ARBITRATION OF INTERNATIONAL BUSINESS DISPUTES

Studies in Law and Practice

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A. Financial Transactions

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ARBITRATION IN BANKING AND FINANCE*

> The human species, according to the best theory I can form of it, is composed of two distinct races: the men who borrow and the men who lend.
>
> Charles Lamb[1]

A. Introduction

The world's bifurcation into debtors and creditors has created yet another class of people: those involved in resolving disputes between lenders and borrowers. To promote reliability in financial dispute resolution, credit agreements have generally provided that potential

* Adapted from *Arbitration in Banking and Finance*, 17 Ann. Rev Banking Law 213 (1998).

[1] Charles Lamb, "Two Races of Men" in *Essays of Elia* (1823).

controversies will be submitted either to courts in the bank's home jurisdiction,[2] or to courts of a major money center such as London or New York.[3]

In the alternative, parties to a financial transaction might agree to resolve disputes between them by arbitration, thus conferring adjudicatory competence on private rather than public decision-makers. Arbitration has long been common in settling commercial[4] and insurance[5] disputes, where its use tends to reduce litigation costs. In an international context, arbitration serves to level the playing field where there exists a particularly acute fear of the other side's "home-town justice."

In contrast to the commercial and insurance communities, bankers have traditionally preferred judges over arbitrators. This should not be surprising. A debtor's default usually results from simple inability or unwillingness to pay, rather than any honest divergence in the interpretation of complex or ambiguous contract terms. Arbitration therefore may appear as an unnecessary invitation to a "split the difference" award, reminiscent of King Solomon's famous threat to cut the baby in two.[6] Moreover, financial institutions with a security interest over a debtor's assets will usually find it easiest to bring a court action where the pledged property is located. Finally, going to court may also give the lender the benefit of summary procedures for the enforcement of promissory notes and other commercial paper obligations.[7]

Herd mentality and respect for custom provide other clues to the banker's hesitation to embrace private adjudication. Not without good reason, the financial sector has tended to be conservative, wary of rapid change.[8] If suing borrowers in court rather than before arbitrators has worked well enough in the past, few bankers will buck the trend.

Increasingly, however, the financial community is finding benefits to arbitration, particularly in connection with securities transactions, guarantees, documentary credits, consumer loans, and public sector lending. This chapter will examine how arbitration has developed in each of these selected areas. In addition, it will analyze the major elements in the efficiency calculus of financial arbitration: (i) the multilateral treaty network for the enforcement of arbitral awards; (ii) the arbitrator's ability to ignore "Act of State" defenses arising from foreign exchange controls; and (iii) the risk of excessive American jury awards with respect to both punitive damages and "lender liability" claims. No dispute resolution clause will satisfy every segment of the financial services industry. Rather, the interaction of all elements of a given financial transaction will determine when and how arbitration may (or may not) be appropriate to the resolution of banking and securities controversies. This chapter suggests,

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[2] In addition, banks sometimes reserve the right to pursue the borrower before other competent courts, such as those at the borrower's domicile. See later discussion of unilateral clauses.

[3] See generally Lee C. Buchheit, *How to Negotiate Eurocurrency Loan Agreements* 126–31 (1995).

[4] See generally cases discussed in Thomas Carbonneau, *Cases & Materials on Commercial Arbitration* (1997); W. Michael Reisman, W. Laurence Craig, William W. Park and Jan Paulsson, *International Commercial Arbitration* (1997).

[5] See e.g. *Quackenbush v. Allstate Ins. Co.*, 116 S. Ct. 1712 (1996), declaring that in a motion to compel arbitration in federal court, abstention in favor of a state court is not appropriate; *U.S. Fire Ins. Co. v. National Gypsum*, 101 F. 3d 813 (2nd Cir. 1996), holding that in an arbitration of insurance coverage of bodily injury claims against asbestos producers, the preclusive effect of a court decision must be arbitrated.

[6] Of course, when Solomon called for a sword to divide the infant, he was rendering only an interim award, designed to discover the real mother. See I Kings 3:24–25.

[7] See e.g. *Nouveau code de procédure civile* (NCPC), Art. 1405 (2) (formerly *Code de commerce*, Art. 641), granting French courts the power to issue a payment order (*injonction de payer*) with respect to promissory notes and other negotiable instruments.

[8] For an analysis of factors that explain deference to the past even when it may be inefficient, see Mark J. Roe, *Chaos and Evolution in Law and Economics*, 109 Harv. L. Rev. 641 (1996).

however, that arbitration merits special consideration when the borrower's assets are found in jurisdictions lacking judgment treaties with the probable litigation forum, when loans are subject to exchange controls, and when debtors might file punitive damage or "lender liability" actions. Arbitration may also be appropriate when there exists a need for special expertise, such as in the settlement of documentary credit disputes subject to the *Uniform Customs and Practices* of the International Chamber of Commerce (ICC).

To the extent that arbitration promotes respect for bargains between creditor and debtor, it commends itself not only to the bankers' self-interest, but also as a matter of sound international economic policy. The greater the risk in loan recovery, the higher the interest rate. Because loans are loans, not gifts, untrustworthy enforcement mechanisms will tend to chill cross-border economic cooperation to the detriment of those countries that depend most on foreign capital for development.

B. Enforcing Loan Agreements

At the outset, arbitration should be distinguished from other non-judicial forms of alternative dispute resolution currently in vogue. Arbitration implies not only the consent of the parties to settle their dispute out of court, but also bindingness of result. On the strength of an arbitral award, assets can be attached and competing litigation precluded.[9] By contrast, neither mediation nor conciliation is legally binding; both may end up being little more than foreplay to litigation.[10]

Treaties

Bankers sometimes must enforce court judgments in their favor against assets located outside the country where the judgment was rendered. For example, an American bank that obtained a judgment in New York against a foreign borrower might have to seek its enforcement against property in Europe, Asia, or Latin America.

Unfortunately, not all banks will benefit from an adequate treaty network for the recognition of foreign judgments. Although the Bruxelles[11] and Lugano[12] Conventions bless Western Europe with a sound mechanism to enforce each others' court judgments, these treaties will be of no avail in recovering loans against assets in non-treaty countries. Moreover, no treaties

[9] Samuel Johnson commented on the salutary effects of looming catastrophe: "Depend upon it, Sir, when a man knows he is to be hanged in a fortnight, it concentrates his mind wonderfully." James Boswell, *Life of Johnson* Vol. 2, 110 (Mowbray Morris,(ed.), 1890).

[10] Dispute resolution possessing a moral force only will be more effective in a closely knit, ethnically homogeneous community with repeat dealings among community members, rather than among culturally diverse and mutually suspicious (or even hostile) commercial actors. See generally Jerold Auerbach, *Justice without Law* (1983); Lisa S. Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. Legal Studies 115 (1992).

[11] See Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Arts. 13–17, 27 September 1968, as amended [1990] O.J. C189/2. Since the original publication of this essay, the Bruxelles Convention has become the Bruxelles Regulation, Council Regulation No. 44/2001/EC, 22 December 2000, Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [2001] O.J. EURO. COMM. L12/1 (Supplement). The relevant provisions are found in Arts. 15–17 and 23.

[12] See Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Arts. 13–17, 16 September 1988 [1988] O.J. L319/9.

at all exist for the enforcement of American judgments abroad.[13] While some countries might as a matter of "comity" enforce a foreign judgment,[14] not all legal systems will be so generous.[15]

In contrast, a worldwide network of bilateral[16] and multilateral[17] treaties provides for the enforcement of arbitral awards. The most important of these treaties is the New York Arbitration Convention,[18] which requires courts of over one hundred contracting states to enforce written arbitration agreements[19] and the resulting awards,[20] subject only to a limited litany of defenses related to procedural matters such as the validity of the arbitration agreement, the opportunity to be heard, and the limits of the arbitral jurisdiction.[21]

Many Latin American countries have adopted the Inter-American Arbitration Convention (often referred to as the Panama Convention),[22] sometimes in addition to the New York Convention. The Inter-American Convention mirrors much of the New York Arbitration Convention, albeit with a more limited enforcement scheme.[23]

In addition, the Washington Convention has established an arbitration procedure under the auspices of the World Bank's International Centre for Settlement of Investment Disputes (ICSID),[24] covering disputes arising out of investment contracts between a host state and a foreign national.[25] Investment treaties frequently contain consent to ICSID jurisdiction, and many define investment to include "all categories of assets," including claims to money.[26]

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[13] The United States' failure to conclude any judgments treaty derives in part from our trading partners' apprehension over punitive damages, civil juries, contingency fees, and other quaint aspects of the American judicial system. See generally William W. Park, *International Forum Selection* 46–9 (1995).

[14] See e.g. Restatement (Second) of Conflict of Laws, § 98 (1988).

[15] See e.g. Wetboek van Burgerlijke Rechtsvordering [Code Civ. Proc.], Art. 431(1) (Neth.): "Except for provisions of Articles 985–94 [concerning treaties] decisions rendered by foreign judges or public deeds executed outside the Netherlands cannot be enforced in the Netherlands." (Translation by Albert Jan van den Berg.)

[16] See Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties* (1995).

[17] See later discussion of the New York, Panama and Washington Conventions.

[18] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 21 U.S.T. 2518, 330 U.N.T.S. 3 (hereinafter New York Convention). The operation of the New York Convention is supplemented by the European Convention of 1961, but only as between residents of European Convention countries. European Convention on International Commercial Arbitration, 9 February 1968, 484 U.N.T.S. 349 (Geneva).

