International Arbitration

Law and Practice

Mauro Rubino-Sammartano

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Foreword
by
The Right Hon. The Lord Mustill

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FOREWORD

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The Right Hon. The Lord Mustill

The past two decades have witnessed a remarkable flowering in the study of arbitration. It has always been a subtle and elusive subject, but until quite recently the intellectual problems have been masked by the relatively small scale of the disputes, by the fact of their conduct within the confines of individual national systems of law and practice, and by their strictly limited exposure to scrutiny. With the exception of a few notable international scholars few were interested in the articulation of a process which was considered to be of only local and workaday concern.

This landscape is now dramatically transformed. Disputes are now often of a quite different order of magnitude. The availability of primary sources, and particularly of international sources, has been greatly enhanced, so that workers in the field can look beyond their own parochial and personal experience to see how others with equal experience but different cultural and legal backgrounds have conducted the arbitral process. An intensified conflictual element has made all concerned in that process more ready to dissect and criticise what is going on. The growth of large-scale institutional arbitration has brought together, head to head, numbers of skilled arbitrators with differing legal and forensic backgrounds, whose preconceptions and methods may differ widely. The large amounts at stake have attracted the attention of law firms, packed with able lawyers, who would previously have seen arbitration as no more than a minor adjunct of their major concerns. Equally, there has been the exposure of major cleavages – between the supposedly antithetical procedural disciplines of the civil and the common law; between private choices in dispute resolution and public policy; between party autonomy and due process; between speed and economy on the one hand and accuracy of decision on the other; and of course between various conceptions of what a fair process really involves – an exposure which has made all those who think about arbitration realise how confused and difficult its principles really are. This realisation has led academic law departments which might previously have regarded arbitration as a minor dependency of commerce and hence unworthy of serious study to come to recognise that this is an area in which the best minds can fruitfully be engaged.

All these factors have combined to create a pressing need for published studies which combine two virtues, not always found together. First, they must be scholarly, which means they must be both intellectually rigorous and well founded on the primary materials. Second, they must show an awareness of, and a response to, the needs of the community (and particularly the international trading community) whose function it is for commercial arbitration to serve. The outcome

of this need has been a surge of publication. Any further contribution to it must justify its existence by freshness of approach, clarity of structure, cogency of reasoning, or breadth and depth of learning.

Happily, the present volume amply satisfies these demands, as the call for a new edition plainly shows. Even a glance through the chapter headings is enough to show the welcome breadth of the author's approach. Certainly, some of them occasion no surprise. Nowadays no work on arbitration with any international pretensions could omit a full treatment of, for example, the role of the state court, or the enforcement of foreign awards. But many of them are not routine. We find distinct and full treatment of the Iran/US Claims Tribunal; ICSID arbitration; speed in arbitration; documents-only arbitration; disputes between states; disputes between states and private parties; the UNCITRAL Rules; venue. These and others are not the common coin of texts aimed at those who want to learn no more than will help them to join the top players in the narrow and exclusive world of eurocentric commercial dispute-resolution. The perspective is wider, and the aims more grounded in practice, than that. And of course the reader will not simply glance at the chapter headings, but will look within, at the notable collection of materials and ideas; notable for the manner of organisation and the profusion of sources, drawn from round the world. There will be found an interesting discussion of, amongst others, the participation of connected parties, not a novelty in itself, but a conceptually difficult topic which one can look for in vain in works aimed at the practitioner; administered arbitration; internal appeals from one arbitral body to another, long a feature of common law commercial arbitration but scarcely noticed in the doctrinal works; the kindred topic, now achieving prominence, of a standing external body able to receive challenges and appeals otherwise than by recourse to the courts; *tronc commun*, already well known as one of the author's special fields. There is no need to multiply examples. These will serve to show the distinctive character of the work.

The last chapter is entitled: "The continual search for improvements". One need look no further for the philosophy of the author or for the service which this work will perform for the arbitrating community.

Mustill

PREFACE

If I am right, the best role each of us can play is that of bearer of our beliefs and ideals. If this is so, what matters is that these beliefs and ideals continue to be carried on, irrespective of who the individual bearers are. However, nobody can carry them on unless others have carried them on before and passed them on further.

I therefore hope that the opinions expressed in this book will be kept alive by other bearers, along with continuing development and improvement in the ideas. I gratefully acknowledge the existing contributions on arbitration, in particular those by van den Berg, Fouchard, David, Lew, Wetter, Gaja, Craig et al, Saleh, Simmonds et al., Schizzerotto, Vecchione and Bernardini, as well as publications such as *Clunet,* the *Yearbook Commercial Arbitration* and the *Revue de l'arbitrage.* Without them this study (which is based on my lectures to law students at the University of Padua during the academic years 1987–1988 and 1988–1989) could not have been made.

I have been asked to say in what way this study is different from others. The author is generally the least suitable person to express such a view but, if I have to give an opinion, I would say that the main characteristic of this study is that it focuses on a different criterion for identifying international arbitration.

A distinction must certainly be made between international arbitration and domestic and foreign arbitration. I believe that a further distinction must be made between international arbitration and arbitration which is international only because of the different nationality (or residence) of the parties, or because it concerns relationships connected with various jurisdictions.

An 'internationality' based on procedure seems to me to be the key element of international arbitration. Once this is acknowledged, international arbitration acquires a unity. I have tried to reflect the effects of this unity on the different aspects of international arbitration.

The references I have made to various legal systems have been taken from specialised publications. Because of the scope and diversity of the subject matter and of the continual revision of statutory provisions and changes in precedents, the information given here is simply preliminary. It cannot be used to settle specific cases without being checked and studied in detail with the advice of expert local counsel.

Milan, June 1, 1989

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The eleven years which have elapsed since the first edition have been rich in changes in national legislations. The Uncitral Model Law has been adopted by many countries.

The number of arbitral proceedings has increased. ADR has registered more interest in the U.S. than in other parts of the world. Several law schools are now teaching arbitration. I myself have taught arbitration once again at the University of Milan during the academic year 1996 – 1997 and at a 22-hour course organised by the European Court of Arbitration and the Council of the Bar of Milan. The procedural aspects of it have attracted more attention from scholars of procedural law.

The new millennium offers much room for improvement, for instance in the field of an International Arbitration Court of Appeal. Open minds have the opportunity to help arbitration progress in many ways.

Milan, April 2000 *Mauro Rubino-Sammartano*

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1.1 ARBITRATION

Arbitration as a concept is known in the large majority of legal systems, but it does not always take the same form in different countries. Inevitably, each different form reflects local problems and sometimes a different approach to the entire legal system. Besides civil law[1] (*diritto scritto, droit écrit)* legal systems and common law systems[2] there are other legal systems, such as those of the former socialist countries,[3] of Islamic law,[4] and of the Far East countries.

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1 All the countries which are close to Roman law tradition, including – (besides Italy) – France, Spain, Germany, etc. use *jus civile* (civil law) systems. There are also what could be called infiltrations of Roman law in Anglo-Saxon countries, for example in Scotland which, even if close to England, has a civil law which is clearly of Roman origin. See A. CAVANNA, *Storia del diritto moderno in Europa* (History of Modern law in Europe) *Le fonti del pensiero giuridico* I, Milan Giuffré, 1979, 490. Further traces of Roman law are to be found in Dutch and consequently in South African law.

2 Among the common law countries are England and Wales, the United States of America (except for Louisiana which has a Civil Code similar to France) and Canada (with the exception of Quebec which is influenced by French law) Ireland, India, Pakistan, Australia, New Zealand. There are also legal systems with mixed law such as South Africa, Ceylon, British Guyana (Common law and Dutch Roman law) Common law nowadays extends over a territory of about 30 million square kilometers. See A. CAVANNA. *op.cit.*, at 489-490.

3 Among the countries in that area are the Czech Republic, Slovakia, Poland, Hungary, Bulgaria, Rumania as well as the countries which were formally part of the USSR.

4 Among the Islamic law countries: Syria, Jordan, Iraq, Egypt, Libya, Kuwait, Bahrain, Saudi Arabia, Quatar, The United Arab Emirates, Oman, North Yemen. On Islamic law (Sharia) see *Nov. Dig. It.*, item Islamic Law, 944, and in particular concerning arbitration in these countries: S. SALEH, *Commercial Arbitration in the Arab Middle*

Furthermore, many other legal systems, theoretically, can be treated as belonging to the area of influence of another legal system. However, in the construction and application of rules which these systems have imported from other countries, they finally acquire – as is natural – a different meaning, because of their adaptation to a different civilization.

An example of this situation is arbitration in *equità, (equité* or *equidad,* i.e. according to natural justice),[5] which is not accepted by common law systems,[6] either from a technical point of view (since courts would not be able to review the decision of the arbitrators), or on a more profound level, since the notion of natural justice is less acceptable to these systems than the application of specific rules of law, and it conflicts with their need for certainty in the law. The notion of natural justice consequently introduces in their opinion a subjective element and an uncertainty which are both unsatisfactory. This reluctance may be surprising to civil law countries, since it is the common law systems which, in principle[7], are in favour of unwritten provisions and many centuries ago they had in addition to ordinary courts, which decide according to the law, the Court of Chancery which developed equitable rights.

However, this attitude must be taken as a fact.

Likewise arbitration proceedings which are not governed by statutory provisions are not even treated as arbitration in several legal systems.[8] This is the case in *joint mandates to settle*, since in such proceedings the arbitrator is not

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East (hereinafter Saleh), London, Graham & Trotman, 1984, at 1-95, and EL AHDAB, *L'arbitrage dans les pays arabes*, Paris Economica, 1988.

5 On arbitration according to natural justice see the study by R. LOQUIN, *L'amiable compositeur en droit comparé et international* (Amicable composition in comparative and international law), Librairies Techniques Paris, 1980, vol. 7; see also R. VECCHIONE, *Impugnazione del lodo degli arbitri di equità,* (Challenges against the award rendered by arbitrators deciding according to natural justice) *Foro pad.*, 1955, I, 1979.

6 For example in England:

> it is the policy of the law in this country that, in the conduct of arbitration, arbitrators must in general apply a fixed and recognizable system of law ...

Lloyds Rep. 1962, 2, 257-264 (from REDFERN-HUNTER), *op. cit.* at 23. See also LOQUIN, *op. cit.*, at 96 *et seq.*

7 However, while common law is based exclusively on unwritten principles, in recent years a large increase in the issue of statutes has occurred.

8 As to "contractual" arbitration see G. SCHIZZEROTTO, *L'arbitrato* (Arbitration) Milan, Giuffré, 1982, at 253 *et seq.;* for an overall idea of the various forms of arbitration in individual legal systems see BERNARDINI, *L'arbitrato internazionale* (International arbitration) Rome, Giuffré 1987 (hereinafter Bernardini) at 31 *et seq.* See also A. J. van den BERG, *The New York Convention of 1958* (hereinafter van den BERG), Kluwer Law and Taxation Publishers, 1981 at 45 *et seq.*, which reports several other proceedings such as "Schiedsgutachten", in Austria and in Germany where it is not an arbitration procedure under the Civil Procedure Act, or "bindend advies" (Holland and Indonesia).

requested to decide – like a judge – but to settle a dispute; this is seen as instructions to enter into a contract (although there is then disagreement as to its contents, which according to some are merely to settle, but according to others may be also a contract to establish the existence of a right or a duty). The performance of such instructions does not produce a decision but a contract, which may then be enforced as any other contract. Examples of joint mandates to settle are the Italian *arbitrato irrituale* and the French *désignation d'un mandataire commun* which is the object of the *Karim* judgment.[9] Still the position of such proceedings becomes less clear when one considers that an arbitrator sitting as an *amiable compositeur* (if this is construed as instructions to settle the dispute), may in some jurisdictions discharge the same task. It should follow from this that *arbitrati irrituali* and *amiable composition* could both be treated as arbitration or both treated separately from it.[10]

Still the role of the *amiable compositeur* is subject to differences of opinion in the various jurisdictions,[11] since according to some[12] his task is to settle, while according to others it is to decide *en equité*, i.e. under the principles of natural justice.

In conclusion, the term arbitration covers a variety of mechanisms both in theory and in application. Nevertheless, this term is rightly used to define the institution as a whole, since the elements common to the various systems prevail on the differences registered in their applications. Arbitration in fact aims to satisfy a widespread need not only on the national, but also on the international level.

Extensive discussion has taken place as to the nature of arbitration. Various theories have been elaborated. One theory is that, since arbitration derives from a clause or agreement, its nature is contractual; hence the *contractual theory*.

Another theory is that since arbitral proceedings are judicial, its nature is jurisdictional; hence the *jurisdictional theory*.

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[9] *Société Karim v. SCI D.H.P.*, Court of Appeal, Paris, March 17, 1989, *Rev. arb.* 1990, 727.

[10] M. RUBINO-SAMMARTANO, *Amiable compositeur (Joint Mandate to Settle) and Ex Bono et Aequo (*Discretional Authority to Mitigate Strict Law – Apparent Synonyms Revisited*), 9 J. Int. Arb.* 1,5.

[11] See LOQUIN, *op. cit.*, I., Chapters II-III.

[12] H. YANMING, *Some remarks about the 1994 Rules of CIETAC and China's New International Arbitration Rules,* 11 *J. Int. Arb.* 4, 104; PENG, *The Influence of Chinese Philosophies on Mediation and Conciliation in the Far East* (1996) J.C.I. Arb. 1, 16; H. YANMING, *Mediation in the Settlement of Business Disputes,* 8 *J. Int. Arb.,* 4, 23; HILL, *Non-Adversarial Mediation,* 12 *J. Int. Arb.* 4, 135; TASHIRO, *Conciliation or Mediation during the Arbitral Process. A Japanese View,* 12 *J. Int. Arb.* 2, 119; TRAPPE, *Conciliation in the Far East,* 5 *Arb. Int.*, no. 2, 1989, 77; SCOTT-DONAHEY, *Mediation and Conciliation in the Asia Pacific Region,* in DOYLE (ed.) *Doyle's Dispute Resolution Practice: Part of Asia-Pacific* 85-000.

Sanders[13] rightly refers to these different opinions as a 'battle of theories". This battle moved from writers to courts, as it results from the *Del Drago*[14] leading case. In that case a dispute arose concerning the estate of Queen Marie Christine of Spain, which *inter alia* involved identification of the national law of the defendant. It was decided that it was the law of the Pontificial State, since Princess del Drago belonged by marriage to the Pope's Household.

In addition to arbitration there are several other methods of settling and even of preventing disputes. In practice they are different responses to the same desire to settle the dispute, but each of them has its own features.

1.2 *AD HOC* V. ADMINISTERED ARBITRATION

From the point of view of the framework in which the arbitral proceedings are conducted, arbitration may be divided into two categories:

- institutional and
- *ad hoc* arbitration.

Institutional arbitration is arbitration administered by an arbitral institution while *ad hoc* arbitration is arbitration administered by the arbitral tribunal itself.

However, the situation is not always so neat. Intermediary situations arise.

For example, the parties may appoint the arbitrators, but determine that the arbitrators must apply the rules of a given arbitral institution, without the institution having to discharge any other tasks. If so, except for that, the arbitration rules of that body shall apply.

A different situation arises where the parties choose an administered arbitration, but exclude or replace some of the arbitration rules of that body. A delicate issue then arises as to which of such rules an arbitral institution will accept to be waived by the parties, in order to administer those arbitral proceedings.

In other situations the parties may elect even in *ad hoc* proceedings that the arbitrators be appointed by an arbitral institution.

A set of rules for *ad hoc* arbitration was drawn up in 1992 by a group of practitioners, who created a Centre for Public Resources for Non Administered Arbitration of International Disputes, an initiative of which to this day little advantage has been taken.[15]

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[13] P. SANDERS, (Chapt. 12) Arbitration (Volume XV) Civil Procedure, *International Encyclopaedia of Comparative Law* Mohr, Tübingen 1996.

[14] *Marquis de Santa Cristina et al v. Princess del Drago et al.*, Court of Appeal Paris, December 10, 1991, *Clunet* 1992, 314.

[15] R. B. von MEHREN, *Rules of Arbitral Bodies Considered from a Practical Point of View*, 9 *J. Int. Arb.*, 3, 105.

1.3 FROM HOSTILITY TO FAVOUR

According to MacNeil[16], in the U.S. the attitude towards arbitration was one of encouragement (in the nineteenth century), then hostility (in the first half of the twentieth century) and recently again one of open favour, and the first attitude may have been favourable only in the abstract, because at that time the number of arbitral proceedings was limited.

However there is not agreement on MacNeil's view. In the U.S. the Federal Court in *Mitsubishi*[17] quoted *Kilikundis Shipping Co. v. Amtorg Trading Corp.*[18] stating that:

> national courts will need to shake off the old judicial hostility to arbitration ...

Roebuck[19] quotes an objective statement from Blackstone:[20]

> experience having shown the great use of these flexible and domestic tribunals, especially in settling matters of account, and other mercantile transactions, which are difficult and almost impossible to be adjusted on a trial at law, the legislature has now established the use of them.

However, more or less at the same time an English judge, Lord Campbell, said:

> I know that there has been a great inclination in the courts for a good many years to throw obstacles in the way of arbitration.

The negative attitude is witnessed by many court rulings. In the U.S. the Supreme Court's ruling in *Wilko v. Swan*[21] neatly held that:

> a customer of a stock broker who alleged to have been induced to deal with stock, was entitled to issue proceedings before the state courts, for breach of the Securities Act 1933, since the arbitration agreement which the parties had entered into produced no effect.

The Court affirmed that it was the intention of the Congress that violations of the Securities Act be excluded from the ambit of arbitration agreements.

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16 Ian R. MacNEIL, *American Arbitration Law:Reformation, Nationalization, Internationalization,* 4, 1992.

17 *Mitsubishi Motor Corporation (Japan) v. Soler Chrysler Plymouth Inc.* U.S. Supreme Court July 2 (1985), *Yearbook Commercial Arbitration* 1986, 833.

18 126 F. 2nd 978, 85 (2nd Cir. 1942).

19 D. ROEBUCK, *The Myth of Judicial Jealousy* 10, *Arbitration International*, 4, 403.

20 W. BLACKSTONE, *Commentary on the Laws of England* Oxford 1765-69, III, 17.

21 *Wilko v. Swan* 107 F. Suppl. 75, 79 (S.D. N.Y. 1952).

Rather than such a finding, it is the language used by that Court in respect of arbitration, such as references to 'looser approximations of rights' and to a 'surrender of rights' which leaves little doubt as to the esteem in which some state courts held arbitration.

Arbitration itself was referred to in *Tobey*[22] by the highly respected Justice Story in no flattering way. According to him arbitrators:

> are not ordinarily well enough acquainted with the principles of law or equity, to administer either effectually in complicated cases; and hence it has often said, that the judgment of arbitrators is but *rusticum judicium*. Ought then a court of equity to compel a resort to such a tribunal by which however honest and intelligent, it can in no case be clear that the real legal or equitable rights of the parties can be fully ascertained or perfectly protected?

In 1980 a completely different view was expressed by the U.S. Federal Court in *Mitsubishi*:[23]

> As international trade has expanded in recent decades, so too has the use of international arbitration to resolve the disputes arising in the course of that trade. The controversies that international arbitral institutions are called upon to resolve have increased in diversity as well as in complexity. Yet the potential of these Tribunals for efficient disposition of legal disagreements arising from commercial relations has not yet been tested. If they are to take a central place in the international legal order, national Courts will need to 'shake off the old judicial hostility to arbitration ...', and also their customary and understandable unwillingness to cede jurisdiction of a claim arising under domestic law to a foreign or transnational tribunal. To this extent, at least, it will be necessary for national Courts to subordinate domestic notions of arbitrability to the international policy favouring commercial arbitrations. See *Scherk, supra.*

This was a view followed by a large number of courts which saw in arbitration a remedy against their heavy caseload.

Arbitration was now praised for simplicity, informality and expeditiousness.

The importance of arbitration has been recognized at the highest level, i.e. by the General Assembly of the United Nations, which has commenced its Resolution adopting the Model Law by stating:

> Recognising the value of arbitration as a method of settling disputes arising in international commercial relations ...

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[22] *Tobey v. County of Bristol et al.*, 23 *Fed. Cas.* 1313, 1321-23 (CCD. Mass. 1845); G. BORN, *International Commercial Arbitration in the United States*, Kluwer 1994 at 187.

[23] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth* 473, U.S. 614 (1985).

Current favour and developments are subsequently discussed in Chapter 28.

1.4 CONCILIATION AND MEDIATION

An institution not far removed from arbitration, but certainly quite different from it in law, is conciliation.[24] This well-known system consists in an attempt by a third party, designated by the litigants, to reconcile them either before they resort to litigation (whether to court or arbitration), or after. The attempt to conciliate is generally based on showing each side the contrary aspects of the dispute, in order to bring each side together and to reach a solution, which will generally be found in the middle of the two parties' positions.

Conciliation proceedings may take many forms and in some legal systems they are presented in a modern fashion.[25]

However, in substance, even with this new look, we are always presented with a traditional conciliation, the merits of which are certainly undisputed when the parties are persuaded to become more reasonable. In fact, it must be recognized that litigation generally takes place when at least one of the litigants is being unreasonable. Helping the parties to see reason is therefore a useful social role of conciliation.

Conciliation, due to its importance, is mentioned in the most recent Arbitration Conventions. The 1965 Washington Convention[26] provides that a

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[24] Among the vast literature on conciliation and mediation are: HOLLERING, *Arbitration Practice in the United States,* in SANDERS (ed.). *Comparative Arbitration Practice and Public Policy in Arbitration,* Eighth International Arbitration Congress New York, May 6-9 (1986). ICCA Congress Series no. 3 (1987), at 150: DARWING, *Mediation and Good Offices in International Disputes: The Legal Aspects,* London, 1972, at 83-85; V. FOX, *Conciliation, ibidem,* at 95: SINGER, *The Use of Conciliation for Dispute Settlement,* in General Reports to the Tenth International Congress of Comparative Law, Budapest. Akademiai Kiado, 1981, at 365-367; SMITH, *A Warmer Way of Disputing: Mediation and Conciliation,* (26 Supp.). *American Journal of Comparitive Law,* 1978, at 205; GOLDENBERG, *Mediation and Arbitration of International Disputes.* I. Hofstra L.R., 1973, at 9; COT, *La conciliation internationale* (International conciliation), Paris, 1968; HAMZEH, *International Conciliation,* Amsterdam, 1964; HOLTZMANN, *Conciliation: A Promising Procedure for Resolving Multi-party Disputes.* Report submitted to the ICCA Interim Meeting, Warsaw, 1980.

[25] As has happened to other established institutions such as leasing contracts and assignment of credits, which have been presented in the guise of financial contracts or factoring agreements.

[26] Convention for the Settlement of Disputes Concerning Investments between States and Nationals of Other States. Washington, March 18, 1965. As of June 1986, 88 countries had ratified this convention (See M. GIULIANO, F. POCAR, T. TREVES, *Codice delle convenzioni* di *diritto internazionale privato e processuale* (Code of Private and Procedural International Law Conventions)), Milan, Giuffré, 3rd ed., 1999, at 1765.

conciliation committee should be set up, at the request of a Contracting State, or of a subject of a Contracting State, and rules its procedure:[27]

> *Article 34.* (1) It shall be the duty of the Commission to clarify the issues in dispute between the parties and to endeavour to bring about agreement between them upon mutually acceptable terms. To that end, the Commission may at any stage of the proceedings and from time to time recommend terms of settlement to the parties.
>
> The parties shall cooperate in good faith with the Commission in order to enable the Commission to carry out its functions, and shall give their most serious consideration to its recommendations.
>
> (2) If the parties reach agreement, the Commission shall draw up a report noting the issues in dispute and recording that the parties have reached the agreement. If, at any stage of the proceedings, it appears to the Commission that there is no likelihood of agreement between the parties, it shall close the proceedings and shall draw up a report noting the submission of the dispute and recording the failure of the parties to reach agreement. If one party fails to appear or participate in the proceedings, the Commission shall close the proceedings and shall draw up a report noting that party's failure to appear or participate.
>
> *Article 35.* Except as the parties to the dispute shall otherwise agree, neither party to a conciliation proceeding shall be entitled in any other proceeding, whether before arbitrators or in a court of law or otherwise, to invoke or rely on any views expressed or statements or admissions or offers of settlement made by the other party in the conciliation proceedings, or the report or any recommendations made by the Commission.

The same applies to several sets of arbitration rules. The first part of the International Chamber of Commerce (1988) rules,[28] devoted to conciliation, opened with a clear statement in favour of it:

> settlement is a desirable solution of disputes of a commercial nature.

However, an attempt to settle is not a condition precedent to arbitration. The first of the various provisions of the ICC (1988) rules devoted to conciliation stated:

> *Article 5.* The conciliator shall conduct the conciliation process as he thinks fit, guided by the principles of impartiality, equity and justice.
>
> With the agreement of the parties, the conciliator shall fix the place for conciliation.

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[27] See Articles 34-35 of the Convention, *supra* note 12.

[28] ICC Conciliation and Arbitration Rules, in force from January 1 (1988), publication no. 581, ICC 1997, Paris.

> The conciliator may at any time during the conciliation proceedings request a party to submit to him such additional information as he deems necessary.
>
> The parties may, if they so wish, be assisted by a counsel of their choice.[29]

Conciliation is mentioned in the international arbitration rules of the American Arbitration Association[30] and is governed as to domestic commercial arbitration by the Commercial Mediation Rules.[31] However, in general conciliation is more than welcomed and is occasionally referred to as mediation. A set of mediation rules has been set out by the *Cour Européenne d'Arbitrage* (European Court of Arbitration).[32] Reference to Conciliation can be found in the rules of the Inter-American Commercial Arbitration Commission (IACAC):[33]

> On some occasions the parties may prefer to use procedures for conciliation rather than arbitration. This can be frequently effected through the good offices of the Commission or its National Sections.

Reference to conciliation can be found in the international arbitration rules of the Milan Chamber of Arbitration.[34] No reference is made to it in the 1999 arbitration rules of the Institute of Arbitration of the Stockholm Chamber of Commerce,[35] but at the same time the Stockholm Chamber of Commerce has set up the Mediation Institute of the Stockholm Chamber of Commerce which has published its own set of rules. Conciliation is given much coverage by the rules of the Euro-Arab Chambers of Commerce.[36] It is reported that under Islamic law, in compliance with Art. 1848 of the *Majalla,* two arbitrators, one appointed by each party, decide the dispute under the conciliation rules.

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29 Articles 1-11 of the rules quoted in the previous note.

30 Introduction to the AAA International Arbitration Rules.

31 Rule 10 AAA Domestic Commercial Arbitration Rules, and Commercial Mediation Rules.

32 A private arbitral institution, having the status of a legal entity, and its seat in Strasbourg, formed about 40 years ago under the patronage of the Council of Europe and of other bodies and having branches in Karlsruhe, Milan, Istanbul, Zagreb, Barcelona, London, Brussels and Paris.

33 Article 1, edition April 1 (1982) in J. S. McCLENDON and R.E.E. GOODMAN, *op. cit.* at 228, no. 1 (Introduction).

34 The International Rules of the Milan National and International Chamber of Arbitration (the Milan Chamber devote the whole of their Title I to this issue (Conciliation Proceedings) Articles 12 through 17.

35 Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, 1999.

36 Rules of Conciliation, Arbitration and Expertise of the Euro-Arab Chambers of Commerce, Paris, 1983, Articles 12-18.

In practice, one does not often resort to conciliation. The ICC has in fact declared that in 1986 it received only 8 requests for conciliation. This is because the party which knows it is in the wrong generally tries to avoid a quick settlement of the dispute.

This tendency is encouraged by the duration of court and arbitral proceedings and by the financial advantage that the defaulting party can obtain from a delayed payment. Interest, for example, is not a universal achievement, in as much as the winning party is not entitled in every jurisdiction to full interest from the date of maturity to collection. In fact, the starting date of interest (sometimes only from judgment) may be argued[37] and even more its rate. These are real incentives for the litigant who is in the wrong, or short of cash,[38] to delay the proceedings. It is also essential to mention that, in many legal systems, damages in excess of interest at the legal rate caused by non-payment[39] are not recognized, and interest at the legal rate is the only remedy available.

Therefore, it is not surprising that, in the face of such serious limits in legal systems, conciliation, if not agreed upon by the parties from the beginning, should rarely be used. Furthermore, even when it has been agreed from the beginning, it frequently produces a negative result.

Conciliation is sometimes distinguished from mediation.[40]

According to Lord Donaldson[41] in conciliation proceedings the neutral party:

> Listens to the complaints of the disputants and seeks to narrow the field of controversy. The Chinese word for a conciliator is said to be 'a go-between who wears out 1,000 sandals' while 'the mediator performs the functions of a conciliator but also expresses his view on what would constitute a sensible settlement'.

Lord Wilberforce, himself a Law Lord,[42] has expressed a view along the same lines:

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37 On the accrual of interest after judgment see for example *N.V. Market Ltd. (Nicosia) v. Kiriakos Mavronikolas (Nicosia)*, District Court of Nicosia, Cyprus, May 5, no. 71/83 (1984) in *Mediterranean and Middle East Arbitration Quarterly*, 1987, I, no. 4, 4; concerning England, see S. BOYD, *Interest on the late payment of money*, in *Arbitration International*, 1985 vol. 1, no. 2, at 153 *et seq.*

38 See REDFERN-HUNTER, *Law and practice of international commercial arbitration*, London, Sweet & Maxwell, 1986, at 305-306 and S. BOYD, *op. cit.*, see *supra* note 37.

39 In fact in many legal systems there is no rule similar to Section 1124, 2nd para., of the Italian Civil Code, which entitles parties to recover higher damages, i.e. in excess of interest at the legal rate.

40 K. LIONNET, *Arbitration and mediation – Alternative or opposites,* 4 *J. Int. Arb., 1,* 69.

41 DONALDSON, *Alternative Disputes Resolutions* (1992) 58 *JCI Arb.* 2, 102.

42 WILBERFORCE, in *Arbitration Model Law in Canada* (Carswell, Toronto, 1987, 7).

> Conciliation I understand to be a process by which the parties to a dispute ... are helped by a neutral and independent party ... to reach a mutually acceptable settlement. It is the responsibility of the parties themselves to reach agreement. Mediation involves a further step. The mediator not only conciliates but makes his own recommendations.

Lord Wilberforce, acting as a conciliator in *Tecno Petroleum*[43] described his task as follows:

> to examine the contentions raised by the parties, to clarify the issue, and to endeavour to evaluate their respective merits and the likelihood of their being accepted or rejected, in arbitration or Court proceedings, in the hope that such evaluation may assist the parties in reaching an agreed settlement recommending to issue in the end a binding settlement.

The difference between the two methods of settling disputes would thus be that the purpose of a conciliator would be to induce the parties themselves to realize what benefits they might obtain from settling the matter out of court in whichever way they deem most convenient. Mediation, on the other end, would have the more concrete aim of advising each litigant to waive part of his claim in order to reach a settlement through an *aliquid datum* and an *aliquid retentum* (i.e. giving up a part of a claim in exchange for receiving the rest of it). This distinction is perhaps theoretically accurate, but somewhat artificial. In fact, if a real distinction between these two systems must be drawn, it is submitted that it lies in the granting of the authority to the third party to issue in the end a binding settlement. In fact, one must distinguish situations where the conciliator (or mediator) has that authority from other situations in which he may merely propose a settlement formula to the parties. However, nothing seems to prevent the parties from granting such authority to a conciliator or to a mediator. It is suggested that in this wider authority, rather than in an intrinsic distinction between conciliation and mediation, one could perhaps see a real difference between the two terms. No distinction between them is made by Goldberg, Sander and Rogers[44] who describe this exclusively as mediation. In several jurisdictions a conciliator or mediator with such authority will be treated as an arbitrator acting as *amiable compositeur*. Be that as it may, in

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[43] *Tecno Petroleum v. Trinidad and Tobago*, L. NURICK – S.J. SCHNABL, *The First ICSID Conciliation* I ICSID – Review FILJ (1986) 340, 348.

[44] GOLDBERG, SANDER and ROGERS, *Dispute Resolution*, 2nd Ed. Little Brown & Co., 1992 at 103.

several legal systems – I would say in the majority of them – the role of the conciliator or mediator is merely to try to bring the parties together.[45]

This view is confirmed by the French judgment in *Clause France*[46] which, disregarding the reference to arbitration in the parties' agreement which gave rise to the proceedings, has held that if the proceedings aim to end up with an opinion which - if not accepted by the parties – is not binding, the proceedings are to be characterised as conciliation and no appeal is conceivable against such an opinion.

