THE TIES THAT BIND: 
THE LIMITS OF AUTONOMY AND UNIFORMITY 
IN INTERNATIONAL COMMERCIAL ARBITRATION 

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1. INTRODUCTION

Responding to the perceived requirements of international commerce, most industrialized nations have enacted legislation that encourages recourse to international commercial arbitration. Legislative support for arbitration, however, has not been unconditional. International commercial arbitration is also a creature of contract and therefore implicates the public policy of the country where it takes place.

The call for autonomy and uniformity in international commercial arbitration reflects a desire to liberate this process from the shackles of local curial norms. Modern national arbitration laws differ in the extent to which they separate international arbitration from domestic public policy; but all laws protect at a minimum those interests deemed vital to basic notions of morality and justice. These are the ties that bind.

This Comment addresses the development of international commercial arbitration in four parts. Section II analyzes the commercial needs which drive international arbitration. Section III describes the importance of autonomy and uniformity in the arbitral process. Section IV discusses the laws of the United States, England and France. Finally, Section V examines the impact which these diverse laws have on arbitral discovery procedures.

2. THE NEED FOR INTERNATIONAL COMMERCIAL ARBITRATION

Economic interdependence is one aspect of the so-called New World Order. The globalization of most national economies has resulted in a dramatic increase in transna-
tional commerce. Unfortunately, the increasing volume of international commercial activity has generated a concomitant increase in international commercial disputes. An effective framework for the resolution of these disputes has become indispensable to the continued viability and expansion of transnational commerce. The parties in international commerce demand a process capable of rendering efficient, fair and final decisions. They also seek a process based on uniform principles that can easily be incorporated into their business activities without misunderstandings or surprises.

Because there is no international authority with jurisdiction over private commercial disputes, parties must rely upon state-based adjudicative mechanisms, generally either litigation or arbitration.

The first option, litigation in national courts, is frequently an unreliable and undesirable means of resolving international commercial disputes. In short, this process can be costly,


4 Carbonneau, supra note 2, at 43.


7 While the world awaits the advent of an international commercial court, bilateral and multilateral agreements have already created fora with limited jurisdiction over commercial disputes. For example, the Court of Justice for the European Communities may be seized by private (non-institutional) parties under certain limited circumstances, and is competent to rule on the interpretation and application of the treaties which drive the communities. See generally Jean Boulois, Droit Institutionnel Des Communautés Européennes (1984). The Iran-United States Claims Tribunal, created under the Algiers Accords, is an arbitral institution with jurisdiction to resolve the commercial disputes that arose as a result of the political upheaval in Iran in 1979. See Monica P. McCabe, Arbitral Discovery and the Iran-United States Claims Tribunal Experience, 20 Int'l Law. 499, 511 n.101 (1986).

8 See, e.g., Leahy & Pierce, supra note 5, at 292; Lawrence Perlman & Steven C. Nelson, New Approaches to the Resolution of International Commercial Disputes, 17 Int'l Law. 215 (1983); Steven C. Nelson, Alternatives to Litigation of International Disputes, 23 Int'l Law. 187 (1989); Peter D. Ehrenhaft, Effective International Commercial Arbitration,
slow,9 biased10 and uncertain.11

In an effort to avoid these problems, international business-people and their counsel have turned toward commercial arbitration to resolve their disputes.12 Most industrial nations, recognizing that effective arbitration is essential to the success of international commerce,13 have enacted legisla-


† The cost and delay associated with wholly domestic litigation (pre-hearing procedure, multiple appeals, crowded dockets, etc.) remain problems when one or more of the parties are foreign. In fact, these problems are often magnified. The cost of litigating a claim abroad is higher simply because it may require frequent travel and retaining translators and foreign counsel.

Furthermore, jurisdictional uncertainty decreases the efficiency of litigation by encouraging lengthy and expensive battles over personal and subject matter jurisdiction. See Ehrenhaft, supra note 8, at 1192. Worse still, this same uncertainty may lead to forum-shopping and multiple proceedings. See Nelson, supra note 8, at 188-89.

10 Whether or not a legitimate concern, a party forced to litigate before the courts of the party's opponent may well perceive bias. See Leahy & Pierce, supra note 5, at 292. Even if judicial parity exists, a foreign litigant may nonetheless be disadvantaged by a lack of familiarity with the substantive and procedural rules of the forum, its customs, and its language. See Ehrenhaft, supra note 8, at 1193. While a forum selection clause may help reduce the risk of bias, such a clause cannot guarantee neutrality. For any number of reasons, a judicial officer of the selected forum may favor one party over another. See Hans Smit, The Future of International Commercial Arbitration: A Single Transnational Institution?, 25 COLUM. J. TRANSNAT'L L. 9, 10 n.3 (1986).

11 Even after a decision has been rendered on the merits and all appeals have been exhausted, the prevailing litigant may be hard pressed to enforce the court's judgement. No broad-based international norm assures that judgments rendered in one country will receive "full faith and credit" in another. See Nelson, supra note 8, at 190-91. The public policy exception, discussed at length in Section 3.2, infra, is frequently invoked to justify the refusal of one court to recognize and enforce the decisions of another. See Javier Garcia de Enterrfa, The Role of Public Policy in International Commercial Arbitration, 21 LAW & POL'Y INT'L BUS. 389, 393 (1990).

12 See Perlman & Nelson, supra note 8, at 225; Thomas E. Carboneau, Arbitral Adjudication: A Comparative Assessment of Its Remedial and Substantive Status in Transnational Commerce, 19 TEX. INT'L L. J. 33, 34 (1984) [hereinafter Carboneau, Arbitral Adjudication] ("With the growth of international trade, arbitration has emerged as the preferred remedy for disputes in private international commerce.") (footnote omitted).

13 For example, the Supreme Court of the United States has emphasized:
tion favorable to this process. This development has been characterized by a greater degree of autonomy and uniformity.

3. THE CALL FOR AUTONOMY AND UNIFORMITY

3.1. Party Autonomy: Supplementing Choice and Flexibility

Perhaps the most significant advantage of international commercial arbitration over litigation is flexibility. While litigation tends to impose a rather rigid framework upon the parties and their dispute, arbitration can be "custom-tailored to suit the parties' needs and desires." The result is an adjudicatory process superior to litigation in many instances. For example, while international commercial arbitration may be more costly and time-consuming than its domestic analog, it is quite efficient and inexpensive when compared with international litigation. Furthermore, the parties' ability to select a neutral decision-maker and situs theoretically leads to a less biased decision.

Arbitral flexibility also permits the parties to create a specialized process. They are able to select decision-makers with the requisite expertise and procedurally adapted to the circumstances surrounding the dispute. Furthermore, rather than relying on the rigid choice-of-law

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A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is ... an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction. . . .


