ARBITRATION UNBOUND: AWARD DETACHED FROM THE LAW OF ITS COUNTRY OF ORIGIN

by

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Reprinted from THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY
April 1981
REFERENCE to a neutral authority to resolve disputes is an essential tool in drafting international contracts. But in choosing arbitration in Paris or London or Stockholm, is one always opting for a French, English or Swedish forum; or may the arbitral process, in the context of international commerce, be detached from the legal system of the country where the proceedings take place?

The sometimes-used expression "floating arbitration" is not entirely satisfactory, because all arbitral awards may, and frequently do, "float". Even the most national of awards — involving residents of the country where the arbitration took place and the award was rendered, concerning a transaction completely localised there, and established in accordance with domestic procedural rules under the supervision of a local arbitration institution — may be enforced in other countries under an ever-increasing range of circumstances. Apart from unilateral recognition of awards or the operation of bilateral treaties, the arbitral process enjoys transnational efficacy under the New York Convention of 1958 on the Recognition and Enforcement of Arbitral Awards, whose history is one of remarkable success.¹ So the question is not so much whether an award may float — this seems beyond dispute — but whether it may also drift, that is to say enjoy a potential for recognition in one or more enforcement jurisdictions without being ultimately anchored in the national legal system of the country where it was rendered.

If detachment of the transnational arbitral process were denied, the choice of the place of arbitration has great significance. The transnational efficacy of the award would depend on its validity in the eyes of the courts of the country where it happens to be rendered. Parties seeking to rely on the award in other countries may be delayed or hindered by challenges to it before those courts. On the other hand, if detachment were accepted, the choice of the place of arbitration is of marginal importance; the award, once rendered, would be cast adrift, its effects to be controlled by no other authority than its (unvarying) contractual foundation and the (varying) requirements of the particular jurisdictions in which it may be sought to be relied on.

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Arbitrators themselves cannot, any more than commentators, settle the controversy. Their declarations of emancipation from, or, for that matter, subjection to, the legal order of the place of arbitration will have no greater effect than that which courts give them. The matter could be settled by international treaty or — piecemeal and within the limits of international engagements — by national legislation.

More likely over the foreseeable future one will have to examine national caselaw. There is no guarantee of uniformity of the solutions given. Even in the context of a single case, one must compare the attitude of the court of the place where the award was rendered with that of the jurisdiction(s) where it is sought to be enforced.

A recent transnational litigation provides a brilliant illustration of the detachment question and its resolution by two court systems — that of the place of arbitration and that of the enforcement jurisdiction.

Arbitration was initiated under the Rules of the International Chamber of Commerce by Göتaverken Arendal AB, the large Gothenburg shipyard, against the Libyan General National Maritime Transport Company, on account of an unpaid balance of the sales price stipulated in contracts for the construction of three tankers. An award was rendered in Paris in the shipyard’s favour, but it was rejected by Libyan Maritime Co. Göтaverken then sought to enforce the award in Sweden. In reaction, Libyan Maritime Co. brought a challenge action against the award in France, and asked the courts of Sweden to suspend enforcement until the challenge had been decided.

Both legal systems pronounced themselves in favour of the award’s effective detachment from the French legal order. For its part, the Swedish Supreme Court declared the award immediately enforceable irrespective of the pendency of an action in France to set it aside. This decision will be discussed in Section III below. But before getting there, consideration will be given to the judicial authority of the place of arbitration. In what appears to be a unique decision, the Court of Appeals of Paris declined to take jurisdiction to hear a challenge to what it recognised as an international award stemming from proceedings whose location in France it held to be without significance (even though Paris was chosen by the parties, and not by the institution supervising the arbitration). This remarkable holding will be analysed in Section II, after a review of the conceptual framework for the debate (Section I).

2. Cf. the statement of Judge Lagergren, Sole Arbitrator, in an Award of October 10, 1973, in the BP v. Libya arbitration, after having declared “the procedural law of the arbitration” to be Danish law: “The tribunal is not competent to establish conclusively the nationality of its Award, for this can only be decided by the courts of Denmark and of other jurisdictions in which enforcement of the Award may be sought”, quoted in (1980) 5 Yearbook — Commercial Arbitration (Sanders, ed.), at p. 147.
1. A "DELOCALISED" LEGAL ORDER FOR INTERNATIONAL COMMERCIAL ARBITRATION: ITS ADVOCATES AND CRITICS

What authority underlies transnational arbitral proceedings? The premise to be examined is the following: *The parties have the power to stipulate that the law giving binding effect to the proceedings is not the law of the place of arbitration.* It would follow that the courts of the place of arbitration, unless they have other bases of jurisdiction over the parties or the subject-matter, have no particular mission to rule on challenges to awards only because they are rendered within their territory.

(a) The traditional view

Some commentators have argued that the consequences of any activity taking place in a given country, including arbitration, must be subject to the law of that country.

F. A. Mann, for one, has maintained that the very term "international arbitration" as used in a transnational business context is a mere colloquialism, since international commercial arbitration does not exist in the legal sense. Every system of so-called private international law is in fact a system of national law; in the same way, argues Mann, "every arbitration is a national arbitration, that is to say, subject to a specific system of national law". It may be that multilateral treaties, such as the Geneva Convention on International Commercial Arbitration of 1961, apply only to disputes between parties of different nationalities. But in Mann’s view, any specific arbitral proceedings arising from private contractual stipulation will have a national character. Treaties are operative only because they have been accepted by the State controlling the arbitration. They in no way impinge on the supremacy of the national legal system within which the proceedings take place. According to Mann:

> even the idea of the autonomy of the parties exists only by virtue of a given system of municipal law and in different systems may have different characteristics and effects. . . .
> Every right or power a private person enjoys is inexorably conferred by or derived from a system of municipal law which may conveniently and in accordance with tradition be called *lex fori*, though it would be more exact (but also less familiar) to speak of the *lex arbitri* or . . . *la loi de l’arbitrage.*

The *lex arbitri*, or *la loi de l’arbitrage*, is thus the source of the rights and of the duties which an arbitration tribunal may pronounce; it makes the award binding. The traditional view is that the binding nature of an award must necessarily derive from a legal system which is at once (a) exclusively competent and (b) national, and that this legal system must be that of the place of arbitration. The fundamental reasons may be summarised as follows:

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(1) The principle that contracts are governed by the law chosen by the parties does not exist *in vacuo*; if it applies, it does so as a rule which is part of a specific legal system, and where private parties are concerned, that system must be a *national* one.

(2) The same analysis holds for the notion that the arbitral process is subject to the law chosen by the parties as *lex fori*; the very principle that the parties have the right to make a binding election of an arbitral forum — to the exclusion of some other jurisdiction whose prerogatives may be jealously guarded by municipal judges — must derive from such a national legal system.

(3) An arbitral tribunal’s constitution and functioning are most effectively defined and controlled by the judges and the law of the place of arbitration.

(4) “It would be intolerable if the country of the seat could not override whatever arrangements the parties may have made. The local sovereign does not yield to them except as a result of freedoms granted by himself.” 5

(5) It is a fallacy to argue that arbitration is different from judicial proceedings in that it constitutes neither a manifestation nor an exercise of sovereignty, and that it therefore cannot be deemed to be part of the judicial public service of the country where it happens to take place:

Is not every activity occurring on the territory of a State necessarily subject to its jurisdiction? Is it not for such State to say whether and in what manner arbitrators are assimilated to judges and, like them, subject to the law? Various States may give various answers to the question, but that each of them has the right to, and does, answer it according to its own discretion cannot be doubted." 6

(6) It is likewise a fallacy to imagine that arbitration is governed by the proper law of the contract in which the agreement to arbitrate is contained. As noted under (1) *supra*, the rule upholding the choice of the proper law must be grounded somewhere, and only a Baron Münchhausen could imagine that the choice of the proper law may be enforced by the proper law itself. The fact that the contract is subject to Swedish law does not mean that in the event it gives rise to arbitration in Switzerland, the arbitrators will conduct proceedings under the assumption that they are controlled by the Swedish arbitration statute.

These arguments are, as noted, based on the premise that one single national legal order must give binding effect to the arbitral proceedings. Is this premise an article of faith, or an inescapable conclusion to be derived from the realities of contemporary interaction of the world’s legal systems? This question should be kept in mind as we now turn to examine the approach of those who would cut

the arbitral process loose from any imperative ties to the courts of the place of arbitration.