[19] New York Convention (n. 18) Art. II(1), 330 U.N.T.S. 38.

[20] Ibid. Art. III, 330 U.N.T.S. 40, requiring that a foreign award be enforced as would be a domestic award.

[21] Ibid. Art. V, 330 U.N.T.S. 40, 42.

[22] Inter-America Convention on International Commercial Arbitration, Panama, 1975, 14 I.L.M. 336 (hereinafter Panama Convention).

[23] The Panama Convention is silent on orders to compel arbitration, stating only that an agreement to arbitrate is "valid." Moreover, the Panama Convention provides that execution and recognition of an award "may" be ordered, as contrasted with the New York Convention's mandatory "shall." Finally, the Panama Convention's enforcement obligation applies only to awards that are "not appealable"; no similar limitation is found in the New York Convention.

[24] Convention on the Settlement of Disputes Between States and Nationals of Other States, 18 March 1965, 575 U.N.T.S. 159 (hereinafter Washington Convention).

[25] Washington Convention (n. 24) Art. 25.

[26] See Dolzer and Stevens (n. 16) 25–31, 130–46. See also Jan Paulsson, *Arbitration without Privity*, 10 ICSID Rev. Foreign Investment L.J. 232 (1995). Consent to ICSID jurisdiction may be given in an individual investment agreement, host state legislation or treaty obligations, but may not be withdrawn unilaterally. The North American Free Trade Agreement (NAFTA) gives investors a right to bring claims for expropriation under the arbitration rules of ICSID, the ICSID "Additional Facility" or UNCITRAL. See NAFTA, Art. 1120, Ch. 11, § B (1992).

Lender liability[27]

Claims by debtors

A chameleon-like catch-word with several meanings, "lender liability" has been pressed into service by non-performing debtors in the United States seeking damages for a bank's alleged failure to act in "good faith,"[28] whether under common law[29] or statute.[30] Analogous regimes have been imposed in some Continental legal systems.[31]

The "lender liability" label has been affixed to duties owed by a creditor to a debtor under theories of breach of contract, fraud and bad faith in pre-contractual negotiation. Such claims typically arise at termination of a line of credit, acceleration of payment under a note or foreclosure on collateral.[32] Sometimes claims are made even when a bank exercises explicit powers under a credit agreement.[33] While bankers are most often criticized for being too closefisted,[34] some financial institutions have also been faulted for being overly generous with credit.[35]

To avoid what they consider to be excessive and unpredictable awards by juries in such litigation, several American financial institutions now provide for arbitration in credit agreements.[36] These institutions presume that an arbitrator will be less swayed by solicitude for the borrower than will members of a civil jury, whose own credit problems may cause them to empathize with the debtor.

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[27] See generally Helen Davis Chaitman, *The Law of Lender Liability* (1990).

[28] On good faith in contract performance, see generally Steven J. Burton and Eric G. Andersen, *Contractual Good Faith* (1995); Steven J. Burton, *Judging in Good Faith* (1992).

[29] In the United States, the duty of "good faith" usually arises under state rather than federal law. See Restatement (Second) of Contracts, § 205 (1979), providing that "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.".

[30] See generally U.C.C. § 1-203 (1995). Certain portions of the Code extend the "good faith" definition to include the "observance of reasonable commercial standards of fair dealing." See U.CC. §§ 2-103(1)(b), 2A-103(3), 3-103(a)(4), 4-104(c), 4A-105(a)(6) (1995). Although the Code governs security agreements under its Article 9 (Secured Transactions), it is uncertain whether the Code also covers other aspects of secured loans themselves.

[31] France's Loi No. 84–46, Art. 60, 27 January 1984. The *Cour de cassation* has held that renewal of a fixed-term loan may create an indeterminate credit. See *Cour de cassation*, 3 December 1991, Revue Banque 842 (1992) (commentary by Rives Lange). If a loan does not contain a specific term, then the courts may deem a "reasonable" term to be implied, which might extend the time required to find substitute financing.

[32] See e.g. *Duffield v. First Interstate Bank of Denver*, 13 F. 3d 1403 (10th Cir. 1993); *Bank One Texas v. Taylor*, 970 F. 2d 16 (5th Cir. 1992). Compare cases finding borrower's claim of bad faith not proven, including *Quality Automotive v. Signet Bank Maryland*, 983 F. 2d 1057 (4th Cir. 1993); *Roberts v. Wells Fargo AG Credit Corp.*, 990 F. 2d 1169 (10th Cir. 1993)

[33] Many states have now added credit agreements to statutes of frauds in order to preclude lender liability claims based on alleged oral contract terms. See Todd C. Pearson, Note, *Limiting Lender Liability: The Trend toward Written Credit Agreement Statutes*, 76 Minnesota L. Rev. 295 (1991).

[34] See earlier discussion.

[35] Several American banks have recently come under attack for aggressive marketing, allegedly making excessive loans on overpriced houses to low-income borrowers, thereby bringing on foreclosure and bankruptcy. See e.g. *Lessons in Home Financing*, Boston Globe, 6 November 1997, A30; *Bad Credit in Dorchester*, Boston Globe, 28 October 1996, A14. Banks in the United States have also been subject to allegations of insufficient lending in poorer communities, leading to remedial legislation in the form of the Community Reinvestment Act, 12 U.S.C. § 2901 (1996). The complexity of mortgage lending to less affluent borrowers is explored in Hillel Levine and Lawrence Harmon, *The Death of an American Jewish Community* (1992).

[36] See the model clauses adopted by Bank of California and Bank of America, reprinted in James R. Butler, *Arbitration in Banking* (1988). See generally Michael L. Weissman, *Lender Liability: How to Protect Yourself against Unwarranted Suits* (1988).

Claims by third parties

Another incarnation of lender liability relates to a banker's duty toward the borrower's other creditors. Bankers have sometimes been asked to pay their debtors' bills, under the theory that the lenders were *de facto* partners in the borrowers' ventures.[37] The plausibility of such claims usually turns on the amount of control exercised by the financier over the management of the borrower's business.

Lenders will not always be able to impose arbitration of such third-party claims, simply because a borrower's other creditors will not necessarily have agreed to arbitration. Nevertheless, arbitrators sometimes do hear third-party claims, and their commercial sophistication has often led to reasonable solutions.[38]

Exchange controls

When a country freezes or restricts payment of foreign currency obligations,[39] borrowers sometimes invoke these exchange controls as defenses to loan recovery,[40] on the theory that such controls constitute a foreign "Act of State" to which courts must defer. Although principally an American obsession, the Act of State doctrine exercises an influence well beyond common law countries, given the large number of cross-border financial transactions routinely subjected to the law of New York or to the jurisdiction of New York courts.

The Act of State doctrine generally prohibits courts from questioning a foreign government's behavior concerning assets within its territory.[41] Sometimes explained as a limit on judicial interference with the conduct of foreign affairs,[42] the doctrine might best be understood as a conflict-of-laws rule that imposes foreign law even if such law is contrary to the public policy of the forum.[43]

Creditors sometimes avoid application of the Act of State doctrine by virtue of judicial manipulation of the situs of the debt in question. Courts may deem the debt to be located outside the territory of the country imposing the exchange controls.[44] Favorable characterization of the debt situs, however, may come only after years of costly litigation.[45]

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[37] See e.g. *United States v. Fleet Factors Corp.*, 901 F. 2d 1550 (11th Cir. 1990) (security interest and role in borrower's management created liability for hazardous waste clean-up costs).

[38] See arbitration award in *Schlumberger v. Duferco*, International Chamber of Commerce (ICC) Case 8465, reported in 11(3) Mealey's Int'l Arb. Rep. C-1 (1997).

[39] On exchange controls, see generally International Monetary Fund Articles of Agreement, Art. VIII(2); Klaus Peter Berger, "Acts of State and Arbitration: Exchange Control Regulations" in Karl-Heinz Böckstiegel (ed.), *Acts of State and Arbitration* 99 (1997).

[40] See e.g. *Wells Fargo Asia Ltd. v. Citibank*, 852 F. 2d 657 (2nd Cir. 1988), vacated and remanded, 495 U.S. 660 (1990), affirmed 936 F. 2d 723 (2nd Cir. 1991).

[41] See Restatement (Third) of Foreign Relations Law of the United States, § 443 (1987).

[42] See generally *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

[43] An alternative rationale sees the Act of State doctrine as promoting security of transactions, an explanation that works best when tangibles are concerned. For example, without the Act of State doctrine, one who buys wood or sugar from a revolutionary government might later be subject to a claim brought by the original owner seeking to recover the goods.

[44] See *Allied Bank v. Banco Credito Agricola*, 566 F. Supp. 1440 (S.D.N.Y. 1983), affirmed 733 F. 2d 23 (2nd Cir. 1984), reversed on rehearing, 757 F. 2d 516 (2nd Cir. 1985). Such situs manipulation works best when the place of payment and/or applicable law are other than the country of the debtor's residence. For alternative ways to analyze the legitimate extent of exchange controls, see P. S. Smedresman and Andreas Lowenfeld, *Eurodollars, Multinational Banks, and National Laws*, 64 N.Y.U. L. Rev. 733 (1989).