14 See infra Section 3.
15 Ehrenhaft, supra note 8, at 1194.

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provisions of the forum, parties to an arbitration may select the law which will govern the substance of their dispute.\textsuperscript{20} This chosen law need not come from traditional sources. For example, the parties may empower the arbitral tribunal to rule \textit{ex aequo et bono},\textsuperscript{21} as an \textit{amiable compositeur}\textsuperscript{22} or with regard to the developing \textit{lex mercatoria}.	extsuperscript{23}

Finally, whereas judicial proceedings are frequently public events, the parties to an arbitration can choose to keep the proceedings confidential.\textsuperscript{24} Such an arrangement benefits parties who hope to preserve their business relationships and keep their disputes "in the family."\textsuperscript{25}

While the call for greater flexibility has led to a greater degree of party autonomy in international commercial arbitration, the parties have not been given unfettered control.

3.2. Public Policy: The Bonds of Domestic Law

3.2.1. Public Policy and the Limits of Party Autonomy

A contractual relationship involves a dynamic interplay between the interests of two distinct legal orders, the internal order created by the contract itself and the external order from which the contract derives its legal effect and legitimacy. Since the parties to a contract may wish to further interests which rival those of the state, it is not unusual for the two legal regimes to come into conflict. When this occurs, one legal order must yield.

\textsuperscript{20} A simple choice-of-law provision, however, does not guarantee that the chosen law will be applied. For instance, the conflict-of-law rules of the selected law may direct that a different body of law govern the dispute. \textit{See} Ehrenhaft, \textit{supra} note 8, at 1209.

\textsuperscript{21} Party control over the substance of arbitration derives from the fact that national courts will not generally review the merits of an arbitral award. \textit{See} VAN DEN BERG, \textit{supra} note 18, at 33.

\textsuperscript{22} Literally a friendly composer. Such a provision allows the members of the tribunal to follow their instincts and create law consistent with their own notions of fairness and justice. \textit{W. Laurence Craig, William W. Park & Jan Paulsson, International Chamber of Commerce Arbitration} § 8.05 (2d ed. 1990).

\textsuperscript{23} \textit{See}, eg., Stevenson, \textit{supra} note 17, at 382; \textit{VAN DEN BERG, supra} note 18, at 33.

\textsuperscript{24} Stevenson, \textit{supra} note 17, at 381.

\textsuperscript{25} de Vries, \textit{supra} note 16, at 43.
Certain legal rules are so basic to a legal system that the parties may not derogate from them in a contract. These "minimum standards of justice and morality"\(^{26}\) may be grouped under the common law heading "public policy" or its civil law equivalent "ordre public."\(^{27}\)

Despite the importance of the concept of public policy in contract theory, it cannot be defined with great precision. One scholar has described public policy as "one of the most elusive and divergent notions in the world of juridical science."\(^{28}\) In general, public policy is a national phenomenon having a substantive as well as a procedural dimension.\(^{29}\) The specific content of the concept varies according to the peculiar moral, legal and social traditions of a particular place at a particular time.\(^{30}\)

Scholars in the field of private international law often distinguish between domestic and international public

\(^{26}\) García de Enterría, supra note 11, at 392.

\(^{27}\) See van den Berg, supra note 18, at 376. Although the terms are frequently used interchangeably, the common law term "public policy" is generally applied more narrowly than the civil law term "ordre publique." Id. at 359. Public policy is most often discussed in the context of private international law as a defense by which states reject foreign acts or norms deemed inconsistent with fundamental legal principles. See, e.g., García de Enterría, supra note 11. While the notion of ordre public includes this aspect, it is also used to describe domestic norms from which parties may not derogate. Id. at 395. In this paper, the term public policy will be used with the understanding that it has the same meaning as the term "ordre public."

\(^{28}\) García de Enterría, supra note 11, at 401 (citing Ferrante, Enforcement of Foreign Arbitral Awards in Italy and Public Policy, in HOMMAGE À FREDERICK EISEMANN 86 (1978)).

\(^{29}\) Thus, in a given country it may include principles as diverse as minimum wage and fair notice requirements. Public policy is related to, but should not be confused with, due process. Public policy has a substantive content which, notwithstanding modern constitutional law, is not normally associated with due process. Furthermore, specific due process requirements vary according to the type of case (civil or criminal) or the particular forum (judicial, administrative, or arbitral). See Steven J. Stein & Daniel R. Wotman, The Arbitration Hearing, in INTERNATIONAL COMMERCIAL ARBITRATION IN NEW YORK 86, 93 (J. Stewart McClendon & Rosabel E. Everhard Goodman eds., 1986) (Due process requirements in arbitration are less stringent than those imposed in litigation.).

\(^{30}\) García de Enterría, supra note 11, at 401. As a country's notions of justice and morality evolve, so too does its concept of public policy. Id. at 402.

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policy. While domestic public policy includes all of the mandatory norms of a given jurisdiction, international public policy includes only the most basic notions of morality and justice, those that are regarded as essential to the preservation of social and legal order. The need for such a distinction arises from the unique problems present in international disputes.

3.2.2. Public Policy and Commercial Arbitration

Parties who wish to have their disputes settled by a private mode of adjudication can write a contractual agreement for commercial arbitration. Most states accommodate arbitration by granting parties the freedom to fashion a remedial process tailored to their needs. However, the country supporting the arbitration may wish to preserve the integrity of its legal order or protect the rights of non-parties. Consequently, party autonomy is always subject to considerations of public policy expressed by the heteronomous provisions of some arbitration law or lex arbitri.

In principle the lex arbitri governs all phases of arbitration including the validity and effect of the submission as well as the selection of the tribunal prior to the arbitration; the procedural and substantive rules during the arbitration; and the form, interpretation, review and enforcement of the award after the arbitration. Therefore, at every stage, public policy considerations impose mandatory requirements upon the

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31 Id. at 396-98.
32 See García de Enterría, supra note 11 at 396. International public policy, despite its appellation, remains a creation of individual national legal systems and should not be confused with transnational public policy created at the global level. Id. at 397.

Certain fundamental principles characterize most modern legal systems. For example, the American notions of “notice” and “opportunity to be heard” correspond closely with the French “contradictoire” and “droit de defense.” See REPertoire DE PROCEDURE CIVILE [C. PR. CIV.] arts. 14-20 (Dalloz 1987) (Fr.).

