³ See *id.* art. 8 (describing referral of arbitration agreement actions to arbitration).

made.”⁸⁴ Further, the court may attempt to provide interim protection, whether or not the place of arbitration is within the Model Rules state.⁸⁵

Model Rules parties are granted fundamental autonomy, in choosing the procedural rules,⁸⁶ the place of arbitration,⁸⁷ timing,⁸⁸ and the language to be used in the proceedings.⁸⁹ In the absence of agreement on these issues, the Model Rules allows the arbitral tribunal to fill in the gaps.

Further autonomy is granted in Article 28, which gives the parties the right to choose the substantive law applicable to the dispute.⁹⁰ An arbitral award must be in writing, must be signed by the arbitrators, and must state the reasons upon which the award is based unless the parties have agreed that no reasons are to be given or the award is on agreed

⁸⁴ See *id.* art. 35. “An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and article 35.” *Id.*

⁸⁵ See *id.* art. 9. “It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.” *Id.*

⁸⁶ See *id.* art. 19. “The parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.” *Id.*

⁸⁷ See UNCITRAL Model Rules, *supra* note, art. 1(2), art. 20. “The parties are free to agree on the place of arbitration.” *Id.*

⁸⁸ See *id.* art. 21. “[A]rbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.” *Id.*

⁸⁹ See *id.* art. 22. “The parties are free to agree on the language or languages to be used in the arbitral proceedings.” *Id.*

⁹⁰ See *id.* art. 28(1) “The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute.” *Id.* Interestingly, the Model Law appears to exclude conflict of laws rules from such choice, reserving that choice for the tribunal. See *id.*, art. 28(2). “Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.” *Id.* art. 28(2).

terms.⁹¹ A final award terminates the arbitral proceedings,⁹² subject to the right of the parties to request correction or interpretation.⁹³

A party may apply to the competent court to set aside an arbitral award only if it can prove:

1. incapacity of the parties or invalidity of the arbitration agreement,
2. improper notice or other lack of due process,
3. an award beyond the scope of the agreement to arbitrate,
4. improper arbitral procedure or composition of the arbitral board,
5. that the award has been annulled or suspended or is otherwise not binding,
6. that the subject matter of the dispute is not capable of settlement by arbitration under the enacting state's laws, or
7. that the award is in conflict with the public policy of that state.⁹⁴

The Model Rules generally seek to limit judicial control during enforcement, allowing a court faced with a request to set aside an award to contact the tribunal in an attempt to "eliminate the grounds for setting aside."⁹⁵ The final provisions of the Model Rules address recognition and enforcement of awards, "irrespective of the country in which [they are]

⁹¹ See *id.* art. 31. "The award shall be made in writing and shall be signed by the arbitrator or arbitrators The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms." *Id.*

⁹² See UNCITRAL Model Rules, *supra* note 80, art. 1(2), art. 32. "The arbitral proceedings are terminated by the final award." *Id.*

⁹³ See *id.* art. 33. "[A] party . . . may request the arbitral tribunal to correct in the award any errors in computations, any clerical or typographical errors or any errors of similar nature [A] party . . . may request the arbitral tribunal to give an interpretation of a specific point or part of the award." *Id.*

⁹⁴ See *id.*, art. 34(2) (following provisions found in Article V of the New York Convention, and Article 5 of the Inter-American Convention on International Commercial Arbitration).

⁹⁵ *Id.* art. 34(4).

made."⁹⁶ Following the language of the New York Convention, recognized grounds for refusing enforcement are the same as those for setting aside an award.⁹⁷

III. THE DE-LOCALIZATION MOVEMENT IN NATIONAL LAW

Typically, national laws play a potential role in a variety of areas during the arbitration process: (1) the substantive law governing the issues in dispute (*lex contractus*); (2) the law governing the capacity of the parties to enter into an arbitration agreement; (3) the law governing the arbitration agreement and the performance of that agreement; (4) the law governing the existence and proceedings of the arbitral tribunal—the (*lex arbitri*); and (5) the law governing recognition and enforcement of the award.⁹⁸

Regarding the first area, the substantive law of the dispute, choice of law clauses are commonly accepted in most adjudicatory traditions, and do not present serious perils for the parties. This is said acknowledging that the chosen law's Conflict of Laws regime might designate a different law than that specified by the parties. Usually, however, the type of dispute anticipated by the parties in their contract will be decided under the system of law designated by the choice of law clause.⁹⁹ The remaining categories fall under the title of procedural rules governing the arbitral dispute, and present more difficult questions for those concerned with the potential pitfalls of arbitration.

The instances when national legislation is likely to affect arbitral proceedings most significantly are those involving a losing party that is seeking to defend its non-compliance before the national court. Importantly, national legislation may allow for procedural challenges beyond those acknowledged by the New York Convention and the Model Law.¹⁰⁰

⁹⁶ *Id.* art. 35.

⁹⁷ See generally UNCITRAL Model Rules, *supra* note 80, art. 1(2), art. 36 (identifying grounds for refusing enforcement of awards, including cases where an award is not yet binding). Cf. *id.*, art. 34 (identifying grounds for setting aside an award).

⁹⁸ See REDFERN & HUNTER, *supra* note 2, at 72. As regards the latter, it may, "in practice, prove to be not one law, but two or more, if recognition and enforcement is sought in more than one country in which the losing party has, or is thought to have, assets." *Id.*

⁹⁹ See, e.g., Bockstiegel, *supra* note 46, at 25 (stating that "the trend of modern national as well as international legislation on conflict of laws and on arbitration leans clearly in the direction of a maximum of party autonomy").

¹⁰⁰ Beyond public policy and arbitrability defenses, national laws may allow for challenges based on, for instance, the validity of the arbitration agreement, the form of the award, deposit of the award, special treatment for arbitration of international disputes, and timeliness of the claim. See CRAIG ET AL., *supra* note 5, at 447, 449.

Almost simultaneous to the adoption of the New York Convention and the Model Rules, the nations of Europe began re-drafting their laws. The motivations for re-drafting are complex and varied, but can generally be described as states wanting to attract international commerce,¹⁰¹ or perhaps even the commerce of international arbitration itself.¹⁰² Changes in national legislation tend to fall into two categories: (1) establishing grounds for review, and/or (2) establishing the proper grounds for nullification or enforcement.¹⁰³

A number of European countries have recently revised their laws to accommodate the demands of international arbitration (including France, Belgium, the Netherlands, Switzerland, England, and Scotland, as well as recent modifications in Italy and Germany). Generally, these laws have demonstrated increased favor toward de-localized arbitral proceedings. Meanwhile, several European nations still strictly apply their own procedural law to all arbitral proceedings taking place within their country.¹⁰⁴ To determine how widespread the trend has become, and how the legislation has manifested itself in specific cases, it is useful to examine the national laws of countries which have moved toward de-localization, noting the specific areas where legislative modifications will distinguish the outcome of arbitral proceedings in that state from those in other states.

Advocates of de-localization have approved the Swiss and Belgian statutes¹⁰⁵ as well as the new English Arbitration Act.¹⁰⁶ These statutes, and others like them, follow "the correct path to be followed in [the] future," advocated in the 1980s.¹⁰⁷ This is not to say that any of these stat-

¹⁰¹ See Lecuyer-Thieffry & Thieffry, *supra* note 3, at 601 n.115 (citing Emmanuel Gaillard — "National legislators do not hesitate to state that their objective in enacting new legislation is to enhance desirability of their country as a situs for international arbitration").