(b) The proponents of detachment

Academics defending the notion of an “internationalised” arbitral process have spoken of “arbitration escaping the hold of any national law and thus subject directly to international law”. 7 Or, as Berthold Goldman has put it, the search for a source of authority consistent with the nature of international arbitration can lead only to an “autonomous, non-national” system. 8

In a remarkably concise article which addresses the specific question of choice of law in international arbitration but which has wider implications for the concept of lex arbitri, Pierre Lalive reasons as follows in support of the thesis of detachment. 9

The municipal judge necessarily applies the rules of conflict of the forum, which represent the politico-juridical concepts — particularly as to the territorial limits of legislative power — of the State from which he derives his authority. The international arbitrator is in a fundamentally different position. Whatever one might think of the contractual (as opposed to judicial) source of an arbitral tribunal’s authority as a purely internal matter, it is difficult to consider the international arbitrator as a manifestation of the power of a State. His mission, conferred by the parties’ consent, is one of a private nature, and it would be a rather artificial interpretation to deem his power to be derived, and very indirectly at that, from a tolerance of the State of the place of arbitration. 10

For Lalive, the notion that the international arbitrator must fit into the mold of the legal system of the place of arbitration recalls the myth of Procrustes, who seized unsuspecting travellers and made them fit his bed, cutting off their legs if they were too long, stretching them if they were too short. Parties to international arbitration are indeed sometimes like unsuspecting travellers when they end up in a particular country. Whilst, if their contract had stipulated

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10. Ibid, at p. 159. Lalive had the occasion to apply his views on lex arbitri in a concrete case when, sitting as Sole Arbitrator in an I.C.C. arbitration between an Indian cement company and a Pakistani bank, he held that a now “generally recognised international custom” (citing as evidence the New York Convention to much the same effect as that analysed in Section II(b) of the present article) accepts that “international commercial arbitration may be entirely ‘detached’ or separated from the ‘national’ laws of the parties: it shall only be governed by the rules of arbitration chosen by the parties or referred to by the parties in their agreement (such as the I.C.C. Rules in the present case),” (1980) 5 Yearbook Commercial Arbitration (Sanders, ed.) 176. In the premises, Lalive had to deal only with a contention that the “national” law of one of the litigants was applicable to the proceedings; given the last phrase of the just-quoted sentence, confirmed by his subsequent scholarly writing, it is likely that he would also have been prepared to dismiss any argument that Swiss law necessarily applied to the proceedings merely because they were held in Geneva.
the jurisdiction of that country’s courts, they may have expected the local judge to fit the Procrustean bed of the municipal legal system, which would be his exclusive source of authority, the same need not be true with respect to arbitrators whom the parties, as it were, brought along.

(c) A new approach: lex arbitri delocalised

It is difficult — and here Mann’s reasoning is compelling — to maintain that the proper law of a contract containing an arbitration clause is, ipso facto, lex arbitri. But that is not the only alternative to viewing the law of the place of arbitration as lex arbitri. The traditional approach has a tendency to take for granted something which need not be, namely that there is one, and only one, loi de l’arbitrage. Indeed, it is submitted that an international arbitration may create obligations even if no such effect is recognised by lex fori, in which case lex fori is not lex arbitri in any sense.

Consider the case in which arbitration takes place in country A and that an award is rendered there. Let us assume the courts of that country reserve the imperative power to overrule an arbitral tribunal in the event they find a manifest error of law was committed; and that there is thus a possibility of appeal. Now, most countries’ judicial systems, whether by the operation of multilateral conventions or by unilaterally applied principles of comity, are prepared to enforce a foreign arbitral award only if satisfied that the award is “binding”. To determine whether an award rendered in A is binding, reference to the law of A may be pertinent. That law may hold an award not to be binding until it has resisted appeal (or unless no appeal has been lodged within a certain period). But surely nothing would prevent country B from legislating — and acting upon — a rule that an award by an arbitral tribunal constituted according to contractual agreement, wherever rendered, is binding for the purpose of enforcement in B at the moment it is pronounced.

Parties active in international commerce care about the reality of the protection they receive. If theoreticians are reduced to insisting that protection which has proved effective in practice is aberrant because it has its source outside the conceptual system they have elaborated, perhaps the time is ripe to expand the notion of the legal framework of transnational arbitration. Although a party’s rights may be limited to those conferred upon it by those national legal systems which might have an impact on the arbitral proceedings or the enforcement of the award, it is difficult in today’s world reasonably to resist the conclusion that the transnational arbitral process is something apart from purely national arbitration. For it is apparent that when a party operates internationally, it may have greater or lesser rights, with respect to the same relationship or dispute, depending upon the national system which is brought to bear on its case, whether at the adjudicatory or execution stage of litigation.
And ultimate redress is neither limited to that afforded by the *lex fori*, nor — as illustrated in Section III *infra* — necessarily subject to its control. That is why international arbitrators are not obliged to ascertain their jurisdictional competence under the law of the place of arbitration; the grant of jurisdiction by the will of the parties is sufficient. Whilst the party requesting arbitration in country A will prefer that the tribunal conform to the rules for arbitral proceedings of that country, not only because he may want to execute an award in A but also because execution in country B under its laws may (not must!) depend on the validity of the award in A, it must now be seen as incorrect to affirm that the law of the place of arbitration is the only one which can give an arbitral award obligatory force.

This proposition is demonstrated by our case in point, to which we now revert for a closer look.

II. THE POSTURE OF THE COURTS OF THE COUNTRY WHERE INTERNATIONAL ARBITRATION TAKES PLACE: THE FRENCH GÖTAVERKEN DECISION

(a) Facts and holding

On February 21, 1980, the influential Court of Appeals of Paris declined to take jurisdiction over Libyan Maritime Co.'s appeal against the arbitral award rendered in Paris in favour of Götaverken.\(^1\)

At the origin of the dispute was a set of substantially identical contracts whereby Götaverken undertook to construct three tankers for Libyan Maritime Co. Having previously paid three-fourths of the total purchase price, Libyan Maritime Co. refused to take delivery of the vessels, asserting (i) that contract provisions with respect to non-use of components made in Israel had been violated, and (ii) that technical specifications had not been met. Götaverken rejected these arguments and brought action to oblige Libyan Maritime Co. to take delivery and to pay the remaining portion of the purchase price (some 30 million U.S. dollars).

In accordance with the contracts, the dispute was submitted to I.C.C. arbitration in Paris. The arbitral tribunal, composed of a French Chairman, a Norwegian, and a Libyan, by a majority decision dated April 5, 1978 (which the Libyan arbitrator refused to sign), rejected Libyan Maritime Co.’s defence and held in favour of Götaverken. Libyan Maritime Co. was ordered to take delivery of the vessels and to pay the outstanding portion of the purchase price, with a reduction of about 2% for deviations from the specifications. An extensive record of the arbitral proceedings has been published.\(^2\)


Libyan Maritime Co. petitioned the Court of Appeal of Paris to set the award aside, on the grounds that (i) it was self-contradictory and insufficiently motivated in that it ordered Libyan Maritime Co. to take delivery while acknowledging that the vessels had failed to meet specifications, (ii) it failed to give reasoned grounds for the computation of interests and the rejection of additional arguments raised by the parties, (iii) it failed to apply the clear terms of the Libyan boycott legislation, and (iv) it violated French public order because it imposed on a foreign contracting party an obligation contrary to the imperative norms of its home country (i.e., the Libyan boycott laws, which were alleged to comport criminal sanctions).

It is a fair inference that this appeal was designed to have its greatest effect not in France, where there appeared to be no reason to think Götaverken would have sought execution of the award, but in Sweden, where the shipyard attached the vessels and sought recognition of the award. One of Libyan Maritime Co.'s central defences against these actions in Sweden was to argue that the award was not binding anywhere pending its challenge before the courts in the country where it was rendered. But all of the other points raised by Libyan Maritime Co. in France were also invoked by it in Sweden, so the reader wishing to study judicial disposition of these arguments (which were not ruled upon in France since the Court of Appeals of Paris refused to take jurisdiction) may refer to the decision of the Swedish Supreme Court of August 13, 1979, and particularly to the more detailed decision of Svea Hovrätt of December 13, 1978.14

As for Götaverken, its brief in reply was focused on the issue whether the courts of France had jurisdiction to control international arbitral proceedings on the sole grounds that France had happened to provide geographically neutral grounds for the litigation. It took as a starting point the much-discussed Article 11 of the I.C.C. Rules, which, after the revision of 1975, provides:

The rules governing the proceedings before the arbitrator shall be those resulting from these Rules and, where these Rules are silent, any rules which the parties (or, failing them, the arbitrator) may settle, and a whether or not reference is thereby made to a municipal procedural law to be applied to the arbitration.