34 de Vries, supra note 16 at 50. The concept of public policy as it relates to commercial arbitration is almost exclusively discussed in relationship to the post-arbitral enforcement stage. See, e.g., García de Enterría, supra note 11, at 390.
arbitral tribunal and define the available judicial remedies for assisting or controlling the arbitral process. 35

3.3. The Need for Uniform Lex Arbitri

Because each phase of the arbitral process in international commercial arbitration may occur in a different state, the choice of applicable lex arbitri may be quite complex. For example, in a dispute between an American corporation and an English corporation, a federal district court in New York might refer the parties to arbitration, which, because of prior agreement, takes place in Paris and results in an award that is enforced in Switzerland where the losing party has substantial assets. In this case the arbitral process would be affected by the mandatory provisions of three distinct national arbitration laws, each of which might reflect a different public policy formulation. Under such a scenario, the arbitral process could become unpredictable. First, the parties would be unsure of the legal effect of their submission clause. An enforceable agreement in England might not be enforceable in the United States. In addition, procedural provisions acceptable in the United States might run against a mandatory provision of French law, thereby frustrating the intent of the parties. 36 Finally, and perhaps most significantly, an award binding under French law may be unenforceable in Switzerland. 37

3.4. The New York Convention: One Leap Toward Uniformity

The New York Convention, 38 a transnational agreement attempting to unify private international law, 39 "reconcile[s]
among the contracting states [potentially conflicting provisions] for the acceptance of arbitration clauses and [foreign arbitral] awards."\(^4^0\) The Convention gives preeminence to the notion of party autonomy\(^4^1\) and minimizes the imposition of parochial views by expressly providing the conditions under which national courts may intervene. The Convention contains a "most favorable right" provision and thus supersedes any municipal law that is more rigid.\(^4^2\)

Article II of the Convention provides that the court of a contracting state must enforce an agreement to arbitrate unless it determines (1) that the subject matter of the dispute is incapable of settlement by arbitration,\(^4^3\) or (2) that the agreement itself is null and void, inoperative or incapable of being performed.\(^4^4\) The effect of this article is to create a presumption in favor of arbitration that can only be overcome by a showing of contractual defect.\(^4^5\)

The New York Convention also proposes a limited role for national courts with regard to the enforcement of arbitral awards. Article V establishes the seven grounds upon which the court of a contracting state may review a foreign arbitral award for the purposes of recognition and enforcement. The first five of these grounds are quite specific and relate to

\(^{40}\) García De Enterría, supra note 11, at 391. According to the United States Supreme Court, "The goal of the Convention, and the principle purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries." \(\text{Id.}\) at 391 n.4 (citing Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n.15, \text{reh'g denied}, 419 U.S. 885 (1974)). See also CARBONNEAU, supra note 2, at 65.

\(^{41}\) See Van Compernolle, supra note 19, at 102.

\(^{42}\) New York Convention, supra note 38, Art. VII (1), 21 U.S.T. at 2520-21. See VAN DEN BERG, supra note 18, at 82-84 (noting that an exclusivity provision would have improved uniformity).

\(^{43}\) New York Convention, supra note 38, Art. II (1), 21 U.S.T. at 2519. See VAN DEN BERG, supra note 18, at 152-54. Non-arbitrability is also an exception to the enforcement of an arbitral award under Art. V(2)(a). See discussion infra notes 45-46 and accompanying text.

\(^{44}\) New York Convention, supra note 38, Art. II (1), 21 U.S.T. at 2519. See VAN DEN BERG, supra note 18, at 154-56; CARBONNEAU, supra note 2, at 65-66.

\(^{45}\) CARBONNEAU, supra note 2, at 66.
fundamental contractual and due process requirements.46 These defenses can only be applied at the request of the party against whom the award is invoked.47

Article V also lays down two grounds for denying recognition and enforcement that a court may raise sua sponte. Thus, a court may refuse to recognize or enforce a foreign arbitral award if it deems that under its laws: (a) the subject matter of the dispute is not capable of settlement by arbitration;48 or (b) recognition or enforcement of the award would be contrary to public policy.49

The inclusion of a separate public policy exception is disconcerting because the other six exceptions are based on public policy notions.50 If the public policy provision merely reiterates these defenses then it is superfluous. Some scholars have therefore claimed that the purpose of this defense is to

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46 Id. at 66. Art. V(1)(a-e) provides that recognition and enforcement of an award may be refused at the request of the losing party only if that party can prove any of the following: (a) that one or both parties lacked the contractual capacity to enter into a binding agreement to arbitrate; (b) that the losing party was denied proper notice or the opportunity to be heard; (c) that the arbitrator[s] exceeded the authority granted to them by the agreement; (d) that the composition of the arbitral tribunal or the arbitral procedure was inconsistent with the agreement (or in its silence the law of the forum); and finally, (e) that the award is not yet binding or has been set aside. See van den Berg, supra note 18, at 275-358.


48 New York Convention, supra note 38, Art. V (2)(a), 21 U.S.T. at 2520. See van den Berg, supra note 18, at 368-75. This provision is essentially identical to one found in Article II(1). See infra note 40. Both provisions have been interpreted as referring to arbitrability of the dispute under the law of the state where enforcement is sought, not where the award was made. See van den Berg, supra note 18, at 369.

49 New York Convention, supra note 38, Art. V (2)(b), 21 U.S.T. at 2520. The inclusion of both the non-arbitrability and public policy exceptions is somewhat redundant since non-arbitrability has traditionally been considered an element of public policy. See van den Berg, supra note 18, at 359. As one scholar stated, the non-arbitrability of a particular subject matter "reflects a special national interest in judicial . . . resolution of disputes." Id. at 369. See also Carbonneau, supra note 2, at 66-67; García de Enterría, supra note 11, at 411. The reason that both provisions figure in the text is historical. The non-arbitrability exception appeared as a distinct ground in the Geneva Convention of 1927, the ICC Draft Convention of 1953 and the ECOSOC Draft Convention of 1955. See van den Berg, supra note 18, at 368.

50 See García de Enterría, supra note 11, at 416.
serve as a "residual escape clause" in cases where the specific defenses do not apply. Such a catch-all provision could have resulted in unrestrained judicial interference, undermining the basic purpose of the Convention to reduce the impact of domestic legislation.

However, the public policy provision has not been construed so broadly. In fact, the decisional law of signatory states demonstrates that national courts almost uniformly interpret the public policy exception and the other defenses listed under Articles II and V narrowly and by reference to the underlying intent of the Convention.

Many courts have interpreted Articles II(1), V(2)(a) and V(2)(b) as authorizing judicial interference only when considerations of international public policy are at stake. International public policy has a more limited content and scope of application than domestic public policy.

As a result of this analysis, the scope of judicial supervision is narrowed and foreign arbitral awards are more likely to be recognized and enforced than foreign court judgments. Ultimately, the New York Convention represents a triumph of

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51 Id. at 416.
52 Id. at 416-17, 417 n.130.
53 One author describes the public policy exception as the "enemy" of international commercial arbitration. García de Enterría, supra note 11, at 405 (citing Michael Quilling, The Recognition and Enforcement of Foreign Country Judgments and Arbitral Awards: A North-South Perspective, 11 GA. J. INT'L & COMP. L. 635, 646 (1981)).
54 See CARBONNEAU, supra note 2, at 67. For example, the public policy defense is rarely invoked except in cases of alleged lack of due process. See VAN DEN BERG, supra note 18, at 376; García de Enterría, supra note 11, at 413.
55 See VAN DEN BERG, supra note 18, at 391. For example, U.S. courts have concluded that "the Convention's public policy defense should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state's most basic notions of morality and justice [as opposed to mere public policy concerns]." Parsons v. Whittemore, 508 F.2d 969, 974 (2d Cir. 1974). See also CRAIG, PARK & PAULSSON, supra note 22, at § 5.07; Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).
56 See supra Section 3.2.1. See also VAN DEN BERG, supra note 18 at 360; García de Enterría, supra note 11, at 396.
57 de Vries, supra note 16, at 56-57. As of 1987, 73 countries were signatories to the Convention. Signatories to the 1958 New York Convention, J. INT'L ARB., Mar. 1988, at 117 (vol. 5).
uniformity and party autonomy over diversity and parochialism.