1.5 Alternative Dispute Resolution

The economic success of common law countries in this century and the last has resulted in their taking very interesting initiatives in the legal field also. One may refer to financial lease contracts[47] for example, which are an interesting development of the old lease, to factoring[48] and forfeiting,[49] which originate in the assignment of credits as well as countertrade[50] and franchising.[51] It is suggested that common law is more fully developed on trial procedure while civil law has kept the lead on general theoretical and legal architecture issues, based on its attitude to sophisticated analysis, which, borrowing Ancel's happy definition, is probably seen by common law lawyers as a *péché d'analyse*[52].

Following this trend, in the area of alternative resolutions, the United States have developed various solutions, studied to meet their market's needs and

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45 For example, under Italian Law the judge under Section 189 of the Italian Rules of Civil Procedure may attempt to settle a dispute if its nature allows it, but he has no authority to impose a settlement.

46 *Sté Clause France v. Coopérative Agricole de l'Aunis*, Court of Appeal, Paris March 23, 1989, *Rev. arb.* 1990, 3, 731.

47 Reference is made to the large number of authors and precedents on this subject referred to in G. DE NOVA, *Il Contratto di leasing* (Hire purchase contract). Milan, Giuffré, 1982.

48 As regards factoring, reference is made only to some of the many studies which have been published: *G. ZUDDAS, Il contratto di factoring (Factoring)* and B. ROSSIGNOLI, *Manuale del factoring* (Factoring), Jovene, Naples, 1983; R. RUOZI and B. ROSSIGNOLI, *Manuale del factoring* (Manual on Factoring), Milan, Giuffré, 1984; BISCOE, *Law and Practice of Credit Factoring*, London, Butterworths, 1975.

49 See E. TAVERNIER, *Il Forfeiting, Foro pad.* 1983, II, at 285.

50 See P. MISHKIN, *Countertrade and barter: the basic legal structure, in International Business Lawyer*, Febr. 1986, vol. 14, at 7 *et seq.*

51 See *Nov. Dig. It.*, item Franchising, Appendix vol. III, at 884 *et seq.*; see also A. FRIGNANI, *Il franchising di fronte all'ordinamento italiano, spunti per un'indagine comparativa* (Franchising in Italian law, cases for a comparative analysis), in *Rivista di Diritto Industriale* (*Riv. Dir. Ind.*), 1972, I, 244 *et seq.*

52 B. ANCEL, Comments to *Epoux A.v. Préfet de Paris*, Tribunal de Grande Instance de Paris, November 18, 1980 *Rev. crit. droit. int. privé* 1981, 673.

attractively presented them. Among the solutions are various formulas for meetings and discussions between the parties, aiming to lead them to a better understanding of each other's position and thereby bring about a settlement of the dispute. These formulas are frequently variations on the old conciliation pattern which are revived by the firm intention to avoid very expensive litigation or arbitral proceedings and which require an open and constructive mind, which is not common.

At the beginning arbitration was seen as an alternative to court proceedings.

However arbitration has been frequently administered in such a way that – although it could be short and not too expensive – it has been and has been seen to be a long and expensive exercise. Much water has unfortunately run under the bridge since the *Forsythe* court in the U.S. could assert:[53]

> As a speedy and informal alternative to litigation, arbitration resolves disputes without confinement to many of the procedural and evidentiary structures that protect the integrity of formal trial.

For these reasons, these various methods are seen now as an alternative even to arbitration, in spite of generous efforts to stress that rather than an alternative, they should be seen as an *additional* mechanism.[54]

Alternative Dispute Resolution has been covered in detail by writers.[55]

ADR is not immune from criticism. Some have seen in it a waste of time; others recognize the risk that it be only initiated to check what is the minimum offer that the other party would accept. Questions have been raised[56] as to how the neutrality and impartiality of ADR can be secured, as to how one should choose from the many ADR methods and as to how one may ensure that the dispute resolver has behaved correctly. The need to control compliance with

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[53] *Forsythe Intl. S.A. v. Gibbs Oil Co.*, 915, F 2nd 1017, 1022 (5th Cir. 1990).

[54] L. STREET, *The language of ADR – Its Utility in Resolving International Commercial Disputes – The Role of the Mediator* (1992) *J.C.I. Arb.* 2 (5), 17.

[55] P. SANDERS, *ADR in civil law countries* (1994) 61 *JCI Arb.* 1, 35; J. WERNER, ADR: *Will European Brains Be Set On Fire?* 10 *J. Int. Arb.*, 4, 45; R. COULSON, *Will the Growth of Alternative Dispute Resolution (ADR) in America be Replicated in Europe?* 9 *J. Int. Arb.* 3, 39; CUSHMAN-MYERS-BUTLER-FISHER, *Construction Dispute Resolution Book*, Wiley, 1997; A. CONNERTY, *The Role of ADR in the Resolution of International Disputes* (1996) 12 *Arb. Intl.* 47; H. BROWN-A. MARRIOTT, ADR *Principles and Practices*, Sweet & Maxwell 1993; E. MOND, *Alternative Dispute Resolution, A Conceptual Overview*, 22 *Kobe Univ. Law Review* (Int. Ed.) 1988, 10; MARKS-SZANTIN-JOHNSON, *Taking Stock of Dispute Resolution: An Overview of the Field,* National Institute for Dispute Resolution, 1981; R. SCOTT, *The Courts and Alternative Dispute Resolution* (1990) 56 *J.C.I. Arb.* 3, 176; CARRINGTON, *Civil Procedure and Alternative Dispute Resolution* 34 *Journal of Legal Education* 2981 (1984); C.R. RAGAN, *Emerging Dispute Resolution Techniques in the Pacific Basin* 9, *Arb. Intl.* 2, 131.

[56] SCOTT, *op. cit.* 181.

procedural norms and the general need to control misuse of the ADR process has been advocated. Finally enforcement of the solution reached through ADR has been discussed.

Jarosson[57] has raised the issue whether ADR is to be examined from a procedural or a contractual point of view. His conclusion, that ADR is a contractual mechanism, must be shared.

However the conclusions of the various ADR mechanisms may produce different results as to enforcement as well as to attacks.

If no settlement is reached, statements made by the parties during the proceedings may have to be treated as made without prejudice or conditional upon the reaching of a settlement.

If a settlement is reached and it is treated as a contract, it may be enforced as any other contract. Different effects may be produced by a waiver by one party or by an acknowledgement by the other party.

Attacks, on the ground of fraud or gross lack of care by the dispute resolution facilitator may affect the settlement which has been entered into by him, or on his recommendation. Likewise fraud by a party in the presentation of its case may affect the conclusion of the ADR mechanism.

ADR mechanisms tend to be *hybrids* between negotiation and litigation. In view of that, they have been referred to by Marks[58] as '*litigotiation*'.

A normal step is to envisage conciliation as a preliminary to arbitration.[59] However, regrettably the two methods are frequently seen at least in Western countries as alternative, rather than subsequent steps. This is shown by the extremely rare number of cases in which one clause includes the two.

The opposite tendency seems to exist in the Far East. In China one has made reference to the two methods as a *combined* process.[60]

1.6 Mini Trials

One element in the search for new solutions is the mini-trial formula or, rather, simulated or *in vitro* trials, so-called because in fact they are not real trials. Through them the parties are obliged to face each other and to verify their reasoning in front of a neutral person, who then expresses his opinion on the probable result of litigation. This opinion thus takes on the shape of a preview of the decision by the future judge or arbitrator in real litigation and hence may induce the parties to settle the dispute. From this point of view the

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57 H. VAN HOUTTE, *Pour ou contre l'ADR*, 7, ICC Bulletin, 1996, 1, 77.

58 MARKS, GREEN and CROOME, *Beyond Adjudication* (1988).

59 R. WILLIAMS, *Alternative Dispute Resolution (ADR) Salvation or Chimera?* (1990) 56 *JCI Arb.* 1, 101.

60 P. SANDERS, *op.cit.*, 37: H. YANMING, *op.cit.*, 112.

purpose of *mini trials* is to be conciliatory. The neutral person is frequently a retired judge, in which case the commercial-sounding formula *rent a judge* is used.[61] The most important aspect of *in vitro* trials seems to be the decision-making role reserved to non-lawyers. In fact, the trial has two aspects: the first one is similar to a real trial in which the parties present their evidence through their counsel, albeit in a more concise form that in real trials.

The second aspect – typical of mini-trials – is that the presentation of their case by the parties takes place before two negotiators, one appointed by each party (if the party is a company from among its senior officers) who has authority to decide and who has preferably not been involved in the dispute, so he can be more removed from it. The purpose of mini-trials is to make each party realize his position better (including his weak points) and try to settle the dispute, rather than close his eyes to reality and postpone facing the truth for some years, eventually at a much higher cost. Therefore, at the end of the argument, the negotiators representing the two parties may discuss the case between themselves and reach a settlement if possible.

If this process is unsuccessful, then at that stage the neutral advisor, who is frequently an attorney or a retired judge who has followed the entire mini-trial from the beginning, steps in and informs the parties of what he thinks a future judge or arbitrator will decide. This opinion, expressed by the neutral advisor, offers the parties a further opportunity to settle the dispute.

This formula has been applied, in particular, by the Centre for Public Resources in the United States and in some cases it is reported to have produced positive results.

Other bodies were formed in Europe, such as the Centre for Dispute Resolution (CEDR), and the International Dispute Resolution (Europe) Ltd. (IDR)

Cases of settlement of disputes through mini-trials such as *Rank Xerox* have been published.

Illustration

> Xerox Corporation entered into a distribution agreement with a Latin American company. When a difference arose between the parties, the distributor construed the contract as applying (i) not to one line of computers only, but to all the computers sold by Rank Xerox (ii) throughout Latin America rather than in a more limited territory.
>
> One year after proceedings had commenced before the California Courts, an extremely quick mini-trial took place (Rank Xerox presenting

[61] See REDFERN-HUNTER, *op. cit.*, at 25.

its case in 1 hour and 40 minutes) which produced a positive result ending in a promptly reached settlement.[62]

Another positive mini-trial is the *Telecredit-TRW* dispute concerning trademarks, conducted before the parties' negotiators and a neutral advisor; the dispute was settled by the parties' CEOs in 30 minutes after 14 hours of mini-trial.[63]

A third positive mini-trial is reported as having taken place between a German manufacturer and an American distributor. Settlement was reached after a presentation of one hour by each party.[64]

A further positive mini-trial concerned the *Tennessee-Tomtigbee* waterway project designed by the Corps of Engineers in order to provide a waterway between the watersheds of such rivers, for a length of 232 miles. The mini trial lasted four days, (but it benefited from evidence raised during the previous proceeding which had lasted 90 days).

Mini-trial rules were issued by the *American Arbitration Association*, by the *Zürich Chamber of Commerce* (ICCA Yearbook 1986-241) and by the *Netherlands Arbitration Institute.*

The mini-trial has also been the subject of writings by many authors.[65]

Fischer-Zernin and Junker point out that the role of conciliation and mediation is also a part of arbitration and that a conciliatory role is frequently played by arbitrators in Germany, Austria, Switzerland and the Netherlands. In fact, the national arbitration laws of Continental European countries favour and sometimes expressly provide for an attempt by the arbitrators to reach a settlement. A strong tendency in favour of conciliation is also reported in China and the Far East in general.[66]

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62 T.D. TAUBENECK, *Managing Legal Costs. New Ideas from America,* in *Arbitration* (The Journal of the Chartered Institute of Arbitrators, hereinafter J.C.I.); vol. 50, no. 2, 129 *et seq.:* J.B. MARKS, *Alternative Methods* of *Dispute Resolution, a View from the United States, id.,* vol. 50 no. 1, 81 *et seq.;* A.H. HODDINOT Jr., *Alternative Resolution of International Disputes, Arb. Int.* , 2, 172.

63 The speed of the Telecredit-TRW dispute, also quoted by TAUBENECK, *op. cit.,* at 132-133, is very important.

64 V. FISHER-ZERNING and A. JUNKER, *Arbitration and Mediation: Synthesis or Antithesis, J. Int. Arb,* 1988, no. 1, 21 *et seq.*

65 V. FISCHER-ZERNIN and A. JUNKER, *op. cit.,* 21 *et seq.;* J. WERNER, *Alternative Disputes Resolution, J. Int. Arb.*, 1985, no. 4, at 5; K. LIONNET, *op. cit.* at 69; REDFERN-HUNTER, *op.cit.,* at 25; M. BLESSING, *The Zürich Minitrial Procedure, J. Int. Arb.* 1, March 1985, 67; P. O'CONNOR, *Alternative Dispute Resolution: Panacea or Placebo?* (1992) 58, *J.C.I. Arb.* 2, 107; J. LEMLEY, *The Mini-trial procedure in Claims Settlement Disputes* (1990) 56 JCI Arb. 3, 183; J.B. MARKS-C.A.FOSTER, *Minitrials in Construction Disputes Resolution, in Construction Dispute Resolution Book, Wiley,* 1997.

66 For the importance of conciliation in the People's Republic of China see *Yearbook Commercial Arbitration,* III, 1978, at 153 and in particular at 155-156, as well as

The negative aspect of such proceedings is that they require goodwill from all the parties and it is exactly the absence of this essential element, in at least one of the parties, which, in the large majority of legal systems, will make it very difficult for conciliation to develop as it deserves.

1.7 TECHNICAL EXPERTISE, VALUATION, *SCHIEDSGUTACHTEN, BINDEND ADVIES,* QUALITY ARBITRATION

In addition to the longer and more formal arbitral proceedings, there are also the quicker, and sometimes simpler, technical expertise proceedings. The Rules of Technical Expertise[67] of the International Chamber of Commerce must be mentioned in this connection. The ICC has in fact created a specific Centre for this. Technical expertise consists in the appointment by the parties or in their absence by the ICC International Court of Arbitration of a technical expert who verifies the situation by hearing the parties and witnesses and obtains a comprehensive overview of the situation by making inspections, controls and calculations. In this way important factual elements are recorded while they are still fresh, avoiding the risk that they be lost or that they fade after a long period of time. The Technical Expertise Regulation provides also that the parties may grant a technical expert wider authority than that of merely making recommendations. Sometimes he may even be given the power to decide, but this is exceptional:[68]

> Except when there is an agreement to the contrary, the findings and the recommendations of the technical expert will not be final nor binding for the parties.[69]

The parties rarely grant such authority to the expert. Technical Expertise is not yet a widely used dispute resolution method.[70]

SENKIN SHIUFAN CHAN, *Settlement of Foreign Trade Disputes in the People's Republic of China, Arbitration* (The Journal of the Chartered Institute of Arbitrators), vol. 49, no. 4, 282 *et seq.* See also K.R. SIMMONDS, B.K.W. HILL and S. JARVIN, *Commercial Arbitration Law in Asia and the Pacific* (hereinafter SIMMONDS *et al.*), Oceana, New York; for example, the figures concerning Korea report that in 1982, out of 552 cases 494 have been settled through conciliation and only 58 through arbitration. It is reported that the large majority of these disputes concerned non-residents.

67 See *Expertise Technique* (Règlement et clause type), International Chamber of Commerce, Paris, 1977.

68 The 'International Technical Expertise Centre' of the International Chamber of Commerce, (Paris, 38 Cours Albert 1er).

69 Art. 6, para. 3, Technical Expertise Regulation.

70 The data provided by the International Chamber of Commerce, even if not official, do not show the existence of many procedures: for example in 1986 only 14 new applications were filed. See *Chronique des sentences arbitrales* by Y. DERAINS and S. JARVIN, in *Clunet*, 1987, 1009 *et seq.*; in particular 1010-1011.

Within the ambit of technical expertise fall the English *valuation,* the German *Schiedsgutachten,* the Italian *perizia contrattuale.* The Dutch *bindend advies* is an opinion on a factual issue, which may be requested by the parties as a technical expertise or as a part of other proceedings. It is binding for the parties, if they have so agreed.

Quality arbitration is a resolution mechanism which may, depending on the circumstances, amount to arbitration or confine itself to a technical expertise.

Technical expertise is frequently used in insurance disputes.

The Italian proceedings defined as *arbitraggio*[71] belong to the family of technical expertise.

The characteristic of *arbitraggio* lies in it being a mechanism which is used to complete a contract, by filing a term of the contract which the parties have left for decision by a neutral. This is the case of a sale of goods, in which the parties have left to *arbitraggio* to determine the sale price.

The Italian notion of *arbitraggio* is followed by the Swiss Courts which emphasise that whenever the neutral has to establish a fact, rather than deciding a dispute, one is in the presence of a *referto di arbitratore*[72]

1.8 Technical Expertise v. Arbitration

When the expert confines himself to fact finding, such as a physical or some other assessment of quality, quantity, or the existence of a defect, or the duration of incapacity to work due to an accident, or the percentage of invalidity, it may in principle remain within the ambit of technical expertise.

Along the same line is *Tropical Cruise*[73] according to which a proceeding to determine the amount of a loss is an appraisal provision and not an arbitral agreement. This conclusion might be too strict.

Whenever the expert, while deciding a fact, decides a legal issue, he acts indeed as an arbitrator. This view is shared by *Montaldo*[74] which has held:

> When the parties have expressed the intention that the issue in dispute (the percentage of permanent invalidity due to an accident) be finally decided by a medicine doctor, his decision, however framed, is an award and may be attacked as such.

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71 Assessment by a neutral party.

72 Cantonal Tribunal, Tessin, November 26, 1993, *ASA Bulletin* 1998, 1, 149.

73 *Tropical Cruise Ltd. v. Vesta International Company et al.* (U.S. District Court [South Distr. Mississipi] May 6, 1992 ICCA *Yearbook Commercial Arbitration* 1993, 557 1994, 272).

74 *Montaldo v. Sté G.A.N. Vie*, Court of Appeal, Paris, June 13, 1989, *Rev. Arb.* 1990, 3, 717.

The Swiss Federal Court in turn has held that the findings of an expert may not be challenged as an award, but only by instituting ordinary court proceedings.[75] David[76] holds that, whenever an expert decides a fact, he is no longer an expert, but becomes an arbitrator.

The traditional distinction between arbitration and technical expertise is simple: the arbitrator determines legal issues while the expert establishes facts.

This was clearly held by the Swiss Federal Court[77] in classifying an agreement which had appointed a technical expert:

> It appears that the parties have had the intention to submit disputes to arbitrators in order that they be determined by them.

It is not rare that agreements be entered into providing that disagreements related to damages be decided by a neutral party. If the disagreement merely concerns the amount of the damages, this may remain within the ambit of technical expertise.

However if the disagreement concerns also legal issues, or the determination of the amount involves legal issues, then its ambit is wider. It is submitted then that the agreement may have to be classified as arbitration. The solution will depend each time upon the circumstances.

1.9 MED/ARB

Med/Arb is a formula under which the parties agree that the dispute goes through mediation and arbitration, generally the mediator acting subsequently as the arbitrator. Although the original and logical sequence was mediation and, if unsuccessful, arbitration, several variations have been worked out.

For example, the process occasionally starts with arbitration, and mediation may follow during the arbitration.

One of the advantages of Med/Arb is that the time spent for mediation is not wasted if one has to turn to arbitration, since the arbitrator has already become acquainted with the dispute.

Even Med/Arb has registered successes which are reported by Elliott.[78]

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[75] *V. v. W et al*, Swiss Federal Court, September 30, 1993, ASA *Bull* 1994, I, 46.

[76] R. DAVID, *L'arbitrage dans le commerce international* (Arbitration in international trade), Paris, Economica, 1982, at 10.

[77] Swiss Federal Court, 2nd Civil Division, September 30, 1993, *V. v. W, et al, Bulletin ASA* 1994, 1, 46.

[78] D.C. ELLIOTT, *Med/Arb: Fraught with Danger or Ripe with Opportunity?* (1996) 62 JCI *Arb.* 3, 175.

Illustration

IBM and Fujitsu were involved in a high profile dispute.

The dispute was resolved through negotiations, mediation and arbitration.

Conoco Inc. and Browning Ferries Industries turned to med/arb after 3 years of litigation, and in 9 months of mediation settled many issues. The mediator became the arbitrator and chose one of the parties' final offers.

Federal Deposit Insurance Corp. and Chery, Bekart and Holland got involved in litigation over a claim against the auditors for misrepresentation. After spending $ 2 million in fees, without yet getting to trial, the parties moved to mediation and settled through the final offer system.

1.10 MEDALOA

Medaloa is the very attractive term invented by Robert Coulson[79] for a variation of Med/Arb.

Instead of arbitration, mediation – if unsuccessful – is followed by each party submitting to the mediator its last offer, authorising him to select one of them, both parties accepting to be bound by the mediator's selection between them.

The advantage of this mechanism on Med/Arb is that it obliges the parties to make their best settlement proposal knowing that the arbitrator will have to choose between them.

1.11 DISPUTE REVIEW BOARD (OR ADVISORS)

In an effort to avoid litigation, the parties to a contract sometimes appoint, in the terms of the contract itself, a Dispute Review Board generally consisting of two party appointed members and of a neutral member. The Board is paid by both parties and becomes familiar with the projects. It holds periodical meetings and helps to clarify and resolve misunderstandings. Whenever this does not happen, and a dispute arises, it tries to settle the dispute.

This formula, which was introduced by the American Society of Civil Engineering, was used in the Channel Tunnel contract.

There is not just one rigid formula; the Board and the parties are free to suit the Board's role to their requirements, including its possible role as arbitrator, subsequently.

Occasionally a *Dispute Resolution Advisor* is appointed instead of a Board.[80]

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[79] R. COULSON, *A Practical Technique for Resolving International Business Disputes*, 11, *J. Int. Arb.* 2, 111.

The Dispute Review Board (or Advisor) tends to work satisfactorily. Among its positive results, are the Queen Mary Hospital Refurnishment Project and the Queen Elizabeth Hospital refurbishment project both in Hong Kong.

1.12 PARTNERING

In an attempt to avoid disputes, the parties occasionally have recourse to partnering which is also referred to as *strategic alliance.*

This, rather than a dispute resolution mechanism, is a tool aiming to prevent disputes. Generally it consists[81] in an agreement between parties to work in a 'non adversarial environment'.[82]

This new approach requires training project managers in order to convince them that the parties must cooperate and that a smooth execution of the project is the best solution both for the Employer and the contractor.

1.13 SEQUENCE OF ADR MECHANISMS

In an attempt to be sure that no means to avoid a dispute are forgotten, very sophisticated projects adopt various 'filters' to be used in a given sequence.

The Boston Central Artery Tunnel Project involving costs in excess of US$ 6 billion and a duration of more than 10 years, has adopted a Multi ADR scheme consisting of:

- partnering
- presentation of the dispute to an 'authorized representative'
- a Dispute Review Board
- a mediator or alternative Dispute Resolution Board.

Along the same line is the Hong Kong's New Airport Project which has provided for:[83]

- submission of the dispute to the Engineer for a decision
- mediation
- adjudication

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[80] A.D. SILBERMAN–A.B. BATTELLE, *Dispute Review Board: An Analysis and Critique,* in *Construction Dispute Resolution Book,* Wiley, 1997; A. E. HARRIS *et al,* ADR: *A Practical Guide to Resolve Construction Dispute;* R.J. SMITH, *Dispute Review Boards Using the ASCE Model. If it's Not Broken Do Not Fix it.* ABA Dispute Avoidance and Resolution Task 1993; J.W.K. LUK *The Current Practice of Dispute Resolution Adviser (DRA) in the Construction Industry of Hong Kong* Arbitration 1995, 2531.

[81] L. EDELMANN–F. CARR, *Partnering* in *Construction Dispute Resolution Book,* Wiley 1997.

[82] This approach has been fostered in the U.S. by the Army Corps of Engineers.

[83] J.W.K. LUK, *The Current Practice of Dispute Resolution Advisor (DRA) in the Construction Industry of Hong Kong* (1995) *JCI Arb.* 4, 253.

- arbitration

These sophisticated *multi-stage systems* may indeed avoid litigation or arbitration. A disadvantage of them may be seen in the time and cost which is involved if many stages go through unsuccessfully.

It is submitted that two stages are probably a reasonable compromise between the justified eagerness to settle at all costs and the risk that such a programme be defeated by a non-cooperative party.

1.14 COURT ANNEXED ARBITRATION

Courts have been flooded during this century by proceedings. As expressed in *Mitsubishi* it was hoped that arbitration would be the remedy to this.

The hope that the courts' backlog could be dramatically cut by recourse to arbitration unfortunately did not materialise and the American legal system resorted to other imaginative solutions.

Sander[84] in 1976 during the Pound Conference[85] which echoed the 1906 Roscoe Pound speech[86] called for what became known as '*a multidoor courthouse*',[87] i.e. for access to justice being possible by opening the many *new* doors which the modern court-house made available to citizens. More specifically, Sander advocated that mediation or alternative phases be incorporated in the judicial process.

One of such new doors was the discretion granted to judges to order litigants to arbitrate, such litigants remaining free not to accept the arbitrator's award or to resume the courts proceedings, at the risk of bearing the costs of the arbitral proceedings and/or of penalties, if the court confirmed the arbitrator's award.[88]

This non-contractual arbitration became know as *court annexed arbitration* and raised more interest than other formulae such as, on the one hand creative judicial management (CJM), and on the other summary jury trials, mediation and early neutral evaluation[89] all these formulae together being also referred to as the *ADR basket.*

The way to a formal acknowledgement of Court annexed arbitration was paved by the 1983 amendments[90] to Rule 16, Federal Rules of Civil Procedure,

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84 F. SANDER, *Varieties of Dispute Processing*, 70 FDR 111, 131 (1976).

85 A. COHN, *The Pound Conference,* 60 *Mich. B.J.* 35 (January 1981).

86 *The Causes of Popular Dissatisfaction with the Administration of Justice*, August 29, 1906, St. Paul. Minnesota, ABA's Annual Meeting.

87 J. RESNIK, *Many doors? Closing doors? Alternative Dispute Resolution and Adjudication, The Ohio State Journal on Dispute Resolution* vol. 10, no. 2, 211.

88 RESNIK, see *supra* no. 8.

89 RESNIK, see *supra* no. 8.

90 Fed. R. Civ. Pr. 16 (c) (7) (1993).

which no longer provided Courts with the discretion to try to settle, but *required* the facilitating of the settlement of the case.

The 1993 amendments[91] to the Federal Rules described ADR as 'special procedures to assist in resolving the dispute when authorized by statute or local rule'.

In spite of Dayton's view of ADR's practical role in adjudication as a myth[92] 31 districts had court annexed arbitration in 1994. The Civil Justice Reform Act of 1990[93] has repeated the desire that district courts use ADR.

During the same year the Administrative Dispute Resolution Act of 1990[94] required federal agencies to adopt a policy that addresses the use of alternative means of dispute resolution.

Eventually Congress has authorized 20 districts to use court annexed arbitration, extending its authorisation until 1997.[95]

References out of Court

In Australia a different mechanism is used for the same purposes, which is defined as *reference out of Court.*[96]

In Australia the Federal Court (Commonwealth) and the Supreme and District or County Courts of States and Territories have provisions under governing rules or statutes to refer the whole of the proceedings or questions which have arisen in the proceedings on application of a party or parties or on their own motion to a third party or tribunal expert in the field related to the proceedings in question.[97]

The power of the court to so refer is discretionary and may be exercised over objection by a party or the parties to the proceedings. However such a reference over objection is rarely ordered.

The referee or tribunal conducting such a reference is bound to comply with requirements of natural justice.

The wide notion of the term 'question' grants to the Courts much flexibility.

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91 Fed. R. Civ. Pr. 16 (i) (9) (1993).

92 K. DAYTON, *The Myth of Alternative Dispute Resolution in the Federal Courts*, 76 *Iowa L. Rev.* 889, 897-98 (1991).

93 28 USC 473 (a) (3) A.

94 5 USC 581-593 (1990).

95 Judicial Amendments Act of 1994, Pub. L. no. 103-420, 109.

96 COLE *Expediting the Dispute Resolution Process, References Out of Court,* 12 *The Arbitrator*, 4, 222.

97 For example: Part 72 Supreme Court Rules 1989 (NSW), S65 Supreme Court Act 1935 (SA), Supreme Court (Arbitration) Act 1990 (ACT), Order 30 Rules of the Supreme Court (Qld),S54 Supreme Court Act 1935 (WA) and S27 Supreme Court Act 1986 (Vic).

1.15 ADAPTATION OF CONTRACTS

The contract adaptation procedure introduced by the International Chamber of Commerce[98] is also particularly important.

It helps to solve problems whenever the parties have not provided for adaptation of contracts in their agreement.[99]

It is a reaction to the imbalances in the contract which frequently come about through circumstances which were unforeseen, or unforeseeable, by the parties at the time they entered into the contract. The continuous depreciation of currencies, the increase in the price of oil and other important international factors have meant that, in the last fifty years, parties have frequently found themselves having to live with a contract totally unadapted to changing circumstances. Such situations occur frequently.

Illustration

> In 1978 an Italian and a Swiss company concluded a hire purchase contract for television cameras and recording equipment. The contract provided for 20 rental payments in dollars over several years. After making a few payments, the Italian company claimed that the worsening of the exchange rate between the US dollar and the Italian lira had produced an excessive imbalance and asked for rescission of the contract. At the same time it ceased its rental payments. The Swiss company opposed the Italian company's claim, arguing that in a hire purchase contract all the risks, including any deterioration of the exchange rate, are incumbent on the lessee, and that the worsening of the exchange rate was in any event neither unforeseeable nor extraordinary. The Court of Catania rejected the first argument of the lessor, holding that in a hire purchase contract the risks born by the lessee are only those connected with the use of goods and not also the risk of a deterioration of the exchange rate.
>
> However, the Court accepted the lessor's second argument that, since the parties had negotiated payment in a foreign currency which had an exchange rate against other currencies notoriously influenced by political factors and by financial manoeuvres, variations in the exchange rate had been accepted as a normal risk and were consequently foreseeable.
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> The Court consequently rejected the lessee's claim for rescission.

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[98] See *'Adaptation des contrats'* (Adaptation of Contracts), International Chamber of Commerce, no. 326, Paris, 1978.

[99] H. van HOUTTE, *Changed circumstances and pacta sunt servanda; Transnational Rules in International Commercial Arbitration*, ICC Publication no. 480/4, 10; P. FOUCHARD, *L'adaptation des contrats à la conjoncture économique*, (Adaptation of contracts to the financial situation) *Rev. arb.* 1979, 67; J. PAULSSON, *L'adaptation du contrat*, (Adaptation of contracts) *Rev. arb.* 1984, 249.

The Court of Appeal upheld its judgment.[100]

The reaction to this situation from the legal point of view is represented by *hardship clauses*.[101] However, these are frequently confined to placing the parties under an obligation to discuss and re-examine the situation, and to look for a solution. A more effective solution would try, in the absence of a friendly agreement between the parties, to have the imbalance redressed and the contract rebalanced by a third party. The instructions to a neutral third party may then be to issue a recommendation for adapting the contract, or to adapt it himself.[102]

By adapting the contract, potential disputes can be avoided and the parties can achieve exactly what they had in mind under their original agreement by adjusting it to the new circumstances. However, even this important formula has not yet developed as well as it should as an instrument for peace.

Arbitral proceedings must be distinguished from all the other methods of preventing or resolving disputes which are the subject of this very brief survey.

1.16 Compulsory (or Statutory) Arbitration

Compulsory (or statutory) arbitration also deserves a mention although it is difficult to situate it within the framework of arbitration, since the latter takes place pursuant to the agreement of the parties, and not because it is mandatory to refer the dispute to an arbitrator.

Compulsory arbitration is closely linked to the domestic provisions of each individual legal system.

It is consequently examined here limitedly to individual legal systems which recognize it.

In some jurisdictions, authors[103] tend to consider compulsory arbitration to be different from arbitration. In fact it derives its authority from Acts of Par-

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[100] *Telecolor International ICI v. Greyhound Financial & Leasing Corporation,* Court of Catania, July 29 (1983) (unreported).

[101] See A. FRIGNANI, *Arbitrato e 'Hardship clause': una prassi internazionale nuova per una diversa collocazione e gestione del rischio contrattuale* (Arbitration and hardship clause: a new international practice for a different management of the contractual risk), *Rass. Arb.*, 1980, 2 *et seq.*; see also O. SANDROCK, *Choice of Law and Choice of Forum in Civil Law Jurisdictions,* YELPAALA, RUBINO-SAMMARTANO and CAMPBELL (gen. eds.), *Drafting and Enforcing Contracts in Civil and Common Law Jurisdictions*, Kluwer Law and Taxation Publishers, 1986, 145 *et seq.*

[102] Art. 11, no. 1, of the Contract Adaptation Rules, ICC Publication, no. 326, at 17, which ICC declared in 1994 to consider no longer applicable, no applications having been made to it to apply said Rules since they had been issued.