Article 16 of the 1955 Rules had provided:

The rules by which the arbitration proceedings shall be governed shall be these Rules and, in the event of no provision being made in these Rules, those of the law of procedure chosen by the parties or, failing such choice, those of the law of the country in which the arbitrator holds the proceedings.

Götaverken pointed out that recognition proceedings were taking place in Sweden, and that this was permissible, without any prior ruling of a French

court, under the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards, whose principal significance was that recognition (*exequatur*) in the country where an arbitral award is rendered is not necessary for it to be recognized and enforced elsewhere.

Götaverken also maintained that the challenged award was not French in nationality. It observed that both parties were foreign to France, that neither had any establishment or assets in France, and that the contracts had no connecting factor with France. Thus, argued that shipyard, fixing Paris as the seat of arbitration did not give the courts of France any jurisdiction over the proceedings, given the rule of autonomy that applies to I.C.C. arbitrations. Furthermore, an efficient administration of justice called for the "centralizing" of procedures before the courts of Sweden, as the place of execution of the award. This was asserted to be in harmony with the New York Convention which, according to Götaverken, tends to concentrate the control function in the country where a sentence is sought to be executed rather than in the country where it is rendered.

On rebuttal, Libyan Maritime Co. argued the view that French law necessarily controlled the arbitration. This position was founded on three observations: (i) the New York Convention's reference to the (subsidiary) applicability of the procedural law of the place of arbitration, (ii) the fact that the arbitrators had expressly applied French rules of conflicts of laws, and (iii) the fact that Götaverken itself had, in the Swedish recognition proceedings, maintained that the failure of the Libyan arbitrator to sign the award was "in conformity with French procedure, the place of arbitration being Paris". For these reasons, according to Libyan Maritime Co., the Court of Appeals of Paris had jurisdiction.

Götaverken retorted that there was no need for arbitral proceedings to be attached to a national legal system; under the New York Convention, the law of the place of arbitration controls the proceedings only in the absence of a specific agreement by the parties, and such agreement, according to the shipyard, was present by virtue of the reference to the Rules of the I.C.C. whose Article 11 (reproduced *supra*) authorises the detachment of arbitral proceedings from local law. Thus, the award was not French, and could not be appealed in France.

The opinion of the Court, whose dispositive passages are annexed to this article, founded the decision not to take jurisdiction on the principle that parties to international arbitral proceedings are free to select the legal order to which they wish to attach the proceedings, and this freedom extends to the exclusion of any national system of law.

In point of fact, as neither of the parties nor their transaction had a connection with France, as neither they nor the arbitrators had chosen to
declare French law to apply to the proceedings, and finally as the I.C.C. Rules no longer mandate application of the law of the seat of arbitration in the absence of a choice by the parties, the Court concluded that the award was neither French in nationality, nor for other reasons subject to the French legal order.

It therefore refused to hear the challenge to the award, noting that non-French awards may be challenged only on the same basis as foreign awards.16

(b) Implications

The decision of the Court of Appeals of Paris constitutes clear acceptance of the detachment phenomenon. Its underlying thesis is that the legal force of transnational arbitration is founded on the parties' creation of a contractual institution; the effect of the proceedings may be left to be controlled by whatever legal system is requested to recognize the award once it is rendered, and that system need not necessarily be that of the place of arbitration.

The discussion in Section I is intended to have underlined the importance of distinguishing carefully the procedural rules applied by the arbitrators from the law applicable to the proceedings. In French, one must take care to stay in context, since the expression "loi applicable à la procédure arbitrale" may refer either to the notion of procedural rules or to the system of law which underlies the proceedings. The latter concept is somewhat evasive, but merits reflection.

Different from the law governing the contract, which supplies the norms in accordance with which the rights and obligations created by the contract are to be determined by the deciding authority, as well as from the rules of conflict of law (private international law) to be applied to determine the law of the contract, the law applicable to the proceedings as such is the one that gives them binding effect ("force obligatoire").

The importance of the Paris decision is not its acceptance of the parties' right to agree to rules of conduct for the arbitration. Deadlines, types of written

15. In previous cases, the fact that arbitration proceedings were held pursuant to the I.C.C.'s 1955 Rules had led the French courts to conclude that the awards resulting from said proceedings were French; see the numerous citations in 1980 Journal du Droit International at p. 671. That the difference between Article 16 of the 1955 Rules and Article 11 of the 1975 Rules justified such a great difference in result seems less than compelling, since both Articles give primacy to the parties' contractual stipulation. The prior caselaw has been challenged (Goldman, "Les problèmes spécifiques de l'arbitrage international" (1980) Revue de l'arbitrage 326, and indeed was inconsistent, on at least one important occasion, when a French court refused to consider an I.C.C. Award to be Swiss even though it had been rendered in Switzerland under the 1955 I.C.C. Rules, (1976) Revue critique de droit international privé 538; (1976) Revue de l'arbitrage 210 (which had the effect of rendering the award unenforceable under a bilateral treaty - the New York Convention being inapplicable under the peculiar facts of the case). Rather than acknowledging the change in the I.C.C. Rules to be fundamentally dispositive, one might well conclude that the Court of Paris wanted to strike out in a new direction.

16. Rule 5 of the Stockholm Chamber of Commerce Arbitration Institute requires application of Swedish law. If the Court of Paris' approach were transposed to Sweden, S.C.C. arbitration would thus probably always be Swedish in "nationality". Reference to other rules of arbitration may lead to an ambiguous situation between the I.C.C./S.C.C. "extremes"; see, e.g. Article 1(2) of the UNCITRAL Arbitration Rules of 1976.
submissions, form and content of hearings, use of technical experts: the stuff of arbitral practice; that these points may be freely determined by the parties' agreement — including their consent to have the matter settled by a supervising institution or the arbitral tribunal itself — is beyond cavil. Rather, the decision addresses the fundamental issue of whether the legal system of the place of arbitration has imperative authority to rule on the validity of the proceedings as such — and thus on the binding effect of its result: the award.

So when the Court of Paris affirmed that the place of arbitration was chosen only in the interest of geographical neutrality and may not "be considered an implicit expression of the parties' intent to subject themselves, even subsidiarily, to the loi procédurale française", this must be understood in the more fundamental sense. Indeed, the decision (annexed hereto) refers to the fact that the proceedings were not those contemplated by French (arbitration) law, that they had "no attachment whatsoever to the French legal order" (in view of the parties' status as foreigners and the lack of connection between their transaction and the territory of France), and that the award was thus not French.

The message seems clear: one is authorised to conclude that the binding force of an international award may be derived from the contractual commitment to arbitrate in and of itself, that is to say without a specific national legal system serving as its foundation. In this sense, an arbitral award may indeed "drift", but of course it is ultimately subject to the post facto control of the execution jurisdiction(s).

In some ways this result is uncontroversial. As was written nearly 20 years ago, "the doctrine of the autonomy of the parties' will, which is declining everywhere in municipal law, is gaining ground in the international legal order". Both the New York Convention of 1958 and the European Convention on International Arbitration have acknowledged the parties'...

17. Tallon, "The Law Applied by Arbitration Tribunals — II", in The Sources of Law in International Trade (1964, Schmitthoff, ed.) 156. The reason for restricting freedom to contract internally is to curtail abuse of the law, particularly by parties enjoying disproportionate bargaining power in consumer transactions. The possibility of getting around this by "internationalising" such transactions seems largely theoretical; the place where the overreaching party would want to enforce an award in those situations would normally be at the defendant's domicile (as he is unlikely to have assets around the world), where presumably such enforcement would be contrary to local public policy (such as absence of an arbitrable dispute, cf. Article VI(2)(a) of the New York Convention).

18. Article VI(1)(d) evaluates the legitimacy of "the composition of the arbitral authority or the arbitral procedure" by examining its compliance with the "agreement of the parties". Only in the absence of such agreement is reference made to the law of the place of arbitration. The point is that the parties are free to stipulate the latter law into irrelevance. Thus this provision is consonant with the French Götaverken holding.

19. Article V, s. 3 provides that the arbitrators determine their own jurisdiction; Article VII, s. 1 gives them freedom to choose their conflict of laws rules. (Thus went to an early grave a 1957 Resolution of the Institute of International Law, which affirmed: "The rule of choice of law in force in the state of the seat of the arbitral tribunal must be followed to settle the law applicable to the substance of the difference" (1957) Annuaire de l'Institut du droit international 496.) This freedom in the contractual sphere is not a purely Western invention: "As a general rule, the conflicts rules of all the countries of the Soviet bloc permit the parties to agree upon the law which is to govern their contract", Jonas & Nestor, "The limits of Party Autonomy — I" in The Sources of the Law of International Trade (Schmitthoff ed. 1964) 187.
right to define the workings of their chosen forum. Under the UNCITRAL Rules, recommended by the U.N. General Assembly to be applied to arbitration arising from “international commercial relations,” arbitral tribunals shall in all cases decide in accordance with the terms of the contract and taking into account trade usages applicable to the transaction. To free transnational contracts from national Procustean beds has become commonplace in arbitral awards. Thus, in sum, it is within the power of the parties, as acknowledged by Judge Lagergren (hardly an enthusiast for detachment) to establish by contract a procedure whose operations “must even be deemed to overrule compulsory provisions in the country of arbitration.”

