

## RESOLVING DISPUTES ARISING OUT OF THE PERSIAN GULF WAR: INDEPENDENT ENFORCEABILITY OF INTERNATIONAL AGREEMENTS TO ARBITRATE

### ABSTRACT

Arbitration can be used as an effective dispute resolution tool for claims between a State, and the corporations and nationals of another State. A given arbitral procedure can be custom designed for the circumstances. Enforcement of valid agreements to arbitrate are guaranteed in those States which are signatories to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The UNCITRAL Model Law also purports to simplify arbitral award enforcement. The unprecedented U.N. Security Council military response, to Iraq's invasion of Kuwait triggered numerous individual claims. In order to begin settling disputes, the Secretary General proposed a non-exclusive Compensation Commission to hear most claims, and established a fund to pay successful claimants. Certain exceptional and pre-invasion claims will not fit neatly into this procedural framework. An Iraq-World arbitral panel should be established as an alternate forum to process claims arising out of the Persian Gulf War for claimants lacking a convenient forum in which to proceed.

### INTRODUCTION

The Persian Gulf War between Iraq and Kuwait presents unprecedented issues concerning the payment of war reparations.<sup>1</sup> Some claims will be processed by the United Nations Compensation Commission ("Commission").<sup>2</sup> Some exceptional claims—very expensive or complex claims—will

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1. Iraq's August 2, 1990 invasion of Kuwait left many thousands of people dead and others homeless. Many international business transactions were also disrupted. U.N. S.C. Res 686, U.N. SCOR, Mar. 2, 1991, 30 I.L.M. 567 (1991) demanded that Iraq "accept in principle" its duty to pay for damages to Kuwait and third States arising out of the war. For the purposes of this comment, all claimants against Iraq for the damage incurred by the Persian Gulf War will be discussed under two general groups. First, claims suitable for the United Nations Compensation Commission that can be settled by making lump sum payments to States. Such a Commission was contemplated by then Secretary-General of the United Nations Javier Perez de Cuellar in his *Report of the Secretary General Pursuant to Paragraph 19 of Security Council Resolution 687* May 3, 1991, U.N. Doc. S/22559 [hereinafter *Secretary's Report*]. See *infra* notes 41 through 94 and accompanying text for a more complete discussion. The second category is exceptional claims—very large or complex claims that will need to be processed individually. For the purposes of this comment, pre-invasion claims will be treated as if they were exceptional claims. An Iraq-World Arbitral Panel similar in procedure to the Iran-U.S. Claims Tribunal is proposed as a forum to process these large and complex claims. See *infra* notes 192 through 250 and accompanying text.

2. U.N. S.C. Res 687, U.N. SCOR, Apr. 3, 1991, 30 I.L.M. 847 (1991). In paragraph 18, the Security Council decided "[t]o create a fund to pay compensation for claims . . . and to establish a Commission that will administer the fund."

need an entirely different procedure.<sup>3</sup> Claims arising before Iraq's August 2, 1990 invasion will also need to be adjudicated in a different forum.<sup>4</sup> An arbitration panel similar to the Iran-United States Claims tribunal may be a proper forum to sort out the exceptional and pre-invasion claims that do not fit within the compensation framework established by the United Nations.<sup>5</sup> The basic premise of this comment is that claims arising out of war could be best settled through the creation of a binding arbitration panel.

War reparations are those funds paid from the loser of a conflict to the winner. However, the winner cannot simply gather his booty and take it home like Napoleon leaving Egypt.<sup>6</sup> World leaders are also well advised to avoid an oppressive winner's justice.<sup>7</sup> The world's legal system, by necessity, is invoked to settle disputes of any magnitude between independent States.<sup>8</sup> Because thousands of claims totalling in the hundreds of billions of dollars will need to be processed, determining how to pay claims arising out of the Persian Gulf War is likely to stretch the world's legal system to its limit and become a "legal nightmare."<sup>9</sup>

Overcrowding in the courts of the United States and elsewhere causes many disputants to turn to arbitration to settle their conflicts as an inex-

3. *Secretary's Report*, *supra* note 1, defining exceptional claims as either very expensive or complex. Deciding exactly how to process claims will be a challenge for many years. For a description of the mechanism that the Security Council initially approved, *see, e.g.*, Anthony F. Essaye & Dale C. Turza, *Iraq Settlement Claims in Process*, NEW YORK L.J., June 6, 1991 (LEXIS, Nexis Library, Current File).

4. U.N. S.C. Res. 687 para. 16, U.N. SCOR, Apr. 3, 1991, 30 I.L.M. 847 (1991). "[R]eaffirms that Iraq, without prejudice to the debts and obligations of Iraq arising prior to 2 August 1990, which will be addressed through the normal mechanisms, is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait." *Id.*

5. To end the hostage crisis of 1979-1980, the United States and Iran entered into an agreement to arbitrate claims arising out of the two countries severing ties. Iran-United States: Settlement of the Hostage Crisis, Jan. 19, 1981, 20 I.L.M. 223 (1981). The Iran-U.S. Claims Tribunal will serve as a model of a functioning dispute resolution panel that may be the forerunner of an Iraq-World arbitral panel formed to process claims against Iraq arising out of the Persian Gulf War.

6. Any tour of the Louvre and castles in Paris would reveal the nature of the spoils of war. Mummies, ancient pottery, gold jewelry and a hieroglyphic inscribed obelisk are all treasures that the French acquired during their domination of Egypt.

7. The harsh Treaty of Versailles planted the seed for the start of World War II. It has been suggested, and properly so, that the winners of a conflict write history, Howard Berman, Lectures on Public International Law, Address at California Western School of Law (Fall 1991). Steps should be taken to make sure that the peace that is negotiated in the Persian Gulf is stable, lasting and equitable.

8. Customary international law (including State sovereignty which acts as a bar to unilateral State prosecutions) is invoked in all dealings between States.

9. Bringing together all the different arbitrators with their different backgrounds will create many problems. Even deciding on priority of claims will be a challenge. Language barriers may be a stumbling block. The claims tribunal may end up resembling an "international lawyers' bazaar." *Milan Meeting Addresses Arbitration Issues Emerging From Gulf War*, 2 WORLD ARB. & MEDIATION REP. 101, 102 (Apr. 1991).

pensive and expeditious alternative to fullblown litigation.<sup>10</sup> The settlement of the current crisis does not compel the conclusion that this situation will be different. Certainly, arbitration has been employed to settle international disputes since ancient Greece.<sup>11</sup> Ultimately, the effectiveness of international arbitration will come down to whether or not the losing party will pay.<sup>12</sup> Binding arbitration agreements between States often create procedures to enforce arbitration agreements and decisions.<sup>13</sup> A party that submits its dispute to binding arbitration should, justifiably, be entitled to some security when he consents to the jurisdiction of an arbitrator.<sup>14</sup> Multinational conventions or treaties providing for comity between States can help increase the chances that an arbitral award will be enforced. The enforcement provisions of both The Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention")<sup>15</sup> and The Model Law on International Commercial Arbitration ("Model Law") as done by the

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10. Arbitration can be flexible, fast, economical, and respond to parties' distrust of the courts of another State. Expansion in international trade has brought arbitration back as a viable alternate dispute resolution technique for many commercial disputes. See, e.g., Jill Pietrowski, Comment, *Enforcing International Commercial Arbitration Agreements—Post-Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 36 AM. U. L. REV. 57, 58 (1986).

11. Arbitration was frequently employed to peacefully settle disputes even during the Middle Ages. LOUIS HENKIN ET AL., INTERNATIONAL LAW CASES AND MATERIALS 588 (2d ed. 1987). See, e.g., JACKSON H. RALSTON, INTERNATIONAL ARBITRATION FROM ATHENS TO LOCARNO (1929).

12. The question one may ask is whether the arbitral award can be enforced against the losing party. Arbitral awards are voluntarily complied with in a large number of cases. This may be connected with the fact that international enforcement measures are available to many winning parties. Albert Van Den Berg, *Recent Enforcement Problems Under the New York and ICSID Conventions*, 5 ARB. INT'L 2 (1988).

13. A good first step for entering into binding arbitration is to sign an arbitration agreement. This will trigger the enforcement Conventions that States have ratified. This comment assumes the signing of a valid and binding agreement to arbitrate between Iraq and the States seeking reparations for their direct harms and the harms of their nationals. The customary international law concept of *pacta sunt servanda* would help insure that the agreement was carried out. Article 26 of The Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/Conf. 39/27, 8 I.L.M. 679 (1969) states: "[E]very treaty in force is binding upon the parties to it and must be performed by them in good faith." This should apply to an agreement to arbitrate contained in a peace treaty.

14. Ordinary channels for appeal are not available to the party that consents to binding arbitration. Recognition and enforcement conventions in force between States limit the channels of appeal and increase the likelihood that an arbitral award will be enforced. "The goal of the [New York] 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." Scherk v. Alberto-Culver, 417 U.S. 506, 520 (1974).

15. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention]. The subsequent Model Law on International Commercial Arbitration as done by the United Nations Commission on International Trade Law mirrors the enforcement language of the New York Convention. The primary differences with respect to enforcement will be highlighted throughout this comment.

United Nations Commission on International Trade Law (UNCITRAL)<sup>16</sup> help facilitate this end.<sup>17</sup>

This Comment demonstrates that an Iraq-World arbitral panel can work as an effective tool to settle claims in the aftermath of war. A brief history of the Persian Gulf War with a special emphasis on the resolutions created by the United Nations Security Council ("Security Council") in response to the crisis will create a factual context for the discussion. Other U.N. activity including the formation of the Compensation Commission will necessarily be included.<sup>18</sup> Attention will then turn to the enforcement provisions of the New York Convention and the Model Law and how they can be used to enforce the decisions of an *ad hoc* arbitral panel. Congressional Acts and recent U.S. Court decisions relating to the recognition and enforcement of arbitral awards will also be examined. Finally, a description of an Iraq-World arbitral panel based on the Iran-U.S. claims tribunal is proposed as an effective forum for settling claims not contemplated by the Security Council when creating the Commission.

## I. HISTORY—U.N. RESPONSE TO THE IRAQI INVASION OF KUWAIT

The August 2, 1990 Iraqi invasion of Kuwait brought about unprecedented international concerted action.<sup>19</sup> The response from the U.N. Security Council in several resolutions brought about an invasion of Iraq that liberated Kuwait and reinstated the internationally recognized government of that State. The Security Council acted on the authority of the U.N. Charter, first by attempting the peaceful settlement of the dispute,<sup>20</sup> and then, by using force.<sup>21</sup> The Security Council passed several resolutions concerning

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16. U.N. GAOR, 40th Sess., Supp. No. 17, U.N. Doc. A/40/17, 24 I.L.M. 1302 (1985) [hereinafter Model Law].

17. The enforcement and appeal language contained in the New York Convention and the Model Law is discussed at *infra* notes 92-190 and accompanying text.

18. U.N. S.C. Res. 686, U.N. SCOR, Mar. 2, 1991, 30 I.L.M. 568 (1991); U.N. S.C. Res. 864, U.N. SCOR, May 20, 1991, 30 I.L.M. 864 (1991).

19. The U.N. effectively organized a force that defeated one of the ten largest armies in the world. The effort of the U.N. could be heralding a new era in the area of international law enforcement. See, e.g., Bruce Zagaris, *U.N. Cease-fire Resolution Brings Revolutionary Development in International Law*, 7 INT'L ENFORCEMENT L. REP. 151 (Apr. 1991).

20. U.N. CHARTER art. 41. "The Security Council shall decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations." *Id.*

21. "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42 to maintain or restore international peace and security." U.N. CHARTER art. 39. Article 39 authorizes the Security Council to use force since Article 42 reads "[s]hould the Security Council consider that measures provided for in Article 41 would be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea or land forces of Members of the

the Persian Gulf War, some of which relate directly to the issue of the payment of war reparations.

Security Council Resolution 660 condemned Iraq's invasion of Kuwait and called for their immediate withdrawal from that territory.<sup>22</sup> The Security Council determined Iraq had breached international peace and security which triggered the Council's authority under the U.N. Charter to decide what measures were necessary to restore peace to the region.<sup>23</sup> The Security Council first decided what measures not involving the use of armed force ought to be implemented in accordance with the U.N. Charter.<sup>24</sup> Subsequently, Resolution 661 was enacted imposing comprehensive economic sanctions against Iraq and establishing a special committee to monitor the sanctions process.<sup>25</sup> This committee was the predecessor of the Commission established in Resolution 687 responsible for administering war reparations.<sup>26</sup>

Later resolutions<sup>27</sup> culminated in the Security Council authorizing the use of all necessary means to restore international peace and security in the region.<sup>28</sup> The Security Council decided that the sanctions had been inadequate and that the use of force provided for in the U.N. Charter was appropriate.<sup>29</sup> A deadline was set for Iraq to begin their withdrawal from Kuwait.<sup>30</sup>

Soon after the January 15, 1991 deadline<sup>31</sup> passed, a United Nations coalition force engaged the Iraqis both in Kuwait and in Iraq. During the conflict, the Security Council passed Resolution 686 which called for Iraq to "accept in principle its liability under international law for any loss, damage or injury arising in regard to Kuwait and third States, and their nationals and corporations, as a result of the invasion and illegal occupation of Kuwait by Iraq."<sup>32</sup> This strong language began the lengthy war reparations process to compensate the States and nationals injured due to the Persian Gulf War.

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United Nations."

22. U.N. S.C. Res. 660, U.N. SCOR, Aug. 2, 1990, 29 I.L.M. 1325 (1990).

23. U.N. CHARTER art. 39.

24. U.N. CHARTER art. 41.

25. U.N. S.C. Res. 661, U.N. SCOR, Aug. 6, 1990, 29 I.L.M. 1325 (1990).

26. U.N. S.C. Res. 687, U.N. SCOR, Apr. 8, 1991, 30 I.L.M. 847 (1991).

27. U.N. S.C. Res. 665, U.N. SCOR, Aug. 25, 1990, 29 I.L.M. 1329 (1990) endorsed a naval blockade; U.N. S.C. Res. 666, U.N. SCOR, Sept. 13, 1990, 29 I.L.M. 1330 (1990) addressed some humanitarian needs; U.N. S.C. Res. 667, U.N. SCOR, Sept. 16, 1990, 29 I.L.M. 1331 (1990) demanded the release of foreign nationals; U.N. S.C. Res. 670, U.N. SCOR, Sept. 25, 1990, 29 I.L.M. 1334 (1990) reiterated the need for strict compliance with sanctions; and U.N. S.C. Res. 677, U.N. SCOR, Nov. 28, 1990, 29 I.L.M. 1564 (1990) condemned Iraq's attempt to destroy Kuwait's civil records.

28. U.N. S.C. Res. 678, U.N. SCOR, Nov. 29, 1990, 29 I.L.M. 1565 (1990).

29. U.N. CHARTER art. 42.

30. U.N. S.C. Res. 678, U.N. SCOR, Nov. 29, 1990, 29 I.L.M. 1565 (1990) gave the Iraqis until January 15, 1991 to begin their unconditional withdrawal from Kuwait.