4. THE LIMITS OF AUTONOMY AND UNIFORMITY

4.1. Diversity and the Lex Arbitri

4.1.1. The Limited Scope of the New York Convention

While the New York Convention reflects the great strides that have been made toward unifying and liberalizing the rules of international commercial arbitration, its field of application, and thus its ultimate effect, are limited. The Convention does not regulate all aspects of international commercial arbitration. The Convention reaches the validity of arbitration agreements and the enforcement of foreign arbitral awards but does not govern the actual conduct of the arbitrations that fall under its purview. It leaves such important issues as the constitution of the arbitral tribunal, the selection of the procedural and substantive rules, and the confirmation or annulment of awards to the lex arbitri of a particular country. No widely adopted convention has yet established a unified transnational rule of law with regard to the entire arbitral process. However, there has been a definite trend toward greater autonomy.

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68 See VAN DEN BERG, supra note 18, at 9-10.
59 Id. at 99.
69 However, in the field of investment disputes, the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (Washington Convention), March 18, 1965, 575 U.N.T.S. 160, provides a comprehensive scheme for international commercial arbitration. Arbitrations falling under the Washington Convention are administered by the International Center for Settlement of Investment Disputes ("ICSID"), according to the provisions of the Convention and the arbitration rules issued thereunder and to the exclusion of any national arbitration law. See VAN DEN BERG, supra note 18, at 98. For a discussion of other bilateral and multilateral arbitration agreements, see VAN DEN BERG, supra note 18, at 90-120.
61 CRAIG, PARK & PAULSSON, supra note 22, at § 1.06.
4.1.2. The Liberalization of Arbitration Law

Historically, the laws of many countries mandated close judicial supervision of the arbitral process. Today however, most lex arbitri authorize only minimal court intervention. In fact, some legal scholars have suggested that parties should be completely free to detach the arbitral proceedings from the law of the situs. A less radical formula that is consistent with

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62 Courts have traditionally viewed arbitration with hostility, as a potentially dangerous derogation of the their monopoly of adjudicative competence. See generally Carbonneau, Arbitral Adjudication, supra note 12, at 39-57. Where the parties’ initial choice of arbitration could not be defeated, courts mandated broad judicial oversight to ensure that the arbitrators achieved legally correct results. Id. at 41.

This model gradually became obsolete for a number of reasons. First, national courts overcame their traditional suspicion of alternative means of dispute resolution. Indeed, as court dockets have swollen, the courts of many countries have embraced alternative dispute resolution in general and arbitration in particular as a practical necessity. See generally Carbonneau, supra note 2. Additionally, modern commercial realities have made the use of arbitration a necessity. See RENEE DAVID, L’ARBITRAGE DANS LE COMMERCE INTERNATIONALE 41 (1982).

Commentators have also criticized the territorial basis of the judicial oversight model, pointing out that the situs of most arbitrations is chosen for reasons of neutrality or geographic appropriateness and not because of the relationship between the parties, their dispute, and the law ofler or the forum. In the absence of such a nexus, it is more difficult to justify local interference. Jan Paulsson, Delocalization of International Commercial Arbitration: When and Why It Matters, 32 INTL & COMP. L.Q. 53, 54-55 (1983). Finally, as major industrial centers vie for a greater share of the global arbitration business, it has become evident that excessive judicial supervision may drive potential customers away. See Carbonneau, Arbitral Adjudication, supra note 12, at 62.

63 See, e.g., Paulsson, supra note 62, at 61. This view has recently been at the center of a heated debate over what has variously been called “de-nationalized” or “de-localized” arbitration. See generally Park, supra note 33; Paulsson, supra note 59; VAN DEN BERG, supra note 18, at 28-43.

Proponents of de-nationalized arbitration contend that the parties may authorize the arbitral tribunal to exclude the applicability of any national arbitration law. They aver further that the “a-national” or “floating” award produced by such an arbitration may be enforced abroad despite annulment by the forum state. See, e.g., Paulsson, supra note 62, at 53. The French case, Libyan Maritime Co. v. Gotaverken, Cour d'Appel de Paris (1re Ch.) (Feb. 21, 1980), is frequently cited as supporting this view. In that case, a French court of appeals dismissed a challenge to an arbitral award rendered in Paris under I.C.C. rules on the ground that the award was not governed by French arbitration law.

The opponents of de-nationalized arbitration have vigorously rejected this interpretation of Gotaverken and the concept of de-nationalized arbitration as a whole. No court, the critics point out, has given effect to an
the concept of international public policy would not totally detach international arbitrations from their country of origin but would subject them to fewer constraints than a domestic arbitration.64 This approach would limit judicial intervention to ensuring compliance with "the minimum norms of transnational currency"65 such as those embodied in Article V of the New York Convention.66 Thus, according to one scholar, the mandatory public policy requirements applicable to international arbitrations would be limited to the right of each party to present its own case and the right to discuss the position of the opposing party.67

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arbitral award that was annulled by the forum state. In fact, in Gotaverken, the French court refused to annul the award. See Park, supra note 33, at 26. Critics also attack the "contractualist" underpinnings of this view, arguing (weakly, I believe) that "[e]very right or power a private person enjoys is inexorably conferred by or derived from a system of municipal law." Id. at 23 (citing Mann, Lex Facit Arbitrum, in INTERNATIONAL ARBITRATION: LIBER AMICORUM FOR MARTIN DOMKE, 159 (P. Sanders ed., 1967)).

Finally, critics persuasively challenge the desirability of de-nationalized arbitration. National courts, they contend, are necessary as a supporting judicial authority (authorité d'appui) without which arbitration would often grind to a halt. Courts are necessary, for instance, to enforce interim arbitral orders. If the law of the situs is inapplicable, then it is difficult to see how the jurisdiction of the local courts can be invoked. See VAN DEN BERG, supra note 18, at 30; de Vries, supra note 16, at 47; Steven Stein & Daniel Wotman, International Commercial Arbitration in the 1980's: A Comparison of the Major Arbitral Systems and Rules, 38 BUS. LAW. 1685, 1705 (1983). Finally, critics challenge the legal basis of this approach. An arbitral award that cannot be challenged under the law of forum where it was rendered might not fall under the New York Convention and may be unenforceable abroad. See VAN DEN BERG, supra note 18, at 34-40; Park, supra note 33, at 30. On the other hand, if an invalid a-national award is generally enforceable, then the losing party will be unjustly forced to attack the award in every state where it might be enforced. See VAN DEN BERG, supra note 18, at 34-40; Park, supra note 33, at 30.