[45] See e.g. *Wells Fargo v. Citibank*, 660 F. Supp. 946 (S.D.N.Y. 1987) (recovery allowed), remanded for clarification, 847 F. 2d 837 (2nd Cir. 1988), recovery ordered again, 695 F. Supp. 1450 (S.D.N.Y. 1988), affirmed, 852 F. 2d 657 (2nd Cir. 1988), vacated and remanded 495 U.S. 660 (1990), reaffirmed on remand, 936 F. 2d 723 (2nd Cir. 1991). Subsequent legislation provides that banks which are members of the Federal Reserve are

The United States has eliminated the Act of State defense in actions to enforce arbitration agreements and awards. The Federal Arbitration Act (FAA) provides:

> The enforcement of arbitral agreements, and the confirmation of arbitral awards, shall not be refused on the basis of the act of state doctrine.[46]

The scope of this remarkably succinct bit of legislation, however, has not been extended to court litigation. Thus, an arbitration clause in a cross-border loan agreement may enhance considerably a creditor's prospect of loan recovery.

Sovereign immunity

To avoid repayment of loan obligations, government debtors often invoke principles of "sovereign immunity," which operate to prevent one country from hauling another country into its courts. The modern rationale for sovereign immunity mirrors the justification sometimes given for the Act of State doctrine: judges should not interfere with the executive branch of government in its conduct of foreign relations.

Although most nations grant immunity to foreign governments and their agencies, immunity is subject to several exceptions. As a general rule, immunity covers "public" rather than "commercial" acts,[47] with the character of an act determined by its nature rather than its purpose.[48] Immunity from suit will be further restricted by an arbitration clause. Many national legal systems deny sovereign immunity in an action to enforce an arbitration agreement or to confirm an arbitral award.[49]

Arbitration can be of special benefit to a lender when an award must be enforced against a sovereign debtor's assets in the United States. Normally, a functional connection is required between the property to be attached and the activity that gave rise to the claim. A judgment against a foreign state can be executed only against property used in the same commercial activity upon which the claim is based.[50] In the case of a loan, this "same activity" requirement can limit attachment of assets to funds earmarked for debt reimbursement, which may be scarce when the debtor defaults.

The Foreign Sovereign Immunities Act,[51] however, removes this requirement of a functional nexus with respect to arbitral awards. The statute provides that property of a foreign state

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not required to repay foreign branch deposits blocked by foreign government action, absent an express agreement to the contrary. See Federal Reserve Act § 25C, 12 U.S.C. § 633 (1994).

[46] 9 U.S.C. § 15 (1994), was enacted following a frustrating attempt to enforce an arbitration award against Libya in American courts. See *Libyan American Oil Co. (LIAMCO) v. Libya*, 482 F. Supp. 1175 (D.D.C. 1980), vacated as moot, 684 F. 2d 1032 (1981).

[47] See e.g. U.S. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602–1611 (1994); State Immunity Act, 1978 (c. 33) (Eng.). A Swiss wrinkle to sovereign immunity requires a link ("internal connection" / *Binnenbeziehung*) between the sovereign act and Switzerland before Swiss courts will accept jurisdiction over the sovereign or its assets. See *Circulaire du Département fédéral de justice et police*, 26 November 1979, reprinted in (1980) Jurisprudence des Autorites Administratives de la Confederation 224.

[48] For the United States, see 28 U.S.C. § 1603(d) (1994). Legislative history indicates that "both a foreign government sale of bonds and a loan from a commercial bank to a foreign government are to be considered activities of a commercial nature." See H.R. Rep. No. 1487, 94th Cong., 2nd Sess., 10 (1976). The British statute defines a commercial transaction to include "any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation." See State Immunity Act, 1978, § 3(3)(b) (Eng.).

[49] In the United States, see 28 U.S.C. § 1605(a) (1994). Compare State Immunity Act, 1978, § 9 (Eng.).

[50] Some property, such as central bank funds (absent an explicit waiver of immunity), is always immune, unless perhaps the central bank functions as a commercial bank in a particular transaction. See 28 U.S.C. §§ 1609–1610 (1994).

[51] 28 U.S.C. §§ 1330, 1602–1611 (1994).

used for a commercial activity in the United States shall not be immune from attachment in aid of execution if judgment is based on an order confirming an arbitral award.[52]

An arbitration clause in a loan agreement can also be helpful when the borrower is an international organization. In Britain, a dispute between the International Tin Council (ITC) and its creditors ended up before the House of Lords, which interpreted the ITC Headquarters Agreement with the United Kingdom as granting the ITC sovereign immunity.[53] The same Headquarters Agreement, however, had also provided that the ITC would *not* benefit from immunity in the enforcement of arbitration awards. The metal exchanges among ITC's creditors were thereby protected, since their trading contracts contained arbitration clauses. Banks were in a different situation, however, since few lenders had had the foresight to incorporate arbitration clauses in their loan agreements.

Interbank disputes

Court selection clauses

Not all jurisdictions are user-friendly in matters of court selection. If two banks wish an unbiased judge in a neutral third country to resolve a controversy between them, the contractually selected neutral court may not always have enough links to the parties or the controverted event to justify hearing the case.

While some countries require their judges to hear cases pursuant to court selection clauses,[54] others do not. In particular, no American jurisdiction except New York mandates recognition of court selection clauses;[55] neither federal statute nor treaty enforces choice-of-court clauses in the way that the FAA and the New York Arbitration Convention enforce arbitration agreements.[56]

Several U.S. Supreme Court decisions are often cited for the proposition that court selection clauses will be recognized.[57] Yet these cases actually say only that jurisdiction agreements will be respected if "reasonable" by reference to a multiplicity of factors (place of contract execution, place of performance, location of witnesses and documents, remedies available in the alternate forum and public policy), all of which vary from case to case.[58] Moreover, unless a controversy implicates a question of federal law, one foreigner normally may not sue another in federal court, regardless of how eager the litigants are to thrust jurisdiction on the designated tribunal.[59]

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[52] 28 U.S.C. § 1610(a)(6) (1994).

[53] *J.H. Rayner Ltd. v. Dep't of Trade* [1989] 3 All ER 523 (H.L.) (Eng.).

[54] See e.g. Swiss *Loi fédérale sur le droit international privé* (LDIP), Art 5, 18 December 1987, which mandates respect for court-selection clauses as long as Swiss law applies to the dispute.

[55] See N.Y. Gen. Oblig. Law § 5-1402 (McKinney 1989) and N.Y. C.P.L.R. § 327 (McKinney 1989).

[56] For a recent U.S. federal case citing absence of a court selection statute as a factor justifying refusal to enforce a jurisdiction clause, see *Richards v. Lloyd's of London*, 107 F. 3d 1422, 1427 (9th Cir. 1997).

[57] See e.g. *Carnival Cruise Lines v. Shute*, 499 U.S. 585 (1991); *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988); *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

[58] One decision set forth nine factors relevant to the reasonableness of a jurisdiction clause, emphasizing "the totality of the circumstances measured in the interests of justice." *D'Antuono v. CCH Computax Sys.*, 570 F. Supp. 708 (D.R.I. 1983). See e.g. *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 28–32 (1988) (listing factors).

[59] Federal court power is limited to cases arising on the basis of a federal question or diversity of citizenship. The latter requires litigation between citizens of different states or between a U.S. citizen and a foreigner. For a recent case discussing the complexity of "diversity jurisdiction," see *Dresser Industries v. Underwriters at Lloyd's of London*, 106 F. 3d 494 (3rd Cir. 1997).

The situation is even more complex for state law,[60] which allows courts to refuse to enforce court selection clauses either in general[61] or with respect to particular types of contracts.[62] Even when acknowledging the validity of court selection clauses in theory, state courts may in practice give such clauses a restrictive reading that vitiates their effect.

Some court decisions have construed court selection agreements narrowly, as excluding actions based on extra-contractual wrongs such as deceit and unfair business practices.[63] Courts may also restrict the scope of a choice-of-court clause by construing it as a non-exclusive consent to jurisdiction, therefore allowing actions in competing fora.[64] Whether a clause is exclusive (mandatory) or non-exclusive (permissive) will depend on the intent of the parties as determined by the contract language and context of the agreement.[65] The exclusivity of a forum selection clause may be either bilateral or unilateral. A bilateral clause imposes a single court on both sides of the transaction, while a unilateral clause limits only one party's jurisdictional choice. Banks have often required borrowers to bring litigation at the bank's domicile, while preserving the right to pursue debtors and their assets wherever they may be found.[66]

The need for predictability in international business argues for the presumptive exclusivity of a court selection clause,[67] although not all courts follow this commonsense approach. Some decisions have stated that forum selection clauses will be enforced as exclusive only if containing specific language to that effect,[68] while others have taken the opposite view.[69] Wisdom, therefore, calls for parties seeking exclusivity to provide that "all disputes shall be decided exclusively by" or "any claim shall be subject to the exclusive jurisdiction of" courts at the desired location.

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[60] State law may apply not only in state courts, but also in federal courts where jurisdiction is based on diversity of citizenship between the parties. Some federal courts see enforcement of a jurisdiction clause as a matter of substantive law, requiring application of state norms in diversity cases under the principle of *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938). Other courts have assumed (often with little discussion) that the matter is procedural and that federal law applies.

[61] As of this writing, at least five states (Idaho, Iowa, Maine, Montana and Texas) continue to restrict enforceability of court selection clauses. Some Georgia cases have endorsed court selection clauses (see e.g. *Harry S. Peterson v. National Union Fire Ins.*, 209 Ga. App. 585 (Ga. Ct. App. 1993)), although the Georgia Supreme Court has not overruled its decision disapproving such clauses in *Cartridge Rental Network v. Video Entertainment*, 132 Ga. App. 748 (1974). See generally William W. Park, *International Forum Selection* 35–6 (1995).