31. *Id.*

32. U.N. S.C. Res. 686, U.N. SCOR, Mar. 2, 1991, 29 I.L.M. 568 (1991).

Due to the war, business was interrupted between Iraq and the rest of the world as mandated by the Security Council.<sup>33</sup> Resolutions by the Security Council put many corporations who were doing business with Iraq in breach of contract.<sup>34</sup> Sanctions aside, many other claims in contract, tort and property have arisen out of the Persian Gulf War. Thus, the question still remains: what amount of these war-related liabilities will be apportioned between the different states and their nationals?

Resolution 687 reaffirmed that Iraq was liable "for any direct loss, damage, including environmental damage and the depletion of natural resources, or the injury to foreign Governments, nationals and corporations."<sup>35</sup> This demand was not to prejudice the already existing Iraqi debt and obligations that accrued before the August 2, 1990 invasion of Kuwait.<sup>36</sup> Resolution 687 also called for the creation of "a fund to pay compensation for claims . . . and to establish a Commission that will administer the fund."<sup>37</sup> Additionally, Resolution 687 directed the Secretary General to make a report on how Iraq would contribute to the fund and on the composition of the Commission that would be necessary for verifying claims and administering the fund.<sup>38</sup> The Secretary General's Report of May 2, 1991, created the Governing Council of the Compensation Commission ("Governing Council"). The Governing Council has a duty to sort out claims and to set the level of Iraqi contribution to the Compensation Fund.<sup>39</sup> Resolution 692 gave the Governing Council its authority to begin processing claims.<sup>40</sup>

## II. THE SECRETARY GENERAL PROPOSED THE GOVERNING COUNCIL AND THE COMPENSATION COMMISSION TO PROCESS CLAIMS ARISING OUT OF THE PERSIAN GULF WAR

The May 2, 1991 Report of the Secretary-General outlined suggestions for the creation of a non-exclusive Commission to settle disputes arising out of the Persian Gulf War.<sup>41</sup> The Governing Council is comprised of 15

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33. U.N. S.C. Res. 661, U.N. SCOR, Aug. 6, 1990, 29 I.L.M. 1325 (1990).

34. *Id.* Comprehensive sanctions forcing the end to trade can cynically be viewed as a breach of contract.

35. U.N. S.C. Res. 687, U.N. SCOR, Apr. 8, 1991, 30 I.L.M. 847 (1991).

36. *Id.* Iraq was still liable for any debt it had outstanding before the Kuwait invasion.

37. *Id.*

38. *Id.*

39. *Secretary's Report, supra* note 1.

40. U.N. S.C. Res. 692, U.N. SCOR, May 20, 1991, 30 I.L.M. 864 (1991).

41. *Secretary's Report, supra* note 1, para. 22. The Report gives a description of one possible, non-exclusive forum for processing claims. The structure would be a Governing Council, supported by Commissioners, deciding how to distribute funds from an escrow account.

members—one each from the current members of the Security Council.<sup>42</sup> They will be responsible for maintaining the United Nations Compensation Fund (Fund).<sup>43</sup> The purpose of the Fund is to pay reparations for losses arising out of the invasion and occupation of Kuwait in accordance with Security Council Resolutions 687 and 692.<sup>44</sup> Decisions of the Governing Council will require the affirmative vote of nine of its members unless the decision concerns the method of ensuring payment to the fund which requires a unanimous vote.<sup>45</sup>

Individual claimants will have limited access to the Commission.<sup>46</sup> To expedite the claims procedure, individual claims will only be checked on a sample basis.<sup>47</sup> Further verification will be requested only if the circumstances warrant.<sup>48</sup> The Commission will hear the consolidated claims that governments will bring on their own behalf and on behalf of their corpora-

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42. U.N. S.C. Res. 692, U.N. SCOR, May 20, 1991, 30 I.L.M. 864 (1991), “[D]ecides to establish the fund and the Commission . . . in accordance with Section 1 of the Secretary-General’s report, and that the Governing Council will be located at the United Nation’s Office at Geneva and that the Governing Council may decide whether some of the activities of the Commission should be carried out elsewhere.” *Id.* The *Secretary’s Report*, *supra* note 1, para. I(C)(5) provides that “[T]he principal organ of the Commission will be a 15-member Governing Council composed of the representatives of the Security Council at any given time.”

43. *Secretary Report*, *supra* note 1, para. I(G)(10). “As the policy-making organ of the Commission, the Governing Council will have the responsibility for establishing guidelines on all policy matters, in particular, those relating to the administration and financing of the Fund, the organization of the work of the Commission and the procedures to be applied to the processing of claims and to the settlement of disputed claims, as well as to the payments to be made from the Fund.” *Id.*

44. *Secretary’s Report*, *supra* note 1, para. I(A)(3). The fund was established as a special account of the United Nations. This fund was to be given all the privileges and immunities that are available under Article 105 of the U.N. Charter.

45. *Id.* para. I(G)(1). Neither will a veto apply to any of the decisions of the Governing Council. If consensus is required for a particular decision and not attained, the matter will be referred to the Security Council on the request of any one member of the Governing Council. *See, e.g.,* Chris Whaling, Note, *Enforcement Against Crimes of Aggression*, 7 INT’L ENFORCEMENT L. REP. 325 (Aug. 1991).

46. *Secretary’s Report*, *supra* note 1, para. 21. “It is recommended that the Commission should entertain, as a general rule, only consolidated claims filed by individual Governments on their own behalf or on the behalf of their nationals and corporations.” *Id.* Each State will aggregate claims and submit them on a consolidated basis. Reparations will be made in lump-sum settlements and each State will be responsible for distributing the proper amount to its citizens. *See, e.g.,* Essaye & Turza, *supra* note 3.

47. The Governing Council will only check some random sample of each claim package presented by a State for their consideration. Most claims will not receive individual attention. It seems as if the onus has been placed on States to eliminate frivolous claims before presenting them to the Compensation Commission. This process seeks to insure that the most urgent claims based on personal losses due to the invasion will be processed quickly. *See, e.g.,* Whaling, *supra* note 45, at 325.

48. The Commissioners are empowered to call expert witnesses or request more evidence if they need it to determine the validity of a claim. Otherwise they will merely verify that the loss was within the meaning of paragraph 16 of Resolution 687—a direct result of Iraq’s unlawful invasion and occupation of Iraq. If the claim meets this threshold, it can then be passed to the Governing Council for final approval and distribution of funds. *Secretary’s Report*, *supra* note 1, paras. 25-26.

tions and nationals.<sup>49</sup> The Commission will then recommend, and the Governing Council will decide, the total amount of available funds to be allocated to each government “[t]aking into account the size of the claims, the scope of the losses sustained by the country concerned and any other relevant factors.”<sup>50</sup>

Individual governments will determine the procedures for consolidating claims.<sup>51</sup> The role of the individual claimant may only relate to the registration, verification and evaluation of the claims.<sup>52</sup> Claims will be assessed by the Commission which will submit them to a panel consisting of three commissioners for verification and evaluation.<sup>53</sup> These commissioners may request additional evidence or hold hearings to determine the merit of each claim or they may make recommendations that will be final and subject only to the Governing Council’s approval.<sup>54</sup> Only during the verification and evaluation stage will individual claimants be called upon to present new evidence.<sup>55</sup> Payments awarded by the Commission go to the government of the state who is then responsible for distributing the funds to the individual and corporate claimants.<sup>56</sup>

The Commission will employ a different mechanism to handle various claims. The Secretary’s Report suggested categorizing claims by type and

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49. It will be for each individual Government to decide on the procedures to be followed internally with respect to the consolidation of the claims. Each State will take into account its own legal system, practice and procedures. *Secretary’s Report, supra* note 1, para. 21.

50. *Secretary’s Report, supra* note 1, para. 28. The Report goes on to say that it might be necessary to create a separate category for Kuwait. The occupation of their country, combined with the bombing of their cities, the advancing coalition troops, and the scorched earth Iraqi retreat took a disproportionately heavy toll on the Kuwaitis. Their losses have been estimated to be in the neighborhood of \$100 billion. The rest of the world also has claims that may surpass that total. *Essaye & Turza, supra* note 3.

51. The Secretary’s Report alludes to the possibility of creating categorizations for the filing of consolidated claims. The report suggests dividing losses by size or by a public versus private distinction. The Governing Council is given wide discretion to decide all the formal requirements for the presentation of a claim. *Secretary’s Report, supra* note 1, paras. 23-24.

52. “The filing of individual claims would entail tens of thousands of claims to be processed by the Commission, a task that could take a decade or more and could lead to inequalities in the filing of claims disadvantaging small claimants.” *Id.* para. 21. The process is going to take several decades to complete anyway, since that is how long it will take for Iraq to come up with the necessary funds to pay claims.

53. *Id.* para. 26. Once it is established that the formal requirements have been met, the claim will be to a verification and evaluation panel. Such panels are “[n]ormally comprised of three commissioners for this purpose.” *Id.*

54. *Id.* Of course, the Governing Council should have the power to decide whether or not the award is warranted. They should be able to return claims to the Commissioners for further review if they desire.

55. *Id.* At this stage in the proceeding, Iraq will be informed of all the claims against it and will have the right to present its comments to the Commissioners. The Report also recommends that the Governing Council decide if the claimant State needs assistance to ensure adequate representation.

56. *Id.* para. 28. Should payments be made in full or should percentages be paid? What is the effect of outstanding obligations from early judgments on later claimants? Will individual States be free to negotiate cents on the dollar agreements with their nationals in order to satisfy that individual?



size.<sup>57</sup> Distinguishing between losses incurred by governments and losses incurred by corporations and nationals might also be useful to expedite the claims process.<sup>58</sup> Priority consideration may be granted to small claims relating to loss of life and personal injury.<sup>59</sup> Certain urgent claimants may have access to an expedited process requiring minimal evidentiary proof.<sup>60</sup> Some claims should be easier to process due to simplicity in documentation as compared to claims with complex legal questions involving multiple parties.<sup>61</sup> Regardless of the size of the controversy, all successful claimants will be vying for the same limited Iraqi oil profits for decades.<sup>62</sup>

One downside of expediting small claims is that it practically guarantees that the limited available funds will be completely depleted before the larger claimants have prepared their cases.<sup>63</sup> Many of these claims will be in the exceptional category.<sup>64</sup> A mechanism for resupplying the fund is currently under consideration. The Secretary's Report suggests several ways to ensure Iraqi payments into the fund including, but not limited to, taking a percentage of Iraqi oil profits and creating an escrow fund into which Iraq will

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57. *Id.* para. 23. For example, claims of personal injury or wrongful death, are distinguishable from claims for property damage, environmental damage or damage due to the depletion of natural resources. The claim could be any size.

58. *Id.*

59. *Secretary's Report*, *supra* note 1, para. 24. The Secretary General believed there was "some merit in providing for a priority consideration of small claims relating to the losses of individuals so that these are disposed of before the consideration of claims relating to losses by foreign Governments and by corporations." *Id.*

60. Whaling, *supra* note 45, at 326-27. Some proposed urgent claims are those seeking a one-time payment as the result of Iraq's invasion of Kuwait who either a) departed from Iraq between August 2, 1991 and March 2, 1991; b) were seriously injured; or c) whose children, spouses or parents died. These claims could be further divided into claimants who will settle for \$2500 and those seeking up to \$100,000. The amount of documentary proof for these claimants will adjust according to the size of the claim. *Id.*

61. Not much more than a death certificate or hospital bills should be required of claimants seeking compensation for wrongful death or personal injury. After a claim is verified, the successful claimant then waits for a pro rata share of a lump-sum payment coming to her State. For major international business transactions the required documentation may not be as clear-cut. Attorneys would almost certainly present large claims to the Commission in order to make sure that the rights of the parties were protected.

62. Whaling, *supra* note 45, at 328. If Iraq owes \$180 billion dollars in total pre-war and post war debt, and if \$7 billion is acquired each year by attaching 30 percent of Iraqi oil profits (if Iraq returns to pre-war export levels) after paying anticipated administrative costs, it will take approximately 30 years before the funds are available to pay the final award. *Id.*

63. Whaling, *supra* note 45, at 327. Claims with complicated documentation will take longer to assemble. Also, if there is a dispute over whether or not the loss has occurred, an evidentiary threshold may appear that will also slow down the claims process. If funds are distributed on a first settled, first paid basis, successful claimants will need to wait until Iraq has placed more money in the escrow fund established in the Secretary's Report.

64. Since exceptional claims are, by definition, the very large and complex claims it follows that it will take longer for the individual claimant to assemble a case. It makes sense that claimants would want to spend more time and resources pursuing a claim worth many millions of dollars rather than if the claim were worth thousands of dollars.

deposit funds.<sup>65</sup>

Controlling trade with Iraq will be essential to ensure that funds are available to pay successful claimants.<sup>66</sup> The capacity of a fund to pay claimants is one measure of the success of a dispute resolution technique.<sup>67</sup> Monitoring the exports of Iraq is the Commission's duty most relevant to the issue of enforcing arbitral awards since some percentage of Iraqi oil exports will finance the Fund.<sup>68</sup> Although the embargo placed on Iraq at the start of the Persian Gulf War has since been eased to allow the Iraqis to purchase medicine, food and other non-military goods,<sup>69</sup> eventually the Iraqis will be able to increase their oil exports to pre-war levels when a compensation mechanism has been set in place.<sup>70</sup> In addition to the role of watchdog of Iraqi trade, the Commission and its Governing Council will take an active role in gathering funds and processing claims against Iraq.<sup>71</sup>

It is estimated that over 10,000 claims will need to be processed due to the Persian Gulf War, including many pre-invasion and exceptional claims.<sup>72</sup> Some claimants who wish to attach some particular Iraqi frozen assets may choose not proceed before the Commission.<sup>73</sup> To bring all such

65. *Secretary's Report, supra* note 1, para. 17. The report suggests the following as a means for ensuring Iraqi payment into the Fund: payment of a fixed percentage of market value of petroleum exports, transferring actual petroleum to the Commission for sale on the open market, establishment of an escrow fund to take lump sum periodic payments, taking a percentage of titles of documents issued in favor of Iraq and depositing the proceeds in an escrow fund.

66. *Id.* para. 16. The Report determined that the Security Council did not intend that Iraqi foreign "frozen assets" would be used to finance the Fund. All U.N. plans to finance awards create a model based on contribution into an account by Iraq of money gained through exportation of oil.

67. *Id.* para. 14. "The arrangements for ensuring payments to the Fund are among the most technical and difficult of the tasks that have been entrusted to the Commission. The decisions taken in this regard will determine, inter alia, the financial viability of the Fund and its capacity to meet the compensation claims decided upon [by] [sic] the Commission as well as the size and organization of the secretariat." *Id.*

68. *Id.* para. 18. "All of these methods [of the payments into the fund] presuppose cooperation by Iraq and strict supervision of the exports of petroleum and petroleum products from Iraq. To this end, the Commission should arrange for appropriate monitoring. Whatever approach is adopted, should Iraq fail to meet its payment obligation, the Governing Council would report the matter to the Security Council." *Id.*

69. U.N. S.C. Res. 687 para. 20, U.N. SCOR, Apr. 3, 1991, 30 I.L.M. 847 (1991). The Security Council decided to modify an earlier prohibition against financial transactions with Iraq to allow trade of foodstuffs and supplies for essential civilian needs in addition to medicine and other health supplies which Iraq had already been permitted to purchase.