Indeed, by such instruments as the New York Convention the transnational legal order prohibits, if the parties so agree, overruling arbitral awards on the grounds of failure to obey national procedural rules which otherwise might have invalidated the award.

And French case law has “unilaterally” tolerated dispositions contrary to French internal rule when they occur within the framework of international transactions, specifically with respect to settlement in a currency other than francs; the “autonomy” (separability) of the arbitration clause from the rest of the contract, thus permitting international arbitrators to rule on an allegation of nullity of the contract; the possibility of not applying the law otherwise governing the contract to the arbitration clause; and the acceptance of arbitration by French State entities. The motive for allowing this exceptional freedom is typically stated by the Cour de Cassation to be recognition of the “needs” and “usages” of international commerce. The same recognition of special freedom for international arbitration appears to have been recognised,

20. Art. 33(3).
21. See the awards discussed in s. IV(a) infra, and those analysed in Goldman, “La lex mercatoria dans les contrats et l’arbitrage internationaux: réalité et perspectives”, (1979) Journal du droit international 475. A remarkable illustration is a 1971 award, excerpted in (1973) Revue de l’arbitrage 145, in which an I.C.C. arbitrator refused to apply the law of a defendant State (under which the State alleged it lacked capacity to agree to arbitration) on the grounds that international public order would not accept that a State organ could invoke the nullity of its own agreement. Thus the tribunal relied on the legal order of its own non-national forum (Goldman writes “transnational”, (1979) Journal du droit international at p. 483).
22. See description of his Award in the BP v. Libya arbitration, at n. 53 et seq., infra.
24. See n. 18 supra.
27. The Hecht case, reported in (1972) Journal du droit international 843.
for example, by the U.S. Supreme Court, and the legislature of the U.K.

If actions to set aside non-French awards are not to be entertained by French courts, there must be a way to resist execution in France if such awards are contrary to imperative French norms. But where *exequatur* has not been sought by the winning party of a non-French award — as was the case in Götaverken — what possibilities are open to the party wishing to challenge the award? It is not clear whether he has any means of taking the initiative to ask the French judge to control the award. *De lege ferenda*, should one favour non-intervention in "delocalised" proceedings, or should one insist on the identification of one "natural" judicial authority — the judge of the place of arbitration — rather than an unknown number of potential execution jurisdictions, to control the arbitral process? One may safely predict, with Professor Fouchard, a vigorous debate.

In the case of France, arbitration specialists are already working on proposals for legislation that would specifically cover French court interaction with the *international* arbitral process as such.

Those who favour the Götaverken decision do not necessarily insist on a hands-off attitude; the judge at the place of the arbitration is seen as the best-placed authority to control the award. If he is to assume this role, however, it should be only as an instrument for the control of the conformity of the award to transnational minimum standards such as those embodied in the major international conventions. Unless the parties have agreed otherwise, he has no mission or capacity to apply his own national criteria to the award. This perspective seems to have been that adopted by the French Cour de Cassation in the Bruynzeel case, where it was recognised that the parties, having chosen

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30. "A parochial refusal by the courts of one country to enforce an international arbitration agreement would frustrate these purposes" (of orderliness and predictability in international business transactions), Scherk v. Alberto-Culver, (1974) 417 U.S. 506.
34. See the quotation from Judge Lagergren at n. 23 supra. In addition to the instances of special tolerance cited at nn. 25-28 supra, the French courts have implicitly recognised the greater degree of tolerance appropriate in examining *international* awards presented for execution, e.g. with respect to alleged failure to obey French rules regarding time limits for rendering the award, (1977) *Journal du droit international* 671, or the obligation for the arbitrators to meet physically, (1979) *Revue de l’arbitrage* 266.
not to refer to a national law to govern the proceedings, had the capacity to leave the arbitrators full discretion to fix their own time limits because to do so did not violate imperative international norms.

In the Bruynzeel case, the law applicable to the proceedings was that established by the Investment Code of Madagascar, which meant that the award, although rendered in France, was not to be judged by French criteria. In a case decided almost simultaneously on the same issue of arbitrators’ failure to respect time-limits for rendering the award the Court of Paris did examine an award under French law because it was rendered in France under the 1955 I.C.C. Rules, but rejected the challenge on the grounds that the I.C.C. Rules provided for extensions of the time limits. One concludes that (a) if French law applied, it was only because the parties had so chosen, and (b) it applied only in the limits of that choice (i.e. extension under the I.C.C. Rules was given primacy over French law, effective only in the silence of the former).

Unless national courts accept this role as “transnational” controllers at the seat of arbitration, the detachment principle may be justly criticised on the grounds that it leaves no forum where a manifestly deficient award may be set aside. In fact, it is interesting to note that the Court of Paris, some months after its Götaverken holding, was confronted with a case involving a Turkish party which requested the setting aside of an international award rendered in France. Its adversary was a French company. Faithful to its Götaverken rationale, the Court held the award not to be French on the grounds that proceedings under the 1975 I.C.C. Rules are not French, and thus refused to take jurisdiction. (Incidentally, the court’s decision does not state what the law governing the contract was, but it may very well have been French, that being the domicile of the seller.) Although one may accept the Court’s refusal to hear a motion to set aside the award under the grounds provided for by French law, it might be rather disturbing if no challenge action whatsoever would be entertained by a French court. If the availability of the French courts as controllers of the “transnational” legitimacy of the award commends itself whenever it is rendered in France, it may legitimately be wondered if it is not commanded whenever, in addition, the respondent is domiciled in France.

It is to be noted that the New York Convention speaks of the competent authority of a country where or under whose law the award is rendered. This is for the purpose of both refusing to recognise an award because it has been set aside in such country and suspending recognition pending appeal in such country. But if, as in the Götaverken case, the legal system of the place of

36. Ibid., at p. 671.
38. Article V(1)(e).
39. Article VI.
arbitration considers itself not to have authority with respect to the arbitration, and no other national legal system has been designated, there is no country where the award can be challenged in such manner as to hinder enforcement under Article V(1)(e) or VI of the New York Convention. This would be the case if the parties expressly agree that their proceedings are subject to no national body of laws, or even, in contexts such as the Götaverken arbitration, where they omit stipulation of such law.

The Paris decision acknowledges the parties’ ability so to denationalise the arbitral proceedings. The very recent decision is in a controversial area closely analysed by scholars around the world; much fruitful discussion may be expected to follow. It seems unwise at this stage to close one’s mind by taking a categorical position. Nevertheless, as a first reaction one might note that Article I of the New York Convention, defining the awards to which the Convention applies, simply refers to awards “made in the territory of a State other than the State where the recognition and enforcement of such awards are sought”, and thus does not explicitly require that such awards are subject to the control of the authorities of a given country. One might conclude that Article V(1)(e) and VI apply only to cases where such a country has in fact been designated by the parties or the arbitrators. The absence of such a designation would thus not keep the Convention from applying; to the contrary, if this view is correct, it would apply even more efficaciously in such case, as the potential hindrances to recognition on the grounds of Articles V(1)(e) and VI would ipso facto have been removed.

The award would accordingly be immediately enforceable as the result of the parties’ contractual commitments, recognised by the enforcement jurisdiction directly without reference to any other underlying authority. This in fact was what happened when the Götaverken award was presented for execution in Sweden.

III. THE POSTURE OF THE COURTS IN THE COUNTRY (OR COUNTRIES) OF ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARDS: THE SWEDISH GÖTÄVERKEN DECISION.

The Götaverken litigation’s Swedish sequels４０ may be summarised very briefly.

The Swedish courts deemed the award to have been “binding” — in the sense of the New York Convention — as of the moment it was rendered. This was because in accepting to arbitrate under the I.C.C. Rules, the parties had waived the right to appeal. It is significant to note that the Swedish courts did not inquire whether the award was binding under French law, but as a function of the parties’ contractual stipulation, recognised and given effect by the

４０ See references, supra, n. 13.
Swedish legal system. And the Swedish Supreme Court specifically declined to follow Libyan Maritime Co.’s suggestion, adopted by a dissenting judge, at least to suspend enforcement pending the outcome of the French challenge proceedings.