[62] For a recent illustration of restrictive state law, see *Kubis & Perszyk Associates, Inc. v. Sun Microsystems, Inc.*, 680 A. 2d 618 (N.J. 1996), arising under the New Jersey Franchise Practices Act (codified at N.J. Stat. Ann. § 56:10–1 (West 1997)). The ill-fated jurisdiction clause would have sent parties to Santa Clara, California.

[63] In one case, the trial judge was instructed by the state supreme court to determine whether the "principal focus" of plaintiff's claims was for breach of contract or for extra-contractual wrongs. See *Jacobson v. Mailboxes Etc.*, 646 N.E. 2d 741 (Mass. 1995).

[64] See e.g. *Blanco v. Banco Industrial de Venezuela*, 997 F. 2d 974 (2nd Cir. 1993) (forum provision held to be non-exclusive due to use of permissive language).

[65] Compare *Central Coal Co. v. Phibro Energy, Inc.*, 685 F. Supp. 595 (W.D. Va. 1988), holding the relevant forum selection clauses to be exclusive, and *Furry v. First Nat'l Monetary Corp.*, 602 F. Supp. 6 (W.D. Okla. 1984), with *Heyco v. Hayman*, 636 F. Supp. 1545 (S.D.N.Y. 1986); *Leasing Service Corp. v. Patterson Enters. Ltd.*, 633 F. Supp. 282 (S.D.N.Y. 1986); and *First Nat'l City Bank v. Nanz*, 437 F. Supp. 184 (S.D.N.Y. 1975), holding the relevant clauses to be mere non-exclusive consents to jurisdiction.

[66] See later discussion of unilateral arbitration clauses.

[67] See e.g. LDIP, Art. 5 (18 December 1987) (Switz.), providing that: "Unless stipulated otherwise, the court agreed upon shall have exclusive jurisdiction."

[68] *John Boutari & Sons v. Attiki Importers*, 22 F. 3d 51, 52 (2nd Cir. 1994), quoting *Docksider Ltd. v. Sea Technology*, 875 F. 2d 762 (9th Cir. 1989), and *Utah Pizza Service v. Heigel*, 784 F. Supp. 835 (D. Utah 1992).

[69] See e.g. *Central Coal Co. v. Phibro Energy Inc.*, 685 F. Supp. 595, 598 (W.D. Va. 1988).

A court may also decline to hear a case on grounds of "inconvenient forum" (*forum non conveniens*),[70] due to the location of witnesses and documents, or the drain on public resources. While one overworked judge might enforce a jurisdiction clause to clear a crowded docket, an equally overworked judge in the contractually selected jurisdiction may decline to hear the dispute on the basis that a more convenient forum may be found elsewhere.[71] This risk is particularly significant in a transaction between two foreign entities, when the controversy lacks sufficient connection with the state.[72]

Arbitration clauses

Unlike judges, arbitrators rarely (if ever) refuse to hear a dispute because of *forum non conveniens* or the parties' lack of diversity of citizenship. If the parties can provide an adequate deposit to cover costs, professors around the world can usually be found eager to supplement meager academic stipends by serving as arbitrators.

Arbitration, of course, suffers from its own forms of uncertainty. Particularly when consolidation of related claims becomes desirable, there will be many disputes better litigated before courts than arbitrators. These drawbacks of arbitration are discussed more fully later in this chapter.

C. Securities[73]

Broker misbehavior

Securities-related disputes involving broker-dealers now provide one of the most frequent occasions for arbitration in the financial services industry.[74] The explosion of securities arbitration in the United States dates from 1989, when the U.S. Supreme Court finally permitted arbitration of securities disputes in domestic transactions.[75] In Britain, by contrast, courts never displayed the same hostility toward arbitration of securities claims,[76] probably because awards in domestic cases could traditionally be challenged on their legal merits.[77]

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[70] See generally Gary Born, *International Civil Litigation in United States Courts* 289–369 (3rd edn, 1996) (cited cases).

[71] At least one circuit court, however, has held that signature of a valid court selection clause constitutes a "waiver of the right to move for a change of venue on the ground of inconvenience to the moving party." *Northwestern Nat'l Ins. Co. v. Donovan*, 916 F. 2d 372, 378 (7th Cir. 1990).

[72] See *Universal Adjustment Corp. v. Midland Bank, Ltd.* (Eng.), 184 N.E. 152 (Mass. 1933).

[73] See generally Symposium, *Securities Arbitration: A Decade after McMahon*, 62 Brooklyn L. Rev. 1329 *et seq.* (Winter 1996)

[74] For 1994, the National Association of Securities Dealers (NASD) reported 5,570 new arbitration claims filed under its Code of Arbitration Procedure, up from 318 in 1980. See Deborah Masucci, *Securities Arbitration: A Success Story—What Does the Future Hold?*, 31 Wake Forest L. Rev. 183 (1996).

[75] See *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) (Securities Act of 1933); and *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (Securities Exchange Act of 1934). Earlier Court decisions permitted arbitration of securities disputes in international transactions. See *Scherk v. Alberto Culver Co.*, 417 U.S. 506 (1974).

[76] See generally John J. Kerr, Jr., *Arbitrability of Securities Law Claims in Common Law Countries*, 12 Arb. Int'l 171 (1996).

[77] Before 1979 the "case stated" procedure permitted *de facto* challenge for error of law. The 1979 Arbitration Act replaced the "case stated" procedure with a more limited right of appeal, which was not waivable in domestic cases until after the dispute had arisen. See Arbitration Act 1979, § 3 (Eng.). The 1996 Arbitration Act provides for appeal on points of law, but allows waiver of this act. See Arbitration Act 1996, § 69 (Eng.). Although the 1996 Act prohibited pre-dispute exclusion of such appeal in domestic cases, this provision never entered into force, due to a perceived conflict with the non-discrimination regime of the European Union.

Claims against brokerage firms usually relate to misbehavior such as "churning" (needless buying and selling to generate commissions), unauthorized or unsuitable trading, and misrepresentations. Occasionally brokers are accused of outright theft, euphemistically referred to as misappropriation.

In the United States, arbitration reduces the cost and delay in dealing with such disputes, and reduces the prospect of punitive damages awarded by pro-customer juries. American brokerage firms' customer account agreements usually provide that any disputes will be settled by arbitration. The customer often has the right to elect among several sets of rules, including those of the American Arbitration Association (AAA), the New York Stock Exchange (NYSE) and the National Association of Securities Dealers (NASD).[78]

Not all quarters have been happy with binding dispute resolution under the securities industry's various arbitration rules. In particular, the fairness of arbitration against brokerage houses has been questioned in connection with employment-related claims as well as customer complaints.[79] These critiques, which often raise questions about the voluntariness of the consent to arbitration, are discussed later.

Punitive damages

When a wrong is aggravated by defendant's malice, fraud, or wanton conduct, civil juries in the United States often award punitive damages for amounts over and above the plaintiff's actual loss.[80] Arbitration provides one way to reduce the risk of such damages.[81]

The securities industry has generally presumed that arbitrators will be more reasonable (i.e. less generous) than juries in granting punitive damages. In addition, the law of some states, including New York, prohibits arbitrators from giving a claimant anything more than compensation for actual loss.

The U.S. Supreme Court, however, recently upheld an award for $400,000 to punish broker misbehavior (in addition to $159,000 in actual loss), notwithstanding that the agreement was governed by New York law, which forbids punitive damages in arbitration.[82] In *Mastrobuono v. Shearson Lehman Hutton*[83] the Supreme Court read the relevant New York choice-of-law clause to refer only to substantive contract law, to the exclusion of state arbitration principles.

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[78] Under some rules, arbitrators are classified as either "public" (i.e. customer) or "industry" arbitrators, with the latter category including broker-dealers and their employees, as well as attorneys, accountants and other professionals with close ties to the securities industry. See NASD Code of Arbitration Procedure, § 19 (1995) (excluding from the public arbitrator category professionals who have worked twenty percent or more for the securities industry during the previous two years). A study completed by the U.S. General Accounting Office (GAO) has found no evidence of pro-industry bias in such arbitration. See U.S. General Accounting Office, *Securities Arbitration: How Investors Fare* (1992).

[79] In at least one case discovery was ordered on the adequacy of the New York Stock Exchange (NYSE) arbitration rules to resolve discrimination claims. *Rosenberg v. Merrill Lynch*,.170 F. 3d 1 (1st Cir. 1999).

[80] On the biblical origins of punitive damages, see Exodus 22:1, requiring multiple payments for theft.

[81] In January 1997, the NASD Board of Governors approved a cap that will limit punitive damages to the lesser of $750,000 or twice compensatory damages. See *Report of the Arbitration Policy Task Force to the Board of Governors National Association of Securities Dealers*, Fed. Sec. L. Rep. (CCH) para. 85,735, § V(B) (also known as the Ruder Report, so named for Task Force Chairman David Ruder).

[82] See *Garrity v. Lyle Stuart, Inc.*, 353 N.E. 2d 793 (N.Y. 1976), forbidding punitive damages. Recently, however, at least one New York decision has allowed arbitrators to award punitive damages unless the parties have unequivocally agreed otherwise. See *Mulder v. Donaldson, Lufkin & Jenrette*, 224 A.D. 2d. 125 (N.Y. App. Div. 1996), reconsidering *Garrity* in light of the *Mastrobuono* decision.

