



2002

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15 *Transnat'l Law*. 43

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Current Issues in International Arbitration*

Michael P. Malloy, Ph.D.**

I. INTRODUCTION

Arbitration is now one of the most important methods of dispute resolution in international commerce.¹ Thus, in order to operate effectively in the field of international business and trade, attorneys must understand how international arbitration works. An effective and credible method of dispute resolution is an important, indeed critical, element in the negotiation of any international commercial transaction. Therefore, the parties to such a transaction will best serve their interests by arriving at a clear understanding of dispute resolution.

If one theme could accurately depict the unifying element of the current issues occupying international arbitration theory and practice, that theme is this: international commercial arbitration is an important feature of the globalization phenomenon. To phrase the theme another way, one might observe that the process of international commercial arbitration has been affected by the increasingly globalized nature of international commercial activity.

This theme was illustrated quite dramatically by an event reported in the *Business Times of Singapore* on 4 May 2000.² The World Intellectual Property Organization (WIPO)³ announced that it was in the process of establishing an online global dispute resolution mechanism in order to settle disputes between application service providers (like Microsoft, Oracle and IBM) and their customers. The software application business is relatively new, but industry analysts expect expansion to multi-billion U.S. dollar annual sales in the next few years.⁴

The WIPO program, which came online fully at the end of 2000, is the second program of this kind sponsored by the UN agency. WIPO already runs an online arbitration service for disputes over internet addresses; and more than three hundred cases were filed in the first few months that the program was operating.

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** An earlier version of this talk was presented as a *Tagung* at the *Rechtsakademie* of the *Rechtswissenschaftliche Fakultät, Universität Salzburg* in May 2000. J.D., University of Pennsylvania (1976); Ph.D., Georgetown University (1983).

1. See, e.g., GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 7 (2d ed. 2001) (noting increasing significance of arbitration over past several decades).

2. D. Ravi Kanth, *Soon: Settlement Body for E-Commerce Disputes*, *BUS. TIMES* (Sing.), May 4, 2000, at 19, available at 2000 WL 20284319.

3. For background information on WIPO, see *ASP Industry Consortium, World Intellectual Property Organization to Develop Global Contract Process for ASPs; Groups to Work Jointly on Dispute Avoidance, Settlement Mechanism*, M2 PRESSWIRE, May 3, 2000, available at 2000 WL 20191593.

4. *Id.*

What is the significance of the WIPO programs to the theme that we are following? It can be found in the reported comments of Traver Gruen-Kennedy, Chairman of the ASP Industry Consortium⁵ that is working on the new program with WIPO: "Internet companies and ASPs have huge challenges because they can face lawsuits in many countries . . . The idea is, instead of having your contract fall under local law, it would fall under international law."⁶ Similarly, Francis Gurry, Director of WIPO's Arbitration and Mediation Center, has observed that "[t]he challenge is to establish a framework of legal security in which electronic commerce and the ASP model can deliver software throughout the world."⁷

In other words, effective dispute avoidance, management, and resolution have the potential to instill confidence in the business relationship. To the extent that this "framework of legal security"⁸ ameliorates the risks of trans-border business, it may lead to more robust business relationships.

II. IDENTIFYING SOME CURRENT ISSUES

In these remarks, I shall first identify certain current issues relating to the theory and practice of international arbitration, and then offer some extended discussion of two issues that implicate contract negotiation and interpretation. The issues that seem particularly current in international arbitration today include the following:

A. *Significant Revision of Most Major Sets of International Arbitration Rules*

Since 1996, the major independent arbitral organizations, including the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), and the American Arbitration Association (AAA), have all redrafted their international arbitration rules. Increasingly, they are being joined by specialized institutions like WIPO in fashioning specialized regimes for arbitration in specific industries. With these widespread changes, the use of international commercial arbitration is likely to increase. It is important to consider how these arbitral regimes compare with each other, and what effect the revised regimes will have on uniformity and predictability in the settlement of international commercial disputes.⁹

5. For background information on the Consortium, *see generally id.*

6. Jack Rejtman, *Application-Service Network, Others Create Global Mediation Center*, TRIB. BUS. NEWS, May 3, 2000, available at 2000 WL 19319923.