70. *Secretary's Report, supra* note 1, para. 19. The Secretary-General did recognize the possibility that it would be some time before the Iraqis were able to resume oil exports to pre-war levels.

71. The respective roles of the Governing Council and the Commission in processing claims, as suggested by the Secretary's Report, appears *supra* notes 41-70 and accompanying text.

72. *See, e.g.,* *Essaye & Turza, supra* note 3.

73. *Secretary's Report, supra* note 1, para. 22. The Report addresses the issue of whether or not the Commission is an exclusive claims procedure forum. The pre-invasion claims which needed to be addressed "through the normal mechanisms" answered the Secretary-General's question. The Report went on to say that Resolution 687 could not establish the Commission as an organ with exclusive competence to consider claims arising from Iraq's unlawful invasion and occupation of Kuwait.

claims into the various courts of the States involved would be overly burdensome on these States' respective legal systems. For example, getting listed on full dockets in the United States' courts would require years for some claimants before they stepped into an effective existing forum. This would also assume that Iraq would accept the jurisdiction of the U.S. courts which is certainly not guaranteed.<sup>74</sup> If U.S. nationals were forced to proceed against Iraq on an individual basis, only the wealthier plaintiffs would likely be able to afford and receive their day in court.

Some claimants with pre-invasion or exceptional claims may need to proceed through the normal channels of their country's legal system.<sup>75</sup> Creating an Iraq-World arbitral panel, though not a normal channel, could effectively administer some claims for parties who were somehow precluded from proceeding before the Commission and wanted to keep the matter out of their domestic courts.<sup>76</sup> In light of the similar circumstances often surrounding these claims, a permanent arbitral panel could facilitate the claims settlement process. Such a panel would assist in decreasing the time and monetary expenses involved in settling claims. A panel of arbitrators which is already aware of the factual circumstances common to all of the Persian Gulf War claims would also diminish the effort ordinarily required in the discovery process. Points common to all claims would not need to be treated anew with each claim. Thus the panel could more quickly direct their attention to issues which distinguish a particular claim from all others. Any such savings in time and effort can translate into lower costs for all involved in processing these claims.

Regardless of the eventual procedure adopted, claims need to be identified now while documents are still intact, witnesses are still alive and before claims grow stale. The Office of Foreign Asset Control (OFAC) will play a major role to that end with respect to claims held by U.S. citizens against Iraq. U.S. claimants are required to register their complaints with OFAC.<sup>77</sup> This governmental agency, integral in the seizure of Iraqi foreign assets located in the U.S., will also have a role in administering those assets. Similar bodies in other States also fill this function or can be created to watch Iraqi assets located within their country and to compile the claims of

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74. Questions of sovereign immunity are certainly germane to the discussion of this comment, but outside its scope.

75. U.N. S.C. Res. 687, U.N. SCOR, Apr. 3, 1991, 30 I.L.M. 847 (1991). See Essaye & Turza, *supra* note 3. Some claimants may seek recourse in their respective national forums. Private arbitration or mediation also count as more normal channels.

76. The difficulty of enforcing a court decision against an unwilling litigant with no *in rem* jurisdiction is one reason for not wanting to proceed unilaterally in one's own domestic forum.

77. Every U.S. citizen with a claim against Iraq that arose prior to January 16, 1991, was required to register their complaint. To achieve this end, OFAC developed Form TDF 90-22.41 complete with instructions for use in reporting information on claims. John Gerald Jr., *Pursuing Claims Against Iraq: Available Options*, 14 MIDDLE E. EXECUTIVE REP., LTD. 9 (June 1991) (LEXIS, Nexis Library, Current file).

that State against Iraq.<sup>78</sup>

All U.S. nationals with an outstanding claim against Iraq as of January 16, 1991, were required to complete a report concerning that claim and file it with OFAC.<sup>79</sup> This action was mandated by the Iraqi Sanctions Regulations, which provide, among other things, for the carrying out of a census of claims against Iraq.<sup>80</sup> The claim may be in relation to losses due to nationalization, expropriation, or other such loss involving property rights, compensation for personal injury or death, losses from breach of contract or default on debts, and any other losses that may be attributable to Iraq or an entity of the government of Iraq.<sup>81</sup> The broad language seems to include even those claims that may have arisen prior to the August 2, 1990, invasion of Kuwait by Iraq in contrast to the language of Resolution 674 which spoke only of injuries "as a result of the invasion and illegal occupation."<sup>82</sup> This language was supported by Resolution 687 which states that claims prior to August 2, 1990, would be "addressed through the normal mechanisms."<sup>83</sup>

In reporting a claim, the claimant must provide details relating to himself and the identification of the Iraqi entity against which the claim is asserted.<sup>84</sup> An estimate of the value of the claim and the circumstances of the loss must also be included.<sup>85</sup> Outside parties who may have an interest in the claim should be identified, as well as any alternative source of compensation available.<sup>86</sup> Any potential counterclaims on the part of the government of Iraq should be described.<sup>87</sup> The party making such a report also must submit a signed good faith certification as to the accuracy and completeness of the report.<sup>88</sup> The deadline for reporting claims was finally set at March 15, 1991.<sup>89</sup> These initial claims were not formal claims against the government of Iraq, but were intended to give the Commission information

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78. *Id.* In the United Arab Emirates, the Ministry of Foreign Affairs and the Federation of the U.A.E. Chambers of Commerce are ensuring that officials in the U.A.E. are notified of claims. One chamber has indicated that there is no particular form for reporting a loss, but a valid report will be signed by the party who suffered the loss, notarized, and accompanied by copies of available supporting documents. The Kuwait Council of Ministers established the Central Committee for the Assessment of damages Incurred by Kuwait from the Iraqi Invasion. This Committee created a claims report form. *Id.* Since awards paid by the Commission will be in the form of lump-sum settlements, States will need to find a way to organize claims that they are submitting for consideration.

79. *Id.*

80. *Id.* Iraqi Sanctions Regulations, 31 C.F.R. § 575 (amended Feb. 11, 1991).

81. Gerald, *supra* note 77.

82. U.N. S.C. Res. 674, U.N. SCOR, Oct. 29, 1990, 29 I.L.M. 1560 (1990).

83. U.N. S.C. Res. 687 para. 16, U.N. SCOR, Apr. 3, 1991, 30 I.L.M. 847 (1991).

84. Gerald, *supra* note 77.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* Though extensions have been granted for a variety of reasons including that the injured party was unaware of the published deadline.

that will enable it to establish its own effective claims mechanism.<sup>90</sup>

As noted, some claims will fall outside the scope of the Commission's mandate. Two categories of claims—exceptional claims involving complex issues and large dollar amounts, and pre-invasion claims—need to be handled through normal mechanisms and are not covered by the language of either the Secretary's Report or Security Council Resolutions. Establishing an arbitral panel specifically to hear these types of claims seems appropriate. An *ad hoc* or institutional arbitral panel would need to have the force of law behind it to make it attractive for parties to voluntarily submit their claim to it. The issue of enforcement would be foremost in the minds of many claimants. The New York Convention and the Model Law may provide the key to independent enforcement of claims that would make creating an *ad hoc* arbitral tribunal viable.<sup>91</sup>

### III. THE NEW YORK CONVENTION AND THE MODEL LAW PROVIDE ENFORCEMENT TO PARTIES ENTERING INTO AGREEMENTS TO ARBITRATE

Enforcement provisions are included in any effective set of arbitral rules.<sup>92</sup> The international effect of an arbitral convention could not be that extreme without the power to enforce decisions rendered pursuant to the rules of that convention. Both the New York Convention<sup>93</sup> and the Model Law<sup>94</sup> devote a great deal of attention to ensuring comity between states and their nationals in the enforcement of arbitral awards. The Secretary's Report specifically mentioned the rules of the Model Law,<sup>95</sup> and the rules of the New York Convention will apply to all its signatory States.<sup>96</sup>

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90. *Id.*

91. For the purpose of enforcing claims by United States citizens for claims arising out of the Persian Gulf War, two recognition and enforcement conventions stand out as most relevant. The New York Convention will apply to agreements to arbitrate entered into by U.S. nationals as the U.S. is a signatory State to that convention. The Model Law was specifically mentioned in the Secretary's Report so it will apply, at least to claims processed by the Commission.

92. An arbitral convention that did not include specific enforcement provisions would have little value, save for domestic use, where enforcement through the courts would be almost automatic.

93. New York Convention, *supra* note 15.

94. Model Law, *supra* note 16.

95. *Secretary's Report*, *supra* note 1, para. 27. "Where a dispute arises out of the allegations made by a claimant that the Panel of Commissioners, in dealing with its claims, has made an error, whether on a point of law and procedure or on a point of fact, such disputes will be dealt with by a board of commissioners who for this purpose should be guided by such guidelines as have been established by the Governing Council and UNCITRAL." *Id.* The paragraph goes on to specifically give the Governing Council the final decision to "modify as necessary" the UNCITRAL rules.

96. The following States are parties to the New York Convention. A (1) signifies that a Contracting State made the reciprocity reservation. A (2) signifies the commercial matter reservation: Australia, Austria (1), Belgium, Benin, Botswana (1-2), Bulgaria (1), Burkina Faso, Byelorussia (1), Cambodia, Canada (1-2), The Central African Republic (1-2), Chile, Columbia, Cuba (1-2), Cyprus (1-2), Czechoslovakia (1), Denmark (1-2), Djibouti, Ecuador (1-2), Egypt, Finland, France (1-2), Germany (1-2), Ghana, Greece (1-2), Guatemala (1-2), Haiti, The Holy

The United States has been a party to the New York Convention since 1970.<sup>97</sup> Consequently, the U.S. is seized with a duty to recognize and enforce foreign arbitral awards when the proper procedure is followed.<sup>98</sup> When adopting the New York Convention, a state is given the opportunity to take reservations—one on reciprocity and another for limiting the Convention's effectiveness to commercial disputes.<sup>99</sup> The U.S. availed itself of both reservations when it ratified the New York Convention.<sup>100</sup>

The first reservation of the New York Convention, the reciprocity reservation, would require a State to recognize and enforce only those awards rendered in another Contracting State.<sup>101</sup> Thus, if the arbitration panel is established in a Contracting State, all other Contracting States would be required by the New York Convention to recognize and enforce the panel's awards. Currently, New York is the proposed site for the Commission to base their operations, with Geneva and Vienna acting as backup locations.<sup>102</sup> The United States, Switzerland and Austria are signatory States

See (1-2), Hungary (1-2), India (1-2), Indonesia (1-2), Ireland (1), Israel, Italy, Japan (1), Jordan, Korea (1-2), Kuwait (1), Luxembourg (1), Madagascar (1-2), Malaysia (1-2), Mexico, Monaco (1-2), Morocco (1), The Netherlands (1), New Zealand (1), Niger, Nigeria (1-2), Norway (1), Panama, The People's Republic of China (1-2), The Philippines (1-2), Poland (1-2), Romania (1-2), San Marino, Singapore (1), South Africa, Spain, Sri Lanka, Sweden, Switzerland (1), Syria, Tanzania (1), Thailand, Trinidad & Tobago (1-2), Tunisia, The Ukraine, The U.S.S.R. (1), The United Kingdom (1), The United States (1-2), Uruguay and Yugoslavia (1-2). See U.S. DEPARTMENT OF STATE, TREATIES IN FORCE 212 (1986).

97. 9 U.S.C.A. § 201 (West Supp. 1991). "The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter." *Id.*

98. New York Convention, *supra* note 15, art. 3. "Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition and enforcement of arbitral awards to which this Convention applies than are imposed on the recognition and enforcement of domestic arbitral awards." *Id.*

99. New York Convention, *supra* note 15, art. I sec. 3. "When signing, ratifying or acceding to this Convention, . . . any State may declare on the basis of reciprocity that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration." *Id.*

100. 9 U.S.C.A. § 201 (West Supp. 1991).

101. New York Convention, *supra* note 15, art. I sec. 3. This means that the arbitral body must be centered in a Contracting State in order for the award rendered by such a body to enjoy the full enforcement protection of the New York Convention. A States that did not avail itself of the reciprocity reservation would be bound to recognize an arbitral award if it was otherwise valid. States that took the reciprocity reservation would not be treaty bound to recognize and enforce awards rendered in a State that was not a party to the Convention.

102. *Secretary's Report*, *supra* note 1, para. 9. The Secretary General specifically suggested three places for the center of the Commissions' activity. "For reasons of economy and practicality, particularly in the secretariat servicing of the Governing Council and the commissioners, the headquarters of the commission should be in New York. Alternatively, it might be located at the site of one of the two offices of the United Nations in Europe, *i.e.* Geneva or Vienna. The Governing Council may decide whether some of the activities of the Commission should be carried out elsewhere." *Id.* Notice the latitude that is available for the creation of subsidiary dispute resolution forums to supplement the Governing Council.

to the New York Convention, so enforcement should be automatic even in States availing themselves of the reciprocity reservation.<sup>103</sup> Since the Model Law was mentioned specifically in the Secretary's Report, it will automatically be used to help enforce awards.<sup>104</sup> Award recipients will also be able to avail themselves of contractually established recognition and enforcement provisions.<sup>105</sup> Since the signatories of the New York Convention represent all major countries of the West and all of the Eastern European countries, the likelihood that Iraq's foreign assets will be found in them is increased.<sup>106</sup> These signatory States account for a very large percentage of world exports and imports.<sup>107</sup>

The second reservation of the New York Convention allows a State to declare that it will "apply the Convention only to differences arising out of legal relationships . . . which are considered as commercial under the national law of the State making such declaration."<sup>108</sup> The potential for conflict may arise if States give a narrow interpretation to the word "commercial." If this were to happen, the range of awards to be enforced by the New York Convention would be narrowed. Consequently, these claims would need to be handled under the auspices of the Governing Council because such claims would be improper for the proposed Iraq-World arbitral panel due to their lack of independent enforceability.<sup>109</sup> A claimant

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103. See *supra* note 96, for a list of signatory States.

104. *Secretary's Report*, *supra* note 1, para. 27. The Governing Council has wide discretion to create its own guidelines and to use the Rules of the Model Law when it needs to settle a dispute. See *supra* note 95, for the text of paragraph 27 of the Secretary's Report.

105. If the ideas of the Secretary's Report were turned into a written agreement to arbitrate, then the Model Law and the New York Convention would apply to the recognition and enforcement decisions of the body which is created to adjudicate the claims. The Model Law would apply by reference. The New York Convention would apply by treaty.

106. Ramona Martinez, Comment, *Recognition and Enforcement of International Arbitral Awards Under The United Nations Convention of 1958: The "Refusal" Provisions*, 24 INT'L LAW. 487, 493 (1990). Many nations had heavy trade ties to Iraq preceding the Persian Gulf War. Images of centrifuges capable of manufacturing fissionable material being destroyed aired on CNN for sometime after the war ended. These centrifuges of Western origin, are a good example of the extent of the resources that Iraq was able to amass before the invasion of Kuwait.