[83] 115 S. Ct. 1212 (1995). For a pre-*Mastrobuono* survey of the subject, see E. Allen Farnsworth, *Punitive Damages in Arbitration*, 7 Arb. Int'l 3 (1991).

The decision in *Mastrobuono* is hard to square with previous Supreme Court pronouncements on choice of law in arbitration. A few years earlier, the Court had upheld a stay of arbitration on the basis of a choice-of-law clause deemed to incorporate California state law into the agreement to arbitrate.[84] Court decisions since *Mastrobuono* have sometimes distinguished the case on the basis of forum public policy or the drafting of the choice-of-law clause, so as to reject the arbitrators' power to grant punitive damages.[85]

Following *Mastrobuono*, the path of prudence for financial institutions wishing to avoid punitive damages lies in explicit exclusionary language in the relevant contract. Reliance on choice-of-law clauses alone will be unpredictable at best.

Time bars

This subsection discusses questions of time bars that are addressed in the chapter "Who Decides What? : A Comment on *Lesotho Highlands*" (Part II, Section A, Chapter 1).

D. Selected Financial Transactions

Guarantees

Issuers of guarantees[86] often find themselves bound by the dispute resolution clause in the principal contract.[87] For example, a guarantee in favor of Company Y might incorporate by reference the arbitration clause in the contract between Company Y and Company Z.[88]

General principles of contract interpretation (developed principally in the areas of reinsurance, charter-parties, and construction) subject a guarantee to the forum selection mechanism in the primary obligation. Whether the guarantor will be bound by the arbitration clause in the principal agreement depends on the parties' intent, which will normally be determined by reference to factors such as the language of the guarantee, the relationship between the guarantor and the principal obligor, and the reasonableness of characterizing several documents as a single transaction.[89] In order to promote uniformity of contract interpretation, conflict-of-laws doctrine in some countries favors submission of suretyships (whereby one person agrees to answer for the debts of another) and other "accessory" agreements to the same law governing the principal obligation.[90]

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[84] See *Volt v. Stanford*, 489 U.S. 468 (1989). In contrast, the U.S. Supreme Court in *Mastrobuono* interpreted the choice-of-law clause *de novo*. See *Mastrobuono*, 115 S. Ct. 1215.

[85] Compare *Dean Witter Reynolds v. Trimble*, 631 N.Y.S. 2d 215 (N.Y. App. Div. 1995), with *Merrill Lynch v. Levine*, N.Y. L.J. 26 (July 1995) (N.Y. Sup. Ct.).

[86] In particular, arbitration often arises when banks outside the United States issue "first demand guarantees" ("*garanties à première demande*"), which are payable on the first demand of the beneficiary, without any condition (such as proof of the principal debtor's default) other than the request for payment. On first demand guarantees, see generally Roeland Bertrams, *Bank Guarantees in International Trade* 36–39 (1990); Bertrand Chambreuil, *Arbitrage international et garanties bancaires*, Revue de l'arbitrage 33 (1991).

[87] See generally Bernard Hanotiau, *La Pratique de l'arbitrage international en matière bancaire*, in *Les Modes non judiciaires de règlement des conflits* 67 (1995); and Chambreuil (n. 86).

[88] See *Compania Espanol de Petroleos v. Nereus Shipping*, 527 F. 2d 966, 969–73 (2nd Cir. 1975).

[89] See e.g., *United States Fidelity v. West Point Construction*, 837 F. 2d 1507 (11th Cir. 1988) (performance bond incorporated subcontract terms by reference). But see *Grundstad v. Ritt*, 106 F. 3d 201 (7th Cir. 1997), reversing a summary judgment compelling a Norwegian guarantor to arbitrate a dispute arising from the guarantee of non-competition and payment obligation relative to a cruise-ship gambling concession; the Court distinguished cases where a separate document contained the guarantee from cases in which the guarantee was included beneath the signature line of the principal agreement.

[90] See generally Restatement (Second) Conflict of Laws, § 194 (1988).

Documentary credits

The context: trade finance and performance guarantees

International business transactions rely increasingly on a payment mechanism known as the documentary credit (or letter of credit) by which banks promise to pay money upon presentation of documents. The "commercial" letter of credit insures a buyer's settlement of the purchase price. A "standby" letter of credit guarantees the ability of one party to a transaction to perform a more general obligation. In a commercial letter of credit the beneficiary presents invoices, proof of insurance, inspection certificates and bills of lading. In a standby letter of credit the beneficiary presents a document certifying that the relevant obligation (for example loan repayment) has not been performed.[91]

The advantage of a documentary credit lies in its independence from the underlying business relationship. A seller can get paid even if the buyer has complaints about the quality of the merchandise, provided the documents presented to the bank comply with the terms of the credit. To maximize confidence in the credit, the promise of the bank issuing the credit is often ratified by another financial institution (the "confirming bank") in which the beneficiary of the credit may have greater confidence.

Bankers and borrowers being what they are, it is not surprising that documentary credit transactions often give rise to disputes, not only between banks and their customers, but also between issuing and confirming banks. Controversies often result from differing interpretation of the letter of credit terms, sometimes aggravated by allegations of fraud or bad faith. For example, a buyer's bank in Paris might issue a letter of credit in favor of a seller in Boston, confirmed by the seller's bank in Massachusetts. Later the issuing bank might refuse payment, claiming that the requirements of the credit were not met because the bill of lading lacked the mention "Clean on Board." The confirming bank might respond that no such requirement exists under the *Uniform Customs and Practices for Documentary Credits* (UCP).[92] This disagreement on how to interpret the UCP might be surrounded by allegations that the seller never actually shipped the goods, or that the issuing bank used funds that should have gone to pay the credit in order to offset the borrower's unrelated indebtedness to the bank. The following section examines a real-life instance of how complex letter of credit disputes can be.

A cautionary tale about courts and credits

If scholars tried to construct an illustration of the hazards of going to court to settle a documentary credit dispute, it would be hard to beat *Clarendon v. State Bank of Saurashtra*.[93] In *Clarendon*, a Swiss beneficiary of a letter of credit, issued by a state bank in India, had to pursue almost four years of judicial proceedings, with three different court decisions, merely to obtain an appellate order remanding the case to a lower court for disposition on the merits of the claim.

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[91] See generally Brooke Wunnicke, Diane Wunnicke and Paul Turner, *Standby and Commercial Letters of Credit* (1996); John Dolan, *The Law of Letters of Credit* (1986); Michael K. Madden and Carole E. Klinger, *Letters of Credit: When Can Payment Be Prevented Or Enjoined?*, Letter of Credit Update 44 (July 1997).

[92] See *Uniform Customs and Practices for Documentary Credits* (ICC Pub. No. 500, 1993) (hereinafter UCP): Cases in which the arbitrator is called to decide only on the basis of the UCP provide an interesting example of application of what has come to be called "international law merchant," or *lex mercatoria*. On *lex mercatoria*, see generally essays contributed to Thomas E. Carbonneau (ed.), Lex mercatoria *and Arbitration* (1990).

[93] 77 F. 3d 631 (2nd Cir. 1996).

The defendant raised legal questions related to alleged procedural defects under the Federal Rules of Civil Procedure: the court's "subject matter jurisdiction," the Foreign Sovereign Immunities Act, and the applicant's arguable status as an indispensable party to the litigation. To the beneficiary, these quibbles must have seemed arcane at best, and totally irrelevant to interpretation of the letter of credit itself. The merits of the case hinged on whether the UCP requires (as it does) that an issuing bank give prompt notice of refusal to honor a credit by reason of discrepant documents, in this case a bill of lading dated a day earlier than called for in the credit.[94] Yet all that the appellate judge decided was that the lower court should not have dismissed the case on the basis of the alleged procedural defects.

Contemplating alternatives to court proceedings

Arbitration To reduce the cost and delay of such documentary credit litigation, parties to letters of credit sometimes agree to submit their controversy to arbitration under the rules of an institution that has developed experience in documentary credit disputes.[95] Special care must be taken in drafting an arbitration clause for a letter of credit, since the dispute may implicate more than two parties. For example, if a controversy involves an applicant or beneficiary as well as the issuing and confirming banks, the arbitration clause should provide for consolidation of all claims before a single arbitral tribunal. Otherwise, a bank may be caught in the middle between inconsistent results of multiple arbitral and/or court decisions.

Expertise Another response to potential documentary credit disputes would be resolution by "experts" convened under the auspices of the ICC. Developed through almost two years of intensive deliberation by a working party convened by the Banking Commission, the Rules for Documentary Credit Dispute Resolution Expertise (DOCDEX) took effect in October 1997.[96] The dispute resolution process will be administered by the ICC Centre for Expertise in conjunction with the ICC Banking Commission.

Under the DOCDEX rules, a request for dispute resolution may be filed unilaterally by an aggrieved party, or jointly by all parties to the dispute. From a list maintained by its Banking Commission, the ICC will appoint three independent individuals who will render a decision on the basis of documents alone.[97]

Parties to a dispute submitted for DOCDEX resolution may consider the decision to have moral force only. Absent a contrary choice, the decision will be considered non-binding.[98] Consequently, courts are unlikely to apply arbitration statutes or treaties to the DOCDEX process.

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[94] Under the UCP the issuing bank must either hold the documents at the disposition of the presenter or return them. See UCP (n. 92) Art. 14.

[95] Such institutions include the International Chamber of Commerce, the London Court of International Arbitration, the American Arbitration Association, and the recently created Institute of International Banking Law and Practice.