7. *Id.*

8. *Id.*

9. For discussion of the effects of these recent revisions, *see* Allen Holt Gwyn & Benjamin O. Tayloe, Jr., *Comparison of the Major International Arbitration Rules*, 19 CONSTRUCTION LAW. 23 (1999).

The changes are taking place primarily in rules governing *administered arbitrations*, that is, arbitrations under rules established by an institution which will manage or supervise the arbitration—to a greater or lesser extent, depending upon the institution. This practice is in contrast to *ad hoc arbitration*, where the individual parties operate the arbitration under procedures fashioned by individual negotiation and agreement on programs, or by adoption of an established set of arbitration rules by agreement of the parties. In selecting an established set of rules for their ad hoc arbitration, the parties might choose, for example, the UNCITRAL Model Rules (which are not administered), or the parties might choose the rules of an arbitral institution *without* also choosing to have their arbitration administered by the arbitral institution.

As a result, the arbitration rules of institutions like the ICC, the AAA, and the LCIA, have an influence beyond the arbitrations that they administer because their rules may be borrowed by ad hoc arbitrations. More broadly, they serve as significant models and sources of inspiration for other arbitral institutions and for individual parties seeking draft language for contractual clauses concerning arbitration.

Many of the revisions to the ICC, AAA and LCIA rules appear to be modest technical changes to operational provisions. However, seen in context, these changes represent the effects of the increasing globalization of commerce. As Christopher Drahozal has pointed out: “competition among countries to serve as arbitral sites has accelerated. Increasingly, countries are adopting specialized international arbitration statutes to replace . . . previous statutes that [were] . . . designed principally for domestic arbitrations.”¹⁰

So also with the revisions to the arbitration rules, competition among arbitration institutions for the growing number of international commercial arbitrations has moved their respective technical details closer to conformity. While differences still remain among these rules, the differences tend to relate to variances in fundamental institutional policy. For example, there remain differences in the degree to which each institution may actively supervise individual arbitrations under its rules, with the ICC International Court of Arbitration still taking the most active role among the three major institutions.

10. Christopher R. Drahozal, *Commercial Norms, Commercial Codes, and International Commercial Arbitration*, 33 VAND. J. TRANSNAT'L L. 79, 120 (2000).

B. *Subsidiarity and Supremacy in the Context of “Delocalization” of Arbitral Practice*

Whether or not, in principle, the situs of arbitration should make a difference to the legal principles applied or the procedure followed, as a practical matter, situs is often significant in this regard. As international arbitration continues to gain in popularity as a commercial dispute resolution device, the utility of such “localization” principles as *lex loci arbitri* need to be examined. *Localized* public policy defenses against arbitration may include, for example, European Union (EU) industrial competition policy, community environmental standards, community energy policy, transport policy, employment and social policy, internal market and economic policies, and the like. In fact, many European nations have adopted or are in the process of adopting arbitration laws that tend to favor a “de-localized,” autonomous approach to arbitral proceedings, without regard to such localized policy defenses. What effects will de-localized arbitration have on subsidiarity and supremacy?¹¹

As with the confrontation between national laws and EU harmonization and competition policies, the primary question confronting delocalized arbitration within the EU is whether there are EU policy objectives—such as competition policy—that will preempt the desire of many EU member states to respect complete party autonomy in international commercial arbitration. Facing similar policy questions, the U.S. Supreme Court has definitively vindicated delocalized arbitration despite public policy arguments based on antitrust or securities regulatory policy.¹² Whether the Commission or the European Court of Justice (ECJ) would be willing to embrace a similar position is unclear.¹³ Thus, the ECJ has held that a national court reviewing an arbitral award must determine whether the award would also be consistent with EU policy.¹⁴

C. *Cross-Cultural Difficulties in Arbitral Practice*

Cross-cultural differences that may affect arbitral proceedings remain, for example, in such areas as examination of witnesses; the active or passive role of the tribunal; use of written pleadings and oral submissions; use of expert evidence; and, proof and application of foreign law and transnational commercial law.

11. For an interesting review of this question, see Theodore C. Theofrastous, Note, *International Commercial Arbitration in Europe: Subsidiarity and Supremacy in Light of the De-Localization Debate*, 31 CASE W. RES. J. INT'L L. 455 (1999). Cf. Georgios I. Zekos, *The Treatment of Arbitration under EU Law*, 54 DISP. RESOL. J. 9 (May 1999).