[103] P. CALAMANDREI, *Studio sul processo civile* (Study of civil trial), II, no. 3 and comments at 8 and 10; *id Situazioni processuali di guerra* (Court proceedings in wartime) in *Riv. Dir. Comm.* 1918, at 20-21.

liament through which, in some case, the citizen is obliged to submit some disputes to arbitral tribunals to be formed as ordered by Parliament. It follows that these proceedings are a *creation of Parliament* and not of a meeting of minds even if arbitration law is applied to them, and a new kind of arbitrator may, as a result of this, be created, who can be situated between an arbitrator and a special judge.

It has been held[104] that in compulsory arbitration one can find all the elements of special jurisdiction, i.e. of a state jurisdiction different from the ordinary one, to the extent that there would be no difference between compulsory arbitration and special jurisdiction. An objection to this is that in special jurisdiction proceedings the members of the special court are appointed by a public authority, while in statutory arbitration the choice of arbitrators may be left to the parties.[105] The major criticism to be made against this doctrine is that in real arbitration the parties are free and not obliged to resort to arbitration and the choice of arbitrators is simply a consequence of the decision to go to arbitration.

According to another opinion, the difference between compulsory arbitration and special jurisdiction is that the latter is a permanent body.[106] However, this view can be criticized in that even a special jurisdiction may function temporarily.[107]

In the absence of clear statutory provisions, the matter is open to many interpretations. Compulsory arbitration must consequently be looked at from the point of view of each legal system. Trying to see statutory arbitration from an international point of view, these tribunals may also be considered as special jurisdictions for international trade.

Arbitration which is compulsory between CMEA countries, then becomes a traditional arbitration in disputes between a socialist and a non-socialist party.

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[104] A. PRESUTTI, *Istituzioni di diritto amministrativo* (Administrative Law Institutions), I, at 528.

[105] P. CALAMANDREI, *Contributo alla teoria dell'arbitraggio necessario nel diritto pubblico* (Contribution to the Doctrine of Compulsory Arbitration in Public Law). *Giurisprudenza Italiana* (hereinafter *Giur. It.*), 1924, at 259; BRACCI, *Della potestà regolamentare di un ente pubblico in rapporto all'arbitrato e alle giurisdizioni speciali* (The Regulatory Authority of Public Bodies vis-a-vis Arbitration and Special Jurisdictions), *Rivista di diritto processuale civile* (hereinafter *Riv. dir. proc. civ.),* 1929, II, at 306; see also FURNO, comments to Court of Cassation, July 31 (1950), *Giur. It.* 1952, I, at 359.

[106] G. ZANOBINI, *Corso di diritto amministrativo* (Course of Administrative Law), 1948, II, at 303.

[107] *Comune di Venezia v. Impresa Scarpari,* Court of Cassation, July 29 (1941), no. 2400 *Giur. It.* 1942, I, 1, 97; NOVELLI, *Gli arbitrati necessari e l'art. 102 della Costituzione* (Necessary Arbitration and art. 102 of the Constitution), *Giurisprudenza Completa della Cassazione* (hereinafter *Giur. Compl. Cass.*), 1948, III, at 578.

Illustration

> In a well-known dispute examined by the Arbitration Committee in Moscow in 1957-1958, concerning a contract entered into by Russian companies to supply oil to Israeli companies,[108] performance of the contract had been prevented by the Soviet government. The Israeli parties argued that the *factum principis* (the act of state) did not relieve the Russian companies of their liability for non-performance of the contract, since Soviet law does not allow *force majeure* to have the effect of releasing a party from liability. The Committee decided that Russian law on that issue applied only to internal relationships between Soviet companies. In the relationship in question, the arbitrators decided to apply the international trade usage, which recognises that the *factum principis* (act of state) is a release from liability.

Among the writers, David[109] treats the *Commissions Soviétiques d'Arbitrage Public* as *arbitrage obligatoire* (compulsory arbitration) when reference to them is compulsory.

Because of the very close relationship between compulsory arbitration and special jurisdictions, some legal systems[110] maintain that compulsory arbitration is not admissible, since their legal system provides only for ordinary courts, voluntary arbitration, and special jurisdictions (which may be created only in most exceptional circumstances).

Other systems treat as statutory arbitration those arbitral proceedings which are imposed by a Statute, but without declaring them null and void.

English law, for example, treats them:[111]

> as if arbitration were pursuant to an arbitration agreement and as if that other Act were an arbitration agreement, except in so far ...

It is submitted that, on the one hand, a compulsory arbitration, in cases where the arbitrators are appointed by the public authority, is an institution totally separate from voluntary arbitration, even if it should apply the latter's

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[108] See DOMKE, *The Israeli-Soviet Oil Arbitration*, 1959, at 93, *American Journal of International Law*, at 787-806.

[109] R. DAVID, *L'arbitrage dans le commerce international, op. cit.*, at 13.

[110] *Unione Sportiva Carrarese v. Unione Sportiva Albese*, Court of Appeal, Turin, November 25 (1985), *Foro pad.*, 1987, 3, at 373; *accord: Soc. Sportiva Calcio Napoli v. Altafini*, Court of Cassation (Joint Divisions) (Italy), May 12, no. 2725 (1979), *Giustizia Civile Massimario* (hereinafter *Giust. Civ. Mass.)* 1979, at 1179; *Coni v. Castaldi*, Court of Cassation, February 17, no. 773 (1978), *Giust Civ. Mass.* 1978 at 316 and *Commissione di Controllo sull'Amministr. Reg. di Venezia v. Davan*, Court of Cassation, May 28, no. 2184 (1977) *Giust. Civ. Mass.* 1977, at 911.

[111] See in England MUSTILL and BOYD, *Commercial Arbitration*, London Butterworths, 1982, at 51 (footnote 1); see also Section 31, Arbitration Act (1950).

rules. On the other hand, when the public authority imposes on the parties reference to this type of arbitration rather than to a court, but they are free to appoint the arbitrators and to establish their procedure, this situation may fall under the heading of arbitral proceedings, of which it may be a special type.

This issue has arisen in Italy as to Government contracts, where Parliament had provided[112] that the related disputes be submitted to arbitration, unless the parties had agreed to exclude arbitration. In *Comune di Alidone*[113] these provisions have been held to be in breach of the constitutional right of access to state courts , because, unless a party is allowed to refuse this resolution mechanism and to litigate in court, these provisions would compel arbitration,

The same view was held by the Italian Court of Cassation in *Comind* as to a similar provision of the Standard Conditions approved by a Ministry.[114]

It is submitted that this opinion omits to consider[115] that, when a Government contact is awarded following direct negotiations, when an agreement is reached, this means that there has been a meeting of minds on its various terms, including on the arbitration clause – if any. Likewise, when the contract is awarded pursuant to an invitation to bid which includes amongst its Standard Conditions an arbitration agreement, the bidder is free to bid or not. The contractor does not consequently seem compelled to submit to arbitration.

Public procurement is now governed by new legislation,[116] which provides that the parties may refer the dispute to arbitration.

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[112] Section 16, Statute December 10, no 741 (1981).

[113] *Mortini v. Comune di Alidone* (Constitutional Court, Italy, May 9 no. 152 (1996), *Foro pad.* 1996, 4).

[114] *Ministero della Difesa v. Comind*, Court of Cassation (Italy) February 10 no. 1458 [1992] *Foro pad.* (1996), 3-4.

[115] RUBINO-SAMMARTANO, *Fulmini sull'arbitrato obbligatorio* (Thunder bolts on compulsory arbitration), *Foro pad.* 1996, 3-4.

[116] Section 10, Statute November 18, no 415 (1998).

CHAPTER 2

NATIONALITY OF ARBITRATION

SUMMARY: 2.1 The Categories of National and Foreign Arbitration - 2.2 Criteria For Identifying Nationality – 2.2.1 The Geographical Criterion – 2.2.2 The Procedural Criterion – 2.2.3 The Difference Between Procedural Nationality and the Place Taken Into Account for Recognition of the Award – 2.3 The Category of International Arbitration – 2.3.1 The Subjective Criterion – 2.3.2 Reference to International Commerce – 2.3.3 The Procedural Criterion – 2.4 Conclusions

2.1 THE CATEGORIES OF NATIONAL AND FOREIGN ARBITRATION

According to a widespread view in the past, national and foreign arbitration could not be distinguished from each other, since arbitration is the result of contract between parties and not a public institution. Consequently, it could not be connected to a particular state and have a given nationality.

However, such an opinion (at least in several legal systems) contrasts with the reality that the statutory provisions on arbitration are found amongst the statutory procedural provisions. This makes arbitration belong to the legal system to which the said procedural provisions pertain and gives it a specific nationality.

This is further confirmed by the term 'foreign arbitral decision' (referred to as an arbitral award), being used both by national legislations and by international conventions.

For example, Swedish law[1] defines as 'foreign' that arbitration which takes place in a foreign country.

Also Italian law, in dealing with the recognition of foreign judgments, deals expresSly with foreign arbitral decisions.

In English law[2] the Arbitration Act (1979) defines as domestic those arbitrations which take place in the United Kingdom, if the parties to them are UK citizens at the time they enter into the submission agreement. Domestic arbitration is still so defined in the Arbitration Act 1996 if also the seat of the arbitration is in the United Kingdom, but the distinction seems to be now felt less than before. The Statute which ratifies the New York Convention in the

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1 Arbitration Act entered into force on April 1, 1999.

2 Arbitration Act, April 4, 1979, Art. 3 (7).

United States excludes[3] arbitration proceedings between US citizens from the application of the Convention, and consequently treats them as national unless they concern assets located in foreign countries, or services to be performed in foreign countries, or proceedings which have another reasonable link with one or more foreign states.

As to International Conventions, the title of the Geneva Convention (1927)[4] is the 'Convention on the Enforcement of Foreign Arbitral Awards'. Similarly, the title of the New York Convention (1958)[5] refers to the recognition and enforcement of 'foreign arbitral awards' (although the proposal was formulated by the International Chamber of Commerce, Paris, to define them as international arbitral awards).

Therefore, not only must a distinction be made between national (domestic) and foreign arbitration, but some States regulate international and domestic arbitrations differently within the ambit of their own national law.

Thus, for example, French law[6] defines French international arbitration and sets out rules which are different from those governing French domestic arbitration. However, such a distinction within national arbitrations has been criticized by some authors.[7] National arbitrations are generally considered to be those arbitral proceedings which take place in a given country and which are governed by its procedural law. A close analogy between arbitration and court proceedings can be seen. In fact, all proceedings brought before a Greek judge, for example, are considered Greek proceedings; all proceedings before an Australian court are Australian proceedings.

In reality, for reasons which will be discussed later, it seems important that a comparison should always be maintained, in the back of our mind, between arbitration and court proceedings.

However, such a comparison is not perfect. In fact, proceedings before an Austrian court are Austrian proceedings not only when all the parties are Austrian, but also if one of them is not Austrian, or when they have some other element foreign to that legal system which consequently requires the application of the conflict of laws rules and in the end the proceedings are governed

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3 Act July 31, 1970, Appendix to G. GAJA, New York Convention (Dodds Ferry 1978-1980).

4 Convention for the Execution of Foreign Arbitral Awards (Geneva, September 26, 1977).

5 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, June 10, 1958.

6 Decree May 12, 1981, no. 81-50.

7 M. RUBINO-SAMMARTANO, *La legge uniforme arbitrale delle Nazioni Unite in embrione e le Rules of Evidence Arbitrali* (The imminent United National Model Law and Arbitral Rules of Evidence), *Foro pad.* 1986, 2, 91, and J. STEYN, *Arbitration in England – The Current Issues, Int'l Bus. Lawyer* 1987, 432.

by a foreign substantive law. Likewise, the process governed by Italian law remains Italian even if the parties are of a different nationality and even if the merits are governed by the substantive law of the foreign state.

However, arbitration which takes place in a given state, but contains elements external to that legal system, is generally treated as international arbitration.

From this point of view, the parallel between arbitration and court proceedings is not perfect. At this stage of the analysis we shall consider as domestic arbitrations all those governed by the procedural law of a given state, and taking place in that state.

2.2 Criteria for Identifying Nationality

Having confirmed the distinction between national and foreign arbitration, the criteria for establishing the nationality of arbitration can be sought.

2.2.1 The geographical criterion

An examination of the various International Conventions on arbitration indicates that there is a preference for the place where the award is made.

The Geneva Convention (1927)[8] deals with awards made in the *territory* of another contracting state. The New York Convention (1958)[9] deals with recognition of awards made in the *territory* of a state other than that in which recognition is applied for.

The Geneva Convention (1961)[10] refers to the states in which, or according to the law of which, the award has been rendered.

However, this criterion does not seem satisfactory. Let us assume that an arbitration takes place in a state, e.g. in France, while the award is made elsewhere, for instance in Tunisia. In this case is it a French or a Tunisian arbitration?

This is the issue which was hotly debated in *Hiscox*[11] where at the end of arbitral proceedings conducted in England and having their seat in England, the English arbitrator decided in Paris and subscribed the award after the words 'Dated _____ Paris, France'. The House of Lords held that the award was then French, even if, since the curial law was English, English courts had

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8 See *supra* note 4, Art. I.

9 See *supra* note 5, Art. I.

10 European Convention on International Commercial Arbitration, Geneva, April 21, 1961, Art. IX.

11 *Hiscox v. Outhwaite*, House of Lords, July 24, 1991, 3 *W.L.R.* [1991] 297-307 and ASA *Bull.* 1991, 279.

jurisdiction being at the same time the 'curial court' as well as the 'enforcing court'.

Let us further suppose that the various meetings during the arbitral proceedings take place in different states – for example some in Canada, others in Argentina, others in Singapore, the arbitrators decide in Hong Kong and the award is signed in Yugoslavia (simply because Yugoslavia is the most convenient place for the arbitrators at that time).

In this example to which country should the arbitral proceedings be attributed, Yugoslavia, Canada, Argentina, Singapore or Hong Kong? This criterion, which I would define as geographical, is then not suitable for defining *prima facie* the nationality of arbitration.

Furthermore, on this basis, the nationality of the arbitration can remain undetermined until the place of the arbitration is chosen, or even until the award is rendered. All this seems to confirm that the geographical criterion is not adequate as a means of determining nationality of arbitration.

2.2.2. The procedural criterion

Another method for determining the nationality of an arbitration may be to base it on the applicable procedural law.

This view is taken into account by *Bergesen v. Müller*:[12]

> Bergesen, a Norwegian shipowner, filed a request for arbitration against Joseph Müller, a Swiss Company.
>
> Arbitration took place in New York. The award, made in 1978, was in favour of Bergesen.
>
> Bergesen sought confirmation of the award by a petition in the U.S. District Court for the Southern District of New York. District Judge Charles S. Haight, Jr. confirmed the award holding that the Convention applied to awards, rendered in the U.S., involving foreign interest.

On appeal, Müller contested that the New York 1958 Convention did not cover enforcement of the award made in the U.S. because it was neither a foreign award nor an award 'not considered as domestic'.

The Court of Appeal, rendering judgement, focused on the requirements in order that an award be not considered as domestic. It referred to the drafting history of the Convention and to the working party's recommendation that both the territorial and the other criteria be included.

After stating:

> in both France and West Germany for example the nationality of an award was determined by the law governing the procedure,

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[12] *Sigval Bergesen v. Joseph Müller Corporation*, U.S. Court of Appeal, 2nd Circuit, June 17, 1983, 710 F2d 929 (2d Cir.) 1987 quoted by BORN *cit* at 468.

it dealt with the second sentence of Art. I.1 of the New York Convention, i.e. with awards 'not considered as domestic' coming to the conclusion that:

> We adopt the view that awards 'not considered as domestic' denotes awards which are subject to the Convention not because made abroad but because made within the framework of another country,

a view to be shared up to this point, but not as to the subsequent examples made by the Court:

> e.g. *pronounced in accordance with foreign law* (emphasis added) or involving parties domiciled or having their principal place of business outside the enforcing jurisdiction.

where 'foreign law' seems to refer to 'substantive law'.

In *Götaverken*[13] the Court of Appeal, Paris was clearer in this respect:

> the award rendered pursuant to a procedure that is not the one prescribed by French Law and that is in no way linked to the French legal order as both parties are foreign and the contract was made and was to be performed above, cannot be considered as a French award ...

Thus, for example, if the applicable procedural law is Turkish law, then using this criterion the arbitration will be Turkish, even if it takes place in the Netherlands and the award is made there.

Likewise, an arbitration governed by Italian law which takes place in Kenya, should remain an Italian arbitration, while an arbitration governed by Egyptian law and taking place in Italy, will be an Egyptian arbitration.

This criterion seems to be more solid, since it is not subject to the fluctuations of the geographical criterion. Furthermore, comparison with court proceedings seems to confirm that it is the most acceptable method.

In fact, if after a trial an Italian judge spends his vacation in Yugoslavia, takes the file there, writes and signs his judgment there, the judgment does not become Yugoslavian simply for that reason.

The nationality criterion based on the applicable procedural law has been met with favour by part of the doctrine.[14]

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[13] *Götaverken Arendal AB v. Lybian General National Maritime Transport Co.*, Court of Appeal, Paris, February 21, 1980 *Clunet* 1980, 660.

[14] A. MIGLIAZZA, *Natura ed efficacia dell'arbitrato internazionale* (Nature and effects of international arbitration) *Riv. Dir. Int. Priv. Proc* 1973, 739; R. LUZZATTO, *Accordi internazionali e diritto interno in materia di arbitrati; la Convenzione di New York del 1958* (International Conventions and domicile law in arbitration. The New York Convention of 1958) *Riv. Dir. Int. Priv. Proc* 1968, 210; M. RUBINO-SAMMARTANO, *Arbitrato italiano e internazionale, distinzione e analisi*, *Foro pad.* 1979, II, 10.

Some writers like Fouchard-Galliard-Goldman[15] recognize that the connection of the arbitral proceedings to the place where they are conducted has lost much ground. Other writers still follow the old doctrine.[16]

Another confirmation can be found in the New York Convention. This treats as foreign awards, in addition to a first class of awards (those made in other states), a second class which, even if made in the state where its recognition is requested, are the results of proceedings governed by a procedural law different from the law of the requested state.[17]

Reference by the Convention to procedural and not to substantive law is confirmed by various precedents amongst which are *Mines Minerais* in Belgium,[18] *Oil and Natural Gas Commission v. The Western Company of North America* in India[19] and *Soquiber* in Spain.[20]

The awards in this second class (even if made in the territory of the state requested to recognize the award) may consequently be considered as foreign in such a state. This consequence has been regarded as possible, rather than automatic, as a result of an inevitable compromise between the requests of some states to recognize the procedural criterion and the objections of other states.

Also the European Convention (1961)[21] refers[22] to the state in which, or according to the procedural law of which, the award has been made.

This view is confirmed in *Ghezzi v. Boss*[23] in which the German Supreme Court has held:

> Pursuant to the constant case law of [our Court] a foreign award is made when the arbitral tribunal has based its decision on foreign procedural law.

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15 FOUCHARD-GAILLARD-GOLDMAN, *Traité de l'arbitrage commercial international*, Paris, 1996.

16 Supra note 5, Art. I, 1.

17 *Supra* note 5, Art. I, 1 *S.A. Mines Minerais et Métaux v. Mecheme Ltd.*, Court of Appeal, Brussels, October 14, 1980, *Yearbook Commercial Arbitration* VII (1992) 316.

18 *S.A. Mines Minerais et Métaux v. Mecheme Ltd., Court of Appeal*, Brussels, October 14, 1980, *Yearbook Commercial Arbitration* VII (1992) 316.

19 *Natural Gas Commission v. The Western Company of North America*, Supreme Court of India, January 16, 1987, *Yearbook Commercial Arbitration* 1988, 473.

20 *Cominco France v. Soquiber*, S.L. Spanish Supreme Court March 24, 1982, *Yearbook Commercial Arbitration* 1983, 408.

21 *Supra* note 10.

22 Art. IX.

23 Bundesgerichtshof June 30, 1961 (BGHZ 21, 365) *Yearbook Commercial Arbitration* XV 1990, 450.

The procedural criterion is therefore officially acknowledged in these references as an independent criterion for establishing the nationality of the arbitral awards.

This is a clear position which, it is submitted, cannot be affected by *Union of India.*[24] Here the parties had sought the Court determination of the law governing the arbitral proceedings. The Arbitration Clause to be construed by the court provided:

> The arbitration shall be conducted in accordance with the procedure provided in the Indian Arbitration Act of 1940 or any re-enactment or modification thereof. The arbitration shall be conducted in the English language. The award of the arbitrators shall be made by majority decision and shall be final and binding on the parties thereto. The seat of the arbitration proceedings shall be London, United Kingdom.

Saville J. found that:

> the parties have chosen English law as the law to govern their arbitration proceedings, while contractually importing from the Indian Act those provisions of that Act which are concerned with the internal conduct of their arbitration and which are not inconsistent with the choice of English arbitral procedural law.
>
> The question posed ... is whether upon the proper construction of Art. 8 of the Launch Agreement the pending arbitration between the parties and any award made by the arbitral tribunal is subject to any supervisory jurisdiction of the Indian courts or the English Courts.
>
> For the reasons given, my answer to this question is that it is the latter.

This view was based on the construction of the term 'seat' as granting to English courts jurisdiction over the arbitration.

The English view that the choice of the seat implies a choice of English procedural law is deeply rooted.

This even if this view has not yet been followed in some recent occasions and even if in *Union of India* Saville J has accepted:

> that English law does admit at least the theoretical possibility that the parties are free to choose to hold their arbitration in one country, but subject to the procedural law of another.

The Union of India Court was impressed by the fact that, as provided also by Kerr L.J. in *Amazonica*:[25]

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[24] *Union of India v. Mc Donnel Douglas Corporation,* High Court, Queen's Bench Division, December 22, 1992, *Yearbook Commercial Arbitration* 1994, 235.

[25] *Naviera Amazonica Peruana v. Compania International de Seguros do Peru*, Court of Appeal of England, November 10, 1987, *Yearbook Commercial Arbitration* 1988, 156-164.

> such an agreement is calculated to give rise to great difficulties and complexities.

Similar comments were made by Mustill J. (as he then was) in *Black Clawson*[26] in the converse situation (in which a foreign arbitration had been argued to be governed by English procedural law).

In his view, such as agreement produced an absurd result.

However, it is submitted that, while complexities arise where this is the intention of the parties, it is not possible to change this by construing the parties' agreement in the opposite way. If the parties expressly state that the proceedings are to be governed by Indian procedural law, their agreement cannot be rewritten because the seat of the arbitration is London, or Shangai or Budapest.

The choice of the seat may even be due to the intention of the parties to meet, as in this case, midway between India and America.

It is suggested that the learned judge's view in *Union of India* cannot consequently be shared and that Indian procedural law was the procedural law and no court could change it.

Whether English Courts had jurisdiction on those proceedings is a different issue. As earlier discussed, state courts have jurisdiction on applications to enforce a foreign award, made in their country under the second criterion of the New York Convention, i.e. under a different procedural law.

Nevertheless, it is submitted that the award may be set aside only by the Courts of the state the procedural law of which has governed the arbitral proceedings.

Procedural law did not play a decisive role in the Polish Supreme Court judgment in *Opulance*[27] which denied jurisdiction to set aside an award rendered by a Polish arbitration body (the International Court of Arbitration of Gdyma) on the following grounds: (i) that the award had been rendered outside Poland, (ii) that the parties were not Polish and (iii) that there was no obligation to be performed there.

However, at least based on the published report, the role of the procedural law was not discussed.

It is suggested that procedural law should be chosen by the parties in the arbitration agreement and if possible should be the one of the venue of the proceedings. In the absence of such a choice, the choice subsequently made by the arbitrators may create difficulties.

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[26] *Black Clawson v. Papierwerke*, 2 *Lloyd's Rep.* 446 at 453.

[27] *Opulance Compania Naviera S.A. Panama v. Checofracht and Chemapol*, Polish Supreme Court, Civil Division, August 27, 1982, *Clunet* 1989, 13.

The procedural criterion might be seen as falling under Sanders'[28] general comment that it is very rare that arbitration problems are solved by applying arbitration theories. However it is submitted that recognition depends also on the procedural criterion and attacks against awards mainly depend on it.

Therefore the procedural criterion (rather than a theory) is a reality with which one has to deal. The decisive consequences deriving from the procedural law which governs arbitral proceedings as to their recognition and difficulties in establishing whether an award is foreign form the basis of decisions of the Supreme Court of India in *Singer*[29] and in *Western Company*[30] In *Singer* the Court had to decide whether under a Contract providing that:

> the laws applicable to the Contract shall be the laws in force in India and the courts of Delhi shall have exclusive jurisdiction in all matters arising under this Contract

(and further providing that the ICC Rules of Arbitration shall apply) the award made in London (the venue chosen by the ICC) was a foreign award for the purpose of its enforcement in India.

In the absence of a choice by the parties, the ICC rules leave to the arbitrators the choice of procedural law.

The Indian court seems to have assumed that the procedural law of the arbitration agreement was the law of the arbitral proceedings, an assumption which – it is suggested – cannot be shared.

Based on this, the Supreme Court held:

> An award is foreign not merely because it is made in the territory of a foreign State, but because it is made in such a territory on an arbitration agreement not governed by the laws of India. An award made on an arbitration agreement governed by the laws of India, rendered outside India, is attracted by the saving clause in Section 9 of the Foreign Awards Act and is therefore not treated in India as a foreign award.

Even if the premise of this reasoning, i.e. that the law of the arbitration agreement is the procedural law of the arbitral proceedings, may not be followed it is submitted that the principle affirmed by the Court seems to be correct, in as much as it asserts that an award rendered outside India but governed by Indian procedural law is an Indian award and not an award foreign to India.

The heavy criticism to such decision, which involved the subsequent Indian judgment on *Renusagar* cannot then be shared.

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[28] P. SANDERS, *International Encyclopedia of Comparative Law,* Vol. XVI Chapter 12 at 12-6.

[29] *NTPC v. Singer Company,* May 7, 1992, 4 *A.M.* 3 September 1992.

[30] *ONGC v. Western Company of North America, AIR* 1987, SC 674.

As Desphande[31] has rightly pointed out it is not satisfactory that the Indian judgment only and not also *Hiscox* – which is largely open to discussion and to criticism – were the object of such an attitude. He has further argued that in view of the difficulties arising from the selection of a venue different from the procedural law, the tendency to choose a neutral venue has to be considered carefully. This remark seems correct. However a neutral venue is highly desirable. It is suggested that the parties select themselves such a venue in the arbitration agreement and that they also select expressly the procedural law which – if possible – should be the one of that venue.

In this way one should be able to avoid or at least to substantially reduce the difficulties which (as rightly pointed out by Redfern and Hunter)[32] arise from the choice of a venue and of a procedural law different from that of such a venue.

2.2.3 The difference between procedural nationality and the place taken into account for recognition of the award

It must be recognized that, if the nationality of arbitration is determined on the basis of the applicable procedural law, such nationality may be different from that of the place to be taken into account for recognizing the award in another state

The International Conventions generally refer to the place where the award is made. The Geneva Convention (1923)[33] refers to the state in whose territory the arbitration has take place. The Geneva Convention (1927) refers to awards rendered in the territory of a given state.[34] In the New York Convention the place of an arbitration is the first (even if not the only) criterion, and the Geneva Convention (1961)[35] refers to the state in which, or according to the law of which, the award has been made.

For recognizing an award, the place where the award is made, or the place of arbitration is therefore generally referred to rather than the procedural law applied to it. A contrast then exists between procedural nationality and the place to be taken into account for recognition of the award.

The coexistence of the geographical criterion for recognition purposes and of the procedural criterion to establish the nationality of the award is not – one must accept it – fully satisfactory. However the place in which the award is

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31 V.S. DESPHANDE, *Foreign Award in the 1958 New York Convention,* 9. *Int. Arb.* 4, 51.

32 REDFERN-HUNTER, *Droit et pratique de l'arbitrage commercial international, L.G.D.J.* 1991, 75.

33 Geneva Protocol on Arbitration Clauses, Geneva September 24, 1923.

34 *Supra* note 4, Art. I.

35 *Supra* note 10, Art. IX.

made (while relevant for the recognition and enforcement in other jurisdictions) must not necessarily be the criterion[36] for establishing the nationality of the arbitral proceedings.

An award can be made in state A, but governed by the procedural law of state B and considered as having the latter's nationality; but when the award is to be recognized in another state, if the applicable International Convention so states, the basis for deciding whether the award can be recognized will normally be the place where the award was rendered., i.e. state A.

Problems can occur even under the mere geographical criterion, for example in the event of attacks against the award, or when its recognition in other states is sought.

Let us suppose that an award is made in country A, but governed by the procedural law of country B, and that it is not attacked in country A because attacks are allowed there only against awards made under its national procedural law. The winning party seeks recognition of the award in country B. Let us suppose that county B considers the award as national. In this case it will refuse to recognize the award, while country B might consent to its being attacked before its courts.

Such difficulties can be overcome. They have already been greatly reduced by the New York Convention in that it recognizes the procedural criterion as being separated from the geographical one. Even if the state in which the arbitral proceedings take place does not prevent them from being governed by foreign procedural law, it may not consider them as national arbitration. It should then agree to recognize them as 'foreign arbitration' by applying the procedural criterion. The state whose procedural law has been applied, provided it does not prohibit its procedural law from being applied to arbitration taking place abroad, may treat the award as domestic, if it applies the procedural criterion, or as foreign if it applies the geographical criterion, since it was made in another state and recognize it as a foreign award.

The positive effects of the possibility of using both criteria are very clearly described by van den Berg.[37]

2.3 THE CATEGORY OF INTERNATIONAL ARBITRATION

The distinction between national and foreign awards might seem to divide all arbitrations into national and foreign. It might appear, therefore, to cover all arbitrations which will be attributed to a given state on the basis of the geographical or procedural criterion and which will be national in that state and

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[36] The aim of this criterion in fact is just to allow recognition of the award in the state where it is requested.

[37] A.J. van den BERG, *The New York Arbitration Convention of 1958*, Kluwer 1981, 24.

foreign for all the other states. One might then wonder whether there is a place for international arbitration in addition to national and foreign arbitration, or whether in reality international arbitration is merely a synonym for foreign arbitration.[38]

To find an answer to this, one must search for the elements which might justify the existence of a *tertium genus*, i.e. an arbitration that is neither national nor foreign, but international, and to establish in such a case a basis for affirming possible internationality.

2.3.1 The subjective criterion

As we have seen, the recurring definition of international arbitration is based on the different nationality, or domicile of the parties to the proceedings.

However, this criterion does not seem to be strong enough to grant real internationality. In fact, it is fully compatible with the attribution of a given procedural nationality to arbitration.

There can in fact be a national arbitration, for example in Thailand (based on the place in which the decision was made or on the applicable procedural law), and a simultaneous international difference under the subjective profile, since the parties to the proceedings belong to different states.

The nationality of the parties according to many views does not limit the jurisdiction of arbitral institutions.

However in *Lido Hotel*[39] the Beijng Intermediate People's Court has overturned a CIETAC award on the ground that CIETAC had exceeded its jurisdiction since the Lido Hotel Corporation was a Chinese foreign joint venture, but in spite of that its legal nature was that of a Chinese enterprise and therefore its dispute with China International Construction and Consultant Corporation was a dispute between two resident companies and as such not subject to CIETAC jurisdiction.

The subjective criterion cannot influence the nationality of the proceedings, even when it is applied to court proceedings. In fact, even in the latter case the different nationality of the parties is relevant for establishing the substantive law, but not the nationality of the proceedings.

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[38] The existence of the class of international arbitration has been the object of a specific study by FOUCHARD. *Quand un arbitrage est-il international?* (When is an arbitration international?) *Revue de l'Arbitrage* 1970, 59, and by C.N. FRAGISTAS, *Arbitrage étranger et arbitrage international en droit privé* (Foreign arbitration and international arbitration in private law). *Revue critique de droit international privé* (Rev. cr. dr. int. pr.) 1960, I. However they have focused on different criteria from the one suggested.

[39] *China International Construction and Consultant Corporation v. Beijng Lido Hotel Corporation*, quoted by M. J. MOSER, *CIETAC Arbitration: Success Story?* 15, *J. Int. Arb.* 1, 22.

It is submitted that such a criterion does not therefore have enough strength to produce international arbitration as a *tertium genus*.