[96] ICC Publication No. 577.

[97] The Rules cover only issues arising under the Uniform Customs and Practices for Documentary Credits or the Uniform Rules for Bank-to-Bank Reimbursement under Documentary Credits (URR). Thus an allegation of fraud would fall outside the scope of the expert's mission. See ICC Publication No. 577.

[98] The Rules state that the experts' decision "is not intended to conform with any legal requirements of an arbitration award" (Art. 1.3) and that "unless otherwise agreed a DOCDEX decision shall not be binding upon the parties" (Art. 1.4). See ICC Publication No. 577.

Distinguishing experts from arbitrators[99]

The DOCDEX insistence that its decisions are not intended as arbitration awards raises the question of how exactly they *should* be characterized. Notwithstanding Shakespeare's suggestion that what we call something does not matter,[100] it does make a significant difference whether a contractually designated decision-maker is characterized as an "arbitrator" rather than an "expert."[101]

An arbitrator's award generally will benefit from the network of enforcement provisions created by multinational treaties and national arbitration statutes. On the other hand, an expert's opinion can be enforced abroad only in a new action under the relevant foreign law, subject to whatever contract defenses may exist.[102] Arbitrators will generally benefit from immunity from suit for errors or omissions, while experts will not.[103] Under some legal systems an arbitral award might be subject to appeal under statutory provisions for judicial review on the merits of an award,[104] while decisions of experts would fall outside the scope of such appellate schemes.[105]

It is easier to describe the consequences of characterizing a decision-maker as an arbitrator than to describe how the characterization should be made. The existence of a dispute and the adversarial nature of the proceedings are often cited as indicating the exercise of arbitral rather than expert functions.[106] Even if a dispute has arisen, however, a decision-maker may be characterized as an expert rather than an arbitrator.

Criteria relevant to the characterization process will vary from country to country. In general, however, courts usually seek analogies between arbitration and judicial proceedings, on the assumption that arbitrators are substitutes for judges. With respect to the substance of the dispute, experts tend to deal with narrow questions of fact (such as post-closing purchase price adjustments or consideration to be paid for a privately held investment), while more complex legal questions would be given to arbitrators. In matters of procedure, arbitrators are more likely than experts to adopt a decision-making mechanism with the basic attributes

[99] See generally John Kendall, *Expert Determination* 195–217; (2nd edn, 1996) Michael Mustill and Stewart Boyd, *Commercial Arbitration* 38–50 (2nd edn, 1989).

[100] "What's in a name? That which we call a rose by any other name would smell as sweet." *Romeo and Juliet*, Act II, scene 1, l. 85.

[101] Analogous decision-makers are also known as "adjudicators," "evaluators" or "appraisers."

[102] See generally Jean-François Bourque, *L'Expérience du Centre International d'Expertise de la CCI et le développement de l'expertise internationale*, Revue de l'arbitrage 231 (1995).

[103] See Arbitration Act 1996, § 29 (Eng.). See generally Julian D.M. Lew, "Immunity of Arbitrators under English Law" in Julian D.M. Lew (ed.), *The Immunity of Arbitrators* 21 (1990).

[104] See e.g. Arbitration Act 1996, § 69 (Eng.).

[105] See e.g. *Jones v. Sherwood Computer Services* [1992] 1 WLR 277 (Eng.) (review of expert's decision only for fraud or failure to perform correct function). Compare *Mercury Communications v. General Telecommunications*, [1996] 1 WLR 48 (Eng.) (House of Lords accepted review of expert's error).

[106] It is sometimes said that the role of experts is to avoid disputes, while the function of arbitrators and judges is to decide them. See *Sport Maska, Inc. v. Zittner* [1988] 1 S.C.R. 564, 588 (Can.), finding that the evaluators of inventory of a bankrupt company cannot benefit from immunity as arbitrators). See also Yves Derains *et al.*, *Cour Internationale D'Arbitrage de la Chambre de Commerce Internationale*, 120 J. du Droit Int'l 1001, 1024 (1993) (comment by Dominque Hascher discussing the award rendered in ICC Case No. 6535, involving a construction contract).

of a judicial proceeding. In the United States,[107] Britain[108] and on the Continent,[109] these procedural identification tags include hearings, the application of law, an ultimate determination of legal liability and evidentiary submissions from the parties.

Although the parties' label on their dispute resolution process may create a presumptive characterization, it will not be conclusive. For example, courts have denied New York Arbitration Convention coverage to the determination of the price of shares at the break-up of a joint venture, even though the process was labeled arbitration.[110]

Perhaps the best approach to distinguishing between an arbitrator and an expert would be to focus on the substance of the claims rather than the nature of the dispute resolution process. Reasoning teleologically, one might ask whether the goals of an arbitration statute or treaty will be served by treating a decision-maker as an arbitrator. Generally, arbitration law comes into play when parties to a controverted event have agreed (or allegedly agreed) to abandon recourse to courts in favor of private dispute resolution. In such event, arbitration law aims to promote finality on the merits while safeguarding minimum standards of procedural fairness. Therefore, arbitration would be the proper characterization of a decision-making process when the questions posed to the decision-maker approximate a request for judicial relief. For example, a building contractor and his customer, fighting over the non-payment of a bill, might ask the decision-maker: "Was the roof completed?" Or they might ask: "Does Customer owe $10,000 to Contractor?" An expert would be more likely to answer the first question, while the second would normally be for an arbitrator.

Debt rescheduling and public sector lending

A British economist reportedly remarked, "If you owe a man £100, you have a problem. If you owe him £1 million, he has a problem." Restructuring a country's external debt often involves amounts so sizeable that the bank, not the borrower, has a problem. Debtor nations may have enough economic muscle to reject jurisdiction clauses designating the lender country's own courts. For example, Brazil's rescheduling agreements accepted New York governing law, but provided arbitration as a dispute resolution mechanism.[111]

Multilateral and bilateral public sector lending, both to states and state enterprises, also have relied on arbitration clauses in loan and guarantee documentation.[112] The *Standard Terms and Conditions of the European Bank for Reconstruction and Development* adopt the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules,

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[107] See e.g. *Omaha v. Omaha Water Co.*, 218 U.S. 180 (1910); *Sanitary Farm Dairies v. Gammel*, 195 F. 2d 106 (8th Cir. 1952); *Shepard & Morse Lumber v. Collins*, 256 P. 2d 500 (Or. 1953). See generally Samuel Williston, 16A *Treatise on the Law of Contracts* § 1919 (Walter H. Jaeger (ed.), 3rd edn, 1976), discussing commercial arbitration agreements.

[108] See generally John Kendall, *Expert Determination* 198–99 (2nd edn, 1996) (cited references).

[109] See Charles Jarrosson, *La Notion d'arbitrage*, §§ 202–297, at 112–57 (1987). See also decision of the Swiss *Tribunal fédéral* in *X et Y contre Z*, 26 November 1991, ATF 117 Ia 365. See discussion in Paolo Michele Patocchi and Elliott Geisinger, *Code de Droit International Privé Suisse Annoté* 433 (1995) (concerning LDIP, Art. 176 (Switz.)).

[110] See e.g. *Frydman v. Cosmair*, 1995 WL 404841 (S.D.N.Y. 6 July 1995).

[111] See Deposit Facility Agreement between Banco Central do Brasil and Republica Federativa do Brasil (as guarantor) and Citibank, N.A. (as agent), 22 September 1988, § 12.08(a)–(b).

[112] In contrast, private sector lending by the European Bank for Reconstruction and Development retains the option to elect, at the time of a dispute, either to arbitrate or to sue the borrower in its country of residence. If elected by the Bank, arbitration will proceed according to the UNCITRAL Arbitration Rules, with a situs in London and the London Court of International Arbitration as the appointing authority. See generally John W. Head, *Evolution of the Governing Law for Loan Agreements of the World Bank and Other Multilateral Development Banks*, 90 Am. J. Int'l L. 214 (1996).

and designate the International Court of Justice as the appointing authority.[113] The World Bank's *General Conditions Applicable to Loan and Guarantee Agreements* provide for arbitration under an *ad hoc* procedure.[114] And Franco-Iranian loans related to nuclear energy cooperation included arbitration clauses that were tested when the cooperation went sour after the Iranian revolution, resulting in arbitration and ancillary litigation in both Geneva and Paris.[115]

E. Drafting the Arbitration Clause[116]

General principles

The cardinal rule of drafting an international arbitration agreement is to avoid ambiguity and equivocation. Uncertainty about whether, where, and how the parties wished to arbitrate will delight only the party wishing to drag its feet, and will often render the clause unenforceable.[117] Misguided lawyers invite unnecessary litigation by providing that some disputes arising out of the contract will be settled by arbitration, while others are for courts or experts.[118] In some cases defective clauses can be repaired by courts presuming the parties' intent as to elements that are missing[119] or self-contradictory.[120] The indeterminacy of the dispute-resolution mechanisms, however, adds an unpleasant layer of contention to business relationships.[121]

Some lawyers advocate pre-arbitration negotiation and mediation.[122] Unless drafted with great care, the benefits attending such stipulations sometimes will be outweighed by added

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[113] See European Bank for Reconstruction and Development, Standard Terms and Conditions, § 8.04 (September 1994). Other elements of the arbitral procedure provided in the Standard Terms include a three-member arbitral tribunal, the Hague as the seat of arbitration and proceedings in English.

[114] See International Bank for Reconstruction and Development, General Conditions Applicable to Loan and Guarantee Agreements, § 10.04 (1 January 1985).