12. See, e.g., *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1973) (involving securities regulation); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614 (1985) (involving antitrust policy).

13. See generally Zekos, *supra* note 11 (discussing problem).

14. *Eco Swiss China Time Ltd v. Benetton Int'l NV*, 5 C.M.L.R. 816 (2000).

Further harmonization may be useful, and common law and civil law arbitral practitioners would benefit from study of competing legal traditions.¹⁵

III. CONTRACT DRAFTING ISSUES IN CONTEMPORARY PRACTICE

I turn now to two current concerns about contract drafting issues in contemporary practice. These are: (1) choice of law issues in international arbitration agreements; and, (2) the incorporation of “trade norms” in commercial contracts and the application of such norms in the arbitration of disputes arising under such contracts.

Contracting drafting involving international arbitration is an area where making broad generalizations is difficult because, of course, the individual language and specific commercial context of each contract gives it a particularized quality that is difficult to apply broadly to other contracts in other contexts. Nevertheless, certain generally applicable principles can be identified, and these principles will be useful in construing and applying the language of specific contracts.

First, arbitration is itself essentially consensual in nature. That is, parties are compelled to arbitration only to the extent that they have bound themselves in contract to do so. This is the principle of party autonomy. Second, under most legal systems, this consensual characteristic extends itself, among other things, to the realm of choice of law. Third, in applying contract analysis to commercial undertakings that include an obligation to arbitrate disputes, we analyze that obligation as if it were an entirely separate obligation, distinct from any other contractual obligations between the parties. This third principle is usually referred to as the separability doctrine. One consequence that is related to this doctrine, and which is articulated in arbitration rules themselves,¹⁶ is the so-called *Kompetenz-Kompetenz* doctrine.¹⁷ That is, once a determination is made that parties have undertaken an obligation to arbitrate, a national court should respect the exclusive authority of the arbitral panel to determine the extent of its own jurisdiction, as well as the merits of any claims based on the underlying contract between the parties.

15. For a useful discussion of cross-cultural issues, see Julian D.M. Lew & Laurence Shore, *International Commercial Arbitration: Harmonizing Cultural Differences*, 54 DISP. RESOL. J. 33 (Aug. 1999).

16. See, e.g., AAA International Arbitration Rules, art. 15, ¶ 1 (1997) (providing that the “tribunal shall have the power to rule on its own jurisdiction”); ICC Rules of Arbitration art. 6, ¶ 2 (1998) (establishing roles of International Court of Arbitration and arbitral tribunal in deciding existence, validity or scope of arbitration agreement); LCIA Rules, art. 23, ¶ 23.1 (1998) (providing that “Arbitral Tribunal shall have the power to rule on its own jurisdiction”); UNCITRAL Arbitration Rules, art. 21, ¶ 1 (1976) (providing that “arbitral tribunal shall have the power to rule on objections that it has no jurisdiction”).

17. For a useful discussion of the *Kompetenz-Kompetenz* doctrine, emphasizing its conceptual distinction from the doctrine of separability, see William W. Park, *Determining Arbitral Jurisdiction: Allocation of Tasks Between Courts and Arbitrators*, 8 AM. REV. INT’L ARB. 133, 142-143 (1997).

These principles, at one level, seem straightforward and almost unremarkable. Yet much ambiguity and controversy result from the interplay of these three concepts. If arbitration is fundamentally consensual in nature, does this mean that the parties completely control the choice of law, even to the extent of dictating the essential public policy of how and when a court should refer them to arbitration? Can consensual party autonomy control the exercise of *Kompetenz* by the arbitral process that the parties have chosen? Two areas of controversy may illustrate ways in which these principles interact. These areas share a common theme: sometimes, the complexity or uncertainty of contract drafting itself creates ambiguity about the choices that the parties have actually made. This ambiguity may then call into question the appropriate way in which these three principles should be applied in a particular case.