107. See *supra* note 96. This is, of course, an understatement. Besides Europe and North America, all major Pacific Rim trading powers are also Contracting States of the New York Convention. Since Iraq and some other Middle Eastern countries are not parties to the New York Convention, one would need to find another basis to justify enforcement in those States other than duty imposed by a previous treaty. Reference to UNCITRAL in the agreement may gain access to the foreign assets of Iraq that are located in non-signatory States.

108. The New York Convention, *supra* note 15, art. I, sec. 3. See *supra* note 99 for the actual text. This provision of the New York Convention will require a reviewing court to determine if the claim is commercial under the laws of the State seeking to enforce the award. For States not availing themselves of this second reservation, the award can be enforced if the agreement to arbitrate was valid and no grounds to refuse enforcement have been shown.

109. Actions arising solely out of tort with no issue of prior insurance is an example of a claim that could not be enforced through the New York Convention by a country taking the "commercial" reservation of Article I section 3. These claims would be better handled through the Compensation Commission described by the May 2, 1991, *Secretary General's Report*, *supra* note 1. There would be no conflict if the State where enforcement was sought did not avail itself of the commercial reservation.

proceeding before an arbitral body that cannot guarantee some extent of enforcement, is exposing herself to risk of non-enforcement.<sup>110</sup> Most States give a broad meaning to the term "commercial" preferring to limit the arbitrability of the matter under their laws rather than exclude the matter entirely due to a strict definition of the word "commercial."<sup>111</sup> For a State which did not avail itself of this second reservation, all matters arbitrable under its laws could be considered, recognized and enforced.

The Model Law takes the reservations of the New York Convention and incorporates them directly.<sup>112</sup> The Model Law does not provide the chance for reservation. The commercial reservation is incorporated directly into the Model Law which declares that it "[a]ppplies to international commercial arbitration."<sup>113</sup> The reciprocity reservation is not particularly relevant since the Model Law theoretically applies to "[a]ny agreement in force between this State and any other State or States."<sup>114</sup> The U.N. General Assembly has recommended applying the Model Law in the settlement of any international, commercial dispute.<sup>115</sup> Both "international" and "commercial" have special meaning in the context of the Model Law.

The requirement that the arbitration be "international" can be met in a

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110. One peril would be if the court in the State where enforcement was sought, refused to recognize and enforce the arbitral decision. This would be unpleasant if one is trying to attach particular goods in a State. However, the person who was rejected in one forum would not be precluded from trying to attach foreign assets in another State. This is true especially if the award was validly rendered, and the court which refused enforcement did so on arbitrary or unreasonable grounds, not grounded firmly in international law.

111. See, e.g., Kenneth T. Ungar, Note, *The Enforcement of Arbitral Awards Under UNCITRAL's Model Law on International Commercial Arbitration*, 25 COLUM. J. TRANSNAT'L L. 717, 727 (1987). A narrow construction of the term "commercial" would narrow the application of the New York Convention thus limiting its effectiveness. Most States give an expansive definition to the realm of "commercial disputes," preferring to preserve the right to interpret the decision under their laws rather than refusing jurisdiction.

112. Model Law, *supra* note 16, art. I(1) states under the general heading of scope of application that "[t]his Law applies to international commercial arbitration subject to any agreement in force between this State and any other State or States." The reciprocity reservation really does not apply since the Model Law will apply to *any* agreement in force between *any* States. The Model Law seems almost to be an attempt by its drafters to rapidly crystalize into custom the practice of enforcing awards rendered pursuant to a validly made agreement to arbitrate.

113. *Id.* The word commercial is an integral element of the Model Law which can be made less restrictive if a State purposefully gives it a broad meaning.

114. See, e.g., Ungar, *supra* note 111. On December 11, 1985, the General Assembly suggested that all member States adopt the Model Law as their domestic law regulating the conduct of international commercial arbitration. U.N. G.A. Res. 72, U.N. GAOR, Supp. No. 53, U.N. Doc. A/40/53 (1985).

115. Model Law, *supra* note 16. On December 15, 1976, the U.N. General Assembly unanimously recommended "[t]he use of the United Nations Commission on International Trade Law in the settlement of disputes arising in the context of international commercial relations, particularly by reference to the Arbitration Rules in commercial contexts." G.A. Res. 31/98, U.N. GAOR, Supp. No. 39, at 182, U.N. Doc. A/31/39 (1976); G.A. Res. 31/98, U.N. GAOR, Supp. No. 17, at 57, U.N. Doc. A/31/17 (1976).



variety of ways.<sup>116</sup> Under the Model Law, if the parties to the arbitration agreement have their places of business in different States then the arbitration is international.<sup>117</sup> The arbitration is also deemed international if the place of arbitration is situated outside the State in which the parties have their places of business.<sup>118</sup> If any place where the commercial relationship was to be performed, or the place where the subject-matter of the dispute is most closely connected, is outside the State in which the parties have their places of business, then the arbitration is also found to be international.<sup>119</sup> Finally, the parties could expressly agree that the subject matter of the arbitration agreement relates to more than one country.<sup>120</sup>

The international requirement of the Model Law should be easily met for processing claims arising out of the Persian Gulf War. Most claims will fall into the category of claims between parties with places of business in different States.<sup>121</sup> In fact, the only claims which would not fit into this

116. Model Law, *supra* note 16. The definition of "international" with respect to the Model Law is contained in art. 1(3) which reads:

Article 1. Scope of Application . . .

(3) An arbitration is international if:

- (a) the parties to an arbitration agreement have, at the time of the conclusion of the agreement, their places of business in different States;
- (b) one of the following places is situated outside the State in which the parties have their places of business:
  - (i) the place of arbitration of determined in, or pursuant to, the arbitration agreement;
  - (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or
- (c) the parties have expressly agreed that the subject-matter of the arbitration relates to more than one country.

117. *Id.* art. 1(3)(a). art. 1, sec. 4 modifies art. 1, sec. (3) stating:

(4) For the purposes of paragraph (3) of this article:

- (a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;
- (b) if a party does not have a place of business, reference is to be made to his habitual residence.

118. *Id.* art. 1, sec. 3(b)(i). This provision allows an agreement to arbitrate to become international by virtue of the forum where the disputants have chosen to settle their claim. Thus, two parties could turn what might have been a domestic dispute into an international one by choosing to arbitrate in some different State. Such might be the case for parties who bring their dispute to an established arbitration center, known for its fairness, which happens to be located outside of their home State.

119. *Id.* art. 1, sec. 3(b)(ii). This could be a scenario where contractor and sub-contractor came from the same State and were performing their contract in a second State and the breach occurs because of events in the second State. Since the place for performance is closely connected with the dispute, this claim would probably be considered "international" for the purposes of the Model Law.

120. *Id.* art. 1, sec. 3(c). This is a catch-all clause. If the parties truly saw some benefit by bringing their claim under international law, absent an outright fraud, the parties could make it so by their mutual consent.

121. Most claimants will be proceeding against Iraq for their various tort, contract and property claims. For now, Iraqi nationals who have no dual citizenship, would be the group with the most difficulty bringing a claim against Iraq.

category would be those by parties situated in the same State and the basis of the dispute also happened in that State. Parties with this sort of claim may need to proceed in a domestic forum.<sup>122</sup> These parties may still get around the international requirement if the arbitration panel was located outside their State, or if the subject-matter of the dispute was located outside their country.<sup>123</sup>

The term commercial as defined by the Model Law is given a very broad interpretation applying "to all relationships of a commercial nature whether contractual or not."<sup>124</sup> The drafters of the Model Law seemingly try to establish jurisdiction over virtually any type of commercial activity.<sup>125</sup> Further, if a party truly wanted to enforce an arbitral award by invoking the Model Law, most claimants could creatively construe their claim to fall into some category of commercial activity. To aid in finding out if an arbitral tribunal does have jurisdiction, the drafters of the Model Law provided arbitrators with the jurisdiction to rule on this question.<sup>126</sup>

Consent of the parties to arbitration is essential to finalize the agreement. Written consent to arbitration is necessary for recognition and enforcement of an award under the New York Convention and the Model Law.<sup>127</sup> The New York Convention provides that Contracting States shall recognize an

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122. This sort of forum shopping is just mentioned as an aside. Parties are certainly free to pursue claims in their domestic courts or perhaps enter into an agreement to arbitrate. As mentioned previously, the Commission set up by the Secretary General is non-exclusive.

123. Model Law, *supra* note 16, art. 1(3) and 3(c). For text of current article, see *supra* note 116. If parties come to an agreement that their dispute is international, it is more likely than not that they will find a forum to hear them. Evidencing such an agreement in a writing would probably satisfy the international requirement of the Model Law.

124. Model Law, *supra* note 16. *But see* 24 I.L.M. 1302 which states that "[r]elationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or the exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road."

125. Model Law, *supra* note 16. It is consistent with the plain meaning of the Model Law and the intent of its drafters to have it apply to as many situations as possible. If an international event is even remotely commercial (perhaps even because there was an insurance policy), the Model Law will apply to the recognition and enforcement of an arbitral decision rendered with respect to that event.

126. Model Law, *supra* note 16, art. 16(1). "The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement." *Id.* The article goes on to hold that even if the arbitrator finds that no contract exists, the arbitration clause is not *ipso jure* invalid.

127. New York Convention, *supra* note 15, art. 2(1). "Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration." Model Law, *supra* note 16, art. 7(2). "The arbitration agreement shall be in writing." A writing evidencing an agreement to arbitrate is a minimum threshold to trigger either the New York Convention or the Model Law.

agreement in writing under which parties undertake to submit to arbitration.<sup>128</sup> The New York Convention also provides for a stay of court proceedings in a Contracting State at the request of a party who can show that his agreement to arbitrate is valid.<sup>129</sup> Reciprocity reservation aside, the New York Convention does not expressly mention that both or either party to the dispute need be nationals of Contracting States to avail themselves to the enforcement provisions.<sup>130</sup> As long as an agreement in writing exists between the parties going to arbitration, absent a valid defense, the courts in the States that are signatories of the New York Convention are bound by treaty to recognize the award or allow the arbitration to proceed.<sup>131</sup>

The Model Law declares succinctly that “[t]he arbitration agreement shall be in writing.”<sup>132</sup> A writing can be found in anything from a letter to the most recent development in telecommunications.<sup>133</sup> The Model Law provides that an agreement to arbitrate could be found by silence if one was under a duty to deny that such an agreement had been validly reached.<sup>134</sup> The Model Law gives broad range to the form of an agreement to arbitrate which “may be in the form of an arbitration clause in a contract, or in a

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128. New York Convention, *supra* note 16, art. 2(1). According to art. 2(2), an “agreement in writing” includes “an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.” This emphasizes that the writing requirement is not held to a rigid standard. If the New York Convention was drafted today, it would probably contain a telecommunication catch-all like the Model Law.

129. New York Convention, *supra* note 15, art. 2(3). “The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, at the request of one of the parties, refer the parties to arbitration unless it finds that the said agreement is null and void, inoperative or incapable of being performed.” *Id.*

130. This is important in the Persian Gulf scenario considering that Iraq, the State most claimants will be proceeding against, is not a signatory of the New York Convention. Although the Convention would not independently compel Iraq’s courts to recognize and enforce awards, the courts in Contracting States would feel that compulsion.

131. *Id.* art. 2(1). Valid defenses of the New York Convention are the “refusal” provisions of Article V. These are discussed in greater detail *infra* notes 147-91 and accompanying text.

132. Model Law, *supra* note 16, art. 7(2). The written agreement must be a signed document “or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defen[s]e in which the existence of an agreement is alleged by one party and not denied by the other. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make the clause part of the contract.” *Id.*

133. *Id.* The language of the Model Law is sufficiently vague to avoid becoming obsolete with the invention of each new office gadget.

134. *Id.* If a written communication contains an allegation that there was an agreement to arbitrate, then a denial is necessary. Failure to deny could transform the allegation into an agreement in writing under the Model Law. The individual arbitrator(s) must decide the validity of the arbitration agreement based on the facts and evidence that they are presented. If a court is deciding a declaratory judgment action on whether an agreement to arbitrate is valid, the same kinds of considerations would be examined.

separate agreement.”<sup>135</sup> The Model Law further provides that “[a]n arbitral award, irrespective of the country in which it was made, shall be recognized as binding.”<sup>136</sup> This highlights a difference with the New York Convention which only applies to the recognition and enforcement of foreign awards.<sup>137</sup> The Model Law seems to have a broader scope than the New York Convention in that it also applies to enforcement in the state where the award was rendered.<sup>138</sup> However, as we have seen, both the New York Convention and the Model Law have application in the enforcement of claims of the proposed Iraq-World arbitral panel. These sets of rules are not exclusive of each other and can be used in conjunction. Where treaties agree, both can be applied.<sup>139</sup>

If a large scale arbitral panel was established to process the claims of the world against Iraq arising out of the Persian Gulf War, the New York Convention and the Model Law could be employed to aid with enforcement. Ultimately, whether the center for the arbitration is New York, Geneva, Vienna or the Hague should not effect whether or not successful claimants are compensated for their damages.<sup>140</sup> Literally, the New York Convention applies only to enforcement of awards outside of the State where the award

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135. Model Law, *supra* note 16, art. 7(1). An arbitration agreement “is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship whether contractual or not.” *Id.* Including a dispute resolution clause in any contract is essential, especially for an international business transaction (or a pre-nuptial agreement). Choice of forum, choice of law, and even choice of individual arbitrators can be included to avoid jurisdiction difficulties and to commence the suit soon after the dispute arises.

136. *Id.* art. 35(1). The award, and by analogy, the agreement to arbitrate are recognized, if valid, upon application to a competent court.

137. New York Convention, *supra* note 15, art. I(1) provides that it applies to “the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought.” Article I, Section 1 goes on to say that the Convention will “apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.” For the purposes of arbitral award enforcement provisions, this seems to define foreign as either made in another territory and not entirely domestic. The New York Convention will apply to those foreign arbitral awards.

138. Model Law, *supra* note 16, art. 35(1).

139. Vienna Convention on the Law of Treaties, art. 30(3), U.N. Doc. A/CONF. 39/27, 63 A.J.I.L. 875, 8 I.L.M. 679 (1969). When all the parties to the earlier treaty are also parties to the later treaty, but the treaty is not terminated or suspended . . . , the earlier treaty only applies to the extent that its provisions are compatible with those of the later treaty. New York Convention, *supra* note 15, art. 7. “The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreement concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.”

140. The New York Convention would apply to all the Contracting States if the Arbitration center is one of the cities mentioned in the *Secretary’s Report*, *supra* note 1, para. 9. The Model Law will apply both by reference and by custom. The drafters of the Model Law seemed to believe that any valid agreement to arbitrate and any valid arbitral award should be upheld by the courts. Perhaps a duty to recognize and enforce foreign arbitral awards has become an international custom.

was rendered.<sup>141</sup> Because countries will be required to contribute to the fund, the arbitral tribunal seems to take on an anational demeanor—not truly affiliated with any country in particular—as the funds are transferred to the Commission.<sup>142</sup> The country where the arbitration panel will sit could easily deposit their funds with the Commission with the intent to withdraw all or part of their contribution as they win awards.<sup>143</sup> With the funds located outside of the country in which the arbitral panel sits, such country could apply for compensation in a manner like any other nation. Though it seems odd to resort to a legal fiction, there is at least, an enforcement mechanism available for all states and nationals with claims.