64 Park, supra note 33, at 26.
65 Paulsson, supra note 62, at 57.
66 Park, supra note 33, at 31.
4.1.3. The UNCITRAL Model Law

In 1985, the United Nations Commission on International Trade Law ("UNCITRAL") drafted a model law to supplement the New York Convention. The model law is intended to serve as a prototype for domestic arbitration legislation. Its primary purpose is to harmonize the practice and procedure of international commercial arbitration by liberating the process from the peculiar constraints imposed by the domestic law of the situs. Like the New York Convention, the UNCITRAL model law gives maximum effect to the principle of party autonomy. Accordingly, it prescribes a limited role for the courts.

To date, only Canada, Cyprus and California have adopted the model law. The modest response to UNCITRAL's endeavor can be attributed in part to its relative novelty. More importantly, however, the limited response is a reflection of global dissonance. Unlike the New York Convention, which codified "an existing and emerging international consensus on arbitration," the UNCITRAL model law must overcome a genuine and persistent disparity of views.

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70 DORE, supra note 36, at 89; Hoellering, supra note 69, at 328-29.

71 DORE, supra note 36, at 89-90, 98-99.


73 Id. at 418.

74 One reason that Switzerland did not adopt the model law when it recently overhauled its federal arbitration law is that the model law did not reflect the Swiss approach. See Marc Blessing, The New International Arbitration Law in Switzerland: A Significant Step towards Liberalism, J. INT'L ARB., June 1988, at 15-16 (vol. 5).

75 CARBONNEAU, supra note 2, at 67.
4.2. Lex Arbitri: Three Salient Examples

Despite the trend toward greater arbitral autonomy, most countries do not allow the parties to completely avoid the mandatory strictures of their domestic arbitration law. The ties that bind arbitration to a country’s legal order are hard to break. The lack of consensus on this point can be seen by comparing the lex arbitri of the United States, England and France. While all three countries have adopted the New York Convention,76 and all three have enacted modern arbitration statues dealing with international cases, France has gone the farthest in freeing international commercial arbitration from the peculiarities of its domestic law.

4.2.1. The United States Arbitration Act

The U.S. Arbitration Act (“USAA”) governs the international commercial arbitrations taking place in the United States.77 The USAA is similar to the UNCITRAL model law in its emphasis on party autonomy.78 Thus, within the confines of basic public policy, the parties can choose the procedural rules applicable to the arbitration.79 For example, while formal evidentiary rules do not automatically apply to arbitral proceedings under the USAA, the tribunal must hear all relevant evidence.80 The procedural safeguards are

76 The United States acceded to the Convention in 1970. VAN DEN BERG, supra note 18, at annex C (referencing 9 U.S.C § 201 et seq.) The United Kingdom acceded in 1975. Id. (referencing the Arbitration Act of 1975, c.8.) France ratified the Convention in 1959. See CARBONNEAU, supra note 2, at 68.


78 See Carbonneau, Arbitral Adjudication, supra note 12, at 47.

79 Id.

80 9 U.S.C. § 10(c) (1988); see Carbonneau, Arbitral Adjudication, supra
intended to preserve the integrity of the arbitral process. \textsuperscript{81} Except for these heteronomous norms, international commercial arbitration under the USAA seems to be free from the peculiarities of American law.

4.2.2. The Arbitration Act of 1979

English arbitration law historically sanctioned broad judicial oversight of arbitral proceedings. \textsuperscript{82} The relative heteronomy of the English process diminished the attractiveness of England as a situs for international commercial arbitration. \textsuperscript{83} In an effort to reverse this situation Parliament enacted the Arbitration Act of 1979, which sharply curtails the courts' supervisory role. \textsuperscript{84} In addition, the Act allows the parties to an international arbitration agreement to exclude or oust the jurisdiction of the English courts in many cases. \textsuperscript{85} The new law is consistent with the trend toward greater arbitral autonomy and reflects the position expressed by one English judge that the courts "should impose no rules of practice on the conduct of the arbitrators . . . except such as are absolutely necessary to secure justice." \textsuperscript{86}

Notwithstanding this strong statement in favor of autonomy, the English still adhere to the principle that the arbitrat-

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\textsuperscript{81} Id.
\textsuperscript{82} Prior to 1979, commercial arbitration in England was subject to the so-called "case stated" procedure by which a party could have a legal point reviewed by the courts at any point during the proceedings. Park, supra note 33, at 33; Carbonneau, Arbital Adjudication, supra note 12, at 44. This procedure allowed parties on the verge of losing to pull a "December surprise" and delay the unfavorable award by requesting judicial review of some legal issue. See CRAIG, PARK & PAULSSON, supra note 22, at \$ 29.01. For a general discussion of England's arbitration laws, see Michael J. Mustill & Stewart C. Boyd, The Law and Practice of Commercial Arbitration in England (1982).


\textsuperscript{84} See Park, supra note 33, at 35-52; Bentil, supra note 83. In particular, the Act abolished the "case stated" procedure. Arbitration Act of 1979, \$ 1(1).

\textsuperscript{85} Arbitration Act of 1979, \$ (3). See Park, supra note 33, at 41-44; Bentil, supra note 83, at 53-55.

\textsuperscript{86} French Gov't v. Tsurushima Maru, 7 Ill. L. Rep. 244, 248 (1921) (Per Bray, J.) (quoted in Mustill & Boyd, supra note 82, at 252).
ors' powers exist by virtue of an agreement and thus are subject to the same restrictions that apply to every other private contract. In general, English public policy will nullify any arbitral procedure which unreasonably restricts the right of a party to invoke the power of the High Court or is inconsistent with basic procedural requirements.

Thus, the overall effect of the Arbitration Act of 1979 is not as great as it may initially seem. To begin with, the so-called exclusion agreement is void as to admiralty, insurance and commodities cases. Furthermore, a party cannot abrogate the “benefits” of English arbitral law, including the assistance of the High Court in enforcing interlocutory orders. Thus, the English lex loci arbitri continues to leave the High Court with powers sufficient to justify vast judicial interference with the arbitral process.