A. Choice of Law in International Arbitration Agreements

The first area of controversy, which has haunted U.S. jurisprudence and practice, is choice-of-law determination in international arbitration agreements. Parties to international transactions often include a choice of law clause as part of their arbitration agreement. Does the law chosen by the parties to an international contract govern the procedural rules of arbitration, or is it limited to the substantive contract rights of the parties? Recent international arbitral practice favors inclusion of an express choice of law clause that establishes the law governing the parties' contractual agreement as a whole. However, when the parties interpret this arbitration agreement differently, resort to judicial assistance may be necessary to resolve the pre-arbitration dispute. If the parties have chosen a specific law to govern their contractual agreement, a court is usually required to respect that decision. Proper enforcement by U.S. courts of parties' express choice of law clauses continues to be a difficult and unsettled area within commercial arbitration law. Should the choice of law provision be applied to govern "procedural" questions (*e.g.* arbitrability), or is it limited to the interpretation of the substantive rights of the parties under the contract?

In *Mastrobuono v. Shearson Lehman Hutton*,¹⁸ the U.S. Supreme Court adopted an approach that upholds the autonomous decision of the parties to incorporate specific rules of arbitration procedure through the express choice of law clause. The test applied by the Court is whether that choice can be objectively demonstrated from the language of the agreement. This objective test determines the proper scope of express choice of law clause.

The historical approach, pre-*Mastrobuono*, was that choice of law was as to substance, but that national law (*i.e.*, the *lex fori*) went to questions of arbitrability or validity of the arbitral agreement. Thus, U.S. law, embodied in the Federal

18. 514 U.S. 52 (1995). See *Doctor's Associates Inc. v. Cassarotto*, 517 U.S. 681 (1996) (refusing to apply *Volt*, *infra* note 20, and preempting application of Montana statutory requirement as to form of conspicuous notice of arbitration in contract).

Arbitration Act (FAA)¹⁹ was generally interpreted as favoring arbitration, so that arguments of non-arbitrability due to public policy limitations were usually rejected in favor of arbitration.

For example, assume a contract with a general choice of law clause and a general arbitration clause. In the course of a dispute, an argument arises that under the law chosen, certain issues in dispute are nonarbitrable. The historical position, relying on the separability doctrine, dictated that the arbitration clause had to be analyzed as an agreement separate from the substantive agreement between the parties. In light of the FAA, the general arbitration clause would be interpreted as binding and enforceable. The parties would be required to present their arguments with respect to arbitrability of the specific dispute to the arbitral panel, not the court.

However, in its 1989 decision in *Volt Information Sciences, Inc. v. Board of Trustees*,²⁰ the U.S. Supreme Court readjusted this analysis, giving emphasis to the consensual nature of arbitration. Thus, the principle of party autonomy, rather than the separability doctrine, became the key to analysis. In light of party autonomy, the parties were free to choose a body of applicable law that excluded certain issues from arbitration as a matter of public policy. Applying that law as the applicable choice of law of the arbitration clause increased the likelihood that the dispute might be viewed by the court as nonarbitrable, and the dispute would never reach arbitration.

Volt was received with much criticism by courts and scholars alike.²¹ It appeared to underrate the significance of the federal policy favoring arbitration of disputes, and it threatened the effectiveness and credibility of accepted dispute resolution mechanisms in international transactions.²² Some courts tried to limit the effect of *Volt* by saying that the choice of law provision should explicitly indicate that an ouster of federal law was intended.

The issue came to a head over the arbitrability of punitive damages claims. For example, while New York law will allow punitive damages in court actions, it appears to exclude punitive damages in arbitration awards. Assume a contract with a New York choice of law and a general arbitration clause. Can an arbitral panel award punitive damages? Based on *Volt*, some courts answered no, because

19. 9 U.S.C. §§ 1-16, 201-10, 301-07 (2001).

20. 489 U.S. 468 (1989).

21. See, e.g., *Booth v. Hume Publ'g Inc.*, 902 F.2d 925, 928-29 (11th Cir. 1990) (construing contract, despite Georgia choice-of-law provision, as intending application of federal arbitration law); *Merrill Lynch, Pierce, Fenner & Smith v. Shaddock*, 822 F. Supp. 125 (S.D.N.Y. 1993) (distinguishing *Volt*); see also BORN, *supra* note 1, at 340 (characterizing *Volt* as "a cryptic and unfortunate opinion that created uncertainty as to the respective roles of federal and state law under the domestic FAA").