¹⁰² See Park, *supra* note 17, at 689-90. Note, rather than terming the move towards de-localization as a progression, Park refers to it rather as a *laissez-faire* attitude towards the pitfalls of de-localization.

¹⁰³ See *id.*

¹⁰⁴ Though there is *generally* no presumption that this will be the case. See, e.g., ICC ARBITRATION RULES, art. 15 (1998) (stating that "where these Rules are silent, 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").

¹⁰⁵ See Lecuyer-Thieffry & Thieffry, *supra* note 3, at 606.

¹⁰⁶ See Bockstiegel, *supra* note 46, at 26.

¹⁰⁷ Giorgio Bernini, *Recent Legislation and International Unification of the Law on Arbitration*, in PROCEEDINGS OF THE FIRST INTERNATIONAL COMMERCIAL ARBITRATION CONFERENCE 315, 347 (Nabil Antaki & Alain Prujiner eds., 1985).

utes, either in theory or in practice, is completely de-localized. There is always a point beyond which the courts will not enforce an arbitral award. Even if only in terms of defenses elaborated under the Brussels or New York Conventions. The following examines the de-localization trend found in recent legislative changes in several European states that serve as popular sites for arbitration.¹⁰⁸

A. Austria

Austrian arbitration law¹⁰⁹ leaves the parties large autonomy. Only a few provisions cannot be waived by agreement. If the parties have stipulated the application of a set of arbitration rules,¹¹⁰ these are in first instance applicable as *lex specialis*. These regulations apply to domestic as well as to international arbitral proceedings.

Under the old law, a difficult question arose as to whether Austrian courts had jurisdiction to respond to party requests brought under the Civil Procedure Statute (*Zivilprozessordnung*) (ZPO) when the only link to Austria is the agreement to arbitrate in Austria (as in the appointment of an arbitrator,¹¹¹ the rescission of an arbitration agreement,¹¹² or the setting aside of an award).¹¹³ This controversial issue was resolved in 1980 by the Austrian Supreme Court (*Oberster Gerichtshof*) in the *Norsolor* case, where it assumed jurisdiction of Austrian courts in an arbitration between a French and a Turkish party which was held in Austria to decide on an application to set aside the award.¹¹⁴

¹⁰⁸ See HUNTER ET AL., *supra* note 91, at 21-22.

¹⁰⁹ The general statutory regulation of arbitration is contained in chapter four, entitled "Arbitration Procedure — Arbitration Agreement," §§ 577-99 of the Austrian Code of Civil Procedure. ZIVILPROZESSORDNUNG [ZPO] §§ 577-99 (Aus.), translated in [Binder 2, Release 98-4] INT'L COMM. ARB. (Oceana Publications, Inc.) at 10-17 [hereinafter INT'L COMM. ARB.]. Note that §§ 577-99 are not applicable to valuation, which is a distinct process from arbitration under Austrian law.

¹¹⁰ Such as those of the International Chamber of Commerce, the Arbitral Centre of the Federal Economic Chamber, Vienna, the UNCITRAL Arbitration Rules, etc.

¹¹¹ See § 582 (1) ZPO (Aus.), translated in INT'L COMM. ARB., *supra* note 109.

¹¹² See § 583 ZPO (Aus.), translated in INT'L COMM. ARB., *supra* note 109.

¹¹³ See § 595 ZPO (Aus.), translated in INT'L COMM. ARB., *supra* note 109.

¹¹⁴ This concept is codified in the 1983 amendments to the ZPO:

The application should be brought before the court which would have been competent to hear the dispute in first instance in the absence of an arbitration agreement; however, if a court has been indicated in the arbitration agreement as being competent for this purpose and if it would be possible for that court to be given competence by agreement of the parties (para.104 (1) and (2) Judicature Act), of if the

As with most nations, some issues are not subject to arbitration (for instance, matters concerning bills of exchange (*Wechsel*) are not arbitrable). It is, however, possible to go to arbitration on the contract itself, thus making the arbitration agreement separable. Other disputes leave open an option for redress before the courts. For instance, disputes arising out of cartel agreements are in principle arbitrable. However, notwithstanding the existence of an arbitral clause in a cartel agreement, certain disputes (in particular those containing a contractual penalty or punitive measures imposed under the cartel agreement, or disputes concerning its existence) may nevertheless be brought before the ordinary court of law, unless the claimant has already effectively initiated the arbitration.¹¹⁵

The arbitrators will decide according Austrian law, unless the parties have expressed a contrary intention, although the parties may authorize the arbitrator(s) in writing to decide *ex aequo et bono* (*billigkeit*).¹¹⁶ Parties are free to specify their choice of law, substantive or procedural.¹¹⁷

Section 594 (1) of the ZPO declares that an arbitral award has the force of a final and binding court judgment between the parties, unless the parties have provided in the arbitration agreement for the possibility of appeal to second-level arbitral body.

Any party to the arbitration can request the chairman of the tribunal (or if he is unable to act, any other arbitrator), to confirm the final binding nature (*Rechtskraft*) and the enforceability (*Vollstreckbarkeit*) of the award.¹¹⁸ This confirmation is a prerequisite for the enforcement of a domestic award in Austria.¹¹⁹ Additionally, enforcement is by court proceeding.¹²⁰ Parties have three months¹²¹ to challenge an award before the

arbitration agreement indicates the venue of the arbitral procedure, then that court is competent, or in the absence of such indication, the court under whose jurisdiction this venue comes.

ZPO § 582 (Aus.), translated in INT'L COMM. ARB., *supra* note 109.

¹¹⁵ See § 116(1) of the KARTELL GESETZ (Cartels Act) of November 22, 1972.

¹¹⁶ See *supra* note 1.

¹¹⁷ In absence of such an agreement, the arbitrators will determine the applicable law on the basis of the rules of conflict which they deem reasonable. ZPO § 587 (Aus.), translated in INT'L COMM. ARB., *supra* note 109.

¹¹⁸ See § 594 ZPO (Aus.), translated in INT'L COMM. ARB., *supra* note 109.

¹¹⁹ See SURVEY OF INTERNATIONAL ARBITRATION SITES, 23 (J. Stewart McClendon ed., 3rd ed., 1993).

¹²⁰ See *id.*; § 594 ZPO (Aus.), translated in INT'L COMM. ARB., *supra* note 109.

¹²¹ See § 596(2) ZPO (Aus.), translated in INT'L COMM. ARB., *supra* note 109.

a national court.¹²² Thus, while Austrian law prescribes an effective certification of the award by the arbitral tribunal, interaction with national courts is minimal and left to the discretion of the parties until the point of enforcement.