4.2.3. The French Decree of May 12, 1981

The French Decree of May 12, 1981 codified and clarified the traditionally liberal French law of international arbitration. Like its American and English counterparts, the new French law emphasizes the doctrine of party autono-

87 Mustill & Boyd, supra note 82, at 21.
88 Id. at 246.
89 Arbitration Act of 1979, §§ 4(1)(a-c). See Park, supra note 33, at 43; see also Bentil, supra note 83, at 55.
90 Arbitration Act of 1979, § 5. Park, supra note 33, at 44; see also Carbonneau, Arbitral Adjudication, supra note 12, at 62-63.
91 Park, supra note 33, at 51-52.
93 Craig, Park & Paulsson, French Codification, supra note 92, at 739; Delaume, supra note 92, at 39.
my. However, the Decree pushes this principle to its farthest limits.94

Subject only to the minimal confines of French "due process,"95 the French Decree allows parties to designate the arbitral procedure by referring to French, non-French, or even non-national (i.e. institutional) rules.96 In the absence of agreement, the arbitrators are free to determine the procedural law directly or by reference to any law or set of rules.97 The doctrine behind this provision is that arbitrators should be able to choose the rules appropriate to the circumstances of the matter before them. "These rules may constitute a mixture of elements drawn from different practices and legal systems so as to establish equality and justice for the parties involved."98

The role of the French courts during the proceedings is limited to assisting the parties in the appointment of arbitrators.99 The parties may even strip the court of this function.100 The Court's post-award role has also been restricted. Generally, a losing party may seek either a de novo review of the merits or a set aside (recours en annulation) for some defect in integrity. Under the new law right to the former (but not the latter) may be waived by the parties.101 As a result, the Decree creates the possibility of an arbitral process essentially independent of any national control.102

While the United States, England and France have minimized the influence of its parochial notions of public policy, each continues to protect certain norms. The diversity among domestic arbitration laws and the inability of parties to completely detach the international arbitral process from the peculiar exigencies of these laws have implications beyond the

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94 Craig, Park & Paulsson, French Codification, supra note 92.
95 For example, an award will be set aside if the process did not respect the principle of le contradictoire (fair notice). C. Pr. Civ. art. 1502(4) (Dalloz 1987). See also Delaume, supra note 92, at 41.
96 C. Pr. Civ. art. 1494 a.1.
97 Id. at art. 1494 a.2.
98 CRAIG, PARK & PAULSSON, supra note 22, at § 16.02.
99 C. Pr. Civ. art. 1493.
100 Id.
101 CRAIG, PARK & PAULSSON, supra note 22, at § 30.01.
102 Craig, Park & Paulsson, French Codification, supra note 92, at 736; Carbonneau, Arbitral Adjudication, supra note 12, at 78-79.
academic. In particular, the lack of complete conformity and party autonomy cause the choice of situs to be especially important.

5. THE PRACTICAL IMPACT OF DIVERSITY:
THE EXAMPLE OF ARBITRAL DISCOVERY

5.1. Evidence Gathering Procedures in Litigation

Evidence gathering procedures are indispensable to the fair resolution of disputes. The parties and/or the decision-maker must be able to establish a factual record so that they can apply the substantive rules of law. While all legal systems provide these mechanisms, particular approaches vary from country to country.

In the United States, for example, "[m]utual knowledge of the relevant facts gathered by both parties" is considered essential to fair, effective civil litigation. To that end, "either party may compel the other to disgorge whatever facts he has in his possession." A similar attitude characterizes civil procedure in England.

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103 See CARBONNEAU, supra note 2, at 7.

104 BORN & WESTIN, supra note 8, at 262 (citing the United States Supreme Court in Hickman v. Taylor, 329 U.S. 495, 507 (1947)).

105 Id. In the United States, the tools available to disgorge this information fall under the procedural heading "discovery." The rules of civil procedure in force in most jurisdictions in the United States allow discovery of "any matter, not privileged which is relevant to the subject matter involved in the pending action, whether it relates to the claim of defense of the party seeking discovery or the claim or defense of any other party." FED. R. CIV. P. 26. Discovery can be accomplished through a veritable panoply of devices including depositions upon oral examination or written question, written interrogatories, production of documents or other things, entry upon land, physical or mental examination, and requests for admission. FED. R. CIV. P. 26-37. These procedures are generally available to parties without prior court approval. See BORN & WESTIN, supra note 8, at 263.

Despite the lofty goals behind American discovery, abuses have led scholars to severely criticize this procedure. See, e.g., GEOFFREY C. HAZARD, ETHICS IN THE PRACTICE OF LAW 123 (1978) (discovery is an "engine of harassment"); Simon Rifkind, Are We Asking Too Much of Our Courts, 70 F.R.D. 96, 107 (1976) (discovery permits "the most massive invasion into private papers."); CARBONNEAU, supra note 2, at 7 (stating that discovery when abused, is "a means of avoiding a determination of what is legally truthful. . .").

106 The goal of discovery in English civil procedure is to "ensure that all
The liberal evidence gathering techniques practiced by Anglo-American lawyers are generally unavailable to, and would probably offend, civil law practitioners. Just as the broad discovery practiced in the United States and England is rooted in notions of due process, the comparatively restrictive procedures available in civil law countries reflect equally important public policy considerations such as privacy. These conflicting attitudes and principles have made it very difficult to achieve a consensus on the practice of discovery in international commercial arbitration.

documents, including those that are unfavorable to a party, should be produced by him to the court.” W.G.O. Morgan, Discovery in Arbitration, J. INT'L ARB., Sept. 1986, at 9, 11 (vol. 3). Thus, parties are required to list and ultimately produce for inspection any document “relating to matters in question.” Id. This approach, while similar to that followed in United States, is somewhat more restrained. To begin with, English discovery rules do not extend to third parties. In addition, the English procedure is concerned solely with documentary evidence. While other devices, such as interrogatories, are permitted under English procedural law, Morgan, supra, at 13, depositions are rarely permitted. See Perlman & Nelson, supra note 8, at 239-41.

107 Perlman & Nelson, supra note 8, at 239-41. See also, Stein & Wotman, supra note 63, at 1707; Vincent Fischer-Zernin & Abbo Junker, Between Scylla and Charybdis: Fact Gathering in German Arbitration, J. INT'L ARB., June 1987, at 9, 9-10 (vol. 4). Civil law procedures are based on an inquisitorial model. Evidence gathering in civil law systems is conducted almost exclusively by a judicial officer charged with creating the factual record for the case and “is not separate and distinct from what [Americans] would regard as the trial”. Perlman & Nelson, supra note 8, at 239-41. See also, BORN & WESTIN, supra note 8, at 264. Additionally, the scope of evidence gathering is far more narrow in civil law countries than in the United States and England. So-called “fishing expeditions” are not allowed. BORN & WESTIN, supra note 8, at 264; Fischer-Zernin & Junker, supra, at 9.

108 Perlman & Nelson, supra note 8, at 216-18.

109 BORN & WESTIN, supra note 8, at 265; Fischer-Zernin & Junker, supra note 107, at 16-17.

110 Morgan, supra note 106, at 22.
5.2 Evidence Gathering in International Commercial Arbitration

5.2.1. The Role of the Arbitrator

The principle of party autonomy in the choice of procedural rules is almost universally recognized.\(^\text{111}\) Thus, parties are generally free to choose the evidence gathering techniques that will be allowed.\(^\text{112}\) Practitioners often advise parties to take advantage of their freedom to define the scope of permissible discovery in order to avoid needless delays and unwelcome surprises.\(^\text{113}\) Yet, even if the parties breach the subject of discovery, they may be unable to arrive at a consensus on what tools should be available.\(^\text{114}\) Furthermore, breaching

\(^{111}\) Van Compernolle, supra note 19, at 102.