22. While *Volt* itself involved a domestic contract dispute at most, subject to the domestic arbitration provisions of the FAA, 9 U.S.C. §§ 1-16, uncertainty remained as to its applicability to disputes involving international contracts with arbitration clauses otherwise subject to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the implementing provisions of the FAA, 9 U.S.C. §§ 201-210. See, e.g., *American Physicians Serv. Group, Inc. v. Port Lavaca Clinic Ass'n.*, 843 S.W.2d 675 (Tex. App. 1992) (suggesting inapplicability of *Volt* to arbitration subject to FAA §§ 201-210).

New York law applies. Others said that the choice of law was merely as to the substantive law of the contract, not as to arbitrability, and so federal law governed.

In *Mastrobuono*, the United States Supreme Court returned to the issue and attempted to reconcile the principle of party autonomy and the separability doctrine. The parties' contract wishes remain important, but the separability doctrine requires separate examination of the arbitration clause. Unless the parties clearly objectified their wishes to exclude punitive damages, that issue should be sent to arbitration.

The underlying problem in all of this is the failure of parties in contract negotiations to recognize the possible applicability of *dépeçage*²³ to the *post hoc* interpretation of their contract. That is to say, in part because of the separability doctrine, there are actually *four* choice of law issues in drafting the contract language. These are: (1) choice of the substantive law applicable to the underlying contract—the typical subject of a choice of law clause; (2) choice of law applicable to the *separable* arbitration agreement or clause; (3) choice of *lex arbitri*, the law governing the conduct of the arbitral proceedings; and, (4) the logically distinct choice of the conflict of law rules to be used in determining the first three choices.²⁴

Maintaining these distinctions can have significant effects on the outcome of an arbitration. For example, in *Preliminary Award in ICC Case No. 5505 of 1987*,²⁵ the agreement at issue had chosen Switzerland as the situs of the arbitration, and it included a choice of law clause specifying English law. The arbitrators decided that Swiss law had been chosen by the parties as the law governing the arbitral procedure, by virtue of the situs provision, and that English law had been chosen as the law of the contract. Similarly, in *Final Award in ICC Case No. 5946 of 1990*,²⁶ the parties had included a general choice of law provision that stated: "This Agreement is made in New York, New York, and shall be construed in accordance with the laws of New York."²⁷

In the course of arbitration, the respondent claimed punitive (or "exemplary" damages) for the extra-arbitral conduct of the claimant, damages that it alleged would be permitted under the governing New York law. The arbitrator refused to allow exemplary damages because these were not permitted as a matter of public policy in the country that was the situs of arbitration. In addition, the arbitrator gratuitously asserted that, even if situs law had allowed exemplary damages, in

23. *Dépeçage* ("dismemberment") involves the severance of issues in order to apply different choices of law to different aspects of the same factual situation. See Note, *Article 7(1) of the European Contracts Convention: Codifying the Practice of Applying Foreign Mandatory Rules*, 114 HARV. L. REV. 2462, 2467-69 (2001). For extended discussion of the *dépeçage* doctrine, see also Willis L. M. Reese, *Dépeçage: A Common Phenomenon in Choice of Law*, 73 COLUM. L. REV. 58 (1973).

24. BORN, *supra* note 1, at 41-42.

25. 13 Y.B. COMM. ARB. 110 (1988).

26. 16 Y.B. COMM. ARB. 97 (1991).

27. *Id.*

his view, respondent had not proven that New York law would have allowed such damages. Thus, while the parties had agreed upon a general choice of law, they had apparently not considered the possibility that this choice did not resolve the more specialized choice of law issue concerning the law governing the arbitration itself.

In this regard, where the resulting language of the contract is ambiguous (because, for example, it does not make clear and distinct choices of law for all aspects of the arbitration), the established rule of contract interpretation would construe ambiguous language against the interests of the drafting party²⁸—assuming, of course, that that party can be identified. An equally important principle of contract interpretation strongly favors a reading of the contract that would give effect to *all* provisions and to render them consistent with one another.²⁹ In *Mastrobuono*, this meant that the New York choice of law clause would not be read to limit the availability of punitive damages under the *separable* arbitration clause.³⁰

In applying these principles to international arbitration disputes, U.S. courts have usually refused to interpret a general choice of law clause as an expression of the parties' intent to incorporate the local policy and arbitration rules of the forum of the chosen law.³¹ As a result, courts faced with international arbitration disputes have tended, despite *Volt*, to resolve issues involving construction and validity of arbitration agreements in accordance with federal law and not the parties' expressed choice of law.³² *Mastrobuono* has continued to have a profound effect on the interpretive balance between the principle of party autonomy and the separability doctrine.³³ Indeed, in its December 2000 decision

28. *Mastrobuono*, 514 U.S. at 62.