[115] The French Atomic Energy Commission agreed to provide Iran with services, expertise, and access to uranium, in return for Iranian loans that totaled $1 billion. The loan agreement signed by Iran was governed by Iranian law, but provided that any disputes arising in connection with the agreement would be settled in Geneva under the Arbitration Rules of the International Chamber of Commerce. See ICC Arbitration No. 3683 and 5124; Swiss *Tribunal fédéral, C.E.A. v. Republique Islamique d'Iran*, ATF 116 II (17 May 1990), reported in 26 Semaine Judiciaire 566 (1990); *Cass. 1ère civ.* (Fr.) (Judgment of 20 March 1989), Rev. Arb. 653–67 (1989) (comment P. Fouchard); *Cass. 1ère civ.* (Fr.) (Judgment of 28 June 1989), 1989 Rev. Arb. 653–57 (1989) (comment P. Fouchard). A separate French franc loan was made to a related entity called Eurodif, with an award rendered on 20 December 1990. See *Eurodif est condamné à payer 940 millions de fancs à l'Iran*, Le Monde, 1 January 1991, 16.

[116] For implementation of these principles, see Commercial Loan Model Arbitration Clause, Appendix I(1), and for arbitration clauses used by international financial institutions, see Appendix I(2)–(4).

[117] See *Bauhinia Corp. v. China Nat'l Mach. & Equip. Import & Export*, 819 F. 2d 247 (9th Cir. 1987). See also *National Iranian Oil Co. v. Ashland Oil*, 817 F. 2d 326 (5th Cir. 1987), the court deemed itself without power to enforce an arbitration clause providing for arbitration in Iran.

[118] One sometimes sees, for example, provision for post-closing price adjustments to be decided by experts, while the contract's general dispute resolution clause calls for arbitration. Problems can arise when both experts and arbitrators hear allegations about failure on the warranties.

[119] See *Jain v. de Méré*, 51 F. 3d 686 (7th Cir. 1995), holding that a court could compel arbitration notwithstanding the fact that a contract failed to specify either the location of arbitration or the method for appointing arbitrators.

[120] See *Paul Smith Ltd. v. H & S Int'l Holding Inc.* [1991] 2 Lloyd's Rep. 127 (1991) (Eng.).

[121] Compare *Mediterranean Enterprises, Inc. v. Ssangyong Corp.*, 708 F. 2d 1458 (9th Cir. 1983), with *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile S.A.*, 863 F. 2d 315 (4th Cir. 1988), and *S.A. Mineracao da Trindade-Samitri v. Utah Int'l, Inc.*, 745 F. 2d 190 (2nd Cir. 1984).

[122] See e.g. *Model Mediation and Arbitration Clause for Commercial Financial Services Dispute Resolution*, reprinted in Donald Rome, *A New Approach to ADR for the Financial Services Industry*, ADR Currents 14–16 (Spring 1997).

expense and delay when a recalcitrant party resists arbitration or award enforcement by arguing that the terms of the negotiation or mediation provisions were not met.[123]

In addition to an unambiguous submission to arbitration of *all* disputes connected with the contract, other aspects of an arbitration clause include: (i) a workable mechanism for appointing arbitrators; (ii) designation of the place of arbitration; (iii) the standard for fixing the arbitrators' fees; (iv) the language of the arbitration; and (v) the number of arbitrators. Additional items that are usually helpful include a choice-of-law clause (both substantive and procedural[124]), provisions for pre-award attachment and interim judicial injunctive relief, and automatic consolidation of related arbitral proceedings. Finally, it is occasionally useful to provide qualifications for arbitrators, clarification of the arbitrator's power to grant punitive damages and to allocate attorney's fees, a "last best offer" procedure (so-called baseball arbitration) and a requirement of reasoned awards.

Many of these items will be covered by reference to the procedural rules of an arbitral institution. Among the more widely known institutional rules are those of the (AAA), the ICC, and the London Court of International Arbitration (LCIA). Other useful arbitration rules include those of the Geneva Chamber of Commerce and Industry (GCCI), ICSID and UNCITRAL.

F. Uncertainties in Financial Arbitration

The International Monetary Fund agreement

The Articles of Agreement of the International Monetary Fund (IMF) may in some cases circumscribe an arbitrator's power to hear a dispute. The IMF Articles prohibit member states from imposing exchange controls on current transactions, absent IMF approval.[125] However, controls which do comply with the IMF Agreement must be respected.[126]

Certain countries have given the IMF restrictions a broad interpretation, applying them to any contract that affects international balance of payments, including loan agreements between residents and non-residents.[127] By contrast, a narrower interpretation of the

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[123] For example, a defendant may allege that the claimant did not negotiate in good faith, or that the request for arbitration was filed too long after negotiation or mediation failed. See e.g. Swiss *Tribunal fédéral* decision in *Vekoma v. Maran Coal Co.*, 17 August 1995, reprinted in 14(4) ASA Bull. 673 (1996) (Swiss Arbitration Association) (commentary by Philippe Schweizer).

[124] Issues related to the arbitration and the arbitration agreement should be decided under the law of the arbitral situs. When the law selected to interpret the principal contract is applied to the arbitration clause as well, a court asked to recognize an arbitration clause in one jurisdiction (e.g. in New York) may sometimes stay arbitration until the validity of the clause is determined by a tribunal in the country whose law was selected (e.g. Venezuela). See *Pepsico v. Officina Central de Asesoria y Ayuda Tecnica*, 945 F. Supp 69 (S.D.N.Y. 1996). The court ultimately granted Pepsico's motion to compel arbitration after a decision on the validity of the arbitration clause by a court in Caracas. See *Pepsico v. Ayuda Tecnia*, No. 96-CIV-7817 (S.D.N.Y. 25 February 1997), reprinted in 12(3) Mealey's Int'l Arb. Rep. 16 (March 1997). The arbitral tribunal awarded Pepsico $94 million for breach of contract. See 8 World Arb. & Med. Rep. (BNA) 210 (1997).

[125] See Articles of Agreement of the International Monetary Fund, 22 July 1944, Art. VIII, § (2)(a) (hereinafter IMF Agreement). Current transactions include interest on loans and payments of moderate amounts for loan amortization.

[126] See IMF Agreement (n. 125) Art. VIII, § (2)(b), providing that "exchange contracts" contrary to valid exchange controls shall be unenforceable. Debate has focused on whether to interpret "exchange contract" broadly to cover all agreements affecting balance of payments, including cross-border loans.

[127] See e.g. *De Boer, Widow Moojen v. Von Reichert*, J. du Droit Int'l 718 (1962) (Paris, 20 June 1961) (Fr.).

IMF Articles limits its application to contracts that involve the swap of one currency for another.[128]

The broad application of the IMF Articles has two consequences for cross-border financial arbitration. First, exchange controls (if properly imposed) arguably apply regardless of the applicable law chosen by the parties. Like other mandatory norms of international public policy (often referred to as *lois de police*), legitimate exchange controls would seem to be non-waivable.[129] Second, national courts might refuse to enforce arbitration agreements implicating exchange controls, on the ground that the subject matter is "not capable of settlement by arbitration" under the New York Convention.[130] Some authors, however, have taken the position that the IMF Articles ought *not* to constitute such a bar to the arbitrability of international loan disputes.[131]

Of course, if an arbitrator interprets an agreement in a way that violates the IMF Agreement, courts might later refuse recognition to the award. But this does not mean that the arbitrator should be prohibited *ab initio* from interpreting the IMF Articles. The need for a level playing field on which to resolve disputes over transnational loans argues for allowing arbitrators to hear the merits of cross-border credit controversies, and leaving courts to deal with public policy implications after the award is rendered.

Consumers, employees and informed consent[132]

Like any freedom, the right to choose a dispute resolution mechanism justifies itself by the values it furthers. Arbitration in some cases promotes fairer and more efficient adjudication, while in others it can deprive an unsophisticated party of basic procedural safeguards.

Arbitration against banks and securities firms has been subject to special scrutiny.[133] Some courts have refused to enforce arbitration clauses in consumer loan contracts.[134] Others have upheld consumer finance arbitration agreements.[135] The heart of the matter seems to be whether such arbitration agreements are genuinely consensual.

Courts have looked to see that the contractually designated arbitral process is fundamentally fair. A self-administered dispute resolution system allowing for inordinate delay,[136] and an arbitral regime requiring a disproportionately high filing fee,[137] have been held unenforceable.

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[128] See e.g. *Libra Bank, Ltd. v. Banco Nacional de Costa Rica*, 570 F. Supp. 870 (S.D.N.Y. 1983); *United City Merchants v. Royal Bank of Canada* [1983] App. Cas. 168 (U.K.).

[129] See e.g. Bernard Audit, *Droit Int'l Privé* §§ 92–113 (1991).

[130] See New York Convention (n. 18) Arts. II(1), V(2)(a).

[131] See Otto Sandrock, *Internationale Kredite une die Internationale Schiedsgerichtsbarkeit*, 48(10), (11) Zeitschrift für Wirtschafts und Bankrecht (12 March 1994); William W. Park, *L'Arbitrage et le recouvrement des prêts consentis à des débiteurs étrangers*, 37 Revue de droit de l'Université McGill 375 (1992).

[132] See also later discussion of "separability" and *compétence-compétence*.