The language used to describe how awards are recognized is nearly identical in both the New York Convention and the Model Law. The party seeking enforcement of the arbitral award is required to submit either the original award or a duly authenticated copy of the award to the proper court in the country where he is seeking enforcement.<sup>144</sup> That party is also required to have the award translated into the language of the country where he is seeking enforcement.<sup>145</sup> A United States “court shall confirm the

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141. New York Convention, *supra* note 15, art. I(1). The New York Convention applies “to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought.” *Id.* Literally, the scenario contemplated by the drafters of the New York Convention is of a person getting a favorable decision in State A and seeking to enforce it in State B.

142. Despite fears that if an award does not have a nationality, it could not be enforced, viewing an award as anational may have advantages. Calling an award national allows arbitrators to interpret the intent of the parties to arrive at the law to use, rather than using domestic law as a gap-filler for the agreement to arbitrate. The down-side would be that it may be easier to enforce an award if it was valid under the law of the country where the arbitration panel sat. Had there been any procedural problems during the proceeding, local rules could have stepped in. Also, some States are now creating special statutes that cover international commercial arbitration held in their country which exclude peculiar local norms. David D. Caron, *The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution* 84 AM. J. INT’L L. 104, 119 (1990).

143. Considering the anational flavor of the arbitral panel itself, to force the country where the arbitral tribunal sat to send Iraqi assets out of their country, only to retrieve them at a later date, seems to perpetuate a legal concern of the drafters of the 1958 New York Convention. Possibly, Article I, Section 1 was drafted to avoid collusion between domestic arbitrators and judges who may be called upon for writs of execution. The need to get parties properly on the way to compensation seems to outweigh these concerns in our context, as most nations are working for a similar goal of making Iraq pay for their aggression. Still, no matter how much paternalistic legal systems may try to favor their own nationals, the procedures in the current conflict will be handled under the auspices of the United Nations.

144. New York Convention, *supra* note 15, art. IV, secs. 1(a) and 1(b); Model Law, *supra* note 15, ch. VIII, art. 35(2). In the words of the Model Law, the party applying for recognition and enforcement shall supply “the duly authenticated original award or a duly authenticated copy thereof, and the original arbitration agreement . . . or a duly certified copy thereof.” The words are similar in the New York Convention.

145. New York Convention, *supra* note 15, art. IV(2). “If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomat or consular agent.” *Id.* In simpler language, the Model Law, *supra* note 16, art. 35(2), provides “[i]f the award or agreement is not made in an official language of this State, the party shall supply a duly certified translation thereof into such language.”

award unless it finds one of the grounds . . . specified in the [New York] Convention."<sup>146</sup>

The above discussion of what claims can be arbitrated under the New York Convention and the Model Law establishes the foundation for a discussion of their actual enforcement provisions. The authors of the Model Law closely paralleled the language of the New York Convention when drafting their enforcement provisions.<sup>147</sup> Analysis of the similarities and differences of the provisions of these two conventions that speak solely to the issue of enforcement now follows.

#### IV. GROUNDS FOR REFUSING TO ENFORCE AWARDS UNDER THE MODEL LAW AND THE NEW YORK CONVENTION

Article V of the New York Convention lists the grounds upon which a Contracting State may refuse to recognize or enforce an arbitral award which is otherwise in compliance.<sup>148</sup> Corresponding refusal provisions are contained in Article 36 of the Model Law.<sup>149</sup> It is worth noting that both sets of rules use the word "may" when stating the grounds on which a country can refuse enforcement. By using "may," the drafters of the New York Convention and the Model Law have given the courts of the State where recognition is sought, some discretion in deciding whether or not to enforce a given award.<sup>150</sup> Thus, even if a court noted some minor abuse,

146. 9 U.S.C. § 207 (1976). This section provides in whole that

[w]ithin three years after an arbitral award falling under the convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm that award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.

147. The drafters of the Model Law hoped to create a system that would provide for the "uniform treatment of all awards irrespective of their country of origin." *Report of United Nations Commission on International Trade Law*, 40 U.N. GAOR, Supp. No. 17, U.N. Doc. A/40/17 (1985), 24 I.L.M. 1314 (1985). The New York Convention provided a generally satisfactory means of enforcing awards, but not every State has ratified or acceded to the Convention. To obtain this goal, the New York Convention's recognition and enforcement mechanisms were nearly reproduced by the corresponding provisions of the Model Law. *See, e.g., Ungar, supra* note 111, at 719.

148. New York Convention, *supra* note 15, art. V. Recognition and enforcement may be "refused" by the courts of a Contracting State only if proof of one or more of the grounds enumerated in Article V of the New York Convention are shown to exist. The discussion of these refusal provisions will be interspersed with discussion of the corresponding provisions of the Model Law.

149. Model Law, *supra* note 16, art. 36. This is the Article of the Model Law that corresponds with the refusal provisions Article V of the New York Convention. "Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only" if one or more of the defenses enumerated in Article 36 are shown. This same language that takes away the reciprocity reservation of the New York Convention also defines the permissive reasons a court can use to refuse to enforce awards.

150. By using "may" in Article V of the New York Convention, *supra* note 15; Model Law, *supra* note 16, art. 36. The drafters gave judges the opportunity to give as much power to the enforcement conventions as the laws of that State allows.

it could still enforce the award if they thought the outcome fair. U.S. Courts have a predisposition towards upholding the validity of arbitral agreements and their awards.<sup>151</sup> The refusal provisions of the New York Convention and the Model Law profess to provide the only ways in which a court may overturn an otherwise valid arbitral award.<sup>152</sup>

Incapacity to enter into an arbitration agreement is one way under the New York Convention that an arbitral award will not be enforced.<sup>153</sup> If the agreement to arbitrate was invalid under the law the parties have subjected themselves, then a State may also refuse to enforce the award.<sup>154</sup> Likewise, if the award is not valid under the law of the country where the arbitration took place, then States may refuse to enforce the award.<sup>155</sup> This first refusal provision renders an award unenforceable if there was not a valid arbitration agreement between the parties. To date, the invalidity defense has not been raised in litigation in an American court.<sup>156</sup>

The Model Law also authorizes refusal on the grounds of incapacity or invalidity under the choice of law of the parties or of the State where the

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151. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 639 (1985). In *Mitsubishi*, the Supreme Court of the United States reversed the First Circuit Court of Appeals by upholding an agreement to arbitrate despite the unauthorized raising of an antitrust issue. Since the United States has accepted the New York Convention in the Federal Arbitration Act, 9 U.S.C. §§ 201-208, national courts are required to rise above old hostilities towards arbitration and to "subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration."

152. New York Convention, *supra* note 15, art. V(1); Model Law, *supra* note 16, art. 36(1). The drafters of the Model Law chose to mirror the New York Convention's use of the word "only" when deciding on the grounds for refusal of enforcement listed in Article 36. Limited grounds for appeal may actually make arbitral awards easier to enforce than judicial decisions where the whole gamut of defenses and legal arguments could be asserted.

153. New York Convention, *supra* note 15, art. V(1)(a). Recognition and enforcement of an arbitral award may be refused by a competent authority if proof is shown that the parties were "under law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made." *Id.*

154. *Id.* For claims seeking enforcement in the U.S., "[t]he Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24-25 (1983). The parties' intentions control as in any contract, but those intentions are generously construed on issues of arbitrability. *Mitsubishi*, 473 U.S. at 626.

155. For U.S. citizens, almost any matter, unless expressly prohibited by statute can be brought to arbitration. For international agreements to arbitrate may allow matters to go to arbitration that would have required a judicial proceeding had the conflict been purely domestic. "Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Mitsubishi*, 473 U.S. at 628.

156. See *Martinez*, *supra* note 106, at 498. The Supreme Court has ruled that the validity of a contract is for the arbitrator to decide. *Prima Paint Corp. v. Flood and Conklin Mfg. Co.*, 388 U.S. 395 (1967). It is difficult to think of a case where the invalidity of the arbitration agreement could be raised on appeal if the court will make a presumption that the arbitrator was correct when she ruled on the validity of the contract.

arbitration took place.<sup>157</sup> As with awards granted under the New York Convention, incapacity and invalidity defenses have never been successful.<sup>158</sup> As with most of the refusal provisions of the Model Law, the language closely parallels that of the New York Convention. This gives an impression that the drafters of the Model Law wanted to make their law easy to accept for States already party to the New York Convention.

Refusal to enforce an arbitral award is also extended under the New York Convention and the Model Law to situations where the party against whom the award is rendered was not given proper notice of the proceedings or of the appointment of arbitrators.<sup>159</sup> If a party is unable to present its case, then enforcement of an arbitral award can also be refused.<sup>160</sup> The language of the Model Law is identical to that of the New York Convention on these points.<sup>161</sup> The current article seems to be an attempt by the drafters of the Conventions to guarantee procedural due process for persons opposing enforcement of an arbitral award.<sup>162</sup> When creating an ad hoc arbitral tribunal to process claims arising out of the Persian Gulf War, only claims where both sides have fair opportunity to be heard should be considered. Successful claimants would then enjoy the benefit of the enforcement provisions of the Model Law and the New York Convention.<sup>163</sup>

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157. Model Law, *supra* note 16, art. 36(1)(a)(i). An award may be refused if proof is shown a party "was under some incapacity; or the said agreement [to arbitrate] is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made." See New York Convention, *supra* note 15, art. V(1)(a).

158. Ungar, *supra* note 111, at 746. See ALBERT VAN DEN BERG, *THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION* 277 (1981). The incapacity defense has not been invoked before the courts so far. Article 36(1)(a)(i) of the Model Law "has scarcely ever been invoked, and never successfully" to invalidate an agreement to arbitrate. *Id.* at 282.

159. New York Convention, *supra* note 15, art. V(1)(b). Recognition and enforcement can be refused upon proof that "[t]he party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case." The use of the word "proper" may preserve an incapacity defense. Martinez, *supra* note 106, at 499. See U.N. Doc. No. E/CONF. 26/SR.17, at 9, 14 (1958). "Proper" also helps to guard against improper representation. Ungar, *supra* note 111, at 747.

160. The inability to present the case should be a physical barrier, not just a choice not to participate in the proceedings. Some barriers may be inability to obtain a travel visa, force majeure or other special circumstance. See Ungar, *supra* note 111, at 747. See also Martinez, *supra* note 106, at 499.

161. Model Law, *supra* note 16, art. 36(1)(a)(ii). Once again, the drafters of the Model Law appear to have made an attempt to make enforcement of international arbitral awards fair and closely linked to the New York Convention. Those seeking to overturn an arbitral are granted some degree of procedural fairness. See Ungar, *supra* note 111, at 746.

162. Model Law, *supra* note 16, art. 16(1)(a)(ii). This appears to be an explicit right to due process. Since the U.S. Constitution guarantees due process, it is not surprising that an arbitration convention accepted as law in the United States would guarantee a similar right.

163. This is in slight contrast to the Compensation Commission envisioned in the *Secretary's Report*, *supra* note 1, para. 26, which will be handling claims by making lump-sum payments to States. "Iraq will be informed of all claims and will have the right to present its comments to the commissioners within time-delays to be fixed by the Governing Council or the Panel



Under both the New York Convention and the Model Law, a State may refuse to recognize and enforce an arbitral award if the dispute falls outside the terms of the parties' agreement to arbitrate.<sup>164</sup> Likewise, a reviewing court may refuse to enforce decisions that fall outside the scope of the submission to arbitration.<sup>165</sup> If there are elements of an award that are enforceable and some that are not, if a part within the contemplation of the parties is severable, such part may be recognized and enforced.<sup>166</sup> The courts will invoke this refusal provision only when the arbitrator has clearly exceeded his authority since a narrow construction most closely comports with the "enforcement-facilitating thrust of the [New York] Convention."<sup>167</sup> This provision helps to insure that awards which a party seeks to have enforced were arrived at in a consensual proceeding.<sup>168</sup> In effect, the court leaves it to the arbitrator to determine if the subject matter is within the scope of her authority.<sup>169</sup> Since the proposed claims tribunal will be non-exclusive and consensual, the parties will be given the opportunity to decide

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dealing with the individual claim." *Id.* The proposed Iraq-World arbitral panel would require more participation by the individual claimants as the claims relegated to these proceedings would be, by their nature as exceptional claims, very large and complex.

164. Enforcement may be refused if "[t]he award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced." Model Law, *supra* note 16, art. 36(1)(a)(iii); New York Convention, *supra* note 15, art. V(1)(c).

165. *Id.* The parties will be held to their agreement to arbitrate, but an arbitrator cannot wield more power than the parties are willing to give her. An award on a matter not within the contemplation of the parties in their submission to arbitrate, may not be enforced by a reviewing court.

166. *Id.* Deciding how to separate an award into constituent enforceable and unenforceable bits, would be a challenge. Neither Convention specifies what law would govern severability of issues, but one approach might be to look to the law chosen by the parties, or by looking to the law of the State where the award was made. *See* Martinez, *supra* note 106, at 500. The proposed Iraq-World arbitral panel will require parties to decide on choice of law between them, or failing that, the arbitrators deciding between them the law that is to apply.

167. *Parsons and Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier*, 508 F.2d 969, 976 (1974) [hereinafter RAKTA]. In RAKTA, the Second Circuit court of appeals enforced the arbitrators award even though the arbitral award included loss of production costs which were expressly excluded by the terms of the contract in the section concerning liability of the parties. The court accepted the arbitrator's interpretation of the terms of the contract when it is "not apparent" that the scope of the submission to arbitration has been exceeded.

168. *See, e.g., Ungar, supra* note 111, at 748. Model Law, *supra* note 16, arts. 36(1)(a)(i) and 36(2)(a)(iii); New York Convention, *supra* note 15, arts. V(1)(a) and V(1)(c), help to preserve the consensual nature of the arbitration. Parties can specify from the outset which dispute between them they wish to submit to arbitration. Perhaps there can be a scenario where a claimant needs to proceed in one forum for one claim and a different forum for another claim. This is the effect that would be felt if the reviewing body decided that some part of the arbitrators decision was within the agreement to arbitrate and some of it was not.

169. *See* Martinez, *supra* note 106, at 502-03. At least one U.S. Court has stated that it preferred not to try to substitute its judgment for that of the arbitrators. *Fertilizer Corp. of India v. IDI Management, Inc.*, 517 F. Supp. 948, 960 (S.D. Ohio 1981). Trying to get a court to reconstruct the agreement to arbitrate on review is "an activity wholly inconsistent with the deference due arbitral decisions on law and fact." RAKTA, 508 F.2d at 976.

which matters they would like settled there. The defense that the matter is outside the scope of submission to arbitration will not likely be raised in a court reviewing awards of the proposed claims tribunal.