B. Belgium

Belgium modified its arbitration statute in 1985,¹²³ two months before the promulgation of the UNCITRAL Model Rules. It may be regarded as the cutting edge in terms of de-localization of arbitration. It provides:

The Belgian Court can take cognizance of an application to set aside only if at least one of the parties to the dispute decided in the arbitral award is either a physical person having Belgian nationality or residing in Belgium or a legal person formed in Belgium, or having a branch or some seat of operation there.¹²⁴

If there is no Belgian connection, the losing party will not be able to challenge in the Belgian courts an award made in international arbitration proceedings sited in that country.¹²⁵ Therefore, a challenge can be made only in countries where such an award is sought to be enforced (i.e., outside of Belgium). Therefore, Belgium would therefore seem to serve as a choice forum for parties who are unafraid of the pitfalls of "arbitral anarchy."¹²⁶ As will be seen in part III, however, even Belgium's desire to

¹²² Grounds for setting aside an award include: invalid arbitration agreement, the inability of a party to present its case, invalidity of the tribunal's composition, award was improperly signed, justification of the award, unsupported rejection of an arbitrator challenge by the tribunal, or "incompatible with the basic principles of the Austrian legal system." § 595 ZPO translated in INT'L COMM. ARB., *supra* note 109. See REDFERN & HUNTER, *supra* note 2, at 325.

¹²³ The Belgian law on arbitration, enacted in 1972, is found in part six of the Judicial Code, articles 1676 to 1723. See GERECHTELIJK WETBOEK/ CODE JUDICARE (Belg.), translated in MARCEL STORME & BERNADETTE DEMEUEAERE, INTERNATIONAL COMMERCIAL ARBITRATION IN BELGIUM: A HANDBOOK 120-32 (1989) [hereinafter CCP]. Its provisions are based on the uniform law set forth in the European Convention Providing a Uniform Law on Arbitration, adopted in Strasbourg in 1966, under the aegis of the Council of Europe. Belgium has been the only member country to ratify this convention.

¹²⁴ CCP, art. 1717.4 (Belg.), translated in STORME & DEMEUEAERE, *supra* note 123.

¹²⁵ "Regardless of whether the arbitrators took a bribe, exceeded their mission, or participated in fraud against one of the parties." Park, *supra* note 9, at 128-29. See CCP, art. 1717(3) (Belg.), translated in STORME & DEMEUEAERE, *supra* note 123.

¹²⁶ See Park, *supra* note 31, at 135, n.280.

free parties from judicial review may be controlled by the ambit of E.U. law.¹²⁷

C. Netherlands

In 1986, the Netherlands adopted legislation aimed at modernizing its arbitration law.¹²⁸ Many of the changes reflect previous judicial attempts at modernizing Dutch arbitration practice by means of decisional law.¹²⁹ The Dutch law does not adopt a distinction between domestic and international arbitration.¹³⁰ Instead, the 1986 law attempts to liberalize both domestic and international arbitration, while retaining the same basic procedural regime for both.¹³¹

¹²⁷ See *infra*, section IV.

¹²⁸ See 4 Dutch Code of Civil Procedure. WETBOEK VAN BURGERLIJKE RECHTSVORDERING [Rv.] art. 1020 (Neth.), translated in PIETER SANDERS & ALBERT JAN VANDENBERG, *THE NETHERLANDS ARBITRATION ACT 1986* (1987). The law added a new chapter, Book 4, entitled Arbitration, replacing older provisions on arbitration that had remained essentially unchanged since enactment of the Code in 1838.

¹²⁹ See generally SANDERS & VANDENBERG, *supra* note 128 (outlining improvements to Rv. arts. 1020(2), 1022(2), 1036, 1054, 1037, 1046, 1051, 1060, 1050, 1069, 1020(3)). Primary enhancements are as follows:

- Elimination of the distinction between submission and arbitral clause;
- Interim measures of protection;
- Enhanced party autonomy measures;
- Place of arbitration and award left to the parties;
- The right to petition the courts for consolidation of pending arbitrations;
- Summary arbitration proceedings;
- The power to correct and complete awards rests with the arbitral tribunal;
- The parties have no right to court appeal on the merits; rather, the parties may agree to some form of appellate body;
- The tribunal may render an award on agreed terms; and
- The tribunal may fill gaps in a contract.

Id.

¹³⁰ Unlike, for instance, France, where arbitration having an international element is treated as de-localized, with only limited judicial review available. The Dutch dropped the distinction between national and "international" ("*met en cause*"), perhaps believing, as some argue, that the distinction would be a source of confusion and delay. Even the UNCITRAL Model Law art. 1(2) definition was disregarded. NOUVEAU CODE DE PROCEDURE CIVIL [N.C.P.C.], art. 1492 (Fr.), translated in GEORGE A. BERMANN ET AL., *FRENCH LAW: CONSTITUTION AND SELECTIVE LEGISLATION* ch. 7 (1994).

¹³¹ Although certain provisions of the 1986 law provide extended time limits when at least one of the parties resides or is domiciled outside of the Netherlands. Also, the law

Article 1054(2) of the Dutch Rv¹³² provides that, absent a choice of law stipulation by the parties, the arbitrators shall make the award in accordance with the rules of law they consider appropriate.¹³³ Netherlands law requires certification of awards by the District Court,¹³⁴ which will generally be granted unless the award is found to be "manifestly contrary to public policy."¹³⁵ Actions for setting aside the award may be brought only after certification is granted by the court.¹³⁶ Thus, Dutch arbitration supports a high level of party autonomy in structuring the proceedings, but provides the parties with a broad range of available challenges.

D. France

French law on arbitration is set forth in the *Nouveau Code de Procédure Civile* (French NCPC), enacted in 1806.¹³⁷ Between its enactment and 1980, the code remained essentially unchanged. Initiatives to amend the French NCPC came about both as a result of France's increasing importance as an international arbitral center,¹³⁸ and in response to France's adherence to a number of multilateral arbitration conventions.¹³⁹ French courts were frequently called on to adapt the antiquated code provisions to modern arbitration practice, especially on the international level. In

also contains a separate title, Arbitration Outside of the Netherlands, devoted to foreign arbitration agreements and the recognition and enforcement of foreign awards.

¹³² Similar to N.C.P.C. art. 1496 (Fr.), translated in BERMANN ET AL., *supra* note 130.

¹³³ See, e.g., Gotanda, *supra* note 20, at 64 (discussing circumstances under which punitive damages might be awarded).

¹³⁴ See 4 Rv. art. 1062(1) (Neth.), translated in SANDERS & VANDENBURG, *supra* note 128, at 36.

¹³⁵ See *id.* art. 1063 (Neth.), translated in SANDERS & VANDENBURG, *supra* note 128, at 37. A decision not to enforce may be appealed to the Court of Appeals and the Supreme Court.

¹³⁶ See 4 Rv. art. 1062 (Neth.), translated in SANDERS & VANDENBURG, *supra* note 128, at 36-37. Thus also adopting the doctrine of competence-competence of arbitrators. Grounds for setting aside include: lack of valid arbitration agreement; improper constitution of the arbitral tribunal; arbitrators did not comply with their mandate; award was not signed or did not contain reasons; or award, or manner in which it was made, violates public policy. See SURVEY OF INTERNATIONAL ARBITRATION SITES, *supra* note 141, at 88. Further available defenses are party fraud during the arbitration, forgery, or withholding relevant documents. See *id.*; Rv art. 1068 (Neth.), translated in SANDERS & VANDENBURG, *supra* note 128, at 43.

¹³⁷ N.C.P.C. (Fr.), translated in BERMANN ET AL., *supra* note 130.

¹³⁸ I.e., the increasing number of awards being granted by the International Chamber of Commerce in Paris.

¹³⁹ Such as the New York Convention, *supra* note 66.