2.3.2 Reference to international commerce

A different classification, consisting of linking arbitration to international commerce, is followed by several national legislations to identify international arbitration. French law, for example,[40] defines as international the arbitration which 'involves international commerce'.

In *Italo Ecuadoriana*[41] the Court of Appeal, Paris has clearly defined this notion:

> The arbitration which involves international trade is international.
>
> To this effect it is sufficient that the transaction involves a movement of goods or services or a payment abroad. Elements like the venue of the proceedings, the procedure which governs the proceedings and the nationality of the parties are of no effect for this purpose.

Fouchard-Gaillard-Goldmann[42] stress the importance of abandoning the strictly traditional definition of *actes de commerce* (trade transactions) and consider as commercial all those transactions which concern the production, transformation and distribution of goods or services, as well as financial and banking activities, without limiting this to transactions between traders. Consumers transactions, however are not to be included in this category.

The notion of international commerce is clarified in *France Embryon*[43] as being very wide:

> international commerce encompasses all economic exchanges which cross borders and is not limited to the strict technical notion of trade or of a transaction consummated by a trader; all international disputes having an economic object are to be treated as commercial.

In line with the Model Law is the judgment rendered by the Supreme Court of Hong Kong in *Fung Sung*:[44]

> An arbitration will still be international, despite both parties having their places of business in the same State, if any place where a substantial part of the obligations of the commercial relationship is to be performed, or

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[40] Art. 1492, French Procedural Code.

[41] *Sté Aranella v. Sté Italo Ecuadoriana*, Court of Appeal Paris, April 26, 1985, *Rev. arb.*, 1985, 311.

[42] FOUCHARD-GAILLARD-GOLDMAN, *op. cit.* 41.

[43] *Sté France Embryon v. Argonauta*, Court of Appeal, Lyon, July 4, 1991, *Clunet* 1991, 1000.

[44] *Fung Sang Trading Ltd. v. Kaisun Sea Products & Food Co. Ltd.*, Supreme Court of Hong Kong October 29, 1991, *Yearbook Commercial Arbitration* 1992, 289.

> the place with which the subject matter of the dispute is most closely connected is outside the State in which the parties have their place of business.

The Swiss Federal Statute on Private International Law[45] defines as international one arbitration which takes place in Switzerland if at least one party, at the time of the submission agreement, does not have a Swiss domicile or residence. The UNCITRAL Model Uniform Law, among the various criteria[46] used to define international arbitration, refers to the requirement that at least one of the main contractual duties has to be performed in a state other than the one where the parties are domiciled at the time the submission agreement is entered into.[47]

However, such a criterion does not always differ from the subjective criterion, since often in international commerce the transaction takes place between parties belonging to different states, which brings us back to the subjective criterion.

While, in order to identify French arbitration belonging to the subtype international, the French Courts have repeatedly held as in *Italo Ecuadoriana*[48] and in *Sporprom*[49] that neither the procedural law applied nor the nationality of the parties, nor a possible choice by the parties are relevant, it is submitted that the fact that a Court or an arbitrator hears a dispute which involves international commerce plays no role in establishing the nationality of the proceedings.

2.3.3 The procedural criterion

It is suggested that, besides the previous criterion, another one, the procedural criterion, may be conceived.

Rather than basing oneself on objective or substantive elements (which concern the merits of the dispute), one can take into account the procedure to be applied by the arbitrators, which seems appropriate since arbitration constitutes legal proceedings.

This criterion immediately raises an important objection. In fact, one can object that under the applicable procedural law, the arbitration will be either

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[45] Federal Statute on Private International Law, December 18, 1987, *Schw. Bundesblatt* 1988, I, 5.

[46] Adopted on June 21, 1985 by the United Nations Commission on International Trade Law.

[47] Art I (3) (b) (ii).

[48] See *supra* note 41.

[49] *Sté Sporprom Service BV. v. Sté Polyfrance Immo*, Court of Appeal, Paris, January 18, 1983 *Rev. arb.* 1984, 87, with comments by P. Mayer.

national or foreign, but not international, and this is perfectly analogous with court proceedings.

With this approach, the distinction between national and foreign arbitration would deal with the entire matter, and international arbitration would only describe an arbitration which takes place abroad between parties with different nationalities.

If international arbitration were synonymous with anational arbitration, according to van den Berg[50] it would have to be rejected, since arbitration must necessarily be linked to a national procedural law.

However, the Dutch Supreme Court in *SEE v. Yugoslavia*[51] has held that the New York Convention applies also to recognition of awards not rendered according to the law of a given country. This view was shared in France in *SEE v. Yugoslavia*[52] and in the U.S. in *Gould v. Iran.*[53]

Denationalised arbitrations are consequently legitimate and criticism should be limited to situations where respect of the mandatory provisions of the otherwise applicable national procedural law has been excluded. However this exclusion appears to be merely theoretical, since due to their very nature, they would apply even if excluded by the parties.

Such a view consequently does not conflict with the possibility of an arbitration being international from the procedural point of view. One can then search for possible hypothesis of procedural internationality.

(i) Plurality of applicable procedural laws

First of all, there appears to be nothing to prohibit the parties from choosing different procedural laws to govern various aspects of the arbitral proceedings.

For example one law may govern the appointment and replacement of arbitrators, and another procedural law might govern the taking of evidence.

Such a plurality of national procedural laws may confer supra-nationality and internationality on proceedings, to be then distinguished both from national and foreign arbitration.

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50 Van den BERG, *op. cit.* at 28 et seq.

51 *SEEE v. Yugoslavia* Hoge Raad November 7, 1975 (Neth no. 2 D).

52 *SEEE v. Yugoslavia*, Court of Appeal, Rouen November 13, 1984, *Yearbook Commercial Arbitration* Vol. XI, 1986, 491.

53 *Gold v. Iran* U.S. Court of Appeal (Ninth Circuit) October 23, 1989, *Yearbook Commercial Arbitration*, Vol. XV, 1990, 605.

(ii) Duty to comply contemporaneously with the applicable procedure and with the public policy of the (different) procedural law of the place of arbitration

When the applicable procedural law is different from that which prevails at the place of the arbitration, the applicable procedural law must adapt to the latter's mandatory provisions, such as the necessity of forbidding a witness oath, or the illegitimacy of the admission of discovery.

Even in this case it may be said that the arbitration procedure is supranational and as such it might be considered international.

(iii) Supra-national arbitration rules

It is submitted that international arbitration can be ascertained even further, when the parties exclude or do not refer to a national procedural law, and limit themselves to submitting the proceedings to arbitration rules (which they have drafted themselves *ad hoc,* or those of an administering body, which is generally very careful to avoid being subject to a specific national procedural law).

The parties in fact do not have any duty to submit the arbitral proceedings to a national procedural law.

In fact it is said that arbitration does not have a *lex fori,* i.e. that it does not recognize the concept of national law and foreign law.

Furthermore, arbitration rules generally do not govern all the issues which may arise during the arbitral proceedings. They often have to be supplemented;[54] in addition they may be modified by procedural pubblic policy and the parties may refer for this to a procedural law different from the one governing the place of arbitration. On some occasions the arbitration rules and/or the foreign procedural law may have to be modified by procedural public policy.[55]

In arbitration proceedings governed by arbitration rules chosen by the parties, arbitrators frequently tend not to decide which is the applicable procedural law.[56] In such a case arbitration is frequently governed solely by arbitration rules, so the place at which the arbitration takes place is of limited importance.

It is submitted that even such arbitral proceedings may be defined as international.

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[54] M. RUBINO-SAMMARTANO, '*Rules of Evidence in International Arbitration*', 3 *J. Int. Arb.* 2, 87; CRAIG, PARK, PAULSSON, *International Chamber of Commerce Arbitration*, Oceana 1985, III, par. 16.01.

[55] M. RUBINO-SAMMARTANO, *The Keban Arbitration, J.C.I. Arbitration* 1980, 241.

[56] CRAIG, PARK, PAULSSON, *International Chamber of Commerce Arbitration*, Oceana 1985, III, par. 16.01.

(iv) Arbitration instituted by international conventions

Some other international arbitrations derive from International Conventions, such as the Convention of Washington (1965)[57] and the Algiers Declarations (1981)[58] (in as much as the latter falls within the category of international arbitration). These arbitrations are international because they are derived from International Conventions, and because they have supra-national effects.

The Washington Convention for instance states that the award must be considered in each country as a decision of the courts of that country, which is the best way to confirm its supra-nationality and internationality.

It is suggested that the creation of the international arbitration class does not mean leaving the award in the stratosphere of subjectivism,[59] a concern which has induced some courts, particularly in England, when dealing with substantive law, to express themselves regarding the doctrine of *lex mercatoria,* in a negative way, defining such proceedings as floating arbitrations.[60]

In fact it is submitted that international arbitral proceedings remain attached to a given procedural law, or to given rules of procedure chosen by the parties directly.

A partial conclusion which could be drawn from the above is that international arbitrations are those governed by several procedural laws, or by supranational rules of arbitration, or deriving from International Conventions. All other arbitrations would be national for a given state and foreign for all the other states.

(v) International nature of the arbitration agreement

Before completing this analysis, let us look at other possible elements of internationality. In fact, if our analysis ends up without this further examination, an important reality would be disregarded, i.e. that arbitration does not consist – as do court proceedings – of only a procedural phase, but also of the arbitration agreement, from which in fact it originates. The nature of this agreement must then be examined. Contracts made by contracting parties

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[57] The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States.

[58] Algiers Declaration, January 20, 1981, by the United States of America and Iran.

[59] Among the authors: O. SANDROCK, *Choice of Law and Choice of Forum in Civil Jurisdictions, Drafting and Enforcing Contracts in Civil and Common Law Jurisdictions* (YELPAALA-RUBINO-SAMMARTANO, CAMPBELL gen. ed. Kluwer 1986), F. A. MANN, *England Rejects Delocalized Contracts and Arbitration, International and Comparative Law Quarterly* 1984, 193; E. MEZGER, *Comment, International Law Association Report*, 1982 Montreal Conference, London 1983.

[60] Amongst the precedents see: *Amin Rashed Shipping Corporation v. Kuwait Insurance Co.* House of Lords, *All. ER* 1983, 884; and *Bank Mellat v. Helleniki Techniki S.A.*, Court of Appeal of England, *Weekly Law Reports* 1983, 783.

belonging to different judicial systems are considered to be international contracts. Can one deny the same qualification to submission agreements or arbitral clauses made by parties belonging to different states? Even the latter require in several respects the intervention of conflict-of-laws rules to establish the applicable law, the parties capacity, and the requirements of form.

The acquisition of such an important element might induce to consider as international arbitrations those which derive from international submission agreement or clauses, but this temptation must be resisted.

2.4 CONCLUSIONS

It is suggested that one can affirm the existence, besides national and foreign arbitration, of the third category of international arbitration, but that only strictly international arbitrations (i.e. because of their procedural aspect) belong to it. Fouchard-Gaillard-Goldman[61] share in substance this view as to arbitrations under the Washington Convention which are based on provisions which do not belong to national legal systems. However their comments have only been made in passing, as a possible suggestion, without adhering formally to the *procedural internationality criterion* which had been advocated several years before and without discussing this doctrine.

Even the philosophical aspects of international arbitration have been studied by writers.[62]

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[61] FOUCHARD-GAILLARD-GOLDMAN, *op. cit.* at 53.

[62] R. DAVID, *L'arbitrage dans le commerce international*, Paris, Economica, 1982 452; B. OPPETIT, *Phylosophie de l'arbitrage commercial international, Clunet* 1993, 811.

CHAPTER 3

THE SOURCES OF INTERNATIONAL ARBITRATION LAW

SUMMARY: 3.1 International Conventions – (a) Multilateral Conventions – (b) Bilateral Conventions – 3.2 The Intention of the Parties – 3.3 Rules of Arbitral Institutions – 3.4 Arbitrators' Alternative Choice – 3.5 National Legal Systems – 3.6 Precedents – (a) Arbitral Precedents – (b) Court Precedents

The sources of a branch of the law as rich and varied as international arbitration could not be anything but multiple. In addition to the intention of the parties and to the international Conventions, the rules of the arbitral institutions, national legal systems and precedents, within the limits stated below, must be mentioned. An outline of each separate source of international arbitration law will now be given.

3.1 INTERNATIONAL CONVENTIONS

International conventions are traditionally divided into multilateral and bilateral Conventions. Under the Vienna Convention on the Law of Treaties:[1]

> (a) treaty means an international agreement concluded in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.

If multilateral conventions play the main role, the large number of bilateral conventions must not be disregarded. These may be described as complementing the multilateral ones and intervening, for example, where they are not applicable or are less favourable.

3.1 (a) Multilateral conventions

Multilateral conventions can be identified more easily since they are in a limited number.

It may be easier to follow their development in chronological order which is as follows:

- the Geneva Protocol on Arbitration Clauses, (1923);[2]

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1 Art.2.1 (a) *Vienna Convention on the Law of Treaties*, May 23, 1969.

2 *Geneva Protocol on Arbitration Clauses*, Geneva, September 24, 1923.

- the Geneva Convention on the Execution of Foreign Arbitral Awards, (1927);[3]
- the Bustamante Code (Convention on Private International Law);[4]
- the Inter-Arab Convention on the Enforcement of Judgments and Awards, entered into by the States belonging to the Arab League;[5]
- The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, (1958);[6]
- the European Convention on International Commercial Arbitration, Geneva, (1961)[7] supplemented by the Agreement Relating to the Application of the European Convention on International Commercial Arbitration, Paris, December 17, 1962;
- the Convention on the Settlement of Investment Disputes between States and Nationals of other States, Washington, (1965);[8]
- the Convention on the Settlement through Arbitration of Civil Law Disputes resulting from Economic, Scientific and Technical Cooperation, Moscow, (1972);[9]
- the Inter-American Convention on International Commercial Arbitration, Panama, (1975);[10]
- the Uncitral Arbitration Rules;[11]
- the Convention on Investments of Arab Capital, (1980);[12]

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3 *Geneva Convention on the Execution of Foreign Arbitral Awards*, Geneva, September 26, 1927.

4 Signed at Havana, February 20, 1928, 86 L.N.T.S. 246 No. 1950 (1929) (3bis).

5 *Convention on the Enforcement of Judgments and Awards,* entered into by the States of the Arab League, September 14, 1952.

6 *Convention on the Recognition and Enforcement of Foreign Arbitral Awards,* New York, June 10, 1958.

7 *European Convention on International Commercial Arbitration,* Geneva, April 21, 1961 (523 United Nations Treaty. Series. 94/1965).

8 *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, Washington, March 18, 1965.

9 *Convention on the Settlement through Arbitration of Civil Law Disputes resulting from Economic, Scientific and Technical Cooperation,* Moscow, May 26, 1972, (in *Multilateral Conventions and Other Instruments on Arbitration*, Associazione Italiana per l'Arbitrato, Rome, 1974) which is still in force for some countries which were formerly members of CMEA (the Czech Republic, Hungary and Poland would have denounced it).

10 *Inter-American Convention on International Commercial Arbitration,* Panama, January 30, 1975, in *Yearbook Commercial Arbitration* III, 1978, 15.

11 Adopted by the General Assembly on December 15, 1976.

12 *Convention on Investments of Arab Capital,* Amman, November 27, 1980. Although the arbitral proceedings provided for by the Convention do not foresee an arbitral centre, this Convention has given rise to important principles in the area of Inter-Arab arbitration.

- the Convention for Juridical Cooperation between States belonging to the Arab League, Riyadh, (1983);[13]
- the Model Law on International Commercial Arbitration of the United States Commission on International Trade Law, June 21, 1985;[14]
- the Convention on Commercial Arbitration, (1987);[15]
- the Port St. Louis Convention, October 17, 1993.[16]

These Conventions mainly apply to contractual disputes. The Geneva Protocol(1923)[17] for example, concerns arbitration agreements and clauses:

> by which the parties to a contract

may resolve their disputes.

The Geneva Convention (1961)[18] concerns disputes:

> arising from international trade.

The Washington Convention[19] deals with:

> investment disputes.

The last two refer to contractual disputes. However, not all conventions are limited. In that way, The New York Convention,[20] for example, applies to disputes:

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[13] *Convention for Juridical Cooperation between States belonging to the Arab League,* Riyadh, April 4, 1983.

[14] *Model Law on International Commercial Arbitration* adopted by the United Nations Commission on International Trade on June 21, 1985.

[15] April 14, 1987 as well as the previous conventions amongst Arab countries on June 10, 1974, *Rev. arb.* 1981, 348 and the Kuwait 1971 Convention on Investments.

[16] Which *inter alia* has created the 'Organisation d'harmonisation du droit des affaires' (OHADA).

[17] Art. 1, *Protocol on Arbitral Clauses.* Geneva, September 24.1923, which provides:

> Each of the Contracting States recognizes the validity of an agreement . . . by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with such contract ...

[18] Art. 1, *European Convention on International Commercial Arbitration.* Geneva. April 21, 1961, which states:

> This Convention shall apply
> (a) to arbitration agreements concluded for the purpose of settling disputes arising from international trade.

[19] Art. 1 (1).

[20] Art. 11.1 of the *New York Convention* (1958) so provides:

> 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

> arising out of a legal relationship, contractual or not

and the UNCITRAL Model Law (1985)[21] is for disputes which originate:

> in respect of a defined legal relationship, contractual or not.

It must be recognized that conventions are mainly designed to serve as an instrument for settling disputes arising from international trade, but they often deal also with procedural law, the choice of which is generally left to the parties. However procedural law is not always a matter of the parties choice alone; the Geneva Protocol (1923)[22] states that procedural law is governed:

> by the will of the parties *and* by the law of the country in whose territory the arbitration takes place.

In fact, conventions differ on this additional criterion to be used in the absence of a choice by the parties.

While the Geneva Protocol (1923) refers from the beginning to:

> the law of the country in whose territory the arbitration takes place.

the New York Convention (1958)[23] in turn refers as to procedural law to:

> the law of the country where the award was made.

The Geneva Convention (1961)[24] provides that:

> Where the parties have agreed to submit any disputes to an *ad hoc* arbitration by one or more arbitrators and the arbitration agreement contains no indication regarding the organization of the arbitration, ... the necessary steps shall be taken by the arbitrator(s) already appointed ...

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relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

[21] Art. 7 states:

> 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 ...

[22] Art. 2 of the *Geneva Protocol*, September 24, 1923:

> The arbitral procedure including the constitution of the arbitral tribunal shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place...

[23] Art. V.1, *New York Convention*, June 10, 1958:

> Recognition and enforcement of the award may be refused . . only if that party furnishes proof that:
>
> (d) the composition of the arbitral authority or the arbitration 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.'

[24] Art. IV. 3.

The Washington Convention (1965)[25] provides that:

> Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.

The UNCITRAL Model Law (1985)[26] specifies the situations in which:

> the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate.

The Geneva Protocol (1923), although ratified by many European countries, has had little success overseas, while the Geneva Convention (1927) has been a valid supplement to it, filling a large gap in the Protocol. The Geneva Protocol supports the validity of arbitration agreements and clauses which provide for foreign arbitration, guarantees the enforcement of arbitral awards in their country of origin, and defines arbitration:

> 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.

The 1927 Convention concerns the recognition in a Contracting State of awards rendered in another Contracting State under an arbitration agreement provided for by the Protocol and is valid only for States which have subscribed to the Protocol.

An award, in order to be recognized under the 1927 Geneva Convention must satisfy several requirements, one of which is that the award be final in the country in which it is rendered. The Convention provides in this connection:[27]

> To obtain such recognition or enforcement, it shall, further, be necessary: ...
>
> (d) that the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to opposition, *appel* or *pourvoi en cassation* (in the countries where such

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[25] Art. 44.

[26] Art. 19 (2), *Uncitral Model Law:*

> the arbitral tribunal may ... conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

[27] Art. 1 (d).

> forms of procedure exist) or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending.

Such a requirement is generally translated into the need that the award, in order to obtain the *exequatur* in another country, has obtained the *exequatur* in its country of origin. The consequence of this requirement (generally called *'double exequatur'*) has been that the losing party had a possibility of attacking the award in its country of origin to prevent its registration in other countries. In practice this has resulted – certainly contrary to the intention of the Convention – in an increase in the attacks against awards.

This very negative element contributed to the drafting of the New York Convention, which has been ratified by a large number of the countries which had ratified the 1927 Convention.[28]

Contrary to the 1923 Protocol, the New York Convention does not set a limit on the duty of Contracting States to recognize awards.[29] Among the criticisms most frequently made against it are its excessively wide field of application and the fact that sometimes, in spite of the criteria for identifying the awards covered by the Convention being clear, it leads to unsatisfactory results.

Illustration

> An award is made in Paris in a dispute between an American and a French party. If enforcement of the award is sought in the United States, the Convention compels the American Courts to recognize it; if enforcement is sought in France, the Convention does not compel French Courts.[30]

The opening of the Convention to awards made in non-Contracting States has caused reactions from countries which advocate the reciprocity rule. To obtain their ratification several concessions have had to be made to them.

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[28] Except for the abstention of some states such as Albania, Monaco, Norway, Poland, Brazil and India. According to information updated at January 1, 1980 (M. GIULIANO *et al*, *op.cit.*. 1551 and 1703), of the 35 states which adhered to the Geneva Convention of 1927, 22 adhered to the subsequent 1958 New York Convention (but in the meantime this figure has increased).

[29] It is sufficient to consider that out of the 98 adhering states (as of November 1988) all the 5 continents are represented.

[30] In fact Art. 1(1) of the *New York Convention* (1958) provides:

> This Convention shall apply 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.

This is why, in the above illustration, the *New York Convention* would not be able to impose enforcement on French tribunals.

The New York Convention (1958) is far removed from its European predecessors. The first countries to ratify it were the socialist countries of Europe, then Sweden, followed also by many non-European states. The New York Convention marks an important progress in international cooperation, i.e. it has made arbitration a more effective instrument for solving disputes between private individuals or entities.

The Convention replaces the requirement for a *final* award in the country of origin with the requirement of a *binding* award, and agrees to recognize it, even if it has been attacked in its country of origin.[31]

It simplifies the requirements to obtain registration of the award and puts the burden of proving the existence of negative requirements on the party opposing the application for its recognition. It further[32] grants to the parties the right to apply either the Convention or other provisions, if more favourable, except for the 1923 Protocol and the Geneva (1927) Convention:

> 1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements 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.
>
> The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards shall cease to produce effects between the Contracting States on their becoming bound and to the extent they become bound by this Convention.

A special working group on arbitration formed in Geneva in 1955, under the auspices of the Committee for the Development of Trade of the United Nations' Economic Committee for Europe,[33] adopted on April 21, 1961 the *European Convention on International Commercial Arbitration* with the purpose of completing the New York Convention of 1958.

Even if its wording is not perfect, it is generally recognized that the new Convention has the merit of stating the effects and the consequences of arbitration agreements, and of identifying the jurisdiction competent to deal with attacks against an award and the grounds for them.

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[31] This right might be inferred from Art. VI of the *New York Convention* which provides:

> If an application for the setting aside or suspension of the award has been made to a competent authority referred to in Article V (i) (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...

[32] Art. VII, 1 and 2.

[33] Which was transformed in 1961 into a Meeting of Plenipotentiaries.

From the provision that the authority, to which the application for recognition or enforcement is made, may (but does not have to) stay the enforcement (while no reference is made here also to recognition of awards) one could infer that recognition is not affected by an attack pending in the State of Origin.

Mention must also be made of the 1952 Inter-Arab Convention on the Enforcement of Judgments and Awards, which, for the majority of Arab states is, together with the Convention on Investment of Arab Capital (1980) and the Riyadh Convention (1983), the only multilateral convention which applies to them.[34]

In addition, there is the Warsaw Convention (1972), which deals with commercial disputes between Contracting States belonging to the Council for Mutual Economic Assistance (CMEA),[35] and finally, the Inter-American Convention,[36] ratified by a large number of South-American countries and inspired by the New York Convention. It favours the process of integrating the legislation of Latin American countries which started as far back as January 11, 1889, when a Convention was entered into in Montevideo for the union of the South American States on procedural law. This Convention, later followed by the one entered into in Havana on February 10, 1928 (the *Bustamante Code*), and by the Treaty concerning International Procedural Law, in Montevideo, on March 19, 1940, already outlined the essential elements for recognition of awards rendered in the territory of a Contracting State.

Also to be noted, but separately because they lack homogeneity with the previous group, are the *Algiers Declarations,* (1981)[37] which produced the Iran-US Claims Tribunal, the *Hague Conventions* (1897 and 1907)[38] concerning *International Public Law Arbitration* and more recently the *Gatt* (1947) dispute settlement mechanism outlined in Chapters XXII and XXIII,[39] succeeded by the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (WTO Understanding) annexed to the *World Trade*

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[34] See *supra* note 13.

[35] See *supra* note 9.

[36] *The Inter-American Convention on Commercial International Arbitration* in *Rev. arb.*, 1977, 2, 204.

[37] See *infra* Chapter 5.

[38] See *infra* Chapter 7.

[39] P. PESCATORE-W.J. DAVEY-A.F. LOEWENFELD, *Handbook of GATT Dispute Settlement,* Transnational Juris Publication, 1991; P. PESCATORE, *The GATT Dispute Settlement Mechanism,* 27 *J.W.T.* 1,50.

Organisation Agreement[40] and the *World Bank Inspection Panel*, which has been defined as exercising a judicial task.[41]

3.1 (b) Bilateral conventions

Several countries have also drawn up through the centuries – in addition to multilateral conventions – a series of bilateral conventions frequently dealing with other subjects and almost incidentally with arbitration. Amongst them are: France/Italy (June 3, 1930);[42] Switzerland/Italy (January 3, 1933);[43] the Bilateral Friendship Commerce and Navigation Conventions between U.S. and France,[44] U.S. and Japan,[45] U.S. and Germany,[46] U.S. and U.S.S.R.[47] and the French bilateral Treaties with Greece[48] and Belgium.[49]

The Convention between France and Italy (1930), for example, provides a framebook for the recognition of awards between these two countries. It gives in one country the *res judicata* status to awards effective as judgments rendered in the other country, upon its courts checking that the award can be enforced and be a basis for other formalities (such as recording in public registries) and allows the recording of a mortgage on assets under the same conditions required for national judgments. The Convention further provides that the recognition of an award rendered in a Contracting State, in a matter which is not suitability for arbitration under the law of the other state, will be considered contrary to the public policy of the latter state.[50]

Similarly, the Convention between Switzerland and Italy (June 3, 1933) replaces the provisions in force between these countries concerning the recognition of awards. It is applicable if the parties decide not to use other conventions. For the recognition of awards under this Convention the domestic

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[40] On WTO dispute resolution see: N. KOMURO, *The WTO Dispute Settlement Mechanism Coverage and Procedures of the WTO Understanding*; G. BURDEAU, *Nouvelles perspectives pour l'arbitrage dans le contentieux économique intéressant les états, Rev. arb.* 1995, 3.

[41] K.V.S.K. NATHAN, *The World Bank Inspection Board,Court or Quango?* 12 *J. Int. Arb.* 2, 135.

[42] *Convention on the Enforcement of Judgments in Civil and Commercial Matters,* Rome June 3, 1930, (Italian Statute January 7, 1932, No. 45).

[43] *Convention on the Recognition and Enforcement of Awards in Commercial and Civil Matters.* Rome, January 3, 1933 (Italian Statute June 15, 1933, No. 743).

[44] 11 *U. S. T.* 2398.

[45] 4 *U. S. T.* 2063.

[46] 7 *U. S. T.* 1839.

[47] October 18, 1972.

[48] Convention August 3, 1951.

[49] Convention July 8, 1899.

[50] See also the Geneva Convention, September 26, 1927 (Art. 1, 2nd para letter (b) and section 800 Rules of Civil Procedure.)

jurisdiction and not the international jurisdiction of the foreign arbitrators has to be established.

3.2 The Intention of the Parties

The main source of international arbitration law remains the intention of the parties. This is the fundamental element of arbitration, whether it is treated as being contractual (i.e. arising from an agreement between the parties) or procedural (i.e. a means through which a legal system obtains a decision).

The intention of the parties in this respect is not only expressed by submitting a dispute to arbitration (a phase which is comparable to the submission of a dispute to Court proceedings), which consists in taking advantage of alternative legal instruments which the legal system puts at the disposal of the parties for settling their disputes.

The intention of the parties is relevant even before that, when it produces the arbitration agreement. This expression of their intention, in the shape of an arbitral clause or of a submission agreement, is the main source of arbitration law.

Lastly, when the intention of the parties does not limit itself to the choice of a national procedural law or to making reference to arbitration rules, it may, by establishing *ad hoc* rules, give birth to the procedural rules for that specific arbitration, and also to substantive rules if the *tronc commun* or *lex mercatoria* doctrines are applied.

The intention of the parties is thus an essential element of arbitral proceedings and a source of their procedural and substantive law.

One may come across statutory, i.e. compulsory arbitration which, as mentioned above, may have to be treated as a sort of special jurisdiction[51] and not as arbitration proceedings.

3.3 Rules of Arbitral Institutions

Arbitration rules are a set of standard provisions for the conduct of arbitral proceedings, generally prepared by arbitral centres or institutions. These rules become effective when chosen by the parties, expressly or merely by reference to arbitration governed by that given arbitral institution.

For example, the ICC Rules of Conciliation and Arbitration provide that:[52]

> where the parties have agreed to submit to arbitration by the International Chamber of Commerce, they shall be deemed to have submitted *ipso facto* to the Rules in effect ...

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[51] See *supra* Chapter 17.

[52] Art. 6 para 1, ICC rules in force since January 1, 1998.

Likewise, the London Court of International Arbitration Rules[53] state that parties submitting a dispute to arbitration by the London Court of International Arbitration (LCIA):

> shall be taken to have agreed ... that the arbitration shall be conducted in accordance with the following rules (the Rules) ...

Also the UNCITRAL Arbitration Rules[54] provide that those Rules will apply to any dispute submitted to UNCITRAL arbitration.

The Rules of the Court of Arbitration of the Chamber of Commerce and Industry of Bulgaria provide that selection of that Court implies its authority to organize the proceedings in accordance with its rules.[55]

The arbitration rules of the European Court of Arbitration provide as follows as to procedural and to substantive law:[56]

> 1. The rules governing these proceedings are set out in these Rules. Where these Rules are silent and the parties have not agreed otherwise, the Arbitral Tribunal shall decide on any additional procedural rules to be applied.
>
> 3. The parties may agree upon the substantive law applicable to their dispute. If the parties have not so agreed, the arbitral tribunal shall apply the substantive law determined by application of the conflict of law rules common to the legal systems of the respective parties, ensuring that the substantive law chosen is not contrary to the reasonable expectations of the parties. In the absence of any common conflict of law rules, the arbitral tribunal may apply the laws of the state with which the contract is most closely connected. If any provisions of the substantive law as chosen by the parties or by the arbitrators are in conflict with mandatory provisions of the *lex fori,* such mandatory provisions take precedence over the relevant substantive law chosen by the parties or by the arbitrator.

It is not easy to make a detailed inventory of all the existing arbitration rules because of the number of Courts of Arbitration and arbitral institutions which have been formed in various countries. In addition to the rules of arbitral institutions or centres, which aim to resolve arbitrable disputes, considerable importance must be attributed to the arbitration rules created for their members by several trade associations such as the Grain and Feed Trade Association, the Sugar Association, the Coffee Trade Federation, the London Maritime Arbitrators' Association, and eventually the Court of Arbitration for Sport. These

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53 Premise to the London Court of international Arbitration Rules, 1998.

54 See Art. 1, Uncitral Arbitration Rules.

55 See Art. 8 (2) Arbitration Rules of the Court of Arbitration of the Chamber of Commerce and Industry of Bulgaria. *Rev. arb.* 1980, 1, 199.

56 Art. 11.1 and 3, (1997) edition.

are also called "specialized arbitrations" and frequently concern questions of quality. These proceedings are generally much shorter.

Members of the respective trade association generally refer to these rules to settle the disputes which arise amongst them.

Amongst the bodies which have issued arbitration rules one may mention the American Arbitration Association, the International Court of Arbitration of the ICC, the London Court of International Arbitration, the International Arbitral Centre of the Federal Economic Chamber, Vienna, the German Institution of Arbitration, the Interamerican Commercial Arbitration Commission, the Arbitration Institute of the Stockholm Chamber of Commerce, the European Court of Arbitration, the Netherlands Arbitration Institute, China's International Economic and Trade Arbitration Commission, the Indian Council of Arbitration, the Australian Centre for International Commercial Arbitration, the Arbitration Court of the Russian Chamber of Commerce and Industry, the Court of Arbitration at the Chamber of Foreign Trade, the Permanent Court of Arbitration of the Polish Chamber of Commerce, the Hong Kong International Arbitration Centre, the British Columbia International Commercial Arbitration, the Quebec Arbitration Centre,[57] the Centre of Arbitration of the Hungarian Chamber of Commerce, the rules of the World Intellectual Property Organisation (WIPO), Geneva and the rules of the Chicago International Dispute Resolution Association.