One of the principal aims of the New York Convention was to eliminate the “double exequatur” requirement of the Geneva Convention of 1927; the winning party need not, as a precondition to enforcement elsewhere, seek a confirmation of the award by the courts of the country where it was rendered. But what if the losing party challenges the award in its country of origin? If the enforcement jurisdiction does not require confirmation by the courts of the place of arbitration, does it follow that it should take no account of the pendency of a request for disavowal of the award by the same courts?

Nothing prevents the unilateral enforcement of foreign awards in a more liberal fashion than that required by the New York Convention. Subject to other international obligations, one country might allow enforcement of an award even if it has been set aside in its country of origin. (In fact, it is to be noted that the grounds for refusal to recognise and enforce foreign awards as defined in the New York Convention are not mandatory; Articles V and VI list situations where the enforcement jurisdiction may issue such a refusal.) But this hypothesis seems rather remote. Of far greater practical significance is the impact of the pendency of challenge actions, because it is examined by every disappointed party; and the greater its potential, the greater the temptation for its use — and abuse.

In the preparation of the New York Convention, the International Chamber of Commerce drafts sought to deal with the problem by providing unequivocally that a foreign award may be resisted only if it has actually been set aside in its country of origin. The aim of this provision was to reduce the possibility of dilatory tactics by making sure that the international efficacy of an award could not be impaired at the unilateral initiative of the resisting party. The intervention of judicial authority would be required.

In this connection, it is to be noted that the fact that the enforcement of an award is suspended in its country of origin does not necessarily mean that there has been a court intervention. It may be that the challenge action in and of itself has the effect of suspending execution of the award in the country of origin. The question might be examined from the standpoint of judicial economy. The issue of this suspensive effect may be controversial and require the enforcement

41. At the time the Swedish courts decided the Götaaverken case, they may have had difficulty determining whether French law deemed an award to be binding as of the moment it was rendered, as French cases were divided on the issue. But the dominant trend was affirmative, and French legislation in 1980 consecrated this principle. Decree No. 80-354, Journal Officiel, May 18, 1980, pp. 1238-1240, Article 36; see Paulsson, “France and the Arbitral Process in 1980: A New Law and a Major Court Decision”, in Svensk och internationell skiljedom 1981 (arbitration yearbook of the Stockholm Chamber of Commerce) at pp. 43 et seq.

42. Fouchard, L’Arbitrage commercial international (1965) 533.
jurisdiction to examine complex proof of foreign procedural law. As for the courts of the country of origin, they may, in the context of international arbitration, not consider it particularly urgent or necessary to rule on the bona fides of an award involving two non-resident parties and a contract to be executed abroad — and all the more so if there is no reason to expect enforcement of the award in the country where it is rendered, which is unlikely to be sought unless the losing party happens to have assets there.

The I.C.C. draft would have required definitive action by the competent authorities; if for any reason such action has not been forthcoming, resistance against the award could not be based on post-arbitration initiatives in its country of origin.

The text in fact adopted in the New York Convention does not contradict the I.C.C. draft, but is more ambiguous.\(^\text{43}\) I have suggested elsewhere\(^\text{44}\) that in fact the Convention leaves room for interpretation by each enforcement jurisdiction, and that indeed it may be that consensus will be formed around an interpretation which is in line with the I.C.C. draft. Certainly the Swedish Supreme Court decision goes in this direction, particularly in refusing even to suspend execution.

Although the Swedish decision is not alone in declaring that the New York Convention’s “binding” requirement does not mean that an award must be confirmed or declared enforceable in the country where it is made,\(^\text{45}\) it is unique as a national Supreme Court decision in a situation where not only was there no such confirmation or declaration, but where in fact it was argued that the award’s enforceability in its country of origin was suspended due to a challenge pending there.\(^\text{46}\)

Was the Swedish Supreme Court imprudent? Informal reactions, both in Sweden and abroad, are divided. Certainly the decision raises troubling questions of precedence and timing in multi-jurisdictional post-award litigation. Critics of the decision would have preferred the dissenting judge’s approach suspending enforcement pending the outcome of the challenge actions in France, but, as I have suggested elsewhere, this approach raises grave

\(^{43}\) For an authoritative interpretation, see Sanders, (1976) 1 Yearbook-Commercial Arbitration (Sanders, ed.) 214.


\(^{45}\) (1979) 4 Yearbook Commercial Arbitration (Sanders, ed.) 249; see also German decision No. 22 and Italian decision No. 40 under the provisional coding system of (1981) 6 Yearbook, op. cit. (not yet published).

\(^{46}\) The Tribunal de Grande Instance of Paris, by a decision of May 15, 1970, enforced an arbitral award rendered in India against a French company on the basis that the award was “binding” for the purposes of the New York Convention as of the moment it was rendered, and this irrespective of the alleged pendency of a request to the High Court of New Delhi for a declaration that the award was without effect in India (on the grounds that the arbitrator, Lord Devlin, had refused to register the award before the local court, which the French company wanted him to do so that challenge procedures could be instituted there), Saint-Gobain v. Fertilizer Company of India, (1971) Journal du droit international 312, affirmed by the Cour d'Appel of Paris, decision of May 10, 1971, (1971) Revue de l'arbitrage 111.
problems of its own. In fact (see Section II supra), the Swedish and French result in this case turned out to be harmonious. But, to test the Swedish decision as a transnational precedent, one must consider the hypothesis that the French court would have taken jurisdiction, and that the award could have been set aside under French law.

The Götaverken litigation finally reflects a shift of the control function, acknowledged by the French as well as the Swedish judges, from the place of arbitration to the place of enforcement. Once again: the binding force of an arbitral award is not necessarily derived from the legal system of the country where proceedings happen to be conducted.

IV. TOWARD A FREEDOM OF CHOICE: TO DRIFT OR TO ANCHOR

The theoretical possibilities of an anational “drifting” arbitral process might create the impression that a new tool, wonderful or dangerous, depending on one’s doctrinal persuasion, has been made available in international commercial arbitration. Either conclusion would probably be an over-reaction.

For in many situations, it is sensible to refer to the national law of the place of arbitration as a foundation of the proceedings. Thus:

— both parties during the course of the proceedings may wish to resort to municipal judges for sanctions or assistance beyond the powers of the arbitral tribunal, and judges may be more likely to accept to intervene with respect to proceedings which they recognise as taking place within a national legal system,

— either party, if it realistically foresees that it may be dissatisfied with the proceedings, and therefore might seek to resist an award it considers defective, will want to have a jurisdiction where it is beyond doubt that it could challenge the award; it is not satisfactory in such cases to have to wait to raise defences in an execution forum selected by one’s adversary,

— arbitrators may generally prefer that their powers be buttressed by a specific national legal order in addition to the authority created sui generis by the parties’ agreement to arbitrate, and, finally,


48. Despite the general rule that French courts do not substitute their interpretation of facts for that of the arbitrators, one cannot neglect the possibility of a “mistaken” decision, such as appears to have been rendered by the Court of Appeals of Orléans in the latest instalment of one of the world’s longest-lasting litigations, SEE v. Yugoslavia, unpublished decision of December 13, 1979, in which the Court refused to enforce the original award, rendered in Switzerland in 1956, on the grounds that it was contrary to “logic and reason”. For other references concerning this case, see Paulsson, op. cit. supra n. 14 (1980) Revue de l’arbitrage 485-6, n. 96; op. cit. supra n. 34 (1981) 21 Virginia Journal of International Law 147; and Paulsson, “Sovereign Immunity from Execution in France,” (1977) International Lawyer 674-675.

As for the French Götaverken litigation, it appears to have come to an end. The vessels were sold at judicial auction in Sweden, and Libyan Maritime Co. has not appealed the Paris Court of Appeals’ decision.
— the party relying on the award may not necessarily find delocalisation of the proceedings to lead to serendipity; because at least in today’s perspective, he cannot count on his enforcement jurisdiction(s) taking the view of the Swedish courts in the Götaverken case. As the Swedish Götaverken case shows, the presence of a potential controlling authority at the place of arbitration need not hinder the efficient enforcement of the award. (Exequatur was rendered in Sweden before the Court of Paris had refused jurisdiction.) But if an award is expressly anational, an enforcement jurisdiction may question whether such an award falls under the scope of the New York Convention. In the particular case of an arbitral award against a State, such a declaration may put into doubt any enforcement, whether under the Convention or otherwise, by a national court. 4 9

So although the Götaverken case demonstrates that its impact may depend on the will of the parties, the law of the place of arbitration remains of great practical significance even in international arbitration.