1980 and 1981, arbitration legislation was enacted for the purpose of codifying and redefining this case law,¹⁴⁰ and codifying the *laissez-faire* attitude of the judiciary toward arbitral proceedings.¹⁴¹

Article 1494 of the French NCPC provides for general party autonomy regarding the arbitral procedure, while Article 1496 provides for traditional party autonomy when choosing applicable substantive law.¹⁴² More importantly, French arbitration law was the first to substantially increase the discretion of arbitrators by providing that, where the parties have not agreed upon the rules of law to be applied, the tribunal shall take into account the relevant trade usages and apply those rules of law it deems proper in that context.¹⁴³

By drawing a distinction between domestic and international arbitration,¹⁴⁴ the French NCPC allows for a high level of de-localization in international (but not all) arbitral proceedings. Meanwhile, in France, arbitrators can determine issues generally found non-arbitrable in many nations, including those involving foreign patent validity, counterfeiting, or licenses.¹⁴⁵ However, arbitral tribunals cannot declare a *French* patent invalid because the tribunal would necessarily have to make determinations of public policy and the rights of third parties.¹⁴⁶ Commentators differ with regard to whether even competition law and anti-trust disputes are actually arbitrable in France.¹⁴⁷

¹⁴⁰ See CRAIG ET AL., *supra* note 5, at 483-85. The new arbitration law is found in Book IV of the French CCP. See *id.* at 483. It provides separate regimes for domestic and international arbitration imposing virtually no constraints on the latter beyond the exigencies of international public policy. See *id.* at 496.

¹⁴¹ See *id.* at 483-84 (describing the codification of France's *laissez-faire* approach to arbitral proceedings in the 1980 and 1981 Decrees).

¹⁴² See Yves Derains, *France*, in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 16, 21 (Pieter Sanders ed., 1984 & Supp. 1986) (describing party autonomy in arts. 1494 & 1496).

¹⁴³ N.C.P.C. art. 1496 (Fr.), translated in BERMANN ET AL., *supra* note 130, at 7-113. See also Arthur Taylor von Mehren, *International Commercial Arbitration: The Contribution of the French Jurisprudence*, 46 LA. L. REV. 1045, 1058 (1986).

¹⁴⁴ N.C.P.C. art. 1492 (Fr.), translated in BERMANN ET AL., *supra* note 130, at 7-113.; see, e.g., CRAIG ET AL., *supra* note 5, at 489, n.28 (quoting *Mardele v. Muller et Cie*, "[whether the court applies domestic or international principles of arbitration] depends less on judicial criteria than on the economic notion of 'international interests.'").

¹⁴⁵ See von Mehren, *supra* note 143, at 1058-59.

¹⁴⁶ Decision forbidden to arbitral tribunals. N.C.P.C. art. 2060 (Fr.), translated in BERMANN ET AL., *supra* note 130, at 7-113. See Martin, *supra* note 61, at 945.

¹⁴⁷ See Berthold Goldman, *The Complementary Role of Judges and Arbitrators in Ensuring that International Arbitration is Effective*, in INTERNATIONAL ARBITRATION: 60

The extreme de-localization of French law is evident in Article 1052 of the French NCPC, which provides the judiciary with only very narrow bases for setting aside an award.¹⁴⁸ The "a-national" spirit of French law is further illustrated by its reference to "international public policy" vs. merely "public policy," when enumerating the bases for annulment.¹⁴⁹ Certification by a national court is required for enforcement of an arbitral award,¹⁵⁰ which, if granted, is not subject to direct judicial review.¹⁵¹

National courts will review international arbitral awards in terms of international standards, so long as the parties have provided for an exclusion of French law. Thus, French law grants high levels of party autonomy, and assumes very high levels of tribunal competence — at least for purely international arbitrations.

E. Switzerland¹⁵²

The Swiss Private International Law Act of 1987 (LDIP)¹⁵³ provides for generous levels of party autonomy in Articles 182 and 187.¹⁵⁴ Parties

YEARS OF ICC ARBITRATION: A LOOK AT THE FUTURE, 257, 270-71 (ICC Publishing S.A. ed. 1984).

¹⁴⁸ CRAIG ET AL., *supra* note 5, at 493-94:

1st, if the arbitrator decided in the absence of an arbitration agreement or on the basis of a void or expired agreement;

2nd, if the arbitral tribunal was irregularly composed or the sole arbitrator irregularly appointed;

3rd, if the arbitrator violated the mission conferred on him;

4th, if due process [literally, the principle of adversarial process] was not respected;

5th, if the recognition or enforcement would be contrary to international public policy (*ordre public international*).

Id.

¹⁴⁹ See *id.* at 494-95 (comparing the bases for setting aside international arbitral awards rendered outside France to those rendered by French courts).

¹⁵⁰ Via a court order of *Exequatur*. N.C.P.C. arts. 1477, 1478 (Fr.), translated in BERMAN ET AL., *supra* note 130, at 7-110. Again, when ruling *Exequatur* or *Ex aequo et bono* courts look to principles of general fairness, rather than any specific national law.

¹⁵¹ SURVEY OF INTERNATIONAL ARBITRATION SITES, *supra* note 119, at 46 (citing arts. 1488, 1504 of the French Code Civile).

¹⁵² Note that, while Switzerland is not a Member State of the European Union, its popularity as an arbitral site by E.U. Nationals, and possible applicability of E.U. law to disputes arbitrated in that country make a review of its arbitration laws relevant to this discussion. For an example of the potential applicability of E.U. law, see *infra* note 184.

are free to specify their choice of law in all areas of the dispute.¹⁵⁵ However, absent such a specification, the arbitral tribunal will perform contacts analysis to determine which forum's rules are most closely connected with the dispute.¹⁵⁶ Regarding arbitrability, the LDIP looks only to whether the dispute involves "financial interests."¹⁵⁷

Swiss judges must hear international cases pursuant to a prorogation agreement as long as one party resides in Switzerland and/or Swiss law is applicable to the dispute.¹⁵⁸ When both parties are Swiss residents, the LDIP does not apply, and Swiss courts may apply the notion of *forum non conveniens*,¹⁵⁹ or the Intercantonal Arbitration Concordat.¹⁶⁰ Thus Switzerland, like the France, retains separate regimes for international and domestic arbitration. Under the Swiss federal Conflict of Laws, parties to international commercial disputes can choose from cantonal law, or limit court review procedural questions.¹⁶¹

Complete autonomy is also an option, provided the parties have concluded an explicit agreement to exclude court challenge, and both parties reside outside Switzerland.¹⁶² Thus, the respect for party autonomy in Switzerland could result in an arbitration that takes place in Ge-

¹⁵³ LOI FEDERALE DE DROIT INTERNATIONAL PRIVE [LDIP] (Switz.) (Federal Law on Private International Law) (1987), translated in SWITZERLAND'S PRIVATE INTERNATIONAL LAW 31 (Pierre A Karrer et al., trans. Kluwer Law and Taxation Publishers 2d ed. 1994) [hereinafter, SWITZERLAND'S PRIVATE LAW].

¹⁵⁴ See PIERRE LALIVE ET AL., LE DROIT DE L'ARBITRAGE INTERNE ET INTERNATIONAL EN SUISSE 348, 387 (Lausanne 1989) (providing an annotated commentary on Art. 182 of the LDIP).

¹⁵⁵ See LDIP, art. 178(2) (Switz.), translated in SWITZERLAND'S PRIVATE LAW, *supra* note 153.

¹⁵⁶ See generally, e.g., Lecuyer-Thieffry & Thieffry, *supra* note 3.