\(^{112}\) Jarvin, supra note 69, at 422.

\(^{113}\) See McCabe, supra note 7, at 526-28; Louis H. Willenken, Discovery in Aid of Arbitration, 6 Litig., Winter 1980, at 16, 18; Rhodes & Sloan, supra note 69, at 41.

\(^{114}\) If the desirability of liberal evidence gathering in litigation is dubious, the question is even more debatable in commercial arbitration. McCabe, supra note 7, at 502-13. Historically Anglo-American-styled discovery has not been made available in arbitrations. Id. at 499-500. See Lawrence W. Newman & Michael Burrows, Deposition and Other Discovery in Arbitration, N.Y. L.J., Sept. 1, 1989, at 3 (vol. 202); Ehrenhaft, supra note 8, at 1207. Conventional wisdom held that elaborate pre-hearing discovery was anathema to the main objective of arbitration, i.e. to resolve the dispute as quickly and inexpensively as possible. See Nelson, supra note 8, at 197-98; Stein & Wotman, supra note 63, at 1706; McCabe, supra note 7, at 499-500 n.3; Ehrenhaft, supra note 8, at 1207. The absence of discovery also benefits parties who are concerned about protecting trade secrets. See Nelson, supra note 8, at 197-98.

At the same time, legal scholars and practitioners have begun to call for broader discovery in international commercial arbitration. Some, noting the greater geographic distances involved, have challenged the premise that discovery is incompatible with efficiency. See, e.g., McCabe, supra note 7, at 504-05, 523-26. Pre-hearing discovery, including depositions, they argue, can reduce the number of hearings and the need for live testimony. Newman & Burrows, supra, at 3; McCabe, supra note 7, at 504-05; Willenken, supra note 113, at 18. Others have noted that the complex claims that may be raised in international commercial arbitration today require broader discovery to insure that all the information necessary for a fair adjudication will be available to the parties and to the arbitrators. Ehrenhaft, supra note 8, at 1199; Nelson, supra note 8, at 203-04; Jarvin, supra note 69, at 422. The discovery of business documents may be indispensable to parties pursuing non-contractual claims. Id.; see also Kurt Riechenberg, The Recognition of Foreign Privileges in United States Discovery Proceedings, 9 NW. J. INT'L L. & BUS. 80 n.1. (1988) (citing In re Uranium Antitrust Litigation, 480 F. Supp. 1138, 1155 (1979)).
the unpopular topic of formal procedures for resolving future disputes can have a chilling effect on the negotiation of the contract.¹¹⁵ In practice, therefore, most arbitration agreements do not precisely enunciate the applicable evidence-gathering rules.¹¹⁶

Frequently, the parties' agreement or the arbitral tribunal will make reference to a body of arbitration rules, such as those furnished by the American Arbitration Association ("A.A.A.")¹¹⁷ or UNCITRAL.¹¹⁸ These rules are not comprehensive, but they permit the arbitral tribunal to conduct the arbitration as it sees fit.¹²⁰ For example, each set of rules gives the arbitrators broad discretion to order the production of documents.¹²¹ In some instances the rules allow the arbitrators to order the appearance of witnesses.¹²² The arbitrators, in the absence of the express agreement of the parties, determine the scope of evidence-gathering.

The forum's arbitration law generally affects the autonomy of arbitral evidence gathering in three important ways: it delimits the authority of the arbitrator to order discovery, it determines the availability of local court procedures to enforce arbitral discovery orders,¹²³ and it sets forth what, if any,

¹¹⁵ CRaIG, PARK & PAULSSON, supra note 22, at § 23.01.
¹¹⁶ Perlman & Nelson, supra note 8, at 227; CRaIG, PARK & PAULSSON, supra note 22, at § 23.01.
¹²⁰ E.g., I.C.C. Rules, art. 14; UNCITRAL Rules, arts. 1(1), 15(1).
¹²¹ A.A.A. Rules, supra note 117, rule 31; I.C.C. Rules, supra note 118, art. 14(1); UNCITRAL Rules, supra note 119, art. 24(3). See also Leahy & Pierce, supra note 5, at 300.
¹²² A.A.A. Rules, supra note 117, rule 30; I.C.C. Rules, supra note 118, art. 15(1).
¹²³ An unenforceable discovery request is useless. Unlike a public judge or magistrate, the arbitrator has no attribute of imperium, and unless the parties so provide, the arbitrator may not punish a recalcitrant party by imposing monetary fines. Van Compernolle, supra note 19, at 116.
non-arbitral (i.e. court-ordered) discovery will be permitted in aid of an arbitration.

5.2.2. Arbitral Discovery in the United States

Foreign parties and their counsel are often reluctant to arbitrate in the United States for fear that they will be subjected to wide-ranging discovery. These misgivings are unfounded. In the United States the Federal Rules of Civil Procedure do not govern the procedures for gathering evidence for presentation to an arbitral tribunal. Rather, the parties (and the arbitrator by default) determine the applicable rules.

The United States Arbitration Act authorizes limited discovery at the discretion of the arbitrator. According to section 7, an arbitrator may issue a summons compelling the testimony of any person or the production of any material document. While this provision does not expressly authorize discovery by written interrogatories or deposition, it has been interpreted to allow any discovery which an arbitrator deems necessary. For example, the district court in Missis-

The most efficient and effective sanction available to the arbitrator is the assumption of a negative inference from the refusal of a party to obey a discovery order. McCabe, supra note 7, at 529; see also Leahy & Pierce, supra note 5, at 301; Nelson, supra note 8, at 203-04. While no set of arbitral rules expressly authorizes this sanction, arbitrators employ it regularly. Leahy & Pierce, supra note 5, at 301. Moreover, both France and the United States approve of its use. See C. PR. CIV. art. 11(1) (Fr); Commercial Solvents Corp. v. Louisiana Liquid Fertilizer Co., 20 F.R.D. 359, 363 (S.D.N.Y. 1975).

When a non-party refuses to comply with a discovery request, the arbitrator cannot draw a negative inference and may find it necessary to seek the aid of the national courts.


126 Id. Rule 81(a)(3) of the Federal Rules of Civil Procedure provides that the Federal Rules of Civil Procedure apply to proceedings under the USAA "to the extent that matters of procedure are not provided for in [that] statute." FED. R. CIV. P. 81(a)(3). Although this rule would seem to permit broad discovery in aid of arbitration, the courts have held that the operative language, "proceedings under Title 9, U.S.C.," refers to court and not arbitral proceedings. Commercial Solvents Corp. v. Louisiana Liquid Fertilizer Co., 20 F.R.D. 359, 361 (S.D.N.Y. 1957). See also Newman & Burrows, supra note 114, at 4; Morgan, supra note 106, at 17.