(a) The Götaverken holding’s consequences for arbitrators

In view of the duty of the international arbitrator to keep in mind the objective of producing an enforceable award, 5 0 what should be his understanding of the source of his authority, and how — if at all — should this understanding be manifest in the award?

The possible answers to these questions are illustrated by the contrasting approaches of two distinguished arbitrators in substantively identical arbitral proceedings arising out of Libyan petroleum nationalisations, and it is instructive to examine their solutions retrospectively in light of the French Götaverken decision.

The claims were brought by major petroleum corporations against the State of Libya. As Libya did not name an arbitrator, the tribunals were constituted by Sole Arbitrators designated, in accordance with the concession agreements, by the President of the International Court of Justice. The arbitrators, in the chronological order of their awards, were Judge Gunnar Lagergren of Sweden, with respect to the claim of British Petroleum Company, 5 1 and Professor

49. For example, in the Texaco Award rendered against the State of Libya, discussed in s. IV(a) infra, the Sole Arbitrator declared the proceedings to be governed by le droit des gens. A national judge might (a) accept this characterisation and (b) conclude that it means the conflict was placed on the level of public international law, with the result that the national judge can assert no jurisdiction whatsoever. Whether or not one believes that such a decision would be erroneous, it must be recognised as a possibility in view of the Sole Arbitrator’s seemingly unnecessary declaration.

50. Cf. Article 26 of the I.C.C. Rules of arbitration, which commands the arbitral tribunal to “make every effort to make sure that the award is enforceable at law”.

René-Jean Dupuy of France, with respect to the joint claim of Texaco Overseas Oil Company and California Asiatic Oil Company.  

In reaching their decisions, the Sole Arbitrators had to be particularly careful to establish their jurisdiction in view of the State of Libya’s decision not to participate in the proceedings. They thus had to rule on the claimants’ contentions without the benefit of an adversarial dialogue, and also perhaps with some apprehension that the ultimate awards might be resisted.

The fact that a State was involved does not mean that these decisions are deprived of a general interest for the purposes of the present inquiry, because only one, the Texaco Award, deemed the sovereign identity of the defendant to be crucial to the resolution of the issue of the *loi de l’arbitrage*.

The background and merits of these arbitrations have been described and analysed elsewhere. For present purposes, it suffices to note that the arbitration clause did not determine the place of arbitration, which the Sole Arbitrators fixed as Copenhagen (Lagergren) and Geneva (Dupuy).

The consequences of this localisation, in the view of the arbitrators, were as follows: Lagergren deemed his Award to be Danish, whilst Dupuy, not content to affirm his freedom to establish rules of procedure independent of the local laws of the seat of arbitration, went further, and explicitly excluded Swiss laws as a consequence of his decision that the *loi de l’arbitrage* was international law ("*le droit des gens*.

Lagergren based his characterisation of the B.P. Award as Danish on the grounds of the enhanced “effectiveness” of an award “founded on the procedural law of a specific legal system and partaking of its nationality”. He also stated that the Award’s attachment to a developed legal system was “both convenient and constructive”, and referred to the “wide scope of freedom and independence enjoyed by arbitration tribunals under Danish law”.

It is important to note that Lagergren deemed his Award to be Danish not because he thought he had to (which a classical view might have commanded), but because he thought he should. He did not reject the possibility that the arbitration be governed by international law (as per the familiar *Aramco* precedent; on the contrary, he affirmed his “full authority to determine the procedural law of the arbitration”. His decision was based on the criteria of effectiveness and convenience, and noted that if the law of the arbitration were

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57. B.P. Award, (1980) 5 *Yearbook-Commercial Arbitration* (Sanders, ed.) 147.
international law — thereby in fact appearing to acknowledge that this was a choice open to him — the award may lack "nationality" and therefore be less efficacious.

Whilst the merits of the proceedings seemed not to be significantly affected by the Sole Arbitrator's choice to subject himself to the Danish legal order, the Award had a sequel. Being dissatisfied with some aspects of the Award, the claimant asked for a reconsideration of the issues decided by the Award of October 10, 1973. In a second Award of August 1, 1974, 58 Lagergren denied a reopening on the grounds that he no longer had jurisdiction to consider issues he had once decided. The point for present purposes is that the second Award was based exclusively on Danish law, the arbitrator refusing to refer to any international or comparative law sources, and led to consultations by Danish law experts and to detailed analysis of Danish legal texts, including examination of the legislative history of the Danish arbitration act.

As for Dupuy, he followed the Aramco precedent in concluding that the principle of sovereign immunity of jurisdiction (par in parem non habet jurisdictionem) prevented the judicial institutions of a country from exercising the ultimate control over arbitral proceedings — even if that control were limited to the application by the arbitral tribunal of that country's rules pertaining to arbitration. Consequently, Dupuy declared that lex arbitri or, in his words, la loi "applicable à la procédure d'arbitrage", was that of the classical international order: "le droit des gens". However, even after expressing the appropriateness of distinguishing between the law "qui régit le contrat" and that "dont dérive le caractère obligatoire du contrat", 59 Dupuy embarked upon an extended discussion in which a double usage of the term "internationalisation" unfortunately appears to confuse these very concepts. 60 At times "internationalisation" is taken to refer to the law chosen as the proper law of the contract. Here he seems to accept, by a favourable reference, Mann's definition of internationalisation "simply/to/mean that by exercising their right to choose the applicable legal system the parties may make public international law the object of their choice". 61 It is submitted, to the contrary, that the "internationalisation" of a contract — or more properly perhaps, its delocalisation — means that it may be subject to a legal order which includes such a rule as "the parties may freely choose the principles of law applicable to

58. Ibid., at pp. 158-161.
60. A similar observation has been made by Professor Stern, op. cit. supra n. 15. 1980 Revue de l'Arbitrage, at p. 22.
the contract, including those of public international law’’.

Thus, when Dupuy took the position that the ‘‘ordre juridique dont dérive le caractère obligatoire du contrat’’ is ‘‘le droit international lui-même’’, whilst ‘‘la loi qui règit le contrat’’ is the law stipulated by the parties as applicable to the concession agreement, the ‘‘internationalisation’’ of the arbitral proceedings should logically refer only to the former. It is precisely the legal order of a contract which does or does not permit the parties to choose applicable law. Mann may be going too far when he speaks of the parties’ choice of ‘‘the applicable legal system’’. The parties can be said to ‘‘choose’’ lex arbitri only in the sense that they willingly establish an international contractual relationship comporting objective indices of a certain legal order, most often administered by neutral arbitral tribunals, and whose specificity is recognised by national courts whenever they decline to invalidate awards alleged to be deficient under the rules of the country where they were rendered.

Dupuy’s three criteria of internationalisation were: reference to general principles of law as applicable to the concessions, the international arbitration clause itself, and the fact that the concessions were ‘‘economic development agreements’’. (Of these, the arbitration clause was crucial in Dupuy’s view, as it ‘‘sufficed to internationalise the contract, that is to say to situate it in a specific juridical framework, that of the international law of contracts’’.)

But for present purposes, it should be noted, confirming the analysis above, that the source of his criteria are general principles of law, and we do not see how it could be otherwise. The parties cannot be deemed to have stipulated that the internationalisation of the contract should be determined under Libyan or Swiss criteria of internationalisation. (And even if this possibility were accepted, note that the validity of such a stipulation must in itself be determined according to the rules of some legal system.)

In sum, Dupuy looked to a borderless lex arbitri. Recalling the discussion above with respect to Mann’s argument lex facit arbitrum, one notes that the Texaco Award plainly contradicts the notion that the awards must be Swiss in nationality; the Sole Arbitrator acted on the assumption that he had authority to declare the parties’ rights and duties without being in any sense a part of the

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62. As to the requirement that one be in the presence of an international contract (which simply means a contract whose connecting factors involve more than one national territory, Texaco Award, (1977) Journal du droit international at p. 352; (1978) 17 International Legal Materials, at p. 11), see, e.g., the commentary by Professor Oppetti, (1976) Revue critique de droit international privé 514: ‘‘the licitness of the arbitration clause would thus flow not from the volition of the parties, but from the sole authority of the principle of autonomy, whose absolute effect would accordingly be acknowledged: in the parties’ silence, the validity of the arbitration clause would follow, not from an imagined intent of the parties to escape from the hold of the law governing the principal contract, but the sole fact that the stipulation was made in an international contract.’’

63. Texaco Award (1977 Journal du droit international, at p. 860; (1978) 17 International Legal Materials, at p. 16. It is hard to accept Dupuy’s theory that the legal order under which he operated was more specific than this. Although he invoked the ‘‘common principles’’ of Libyan and international law referred to in Clause 28 of the concession agreements, this reference is to the principles of law to be applied in interpreting the concessions; it does not create a legal order determining their binding effect.
judicial process of the country of the siège. He considered his authority to derive from an national legal order, and explicitly stated that he deemed his tribunal to be situated on the international plane.