¹⁵⁷ Swiss Conflict of Laws provisions are contained in CODE CIVIL SUISSE [Cc.] art. 177 (Switz.), translated in PIERRE A. KARRER & KARL W. ARNOLD, SWITZERLAND'S PRIVATE INTERNATIONAL LAW STATUTE 155 (1989); see Lecuyer-Thieffry & Thieffry, *supra* note 3, at 608.

¹⁵⁸ See Cc. art. 5 (Switz.), translated in KARRER & ARNOLD, *supra* note 157, at 32.

¹⁵⁹ See Park, *supra* note 14, at 193.

¹⁶⁰ See generally CRAIG ET AL. *supra* note 5, at 541-65 (comparing the LDIP and the Concordat under Swiss law).

¹⁶¹ See LDIP art. 190(2) (Switz.), translated in SWITZERLAND'S PRIVATE LAW, *supra* note 154.

¹⁶² See Cc. art. 192 (Switz.), translated in KARRER & ARNOLD, *supra* note 180, at 165; Park, *supra* note 31, at n.294. In such cases, the parties are free to choose both substantive law and procedural rules governing the dispute. See Gotanda, *supra* note 20, at n.155.

neva, but follows United States substantive law and German procedural law.¹⁶³

The code provides several grounds upon which awards may be challenged if the intent of the parties is unclear.¹⁶⁴ By default, the Federal Supreme Court in Lausanne must hear the challenge of the award.¹⁶⁵ Court review may be excluded by an explicit agreement (*déclaration expresse*)¹⁶⁶ under article 192 of the code, only if no party is a Swiss resident or has a permanent link with Switzerland.¹⁶⁷ The explicit nature of this claim is absolute – even if the default rules (such as those of the I.C.C. or the London Court of International Arbitration) of the institution conducting the arbitration bar judicial review – and only a statement by the parties choosing those rules (or similarly exclusive rules) will bar referral to the courts.¹⁶⁸

Thus, under Swiss federal procedure, parties have the choice of placing themselves under a similar regime of “arbitral anarchy” found in Belgium,¹⁶⁹ though the choice must be made explicitly.

¹⁶³ See Gotanda, *supra* note 20, at n.155.

¹⁶⁴ As Professor Park says:

- (i) irregular composition of the arbitral tribunal; (ii) an erroneous decision by the arbitral tribunal with respect to its own jurisdiction; (iii) an award beyond the issues submitted to the arbitrators, or the arbitrators' failure to decide claims within the request for arbitration; (iv) failure to respect the principle of equal treatment of the parties or the right to adversarial proceedings . . . ; and (v) incompatibility of the award with public policy (*ordre public*).

Park, *supra* note 31, at 185.

¹⁶⁵ See *id.* The court must hear the challenge of the award “unless the parties have expressly agreed to substitute review by the cantonal court of the arbitral seat.” *Id.* If the parties choose otherwise (e.g., cantonal procedure), the International Arbitration Concordat adds “arbitrariness” and “clear violation[s] of law or equity” to the list of challenges. *Id.* The Intercantonal Concordat permits the court to hear an annulment request “where it is alleged . . . that the award is arbitrary in that it was based on findings which were manifestly contrary to the facts appearing on the file, or in that it constitutes a clear violation of law or equity.” *Id.*, n.296, citing the SWISS INTERCANTONAL CONCORDAT art. 36(f).

¹⁶⁶ Park, *supra* note 36, at 696.

¹⁶⁷ See *id.*

¹⁶⁸ Park, *supra* note 36, at 696.

¹⁶⁹ See Park, *supra* note 31 at 135, n.280.

F. The United Kingdom

As stated above, English Arbitration Law prior to 1979 presented an excellent model of a localized arbitration regime.¹⁷⁰ Historically, the English judiciary was free to intervene at any point in the arbitral process.¹⁷¹ Since the enactment of the 1979 law, English courts¹⁷² have remained empowered to hear appeals from an arbitrator's decision on matters of law,¹⁷³ but the parties have been allowed to provide exclusion clauses that eliminate most judicial review of arbitration awards rendered in international disputes (including interlocutory appeals on questions of law arising in the course of the arbitration). The new Arbitration Act 1996 takes party autonomy to a new level.¹⁷⁴ Its most general rulings regarding procedure are found two sections:

Section 1(b): the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;

and

Section 34(1): It shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree to any matter.

What follows in paragraph (2) of Section 34 is a list of such matters. They show the fundamental changes the parties—and otherwise the arbitrators—may make to the usual procedure in England. The Arbitration Act 1996 goes even further, giving the parties freedom to agree or disagree to a broad range of issues.¹⁷⁵ In most of these cases, if the parties

¹⁷⁰ See generally Park, *supra* note 4, at 33-35 (discussing the "special case" procedure under English law prior to 1979).

¹⁷¹ See *Relaxation of Inarbitrability*, *supra* note 24, at 1682 & n.133.

¹⁷² Scotland has its own arbitration regime, and has recently adopted the UNCITRAL Model Arbitration Law.

¹⁷³ See Park, *supra* note 31, at 183.

¹⁷⁴ "[T]he philosophy of the UNCITRAL rule pervades the 1996 act . . ." V.V. Veeder, Q.C., *National Report England*, [Supplement 23] 2 INT'L HANDBOOK ON COM. ARB., at 3 (March 1997). See ARBITRATION ACT, 1996, (Eng.), reprinted in 5 INTERNATIONAL COMMERCIAL ARBITRATION, IV.UK (England) 2.c (Eric E. Bergsten ed., 1997) [hereinafter ARBITRATION ACT 1996].

¹⁷⁵ E.g., consolidation with other arbitral proceedings, concurrent hearings, representation by lawyers or other persons, appointment of experts or legal advisers, appointment of assessors to assist on technical matters, any other power exercisable by the arbitral tribunal, provision of security for the costs of the arbitration, the tribunal's power to give directions in relation to any property, the power of the tribunal to order relief on a provi-

have not expressly agreed upon such matters, a subsidiary competence of the arbitral tribunal is established.

Finally, in Section 46, the English Arbitration Act 1996 provides for the traditional autonomy of the parties to choose the law applicable to the substance of the dispute, but with the addition that the parties may also agree to have the dispute decided "in accordance with such other considerations as are agreed by them or determined by the tribunal."¹⁷⁶ Thus, as the latest addition to the cadre of de-localized arbitral regimes, the English Arbitration embodies the spirit of modern (particularly post-Model Rules) statutes, enabling international commercial disputants to tailor a resolution that excludes all but the most fundamental challenges to arbitral proceedings and awards.

IV. TOWARD UNIFORM DE-LOCALIZATION? E.U. CONSIDERATIONS

The law governing international commercial arbitration in European nations has become increasingly de-localized in recent years, and this trend is spreading. Unless the arguments in favor of localization are to be disregarded entirely, one must ask whether "arbitral anarchy,"¹⁷⁷ legal harmonization,¹⁷⁸ or some new form of European arbitral control¹⁷⁹ is likely to emerge.

It is important to remember that none of the international accords governing the validity of arbitral awards in force in Europe are functionally derived from the European Union.¹⁸⁰ In fact, both the Commission and the Court of Justice have demonstrated a surprisingly low level of activism in governing the field of international commercial arbitration.¹⁸¹ The reluctance to embrace arbitration is, for instance, evidenced in the

sional basis, or powers of the tribunal in case of a party's failure to take certain necessary procedural action.