29. *Id.* at 63.

30. *Id.* at 64.

31. *Cf., e.g., American Physicians Service Group, Inc.*, 843 S.W.2d 675 (refusing to apply *Volt* to international dispute, pre-*Mastrobuono*).

32. *See, e.g., Kamaya Co., Ltd. v. American Property Consultants, Ltd.*, 959 P.2d 1140 (Wash. App. 1998) (involving agreement with choice of Japanese law, which barred arbitrability of "fraud in the inducement" claims; upholding arbitration under FAA); *Westbrook Int'l, LLC v. Westbrook Techs., Inc.*, 17 F. Supp. 2d 681 (E.D.Mich. 1998) (involving international distributorship agreement with choice of law of Ontario, Canada, under which claims allegedly not arbitrable; applying *Mastrobuono* and compelling arbitration).

33. Looking just at the past year, there have been between 30 and 40 cases pending at some stage of litigation or appeal that directly raise *Mastrobuono* issues. *See, e.g., Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000) (requiring arbitration despite claims under federal Truth in Lending Act); *Stout v. J.D. Byrider*, 228 F.3d 709 (6th Cir. 2000); *Paul Revere Variable Annuity Ins. Co. v. Kirschhofer*, 226 F.3d 15 (1st Cir. 2000); *Specialty Healthcare Mgmt., Inc. v. St. Mary Parish Hosp.*, 220 F.3d 650 (5th Cir. 2000); *Smith Barney, Inc. v. Critical Health Sys. of North Carolina, Inc.*, 212 F.3d 858 (4th Cir. 2000) (requiring arbitration and allowing punitive damages award therein); *Connecticut Gen. Life Ins. Co. v. Sun Life Assur. Co. of Can.*, 210 F.3d 771 (7th Cir. 2000); *Grigson v. Creative Artists Agency L.L.C.*, 210 F.3d 524 (5th Cir. 2000); *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126 (9th Cir. 2000); *Sentinel Prods. Corp. v. Scriptoria, N.V.*, 124 F. Supp. 2d 115 (D. Mass. 2000); *Nobles v. Rural Cmty. Ins. Servs.*, 122 F. Supp. 2d 1290 (M.D. Ala. 2000); *Flint Warm Air Supply Co., Inc. v. York Int'l Corp.*, 115 F. Supp. 2d 820 (E.D. Mich. 2000); *Higman Marine Servs., Inc. v. BP Amoco Chem. Co.*, 114 F. Supp. 2d 593 (S.D. Tex. 2000); *Lewis v. Haskell Co., Inc.*,

in *Green Tree Financial Corp.-Alabama v. Randolph*,³⁴ the Supreme Court returned to the issue of federal arbitration policy, holding that despite claims under the Truth in Lending Act³⁵ contract parties were compelled to arbitrate their dispute.

B. Incorporation of “Trade Norms”

Most commercial codes, including the Uniform Commercial Code (UCC), regard common business practices (or “trade usages”) as important interpretive sources for courts to consider when resolving contract disputes.³⁶ Yet some scholars criticize this incorporation strategy, arguing that reliance on commercial norms is often inappropriate and may distort the true nature of the parties’ agreement.³⁷ Reliance on commercial norms does restrict the ability of contracting parties to allocate part of their agreement to extra-legal means of enforcement, but the costs may be outweighed by the benefits of incorporating commercial norms into commercial codes.

In drafting contract provisions and obligations, considering to what extent trade usages should be consulted, and whether the availability of this interpretive source should be expressly addressed in the contract is important. Conversely, in the absence of express language, is it safe to assume that trade usages will be consulted and applied in any subsequent dispute? Is it safe—or even practical—to ignore usage and try to draft party obligations exhaustively? Likewise, is it safe or practical to identify relevant usage and explicitly try to pick and choose which will apply?