If the arbitral procedure is not in accordance with the agreement of the parties or the law that they have subjected themselves to, then a court may refuse to enforce the award.<sup>170</sup> This provision gives the parties to an arbitration agreement some control over procedure.<sup>171</sup> The parties are given the chance to decide how the arbitration should take place and what the applicable law will be. One reason why this defense is not often raised stems from the wide discretionary powers that arbitrators have with respect to the conduct of the arbitral procedure.<sup>172</sup> Even minor procedural deficiencies will not prove fatal to the recognition and enforcement of an arbitral award.<sup>173</sup> In the proposed claims tribunal, the parties will need to agree in advance what law will apply for resolving their dispute and choosing arbitrators. This will circumvent the difficulty of parties attempting to overturn the award on procedural grounds. A party that consents to a particular procedure should not be heard to complain of its application when the dispute settlement procedure he chose reaches an adverse result.

A State may refuse to recognize and enforce an award if the award has not yet become binding on the parties.<sup>174</sup> If the award is invalid under the law of the State where the award was made, or a court in that State has set aside the award, then enforcement may also be refused.<sup>175</sup> Neither the New York Convention or the Model Law give a clear definition of the word

170. New York Convention, *supra* note 15, art. V(1)(d); Model Law, *supra* note 16, art. 36(1)(a)(iv). The reviewing court may refuse to enforce an arbitral decision if the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.

171. Some matters in a typical arbitration agreement can be decided between the parties. What substantive law will be applied? Who will be the arbitrators? Where will the arbitration be held? What role will the law of the State of arbitration play in settling side issues not easily resolvable under the law the parties have chosen for substantive issues?

172. Ungar, *supra* note 111, at 749. If an arbitrator is given discretion to decide on the validity of the procedure she uses, it would take egregious behavior on the part of the arbitrator to have that decision overturned.

173. Martinez, *supra* note 106, at 504. In *Imperial Ethiopian Government v. Baruch-Foster Corporation*, 535 F.2d 334 (5th Cir. 1976), the losing party discovered that the third arbitrator had direct ties with the winning party, having previously drafted the Civil Code for the Ethiopian Government. In the agreement to arbitrate, the third arbitrator was to have no direct or indirect ties to either party. *Baruch-Foster* raised the V(1)(d) defense in their appeal of the district court's decision to enforce the award. The court of appeals decided that this was not enough of a violation of procedure to warrant refusing to enforce the award.

174. Model Law, *supra* note 16, art. 36(1)(a)(v); New York Convention, *supra* note 15, art. V, § (1)(e). The reviewing body in the State where enforcement is sought may refuse enforcement if "the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made."

175. *Id.* The argument that an award that was still on appeal in the State where the award was rendered should be grounds for stay of enforcement was rejected in *Fertilizer Corp. of India v. IDI Management, Inc.*, 517 F. Supp. 948 (S.D. Ohio 1981).

“binding.”<sup>176</sup> A useful interpretation of when an award becomes binding may be when it is binding under the law of the awarding State.<sup>177</sup> Binding carries with it connotations of both finality and enforceability.<sup>178</sup> Even if an appeal is granted, the party seeking to resist enforcement may be required to put up a security while their appeal is pending.<sup>179</sup> A pending appeal allows, but does not compel, a competent authority to adjourn its decision.<sup>180</sup> Thus, even an award with an appeal still pending could be enforced.<sup>181</sup>

The court or competent authority called upon to enforce an arbitral award may refuse to enforce the award if, under the law of that state, the

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176. Martinez, *supra* note 106, at 505. Perhaps “binding” means that there are no further arbitral appeals available as suggested in *Fertilizer Corp. of India*, 517 F. Supp. at 948. The court did not wish to validate a means by which a losing party could circumvent enforcement of an arbitral award by commencing a postarbitral action to set the award aside. *Id.* at 958 (quoting Gerald Aksen, *American Arbitration Accession Arrives in the Age of Aquarius: United States Implements United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 3 SW. U.L. REV. 1, 11 (1971)).

177. See Ungar, *supra* note 111, at 749. The final decision to suspend or enforce an award will end up being made on a case by case basis by the reviewing court, with the pro-enforcement attitude of the New York Convention. *Fertilizer Corp. of India*, 517 F. Supp. at 961. See, e.g., Martinez, *supra* note 106, at 505-06.

178. Martinez, *supra* note 106, at 505. “Final” implies completion of all appeals. “Enforceable” implies that a court action will be required because the arbitral award is not self-executing. Perhaps to avoid the ambiguity of the words “final and enforceable” the drafters of the New York Convention used the word binding. Both the Geneva Protocol on Arbitration Clauses of 1923, 27 L.N.T.S. 157, and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927, 92 L.N.T.S. 301, were superseded by the New York Convention to the extent that parties to those Conventions became bound to the New York Convention. This meant that a pending appeal could no longer block enforcement of an arbitral award.

179. “If the application for setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.” New York Convention, *supra* note 15, art. VI. Model Law, *supra* note 16, art. 36(2) provides almost the same language, except that it references “the court where recognition and enforcement is sought” rather than the “authority before which the award is sought to be relied upon.”

180. Martinez, *supra* note 106, at 506. The fact that a party still has access to a court of law does not prevent that award from taking on a binding quality. This creates a situation where a court in one State is holding an enforcement proceeding while a judicial appeal is conducted in a second State. The problem of a double *exequatur*—two or more authorizations to enforce an award—quickly gets raised. See generally, Michael H. Strub, *Resisting Enforcement of Foreign Arbitral Awards Under Article V(1)(e) and Article VI of the New York Convention: A Proposal for Effective Guidelines*, 68 TEX. L. REV. 1031 (1990). For the current claims settlement concerns, making the verification document difficult to forge and requiring accurate mailing addresses of claimants would go far to insuring that most valid claimants would have only one chance to enforce. Making all claimants register by a certain date after which no more claims can be filed also helps control the double *exequatur* problem.

181. This should not be an issue in the proposed Iraq-World arbitral panel since the only court proceedings conducted will be in the States where Iraqi foreign assets are being attached. It is expeditious to the claims process for Iraq to maintain a regular payment plan and schedule for claimants to receive fund. A large-scale multinational arbitral tribunal to settle war claims will need at least a minimal due process standard for appeals.

subject-matter of the dispute is not capable of settlement by arbitration.<sup>182</sup> If the dispute could not have been settled by arbitration under domestic law of the enforcing State, the court may refuse to enforce the award of a foreign arbitral panel on its own accord.<sup>183</sup> Courts have liberally construed this clause, holding that doubts about the arbitrability of claims should be resolved in favor of arbitration.<sup>184</sup> U.S. courts have adopted a policy of enforcing arbitration agreements if they are reasonable under the circumstances of the dispute.<sup>185</sup> Reflected in court decisions is a strong concern for the effectiveness of commercial arbitration and a desire to break down "a parochial concept that all disputes must be resolved under our laws and in our courts."<sup>186</sup> If the arbitrability of a claim is called into question, a court in the United States should favor agreement to arbitrate in a close case.

The catchall clause of the New York Convention and the Model Law allows a court or competent authority to refuse recognition and enforcement of an award on public policy grounds.<sup>187</sup> U.S. courts again have chosen to limit the effectiveness of this clause by restricting its use to a situation

182. Model Law, *supra* note 16, art. 36(1)(b)(i); The New York Convention, *supra* note 15, art. V(2)(a). The court or competent authority called upon to enforce the award can raise the current defense on its own motion.

183. New York Convention, *supra* note 15, art. V(2)(a). This defense was successfully raised to deny enforcement of an arbitral award in *Libyan American Oil Co. (LIAMCO) v. Socialist People's Libyan Arab Jamahiriya*, 482 F. Supp. 1175 (D.D.C. 1980), *vacated without op.*, 684 F.2d 1032 (D.C. Cir. 1981) [hereinafter *LIAMCO*]. Libya nationalized LIAMCO's rights to petroleum concessions in 1973-1974, that had been granted in the 1950's. Dissatisfied with the compensation it received for its interests and equipment, LIAMCO succeeded in convincing a Geneva arbitrator to render an award in its favor and then sought to enforce the award in the United States. The District Court decided that it could not have ordered arbitration since to do so would have violated the Act of State doctrine. *Id.* at 1178-79. Nationalization laws had abrogated all terms of the concession agreement and the arbitrator would not be the competent authority to review the validity of the nationalization. *Id.* at 1179. Before the appeal was decided, the parties settled. *LIAMCO*, 684 F.2d at 1032. Considering the pro-arbitration posture of the courts today, this agreement to arbitrate would probably be upheld if the case was retried. *See, e.g.,* *Martinez*, *supra* note 106, at 507-08.

184. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985). In *Mitsubishi*, the U.S. Supreme Court upheld an arbitral award based on an antitrust violation. Antitrust had traditionally been an issue solely for the courts due to strong public policy concerns, and treble damages were only awardable by the courts. The Court concluded that "concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties agreement, even assuming that a contrary result would be forthcoming in a domestic context." *Id.*

185. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) (stating that "an agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute.") *See, e.g.,* *Pietrowski*, *supra* note 10, at 70.

186. *Scherk*, 417 U.S. at 519 (quoting *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972) ("[w]e cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.")).

187. New York Convention, *supra* note 15, art. V(2)(b); Model Law, *supra* note 16, art. 36(b)(ii). This defense, like the New York Convention, art. V(2)(a) and the Model Law, art. 36(b)(i), can be raised by one of the parties, by the court or by another competent authority in the State where enforcement is sought.

where "enforcement would violate the forum state's most basic notions of morality and justice."<sup>188</sup> At least one U.S. court has held that a manifest disregard for the law would need to rise above some level of contravening public policy in order for refusal to enforce to be justified.<sup>189</sup> The courts of the United States are reluctant to overturn a decision on public policy grounds.<sup>190</sup> Allowing arbitral awards to be effective except in extreme circumstances protects the integrity of the enforcement provisions of the New York Convention and the Model Law.<sup>191</sup>

The above discussion demonstrates that international enforcement mechanisms are available to successful claimants and that the mechanism is available to limit the grounds for appeal of validity rendered arbitral awards. However, there is nothing to enforce if a competent authority has yet to make a decision. The Governing Council will be able to handle some claims, but some exceptional and pre-invasion claims will need a different procedure. The most successful recent example of an ad hoc international arbitral forum is the Iran-U.S. Claims Tribunal. A discussion of that panel's structure and how it can be used as a model for an Iraq-World Claims Tribunal, now follows.

#### V. MODELING AN IRAQ-WORLD ARBITRAL PANEL AFTER THE IRAN-U.S. CLAIMS TRIBUNAL

When the United States was involved in the hostage crisis with Iran in the late 70's and early 80's, it brought about a disruption of business between the two States that resulted in disputes between the nationals of one state and the government of the other. Algeria was called on, as a neutral third state,

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188. *RAKTA*, 508 F.2d 969, 973-749 (1974). "To read the public policy defense as a parochial device protective of national political interests would seriously undermine the Convention's utility." *Id.* at 974. The United States in acceding to the New York Convention must have meant to subscribe to the supranational emphasis of the Convention's framers. *Id.* (citing *Scherk*, 417 U.S. at 506).

189. *Brandeis Intsel Ltd. v. Calabrian Chemicals Corp.*, 656 F. Supp. 160 (S.D.N.Y. 1987). See Joseph T. McLaughlin, *Enforcement of Arbitral Awards Under the New York Convention: Practice in U.S. Courts*, in INTERNATIONAL COMMERCIAL ARBITRATION RECENT DEVELOPMENTS 275, 290-96 (Emmanuel Gaillard & Robert B. von Mehren Chairmen eds., 1988). Perhaps fraud or duress could be successfully asserted as public policy grounds for refusing to enforce an arbitral award. See *Transmarine Seaways Corp. v. Marc Rich & Co.*, 480 F. Supp. 352, 358 (S.D.N.Y. 1979) (stating that "[a]greements exacted by duress contravene the public policy of the nation, . . . and accordingly, duress, if established, furnishes a basis for refusing enforcement of an award under Article V(b)(2) [sic] of the Convention.").

190. McLaughlin, *supra* note 189, at 288. In *RAKTA*, 508 F.2d at 973, the second circuit held that "the general pro-enforcement bias informing the Convention . . . points toward a narrow reading of the public policy defense. An expansive construction of this defense would vitiate the Convention's basic effort to remove pre-existing obstacles to enforcement."

191. In order for the proposed arbitral panel to be effective, it would need to avail itself of the enforcement power of the New York Convention and the Model Law. There already is a strong public policy reason to hold Iraq accountable for claims arising out of the Persian Gulf War. This policy was expressed in the several U.N. Resolutions calling for Iraq to accept its responsibilities under international law. See, e.g., U.N. S.C. Res. 674, para. 8, U.N. SCOR, Oct. 29, 1990, 29 I.L.M. 1560 (1990).

to create the Iran-U.S. Claims Tribunal to provide a forum for claimants to air these disputes.<sup>192</sup> The general principle of the Iran-U.S. claims tribunal was to terminate all litigation between the Government of each party and the nationals of the other.<sup>193</sup> The purpose of the tribunal was to terminate all legal proceedings between the United States and Iran in their respective national courts and to settle their claims through binding arbitration.<sup>194</sup> A further clause provided that once the hostages were released, the United States agreed to drop its suit that was pending in the International Court of Justice, and to bar the prosecution of any claim of the United States or her nationals for a claim arising before the effective date of the Algerian proposal.<sup>195</sup> In its first ten years, the Tribunal handled nearly 4,000 cases.<sup>196</sup>

Under the Algerian proposal, all judgments that were resolved in a United States court which called for the transfer of property or assets to Iran were guaranteed—at least to the extent the property or assets could be found

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192. Iran-United States: Settlement of the Hostage Crisis, 20 I.L.M. 223 (1981). “The Government of the Democratic and Popular Republic of Algeria, having been requested by the Governments of the Islamic Republic of Iran and the United States of America to serve as an intermediary in seeking a mutually acceptable resolution of the crisis in their relations arising out of the detention of the 52 United States nationals in Iran.” *Id.* at 224. The Tribunal was unique when it was created and has been “described as the most significant arbitral body in history.” See, e.g., John R. Crook, *Applicable Law in International Arbitration: The Iran-U.S. Claims Tribunal Experience*, 83 AM. J. INT’L L. 278, 279 (1989) (citing Richard B. Lillich, THE IRAN UNITED STATES CLAIMS TRIBUNAL—1981-1983 preface (Richard B. Lillich ed., 1984)).

193. “It is the purpose of both parties, within the framework of and pursuant to the provisions of the two Declarations of the Government of the Democratic and Popular Republic of Algeria, to terminate all litigations between the Government of each party and the nationals of the other, and to bring about the settlement and termination of all such claims through binding arbitration.” Declaration of the Government of the Democratic and Popular Republic of Algeria, General Principle B, 20 I.L.M. 224 (1981) [hereinafter Algerian Declaration].

194. *Id.* “[T]he United States agrees to terminate all legal proceedings in the United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration.”

195. *Id.* Point 11, at 227. When the hostages were confirmed released, the United States agreed to promptly withdraw all claims “pending against Iran before the International Court of Justice and will thereafter bar and preclude the prosecution against Iran of any pending or future claim of the United States or a United States national arising out of the events occurring before the date of this declaration related to (A) the seizure of the 52 United States nationals on November 4, 1979, (B) their subsequent detention, (C) injury to United States property or property of the United States nationals within the United States Embassy compound in Tehran after November 3, 1979, and (D) injury to the United States nationals or their property as a result of popular movements in the course of the Islamic Revolution in Iran which were not an act of the Government of Iran.”