¹⁷⁶ See ARBITRATION ACT 1996 S.46, *supra* note 174.

¹⁷⁷ See Park, *supra* note 17, at 690.

¹⁷⁸ See Ronald A. Brand, *UNCITRAL Arbitration Rules*, 2 BASIC DOCUMENTS IN INT'L ECON. L. (CCH) 1015, 1015 (Jan. 1991).

¹⁷⁹ See, e.g., Hans Smit, *The Future of International Commercial Arbitration: A Single Transnational Institution?*, 25 COLUM. J. TRANSNAT'L L. 9, 29-34 (1986) (discussing the future of international arbitration).

¹⁸⁰ See Jean-François Bourque, *The Legal Framework of Arbitration in the European Union*, in ICC INT'L CT. ARB. BULL. 8, 10-18 (International Commercial Arbitration in Europe — Special Supplement 1994).

¹⁸¹ See generally *id.* at 18-25 (offering an excellent overview of the, albeit limited, interplay between E.U. institutions and international commercial arbitration).

Lugano Convention,¹⁸² where arbitration was explicitly excluded from the scope of the accord.¹⁸³ As with national laws, the primary questions here are whether there are E.U. objectives to be honored in terms of Public Policy and Arbitrability, and whether those objectives will trump the desire by Member States¹⁸⁴ to grant complete autonomy to the parties to international commercial arbitrations.

A. *Direct Effect and Challenges*

Through its jurisprudence, the European Court of Justice (ECJ) established the doctrine of "direct effect,"¹⁸⁵ whereby E.U. law will prevail

¹⁸² See Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 16, 1988, art. I, 1988 O.J. L 319/9, 28 I.L.M. 620, 623 (specifying that the Convention does not apply to arbitration) [hereinafter Lugano Convention]. See also *supra* note 79 and surrounding text.

¹⁸³ Article 1 reads:

This Convention shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters. The Convention shall not apply to:

1. the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession;
2. bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;
3. social security;
4. *arbitration*.

Lugano Convention, *supra* note 182, art. 1 (emphasis added).

¹⁸⁴ Note, however, that even arbitrators sitting in non-Member States may choose or feel compelled to apply E.U. law as part of applicable supra-national or transnational public policy. Thus a dispute arbitrated in Switzerland, might imply application of E.U. law as part of Swiss law if the conflict has connections with an E.U. Member State, even if the apparent intent of the parties was to *avoid* E.U. law. See Bourque, *supra* note 180, at 38-42 (outlining three such situations where Swiss arbitral panels ranged broadly in their interpretation of this question).

¹⁸⁵ This doctrine flows from the famous line of cases developed by the ECJ during its more activist phase, stating that "[t]he transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act, incompatible with the concept of the Community cannot prevail." Case 6/64, *Costa v. ENEL* 1964 E.C.R. 585, 594, [1964] C.M.L.R. 425 (1964). See *Humblet v. Belgium* 1960 E.C.J. 559, 560, 569; *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A.* 1978 E.C.R. 629, [1978] 3 C.M.L.R. 263 (1978); see generally *N.V. Algemene Transport — en Expeditie Onderneming van Gend & Loos v. Neder-*

over individual national legislation where the latter is found to be incompatible with that of the European Union. The applicability of the "direct effect" doctrine to the *lex loci arbitri* of member-states is best exemplified by debates surrounding the passage of the 1996 English Arbitration Act. In these debates, it became apparent that Part II of the Act (Domestic Agreements) would be counter to Article 6 of the Maastricht Treaty, because it would be "direct or indirect discrimination against foreign citizens and legal persons of the European Union."¹⁸⁶ Similarly in *Data Delecta Aktiebolag*,¹⁸⁷ the ECJ found that a Swedish law which required security to be furnished by foreign plaintiffs and pay costs if they lost was contrary to Article 6 of the Maastricht treaty, stating:

[A] rule of domestic civil procedure, such as the one at issue in the main proceedings, falls within the scope of the Treaty within the meaning of the first paragraph of Article 6 and is subject to the general principle of nondiscrimination laid down by that article in so far as it has an effect, even though indirect, on trade goods and services between Member States.¹⁸⁸

Thus, not only substantive laws of Member States must approximate E.U. objectives, but so must procedural rules.¹⁸⁹ This begs the question of whether E.U. law is, by virtue of the "direct effect" doctrine, a *part* of each Member State's *lex loci arbitri*, and whether arbitrators can or must consult the ECJ on questions of E.U. law or policy.

The mechanics of appeal flow from Article 177 of the Treaty of Rome.¹⁹⁰ Through Article 177, the courts of Member States are encour-

landse administratie des belastingen (Netherlands Inland Revenue Administration) 1963 E.C.R. 1, 1963 C.M.L.R. 105.

¹⁸⁶ 22 Y.B. COM. ARB. 570 (1997).

¹⁸⁷ See generally Case C-43/95, *Data Delecta Aktiebolag v. MSL Dynamics Ltd.*, 1996 E.C.R. I-4661, [1996] 3 C.M.L.R. 741 (1996) (describing how Article 6 of the E.C. Treaty precludes a Member State from requiring a person from another Member State to furnish security).

¹⁸⁸ *Id.* at I-4676.

¹⁸⁹ Phillip Alexander Sec. v. Bamberger, (Eng. C.A. July 12, 1996), available in LEXIS, Intlaw Library, Engcas File. "In cases concerning the European Union what would best meet the predicament is a Directive defining the extent of the recognition which the orders of the courts of each Member State are entitled to receive from the courts of other Member States." *Id.*

¹⁹⁰ "The Court of Justice shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of this Treaty; (b) the validity and interpretation of acts of the institutions of the Community; (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide." Treaty Establishing the Euro-

aged to seek advisory opinions on questions of E.U. law. In the *Nordsee* case, the ECJ held that the language in Article 177 refers to state-sponsored tribunals—not private international commercial tribunals, even though they are sited in a Member State,¹⁹¹ creating an quandary for arbitral tribunals seeking guidance on the application of E.U. law or policy.

Meanwhile, the ECJ has also held that a national court reviewing an arbitral award, even if it is asked for an *ex aequo et bono*¹⁹² review of the award, must determine whether the award would also be consistent with E.U. policy:

It follows from the principles of the primacy of Community law and of its uniform application, in conjunction with Article 5 of the Treaty, that a court of a Member State to which an appeal against an arbitration award is made pursuant to national law must, even where it gives judgement having regard to fairness observe the rules of Community law, in particular those relating to competition.¹⁹³

pean Economic Community, Mar. 25, 1957, art. 177, 298 U.N.T.S. 11 [hereinafter E.E.C. Treaty], as amended by Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741, in *Treaties Establishing the European Communities* (E.C. Off'l Pub. Off. 1987).

¹⁹¹ See *Nordsee Deutsche Hochseefischerei GmbH v. Reederei Mond Hochseefischerei Nordstern AG & Co. KG* 1982 E.C.R. 1095, 1095:

An arbitrator who is called upon to decide a dispute between the parties to a contract under a clause inserted in that contract is not to be considered as a "court or tribunal of a Member State" within the meaning of Article 177 of the Treaty where contracting parties are under no obligation, in law or in fact, to refer their disputes to arbitration and where the public authorities in the Member State concerned are not involved in the decision to opt for arbitration and are not called upon to intervene automatically in the proceedings before the arbitrator.