Not every claimant would welcome this approach. What if Dupuy, as he apparently felt free to do, disregarded an imperative norm of Swiss law? The Award would hardly have an effect in Switzerland; and it would encounter greater difficulties of execution in other countries if judges there insisted on proof of its validity under the laws of the forum state. And even without going so far as to imagine the case of violation of Swiss imperative rules, what about the fact that an Award like Dupuy’s by its own terms is not Swiss in nationality; that, for example, the Tribunal declared its intention to file the Award at the International Court of Justice, and did not file it with the local Swiss court? Perhaps a Swiss judge would nonetheless rule favourably on a request by a party to the arbitration for a declaration of enforceability of the award in Switzerland on the grounds that it satisfied Swiss norms. Quite possibly a judge in another country in which execution is sought would accept the award (irrespective of the failure of a Swiss judge to declare it enforceable in Switzerland) as a foreign award entitled to recognition and enforcement to the extent it meets local standards, reasoning, like the Swedish courts in Götaverken, that an international award is binding and enforceable as of the moment it is rendered. Perhaps such a judge would even deem the award to be Swiss — following, say, proof of conformity with Swiss rules and the absence of an appeal. He is certainly not bound by the arbitrator’s opinion that the award was not Swiss. Like the other great explicitly “international” award, Aramco, the Texaco Award never had to be enforced because of an intervening settlement, so these questions, answerable only on a nation-to-nation basis, were not resolved in the context of this particular litigation.

In the Texaco case, the claimants themselves urged the Tribunal to act — as it did — on the understanding that it was not concerned with matters of

64. It would, incidentally, be a mistake to conclude from this statement by the Sole Arbitrator that the I.C.J. has an archive where arbitral awards can be filed. Even where its President has participated in the constitution of the tribunal, the I.C.J., as its Secretariat confirms, does not accept to file awards involving private parties.
65. One of the chapters of the epic SEEV v. Yugoslavia litigation, whose centrepiece is an award rendered in Lausanne nearly 30 years ago, revolved precisely around the refusal of the Swiss courts, on formal grounds, to accept the Award as Swiss. This refusal, antedating the Swiss International Arbitration Convention (which favours international arbitration taking place in Switzerland), had the consequence, in a curious, and it is submitted mistaken, fashion, of rendering the Award unenforceable in Holland; see n. 34 supra and reference cited therein.
66. The B.P. Award was also settled. In a third arbitration arising out of the Libyan petroleum nationalisation, an award rendered against the State of Libya in Geneva (in which the Sole Arbitrator considered the proceedings to be independent “of the local law of the seat of arbitration,” (1980) Revue de l’arbitrage 137, and thus to be anational, without going so far as to state them to be international), was presented for execution in four countries, and exequatur was granted in two (France and Sweden). In Switzerland and the U.S. the grounds for refusing to enforce the Award were the defendant’s sovereign status and not the anationality of the Award, Hermann. “Enforcement of Awards Against States”, January 29 (1981) Commercial Law Reports 2; see also (1981) 20 International Legal Materials 151 et seq. and 161 et seq.
enforceability, and hence to deliver a declaratory judgment ("arbitrage de principe").

The meaning of the term "arbitrage de principe" is somewhat obscure, but in the context of the Texaco Award its negative significance seems clear; the tribunal was to declare the rights and obligations of the parties without reference to the award's future enforceability within any national legal system. Once again, we cannot doubt that we are in the presence of an anational award. The fact that such an award may be effective only to the extent that it is integrated into — i.e. recognised by — national legal systems is a different matter. In answer to the traditional objection, one may either acknowledge a new transnational order of general principles serving as lex arbitri, or, perhaps less controversially, come to see that delocalised arbitration has many potential leges arbitri; that indeed every national system becomes lex arbitri under the same party-given authority that Lagergren ascribed to himself. Dupuy's conclusion that the Swiss legal system (or any other national system) could not be lex arbitri seems doubtful. It could be demonstrated that Swiss law follows the general world-wide trend that a State cannot invoke immunity before an arbitral tribunal to whose jurisdiction it has consented by contract. The theory of waiver justifies a finding, as in the B.P. Award, that lex fori may be lex arbitri. However, both Awards make clear (albeit Lagergren by implication only) that this relationship between the forum and the proceedings is not inevitable.

To conclude, the following propositions derived from the Götaverken litigation may be advanced to guide international arbitrators:

1. The arbitral proceedings as an institution are defined by the parties' agreement. The arbitrator discharges his responsibility first and foremost by determining the scope of that agreement. Thus, if the arbitration

67. One might conjecture that Texaco-Calasatic wanted Dupuy to feel free to declare, irrespective of the effectiveness of such an award, that Libya's title to petroleum produced from the relevant concession fields was defective, and that they intended to use that declaration as a basis for subsequent "hot oil" seizure actions before national courts.

68. Cf. the Procedural Order of Andrew Martin, Q.C., Sole Arbitrator sitting in Geneva, joining the Bangladesh Government as a party to I.C.C. arbitral proceedings instituted by a French company, extracts in (1980) 5 Yearbook Commercial Arbitration (Sanders, ed.) at pp. 177-185. Deeming Swiss law to be applicable to the arbitration where the I.C.C. rules were silent (the 1955 Rules were in question), the Sole Arbitrator held the principle of "the immunity of Foreign States from legal process" to be inapplicable, as a matter of Swiss law, to a dispute regarding commercial activity.

69. Switzerland is a signatory to the May 16, 1972, European Convention on State Immunity, whose Articles 2 and 23 provide criteria for waiver of sovereign immunity.

70. See, e.g., Fouchard, L' Arbitrage Commercial International (1965) et 91; Böcksteigel, "Specific Problems of International Arbitration between States and Private Enterprises", in Proceedings, Fifth International Arbitration Congress (1975) at CIII 8, citing, inter alia, the Resolution adopted at the Fifth International Congress of Arbitration, held in New Delhi in 1975, where 43 countries, ranging from Bulgaria, East and West Germany and Ghana to the U.S.S.R. and Sri Lanka, were represented by over 500 delegates, and where it was resolved in part that "the Congress notes with particular gratification that in recent times there appears to have been no claim of immunity by any state made with a view to avoiding the institution of agreed arbitration proceedings and that claims of immunity from enforcement seem to be rare". Quoted in (1975) Revue de l'arbitrage at 134.
clause referred to the Rules of the Stockholm Institute of Arbitration, he must look to Swedish law because those Rules (by their own terms: Rule 5) are ultimately subject to Swedish law. If reference is made to the I.C.C. Rules, the parties have freedom either to stipulate the law of the proceedings or to leave the choice to the arbitrator, who, assuming as often is the case that the I.C.C. Rules themselves provide sufficient procedural guidelines, need not articulate any subsidiary *loi de l'arbitrage*.

(2) Declarations by the arbitrator as to the nationality of his tribunal or his award may most often be viewed as unnecessary, and potentially create difficulties. Once he has determined his freedom to make procedural rulings, he may do so without having to declare whether he deems himself to act as a tribunal of a particular nationality. At any rate, it is unlikely that anything he may say in this respect will have any significance outside the arbitration. If the parties respect the award, its nationality is irrelevant; if it must be enforced before national courts, the only significant finding as to the legal status of the proceedings and the award is *theirs*.

(3) Unless he has been tied to a national order, the arbitrator may apply his own notions of *ordre public*, which may take into account the norms of legitimate expectation of behaviour in international commercial transactions.

(4) While generally avoiding declarations as to their applicability, the arbitrator should in all cases inform himself as to the imperative rules of procedure in force in the place of arbitration, and conform to them, unless in some extraordinarily unlikely situation they violate his own notions of *ordre public* as a delocalised arbitral forum. He should not count on the local court’s refusal to rule on the validity of the award as a local national award. (Even in France, the Götaverken jurisprudence — although not the decision itself — may of course be reversed.) And it is appropriate for the conscientious arbitrator, no matter how “detached”, to inform himself as to the form and procedure which will assure the highest degree of legitimacy to his award in any jurisdiction where the parties are likely to wish to rely on it.

(b) The Götaverken holding’s consequences for parties

It should be observed that a crucial element of the Paris decision was the fact that the I.C.C. Rules permit proceedings to take place without reference to the national system of law of the place of arbitration, and that in this case neither

71. See n. 48, *supra*. 
the parties nor the arbitrators made such reference.

This should lead practitioners to take great care in designating rules applicable to the proceedings, because its consequences may be more far-reaching than one might imagine. In the Götaverken case, if the shipyard had accepted designation of French procedural law as applicable (as might have been done under Article 11 of I.C.C. Rules), it might have thought that this was a relatively innocent stipulation of a back-up set of rules which would probably never be invoked because of the sufficiency of the I.C.C. Rules themselves. But in fact such a designation would have meant that the award was challengeable in France, and that a potential for delay in the country of execution had been created.