[133] In at least one case the judge ordered discovery into the adequacy of the NYSE arbitration rules to resolve claimants' discrimination claims and the circumstances surrounding claimant's agreement to arbitration (phrased as "waiver of her rights to a federal forum"). See previous discussion of *Rosenberg v. Merrill Lynch Pierce*, 965 F. Supp. 190 (D. Mass. 1997).

[134] See *Bell v. Congress Mortgage Co.*, 24 Cal. App. 4th 1675 (Cal. App. 1st Dist., 17 May 1994), ordered depublished 30 Cal. Rptr. 2d 205 (1994), refusing to compel arbitration absent a "clear and informed" waiver of the right to a jury trial when a homeowner claims against mortgage lenders for fraudulent business practices.

[135] See e.g. *Badie v. Bank of America*, 1994 WL 660730 (Cal. Super. 1994); discussed in 63 Banking Rep. (BNA) 293 (29 August 1994) and 5 World Arb. & Med. Rep. (BNA) 231 (October 1994).

[136] See *Engalla v. Permanente Med. Group*, 938 P. 2d 903 (Cal. 1997).

[137] See *Teleserve Sys. v. MCI*, 659 N.Y. 2d 658 (N.Y. App. Div. 1997).

Multiparty and multicontract problems[138]

The rules of some arbitral institutions allow voluntary consolidation of related arbitrations.[139] For better or for worse, however, the FAA does not authorize forced consolidation of different arbitration proceedings, even if they present similar questions of law and fact.[140] Therefore, a company may be whipsawed by inconsistent results in connected financial disputes, unless arbitration takes place in a state that does provide for forced joinder of related claims.[141] And when a dispute implicates a party that has not signed any arbitration clause at all, consolidation of claims may be not just difficult, but completely impossible.

An arbitration may occasionally include several parties on one side of the proceedings. For example, in a contractual relationship involving three companies, two entities might be co-defendants. In such a procedural configuration, particular care must be taken in establishing the arbitral tribunal. Conflict or stalemate may occur if two defendants must agree to share one party-nominated arbitrator. Attempts to impose one arbitrator on two parties have sometimes been resisted as a denial of "equality of treatment."[142]

Federal-state conflicts

In the United States, federal arbitration law will usually pre-empt application of more restrictive state rules.[143] However, it is often unclear exactly which state laws will be considered restrictive, particularly when they have no analogue in the FAA. For example, some courts refuse pre-award attachment in non-maritime arbitration, reasoning that by agreeing to arbitration parties have implicitly excluded intervention by national courts until an award is rendered.[144] Other courts view pre-award attachment as a way to maximize the efficiency of the arbitral process.[145]

With respect to the initial formation of arbitration agreements, state law cannot discriminate against arbitration by erecting obstacles to the validity of arbitration clauses that do not apply to other contractual commitments. The U.S. Supreme Court recently struck down a state "notice requirement" calling for arbitration clauses to be in capital letters on the first

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[138] See generally Philippe Leboulanger, *Multi-Contract Arbitration*, 13 J. Int'l Arb. 43 (1996); Michael Mustill, *Multipartite Arbitrations: An Agenda for Lawmakers*, 7 J. Int'l Arb. 393 (1991).

[139] See Arbitration Rules, London Court of International Arbitration, Art. 13.1 (1985) (Eng.).

[140] See *United Kingdom v. Boeing Co.*, 998 F. 2d 68 (2nd Cir. 1993).

[141] See e.g. Mass. Gen. Laws, Ch. 251, § 2A (1988). Compare Cal. Civ. Proc. Code § 1281.3 (West 1971), with Arbitration Ordinance, Ch. 351, § 6B (H.K.) (applicable to domestic arbitration), and Code of Civil Arbitration Law Procedure § 1046 (Neth.).

[142] See e.g. *Siemens and BKMI v. Dutco*, French *Cour de cassation, Ch. Civile No. 1* (7 January 1992), Rev. Arb. 470 (1992).

[143] See *Doctor's Assocs. v. Casarotto*, 116 S. Ct. 1652 (1996); *Allied-Bruce Terminix Co. v. Dobson*, 513 U.S. 265 (1995). Pre-emption will not only occur in federal courts, but also in state court actions involving interstate commerce. See *Southland v. Keating*, 465 U.S. 1 (1984). For a study of federal-state conflicts engendered by state adoption of the UNCITRAL Model Law, see Alan S. Rau, *The UNCITRAL Model Arbitration Law in State and Federal Courts: The Case of Waiver*, 6 Am. Rev. Int'l Arb. 223 (1995).

[144] See *McCreary Tire & Rubber Co. v. CEAT*, 501 F. 2d 1032, 1038 (3rd Cir. 1974), denying pre-award attachment.

[145] See *Carolina Power & Light Co. v. Uranex*, 451 F. Supp. 1044 (N.D. Cal. 1977) (pre-award attachment allowed).

page of the contract.[146] The Court found such threshold limitations on arbitration agreements undermined the goals and policies of the FAA.[147]

Aside from this limitation, state law generally governs whether, and what, two contracting parties agreed to arbitrate.[148] Some authorities, however, argue that international arbitration agreements are subject to the law agreed upon by the parties, or to a supra-national standard that incorporates only "internationally recognized defenses" to contract enforcement, such as duress, fraud and waiver.[149]

More rather than less conflict between federal and state law is likely, as some states attempt to implement consumer protection measures, and others enact their own international arbitration statutes in the form of the UNCITRAL Model Law. The FAA, unlike the arbitration law of several European countries, does not distinguish between domestic and international arbitration, nor does it shelter consumers from abusive arbitration agreements.

G. Conclusion

The identity of the person who will decide a financial controversy often matters as much as, or more than, the legal standards that purport to govern the merits of the dispute. Rules by themselves have little power to prevent an unjust decision by an antagonistic jury or a xenophobic judge. Neither will the fairest and most favorable decision mean much in practice unless it can be enforced against the loser's assets.

Against these twin concerns—biased adjudicators and unenforceable judgments—lawyers in the financial service industry increasingly are called to evaluate the relative reliability of arbitration agreements as contrasted to court selection clauses. The effectiveness of each of these dispute resolution mechanisms will depend largely on its context, both geographic and transactional.

In some countries, court judgments will not benefit from enforcement treaties, nor will jurisdiction clauses receive dispositive effect from any statute. Moreover, court selection agreements may prove ineffective when judges are unable or unwilling to allow the parties to thrust a case upon the court, due either to limits on subject matter jurisdiction or to *forum non conveniens* notions.

On the other hand, the New York Convention, now in force in over one hundred countries, mandates enforcement of arbitration agreements and awards throughout the world. And *forum non conveniens* and subject matter jurisdiction limits are unlikely to prevent arbitrators from hearing a case, assuming their fees can be paid.

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[146] See *Doctor's Assocs. v. Casarotto*, 116 S. Ct. 1652 (1996). For an application of *Doctor's Assocs.*, see *Huntington International v. Armstrong World Industries*, No. 97-CV-699, available in 1997 U.S. Dist. LEXIS 17514 (E.D.N.Y. 22 October 1997).

[147] For a case applying this principle to a credit agreement, see *Christine Williams v. Direct Cable and Beneficial National Bank*, No. CV-97-009 (Ala. Cir. Ct. for Henry County, 13 August 1997), discussed previously.

[148] See *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). See also dicta in *Perry v. Thomas*, 482 U.S. 483, 492, note 9 (1987). Analysis of the role of state law generally turns on the "savings clause" in Federal Arbitration Act § 2. See 9 U.S.C. § 2 (1994).

[149] See generally *Rhone Poulenc v. Achille Lauro*, 712 F. 2d 50, 53 (3rd Cir. 1983), recognizing an arbitration clause notwithstanding possible invalidity under the peculiarities of Italian law; Gary Born, *International Commercial Arbitration in the United States* 269–77 (1994).

Arbitration, of course, suffers from its own sources of uncertainty. For example, in many jurisdictions there exists no easy way to consolidate related claims. And in some countries judicial decisions have unfortunately obscured the process for monitoring arbitrator excess of jurisdiction.

Before drafting a forum selection clause, therefore, counsel will need to focus on several questions. Can a judgment be rendered in a location where the debtor has assets? If not, will an international treaty enforce the judgment of a court with jurisdiction to hear the dispute? Is the debtor's country likely to impose exchange controls? Will the courts entertain lender liability or punitive damage claims against the banker? How costly and time-consuming will a court action prove to be? Will summary judgment procedure be available to the lender?

Depending on the answers to these questions, an arbitration clause can sometimes prove more reliable and efficient than a court selection agreement. First, when a borrower's assets are located in countries that have not concluded judgment treaties with the expected litigation forum, the New York Arbitration Convention may be a more effective enforcement mechanism than local rules about enforcement of foreign judgments. Second, when loans are subject to possible exchange controls, an arbitration clause reduces the likelihood of an Act of State defense to loan enforcement. Third, an arbitrator may be more reasonable than a jury in considering a punitive damages claim, or a lender liability action against a banker who has refused to advance additional funds or extend the term of a loan. Finally, arbitration occasionally commends itself in resolving documentary credit disputes more efficiently, and with more expertise, than would a judicial proceeding.

The interplay of these diverse elements in financial transactions makes it dangerous to rely on a "one size fits all" dispute resolution clause, based on habit rather than informed analysis. Financial lawyers will need to learn to relish a substantial amount of nuance in crafting dispute resolution clauses appropriate to the contours of each particular type of transaction. Solutions adopted now, when financial arbitration remains embryonic, will create a path of dependency that will affect reliability in financial transactions for years to come.