Id.

¹⁹² "[G]enerally, taking into consideration not only legal rules, but also what they believe justice, fairness, and equity directs . . ." *Lecuyer-Thieffry & Thieffry*, *supra* note 3, at 591; This concept is not to be confused with the arbitral role of amiable compositeur:

[A] term of varied and not altogether precise meaning, used in continental legal systems to refer to the power to decide a dispute without reference to any fixed system of law. An arbitrator exercising such power is sometimes said to be deciding *ex aequo et bono*, although it is not clear how congruent the Latin and French expressions really are. Parties who authorize the arbitrator to act as an *amiable compositeur* may be deemed to have waived the right to challenge the award.

Park, *supra* note 36, at 648 n.1.

¹⁹³ Case C-393/92, *Amelo v. Energiebedrijf Ijsselmij NV*, E.C.R. I-1477 (1994).

Thus, though private arbitrators are not empowered to approach the ECJ themselves on questions of E.U. law and policy, they are bound to apply that policy.¹⁹⁴ Therefore, a national court opinion regarding a challenged arbitral proceeding or award will look to the jurisprudence of the ECJ to make its decision.¹⁹⁵

Without access to the ECJ via Article 177, the arbitrator or the parties to the dispute would need to present an effective interlocutory appeal to the national court for a decision. This is the case even if the parties have explicitly excluded review by the courts via contract, and even if none of the parties is a national of the forum state.¹⁹⁶

B. Subsidiarity,¹⁹⁷ E.U. Public Policy, and Arbitrability

The spirit of the European Union, found in the body of treaties that constitute its fundamental "laws," is one of a harmonious, fair, and freely flowing commerce.¹⁹⁸ As stated in the Maastricht Treaty of 1992, a major objective of the Union is "to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of

¹⁹⁴ See generally *Jacomijn J. van Haersolte-van Hof*, Decision of the European Court of Justice, Dated April 27, 1994 In Case C-393/92, E.C.R. 1994, I-1477, *Amelo/Ijsselmij*, 6 AM. REV. INT'L ARB. 83, 83-88 (1995).

¹⁹⁵ As one German court stated in 1969:

[T]he [European Economic Community] rules of competition form part of the 'public policy' covered by Article 1041(1) (ii). Although the provisions of the E.E.C. Treaty are part of so-called 'Community law,' with the entry into force of the E.E.C. Treaty they have been adopted into the laws of the member-States and must be applied by their courts. [*Costa v. ENEL*] Therefore, provided that they concern the basis of the Common Market and have not merely been enacted out of considerations of expediency, they form part of the doctrine of 'public policy' in force in the Federal Republic.

Re 'Yoga' Fruit Juices (Case KZR 3/68) *Kartellsenat of the Bundesgerichtshof* [1969] 8 C.M.L.R. 123, 134-35 (1969) (emphasis added).

¹⁹⁶ A relevant factor for disputants conducting arbitration in Belgium, Switzerland, or England. Ironically, this creates another form of "statement of the case" — exactly the form of arbitral procedure considered by archaic and counter-productive localization that existed prior to the 1975 Arbitration Act.

¹⁹⁷ Defined as requiring "[a] definite relationship between the goal of public interest and the infringement on the private rights," in Pierre-Yves Tschanz, *The Contributions of the Aminol Award to the Law of State Contracts*, 18 INT'L LAW 245, n.146 (1984).

¹⁹⁸ As evidenced, for instance, by the introductory text of the Single European Act of 1986. See BULL. OF THE SINGLE EUR. COMM., Supp. 2/86.

subsidiarity.”¹⁹⁹ Conceptually, at least, the European Union is designed to play an infrastructural role in the commerce and social welfare of Europe, as opposed to a supra-national form of government.²⁰⁰ The concepts of subsidiarity of the E.U. government and the supremacy of E.U. law and policy, however, do not dovetail as well as, for instance, the New York Convention does with national arbitral laws.

Perhaps in the spirit of subsidiarity, the Commission has resisted an institutional embrace of international commercial arbitration.²⁰¹ Only once has the Commission suggested that arbitrators should ask for guidance on a specific arbitrability question (patent licensing).²⁰² In that particular instance, the ICC objected to such a notification requirement, and it was abandoned by the Commission in the final draft.²⁰³ Instead, the ICC suggested that any control of arbitrators dealing with issues of competition should be exercised by the courts at the time of enforcement of the award, and that arbitral tribunals should have direct access to the ECJ.²⁰⁴

Though the constitutive documents of the European Union are abundant with policy statements which could reasonably be construed as public policy, subject matters that restrict free trade are the most ripe for concern by international commercial disputants. For example, the competition policy of the European Union, as elaborated in Article 85(1) of the Treaty of Rome, forbids decisions and concerted practices “which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market.” Such agreements or decisions are declared to be

¹⁹⁹ See European Union: Consolidated Version of the Treaty on European Union and Consolidated Version of the Treaty Establishing the European Community, Oct. 2, 1997, Preamble, 37 I.L.M. 56, 67.

²⁰⁰ But see Nicholas Emiliou, *Subsidiary: Panacea or Fig Leaf?*, in LEGAL ISSUES OF THE MAASTRICHT TREATY 65, 77-80 (David O’Keeffe & Patrick M. Twomey eds., 1993) (questioning whether subsidiarity can truly exist without clear institutional check and balances to the power of the ECJ).

²⁰¹ See generally Bourque, *supra* note 180 (underscoring the extremely few instances where the commission has specified a proper role for commercial arbitration in the E.U.).

²⁰² See Commission Regulation 2349/84, art. 9, 1984 O.J. L 219/15, at 22 (describing the application of article 85(3) of the E.E.C. Treaty to certain categories of patent licensing agreements).

²⁰³ See Sigvard Jarvin, *The Sources and Limits of the Arbitrator’s Powers*, in CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION 50, 69 (Julian D.M. Lew ed., 1986).

²⁰⁴ See *id.* This final proposal would make sense in the ICC, where the Court of International Arbitration plays a quasi-appellate role to ICC arbitral proceedings and awards.

"automatically void,"²⁰⁵ subject to express exemptions given from the Commission (generally granted in particular areas of competition, rather than to individual parties). The national courts must, therefore, review the contract under arbitration both in terms of its own public policy and arbitrability standards, as well as in terms of Article 85 of the treaty.²⁰⁶

Thus, a losing disputant now has access to powerful non-arbitrability and public policy defenses, even if the contract would successfully de-localize the arbitration at a national level.²⁰⁷ Although not yet addressed by the ECJ, other possible arbitrability or E.U. policy defenses are conceivable. Possible areas where a defense might be brought under E.U. policy include industrial competition,²⁰⁸ community environmental standards,²⁰⁹ community energy policy,²¹⁰ transport policy,²¹¹ em-

²⁰⁵ See E.E.C. Treaty, *supra* note 190, art. 85(2).

²⁰⁶ "Article 85 has direct effect and national courts are accordingly bound to apply it." *Marchant & Eliot Underwriting Limited v. Higgins* [1996] 3 C.M.L.R. 313, 323.