196. Crook, *supra* note 192, at 280. By the end of 1988, the Tribunal had addressed 542 large claims brought by U.S. or Iranian nationals against the other Government; 421 claims brought by Iranian and U.S. banks; 2,795 small claims for amounts less than \$250,000; 23 cases interpreting the Algiers Accords or verifying compliance (A cases); and 74 intergovernmental claims under contracts (B cases). *Id.*

in the United States.<sup>197</sup> The payment of other claims would come from a special escrow account created to hold the funds payable to successful claimants.<sup>198</sup> Getting funds to a neutral third party through the creation of an escrow account is a good way to insure that the funds will be distributed on schedule.<sup>199</sup>

In order to get the funds to a neutral place from which to distribute them, the United States with the Federal Reserve Bank (FED) acting as fiscal agent, signed an escrow agreement with Iran, with the Bank Markazi acting as an interested party.<sup>200</sup> The Banque Centrale d'Algerie acted as the escrow agent.<sup>201</sup> The escrow agreement first had the FED liquidate at market price, all Iranian owned and seized U.S. Government Securities.<sup>202</sup> The FED deposited the proceeds from the liquidation, in addition to any other securities and gold bullion, in the Bank of England.<sup>203</sup> A list of all information necessary to identify the Iranian property was sent to the Banque

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197. Algerian Declaration, *supra* note 193, Point 15 at 228. "As to any judgment of a U.S. court which calls for the transfer of any property or assets to Iran, the United States hereby guarantees the enforcement of the final judgment to the extent that the property or assets exist within the United States." The proposed claims Iraq-World arbitral will also seek to use some frozen foreign assets to satisfy some claimants, especially where the particular asset is logically linked with a particular claim, and where a money judgment would not satisfy the claimant.

198. *Id.* Escrow Agreement, 20 I.L.M. 234. "This Agreement is made to implement the relevant provisions of the Declaration of the Government of Algeria of January 19, 1981 (the "Declaration"). These provisions concern the establishment of escrow arrangements for Iranian property tied to the release of United States nationals being held in Iran."

199. The Algerian escrow account is a useful model for an escrow account used to hold funds to pay awards rendered against Iraq. The Secretary General may have had this in mind when he drafted paragraph 3 of the *Secretary's Report*, *supra* note 1, which established a special account known as the United Nations Compensation Fund. A security and enforcement precaution was added by specifically mentioning that the fund would enjoy the "status, facilities, privileges, and immunities accorded to the United Nations" as bestowed by art. 105 of the U.N. Charter.

200. Escrow Agreement, *supra* note 198, at 234. Like all other international agreements the importance of getting a written agreement cannot be understated. The writing is the first place a reviewing body will look to interpret the agreement of the parties. Vienna Convention on the Law of Treaties, *supra* note 139, art. 31(1): "General rule of interpretation—1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

201. Escrow Agreement, *supra* note 198, at 234.

202. *Id.* at 234-25, Operative para. 1(A). The Government of the United States caused the FED to "[s]ell, at a price which is the average for the middle of the market, bid and ask prices for the three business days prior to the sale, all U.S. Government securities in its custody or control as of the date of the sale, which are owned by the Government of Iran, or its agencies, instrumentalities or controlled entities." This was triggered by the release of the 52 American nationals. *Id.* at 237.

203. *Id.* Operative para. 1(B), 20 I.L.M. 234-35. The U.S. Government was required to cause the FED to "transfer to the Bank of England as depositary for credit to accounts on its books in the name of the Banque Centrale d'Algerie, as Escrow Agent under this Agreement, all securities (other than the aforementioned U.S. Government securities), funds (including the proceeds of the aforementioned U.S. Government securities), and gold bullion . . . which are in the custody or control of the FED and owned by the Government of Iran, or its agencies, instrumentalities or controlled entities as of the date of such transfer." *Id.*

Centrale d'Algerie.<sup>204</sup> All other funds identifiable to Iranians found in the control of the United States or its nationals were likewise made part of the deposit with the Bank of England in the name of Banque Centrale d'Algerie.<sup>205</sup> The Bank of England initially transferred funds to the escrow account to bring the balance to \$1 billion.<sup>206</sup> Incremental deposits were made by Iran if the fund dropped below \$500 million.<sup>207</sup> Eventually, the N.V. Settlement Bank of the Netherlands became the place where the account was kept.<sup>208</sup> The fund acts as an intermediary between the parties in the transfer of arbitral award funds much like any other escrow account would transfer funds.

A similar escrow arrangement could be set up through a network of international banking institutions paying Iraqi frozen assets into a centralized account. This centralized account, containing funds not specifically earmarked for use by the Commission, could be used to fund an Iraq-World arbitral panel charged with the duty of processing exceptional and pre-invasion claims.<sup>209</sup> The Algerian proposal wisely ensured that settlement funds were available by providing specifically that "the expenses of the Tribunal shall be borne equally by the two governments."<sup>210</sup> It would

204. *Id.* at 235. Some suggested information to be included in materials were the type of property, the source of its origin, and the character of the property (principal or interest).

205. *Id.* at 235-36. The Escrow Agreement called for the United States Government to "cause Iranian deposits and securities in domestic branches and offices of the United States banks, Iranian deposits and securities in domestic branches and offices of United States banks, and other Iranian assets (meaning funds or securities) held by persons or institutions subject to the jurisdiction of the United States, to be transferred to the FED." *Id.* The FED in turn transferred this Iranian property to the Bank of England for credit to the Escrow Account.

206. Algerian Declaration, *supra* note 193, paras. 6-7. A special interest-bearing security account received Iranian funds until it reached \$1 billion after which all incoming funds would be transferred to Iran. All funds in the security account were to be used "for the sole purpose of securing the payment of, and paying, claims against Iran in accordance with the claims settlement agreement." See David P. Stewart & Laura B. Sherman, *Developments at the Iran-United States Claims Tribunal*, in THE IRAN UNITED STATES CLAIMS TRIBUNAL—1981-1983, 1, 5 (Richard B. Lillich ed., 1984).

207. Algerian Declaration, *supra* note 193, para. 7. "Whenever the Central Bank shall thereafter notify Iran that the balance in the security account has fallen below \$500 million, Iran shall promptly make new deposits sufficient to maintain a minimum balance of \$500 million in the account." *Id.* The account was to be so maintained until the President of the Arbitral Tribunal certified to the Algerian Bank that all arbitral awards have been satisfied.

208. See Stewart & Sherman, *supra* note 206, at 5.

209. By forcing claimants to put up a bond against entirely frivolous claims, and drawing generally from the pool of available foreign frozen assets and incoming Iraqi award funds, the proposed Iraq-World arbitral panel could find the funding necessary to begin processing claims. States and nationals bringing claims may initially be called upon to pay a filing fee which could be put towards administrative expenses. Under the Secretary General's proposal, the expenses of the Commission should be paid from the Compensation Fund. *Secretary's Report*, *supra* note 1, para. 29. Perhaps the proposed Iraq-World panel could petition the United Nations for support from the Compensation Fund on a showing to the validity of the procedure. Perhaps the proposed Panel could submit consolidated claims of individuals that were successful in that procedure to the Compensation Commission on those individual's behalf.

210. Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, 29 I.L.M. 230, art. VI(3) (1981).



seem to lend legitimacy to a claims tribunal if funds are clearly identified at the beginning of the arbitration and if these funds are in the control of a neutral third party.<sup>211</sup>

The claimants against Iran were required to drop their individual claims and submit to binding arbitration. The authority of the President to enter into an agreement for all claimants was decided by the U.S. Supreme Court in *Dames & Moore v. Regan*.<sup>212</sup> Dames and Moore were required to drop their pursuit of judicial remedies and bring their claim before the Tribunal pursuant to an executive order.<sup>213</sup> Dames and Moore's argument that the forum requirement constituted a taking failed.<sup>214</sup> This taking difficulty should not manifest itself in the settlement of the current conflict since all currently proposed procedures are non-exclusive of each other.<sup>215</sup>

In order for the proposed Iraq-World arbitral panel to be successful, governments and their nationals would need to voluntarily submit their claims to binding arbitration. Since proceeding in two forums simultaneously would be just the sort of redundancy that a claims tribunal would hope to circumvent, individual claimants would have to trust the power of the tribunal and drop any pending court action they may have brought. For this reason, it would be beneficial for gaining the trust of claimants to link the tribunal with a body of law such as the New York Convention or the Model Law with

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211. There probably would be difficulty finding a neutral to the current conflict. A perennial neutral—such as Switzerland or The Netherlands—may need to open escrow accounts from which funds will be distributed to successful claimants.

212. 453 U.S. 654 (1981). In affirming the Ninth Circuit's decision to confirm the United States President's authority to enter into a binding, exclusive arbitration agreement, the Supreme Court considered the interplay between Congress and the President. The Court considered in its analysis, "all the circumstances which might shed light on the views of the Legislative Branch toward the action, including congressional inertia, indifference or quiescence." *Id.* at 668-69.

213. In Exec. Order No. 12170, 3 C.F.R. § 457 (1980), President Carter declared a national emergency pursuant to the International Emergency Economic Powers Act, 91 Stat. 1626, 50 U.S.C. §§ 1701-1706 (1976 ed., Supp. III). This action blocked the removal or transfer of "all property and interests in property of the Government of Iran, its instrumentalities and controlled entities and the Central Bank of Iran which are or become subject to the jurisdiction of the United States." *Dames & Moore*, 453 U.S. at 662-63. The Supreme Court upheld the validity of an OFAC regulation providing that "[u]nless licensed or authorized . . . any attachment, judgment, decree, lien, execution, garnishment, or other judicial process is null and void with respect to any property in which on or since [November 14, 1979] there existed an interest of Iran." 31 C.F.R. § 535.203(e) (1980). See *Dames & Moore*, 453 U.S. at 662-63.

214. *Dames & Moore*, 453 U.S. at 674. The court ruled that since the attachments and the transfer of assets was taken pursuant to congressional authorization, it was "supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it." (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952)).

215. It would be an interesting question of law and fact if all claimants against Iraq were forced to pursue one procedure rather than the choice they currently enjoy. Consider *United States v. Pink*, 315 U.S. 203 (1942). The Court, in recognizing that the President does have some power to enter into executive agreements without obtaining the advice and consent of Congress, held that power to remove such obstacles to full recognition as settlement of claims of our nationals certainly is a modest implied power of the President. No obstacle can be placed in the way of rehabilitation of relations between this country and another nation, unless the historic conception of the powers and responsibilities is to be drastically revised. See also *Dames & Moore*, 453 U.S. at 683.

their established enforcement provisions. This could be accomplished by specifically mentioning the applicable laws in the agreement to arbitrate.<sup>216</sup> Another alternative is to mention that all cases will be decided and enforced with respect for international law as the claims tribunal determines to be applicable.<sup>217</sup> A provision stating that treaties in force are applicable to the current agreement to arbitrate, would bring added enforcement protection at least to the signatory States of arbitral conventions. Thus, even if certain governments were willing to cheat on the payments to an escrow fund, those parties wishing to attach Iraqi foreign assets in a particular country would have a second chance to gain control of those assets through a court proceeding in that State.<sup>218</sup>

Even though not specifically mentioned, the New York Convention applies to decisions rendered by the Iran-U.S. Claims Tribunal. In *Ministry of Defense of the Islamic Republic of Iran v. Gould, Inc. [Gould]*, the Ninth Circuit Court of Appeals decided that the New York Convention would apply to those seeking to enforce awards of the Iran-U.S. Claims Tribunal in courts of the United States.<sup>219</sup> The basic requirement for jurisdiction was held to be that the award arose "out of a legal relationship...which is commercial in nature and . . . which is not entirely domestic in scope."<sup>220</sup> The Algiers Accords served as the writing required by the New York Convention to

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216. Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, 20 I.L.M. 230 (1981) [hereinafter Claims Settlement Agreement]. Article III(2) states that "the Tribunal shall conduct its business in accordance with the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) except to the extent modified by the parties or by the Tribunal to ensure that this agreement can be carried out." The agreement to arbitrate claims in the current situation should follow this example set by the Iran-U.S. Claims Tribunal.

217. *Id.* art. V states "the Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances." Such a broad clause can be read to give courts wide discretion to use whatever treaties in force between States that speak to the issue of enforcement.

218. New York Convention, *supra* note 15, art. III; Model Law, *supra* note 16, art. 6. There is a good possibility of cheating by parties sympathetic to Iraq, but a thorough discussion of this issue is beyond the scope of this note. One premise that this Comment is founded on is that the U.N. Security Council has the force behind its words to pressure enough countries to comply with the Compensation Commission in accomplishing its mandate to control Iraqi foreign assets and oil exports to the extent that claims will be paid.

219. *Ministry of Defense of Islamic Republic of Iran v. Gould Inc.*, 887 F.2d 1357 (9th Cir. 1989), *cert. denied*, 494 U.S. 1016 (1990). The Ministry of Defense sought to enforce an award rendered by the Iran-U.S. claims tribunal against Gould in the courts of the United States. Gould raised several defenses including lack of subject-matter jurisdiction in federal courts and that the New York Convention did not apply to the enforcement of Iran-U.S. Claims Tribunal Awards. The Circuit Court upheld the District Court's finding that they did have the subject matter jurisdiction to enforce an award of the Tribunal under the Federal Arbitration Act (9 U.S.C. § 201-208). They also found that the requirements of the New York Convention had been satisfied which guaranteed enforcement of the award in the U.S. See David J. Bederman, *Jurisdiction—1958 New York Convention- enforcement of award by Iran-U.S. Claims Tribunal in United States courts*, 84 AM. J. INT'L L. 556 (1990).

220. *Gould*, 887 F.2d at 1362.

evidence the consent of the parties to have their award enforced.<sup>221</sup> The writing that Iraq signs to initiate proceedings should make mention of both the New York Convention and the Model Law in order to remove all doubt about the binding quality of the awards and the consent of the parties to enforcement of the awards wherever assets can be attached.

*Gould* argued that an award rendered by an essentially anational arbitral tribunal could not be enforced under the New York Convention.<sup>222</sup> *Gould* relied on the refusal provision which allows a court to not enforce an award that "has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the laws of which, that award was made."<sup>223</sup> The court agreed with *Gould* that this defense could not be raised in challenge to an anational award, but still ruled that the New York Convention would apply to the enforcement of the award.<sup>224</sup> The court ruled that this result was consistent with the purpose of the New York Convention which allows parties to "untether" themselves from any particular national law.<sup>225</sup> Likewise, when parties enter into an agreement to arbitrate their claims before the Iraq-World arbitral panel, the award will be anational. Perhaps reluctant parties would be willing to submit to binding arbitration if they felt that there was a good chance of actually receiving payment if they won. The precedent of *Gould* shows that such awards should be enforceable through the New York Convention.<sup>226</sup>

Another relevant provision of the Algerian proposal actually established the "International Arbitral Tribunal" for the purposes of settling the claims of the nationals of Iran and the United States against their opposite govern-

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221. *Id.* at 1363. The court recognized President Carter's authority to enter into international claims settlement proceedings and his power to conclude such agreements on behalf of U.S. citizens. *See, e.g.,* *Bederman, supra* note 219, at 558. In *Dames & Moore v. Regan*, 453 U.S. 654 (1981), the Supreme Court decided that the suspension of private proceedings by the President in favor of exclusive jurisdiction of an arbitral panel did not constitute a taking. The proposed Iraq-World arbitral panel is non-exclusive and is to be used in conjunction with established claims settlement and enforcement law.