As an alternative to the Uncitral Rules, one should mention the rules for Non Administered Arbitration of International Disputes (the CPR Rules). For a comparative study between the Uncitral and the CPR rules see Smit and Shaw.[58]

It would not be easy to make an exhaustive list. Recently the Commercial and Mediation Centre for the Americas[59] has been founded.

Frequently the Arbitration Rules are the only source of procedural law, except for the mandatory provisions of the *lex fori*. That is the case when the parties make no reference, even subsidiarily, to a national procedural law.[60] Arbitration rules create procedural usages when the effect of their repetition is that in the users' opinion they acquire a binding effect.

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[57] J. THIBAULT *Le Centre d'arbitrage commercial national et international du Québec et son règlement général d'arbitrage commercial, Rev. arb.* 1994, 70.

[58] R. H. SMIT AND N.J. SHAW *The Center for Public Resources Rules for Non Administered Arbitration of International Disputes. A Critical and Comparative Commentary,Am. Rev. Intl. Arb.* 1991, 411, 1997, 275.

[59] M. HOELLERING *Commercial Arbitration and Mediation Centre for the Americas* 13 *J. Int. Arb.* 2, 117.

[60] FOUCHARD GAILLARD GOLDMAN, *cit* at 197.

International Commercial Arbitration[61] is an important source of arbitration rules and contains a country by country survey of selected materials.

3.4 ARBITRATORS' ALTERNATIVE CHOICE

If there is no choice of procedural rules in the arbitration agreement (or after it), and no reference by the parties to arbitration rules, the arbitrators must choose the rules by referring either to existing arbitration rules or to statutory provisions, or draw up themselves these rules, when expressly or implicitly authorized to do so. Their choice then becomes a source of arbitration law. However, when not limited by the parties or by the arbitration rules, the arbitrators tend to choose a national procedural law, or a set of standard arbitration rules, rather than drawing up themselves the rules to be applied to such proceedings.

This although, as Derains[62] has rightly pointed out as to the taking of evidence, in arbitral proceedings between a litigant from Continental Europe and one from a common law country, if the parties themselves do not select the applicable procedural rules, the arbitrators are free to:

> create an independent system for the taking of evidence, half way between civil law and common law systems.

Such a wide discretion, which should perhaps be considered a duty rather than a power, is often conferred on arbitrators by the parties concerning substantive law also.

3.5 NATIONAL LEGAL SYSTEMS

Some national legal systems, particularly in recent years, have made a distinction in their domestic arbitrations between purely internal disputes and international ones. However, this distinction should not be misunderstood. It generally concerns *arbitrations which remain national* in both cases. For example one can distinguish between domestic French arbitrations and international French arbitrations, but they are both French arbitrations.

Each individual national arbitration system generally deals further with foreign arbitration proceedings, without making a distinction between foreign and international arbitration in the sense suggested above. The lack of this distinction is due, as already mentioned,[63] to a territorial notion of arbitration according to which arbitrations taking place, for example in Spain, are domestic for

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[61] *International Commercial Arbitration*, E. BERGSTEN (ed) Oceana Publ. Inc.

[62] JARVIN-DERAINS, *Chronique des sentences arbitrales, Clunet,* 1979, 982.

[63] See *supra* Chapter 2.

Spain, while all those which take place outside Spain are foreign to Spain. With the New York Convention (1958) came the notion that arbitral proceedings which take place in one country under another country's procedural law give rise to awards which should be recognized as *foreign* awards. It is submitted that the recognition of this possibility in itself contains *in nuce* (i.e. in a nutshell) the notion of international arbitration. This view of the New York Convention is reflected even more neatly in the German statute implementing it, which as earlier discussed declared that arbitral proceedings conducted abroad, but governed by German procedural law, were to be treated as German.

International arbitration proceedings may, even if it is not compulsory, refer also to a national procedural law, and that law becomes a source of international arbitration law.

A very short survey of some legal systems and not a study of these national procedural laws will be undertaken here, mainly regarding the distinction they make between their international and domestic proceedings. This summary is made on the basis of studies made by authors in the various countries. In view of the intricacies and peculiarities of national arbitration laws and of their continuous changes, these short comments may be treated only as rough and preliminary information and local advice is to be sought on each specific occasion.

France

For a long time French law has given special attention to arbitral proceedings. The need to update its legislation to the developments of arbitration and several Court interventions have finally provoked the introduction of new legislation. In fact, two statutes have been issued concerning respectively domestic arbitration[64] and international arbitration.[65] In this way, France has become one of the states which have specifically formulated rules for domestic international arbitration.

Decree No. 81-500 of May 12, 1981[66] defines international arbitration[67] as:

> arbitration which involves interests of the international trade.

French law has chosen the criterion closest to that of Art. 1, European Convention of Geneva April 21, 1961. This has produced the result described by Derains:[68]

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[64] Decree No. 80-354, May 14, 1980.

[65] Decree No.81-500, May 12, 1981.

[66] Which has been inserted in the new Civil Code, Titles V and VI (Sections 1492-1507).

[67] Section 1492, New Civil Procedure Code.

[68] In *Yearbook Commercial Arbitration*, 1982, vol. VII, 3 *et seq.*

> An award made in France under French procedural law between French litigants is treated under section 1492 of the (French) Civil Procedure Code as international if the dispute concerns an international sale.

The new French arbitration law leaves the parties a wide choice not only of procedural, but also of the applicable law. For the former it provides:[69]

> The arbitration agreement may state the procedure to be applied (directly or through a reference to arbitration rules). It may make the proceedings subject to the procedural law it deems fit. In the absence of a choice of that law in the arbitration agreement, when necessary the arbitrator decides the procedure to be followed, directly or by reference to statutory provisions or to arbitration rules.

A limit to this wide contractual freedom can be seen in the non-arbitrability of several matters governed by mandatory rules or by public policy, such as labour law and insolvency law.

In choosing the applicable law, parties and arbitrators may make reference to a national legal system or to non-national rules.

The new legislation[70] provides that:

> The arbitrator decides according to the rules (note: *règles de droit,* i.e. rules not necessarily deriving from statutory provisions) which the parties have chosen; in their absence, he decides according to the rules which he deems convenient. He also takes into account trade usages.

Italy

Italian arbitration law is based on the rules of civil procedure which in 1940 have replaced the earlier 1865 rules. The 1940 rules have not been amended for over 40 years. Few, although important amendments were made in 1983.[71] The 1994 statute (hereinafter referred to as the Arbitration Reform Act)[72] has largely re-written such rules.[73]

As earlier discussed, the Italian legal system admits, aside of procedural arbitration (*arbitrato rituale*), proceedings through which the parties, rather than seeking the decision of the dispute, entrust a neutral with the settlement of it on their behalf. These proceedings are called *arbitrato irrituale*, or *libero* or *improprio.*

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69 Section 1494, New Civil Procedure Code.

70 Section 1496, New Civil Procedure Code.

71 Statute February 9, 1983, no. 28.

72 Statute January 5, 1994, no. 25.

73 RUBINO-SAMMARTANO *Il diritto dell'arbitrato (interno)* (Domestic arbitration law) 2nd edition, Cedam, Padua 1994.

The Arbitration Reform Act deals only with procedural arbitration which – it is submitted – is the only real arbitration.

Main amendments

Only the main amendments made by the Arbitration Reform Act will be dealt with.

Autonomy of the arbitration clause

The Reform Act has recognised that the arbitration clause is independent from the rest of the contract in which it is inserted.

Number and appointment of the arbitrators

If the parties do not agree on the number of the arbitrators there will be three arbitrators. If the parties have agreed to have only two arbitrators, the third one will be appointed by the Chief Justice of the *Tribunale*. If the parties do not appoint the arbitrators, they will be appointed by the *Tribunale*, unless the parties have otherwise agreed.

Removal of the arbitrators

The Reform Act allows the parties or the body which the parties have empowered to do so or, if not – in the absence of such delegation – the *Tribunale* to remove, on the application of one of the parties, the arbitrator who does not perform or who delays his performance.

Place of the arbitration proceedings

The place of the arbitration proceedings must still be within the territory of the Republic. The improvement made by the Reform consists in allowing that the award be not only signed but also decided outside Italy.

Continuance of arbitration proceedings in spite of connected court proceedings

The Reform Act has eliminated the situation created by the precedents, under which whenever arbitration proceedings were connected with court proceedings, the arbitrator no longer had jurisdiction on the former, which could then be tried by the state court.

Evidence

The Reform Act allows arbitrators to accept written answers to interrogatories, instead of actually hearing witnesses.

Time limit for the award

The time limit for the award, which was 90 days, has been extended to 180 days. Along the same line, that time limit may be extended from 180 to 360 days, if evidence is taken or an interim award is made.

Possibility to set aside an award only partially

Before the Reform Act, if part of an award was null, the entire award was set aside. Under the Reform Act if that partial nullity does not necessarily cause the nullity of the rest of the award, the latter stands.

Appeals against awards – no filing of the award required in order to appeal

Appeals are allowed also against awards which decide only a part of the *merits* of the dispute. All appeals are to be brought before the Court of Appeal in whose District was the place of the arbitration proceedings. Eventually a filing of the award with the County Court is no longer required in order to attack the award.

Third-party oppositions

Third parties which are affected by an award may now attack it before state courts.

Joining of attacks

Appeals, petitions for reconsideration and third party oppositions may now be joined.

Time bar

Provided the request for arbitration has certain contents, under the Reform Act service of it interrupts the time bar which otherwise would affect the claim.

Filing with the Real Estate Record Office

The Reform Act allows the filing of requests for arbitration with the Real Estate Record Office, as a result of which the related claims on real estate, if allowed by the award, take priority on subsequent transactions dealing with that property.

Transition period

The Reform Act deals in detail with the transition period, stating when already existing arbitration clauses and pending proceedings are to be regulated by the new provisions.

International arbitration

The Italian Parliament has defined as international the arbitration in which:

> at least one of the parties has its residence or registered offices outside Italy; *or*
>
> a substantial part of the obligations, deriving from the relationship which has given rise to the dispute, is to be performed outside Italy.

One might construe this part of the Reform Act as a means to regulate international arbitration. Contrary to this, it is limited to regulate domestic arbitration which has such specific elements of internationality. One is consequently in front of a *domestic* arbitration of the international *subtype.*

Discipline of domestic arbitration (international subtype)

Domestic arbitration, (international subtype), is regulated by the rules on domestic arbitration except when they are derogated from by the Reform Act. This derogation concerns some specific matters:

Form requirements

The requirement of specific acceptance of the arbitral clause (a requirement for domestic arbitration since this clause is considered to belong to the class of the burdensome clauses) has been abolished for international arbitration.

Also the requirement that arbitration clauses, which are included in general terms and conditions, be referred to expressly by the parties in order that they be valid, has been abolished. It is now sufficient that either the contracting parties were aware of it or that they should have been aware of it by using due care.

Applicable substantive law

The parties are free to establish the substantive law. The Italian term used by the Reform Act (*le norme*) is wider than a mere reference to the law. It has been suggested that it may be construed as including not only foreign law but also *tronc common* (i.e. the part of the legislations of the contracting parties which is common to them).

The Reform Act has further provided that, in case of lack of choice of the substantive law by the parties, the arbitrators select the applicable substantive law by applying the closest connection criterion. The arbitrators will also take into account the contract and the trade usages.

Language of the proceedings

In order to avoid any argument on whether proceedings in Italy may be conducted in a language other than Italian, the Reform Act has clarified that the arbitrators are entitled to choose the language of the proceedings. In doing so the arbitrators will have to take into account all the circumstances.

Challenge of arbitrators

The Reform Act entitles the parties not to apply the rules on challenge of the arbitrators before state courts. The parties are then free to provide that the challenge be decided by an arbitral institution or by another body.

The award

The Reform Act provides that the arbitrators may decide not only by personal conference but also by holding that conference by video telecommunication.

Attacks against the award

The Reform Act has excluded, as to domestic international proceedings, attacks for breach of statutory provisions of substantive law.

Furthermore the Reform Act has excluded that, as to such proceedings, if the Court of Appeal, which hears an attack against an award, sets it aside, it may replace it with its own decision on the merits, unless this has been excluded by the parties. Eventually two out of the three attacks available against domestic awards, namely third party opposition and petition for reconsideration, have also been excluded.

Enforcement of foreign awards

Until the Reform Act, in order to enforce a foreign award full proceedings had to take place before the Court of Appeal, to be ended up by a judgment. Their average duration was about two years. Now enforcement is granted by the Chief Justice of the Court of Appeal by Order on an *ex-parte* application,

i.e. without hearing the opposite party; the latter is then entitled to oppose the Court Order in a limited number of situations which are in line with those set out by Art. V, New York Convention.

Conclusions

The Arbitration Reform Act represents an important progress for Italian arbitration law and makes it more modern and simple.

There is no statutory provision under Italian law barring arbitration conducted in Italy from applying the procedural rules of another legal system or rules which do not belong to any national procedural system. In the absence of precedents on these issues, it is suggested that all such proceedings should place themselves outside Italian procedural law and should be treated as foreign arbitration but are generally not treated as such. They generally have no contact with the Italian procedural system, unless Italian mandatory rules are breached, such as the *lois de police* or international public policy.

Recourse to state courts before the beginning of, or during, these arbitral proceedings would be rare since the arbitration agreement generally does not refer to Italian Courts for the appointment of arbitrators or for requests for their removal.

However, applications for the appointment of arbitrators to hear such proceedings, might be entertained. It seems less likely that the Courts entertain requests for removal of arbitrators.

No Court intervention in support of arbitration, such as for the taking of evidence, is provided by Italian procedural law even for its own arbitration proceedings.

Likewise, the filing of such awards with the County Court, for the purpose of an enforcement order, would probably not be accepted since such an order is the final step in arbitration proceedings governed by Italian law and therefore should not be available to proceedings which are not Italian. It is also suggested that attacks provided for by Italian procedural law against awards will generally not be available. The position might be different if no attacks were available elsewhere and the loser should have no other means to oppose the award.

It becomes natural at this stage to wonder what position Italian procedural law takes concerning proceedings which are to be treated as international. It is submitted that for the purposes of enforcement in Italy, the New York Convention (1958) is applicable whenever the decision can be treated as foreign within the meaning of Art. 1.1.

The Italian legal system should not create obstacles to international awards made in Italy being recognised and enforced in another state.

The other state will have to decide whether the requirements stated in the arbitration agreement and in the applicable procedural rules have been complied with. For this the place of arbitration will often be relevant.

A more delicate question is the possibility of arbitral proceedings, which have taken place abroad under Italian procedural law and the seat of which was outside Italy, being treated as domestic. It is submitted that in the abstract they should be domestic, but that they will be treated as *foreign* awards, unless their seat was in Italy. The effect of such non-compliance shall be that the Italian courts are very likely to refuse to grant permission to enforce such an award as an Italian award. It should still be enforceable under the New York Convention as a *foreign* award.

Sweden

Arbitration plays an important role in Sweden. The Arbitration Institute of the Stockholm Chamber of Commerce states in its publication, on which these notes are based,[74] that the large majority of commercial disputes, when not amicably settled, is submitted to arbitration.

The basic statutory provisions are to be found in the Arbitration Act (1999).[75] The Swedish Arbitration Institute (SEC) has issued new Rules in 1999. These rules apply, within domestic disputes, also to arbitration related to international trade:[76]

> This act shall apply to arbitral proceedings which take place in Sweden notwithstanding that the dispute has an international connection.

It is reported that arbitration is treated as *foreign* when it takes place outside Sweden, Freedom of choice of the substantive law is expressly recognized except that:[77]

> Where none of the parties is domiciled or has its place of business in Sweden, such parties may, in a commercial relationship through an express agreement exclude or limit the application of the grounds for setting aside an award as are set forth in Section 34. An award which is subject to such an agreement shall be recognized and enforced in Sweden in accordance with the rules applicable to a foreign award.

Spain

Spain recognises the validity of foreign awards but under Statute December 22, 1953 arbitration was also treated as foreign when the parties had decided to submit it to a different law from the 1953 Spanish statutory provisions gov-

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74 Stockholm Arbitration Report 1999, 1.

75 LAG OM SKILYEFORFARANDE, SFS, 1999, 116.

76 Section 46.

77 Section 51.

erning internal arbitration. The Spanish Parliament has introduced new legislation on December 5, 1988 through Statute No. 36.

Amongst the various and substantial changes so introduced, one may mention the abolition of the requirement that arbitration clauses (rather referred to as preliminary arbitration contracts) be subsequently confirmed by a submission agreement. The new Statute further entitles the parties to choose procedural rules different from Spanish procedural law and recognises institutional arbitration. The attacks against awards have also been simplified into an appeal for annulment. Foreign awards are defined as those which are not made in Spain. Recognition of foreign awards is decided by the *Tribunal Supremo,* while enforcement is left to the Courts of first instance. For obtaining an *exequatur* in Spain[78] several alternatives are available:

(a) application of an international convention; or
(b) reference to the reciprocity rule with the country in which the award has been made; or
(c) compliance with the requirements stated by the Spanish Civil Procedure Code.

The review by the Spanish Court before granting an *exequatur* does not include the merits of the dispute. Apart from the recognition and enforceability of foreign awards, there is no distinction in Spanish arbitration law between merely domestic disputes and the other domestic disputes which have an international feature from the point of view of the parties or as the subject of the dispute.[79]

As to substantive law, the parties may choose provisions different from those of Spanish law, provided there is a connection between those provisions and the merits. If the parties do not make a choice of the applicable substantive law, the conflict of laws rules of the *lex fori* are applied.

In order to favour international trade, particularly between Spain and America, Royal Decree May 22, 1981 was issued. In its preamble, and in an attempt to increase the use of arbitration, the Council of the Chambers of Commerce is authorised to take action to develop in Spain services likely to facilitate commercial arbitration in compliance with the guidelines of the new arbitration law.[80]

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[78] Sections 951-958, Civil Procedure Code .

[79] See for more detailed information: B CREMADES, Spain, *Yearbook Commercial Arbitration*, 1987, Vol. XII, 39 *et seq.*

[80] See B. CREMADES, *Arbitraje Commercial Internacional* (International Commercial Arbitration), Pons, Madrid 1975; see also GONZALES SORIA, *La intervencion judicial en el arbitraje. Recursos jurisdicionales y ejecucion judicial del laudo arbitra*l, Madrid, 1987.

The new Spanish Civil Procedure Code[81] enters into force on January 8, 2001. It establishes a five-year statute limitation for enforcement of awards[82] and amends other aspects of arbitration such as holding measures to be issued by state courts as well as the plea of lack of jurisdiction because of the existence of a valid arbitration clause.

Netherlands

In the Netherlands, as in countries such as France, Italy, England, Austria, Switzerland and Belgium, arbitration law has been amended.[83] The new Arbitration Act entered into force in 1986.

Disputes, taking place under Dutch law as to international trade are treated as international trade of the new Statute deals domestic arbitration; the recognition and enforcement of foreign awards (in the presence of international conventions[84] and in their absence[85]) are treated separately.

Some of the new provisions concerning domestic arbitration deserve a mention. The parties are free to choose procedural rules:[86]

> Except as provided in this Title, arbitral proceedings must be conducted in conformity with the agreement between the parties or in its absence as it will be determined by the arbitral tribunal.

The arbitrators must comply with the arbitration rules agreed by the parties or, in their absence, determined by the arbitral tribunal except for such fundamental principles as the following:[87]

> the parties must be treated with equality.

As regards substantive law, the parties, or in their absence the arbitrators, may choose the rules which they consider suitable.[88]

Austria

Austria also records amendments in its arbitration law.[89] While it does not make a distinction between domestic arbitration and domestic international

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81 Ley de Enjuiciamiento Civil 1/2000 de 7 de Enero.

82 Art. 518 New Spanish Civil Procedure Code.

83 Arbitration Act, July 2, 1986, which has become part of the Dutch Civil Procedure Code (Sections 1020-1076) and which is in force since December 1, 1986.

84 Section 1075 Civil Procedure Code.

85 Section 1076 Civil Procedure Code.

86 Section 1036, para 2.

87 Section 1039 Civil Procedure Code.

88 Section 1054 Civil Procedure Code (Federal Statute, February 2, 1983, in force since May 1,1983).

89 Federal Statute, February 2, 1983, in force since May 1, 1983.

arbitration, the new Statute has the clear purpose[90] to favour international arbitration in Austria.

Where international arbitration takes place in Austria, the applicable procedural law is chosen[91] by the arbitrators at their discretion, unless the parties have otherwise agreed in the arbitration clause, or in the submission agreement.

In any event the arbitrators have a duty to respect mandatory provisions as well as the basic principles of the Austrian legal system.

England

The 1996 Arbitration Act,[92] aims to make London become one of the main venues for settlement of international disputes.

Basic principles

The principles of fairness, impartiality and of avoidance of unnecessary delay are the basis of the Act which focuses also on party autonomy.

Increase of the powers of the parties

Parties are free to grant powers to the arbitrators and to decide which law they are to apply to the substance of the dispute.

Decisions in equity and in fairness

This may include the principles of equity or what in the arbitrators' judgment is fair rather than applying a national law.

Reduction of appeals and in general of the powers of Courts

The parties may also opt out of several provisions of the Act such as excluding any appeals on points of law. Courts may intervene on a more limited number of situations: (i) only where English law is applicable to the substance of the dispute; (ii) the point in issue must have a substantial effect on the rights of one or more of the parties and it must have been raised before the arbitral tribunal; (iii) the Court must be satisfied that this point has been clearly wrongly decided by the arbitrators or that the issue is one of general public interest and that there are serious doubts that the arbitrators have decided it correctly; (iv) the Court must take the view that it is proper to intervene.

Time extensions

In order to reduce the situations where a claimant may obtain a time extension from the Court, the Act allows courts to grant extensions of time (i) only if the circumstances, which have arisen after entering into the arbitration clause or submission, were outside the reasonable expectations of the parties and (ii)

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90 Chapter I ZPO (Civil Procedure Code).

91 Section 587 ZPO (Civil Procedure Code).

92 *Arbitration Act* 1996; see also the 1996 *Report on the Arbitration Bill* issued in February 1996 by the Departmental Advisory Committee on Arbitration Law.

it is fair to extend that time bar, or (iii) the conduct of the other party would make it unjust to enforce the time bar against that party.

Court intervention in aid of arbitration

Unless the parties have otherwise provided, the courts may issue orders for obtaining evidence as well as for interim injunctions.

Arbitrators' powers

Arbitrators' powers have been increased. It is up to them now to decide on their own jurisdiction, on applications for dismissal for want of prosecution and on security for costs.

Severance of the arbitration clause

Severance of the arbitration clause from the contract is also possible.

Seat of the arbitration proceedings

The seat of arbitral proceedings is also dealt with by distinguishing it from the place where some hearings and meetings may take place.

Compound Interest

Arbitrators may now grant compound interest.

Arbitration not to be a mirror of Court proceedings

The Act clearly advises that international arbitral proceedings do not have to imitate English court procedures. For example the parties may release the arbitrators from the duty to apply English rules of evidence.

Furthermore the arbitrators may *take the initiative* in ascertaining the facts and or the law. This step is very far away from the traditional, strictly adversarial nature of court and arbitration proceedings.

Restatement in simple language

Eventually the Act restates English arbitration law in simple language.

Conclusions

The times of the so-called *special case procedure*, and when it was usual to issue awards without reasons to avoid the award being set aside for a manifest error in fact or in law seem to be over. Likewise the tendency to apply English substantive and procedural law, and the refusal to accept that decisions be made in equity should now disappear.[93] The tendency to apply English procedural law has already started to change.[94]

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[93] On arbitration in England see MUSTILL and BOYD; see also a study by BRUNELLI, *La nuova disciplina dell'arbitrato in Inghilterra* (The New Discipline of Arbitration in England).*Riv. Trim. Dir. Proc. Civ.*, 1985, 351 *et seq.*

[94] *James Miller & Partners Ltd. v. Whitworth Street Estates (Manchester) Ltd.* (1970) 1 *Lloyd's Rep.*, 269 (1970), AC 583; see also *Cie Tunisienne de Navigation SA v. Compagnie d'Armement Maritime SA*, (1970) 2 *Lloyd's Rep.*, 99-116 quoted in MUSTILL and BOYD *op. cit*, 61.

As to substantive applicable law an opening has been made by the Master of the Rolls[95] in *Deutsche Schachtbau*[96] in which for the first time it is stated that the arbitrators' choice of:

> a common denominator of principles underlying the laws of the various nations governing contractual relations

does not exceed the powers of the parties. This decision, it is submitted, recognises the lawfulness of the choice of *tronc commun,* and not of *lex mercatoria,* as some commentators on that judgment have held.

Switzerland

Switzerland has for a long time been one of the places most favoured for arbitration because of its traditional neutrality.

Once characterized by the existence of different procedural laws in its various cantons, it was practically unified by the *Concordat Suisse sur l'Arbitrage.*[97]

The *Concordat* provided that any arbitral tribunal with its seat in Switzerland had to comply with the provisions of the *Concordat*[98] several of which were imperative, such as those concerning the form of the arbitration agreement, the contents of the award and the possibility of challenges on it. However, the *Concordat* was declared not applicable to arbitral proceedings taking place abroad.

However in the end, the *Concordat* created difficulties for conducting in Switzerland arbitration not governed by Swiss procedural law, and enabled the parties to cause the Swiss Courts to interfere in several ways with arbitral proceedings.

New legislation, the *Federal Statute on Private International Law* was enacted[99] which aims to deal with the difficulties which arose in the application of the *Concordat* and which risked making Switzerland a less favourable seat for international arbitration.

The new legislation defines as international the arbitration proceedings taking place in Switzerland in which at least one of the parties has no domicile or residence in that country. The parties are completely free to choose any procedural law, or the rules of an arbitration institution, and to give to the

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95 The President of the Court of Appeal of England.

96 *Deutsche Schachtbau und Tiefbohrgesellschaft v. The R 'AS Al-Kaiman National Oil Company,* Court of Appeal (England), March 23 (1987) *Journal of Business Law,* 1987, 168.

97 *Swiss International Concordat on Arbitration,* August 27, 1969, which was adhered to by the Cantons except for Lucerne and Thurgau.

98 Art. 1.

99 Federal Statute on Private International Law, December 18, 1987.

arbitrator the authority to determine it. Attacks against awards have been simplified; the parties having neither their domicile nor their residence nor a commercial office in Switzerland may waive all appeals to the Courts against the award.

Belgium

Arbitration law has been amended in Belgium also.[100] The main change made by the new Statute[101] was that Belgian Courts could not hear a challenge against an award made in a dispute in which none of the parties was a national or a resident of, or a company operating in, Belgium. This provision was particularly significant, since it is clear and firm in excluding the jurisdiction of its Courts on arbitration which is not fully domestic. No challenge *at all* on non-fully domestic Belgian arbitration was then possible,[102] according to commentators. In this way, some of the dilatory tactics practised by losing parties became avoidable.

Section 1717 Judicial Code has been subsequently amended by Statute May 19, 1998, by providing at para 4 the possibility of excluding set aside proceedings, rather than their automatic exclusion:

> The parties may, by an express statement in the arbitration agreement or by a subsequent agreement, exclude any application to set aside the arbitral award where none of the parties is either an individual of Belgian nationality or residing in Belgium, or a legal person having its head office or a branch there.

Arbitral tribunals are also expressly authorized to grant holding measures.

Germany

Germany also has introduced new legislation on arbitration, effective from January 1, 1998. The new Arbitration Law was enacted on December 22, 1997[103] and is very close to the Model Law.

It deals with international and with domestic arbitration, and is not confined to commercial disputes.

State courts may intervene in matters related to arbitration only when this is so provided in the Arbitration Act.

As to requirements of form of the arbitration agreement, the new Act does not maintain the difference between *Kaufleute* (business people) and others and

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[100] Statute May, 9, 1998 *Moniteur belge* August 7, 1998.

[101] Which supplemented Section 1717, Judicial Code.

[102] VAN HOUTTE *La loi belge du 27 mars 1985 sur l'arbitrage international, Rev. arb.* 1986, 31.

[103] *Bundesgesetzblatt* 1997 I, 3224.

requires of every agreement to be evidenced in writing, or by telecommunication whenever the latter provides a record of that agreement.

As to what is capable of arbitration, the new Act provides that any dispute which involves financial interests is capable of arbitration.

If the parties have not agreed on the number of arbitrators, then there will be three arbitrators.

The earlier requirement for the deposit of the award with a German court, in order that it might be enforced, has been abolished.

The arbitral tribunal must first apply mandatory provisions, then the agreement of the parties as to matters where they can derogate from statutory provisions, and lastly in the absence of any of them, the tribunal may apply its own discretion.

A party loses the right to challenge the award because of an irregularity in the proceedings if he does not raise it without delay during such proceedings.

In the event of an arbitrator refusing to participate in a decision, the other arbitrators may reach a decision without him.[104]

The arbitral tribunal now has a duty to tax the costs of the proceedings and to decide which party shall bear them.

Setting aside proceedings before state courts are only available in domestic awards. Such proceedings must be instituted within three months after receipt of the award.

In order to enforce domestic and foreign awards, an application has to be made to the competent German state court, seeking a *Vollstreckbarerklärung* (an order to enforce).

Harmonisation in the European Union

Harmonisation of arbitration law in the European Union would contribute to form that common market and to create unity amongst its Member States. Although each state is jealous of the peculiarities of its law, this target is achievable.

United States

In the United States the sources of arbitration law are reported to be both federal and state law. Federal law consists of the Federal Arbitration Act[105] as amended in 1970 as a consequence of ratification of the New York Convention.

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[104] Section 1052, para. 2.

[105] Originally entitled the United States Arbitration Act Statute February 12, 1925.

In practice, the conflict between state law and federal law is decided according to the subject of the dispute. If it concerns international or inter-state trade, federal law applies, while state law applies to other disputes.

Arbitration is popular in the US[106] and the parties meet with few obstacles to the submission of disputes to arbitration. It is reported that few provisions are mandatory and the parties may also waive oral argument. If so, the arbitrators reach a decision on the basis of documents alone.

Nowadays, in particular after the implementation of the New York Convention, the prevailing notion of arbitration is that of a private means to resolve disputes mainly based on the private intention of the parties. This *favor arbitratus* is particularly obvious in transnational trade. Because of the parties' freedom of choice, which is considered fundamental in the United States also, the parties may choose the applicable procedural law.[107]

Islamic law

It is reported that the traditional doctrine elaborated by the Hanafi School[108] specifies that Islamic procedural and substantive law (*Sharia*) is compulsory being the essential source of the law.

The criteria for establishing whether proceedings belong or not to Islamic law, have been the object of a debate. According to some writers[109] all proceedings taking place in a non Moslem country are to be treated as foreign. According to another[110] opinion arbitration taking place in a non Moslem country between Moslems would not be foreign. According to another view the decisive element to determine nationality is religion and not nationality. According to Saleh,[111] arbitration proceedings which take place in Islamic countries are subject to *Sharia* whatever the nationality of the parties, except in states where, in addition to Islamic courts, secular courts have been formed which are more open to other legislations. *Sharia* consequently appears to treat

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[106] J.S. McLENDON and R.F.E. GOODMAN, *International Commercial Arbitration in NewYork,* Dobbs Ferry, 1986. For a view of the U.S. position from not American commentators see BRUNELLI *L'arbitrato commerciale negli Stati Uniti e i metodi di risoluzione alternativa delle controversie* (Commercial Arbitration with US and alternative dispute resolutions), *Riv. Trim. Dir. Proc. Civ.,* 1987, 1015 *et seq.;* see also DAVID, *cit.,* 161 *et seq.*

[107] BORN *International Commercial Arbiration in the United States,* Kluwer 1994; DOMKE *Commercial Arbitration, The Law and Practice of Commercial Arbitration* (1992) (Rev. Ed.).

[108] One of the four schools of Islamic law (the other schools being Maliki, Shafii and Hanbali).

[109] ABU HANIFA, *Badaei El Sanaei,* at 132.

[110] IMAM MALER, *Mawaheb al Jalil,* vol II, at 31.