108 F. Supp. 2d 1288 (M.D. Ala. 2000); *Marsh v. First USA Bank, N.A.*, 103 F. Supp. 2d 909 (N.D. Tex. 2000); *Polin v. Kellwood Co.*, 103 F. Supp. 2d 238 (S.D.N.Y. 2000); *Bratt Enter., Inc. v. Noble Int’l, Ltd.*, 99 F. Supp. 2d 874 (S.D. Ohio 2000); *In re Mercury Finance Co.*, 249 B.R. 490 (N.D. Ill. 2000); *Wright v. SFX Entertainment Inc.*, — F. Supp. 2d —, 2001 WL 103433 (S.D.N.Y., Feb. 7, 2001); *Zimring v. Coinmach Corp.*, — F. Supp. 2d —, 2000 WL 1855115 (S.D.N.Y. Dec. 19, 2000); *BEM I, L.L.C. v. Anthropologie, Inc.*, — F. Supp. 2d —, 2000 WL 1849574 (N.D. Ill. Dec. 15, 2000); *In re Managed Care Litigation*, — F. Supp. 2d —, 2000 WL 33180826 (S.D. Fla. Dec. 11, 2000); *Goulart v. Snap-On Tools Corp.*, — F. Supp. 2d —, 2000 WL 1863486 (M.D. Ala., Nov. 30, 2000); *Coleman & Co. Sec., Inc.*, — F. Supp. 2d —, 2000 WL 1683450 (S.D.N.Y. Nov. 9, 2000); *Spurlock v. Life Ins. Co. of Va.*, — F. Supp. 2d —, 2000 WL 1785300 (M.D. Ala. Oct. 31, 2000); *Plastech Exterior Sys., Inc. v. Deere & Co.*, — F. Supp. 2d —, 2000 WL 631329 (N.D. Ill. May 12, 2000); *In re RealNetworks, Inc.*, — F. Supp. 2d —, 2000 WL 631341 (N.D. Ill. May 8, 2000); *Floorcoverings, Int’l, Ltd. v. Swan*, — F. Supp. 2d —, 2000 WL 528480 (N.D. Ill. Apr. 25, 2000); *Four B Development Corp. v. Cliff Realty Corp.*, — F. Supp. 2d —, 2000 WL 760972 (D. Me. Apr. 13, 2000); *Warren-Guthrie v. Health Net*, 84 Cal.App.4th 804, 101 Cal. Rptr. 2d 260 (Cal. App. 2000); *Bishop v. We Care Hair Dev. Corp.*, 316 Ill. App. 3d 1182, 738 N.E.2d 610 (Ill. App. 2000); *Quigley v. KPMG Peat Marwick, LLP*, 330 N.J. Super. 252, 749 A.2d 405 (App. Div. 2000); *Lian v. First Asset Mgmt., Inc.*, 273 A.D.2d 163, 710 N.Y.S.2d 52 (App. Div. 2000); *Berkley v. H & R Block E. Tax Servs., Inc.*, 30 S.W.3d 341 (Tenn. Ct. App. 2000); *In re Conseco Fin. Servicing Corp.*, 19 S.W.3d 562 (Tex. App. 2000).

34. 531 U.S. 79 (2000).

35. 15 U.S.C. §§ 1601 *et seq.* (2001).

36. *See, e.g.*, U.C.C. §§ 1-205, 2-208 (permitting reference to usage of trade as extrinsic evidence).

37. For an excellent critique and analysis of the problem, *see* Drahozal, *supra* note 10.

The UCC looks to trade usage as part of the “agreement,” unless clearly contradicted by prior dealings, course of performance, of the express language of the contract.³⁸ There are parallels under the Convention on the International Sale of Goods. Under article 9(1), parties are bound by usages to which they may have agreed and by practices established by them.³⁹ Under article 9(2), in addition to usages to which they have agreed, the parties are “considered . . . to have impliedly made applicable to their contract” any usage that they knew or should have known, and which is widely known and regularly observed by parties in the particular trade concerned.⁴⁰

In the context of arbitration of a contract dispute, however, what is the relevance of trade usage? Under ICC Rule 17(2), the arbitrators must “take account of provisions of the contract and relevant trade usages.”⁴¹ By contrast, AAA Rule 28(2) requires arbitrators to “decide *in accordance with terms of the contract* and take into account usages of trade applicable to the contract.”⁴² Similar language appears in UNCITRAL Rule 33(3). The LCIA rules have no rule specifically dealing with this issue.