222. *Gould*, 887 F.2d at 1364. The court saw the Tribunal's award as "a creature of international law, and not national law," thus not affiliating the award with the law of any one legal system in particular. The Iran-U.S. awards were anational and arose out of the bilateral agreement between the parties. It will be a multi-lateral agreement that would form the Iraq-World arbitral panel but that should not effect the award's anational character.

223. New York Convention, *supra* note 15, art. 5(1)(e). The argument is that if *Gould* was precluded from raising this defense due to the anational nature of the awards of the Iran-U.S. Claims Tribunal, the Convention could not apply. To do so would deprive the parties of this defense and to act contrary to the intent of the drafters of the New York Convention. *See Bederman, supra* note 219, at 558.

224. *Gould*, 887 F.2d at 1365. *See also* *Bederman, supra* note 219, at 558.

225. *Gould*, 887 F.2d at 1364-65. *See also* *Bederman, supra* note 219, at 558. *Gould* was certainly not precluded from raising any of the other refusal defenses in challenge to an anational award. For instance, *Gould* was allowed to raise procedural fairness issues.

226. Many arbitration agreements are established without reference to a particular national law. The *Gould* decision demonstrates that awards emanating from such an agreement are not, by their nature, defective. Of course, enforcement works both ways. Iraq may use the New York Convention or the Model Law to enforce arbitral awards that are rendered in her or her nationals favor. *See Bederman, supra* note 219, at 560.

mental counter part.<sup>227</sup> The Algerian proposal added that the claims settlement tribunal would be the forum for all counterclaims which arose out of the "same contract, transaction or occurrence that constitutes the subject matter of that national's claim."<sup>228</sup> The arbitral tribunal was also empowered to have jurisdiction over all official claims of the United States and Iran that they brought against each other arising out of their contractual arrangements.<sup>229</sup> The proposed Iraq-World arbitral panel should be given the jurisdiction to decide what claims it is competent to hear.<sup>230</sup>

The arbitrators of the Iran-U.S. claims tribunal were given discretion to make choice of law decisions. The Algiers Accords provided for choice of law stating that "[t]he Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable."<sup>231</sup> This language left the arbitrators free to select rules of substantive law through whatever processes and from whatever sources that they deemed fit.<sup>232</sup> Like the Algerian Settlement Agreement, some reference should be made to the Model Law in forming an agreement to arbitrate.<sup>233</sup> A catch-all choice of law language, present in the Model Law states that if the parties do not agree on the law to be used, the "Tribunal shall apply the law determined by the conflict of laws rules which it considers applicable."<sup>234</sup> The arbitrators

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227. Claims Settlement Declaration, *supra* note 216, art. II(1), 20 I.L.M. at 230-31. "An International Arbitral Tribunal [] is hereby established for the purpose of deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the United States." *Id.*

228. *Id.* art. II(1). Claims and counter-claims, whether or not filed by January 19, 1981, were under the jurisdiction of the Iran-U.S. Claims Tribunal. The Iran-U.S. Claims Tribunal also had the jurisdiction to decide whether or not it has jurisdiction over an action. *Id.* art. II(3).

229. *Id.* art. II(2). "The Tribunal shall also have jurisdiction over official claims of the United States and Iran against each other arising out of contractual arrangements between them for the purchase and sale of goods and services." *Id.*

230. All manner of international, commercial disputes should be arbitrable in the proposed Iraq-World arbitral panel. This way, unforeseen claims will not be foreclosed from having an arbitral panel capable of hearing them.

231. Claim Settlement Declaration, *supra* note 216, art. V. The article mentions specifically that "relevant usages of trade, contract provisions, and changed circumstances" should be considered.

232. Crook, *supra* note 192, at 282. The formula for Iraq to choose applicable law does not mention any specific conflict of law rules to follow. It seems the Tribunal is free to select the rules of substantive law that applies.

233. Claim Settlement Declaration, *supra* note 216, art. III(2). "Members of the Tribunal shall be appointed and the Tribunal shall conduct its business in accordance with the arbitration rules of . . . UNCITRAL except to the extent modified by the parties or by the Tribunal to ensure that this agreement can be carried out." *Secretary's Report, supra* note 1, art. 27. The commissioners will be guided by the Governing Council and the UNCITRAL Rules.

234. Model Law, *supra* note 16, art. 28(2). Article 28(1) states that "the arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules." Article 28(3) provides that cases can be decided *ex aequo et bono* if the parties authorize it. The parties in the proposed claims

in the evolving Iraq-World process should be given a free hand to decide the law appropriate for any given conflict they are resolving.<sup>235</sup>

Signing an agreement to arbitrate evidenced the consent of the parties to have their claims finally settled by the Iran-U.S. arbitral panel.<sup>236</sup> Both sets of arbitral rules which have been examined here, require some form of consent of the parties in order for the award to be binding.<sup>237</sup> Since Iraq has recognized its responsibility to pay war reparations,<sup>238</sup> it probably would be willing to arbitrate some of the claims against it.<sup>239</sup> At least, in arbitration, the parties retain more than a modicum of control over the fate of their claim.<sup>240</sup> For the proposed Iraq-World arbitral panel to be effective, Iraq and the parties opposing Iraq, would have to explicitly evidence consent.

The Algerian Declaration wrought enforcement provisions directly into the agreement to arbitrate. All decisions and awards of the Iran-U.S. Claims Tribunal were declared "final and binding."<sup>241</sup> The agreement further provided that "[a]ny award which the arbitral Tribunal may render against either government shall be enforceable against such government in the courts of any nation in accordance with its laws."<sup>242</sup> The agreement provided the mechanism for claimants on either side to enforce their award in any way available under international law. The Iraq-World arbitral panel should contain provisions which give it a quality of independent enforceability—that is enforceability on its own terms.

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settlement procedure should be given some ability to influence what law will be used, but the ultimate discretion should be left with the arbitrators of the particular claim.

235. The number of possible claimants that will demand damages against Iraq makes it impossible to predetermine exactly what law will be applied for all scenarios. A flexible choice of law clause is an essential element in an agreement that processes such a wide range of claims from claimants of such varied backgrounds.

236. U.S. Authorization to Approve Text of Documents relating to the Release of the Hostages, 29 I.L.M. 223 (1981). This cover sheet to the settlement of the hostage crisis evidenced the consent of the parties to execute the Agreements set out by the Algiers Accords.

237. New York Convention, *supra* note 15, art. II(1); Model Law, *supra* note 16, art. I(1).

238. Gerald, *supra* note 77. *Secretary's Report*, *supra* note 1, para. 16, mentions that Iraq has accepted Resolution 687 signifying their acknowledgement of obligation to claimants against them. Iraq, though they have requested a five year grace period before being obligated to commence reparations, have signified a willingness to contribute some percentage of oil exports to the Fund in order to settle claims.

239. Exceptional claims are defined as claims that are for large amounts of money. A rational party would not allow an exceptional claim be uncontested if there is an arguable question of liability.

240. There is control of the selection of arbitrators, but there is no control of the laws used and not used. Thus, a claimant has a chance to appear in front of a supposedly neutral body instead of being prosecuted in the courts of another State.

241. Claims Settlement Agreement, *supra* note 216, art. IV(1). The Iran-U.S. Claims Tribunal was an exclusive procedure. The policy behind finalizing the claims prompted the parties to give the Tribunal enough power to carry out its mandate.

242. *Id.* art. IV(3). This certainly leaves the door open to enforcement through use of the New York Convention or the Model Law. If the place where enforcement was sought had taken the reciprocity reservation, it would be no obstacle since the Netherlands was the place of Arbitration for the Iran-U.S. Claims Tribunal.

An early challenge to the Arbitrators of the Iran-U.S. Claims Tribunal was encountered in the area of case management due to the sheer number of claims.<sup>243</sup> Claims were pooled into general categories according to general legal issues and the type of loss claimed.<sup>244</sup> Pooling of claims allowed the Tribunal to select certain claims for a full hearing.<sup>245</sup> Based on these decisions, the remaining small claims could be arbitrated expeditiously by category.<sup>246</sup> This approach is similar to the approach that the Secretary-General has suggested to process small claims.<sup>247</sup> Most of the claims arising out of the Persian Gulf War will be of a type that the Commission will be able to handle.<sup>248</sup> These smaller claims will generally not fit into the exceptional claims category—failing on either the complexity or value aspect. The proposed Iraq-World arbitral panel could begin processing exceptional claims immediately. This could add up to saving years for some claimants.<sup>249</sup> Considering that the small claims are the ones that have taken the longest to settle in the Iran-U.S. Claims Tribunal, it may actually be advantageous for some exceptional claimants to divorce their claim from the Commission.<sup>250</sup>

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243. Stewart & Sherman, *supra* note 206, at 12-13. The United States filed 2,795 claims of less than \$250,000 on behalf of its nationals. This led to the hiring of more staff at the U.S. Claims Tribunal. The proposed claims panel would need to find a competent staff to organize claims as a threshold to processing any such claims.

244. *Id.* See United States Government Proposal for Expedited Treatment of Claims of U.S. Nationals for Under \$250,000 Each (June 14, 1983) (available at Department of State). There are twelve categories: (1) medical and educational expenses of Iranians in the U.S.; (2) breach of commercial contract or non-payment of commercial debt by Iran; (3) breach of commercial contract by a non-governmental Iranian entity; (4) breach of commercial contract by both governmental and non-governmental entities of Iran; (5) nonpayment of private debt; (6) expropriation of real property; (7) interference with use of bank accounts; (8) loss of personal property; (9) damages to business as a result of the acts of Iran; (10) salary claims where claimant was employed by and in Iran; (11) salary claims where claimant was employed by a U.S. company in Iran; and (12) miscellaneous.

245. Stewart & Sherman, *supra* note 206, at 13. Once small claims were categorized according to legal issues, processing one of a type of claim could allow an arbitrator to make inferences about other similar claims. This is consistent with a procedure that makes lump-sum settlements to States.

246. *Id.* This assumes that the parties entering into the arbitration agreement are willing to give precedential value to early decisions. The Iran-U.S. Claims Tribunal decisions are largely unpublished and *stare decisis* does not apply. The claims panel is suggested to have arbitrators write their decisions and cite sources of law including previous arbitral tribunal decisions.

247. *Secretary's Report*, *supra* note 1. The Tribunal was empowered to hear individual claims though, while the Governing Council will hear only the aggregated claims of States. See *Essaye & Turza*, *supra* note 3. Perhaps the aggregating approach will help the Governing Council to avoid some of the delays that the Tribunal has experienced.

248. See *e.g.*, *Essaye & Turza*, *supra* note 3. It makes sense that the structure proposed by the Secretary General would be one which could process a majority of the claims against Iraq.

249. Many exceptional claims would have to wait until urgent claims were processed by the Compensation Commission. These non-urgent exceptional claims have a low priority as far as the compensation proceedings are concerned. The total time for payment of claims could be 30 years away. See, *e.g.*, *Whaling*, *supra* note 45, at 328.

250. See, *e.g.*, *Crook*, *supra* note 192, at 280. Over 2,500 of the original 2,795 small claims are left to be decided. This compares to 743 out of 963 large claims and bank claims that have already been settled. *Id.*

Besides case management, other ground rules will need to be set for the processing of claims. Certain procedural issues will manifest themselves before any claims will reach the enforcement stage. Choosing arbitrators will be an initial challenge. The arbitrators that begin the Tribunal will have a major influence on not just the claims they process but of future claimants who try to use the early decisions for their precedential value. The arbitrators will need to be dedicated for what will be a long odyssey into a wide variety of legal issues.

### CONCLUSION

The enforcement mechanism is available to the nation that can get Iraq to consent to the jurisdiction of an arbitral panel and win. The New York Convention and the Model Law have been recognized by the United Nations and some of its Member States as valid enforcement tools. Though some reservations and defenses surround these conventions, they have been upheld in the United States and in other States. The biggest problems will be getting to a proper forum and finding the money to pay the claimants.

Iraq will sell many barrels of oil over the next few decades to replenish an escrow fund established to pay claimants against it, money will be available. The proper forum for some claims will be with the Commission established by the Security Council and the Secretary-General. Some exceptional and pre-invasion claims will need to be processed another way. The proposed arbitral similar to the Iran-U.S. Claims Tribunal is not only a viable option, but a rare legal opportunity. If it takes thirty years to process and pay all the claims arising out of the Persian Gulf War, some entire legal careers may be spent working on this same scenario. Right now, the literature only guesses how the claims will be processed. It will be interesting to see how the claims procedure evolves.

It is important to set the right course for the claims process, else procedural issues may bog down the progress of claims settlement. The Iran-U.S. Claims Tribunal serves as a good, but not perfect, model to base the Iraq-World arbitral panel. Some shortcomings of the Iran-U.S. Claims Tribunal will be overcome simply because of the range of countries involved in the proceedings. All countries will have an incentive to make sure that Iraq complies with the mandate of the Security Council. Also, Iraq has consented in principle to a duty to pay for the damage that it has inflicted on States and their nationals. With these hurdles behind, it is time to get an agreement signed and begin the slow healing process.<sup>251</sup>

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251. Iraqi oil exports have not yet returned to pre-war levels and the claims process is slowing. The Security Council mandated the destruction of chemical weapons and the destruction of the tools necessary to create nuclear weapons in Iraq. U.N. S.C. Res. 687, U.N. SCOR, Apr. 3, 1991, 30 I.L.M. 847 (1991). Iraq has not complied. Human rights violations against the Kurds are still ongoing in violation of U.N. S.C. Res. 688, U.N. SCOR, Apr. 5, 1991, 30 I.L.M. 860 (1991). Both of these factors have slowed the claims process.

This comment is devoted to showing that the healing process could be facilitated by the protection that the U.N. has seen fit to adopt in various recognition and enforcement conventions. The awards of an *ad hoc* arbitral tribunal would be recognized and enforced if those awards satisfy the requirements of the New York Convention or the Model Law. These conventions should be used by the United Nations, and the States it represents, to assure individual claimants that they will eventually be paid and to trust the procedure. In this way, exceptional claims outside the scope of the Commission can have an forum in which to proceed. Of course, some claimants falling outside the jurisdiction of all proposed claims tribunals will need to keep forum shopping. Fortunately, the U.N. recognized enforcement conventions will follow the claimant everywhere.

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\*J.D. Candidate, California Western School of Law, 1993. Thanks to my family and friends for their support and encouragement during the preparation of this Comment. Special thanks to Mark Bissonnette for insightful discussions and for introducing me to the fifteenth edition of *The Bluebook*.