Contrariwise, it may be in the interest of a defendant, at the outset of arbitration, to try to obtain from the arbitrators that they declare which law is applicable to the proceedings so as to identify the national law under which irregularities in the proceedings might be sanctioned. While it is not unheard of (witness the Texaco Award), it does take a fair amount of temerity for an arbitral tribunal to declare expressly that it operates above the context of any national system. At least in the ordinary international commercial arbitration, a prudent tribunal would worry about the effects of such a declaration on the enforceability of the award. For although the New York Convention has eliminated the need to obtain a declaration of enforceability of an award in its country of origin before it can be executed elsewhere, it nevertheless considers the law governing the arbitration to have an important role in the sense that jurisdictions where execution is sought may refuse or suspend recognition in light of challenge actions in the country under whose laws the arbitration took place. 72

The law so specified need not be that of the place of arbitration. The New York Convention refers to the competent authority of the country “in which, or under the laws of which, that award was made”. 73 To follow the reasoning of the Court of Paris, the parties might have agreed to arbitration in Germany but subject to French law, and one assumes that the French Court would have taken jurisdiction to hear a challenge against an award rendered in such circumstances.

It may be reasonably expected that in time, as national systems become more uniform in their treatment of international arbitration, the question whether parties are well advised to use their capacity to delocalise arbitration will fade away. The effect of delocalisation would be limited to the issue of the jurisdiction of the court of the place of arbitration to hear challenges, and the desire to avoid places where such jurisdiction is exerted will likely abate to the

72. Articles V and VI.
73. Article V(1)(c).
extent that challenges are disposed of efficaciously and by reference to universally understood criteria. As has been suggested above, the court of the place of arbitration may view itself as a controller of the transnational rather than the national validity of the proceedings.

But until then, there is no substitute for a necessarily complex analysis of the situation of each transaction where reference to international arbitration is called for. Before delocalising arbitral proceedings, one should try to determine whether that means that the courts of the place of arbitration will (a) accept to deem the proceedings not to be national, and/or (b) refuse to take jurisdiction to hear any action to set aside the award, and whether either (a) or (b) imperils reliance on the award in countries where one’s contracting party may one day be sought out.

CONCLUSION

The recent transnational Götaverken litigation demonstrates that the arbitral process, to be effective, does not require that its binding effect be derived from the national legal system of the country where an award happens to be rendered. Indeed, the Court of Appeals of Paris specifically affirmed that if arbitration taking place in France is of an international character, the resulting award is not French. In a subsequent case, the Paris Court applied this principle even where one of the parties was French.

The possibility that awards may be detached from the law of their country of origin raises two issues which doubtless will be the subject of much debate:

1. how to avoid conflicting decisions (particularly the unsatisfactory result of having an award executed in one country only to be set aside afterwards in its country of origin), and
2. whether one single authority should be identified as the forum for challenge, once and for all, of a flawed international arbitral award (and whether the parties may agree to exclude recourse to such authority). If this authority turns out to be that of the national judge at the place of arbitration, it is recommended de lege ferenda that he control the award’s conformity with international minimum standards, not with the particular rules of his national legislation. Specifically, it should be recognised that purely national considerations relating to enforcement procedures which may vary from one country to the next (such as whether a particular defendant is to be accorded immunity, which depends on the legal context — including treaty relations — specific to that country) should not have a prejudicial effect on the binding nature of the award in the transnational perspective. The fact that a recognised right (i.e. the award) may be denied a remedy in one particular jurisdiction should not per se result in the obliteration of that right worldwide.
In the final analysis, the question whether an award is to be anchored at the seat of arbitration, or whether it is allowed to drift, will likely be of reduced importance in the future. National legal systems increasingly appear to recognise and accept the need for uniformity in the process of transnational commercial arbitration. It is to be hoped, accordingly, that they will eschew application of peculiar and unexpected local norms which might otherwise unduly interfere with the process, and to that extent the disadvantages of attachment of the award to the place of arbitration will be effaced.

APPENDIX

Götaverken Arendal AB v. Libyan General National Maritime Transport Co. 74

[Translated excerpt from the decision of the Court of Appeals of Paris, February 21, 1980.]

Considering that arbitration between a Libyan company and a Swedish company, to decide a dispute arising from the execution of contracts for the construction and delivery in Sweden of three petroleum tankers, has an international character because it involves the interests of international commerce;

Considering that each of the three contracts contained an arbitration clause . . . providing that arbitration would take place in Paris and that it would be governed by the Rules of Conciliation and Arbitration of the I.C.C. “in force at the time of the award”;

That the arbitral proceedings took place between the month of July 1976 and April 5, 1978, and the I.C.C. Rules, in force since June 1, 1975, comport the following Article 11;

The rules governing the proceedings before the arbitrator shall be those resulting from these Rules and, where these Rules are silent, any rules which the parties (or, failing them, the arbitrator) may settle, and whether or not reference is thereby made to a municipal procedural law to be applied to the arbitration.

That this provision, consecrating the freedom of choosing a law without reference to a potential supplementary law, is different from Article 16 of the former Rules, dated June 1, 1955, which applies the law of the place of arbitration in the event the parties or the arbitrators do not provide otherwise;

Considering that the Terms of Reference as signed by the parties also provided . . . that:

The arbitration will be conducted in accordance with the Rules of Conciliation and Arbitration then in force of the International Chamber of Commerce. Where the Rules are silent, the arbitrators will settle the rules governing the proceedings;

74. See n. 11 supra.

75. The court’s citation of the arbitration clause seems imprecise, for in fact the language of the contract referred to arbitration “conducted in accordance with the Rules . . . then in force of the International Chamber of Commerce”, J. G. Wetter, op. cit. supra n. 12, p. 181.
Considering that in this case, it is clear that the parties did not designate a procedural law to be applicable apart from the Rules of procedure established by the arbitral institution; and that the arbitrators did not make such designation either;

Considering that the fact that it was noted, at the end of the award, under the signature of the two other arbitrators, that Mr. Toshani, the remaining arbitrator, when requested to sign the award, had expressed his refusal in writing on April 5, is not necessarily to be deemed an implicit reference to French procedural law...

That it is immaterial that Götaverken, before the Court of Appeals of Stockholm, claimed to deduce from this circumstance that the award had been rendered in conformity with French procedure; that said deduction has no significance beyond that of being a party’s opinion as to the interpretation of declarations contained in the decision rendered by the arbitrators;

That, moreover, the arbitrator’s reference to French rules of conflict of laws in order to select the law applicable to the merits of the case has no influence on the possible choice of a procedural law, because it is an established principle in French private international law that the autonomy of the arbitration clause permits the choice of a procedural law of a nationality different from that of the substantive law, and that the I.C.C. Rules allow arbitrators to designate a procedural law directly, without resorting to rules of conflict;

Considering that the award at issue, rendered in accordance with proceedings which are not those of French law and which have no attachment whatsoever to the French legal order since the two parties are foreigners, and since the contract was signed and was to be performed abroad, may not be considered French;

That, in the face of the very clear Article of the I.C.C. Rules recalled above, the place of the arbitral proceedings, chosen only in order to assure their neutrality, is not significant; it may not be considered an implicit expression of the parties’ intent to subject themselves, even subsidiarily, to the loi procédurale française;

That the provisions of the New York Convention, intended to facilitate the recognition and execution of arbitral awards, are inapplicable when the purpose of a court action is not to obtain a declaration of enforceability of an international arbitral award;

That no decisive argument may be deduced from the Convention in order to acknowledge, as a secondary effect, the necessary application of the procedural law of the country where the arbitration takes place;

That moreover, it should be recalled that France expressed the reservation contemplated by Article 1(3) of the New York Convention in declaring that it would apply said Convention on the basis of reciprocity, that is to say only to the recognition and enforcement of awards which are rendered on the territory
of another contracting State;
Considering that the grounds of challenge against an award which is not French — in the hypothesis that there is proof of standing to sue ("intérêt à agir") — are those available against foreign awards;
That for these reasons the appeal to set aside should be dismissed.

(Note: this excerpt contains, with the exception of some minor editorial deletions, the entirety of the dispositive section of the decision. The lengthier introductory section describes the factual circumstances of the arbitration and the arguments of the parties, which are resumed in the preceding commentary).