[111] SALEH, *Commercial Arbitration in the Middle East,* London, Graham & Trotman (SALEH), 1982.

an award as foreign if made under a law other than *Sharia* itself and as Islamic if governed by *Sharia*, even if the place of arbitration was not in an Islamic country. This distinction, which *prima facie* seems far removed from the European position, becomes very interesting if compared with the criterion to establish nationality based on procedural law.[112]

The experiences of Arab countries in the field of arbitration, which have not been entirely successful, have sometimes affected their approach to arbitration. That was the case of Saudi Arabia which, after losing an important dispute between their Government and Arabian American Oil Company (Aramco) in 1958 over a shipping contract with a company of the Onassis group, excluded by a Government resolution[113] arbitration from the means to settle disputes to which the Government was a party[114]

Such disputes were then heard by the Board of Grievances. Only very recently has Saudi Arabia joined the New York (1958) Convention.

Egypt, in which the Cairo Regional Centre plays a relevant role, has enacted on April 18, 1994 a New Arbitration Law (which has adopted the principles of the[115] Uncitral Model Law).

Even if Lebanon has not adhered to the New York 1958 Convention, it is reported that it applies the same or even broader rules. The New Code of Civil Procedure allows the Government and State owned corporations to arbitrate on international matters without the need for authorization. It further deals *inter alia* with the arbitration agreement, its autonomy, the arbitral proceedings, and the requirements for recognition and enforcement of awards, provided they are not manifestly contrary to international public policy. It further provides for attacks against domestic awards.[116]

Asia and Pacific area countries

The vast area of the Asian and Pacific countries has a rich variety of rules for choosing procedural and substantive law.[117]

The present situation is discussed by Pryles.[118]

Both Australia and New Zealand have enacted the Uncitral Model Law, which[119] permits the parties to choose the applicable law.

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[112] See *supra* chapter 2.

[113] Council of Ministers Resolution, June 25, 1963 no. 58.

[114] N.B. TRUCK, *Arbitration in Saudi Arabia,* 1980, 3, 281.

[115] M.I.M. ABOUL ENEIN, *Reflections on the New Egyptian Law on Arbitration*, 11, *Arb. Int.* 1995, 1, 75.

[116] A. NASSER, *International Arbitration in Lebanon,* 10 *Arb. Int.* 3, 295.

[117] The situation in this area has been reported by SIMMONDS *et al.*

[118] M. PRYLES, *Dispute Resolution in Asia,* Kluwer 1997.

[119] Art.116.

In Japan[120] the choice of substantive law is made by the *Horei* (the main source of private international law).The Osaka High Court[121] has ruled that the parties are free to choose a foreign arbitration law unless it contravenes public policy or good morals.

China

In 1994 China's legislative body enacted the first Arbitration Act of China.[122] Furthermore on September 1, 1995 the new Chinese Arbitration Act was enacted. The arbitration rules of China Economic and Trade Arbitration Commission (CIETAC) were revised. These new provisions deal with the arbitration agreement, the place of the arbitration proceedings, the choice of the arbitrators, choice of law, jurisdiction, language of the proceedings, conduct of the procedure, rules of evidence, appeals and enforcement. Although some outside commentators[123] still express concern as to neutrality of arbitrators and for courts interference, CIETAC now has a Panel of Arbitrators which consists of more than 400 arbitrators. Amongst them about 120 are international neutral arbitrators from 24 foreign countries.[124]

Interference from Chinese courts with arbitration is excluded particularly in case of international arbitration held in China. Chinese Courts have no right to review the merits of an arbitral award made by CIETAC which is of international (foreign-related) nature.

Chinese courts are not even allowed to review points of law while enforcing arbitral awards. A ground available to Chinese courts to set aside international (foreign-related) arbitration in China is breach of Chinese 'public policy'.

Iran

In 1997 the Iranian Parliament (the *Majlis*) have enacted the International Commercial Arbitration Act[125] which is inspired by the Model Law. The Act is

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120 K. IWASAKI, Japan, in PRYLES, *Disputes Resolution in Asia,* cit at 123.

121 Osaka High Court, October 18, 1962, 13 Kawinsky no 10, 2094.

122 August 31, 1994.

123 A. SHIELDS *China Two-Pronged Approach to International Arbitration,* 15 *J. Int. Arb.* 2, 67.

124 Amongst which Sweden, Italy, Switzerland, UK, USA, Canada, Korea, Japan, Germany, Russia, Austria, Australia, Spain, Poland, Singapore Malaysia, France, Egypt, Saudi Arabia, The Netherlands, Pakistan, Nigeria, Thailand, Belgium, U.A.E.; about 18 arbitrators are from Hong Kong.

125 September 17, 1997.

considered by a commentator[126] as a remedy to some of the earlier shortcomings such as matters which are either negative or not clearly regulated:

- lack of autonomy of the arbitration clause;
- the arbitral tribunal's unclear power to decide on its own jurisdiction,
- courts interference not being clearly limited;
- institutional arbitration not being clearly recognised.

New Zealand

New legislation has been introduced in New Zealand: the Arbitration Act 1996.

Kuwait

New legislation was introduced also in Kuwait after it became independent in 1960: the Kuwaiti Judicial Arbitration in Civil and Commercial Matters Act 1995.[127] The new legislation has been considered to be a substantial improvement.

India

The Arbitration and Conciliation Act 1996 has repealed the Arbitration Act 1940 as well as the arbitration (Protocol and Convention) Act 1937 and the Foreign Awards (Recognition and Enforcement) Act 1961.

Apart from the differences due to various reasons such as different cultural backgrounds and different foreign influences (which is very clear for obvious reasons in Hong Kong and in Indonesia) or different traditions, it cannot be disputed that, except for some cases where local rules are more protective such as in Pakistan and Japan, generally considerable importance is given to the intention of the parties.

Harmonization in the Pacific Rim has been advocated.[128]

3.6 PRECEDENTS

First of all, a distinction must be made between arbitral and court precedents.

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[126] J. SEEFI *The New International Commercial Arbitration Act of Iran – Towards Harmony with the UNCITRAL Model Law,* 15 *J. Int. Arb.* 2,5. See *supra* Chapter 2.

[127] Law no. 11, February 28, 1995 published in the *Kuwaiti Official Gazette* no. 196 (year 41).

[128] P. YANG, *Harmonization of Dispute Resolution Process throughout the Pacific Rim* (1992) *Arbitration Journal* 2, 42.

(a) Arbitral precedents

Awards are generally not published unless they are attacked, or their recognition or enforcement is sought. An exception to this rule is made for the ICC awards published in *Clunet (Journal du Droit International)* and the decisions of the Iran-US Claims Tribunal.

Individual awards are also occasionally presented to law journals and published; they are regularly published by the *Yearbook Commercial Arbitration.* Among the other reports one must mention, besides *Clunet,* the *Journal of International Arbitration* (Geneva), the *Revue de l'arbitrage* (Paris), the *Rassegna dell'Arbitrato* (Rome), *Arbitration International* (London), the *Arbitration Journal* (London), (the *Journal of the Chartered Institute of Arbitrators*), the *Japan Arbitration Journal,* the AAA's *Arbitration Journal, The American Review of International Arbitration,* Columbia Law School, New York, the *Swiss ASA Bulletin, Mealey's International Arbitration Report,* the *Collection of Information Materials* (USSR), the *News from ICSID,* the *Journal of Commercial Arbitration* and *The Arbitrator* (Australia).

Amongst the bulletins which summarize information are the *ICA Indian Arbitration Quarterly* and the *American Arbitration Association Quarterly.*

As the Arbitral Tribunal (Cremades, Chairman, Pereira and Redfern) stated in *Liberian Eastern Timber*[129] arbitral precedents have no binding nature:

> although the Arbitral Tribunal is not bound by the precedents of another ICSID arbitration tribunal

nevertheless they are carefully examined by the arbitrators, who state:

> it is not without interest to note their construction.

After having quoted several precedents, the arbitrators state that arbitral proceedings constitute:

> a useful guide to the Arbitral Tribunal for the assessment of the damages.

One could say that arbitral precedents have a persuasive value, provided this is construed as a simple possibility that they persuade the arbitrator, and not as having an indirectly compulsory nature. Arbitral precedents are referred to frequently by arbitrators, as witnessed in the important oil arbitrations and in express reference to them in several ICC awards[130] In the award rendered in

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[129] *Liberian Eastern Timber Corporation (LETCO) v. Government of the Republic of Liberia,* award March 31, 1986, *Clunet* 1988, 166 *et seq.*

[130] Such as the decision in ICC proceedings No. 3344 of 1981, *Clunet* 1982, 986.

1986 in ICC proceedings no. 4381[131] the arbitrators openly refer to arbitral precedents stating:

> whereas it has been recognised by arbitral precedents ...

Even Derains in his comments on this award[132] states:

> The reasons given by the arbitrators in this matter are fundamentally based on arbitral precedents, summaries of which have already been published.

The awards made in 1977 in ICC proceedings Nos. 2745 and 2762 go even further:[133]

> It would be paradoxical to hold that an arbitrator sitting in an ICC arbitration would not be bound by a previous award rendered between the same parties and on the same matters by another arbitrator also sitting in an ICC arbitration.

Some principles, in particular, may, because of their continuous application by Arbitral Tribunals, acquire authority. See for example the principle stated by the arbitrator, Mr. Lalive, in *Dalmia*:[134]

> Once the parties have agreed to submit [a dispute] to international arbitration under the ICC rules, there is no possibility to rely, against the ICC rules, upon any provision of the law of Pakistan or of the law of India ... I must find that the ICC rules, expressly accepted by both parties, constitute the law governing the objection raised by the defendant.

The principle that the parties have a duty not to worsen the dispute submitted to arbitration is also very clearly stated by the arbitrators (Lalive, Chairman) in *Framatome*:[135]

> The parties must refrain from any measure which is capable of having prejudicial repercussions on the enforcement of the award to be rendered and, in general, must commit no act, of whatsoever nature, which can worsen or widen the dispute.

One can consequently accept (within these limits) Derains comment[136] that:

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[131] See for example the award rendered in ICC proceedings No. 4381, 1986 *Clunet* 1986, 1106.

[132] In DERAINS-JARVIN, *Chronique des sentences arbitrales, Clunet* 1986, 1107.

[133] Y. DERAINS, *Chronique des sentences arbitrales, Clunet* 1978, 992.

[134] *Dalmia Dairy Industries Ltd. v. National Bank of Pakistan,* preliminary award, January 14,.1970, summarised in *Yearbook Commercial Arbitration,* V, 1980, 174.

[135] *Framatone Alsthom, Atlantique et Spie Batignolle v. Atomic Energy Organization of Iran (AEOI),* award made in 1982 in ICC proceedings No. 3836, *Clunet*, 1983, 914.

> the arbitrators base themselves on international arbitral precedents.

A further comment by Derains,[137] that the publication of arbitral awards contributes to the creation of unity in arbitral precedents, seems well founded.

(b) Court precedents

There are also numerous court precedents on arbitration, emanating from many jurisdictions. They have given rise over the years to a large quantity of judg ments and reasons, which are an inexhaustible source of information for those who study international arbitration. It is interesting to note that the international arbitrator, who declares not to be bound by arbitral precedents, at the same time claims to be independent of Court precedents:[138]

> the Arbitral Tribunal needs not decide this issue debated under French law, such as the preliminary issue to establish to what extent French Court precedents, even if constant, are imposed in practice, if not in law, on international arbitrators.

The national precedents listed in Sanders' *Yearbook Commercial Arbitration* (which is by far the most comprehensive publication of arbitral and court precedents, now edited by van den Berg), provide a very important source of domestic and international information The difference between legal systems makes it possible to compare the various judgments and to study their development, which is a great cultural asset of arbitration law.

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[136] DERAINS, Comments on the award rendered in 1975 in ICC proceedings no. 1434, *Clunet* 1976, 978.

[137] DERAINS, *Chronique des sentences arbitrales, Clunet* 1976.

[138] See award rendered in 1975, in ICC proceedings No 1434, *Clunet,* 1976, 978.

CHAPTER 4

ARBITRATION UNDER THE WASHINGTON CONVENTION

SUMMARY: 4.1 Origin of the Convention – 4.2 Field of Application – 4.3 Identifying the Law Applicable to Investment Contracts – 4.4 Arbitral Proceedings – 4.5 The Award and its Effects – 4.6 ICSID Second Instance Arbitration – MIGA

4.1 ORIGIN OF THE CONVENTION

The Washington Convention March 18, 1965[1] instituted the International Centre for the Settlement of Investment Disputes (CIRDI, or ICSID to use its English abbreviation), with offices in Washington. The Centre appoints the Arbitral Tribunals which decide the disputes and provides administrative services.

The Convention was supported by the International Bank for Reconstruction and Development within the framework of a wider cooperation program between industrialized and developing countries.

The purpose of the Convention is to avoid disputes and to achieve cooperation between systems characterized by different socio-economic factors, by allowing them to reach their desired targets through their contractual relationships.[2] To this end, the Convention provides for special arbitration proceedings to settle disputes which arise from investment contracts.

Adherence to the Convention by a large number of states[3] seems justified by the objectives set on above.

Concern has been expressed by some writers[4] that arbitration remains the prisoner of a formalistic and static view of contracts and that arbitration would

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1 Which is one of the major international conventions related to arbitration.

2 DELAUME, *ICSID Arbitration Proceedings; Practical Aspects*, 5 *Pack Law Review*. 563 (1985) at 582-583; G. SACERDOTI, *La Convenzione di Washington del 1965 per la Soluzione delle Controversie tra Stati e Nazionali di altri Stati in materia di investimenti* (The 1965 Washington Convention for the Settlement of Investment Disputes between States and Nationals of other States), *Rivista di Diritto Internazionale Privato Processuale* (Riv. Dir.Int. Priv. Proc.), 1969, 615-616.

3 As of June 24, 1987, 97 States had adhered to the Convention, of which 89 had already filed their ratification.

4 See M. SORNARAJAH, *Protection of Foreign Investment in the Asia Pacific Economic Cooperative Region*, 29 *J.W.T.* 2, April 1995, 105.

tend to favour western countries. This opinion has been opposed[5] stressing on the one hand that arbitration is in no way a tool designed to favour industrialized countries and on the other hand the importance of avoiding the nationalisation of international arbitration.

Many comments have been published on the Washington Convention.[6]

4.2 Field of Application

The Convention sets out[7] three requirements for disputes to be referred to arbitration:

1. consent of the parties;
2. quality of the parties;
3. nature of the dispute.

Consent

The consent of *both* parties is the essential requirement for referring a dispute to the Arbitral Tribunal provided for by the Convention. The need for this emphasises that a state's adherence to the Convention does not automatically guarantee that a specific dispute will be referred to ICSID arbitration, even if all the other requirements are fulfilled.[8]

Consent must always be expressed in writing, even if no special form requirement exists. In general, it is expressed by inserting an arbitration clause in the investment contract, or by a subsequent submission agreement.

However, there are other ways to express consent. For example, by accepting to invest in accordance with the provisions of the national law of the host

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5 M. RUBINO-SAMMARTANO, *Developing Countries vis-à-vis International Arbitration,* 13 *J. Int. Arb.* 1,21.

6 A. BROCHES, *Convention on the Settlement of Investment Disputes between States and Nationals of The Convention Other States of 1965 – Explanatory Notes and Survey of Its Application, Yearbook Commercial Arbitration,* 1993, 627; *id., On the Settlement of Investment Disputes: Some Observations on Jurisdiction,* 5 *Columbia J.L.* 263 (1983)*; id. Settlement of Disputes Arising out of Investments in Developing Countries,* 11 *Intl. Bus. Law.*, 206 (1983); P. LALIVE, *The First World Bank Arbitration,* 51, B.Y.I.L. 123 (1980); K.V.S.K. NATHAN, *Submission to the International Centre for Settlement of Investment Disputes in Breach of the Convention,* 12, *J. Int. Arb.* 1, 27; SHISHATAK, *Foreign Investment – The Settlement of Disputes Regarding Foreign Investment. The Role of the World Bank with Particular Reference to ICSID and MIGA,* 1 *Am.U.J. Intl. & Pol.* 97 (1986); G. R. DELAUME, *L'affaire du Plateau des Pyramides et le CIRDI – Considérations sur le droit applicable, Rev. arb.,* 1994, 39.

7 Art. 25.1.

8 SACERDOTI, *op. cit.,* at 632.

state on the protection of investments when that legislation expressly refers to ICSID arbitration.[9]

As held both in *South Pacific Properties*[10] and in *Asian Agricultural*[11] consent may be validly expressed by a state in its investment Statute. State consent may be given either to a single dispute or to a class of disputes.

Consent, once given, cannot be withdrawn. Nevertheless in a possible revision of the Convention it might be preferable to state this expressly.

As to the time limit within which the consent to ICSID arbitration may be expressed by the parties, the Arbitral Tribunal in *Klockner* held:[12]

> But according to the Convention, the jurisdiction of an ICSID tribunal is based on the parties' consent, the *cornerstone* of the Centre's jurisdiction. Once the Centre has been validly seised (as it was in this case by Klockner's request), consent as to the *ratione materiae* extent of the Tribunal's jurisdiction may be expressed at any time, even in written submissions to the Tribunal *('forum prorogatum')*. On this score, the Report of the Executive Directors of the World Bank indicates at paragraph 24 that 'the Convention does not ... specify the time at which consent should be given'.

Quality of the parties

The *second requirement* concerns the quality of the parties. They must be a Contracting State (or a public body or entity of that State indicated by the latter to the Centre)[13] and a subject of another Contracting State. The nationality of the two parties (private investor and state where the investment is made) must thus be different to permit reference of the dispute to ICSID arbitration. However, the foreign investor often forms a local company in the state where the investment is to be made, which will become the other contracting party of that state in the investment agreement. In this situation, the Convention would not be applicable because the different nationality requirement is not fulfilled. This is taken care of by the Convention itself[14] which permits reference to the

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9 P. BERNARDINI, *L'arbitrato internazionale* (International Arbitration), Giuffré, 1987, at 157.

10 *South Pacific Properties (Middle East) Ltd. et al v. The Arab Republic of Egypt,* awards November 27, 1985 and April 14. 1989, *Yearbook Commercial Arbitration* 1991, 16 and 1994, 51.

11 *Asian Agricultural Products (Ltd.) v. Republic of Sri Lanka, cit.* Awards November 27, 1985 and April 16, 1988, (Jimenez de Arechaga Chairman, El Mahdi and Pietrowski arb.) *Yearbook Commercial Arbitration* 1991, 16.

12 *Klockner Industrie-Anlagen GmbH v. United Republic of Cameroon and Société Camérounaise des Engrais* (SOCAME) S.A.; Award October 21, 1983. *Yearbook Commercial Arbitration* 1985, vol X, at 74.

13 Art. 25 (1) and (3).

14 Art. 25 (2) (b).

Convention even by a legal entity which has the same nationality as the Contracting State but which, for the purposes of the Convention, is treated as having the nationality of another Contracting State because of the influence foreign interests have on it.[15] See in this respect *Société Ouest Africaine de Bétons Industriels (SOAB) v. Republic of Senegal.*[16]

As held in *Holidays Inn, Occidental Petroleum v. Morocco*[17] the status of Contracting State must be possessed when the request for arbitration is filed.

Nature of the dispute

The *third requirement* concerns the nature of the dispute, which must be related to an investment.[18] The arbitrable area is therefore limited, since it deals only with rights and duties arising from an investment contract, leaving any other dispute unprejudiced. The Convention does not define the term 'investment', in order not to further limit the possibility of referring disputes to the Centre.[19] This makes a wide variety of contracts come within the notion of investment which is arbitrable under the Convention.

4.3 Identifying the Law Applicable to Investment Contracts

In connection with the law applicable to investment contracts, the Convention specifies[20] two situations:

1. the parties have chosen the proper law, or
2. no choice has been made by them.

The *choice* of the applicable law by the parties, in order to be respected by the Arbitral Tribunal, must not be ambiguous. For some authors, this means that it must be an express choice. (See however the comments below concerning tacit choice and *tronc commun*[21] which are applicable to ICSID arbitrations also.)

Since the Convention refers to *rules of law* and not to *statutory provisions,* it could be said that the parties do not necessarily have to refer to a national legal system, but may also refer to rules which do not necessarily belong to one

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15 BERNARDINI *op. cit.*, at 158.

16 Arb. No. 72/1, *ICSID Annual Report* 1972.

17 Awards November 27, 1985 and April 16, 1988 (Jimenez de Arechaga, Chairman, El Madhi and Pietrowski arbitrators, *Yearbook Commercial Arbitration*, 1991, 16.

18 Art. 25 (1).

19 SACERDOTI, *op. cit.*, at 631.

20 Art. 42.

21 See *infra* Chapter *13.*

legal system, provided they have a legal nature. It has also been held[22] that *lex mercatoria* could be made the applicable law.

If the parties choose a national law, frequently that of the host state, the private contracting party, in order to protect itself against the possibility of that state unilaterally amending its legislation, may insert a so-called *stabilization clause* to *cristallize* that legislation for the future as far as that contract is concerned. Such a clause means that if, at the time the Arbitral Tribunal is hearing a dispute, the state law which has been chosen has been unilaterally amended and the amendments alter or cancel the contractual rights of the foreign investor, the Arbitral Tribunal must make its decision on the basis of the legislation existing when the contract was entered into without taking into account subsequent statutory amendments. This is clearly stated in *Agip v. Congo*:[23]

Agip had entered with the Popular Republic of Congo Brazzaville into agreements containing a stabilization clause. Congo Brazzaville later proceeded to a nationalization, occupying by force Agip's offices. Agip referred the dispute to arbitration, seeking a decision that such a nationalization was unlawful. The Arbitral Tribunal, making the first ICSID award, declared the nationalization unlawful being in breach of the stabilization clause and therefore in breach of the principles of international law.

In the absence of agreement between the parties, the Tribunal:[24]

> shall apply the law of the Contracting State party to the dispute (including its rules on conflicts of laws) *and such* rules of international law as may be applicable. (emphasis added).

Reference to national law *and* international law raises the problem of whether they must be applied *simultaneously or alternatively.* It has been held that the Tribunal must apply the law of the state in question and later review whether it is valid under international law, and thus apply only that part of the national law which does not conflict with international law. The principles of international law vis-a-vis the applicable national law consequently have *two possible roles:* a supplementary and a correcting one. There is widespread agreement on the *supplementary role,* which aims at filling possible *lacunae.*

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[22] BERNARDINI, *op. cit.*, at 162; *id. CIRDI, Il punto di vista dell'investitore* (ICSID, The investor's point of view), in *Rass. arb.,1982,* at *50;* see however the negative comments made by various authors as to the legal nature of *lex mercatoria.*

[23] Award rendered on November 30, 1979; see BERNARDINI, *Le prime esperienze arbitrali del Centro internazionale per il regolamento delle controversie relative ad investimenti* (ICSID, First arbitral experiences for the settlement of disputes on investments). *Riv. Dir. Int. Priv. Proc.,* 1981, at 38.

[24] Art. 42 (1).

Indeed, the two *ad hoc* Committees in *Klockner* v. *United Republic of Cameroon*[25] and in *Indonesia v. Amco Asia Corp.*[26] have recognized it.

The solution regarding the *correcting role* is less obvious. In fact, while the *ad hoc* Committee affirms it firmly in *Indonesia* v. *Amco Asia Corp.*, the *Klockner ad hoc* Committee is less convinced:

> This endows these principles ... with a double role, either complementary (in the case of a *lacuna* in the law of the State) or corrective, in a case where this law does not conform in all respects to the principles of international law. *Be that as it may,* and in both cases the arbitrators ...

The Convention[27] does not provide for priority between national law and the principles of international law. It may follow from this that the arbitrator, who is bound to apply both systems, can apply only what they have in common or, in the event of only one of such systems dealing with a matter, will apply only that system. According to another view[28] the international law rules prevail over the law of the Contracting Party in case of conflict.

The Court may also decide *ex aequo et bono* if the parties have so agreed.[29] As it occurred in *Benvenuti & Bonfanti Sarl v. Government of the People's Republic of the Congo*,[30] that authority may be granted even during the arbitral proceedings.

4.4 Arbitral Proceedings

The element which characterizes ICSID arbitral proceedings is their *self-sufficient* nature in relation to any legal system.[31]

The Centre consists of a Board and of a Secretary-General. The Board adopts regulations (which may be arbitral, administrative, financial and for the filing of requests), approves agreements with the International Bank for Reconstruction and Development, draws up the balance sheet and approves the annual report. The Secretary-General examines requests for arbitration[32] and checks whether they comply with the requirements of the Convention. Once he

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25 *Yearbook Commercial Arbitration,* 1986, vol. XI, at 162.

26 *Yearbook Commercial Arbitration,* 1986, vol. XI, at 170.

27 Art. 42.1.

28 See *supra* in this chapter; see also G. ELOMBI, *ICSID Awards and the Denial of Host State Laws,* 11 *J. Int. Arb.* 361.

29 Art. 42, 3.

30 *Yearbook Commercial Arbitration,* VIII (1983), 144.

31 BERNARDINI, *CIRDI, Il punto di vista dell'investitore* (ICSID, The investor's point of view), in *Rass. Arb.,* 1982, at 46.

32 Art. 36.

is satisfied that all the requirements have been met (consent, quality of the parties and legal nature of the dispute related to an investment), he registers the application. This makes the official commencement of the proceedings; until that time the Secretary-General may refuse registration.

The Tribunal may consist of one or more arbitrators, depending on what the parties have agreed.[33] If the parties do not agree on the number of arbitrators, the Tribunal will consist of three; each party appoints an arbitrator, and the third one is then appointed by the first two. If these appointments are not made by the parties, the Centre takes care of them. In that case the majority of the arbitrators are citizens of states different from those involved in the dispute. The Tribunal is the judge of its own jurisdiction.[34] If one party does not appear, the Tribunal may be requested to decide on the basis of the other party's submissions.[35]

When circumstances require it, the Tribunal[36] may also recommend *conservatory measures* to protect the rights of the parties.[37] This is what was done by the Tribunal in *Agip v. Congo.*[38]

The choice of the term 'recommend' is probably weak. It is suggested that in a possible revision of the Convention it be replaced by 'order'. There is disagreement as to whether ICSID Tribunals have exclusive jurisdiction over such measures. Conflicting precedents are recorded on the possibility of the parties to apply to the courts for conservatory measures in spite of an ICSID arbitration agreement. In *The Republic of Guinea v. Maritime International Nominees Establishment (MINE)* the Antwerp Court of Justice[39] denied its jurisdiction by construing Art. 26 of the Washington Convention as an exclusion of recourse to courts on any grounds, including conservatory measures.

The French Court of Cassation took the opposite view in *Atlantic Triton Company (Norway)* v. *Republic of Guinea and Soguipêche (Guinea)*:[40]

> The parties had entered into an agreement which gave rise to disputes which were referred to an ICSID arbitration. Atlantic Triton had attached three ships of the Republic of Guinea in France to secure its claim. The Court of Justice of Quimper had rejected the Republic of

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33 Arts. 37 to 40.

34 Art. 41.1.

35 Art. 45.2.

36 Art. 47.

37 BERNARDINI, *op. cit.*, at 159.

38 *Riv. Dir. Int. Priv. Proc.* 1981, at 38.

39 *The Republic of Guinea v. Maritime International Nominees Establishment (MINE).* Court of Justice Antwerp, September 27, 1985.

40 *Atlantic Triton Company (Norway) v . Republic of Guinea and Soguipêche,* Court of Cassation (France), November 18 (1986) *Yearbook Commercial Arbitration,* 1987, vol. XII, at 183.

> Guinea's application to set aside the attachment, but the Court of Appeal of Rennes had quashed the decision of first instance holding that under the Washington Convention the ICSID Arbitral Tribunal had exclusive jurisdiction over any application for conservatory measures. However the Court of Cassation reversed the appellate decision, holding:
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> 'The Court of Appeal has wrongly applied the law since the authority of the Courts to issue conservatory measures, not having been expressly excluded by the Washington Convention, may be excluded only by the express consent of the parties or by a tacit consent resulting from their adoption of arbitration rules which express such a waiver.'

Delaume is one of the authors who recognize exclusive ICSID jurisdiction.[41] The Court of Justice of Geneva[42] also recognized it when ruling in *Maritime International Nominees Establishment (MINE) v. The Republic of Guinea:*

> Guinea and MINE had entered in 1971 into a contract for a *mixed economy company* called SOTRAMAR to transport bauxite from Guinea to the foreign markets by sea. MINE later complained that Guinea had let another company transport bauxite and that this was in breach of their contract. Guinea replied that such a carriage had been the consequence of breaches by MINE. The parties agreed to refer the dispute to ICSID arbitration. Since a dispute had arisen as to the validity of such an arbitration agreement, MINE proposed to refer the dispute to AAA arbitration and applied to the US District Court (Columbia) that the parties be compelled to submit the dispute to AAA arbitration. The District Court granted the application, holding that Guinea had not referred to ICSID arbitration and had therefore 'frustrated the intent of the agreement'.
>
> MINE then proceeded to AAA arbitration. The AAA arbitrators ordered Guinea to pay to MINE more than 25 million dollars. MINE then applied again to the US District Court for judgment to be entered on such an award. At that stage the Republic of Guinea, which until then had been absent from such proceedings, appeared claiming that MINE's application be rejected on various grounds, amongst which that the parties were bound by ICSID arbitration. The US District Court rejected the Republic of Guinea's defences. The US Court of Appeal (Columbia Circuit) however reversed the first instance decision, holding that the parties were bound by the ICSID arbitration agreement.

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41 DELAUME, *ICSID Arbitration Proceedings: Practical Aspects,* 5 *Pack Law Review* 563 (1985), 582-583; see also Introductory Note to the decision of the Court of Appeal, Rennes, in *Guinea and Soguipêche v. Atlantic Triton Company,* 24 *International Legal Materials* 1985, 340.

42 *Maritime International Nominees Establishment v. Republic of Guinea,* Court of Justice Geneva, March 13 (1986) *Yearbook Commercial Arbitration,* 1987. vol. XII, at 514.

> About 16 months later MINE applied to ICSID for arbitration. While such proceedings were in progress, MINE applied to the Court of Justice of Antwerp for an attachment against the Republic of Guinea based on the AAA award. However the Court held that the ICSID Arbitral Tribunal had exclusive jurisdiction on this issue. Simultaneously, MINE obtained another attachment in Switzerland, again based on the AAA award and further applied for the enforcement of the award. The Swiss Federal Court rejected Guinea's application against the attachment on purely technical grounds (asserting that a court to which an application for attachment under a final award is submitted must grant the attachment, while any argument as to the validity of the award must be heard by the judge who shall be asked to validate the attachment). But at the same time it recognized that ICSID had exclusive jurisdiction to grant awards.
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> In the meantime the ICSID Arbitral Tribunal recommended MINE to waive proceedings before any Courts. The Court of Geneva in the end did not validate MINE's attachment and stated that the ICSID Arbitral Tribunal had exclusive jurisdiction.

It is interesting to note that in the meantime the ICSID Administrative Council[43] added a paragraph 5 to its rule No. 39 which states that:

> Nothing in this rule shall prevent the parties, provided that they have so stipulated in the agreement recording their consent, from requesting any judicial or other authority to order provisional measures, prior to the institution of the proceeding, or during the proceeding, for the preservation of their respective rights and interests.[44]

The arbitral proceedings generally take place at the Centre's offices in Washington, or in other places where the Centre has entered into agreements to this effect (presently Cairo and Kuala Lumpur). However, it is possible to agree on a different place for arbitration, provided it is approved by the Committee, or by the Arbitral Tribunal, after consulting with the Secretary-General.[45]

Taking of Evidence on the Tribunal's Motion

The Convention entitles the tribunal[46] to:

> call upon the parties to produce documents or other evidence.

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[43] On September 26,1983.

[44] On ICSID exclusive jurisdiction see also G.R. DELAUME, *Le CIRDI et l'immunité des Etats* (ICSID and States immunity), in *Rev. arb.*. 1983, at 143 *et seq.* See also *infra* Chapter 19.

[45] Arts. 62 and 63.

[46] Art. 45.

This provision seems quite helpful, in order that the award be based on all relevant evidence.

4.5 THE AWARD AND ITS EFFECTS

The Convention also sets out the *requirements* of the award:[47] it must be reasoned and must deal with all the issues which have been raised before the Arbitral Tribunal. The award must be approved by the majority of the arbitrators. If the minority does not want to sign it, it may be signed only by the members of the Tribunal who have voted in its favour.