²⁰⁷ In *Pigadis Sàrl v. Prodim SNC*, the loser to an arbitral award brought an action for the award to be set aside "on the ground that the franchise agreement, and therefore the arbitration clause, was void as contrary first to public policy, and then to Article 85(1) E.C." *Pigadis Sàrl v. Prodim SNC*, [1996] E.C.C. 277, 278 (Paris CA 1995). It is worth noting that the French *Cour d'appel* found that "[f]or Community law to be applicable to the agreement, the requirement that it affects trade between Member States must be fulfilled. Practices which do not appreciably affect trade are outside the ambit of Article 85(1) even if the quantitative thresholds set by the Commission are exceeded," setting a fairly high bar to the application of Article 85. *Id.* at 281.

²⁰⁸ See E.E.C. Treaty, art. 130 and art. 100A.

²⁰⁹ See *id.* art. 100a, 130r-130t.

²¹⁰ See Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, arts. 3 (general objectives), 57-64 (production and prices), 261 U.N.T.S. 140 [hereinafter ECSC Treaty]; Treaty Establishing the European Atomic Energy Community, Mar. 25, 1957, arts. 40-76 (investment, joint undertakings, and supplies), 91-100 (the nuclear common market), 298 U.N.T.S. 167 [hereinafter Euratom Treaty]; Treaty Establishing the European Community, Feb. 7, 1992, arts. 30-37 (trade), 85-99 (competition), 95-99 (taxation), [1992] 1 C.M.L.R. 573 [hereinafter E.C. Treaty]. See also E.E.C. Treaty, *supra* note 190, Title XIII (discussing trans-European networks).

²¹¹ Articles 3e, 74, and 75 of the EEC Treaty require the Community institutions to establish a common policy in the field of transport and Articles 61 and 75 to 84 include various provisions relating to questions of transport policy. See E.E.C. Treaty, *supra* note 190, arts. 3(e), 61, 74, 75, 84. Articles 129b-129d cover Trans-European Networks. See *id.*, art. 129 (b)-(d).

ployment and social policy,²¹² internal market policies,²¹³ and economic policy.²¹⁴

V. CONCLUSION: RELATIVE AND LONG-TERM IMPORTANCE

European nations that have recently or are in the process of adopting arbitration laws have tended to favor a de-localized, pro-autonomy approach to the law. This means that the situs of arbitral proceedings matters less, and maximum party autonomy is generally found in any of the nations which have updated their arbitral laws in the last two decades. Traditional safety nets incorporated into the process which compensate for lower levels of predictability between the parties, have been minimized in favor of freeing and attracting commerce.

As Europe nears both the turn of the century and the milestones related to the ultimate deepening of the European Union come and go (e.g., fiscal and monetary integration), a number of changes in the landscape of international commercial arbitration beg the question of whether the European Union will become a breakwater for the de-localization trend. Since 1996 most major independent arbitral organizations have both re-drafted their international arbitration rules, including the ICC,²¹⁵ the London Court of International Arbitration,²¹⁶ and the American Arbitration Association.²¹⁷ With such widespread changes, the use of international commercial arbitration is only more likely to increase. Further, by creating more substantive law that will have a direct impact on European

²¹² See generally E.E.C. Treaty, arts. 2, 3, 39, 48-51, 100-02, 117-27, 130a-e and 235 (noting various provisions that attempt to foster freedom of movement for employment purposes and for the harmonization of social systems).

²¹³ E.C. Treaty fundamental provisions: Preamble and art. 2 (part of Community objectives) and 3 (among Community policies and actions), art. 7a (definition), arts. 8a, 48 ff. (free movement of persons) art. 30 ff. (free movement of goods), art. 59 ff. (freedom to provide services), art. 52 ff. (freedom of establishment), art. 73b-g (free movement of capital). See E.C. Treaty, *supra* note 210, Introduction, arts. 2, 3, 7a, 8a, 30, 48, 52, 59, 73b-g. Main legal bases for secondary legislation relating to these five freedoms: See *id.* arts. 8a, 54(2), 57(2), 66, 73c, 75, 99, 100, 100a, 100b and 100c. See *id.* arts. 8a, 54(2), 57(2), 66, 73c, 75, 99, 100, 100a-c.

²¹⁴ See *id.* arts. 3a (2-3), 67-73, 102a, 103, 103a, 104, 104a, 104b, 104c, 105-109m.

²¹⁵ See International Chamber of Commerce, *Rules of Arbitration of the International Chamber of Commerce* (visited Feb. 25, 1999) <<http://www.iccwbo.org/html/rules-english.htm>>.

²¹⁶ See LCIA Arbitration International, *Rules and Costs: Recommended Clauses* (visited Feb. 25, 1999) <<http://www.lcia-arbitration.com/town/squarte/xvc24/rulecost.htm>>.

²¹⁷ See American Arbitration Association, *International Arbitration Rules* (visited Feb. 25, 1999) <http://www.adr.org/rules/international_arb_rules.html>.

commerce, it will be in the interests of both the disputants and the European Union for questions regarding those laws to be settled uniformly and in a way that makes their selection as applicable law attractive to disputants.²¹⁸

Additionally, as Europe undergoes the next stages of "deepening," commercial uniformity may assume a new importance.²¹⁹ More fluid communication between the E.U. administration and arbitrators would seem a requisite element of the effective enforcement of E.U. law in privatized justice.

If the evolution toward de-localization becomes an effective pan-European localization (via enforcement of the laws and policies of the European Union) then perhaps completely unfettered party autonomy is not possible in Europe. Meanwhile, it does not seem, in the short-term, that the laws and policies of the European Union will present fans of localization with effective defenses in arbitral proceedings, based on the one-way relationship between the E.U. government and arbitral fora. As the spirit of harmonization increases, it is not unreasonable that standards of arbitrability and public policy within the Member States will also need to bear a closer resemblance to a single European standard, similar to the commercial harmonization mandated by the ECJ in the area of product standards in the 1970s.²²⁰

The choice of a European forum creates a factor to be considered, along with the full range of alternatives available to commercial disputants.²²¹ Where the predictability of the dispute is low, it may make sense that the parties seek a non-binding solution (evaluative of the law and the facts of the dispute) before committing to an extra-judicial proceeding that may fall short of their intentions, either for autonomy or protection.

As always, the onus remains on the parties to international commercial contracts to make the most complete risk assessment they can, at-

²¹⁸ See, e.g., European Commission, Commission on Contract Law, *The Principles of European Contract Law 1997* (visited Feb. 1, 1998) <http://ananse.ircv.uit.no/trade_law/doc/EU.Contract.Principles.1997.preview.html>.

²¹⁹ See, e.g., Leslie Williams, *Current Legal Developments in the European Union*, 18 WHITTIER L. REV. 307, 307-08 (1997).

²²⁰ For an excellent example of the harmonization of product standards, see the "Cassis Dijon" case of 1978. See Case 120/78. *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] E.C.R. 649.

²²¹ For instance, though the body of international legal literature focuses almost exclusively on arbitration, other methods and fora (such as mediation, mini-trials, and various forms of early neutral evaluation) are available to the parties. Mediation, being purely completely consensual, does not incur the duty to observe E.U., or (for that matter "any") law.

tempting to determining whether it serves their purposes to lock into arbitral proceedings and if so, whether it makes sense to choose a forum where higher levels of judicial review are available. For the time being, the larger choice of the European Union as a “super-situs” for arbitration must figure into this calculation, even if the exact impact of that choice remains to be seen.