In a close case, where evidence of trade usage might make a critical difference to the construction of the contract, the varied formulations of the pertinent arbitration rules could make a material difference to the outcome of the dispute. The ICC rule appears to tip slightly more in favor of usage, but none of the rules bar reference to usage completely.

However, the arbitration statute of the situs of the arbitration may further complicate the matter. The trend seems to favor including some statutory reference to trade usage. For example, the UNCITRAL model law—the principal model followed by national legislatures since 1985—adopts the “in accordance with terms of the contract” and “take into account usages” formulation.⁴³ This approach has been followed by many countries in updating their arbitration laws, including France and the Netherlands. The ICC’s “provisions of the contract *and* relevant trade usages”⁴⁴ formulation has been followed by a minority of states addressing this issue in the past two decades, including Egypt and Italy.

38. U.C.C. §§ 1-205, 2-208.

39. United Nations Convention on Contracts for the International Sale of Goods, Final Act, U.N. Doc. A/CONF. 97/18, art. 9(1) (1980); 52 Fed. Reg. 6264 (1987); 19 I.L.M. 668 (1980) [hereinafter CISG].

40. *Id.* art. 9(2).

41. International Chamber of Commerce Rules of Conciliation and Arbitration art. 17(2) (1998) [hereinafter ICC]. Similar language appears in the European Convention on International Commercial Arbitration, art. 7(1), and in the Inter-American Convention on the Law Applicable to International Contracts (ICLAIC). For discussion of the European Convention, see *Article 7(1) of the European Contracts Convention*, *supra* note 23. For review and analysis of the ICLAIC, see Susie A. Malloy, Note, *The Inter-American Convention on the Law Applicable to International Contracts: Another Piece of the Puzzle of the Law Applicable to International Contracts*, 19 *FORDHAM INT'L L.J.* 662 (1995).

42. International Arbitration Rules of the American Arbitration Association, art. 28(2) (1997).

43. UNCITRAL Model Law, art. 28(4).

44. ICC art. 17(2) (emphasis added).

Consider a situation in which the language of the contract concerning delivery of goods is somewhat uncertain, but is susceptible to an interpretation that is inconsistent with usage in the subject trade. Assume the contract provides for ICC arbitration of disputes, with situs in France, and choice of New York law (and hence, the UCC) as the law governing the contract. Presumably, the UCC would seek an interpretation of the contract that reconciled the express terms of the contract with the relevant usage. Such an approach would certainly be consistent with the approach of ICC Rule 17(2), but is the approach consistent with the French-UNCITRAL law requiring decision “in accordance with” the contract terms?

I would argue that this apparent conflict might be resolved by reference to the fact that the UCC does hierarchize the interpretive sources so that, in principle at least, the interpretation of the contract must still focus primarily on the express language of the contract. However, the parties might well be advised to address this issue explicitly in the contract language, perhaps by explicitly including recognized trade usage as part of the law of the contract.

IV. CONCLUSION

I would emphasize the following six general conclusions from this brief overview of international arbitral process. First, with the recent revisions, international arbitral rules have become increasingly time-sensitive and practical. Several now also provide explicitly for multiparty-arbitration. Second, the rules remain extremely flexible and discretionary on such issues as conduct of proceedings, evidence, hearsay, and the like. Third, choice of law remains an essential issue in international arbitration. If anything, it is becoming even more important as a result of the trend towards de-localization. Fourth, use of trade norms, generally recognized by major commercial law and arbitral rules, adds comprehensiveness and flexibility. However, it can also be the source of uncertainty and ambiguity unless it is managed through the exercise of party autonomy. Fifth, the implications of party autonomy and de-localization in relation to fundamental public policy, particularly in the EU, are still in process. They will doubtless receive further attention from the European Commission and the ECJ. Sixth, all of these factors may exacerbate cross-cultural differences in arbitration practice, but flexibility of procedures may also hold promise for resolving these differences.