Dissenting Opinion

The Convention recognizes the right that any member of the Tribunal may attach his individual opinion to the award, (whether he dissents from the majority or not), or a statement of dissent. This disposes of the civil law objections to dissenting opinions and recognizes the right of any member of the Tribunal to express his own opinion even if he does not dissent.

Interpretation of the Award

The Convention expressly recognizes[48] the right of a party to apply for an interpretation of the award

> if any dispute shall arise between the parties as to the meaning or scope of the award.

The importance of making such interpretation available to the parties is acknowledged by the Convention by providing that, if it is not possible to submit the application to the same Tribunal, a new Tribunal shall be constituted. Here the convention's aim to serve its users goes beyond the average practice and entitles a new Tribunal to construe the decision of the previous one. This might be seen as going beyond the purpose of interpretation, since it is less natural and easy for a new Tribunal to construe the decision of another.

The Secretary-General sends certified copies of the award[49] to the parties; its publication by the Centre requires the consent of the parties.

Exclusion of other remedies

The Convention's express exclusion of any other remedy[50] is one of the main characteristics of ICSID arbitration, as a self-regulating mechanism.

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47 Art. 48.

48 Art. 50.

49 Art. 49.1.

50 Art. 52.

Recognition and enforcement of the award are governed by special rules and in fact each Contracting State:[51]

> shall recognize any award rendered pursuant to the Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a Court in that State.

The consequences of this provision are the most important of the Convention. They represent an *innovation* compared with the traditional mechanism of international arbitration. This is the main achievement of the Convention. The award is then protected from attacks in all the contracting states. Its truly international nature is here clearly and simply stated. The Convention goes further clarifying that the ICSID award will be enforced in each Contracting State as a judgment in force in that state. Thus, an ICSID award has to be treated by each Contracting State as if it were a final judgment rendered by its own courts. Since the need for recognition and enforcement is excluded, an ICSID award is not controlled in any way by national courts regarding its conformity with public policy and with the laws of the State in question. Such a system is even more progressive than the New York Convention (1958), which made marked progress in the recognition and enforcement of awards, but under which a control is still exercised by courts before granting recognition and enforcement.[52]

For the award to become an enforceable instrument, the required formalities are greatly reduced. The Convention in fact provides at Art. 54.2:

> A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General...

It is therefore sufficient to file the award with a competent Court for it to be enforced, since it is an enforceable instrument.

In spite of this, the enforcement of ICSID awards may still encounter difficulties, as in *Letco,*[53] where two attempts by Letco to enforce an ICSID award in the United States were opposed by the plea that a foreign state has immunity from enforcement.

The *rules for enforcing* ICSID awards are simple. Firstly, the award is an enforceable instrument in any Contracting State as a final judgment rendered in

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[51] Art. 54 (1).

[52] GIARDINA, *L'esecuzione delle sentenze CIRDI* (Enforcement of ICSID awards), *Rass arb.*, 1982, at 72.

[53] *Liberian Eastern Timber Corp (LECTO) v. Gouvernement de la République du Libéria,* US District Court, Southern District of New York, December 12, (1986) and US District Court, District of Columbia, April 16, (1987), *Clunet,* 1988, at 179.

that State. Secondly, the ICSID Convention does not deprive a State of the right to claim immunity from enforcement. If so, it belongs to the competent State Court to rule whether that plea is grounded or not. This right, which allows a state not to respect its duty to perform under the award, is balanced[54] by the right of the state of which the investor is a national, to seek diplomatic protection.[55]

Grounds for Attacks against the Award

An ICSID award may be attacked only on the grounds and by the means stated in the Convention,[56] i.e. through an application for revision or annulment, which may cause a stay of the enforcement proceedings. If *revision* is sought, the arbitral tribunal which rendered the award may hear the application. If the original tribunal cannot do so, a new tribunal is formed. The revision of an award is based[57] on the discovery of facts unknown to the arbitral tribunal at that time:

> of such a nature as decisively to affect the award.

Applications for *annulment* of an award are heard by a special *ad hoc* committee of three, appointed by the Chairman of the Centre. The only grounds on which an application for annulment can be heard are those involving serious breaches of the proceedings: faulty constitution of the tribunal, its *manifest excess of power*, corruption of a member of the tribunal, serious breach of a fundamental provision, and absence of reasons in the award.[58]

The Ad Hoc Committee may annul the first instance award only when it has been manifestly wrong.

However this authority does not entitle the Ad Hoc Committee to substitute its views to those of the Arbitral Tribunal.

Excess of power might be seen as a too ample and undetermined ground. In a possible revision of the Convention, this ground might be stated in a more specific way.

Partial annulment is provided for by the Convention.[59]

According to published figures, in 1986 reference to arbitration under the Convention was made 22 times.[60] Five awards have been made, while the other disputes have been either settled or abandoned. Of the five awards, three have

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54 Art. 27.1.

55 BERNARDINI, *op. cit.*, at 164.

56 Art. 52 (3).

57 Art. 51.

58 BERNARDINI, *op. cit.*, at 164.

59 Art. 52.

60 As of February 1986.

been enforced and two attacked (and both set aside). The three awards which have been enforced are: *Adriano Gardella S.p.A.* v. *Gouvernement de la Côte d'Ivoire* (August 29, 1977), *Agip S.p.A.* v. *Gouvernement de la République Populaire du Congo* (November 30, 1979) and *Benvenuti and Bonfant S.r.l.* v. *Gouvernement de la République Populaire du Congo* (August 8, 1980).[61]

See, amongst writers, Westberg.[62]

Recent Developments

Further awards made by ICSID Tribunals include: *Maritime International Nominees Establishment* (MINE) v. *Government of Guinea* (Award dated January 6, 1988),[63] *Southern Pacific Properties (Middle East) Limited and Southern Pacific Properties Limited v. The Arab Republic of Egypt*;[64] (awards dated November 27, 1985 and April 14, 1989), *Asian Agricultural Products Ltd. (AAPL) et al. v. The Republic of Sri Lanka* (Award dated June 27), 1990;[65] *Amco Asia Corporation et al. v. The Republic of Indonesia* (Awards September 25, 1983, June 5, 1990 and June 27, 1990),[66] *Société Ouest Africaine des Bétons Industriels (S.O.AB.I.) v. The Republic of Senegal* (Award dated February 25, 1988;[67] *Vacuum Salt Products Limited v. Government of the Republic of Ghana* (Award dated February 1, 1994);[68] *American Manufacturing and Trading Inc. v. Republic of Zaire* (Award February 21, 1997);[69] *Atlantic Triton Co. Ltd. v. People's Republic of Guinea* (Award dated April 21, 1986).[70]

Among further disputes referred to ICSID one may mention:

Scimitar Exploration Ltd. v. Bangladesh et al.;

Manufacturers Hanover Trust Co. v. République Fédérale d'Egypte;

Seting v. Gabon; Holiday's Inn Occidental Petroleum v. Morocco; Alcoa v. Jamaica.

Other proceedings reported by ICSID are:

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61 *Yearbook Commercial Arbitration* 1983, 133 and 144; see P. BERNARDINI, *La prima esperienza arbitrale del Centro Internazionale per il regolamento delle controversie relative ad investimenti* (ICSID First arbitral experiences on the settlement of investment disputes) *Riv. Dir. Int. Priv. Proc.* 1981, 39.

62 WESTBERG, *Applicable law, Expropriatory Takings and Compensation in Cases of Expropriation: ICSID and Iran-U.S. Claims Tribunal; Case Law Compared,* 8 *ICSID Rev.* FIL J 1993 1, 8.

63 *Yearbook Commercial Arbitration* 1989, 82 and 1991, 40.

64 *Yearbook Commercial Arbitration* 1991, 16 and 1994, 51.

65 *Clunet,* 1992, 217.

66 *Yearbook Commercial Arbitration* 1991, 61, and 1992, 73 and 106.

67 Court of Appeal Paris, December 5, 1989 *Yearbook Commercial Arbitration*, 1991, 704.

68 *Yearbook Commercial Arbitration,* 1995, 11.

69 *Yearbook Commercial Arbitration,* 1997, 60.

70 *Yearbook Commercial Arbitration,* 1987, 183.

American Manufacturing & Trading Inc. v. Republic of the Congo (Case ARB 93/1).

Philippe Gruslin v. Government of Malaysia (ARB 94/1).

Seditex Engineering Beratungsgesellschaft für die Textilindustrie mbH v. Government of Madagascar (Case CONC 94/1).

Tradex Hellas S.A. v. Republic of Albania (Case ARB 94/2).

Leaf Tobacco A. Michaelides S.A. and Greek Albanian Leaf Tobacco & Co. S.A. v. Republic of Albania (Case ARB 95/1).

Cable Television of Nevis Ltd. et al. v. Federation of St. Kitts and Nevis (Case ARB 95/2).

Antoine Goetz et al. v. Republic of Burundi (Case ARB 95/3).

Compañia de Desarrollo de Santa Elena SA v. Government of Costa Rica (Case ARB 96/1).

Misima Mines Pty Ltd. v. Independent State of Papua New Guinea (Case ARB 96/2).

Fedax NV v. Republic of Venezuela (Case ARB 96/3).

Metalclad Corporation v. United Mexican States (Case ARB(AF)/97/1).

Société d'Investigation de Recherche et d'Exploitation Minière v. Burkina Faso (Case ARB/97/1).

Compañia de Aguas del Aconquija S.A. and Compagnie Générale des Eaux v. Argentine Republic (Case ARB/97/3).

Ceskoslovenska obchodni banka, a.s. v. Slovak Republic (Case ARB/97/4).

Lanco International, Inc. v. Argentine Republic (Case ARB/97/6).

Emilio Augustìn Maffezini v. Kingdom of Spain (Case ARB/97/7).

Compagnie Française pour le Développement des Fibres Textiles v. Republic of Côte d'Ivoire (ARB/97/8).

Joseph C. Lemire v. Ukraine (Case ARB(AF)/98/1).

Houston Industries Energy, Inc. and Others v. Argentine Republic (Case ARB/98/1).

Victor Pey Casado and President Allende Foundation v. Republic of Chile (Case ARB/98/2).

International Trust Company of Liberia v. Republic of Liberia (Case ARB/98/3).

Wena Hotels Limited v. Arab Republic of Egypt (Case ARB/98/4).

Eudoro A. Olguín v. Republic of Paraguay (Case ARB/98/5).

Compagnie Minière Internationale Or S.A. v. Republic of Peru (Case ARB/98/6).

Banro American Resources, Inc. and Société Aurifère du Kivu et du Maniema S.A.R.L. v. Democratic Republic of the Congo (Case ARB/98/7).

Waste Management, Inc. v. United Mexican States (Case ARB(AF)/98/2).

The Loewen Group, Inc. and Raymond L. Loewen v. United States of America (Case ARB(AF)/98/3).

Tanzania Electric Supply Company Limited v. Independent Power Tanzania Limited (Case ARB/98/8).

Alex Genin and others v. Republic of Estonia (Case ARB/99/2).

Marvin Roy Feldman Karpa v. United Mexican States (Case ARB(AF)/99/1).

Empresa Nacional de Electricidad S.A. v. Argentine Republic (Case ARB/99/4).

Alimenta S.A. v. Republic of the Gambia (Case ARB/99/5).

Mondev International Ltd. v. United States of America (Case ARB(AF)/99/2).

Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt (Case ARB/99/6).

Patrick Mitchell v. Democratic Republic of the Congo (Case ARB/99/7).

Astaldi S.p.A. & Columbus Latino-Americana de Construcciones S.A. v. Republica de Honduras (Case ARB/99/8).

Zhinvali Development Ltd. v. Republic of Georgia (Case ARB/00/1).

Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka (Case ARB/00/2).

GRAD Associates, P.A. v. Bolivarian Republic of Venezuela (Case ARB/00/3).

The ICSID Arbitral Tribunals have dealt with different issues, such as:

(A) the grounds for annulment of an ICSID Arbitral Award (MINE) which will be dealt with in the subchapter below;

(B) the applicable law governing investment projects (Southern Pacific, AAPL, AMCO);

(C) jurisdiction (SOABI, Vacuum Salt, Southern Pacific).

Relevant holdings dealt with the applicable law governing investment projects.

Asian Agricultural[71] was the first instance in which ICSID was seised by a request for arbitration agreement exclusively based on a treaty provision, and not on the implementation of a freely negotiated arbitration agreement.

Consequently the parties in dispute had no opportunity to exercise their right to choose in advance the law applicable to the dispute.

The Tribunal held that the '*false problem*' related to the preliminary determination in principle of the applicable law had *no relevance* within the context of the arbitration:

> since both parties had agreed during their respective pleadings to invoke primarily a Bilateral Investment Treaty as a supplementary source by virtue of Art. 3 and 4 of the Treaty.

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[71] See *supra* no. 64.

The Tribunal set some preliminary rules of interpretation and construction of Treaties:

> The first task of the Tribunal is to rule on controversies existing ... by indicating what constitutes the true construction of the Treaty's relevant provisions, in conformity ... with Art. 31 of the Vienna Convention on the law of the Treaties.

Likewise in *Van Bokkelen* (Haiti/U.S.A.) which provides inter alia that:

> Treaty provisions must be interpreted according to the Law of Nations, and *not according to any municipal code.* (emphasis added)

The Tribunal further formulated the *other rules* that should guide in adjudicating the interpretative issues, including:

> (i) that it is not allowed to interpret what has no need for interpretation; (ii) not to deviate from the common use of the language, unless we have very strong reasons for it; (iii) that there should be recourse to the integral context of the Treaty, whenever linguistic interpretation of given texts seem inadequate as to wording and ambiguous; (iv) that there should be recourse to the rules and principles of international law; (v) that a clause should be interpreted as to give it a meaning, rather than as to deprive it of meaning; (vi) that there should be recourse to earlier or later treaties, in relation to subjects similar to those treated in the Treaty under consideration.

More specifically in his dissenting opinion, arbitrator Samuel Asante held:

> several arguments have been canvassed before us concerning the law which should be held applicable in the present case. The essence of the problem concerns the proper construction of art. 42 (i) of the ICSID Convention which stipulates:
>
> 'The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

However:

> ... the better view is that there was no real agreement between the parties as to the rules of law which should govern the dispute. Accordingly the second sentence of art. 42 (i) ... should prevail and the majority erred in *not* applying *Sri Lankan law* as the *main source of law, together with such rules of international law as may be applicable.*

In *Amco*[72] once more the Arbitral Tribunal faced the issue of interpretation and enforcement of Art. 42 (i).

The First Tribunal stated that:

> the parties having not expressed an agreement as to the rules of law according to which the disputes between them should be decided, the Tribunal has to apply Indonesian law, which is the law of the Contracting State party to the dispute, and such rules of international law, as the Tribunal deems to be applicable, considering the matters and issues in dispute.

The Ad Hoc Committee in its Annulment Decision held that it considered Art. 42:

> controlling, in exactly the same way that the Tribunal regarded the same article decisive of the law governing the substantive dispute before it.

And further stated that:

> Art. 42 (i) of the ICSID Convention authorises an ICSID Tribunal to apply rules of international law only to *fill up lacunae* in the applicable domestic law and to ensure *precedence* to international law norms where the rules of the applicable domestic law are in collision with such norms. (emphasis added).

Under art. 42 (i) the role of international law is thus:

> supplemental and corrective.

In *Southern Pacific*[73] (Award dated May 20, 1992) once more the Tribunal matched interpretation and enforcement of Art. 42 (i) of the Washington convention.

The Tribunal consistently held that when municipal law contains a lacuna or international law is violated by the exclusive application of municipal law, the Tribunal is bound in accordance with Art. 42 of the Washington Convention to apply directly the relevant principles and rules of international law.

As explained by Broches:[74]

> such a process will not involve the confirmation or denial of the validity of the host-state's law but may result in not applying it where that law or action taken under that law violated international law.

The Tribunal further held that:

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[72] *Ad hoc* Committee (Seidl-Hohenveldern, Chairman, Feliciano, Giardina, arb.) May 16, 1986 *Yearbook Commercial Arbitration* 1987, 129.

[73] See supra note 63.

[74] A. BROCHES, *The Convention on the Settlement of Investment Disputes Between States and Nationals of other States, Receuil des Cours,* vol. 136 1972 at 342.

> the principle of international law which the Tribunal is bound to apply, is that which establishes the international responsibility of States when unauthorised or ultra-vires acts of officials have been performed by State, ...

4.6 ICSID SECOND INSTANCE ARBITRATION

Some awards were set aside by ICSID second instance arbitrators such as *Klockner v. Cameroon, Indonesia v. Amco and Government of Guinea v. Maritime International Establishment.*

Klockner v. Cameroon

The first award was made in a dispute between *Klockner Industrie Anlagen GmbH v. the United Republic of Cameroon* by the arbitrators Jimenez de Arechaga (Chairman), Rogers and Schmidt on October 21, 1983.[75] It was set aside on May 3, 1985, by an *ad hoc* Committee formed by Lalive, Chairman (Switzerland), El-Kosheri (Egypt) and Seidl-Hohenveldern (Austria), arbitrators.[76]

> In 1970 the German company Klockner and the Government of Cameroon entered into an agreement for the construction and management by the German company of a factory to produce fertilizers in Cameroon. Management was to be carried out by a Cameroonian joint venture, 'SOCAME', in which Klockner was responsible for the technical and commercial management. In 1978, after 18 months, the factory was closed. In April 1981, Klockner submitted the matter to arbitration, requesting payment of 207 million French francs for its management of the factory.
>
> The arbitral tribunal accepted Cameroon's *exceptio inadimpleti contractus,* holding that the Government of Cameroon had lawfully refrained from paying because of the German company's liability for the failure of the project, which was caused by the latter's breach of contract. In fact, under the turnkey contract entered into by the parties, Klockner had accepted the fundamental obligation to achieve a level of production in line with the specifications and quantities which it had guaranteed. The Government of Cameroon thus had to pay for a factory which was fully operational in compliance with the contract specifications. Since the factory did not reach the agreed production level, Klockner had not delivered to the Government of Cameroon what it had

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[75] Award October 21, 1983, *Yearbook Commercial Arbitration* 1985, 71, see also 1 *J. Int. Arb.* 2, 1984, 14-168.

[76] *Klockner Industrie-Anlagen GmbH v. United Republic of Cameroon,* ICSID *Ad hoc* Committee, May 3, 1985, *Yearbook Commercial Arbitration,* 1986, vol. XI, at 162.

> undertaken to do. The arbitral tribunal subsequently examined Klockner's specific liability for managing the factory. Evidence of Klockner's lack of success was shown in the German company's decision in December 1977 to close the factory after 18 months of production which fell below the agreed level and caused financial losses. The arbitral tribunal held that Klockner had breached the contract for not having met its commitments and therefore rejected Klockner's claims.

Klockner attacked the award and the Centre appointed the *ad hoc* Committee provided for by the Convention. The Committee firstly pointed out:

> It is clearly not the purpose of an annulment proceedings, brought pursuant to Art. 52 of the Washington Convention, to determine whether the interpretation adopted by the contested award is or is not the best, or the most tenable, or even whether it is (correct). but only whether or not the award is tainted with a manifest excess of power.

Furthermore, the Committee stated that excess of power had been well defined by the Permanent Court of Arbitration in the *Orinoco Steamship Company*[77] award:

> The excess of power may consist not only in deciding a question not submitted to the arbitrators, but also in misinterpreting the express provisions of the Agreement governing the manner in which they are to reach their decision, notably with regard to the statutes or principles of law to be applied.

And it concluded that:

> Excess of power can take the form of the failure of the arbitrator to apply the rules set forth in the arbitration agreement or in the application of other rules.

The *ad hoc* Committee concluded that, although the first arbitrators had found that the arbitration agreement made reference to the law of Cameroon (which was at that time identical to French law), they had based their decision on natural justice and on an appeal to universal principles of justice and legality: in short they had granted themselves the powers of *amiables compositeurs.*

The Committee held that:

> by reasoning as it has done, that is to say by limiting itself to postulating the existence of a principle, without either proving its existence or attempting to identify the rules which form the context of the principle in question, the Arbitral Tribunal did not apply the law of the contracting state

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[77] *Orinoco Steamship Company.* Permanent Court of Arbitration, October 25,1910, *The Hague Court Reports,* at 226.

and in consequence:

> it manifestly exceeded its powers.

The *ad hoc* Committee also held that Klockner's further complaint, that the arbitrators had not taken into consideration, nor dealt with Klockner's counterclaim regarding the non-existence of hidden defects and that the limitation period provided under French Law to assert defects, had expired, was consequently 'well founded'.

Indonesia v. Amco Asia Corp. US

The second award (which was also later set aside) was rendered on December 9, 1984, by the arbitrators Goldman, Chairman (France), Foighel (Denmark) and Rubin (USA)[78] and concerned the dispute between Amco Asia Corp. (US) and the Republic of Indonesia. The award of the *ad hoc* Committee was rendered by the arbitrators Seidl-Hohenveldern, Chairman (Austria), Feliciano (Philippines) and Giardina (Italy) on May 16, 1986:[79]

> In April 1968 the parties entered into an agreement for the construction and management of the *Kartika Palace Hotel* in Indonesia. The investment was guaranteed by Indonesia for 30 years. A further agreement concerning the management and lease of the hotel was made with P.T. Wisma, the owner of the land on which the hotel was to be built. In 1980 the hotel was occupied by force and its management taken over by Wisma. After that, the Indonesian Capital Investment Coordination Board (BKPM) cancelled Amco's licence to conduct business in Indonesia. The first instance arbitrators awarded Amco damages for US $3,200,000 plus interest. The reasons given were as follows:
>
> (1) Indonesia had failed to protect Amco's right to manage the hotel according to the terms of the contract, thereby violating its international obligation to protect the rights and interests of foreign investors.
>
> (2) BKPM, on July 9, 1980, revoked Amco's licence without due regard to the agreed procedure. This revocation was based on two main factors: I. Amco had sub-contracted; 2. the capital promised as security for the investments did not correspond to that effectively produced. The arbitral tribunal held that these two reasons were insufficient to revoke the licence.
>
> The Tribunal therefore awarded Amco damages because of its inability to manage the hotel from April 1, 1980 to 1999, i.e. the remainder of the

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[78] *Amco Asia Corp and others v. Republic of Indonesia,* ICSID, Arbitral Tribunal, December 9, 1983. *Yearbook Commercial Arbitration,* 1986, vol. XI, at 159.

[79] *Republic of Indonesia v. Amco Asia Corp and others*, ICSID *Ad hoc* Committee, May 16, 1986, *Yearbook Commercial Arbitration*, vol. XII, 1987, at 129.

> contract period. Further, the Tribunal recognized Amco's right to recover its imported capital, according to Indonesian Law.

On March 18, 1985, Indonesia applied for annulment of the decision. The *ad hoc* Committee formed by ICSID took as their starting point the fact that the law applicable to the contractual relationship had to be determined according to Article 42 of the Convention and held that, since the parties had not chosen the applicable law, Indonesian law and rules of international law had to be applied, the latter only to fill up lacunae in the applicable domestic law and to ensure precedence to international law norms where the rules of the applicable domestic law conflict with such norms.

The Committee held that the first award was well-founded insofar as it recognized the responsibility of the Indonesian government for the military takeover of the hotel; thereby, the government had violated the obligation imposed on states by international law, to protect foreign investors and their property.

However, the *ad hoc* Committee annulled the part of the award which had recognized Amco's investments as sufficient. The Committee held that the first arbitrators had determined this erroneously, without making reference to Indonesian law, according to which Amco had failed properly to register its investments.

It thus held that the first Arbitral Tribunal had exceeded its powers by failing to apply Indonesian law and that no sufficient reasons had been given.

Government of Guinea v. Maritime International Establishment

In 1971 the Republic of Guinea entered with MINE into a joint venture company, Sotramar, for transportation of half of the bauxite deriving from the exploitation of a mine. In 1974 Guinea entered into an agreement with another corporation, Afrobuen, to transport the bauxite.

In 1984 MINE initiated ICSID arbitral proceedings against Guinea.

On January 6, 1988 the ICSID Tribunal[80] granted to MINE[81] damages in the amount of US$12,249,483. Guinea applied for partial annulment. An *ad hoc* Committee[82] was appointed by ICSID. The Committee annulled a portion of the award.

Grounds for Annulment

As to the grounds for annulment of an ICSID Arbitral Award, in MINE a unanimous decision was reached by an *ad hoc* Committee[83] appointed by

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[80] Consisting of Sucharitkul, Chairman, Broches and Mbaye arbitrators.

[81] See *supra* note 62.

[82] *Yearbook Commercial Arbitration* 1991, 40.

[83] *Yearbook Commercial Arbitration* 1991, 40.

ICSID, which (a) rejected the request for annulment of the portion of the previous award that had held that Guinea had breached the J.V. Agreement but (b) annulled the part of the award which granted damages to MINE, including interest on damages.

The grounds for annulment included 'failure to state reasons', i.e. failure to comply with art. 48 (3) of the Convention which provides:

> The award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based.

The Committee held that:

> the requirement that an award has to be motivated implies that it must enable the reader to follow the reasoning of the Tribunal on points of fact and law ... . The adequacy of the reasoning is not an appropriate standard of review under para (1) (e), because it almost inevitably draws an ad hoc Committee into an examination of the substance of the Tribunal's decision, in disregard of the exclusion of the remedy of appeal by art. 53 of the Convention.

On the other hand:

> ... the requirement to state reasons is satisfied as long as the award enables one to follow how the Tribunal proceeded from Point A to Point B and eventually to its conclusion, even if it made an error of fact or of law. This minimum requirement is in particular not satisfied by either contradictory or frivolous reasons.

Furthermore the Committee accepts that:

> ... failure to deal with a question may render the award inintelligible and thus subject to annulment for failure to state reasons.

The ICSID system which provides for the setting aside of the award is to be approved for the reasons which will be stated below.[84] Its present weakness – it is submitted – lies in not having granted to the *ad hoc* Committee the authority to decide the dispute afresh, rather that having to submit it to a new arbitral tribunal [85]

Jurisdiction

In *S.O.A.B.I.* (1989)[86] and *Vacuum Salt*[87] the Arbitral Tribunal examined both issues of jurisdiction *ratione personae* and pursuant to art. 25 (2) (b), ICSID Convention.

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[84] See Chapter 35.

[85] Art. 52.6.

[86] See *supra* note 66.

The jurisdiction *ratione personae* of the Centre arises if one of the parties is a Contracting State, and the other party is a *national of another Contracting State*. Art. 25 (2) (b) of the Convention provides that the term '*national*' means, in respect of a legal entity:

> any juridical person which had the nationality of a Contracting State other than the State Party to the dispute on the date on which the parties consented to submit such dispute to arbitration, and any juridical person which had the nationality of the Contracting State Party to the dispute on that date and which, because of *foreign control*, the Parties have agreed should be treated as a national of another contracting state for the purposes of this Convention.

In *S.O.A.B.I.* the Tribunal held that:

> it results from the structure and purpose of the Convention that the foreign interest, which might serve as a basis for according 'foreign status' to a company established under local law, should be that of nationals of Contracting States.

This, in line with the objections raised by the government of Senegal that:

> foreign control in respect of Art 25 should be that of nationals of Contracting States.

On the other hand, in its dissenting opinion, arbitrator Keba Mbaye held that in line with *Amco* (1983) art. 25 (2) (b) has a:

> very precise purpose, that is to allow the State to enter into an Agreement with a juridical person possessing its nationality.

And it should be:

> applied with due regard to the concern of simplification that has inspired its drafter. Thus, there is no need to search whether there is, after all, beyond the *immediate* control, an *effective* control assumed by juridical or national persons. To proceed otherwise would be inconsistent with the spirit underlying the conception and adoption of the provision.

In *Vacuum Salt* (1994) the issue of jurisdiction *ratione personae* arose again with regard to the interpretation and application of art. 25(2)(b). The Tribunal held that:

> The Tribunal discerns from the text of art. 25(2)(b) that the conditions of the second clause of Art. 25(2)(b) must be fulfilled at least initially, on the date of consent.

The issue, then, is whether at that date:

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[87] See *supra* note 67.

> because of foreign control, the parties agreed that *Vacuum Salt* should be treated as a national of another Contracting State for the purpose of this Convention.

The Tribunal referred to several precedents: Amco, Klockner, Letco. The tribunal pointed out that:

> the Tribunal's decision on the matter before it, ultimately must turn on whether or not '*foreign control*' as contemplated by the 2nd clause of Art. 25 (2) (b) existed as a matter of fact on the date of consent.

Furthermore:

> the tribunal ... turns to consider that question, for the parties' agreement to treat Claimant as a foreign national because of foreign control does not *ipso jure* confer jurisdiction. The reference in Art. 25 (2) (b) to '*foreign control*' necessarily sets an objective Convention limit beyond which ICSID'S jurisdiction cannot exist and parties therefore lack power to invoke same, no matter how devoutly they may have desired to do so.

In *Vacuum Salt,* the Tribunal finally held that:

> we do not find here indication of *foreign control* of *Vacuum Salt* such as to justify regarding it as a national of an ICSID Contracting State other than Ghana. In our estimation, the drafters of the Convention ... cannot have contemplated that in a case such as this one would bring into play an international dispute settlement regime designed to promote greater private international investment by providing a forum for the resolution of any ensuing disputes between a state and a national of another state.

4.7 M.I.G.A.

The Multilateral Investment Guarantee Agency (M.I.G.A.) was set up by the International Bank for Reconstruction and Development.[88]

M.I.G.A. is a member of the World Bank Group. The Convention establishing M.I.G.A. provides that:[89]

> The objective of the Agency shall be to encourage the flow of investments for productive purposes among member countries and in particular to develop member countries ...

M.I.G.A. issues guarantees against non-commercial risks for investments, such as: currency transfer restrictions, expropriations, war and civil disturbances and breach of contract by host governments, provided that the investor

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[88] Washington DC, October 11, 1985.

[89] Art. 2.

obtains an arbitration award or judicial decision for damages and is unable to enforce it after a specified period.

M.I.G.A. also offers technical assistance to promote the flow of investment to and between its developing member countries.

Activities of Technical Assistance include support to national and local Investment Promotion Agencies (I.P.A.), investment marketing efforts and equity related investments.

M.I.G.A. is also encouraged to use its facilities to settle disputes between investors and its member countries.

M.I.G.A.'s staff experts work out conflict settlements relating to foreign direct investments, generally at a very preliminary stage, often before the dispute arises, at the level of formal conciliation or arbitration. M.I.G.A.'s Report 1996 points out that:

> several investment disputes around the world were resolved in this manner during the Fiscal Year.

Furthermore, M.I.G.A. undertakes a wide range of mediation activities designed to remove obstacles to the flow of foreign direct investment in its developing member countries.

A few years ago, M.I.G.A.'s Annual Report states that the guarantee program was very successful: contracts entered into amounted to 68; coverages issued amounted to US$ 21.9 million.

Furthermore, it was estimated that M.I.G.A. facilitated foreign private investments for at least US$ 15 billion.

M.I.G.A.'s maximum outstanding contingent liability was almost US$ 2.3 billion and its guarantee portfolio divided by sectors included, according to M.I.G.A.'s Annual Report – manufacturing (27%), financial (32%), mining (22%) and infrastructure (12%).

CHAPTER 5

ARBITRATION UNDER THE ALGIERS DECLARATIONS (THE IRAN-US CLAIMS TRIBUNAL)

SUMMARY: 5.1 Origin of the Declarations – Contents – 5.2 Form of the Declarations – 5.3 The two Rules of the Tribunal – 5.4 Jurisdiction of the Tribunal – 5.5 Applicable Substantive and Procedural Laws – 5.6 Arbitral or Non-Arbitral Nature of the Tribunal

5.1 ORIGIN OF THE DECLARATIONS – CONTENTS

The Algiers Declarations aimed to settle the disputes which arose after the fall of the Shah of Iran in 1979, brought about by the Islamic revolution, which subsequently terminated all commercial and financial relationships between the United States of America and Iran.

This crisis, which reached its height when the Iranian authorities arrested staff of the American Embassy in Teheran and the US adopted financial retaliation measures, came to an end with the Agreements of January 19, 1981, in Algiers.[1]

The Agreements concerned the release of the American hostages and the freezing of Iranian funds, but mainly dealt with the settlement of thousands of claims by American citizens against Iran (as well as reciprocally, though to a far lesser degree) involving commercial debts, nationalizations, expropriations, breaches of contract and other matters.