126 Commercial Solvents Corp., 20 F.R.D. at 361.


sippi Power" held that an arbitrator, acting pursuant to Rule 30 of the A.A.A. Rules and section 7 of the Act, could "permit any discovery necessary to the performance of his function."

If a party refuses to obey an arbitral discovery request, section 7 authorizes the district courts to compel compliance. The practical importance of this provision is limited. A court may only hear petitions to enforce subpoenas in the district where the arbitral tribunal sits. If a party controls evidence located outside the district, the ability of the arbitrator to draw a negative inference will probably deter any misbehavior. If, on the other hand, a non-party controls the evidence, the arbitrator may have to be more creative.

In general, the courts of the United States are reluctant to involve themselves at the pre-hearing stage of an arbitration by ordering discovery pursuant to state or federal law. In rejecting requests for non-arbitral discovery, the courts often point out the authority granted to the arbitrators to compel discovery under arbitration rules and statutes. Despite this hesitancy, U.S. courts have allowed discovery prior to the selection of the arbitrators when "extraordinary circumstances" exist. "[N]ecessity rather than convenience is the


130 Id. at 564.


133 See supra note 111.

134 Newman & Burrows, supra note 114. If the evidence is located abroad, the arbitral tribunal may be able to seek the assistance of a foreign court under the Hague Convention. Id. If this fails, the tribunal might request its own courts to issue a letter rogatory. Id.; Willkenen, supra note 113, at 18. If the evidence is located outside the subpoena range of the court, but within the United States, the arbitrator may still look to 28 U.S.C §§ 1783-1784. Newman & Burrows, supra note 114, at 3.

135 Lutz, supra note 124, at 626.

136 Newman & Burrows, supra note 114. Granting such requests results in "double-barreled discovery" contrary to the purpose of arbitration. Id. (citing Mississippi Power Co. v. Peabody Canal Co., 69 F.R.D. 558, 567 (S.D. Miss. 1976)).

137 E.g., Bigge Crane and Rigging Co. v. Docutel Corp., 371 F. Supp. 240,
Court ordered discovery in aid of proceeding arbitrations is even more rare.\textsuperscript{139} Unites States law thus gives maximum effect to the arbitrator’s decision. The omni-presence of court-ordered discovery, even if exceptional, reflects the overriding American concern with due process.

5.2.3. Arbitral Discovery in England

A well-established principle of English law is that an arbitrator may order such discovery as the arbitrator deems necessary to perform the adjudicatory function properly.\textsuperscript{140} The Arbitration Act of 1950 specifically empowers the arbitrator to order discovery of documents and answers to written interrogatories.\textsuperscript{141} Court orders are also available if a party does not comply.\textsuperscript{142} However, the arbitrator’s power does not extend to non-parties.\textsuperscript{143}

Unlike the United States, an arbitrator’s authority to order discovery does not limit the availability of court ordered discovery. According to the Act of 1950, the High Court may simultaneously order discovery, interrogatories, and the giving of evidence by affidavit (a power not expressly given to the arbitrator).\textsuperscript{144} Moreover, if an arbitrator refuses to grant a party’s discovery request, that party may apply to the High Court for an interlocutory order compelling such discovery.\textsuperscript{145} This judicial assistance is considered a “benefit” of the English lex arbitri and, as such, cannot be abrogated by an exclusion

\textsuperscript{138} Lutz, supra note 124, at 626.

\textsuperscript{139} Morgan, supra note 106, at 20 n.32.

\textsuperscript{140} Id. at 13.

\textsuperscript{141} Arbitration Act, 1950, § 12(1) (Eng.) [hereinafter Arbitration Act]. See also Morgan, supra note 106, at 13; Stein & Wotman, supra note 63, at 1706-07.

\textsuperscript{142} Arbitration Act, supra note 141, at § 12(6).

\textsuperscript{143} See supra note 96.

\textsuperscript{144} Arbitration Act, supra note 141, at § 12(4); Mustill & Boyd, supra note 82, at 21.

\textsuperscript{145} Arbitration Act, supra note 141, at § 12(6)(b).
agreement. While helpful in many instances, this principle runs contrary to the notion of party autonomy and the delocalization of arbitral procedure.

5.2.4. Arbitral Discovery in France

An arbitrator gathering evidence under French domestic arbitration law is more constrained than under American and English law. Under the N.C.P.C., the arbitrator can enjoin the production of evidence (élément de prueve) in the hands of a party, but cannot compel compliance. Furthermore, the arbitrator cannot address a request to non-party.

On the other hand, a party may apply to the French courts for an order compelling the production of a document in the hands of any other party. The court can order a recalcitrant party to pay a daily fine (astreint) until that party complies. Finally, only a court may issue a subpoena.

While French domestic arbitration law severely curtails the arbitrator's freedom to gather evidence, the same rules do not necessarily apply in international arbitrations. The French Decree of 1981 provides that unless the parties or the arbitrator so choose, French domestic arbitration law does not apply. Presumably an arbitrator could select more extensive evidence gathering procedures for an international arbitration than would be available in a domestic one.

However, while the French law unshackles the arbitrator from domestic arbitration law, it reinforces the public policy concern for third parties. An enthusiastic arbitrator might decide that depositions are appropriate but would be unable to affect a non-party witness.

146 Park, supra note 33, at 44. See supra Section 3.2.2.
147 CRAIG, PARK & PAULSSON, supra note 22, at § 29.03.
148 C. PR. CIV. art. 1460(3) (Fr.).
149 Delaume, supra note 92, at 43; Stein & Wotman, supra note 63, at 1707. Accord, Van Compernolle, supra note 19, at 116 (discussing Belgian arbitration law). The arbitrator's only recourse is to draw a negative inference from the refusal. C. PR. CIV. art. 11(1) (Fr.).
150 Whereas C. PR. CIV. art. 11(2) permits a court to order any person to produce evidence, art. 1460(2) does not incorporate this provision, but instead provides art. 1460(3).
151 C. PR. CIV. art. 11(2) (Fr.).
152 Id.
153 Delaume, supra note 92, at 43; Stein & Wotman, supra note 63, at 1707.
154 C. PR. CIV. art. 1494 (Fr.). See supra notes 90-96.
155 Ironically, if no reference is made to French law, a party might not
6. CONCLUSION

While parties engaged in international commerce clamor for greater autonomy and uniformity in arbitration, and scholars contemplate the possibility of denationalized arbitration, domestic law continues to impose very real and very diverse constraints on the process. The concept of international public policy suggests that some contractual relationships are less threatening to domestic concerns than others and therefore warrant only minimal judicial supervision. Nevertheless, so long as basic notions of justice and morality differ from one country to another, so too will arbitration law.

...