The Algiers Declarations also provided a financial mechanism to guarantee the obligations assumed by the parties, which was to be supervised by the Algiers Government, the Central Bank and another Central Bank to be designated. A blocked deposit, initially of one billion dollars, transferred from the Iranian funds frozen in the United States, was set up as a guarantee for the performance of decisions made by the Tribunal. It was Iran's duty to maintain the level of the deposit at the minimum amount of 500 million dollars.[2] The

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[1] The full texts of the Declarations are published in *International Legal Materials,* 1981, 223 *et seq.* and in *Yearbook Commercial Arbitration* 1982, vol. VII, 25-260.

[2] For a more detailed description of the mechanism see: L. RADICATI DI BROZOLO, *La soluzione delle controversie tra Stati e stranieri mediante accordo internazionale: gli accordi tra Stati Uniti ed Iran* (The Settlement of Disputes between States and Foreign Citizens through International Conventions: the Agreements between the United States and Iran), *Riv. Dir. Int. Priv. Proc.*, 1982, 300-301.

condicio sine qua non of adhesion by the United States was its receipt of the statement that:[3]

> the 52 American citizens had left Iran safe and sound.

While this was the commitment made by Iran, the obligations of the United States were various. Iran's claims in this respect may be summarized under four headings:

(a) the United States' pledge not to intervene politically or militarily in Iran's business;
(b) the release of Iranian funds frozen in American banks both in the United States and in their foreign subsidiaries;
(c) the end of the financial sanctions applied by the American authorities against Iran;
(d) the return to Iran of the Shah's assets and those of his family.[4]

This resulted in the United States making commitments in different areas: some concern their inter-state relationships with Iran, others are to bring into action internal measures.

It was precisely the contractual strength acquired by Iran through the sequestration of the American Embassy staff which induced the United States to cease having claims by US citizens against Iran decided by US Tribunals and to release the frozen Iranian funds. In fact, it is because of:

> duress[5]

that it has been debated in the United States whether the Algiers Agreements were valid, with the result that the American Government decided to enforce them in any case:

> as a matter of policy.[6]

The commitments of the two States can therefore be summarized in two different principles: on the one hand the United States' commitment to cancel all its measures (legislative, executive, judicial) blocking Iranian assets and to prevent any court proceedings by US citizens against Iran or Iranian entities;

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3 See paragraph 3 of the First Declaration.

4 For a detailed illustration of the commitments of the US and of their classification see B. AUDIT, *Les accords d'Alger du 19 janvier 1981 tendant au règlement des différends entre les Etats-Unis et l'Iran* (The Algiers Agreements of January 19, 1981, for the Settlement of Differences between the United States and Iran), *Clunet,* 1981, 4, at 713 *et seq.*

5 *Reliance Group Inc. v. Oil Service Company of Iran, National Iranian Oil Company and the Government of the Islamic Republic of Iran,* Iran-United States Claims Tribunal, Case No. 115, Chamber 3, Award No. 315-115-3.

6 See *supra* note 5.

on the other hand Iran's commitment to settle the claims of US citizens through the mechanism provided for by these Agreements.

In applying the Algiers Declarations, the President of the United States has ordered[7] that any claim made, or which might be made, before United States Courts concerning rights covered by such Declarations be stayed and become without effect.

The legitimacy of the Presidential Order has been challenged before the Federal Court in the United States.[8] However, the Court has held that the order is lawful since:

> the President has by law the authority to set aside sequestrations and to transfer (Iranian) funds outside the country.

5.2 FORM OF THE DECLARATIONS

A curious aspect of the Declarations is their form. Contrary to other interstate agreements on the settlement of claims by the citizens of one country, which are normally made directly between the countries concerned, the Algiers Agreements result from declarations issued by a third state. The Algerian Republic in fact made two separate declarations to which the United States and Iran adhered separately. Since these two countries had no diplomatic relationship, Algeria performed the necessary role of political mediator, acting as a *trait d'union* (i.e. 'go-between') country.

The Algiers Declarations consist of three separate documents. A first declaration, the *General Declaration* of the Algerian Government, paves the way for the conclusion of an agreement, stating the main commitments made reciprocally by the two contracting states. The second document deals with the first stage of the honouring of commitments by the two states. The third declaration, the *Claims Settlement Declaration,* provides for the formation of an arbitral tribunal to settle various types of disputes. This agreement can be considered as belonging to the category frequently called 'claims settlement agreements'. The term 'claim' is here used in its common law meaning to cover both substantive and procedural right.[9] However, there is an important difference between the normal way of settling claims and the solution provided for by the Algiers Declarations. In the majority of situations, in which there are a large number of claims by citizens of one state against another state, the dispute is settled through a *lump sum agreement,* i.e. through the payment by one state to

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7 Executive Order 12294, 46 Fed. Reg. 14111 (1981).

8 *Dames and Moore v. Regan, Secretary of Treasury* (1981), 453 US 654.

9 For a definition of this term within this framework see Art. VII, par. 2 of the Claims Settlement Declaration.

the other one of a lump sum to settle all the pending claims, which is then distributed among the claimants. Under the Algiers Declarations claims are settled individually. Consequently there is no global settlement of claims, or payment by Iran to the United States of a lump sum. The claims are decided individually in different ways, and payment is made directly to each winning party.[10]

Several Arbitral Tribunals have been formed between states to settle disputes between them and their citizens. These Tribunals frequently convene in places not subject to the sovereignty of any of the litigating states. An example of this is the Muenster Treaty (1648), which ended the 60-year-long war between Spain and the Netherlands, and instituted a Tribunal to settle the disputes between those two states and their respective citizens.

The Peace Treaty of 1794 between Great Britain and the United States instituted a similar Tribunal. Then, the United States and Great Britain instituted an Arbitral Tribunal to decide whether the Bering Sea, beyond a 3-mile limit, was American territorial waters or not, and whether the claimants had the right to protect the seals which were living on the islands in that area. An arbitral tribunal was also created by Austria and Germany by the treaty of June 15, 1955, to settle financial disputes between these two countries in relation to measures adopted by the victors at the end of the Second World War.[11]

5.3 THE TWO ROLES OF THE TRIBUNAL

The Iran-U.S. Tribunal has two functions to perform. The Tribunal has to decide a large variety of disputes. When it hears claims between the two states, it acts within the sphere of international public law; when it decides claims brought by private individuals, it operates within the sphere of private rights.

These two co-existent roles, for which there are no precedents in a similar Arbitral Tribunal, may become an important precedent for the future settlement of similar problems. The fact that the Tribunal must decide disputes concerning the two states (involving issues of public interest and of international public law, particularly nationalisations) and, simultaneously, disputes concerning international contracts between citizens of one state and entities of the other, makes it unquestionably a body having *two separate tasks*. On the one hand,

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[10] For a detailed description of the mechanism for indemnifying damages caused by a foreign state to private individuals, and for an assessment of the degree to which the Algiers Agreements have protected the interest of individuals see L. RADICATI DI BROZOLO. *op cit.*, 303-308.

[11] SEIDL HOHENVELDERN, *Le tribunal arbitral constitué par le Traité austro-allemand du 15 juin 1957 portant le règlement des problèmes des biens* (The Arbitral Tribunal formed by the Treaty between Austria and Germany of June 15, 1957, for the Settlement of Disputes concerning Property).

since the Tribunal is based on an international treaty, and is formed and financed by the two contracting states, it seems to fall within the category of traditional arbitral tribunals of international public law. On the other hand, since it also decides on the rights of individuals, its second role seems to put it in the category of arbitral tribunals deciding private claims. The characterization of the Tribunal will be discussed hereafter.

As to the requirement of the nationality of the parties, the Iran-US Claims Tribunal decided an interesting issue of double nationality in *The Islamic Republic of Iran* v. *The United States of America*:[12]

> For the reasons stated above the Tribunal holds that it has jurisdiction over claims against Iran by dual Iran-United States nationals when the dominant and effective nationality of the claimant during the relevant period from the date the claim arose until January 19, 1981, was that of the United States. In determining the dominant and effective nationality, the Tribunal will consider all relevant factors, including habitual residence, centre of interests, family ties, participation in public life and other evidence of attachment.
>
> To this conclusion the Tribunal adds an important *caveat*. In cases where the Tribunal finds jurisdiction based upon a dominant and effective nationality of the claimant, the other nationality may remain relevant to the merits of the claim.

5.4 JURISDICTION OF THE TRIBUNAL

The Second Declaration of the Algiers Agreements expressly defines the jurisdiction of the Iran-US Tribunal concerning the two types of disputes. Various classifications can be made to distinguish between them.

Firstly,[13] they must be divided into a group concerning debts, breach of contract and a group covering nationalisation and expropriation measures. A second classification,[14] taken directly from the general principles of the General Declaration after identifying the main source of disputes in the various claims which private individuals of one state may make against the other, divides them into those concerning contractual relationships for the supply of goods or services between the two states and then into a third category which includes the construction and enforcement of the two Declarations which form

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[12] Iran-US Claims Tribunal April 6, 1984, proceedings A 18, Lagergren, (Chairman). *Yearbook Commercial Arbitration*, 1985, vol. X, at 203.

[13] BERNARDINI, *L'arbitrato internazionale, op. cit.* at 167.

[14] See Art. II par. 2-3 and Art. IV par. 4 of the Second Declaration; see also L. RADICATI DI BROZOLO, *op. cit.*, at 337.

the Agreement. A third classification[15] made by the Tribunal itself, divides its decisions into class A issues (disputes of international public law between the two States) and a limited number of class B issues (concerning important commercial disputes), the relevance of which requires that they be decided by the full Tribunal. These two categories are separate from the other minor (class B) disputes entrusted to one of the Tribunal's three chambers.

Whichever classification criterion is used, it remains the fact that the disputes submitted to the Tribunal are extremely varied and heterogeneous.

5.5 Applicable Substantive and Procedural Laws

Regarding the applicable law, the Claims Settlement Declaration provides that:[16]

> 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.

The Tribunal has come across substantial difficulties also in regard to substantive law.[17]

In relation to procedural law, the UNCITRAL Arbitration Rules have been adopted to govern the entire proceedings[18] subject to modifications considered convenient to ensure that the proceedings are conducted in the best way.[19] The UNCITRAL Rules have been adopted by the General Assembly of the United Nations to settle international commercial disputes between parties belonging to different social and legal systems.

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[15] See REDFERN and HUNTER, *International Commercial Arbitration, op. cit., 35*-36.

[16] Art. V, Claims Settlement Declaration.

[17] S.K. KHALILIAN, *Controversial Theory of Frustration before the Iran-US Claim Tribunal*, 7, *J. Int. Arb.* 3, 5; H. M. HOLTZMANN, *Disputes Concerning the Termination of Joint Ventures, Lessons from Awards of the Iran-U.S. Claims Tribunal, Arb. Int.* 1993, 1, 103; BROWER, *Current Developments in the Law of Expropriation and Compensation,* 21 *International Lawyer,* 1987, 639; HANESSIAN, *General Principles of Law in the Iran-U.S. Tribunal,* 27 *Columbia Journal of Transnational Law,* 1989, 309; WESTBERG, *Contract Excuses in International Business Transactions;* Awards of the Iran-U.S. Claims Tribunal, 4, ICSID *Review Foreign Investment Law Journal,* 1989, 215; S.K. KHALINIAN, *The Place of Discounted Cash Flow,* in *International Commercial Arbitration*: Awards by the Iran-U.S. Claims Tribunal, 8, *J. Int. Arb.* 1, 31.

[18] See the UNCITRAL Arbitration Rules (Resolution 31/98, General Assembly December 15, 1976).

[19] Art. III, 2, Claims Settlement Declaration.

The body so formed is not merely a mixed commission. It is formed 'by judges', two thirds of whom are appointed in equal proportion by each state. The remaining third has to be appointed after consent of the judges appointed by the parties.[20] In the absence of an agreement they are to be appointed by the authority designated by the Secretary-General of the Permanent Arbitration Court of The Hague.

The Tribunal is divided into three chambers (out of the ten originally provided for), each formed by three judges.

It has been pointed out that the UNCITRAL Rules may be modified by the Tribunal, according to the circumstances, in order to make the proceedings more efficient.[21] The Algiers Declarations already create some provisions for this and contain a certain number of rules which replace, or which should replace, the UNCITRAL Rules.[22] However, since they are limited, by implication the Tribunal is invested with the authority to ensure the satisfactory running of the proceedings by amending the rules and adding to them if convenient.[23] This authority is similar to the powers given to arbitrators in many arbitration agreements.

The Declarations provide for the dispute to be heard either by the full Tribunal or by a chamber consisting of three judges.[24] The only principle which the Declarations wish to be respected is that a certain homogeneity should be maintained in the decisions made by the different chambers on similar problems.

The development of the proceedings is consequently left to the discretion of the Court. The Declarations contain few specific rules to this effect.

The place of the Tribunal is fixed[25] in the Hague, but the Declarations also provide for the possibility of it being fixed in another place. The Declarations do not seem to give much importance to the place of arbitration as regards the proceedings and the enforcement of the Tribunal's decisions.

The costs of running the Tribunal are to be borne equally by the two states[26] and each state may charge part of them to any litigant directly concerned.

Regarding the parties' representation at the proceedings, the Declarations provide[27] that each Government should appoint an agent to represent it at the Tribunal.

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20 Art. III, 1, Claims Settlement Declaration.

21 Art. III, 2, Claims Settlement Declaration.

22 As provided for by Art. 1 of the UNCITRAL Arbitration Rules.

23 B. AUDIT, *ult. op. cit.*, at 765.

24 Art. III, 1, Claims Settlement Declaration

25 Art. VI, 1, Claims Settlement Declaration

26 Art. VI, 3, Claims Settlement Declaration.

27 Art. VI, 2, Claims Settlement Declaration.

Each state, besides acting on its own behalf, also represents individuals whose claims are below 250,000 US dollars. On this specific issue the two states differed as to the procedure to be followed. While the United States were in favour of a special procedure dealing with them globally, through a lump sum settlement (small claims are about 3,000), Iran tended to treat each case separately.[28]

As to the merits of disputes the Claims Settlement Declaration sets out,[29] as the leading principles:

> respect for the law and the application of such choice of laws 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.

The Declarations consequently put on the same footing different sources of law, among which in general there is a well-established order of precedence (for example, international law is not generally placed after commercial law). The scope of the provision which governs the applicable law was handled as follows in *CMI* v. *Ministry of Roads*:[30]

> CMI complained of a breach by Iran of two purchase orders for equipment. The Iranian Ministry denied that an agreement had been entered into. CMI argued for the application of Idaho state law as to the amount of damages, since the purchase orders mentioned it as the applicable law. The Court held that it could not limit itself to such a law, based on Art. V of the Claims Settlement Declaration, and held:
>
> 'It is difficult to conceive of a choice of law provision that would give the tribunal greater freedom in determining case by case the law relevant to the issues before it. Such freedom is consistent with, and perhaps almost essential to, the scope of the tasks confronting the Tribunal, which include not only claims of a commercial nature, such as the one involved in the present case, but also claims involving alleged expropriations or other public acts, claims between the two Governments, certain claims between banking institutions, and issues of interpretation and implementation of the Algiers Declaration ... '

In the matter of recourse to the principles of international law see *American Bell*:[31]

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[28] S. BELLAND, *op. cit.*, at 238.

[29] Art. V, Claims Settlement Declaration.

[30] *CMI International Inc. v. Ministry of Roads and Transportation and the Islamic Republic of Iran,* Iran- US Claims Tribunal, December 27, 1983, Riphagen (Chairman), *Yearbook Commercial Arbitration*, 1985, vol. X, at 318.

[31] *American Bell International v. Islamic Republic of Iran, Ministry of Defense, Ministry of Post, Telegraph and Telephone and the Telecommunications Company of Iran,* Iran-US

> In 1975 Iran had selected AT&T for the general coordination of its program to modernize the Iranian civil and military telecommunication system. AT&T had specifically formed a local subsidiary (ABII) to perform the contract. ABII claimed US$ 63,819,369 against the Employer. The Employer raised various defences and made a counterclaim. Requested to decide on the validity of ADII's limitation of liability provided by the general conditions of the contract, the Tribunal identified the applicable rules in the following manner:
>
> 'Under principles of law acknowledged in many legal systems, limitation of liability clauses in general will not be given effect for a specific default when that default arose through an intentional wrong or gross negligence on the part of the one invoking the limitation.'

Recourse to various procedures to construe a contract is shown in *First Travel Corporation*:[32]

> First Travel Corporation claimed a commission for having promoted the agreements entered into between Transportation Consultants International and Iran Air. The Tribunal construed the contractual provisions related to compensation, stating that:
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> 'Thus, finally, this result is reinforced by the subsidiary rule of interpretation known as *contra proferentem,* which comes into play if, after all the ordinary processes of interpretation are exhausted, doubt still remains as to which meaning should be enforced ... '

The reference to changed circumstances gives rise to problems in interpreting the possible effects of changes both on the contractual situation on which the relationship was based, and on the political situation.

Reference by the Declarations to changed circumstances to be taken into account is construed by the Tribunal in *Questech*[33] as follows:

> The dispute concerned a program, defined IBEX, which had the purpose of organizing a system for the electronic collection of information by the Government of Iran. Iran terminated this contract after the revolution. The Tribunal, in assessing the fact of the *changed circumstances,* stated:
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> 'That provision not only lays down the law to be applied by the Tribunal, but it also mandates the Tribunal to take into account relevant us-

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Claims Tribunal interim award, June 11, 1984, Case No. 48 (41-48-3), Mangard (Chairman), *Yearbook Commercial Arbitration,* 1985, vol. X, at 274.

[32] *First Travel Corporation v. the Government of the Islamic Republic of Iran and Iran National Airlines Corporation,* Iran-US Claims Tribunal, December 3, 1985, Case No. 34 (206-34-1) Böckstiegel (Chairman), *Yearbook Commercial Arbitration,* 1987, vol. XII, at 257.

[33] *Questech Inc. v. the Ministry of National Defence of the Islamic Republic of Iran,* Iran-US Claims Tribunal, September 25, 1985, Case No. 59 (191-59-1), Bockstiegel (Chairman), *Yearbook Commercial Arbitration,* 1986, vol. XI, at 283.

> ages of the trade, contract provisions and *"changed circumstances"* when deciding *"all"* cases, thereby mentioning *changed circumstances* on the same level as *contract provisions* (emphasis added). In the context of the Algiers Declarations the inclusion of the term *changed circumstances* means that changes which are inherent parts and consequences of the Iranian Revolution must be take into account.
>
> 'The fundamental changes in the political conditions as a consequence of the Revolution in Iran, the different attitude of the new Government and the new foreign policy especially towards the United States, which had considerable support in large sections of the people, the drastically changed significance of highly sensitive military contracts as the present one, especially those to which United States companies were parties, are all factors that brought about such a change of circumstances as to give the Respondent a right to terminate the Contract. When the Ministry of Defence decided not to go on with Contract 114 and when it notified the Claimant of that decision in its letter dated July 16, 1979 it opted for the termination of a contract which the Parties probably would not have entered into had it been known that such fundamental changes would occur.'

The Tribunal has inevitably made decisions on procedural issues. This is the case in *Pepsi* v. *Zamzam*:[34]

> The claimant claimed payment for soft drinks concentrates sold to the various Zamzam Companies in Iran. The Zamzam Companies counterclaimed for overpricing and asked for the appointment of a Court expert. Zamzam Companies produced, in support of such an application, an *affidavit* which the Tribunal held to be too general and furthermore limited to only one of the companies, and did not produce any account or specific financial analysis.

The Tribunal held:

> The Tribunal finds that this evidence is inadequate to support the Respondents' allegations and does not form a sufficient basis to warrant appointment of an expert. Furthermore, the Respondents have not pursued or offered further evidence in support of these allegations. In view of the foregoing, the Tribunal does not have to reach the issue of the relevance of the value of the shares or of the Zamzam Companies.
>
> Accordingly, the Tribunal finds that there is no need to grant the request for appointment of an expert, for production of further documents .

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[34] *Pepsi Co. Inc. v. the Government of the Islamic Republic of Iran, Zamzam Bottling Company, Azerbaigian et al.,* Iran-US Claims Tribunal, October 13, 1986, Case No. 18 (260-18-1) Lagergren (Chairman), *Yearbook Commercial Arbitration,* 1987, vol. XII at 254.

In *Flexi-Van*:[35]

> Flexi-Van Inc. claimed damaged for breach of a contract for the lease of containers entered into with two Iranian companies, Star Line Iran Company and Iran Express Lines Company, which the Islamic Republic had taken over. The Tribunal rejected Flexi-Van Inc.'s claim after having so decided on the issues related to evidence:
>
> *Request for production of documents*
>
> The Tribunal finds it unnecessary to require the Claimant to produce further documentation, for it is able to form a basis for deciding the case on the record before it... The Claimant did not present Mr. Maass at the hearing as a witness, so it was impossible to question him and thereby, perhaps, clarify the matter. In these circumstances, the Tribunal could not, in justice, base a monetary award on such a vague affidavit, unexplained by oral testimony. To do so would be arbitrary and improper.

The Tribunal further held on the merits:

> Claimant must establish Government interference for its expropriation claim to succeed, are *(sic)* Flexi-Van's rights under the lease agreements.
>
> The mere fact that the Government through the Foundation controls Star Line does not as such encompass an expropriation of the Claimant's rights that derive from its lease agreements with Star Line. Expropriation of the Claimant's contract rights can only be found in case of interference with these contract rights themselves, and a basic condition for such a finding is that such interference be attributed to the Government
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> ...
>
> In the alternative, the Claimant argues that its claim is supportable on the ground that the Government, commencing about February 29, 1980, interfered with its contractual relations by preventing payment of amounts due under the leases and return of equipment. Once again, convincing evidence in support of these rather specific forms of interference is missing. Star Line and Iran Express, although Government controlled entities, must be assumed to make their own decisions about their commercial dealings, having a substantial freedom in their day-to-day activities, unless there is evidence to suggest otherwise. It would also have been surprising if the fate of the containers would have been the main concern of the new Revolutionary Government. In contrast, in the *Foremost* case, the Tribunal found that it was established by the evidence that in a controlled company, Pack Dairy, the 'withholding of de-

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[35] *Flexi-Van Inc. v. Government of the Islamic Republic of Iran*, Iran-US Claims Tribunal, October 13, 1986, Case No. 36 (259-361-1), Lagergren (Chairman), *Yearbook Commercial Arbitration* 1987, vol. XII at 263.

> cleared cash dividends for two successive years' was a specific interference attributable to the Government'.

On the question of the production of slides as evidence, in *Oil Fields of Texas* it was held:[36]

> The claimant made a claim under a lease contract, which the Iranian defendant held to be unlawful on the ground that it had been obtained by corrupting Iranian officials. The Tribunal held:
>
> 'At the hearing, objections were also made to NIOC's showing of slides. In this context the Tribunal notes that as with other evidence, any means of explanation or clarification of previously submitted evidence during the hearing is in principle admissible, unless new evidence is introduced in that way. As such, the showing of slides is also not objectionable in principle as long as it conforms to these standards. In the circumstances of this case, there is no need to decide whether the slides shown by NIOC constituted all or in part new evidence, as the Tribunal does not rely on them for its decision'.

Estoppel, which arises when a party presents in the same proceedings a submission opposite to its previous one, has been defined by the Tribunal in *American Bell*:[37]

> It is a general principle of law, that a party which at some stage of judicial or arbitral proceedings admits that certain legal conclusions can be drawn from some facts or circumstances is therefore estopped from arguing otherwise in the same proceedings.

The Tribunal's decision in *Dames & Moore*[38] is an example of the reopening of evidence:

> The claimant had produced invoices and *affidavits* in support of its claim, arising from two invoices for services rendered. The defendants challenged such evidence but produced documents only after the hearing at which the issue had been debated. The Tribunal decided in favour of the claimant and held that the arguments of the defendants were late and rejected them. The defendants asked that the case be reopened. The Tri-

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[36] *Oil Field of Texas Inc. v. The Government of the Islamic Republic of Iran and National Iranian Oil Company,* Iran US Claims Tribunal October 8, 1986 Case No. 43 (258-43-1) Böckstiegel (Chairman), *Yearbook Commercial Arbitration* 1987, vol. XII at 287.

[37] *American Bell International Inc. v. The Islamic Republic of Iran,* Iran-US Claims Tribunal September 19, 1986, Case No. 48 (255-48-3), Virally (Chairman) *Yearbook Commercial Arbitration* 1987, Vol. XII at 292.

[38] *Dames & Moore v. The Islamic Republic of Iran, the Atomic Energy Organization of Iran et al.,* Iran-US Claims Tribunal April 23, 1985 Case No. 54 (DEC 36-54-3) Mangard (Chairman), *Yearbook Commercial Arbitration* 1986 vol. X at 281.

> bunal, in rejecting the application, stressed in the following terms that the reopening of evidence was possible only before the decision:
>
> 'The Arbitral Tribunal may, if it considers it necessary owing to exceptional circumstances, decide on its own motion or upon application of a party, to reopen the hearings at any time before the award is made'.

The possibility of amending the claim during the proceedings and to what extent was asserted by the Tribunal in *International School.*[39]

International School Services had reached a settlement with National Defense Industries Organization and was accordingly seeking an award by consent.

> The Iranian organization refused to fulfil the terms of the settlement arguing that, after it had been made, employees of International School Services had made claims against it which, so it asserted, amounted to a breach of contract. The claimant then amended its claim by asserting its original claim under the contract, i.e. its claim as it stood before such settlement. The Iranian organization opposed this because the amendment was late. The Tribunal allowed the amendment on the following grounds:
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> Article 20 provides that:
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> ' ... during the course of the arbitral proceedings either party *may* amend or supplement his claim ... *unless* the Arbitral Tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances.' (emphasis added)

Among the most interesting decisions of the Tribunal on the merits are those related to interest due from the loser. The award of interest on the principal amount has been the subject of conflicting decisions of the various chambers of the Tribunal.

The principle that the creditor is entitled to interest has not in itself given rise to difficulties to the Tribunal, as it appears from *Reynolds Tobacco*:[40]

> The Tribunal found that the claimant was entitled to payment for the supply of tobacco products. Interest due on the principal amount of US $36,294,667.66 was then under discussion. The Tribunal so held:

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[39] *International School Services v. The Islamic Republic of Iran, National Defense Industries Organization,* Iran-US Claims Tribunal, January 30, 1986, Case No.123 (ITL 57-123-1). Böckstiegel (Chairman). *Yearbook Commercial Arbitration* 1987, vol. XI at 333.

[40] *R.J. Reynolds Tobacco Co. v. The Government of the Islamic Republic of Iran and the Iranian Tobacco Company*, Iran-US Claims Tribunal March 1, 1985, Case No. 35 (166-35-3) Mangård (Chairman), *Yearbook Commercial Arbitration* 1986, vol. XI at 280.

> 'An item of consequential injury which any claimant may suffer is the loss of the use of money which rightfully belongs to that claimant during the period between the accrual of the claim and the award. Indeed, the respondent in such cases has been unjustly enriched by having wrongfully had the use of the claimant's money during that period. Interest on the amount of the claim is the standard measurement of claimant's damage for being wrongfully deprived of its money.'

As it is shown by *McCollough*,[41] the difficulty was to assess the date from which interest commences to run and the rate of interest. McCollough was making a claim under a contract for consulting services related to the national Iranian telecommunication system. The court, after having accepted the claim for the principal amount, turned to the question of interest:

> '92. In most, if not all, legal systems when interest is awarded as an element of compensation for damage incurred due to a breach of contract, the applicable rates of interest are determined by reference to statutory rates, unless there are particular circumstances. The rates thus determined are of a great variety in various legal systems, however. The same variety appears in the determination of the date from which interest is awarded. Depending on the legal system in question and the circumstances this date can be either the date on which the damage occurred, the date of a formal notice to pay, the date of the court judgment or still another date.
>
> This variety is particularly well illustrated by the fact that, since the Islamic Revolution, Iranian law like the law in other countries applying Islamic principles, prohibits the award of any interest, whereas in the American legal system interest is usually awarded, and, although the rates vary quite considerably depending on the applicable statute, the trend appears to be towards the application of rates comparable to commercial rates of interest.
>
> 93. The practice of international tribunals demonstrates perhaps an even greater variety in this respect. The international awards which do not allocate interest or which fix very low rates are rather dated or concern non-commercial disputes between governments. For these reasons they have a limited authority. In any event it is noteworthy that no general rule can be derived from them. The often quoted judgment of the Permanent Court of International Justice in the *Wimbledon* case, which awarded interest only from the date of the judgment at a 'fair' rate of 6%, having regard to the conditions then prevailing for public loans, did not purport to establish such a rule.

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[41] *McCollough Company Inc. v. Ministry of Post, Telegraph and Telephone, National Iranian Oil Company, Bank Markazi*, Iran-US Claims Tribunal April 25, 1986, Case No. 89 (225-89-3), Virally (Chairman), *Yearbook Commercial Arbitration* 1987, vol. XII at 316.

94. As to more recent practice, in cases between governments (or their instrumentalities or agencies) and foreign corporations directly submitted by the parties to transnational arbitration by international tribunals, or referred to arbitration through diplomatic protection, a large variety of rates of interest has been awarded. A few examples from among the best known awards show rates varying from 5%, or 6%, to 14 1/2 % through 7 %, 8%, 9%, 10% and 12%.

95. The same diversity appears in relation to the date from which interest is calculated. In some cases, the starting point is fixed at the time when the awarded amounts were due, or, at least, in direct relation with the time when the damage occurred. In yet other cases, the date of the award or of its notification, or a specific date after the award, is determinative. A few awards make reference to the law recognized as applicable to the contract which is the subject matter of the case. Other cases do not refer to any particular system of law or expressly cite the discretion of the arbitrator.

96. Most awards allocate only simple interest, but occasionally compound interest has been awarded and sometimes a percentage is added to the interest in consideration of the rate of inflation.

97. It is difficult to draw any distinct conclusions from so diverse a practice. The Tribunal can conclude, however, that no uniform rule of law relating to interest has emerged from the practice in transnational arbitration, in contrast to the well developed rules regarding the determination of the standard of compensation for damages resulting from a breach of contract, where the rule of full compensation usually is applied. No comparable rule has taken form governing the rate of interest or the time from which interest is to be computed. This is illustrated by the frequent use of the word 'fair' to qualify the rate chosen, or by the equally frequent references to the 'discretion' of the arbitrator. The absence of a uniform rule does not, however, imply the absence of general principles. On the contrary, two principles or guidelines, of general impact, albeit of delicate implementation, can be deduced from the international practice briefly described above.

98. The first principle is that under normal circumstances, and especially in commercial cases, interest is allocated on the amounts awarded as damages in order to compensate for the delay with which the payment to the successful party is made. This delay, however, varies in relation to the date determined to be the time when the obligation to pay arose. This date can be the date when the underlying damage occurred, the date of a formal notice to pay, the date of the beginning of the arbitral or judicial proceedings, the date of the award or of the judgment determining the amount due, or the date when the judicial or arbitral decision reasonably should have been executed.

99. The second principle is that the rate of interest must be reasonable, taking due account of all pertinent circumstances, which the Tribunal is

> entitled to consider by virtue of the discretion it is empowered to exercise in this field.
>
> 100. The circumstances to take into consideration in view of determining a 'reasonable', or 'fair' rate, which would award to the successful party an appropriate compensation without submitting the losing party to an excessive burden, are many and, in fact, unlimited. Given their number, their complexity, the necessity of attributing to each the relative weight it deserves, international or transnational Tribunals usually decline to list them in each case, presumably in order to avoid overly lengthy explanations. Still referring to the scarce guidance given by the practice, it is possible to cite among them: (i) any pertinent contractual stipulations (which, when they exist, are usually followed for the determination of the rates); (ii) the rules and principles of the law applicable to the contract; (iii) the nature of the facts generating the damage; (iv) the nature or level of the compensation awarded, particularly if it extends to the lost profit or includes a profit in the costs to be reimbursed; (v) the knowledge that the defaulting party could have had of the financial consequences of its default for the other party; (vi) the rates in effect on the markets concerned; and (vii) the rates of inflation, etc.
>
> 101. These two principles, drawn from the international practice, are principles of commercial and international law, within the meaning of Art. V of the Claims Settlement Declaration. By virtue of the nature of the arbitral tribunals which apply them and of the cases involved, they qualify as general usages of trade, they are particularly relevant to this Tribunal'.

As to interlocutory injunctions, the Tribunal in *Boeing*[42] held that:

> monetary damages are not irreparable harm ...

even though the notion of irreparable damage in international law is wider than in Anglo-Saxon law, where damage is not irreparable if it can be remedied by payment of an amount of money.[43]

The existence of various possible forms of indirect expropriation was confirmed by the Tribunal in *International Technical Products*:[44]

> This claim is directed against the Government of Iran on the basis of an allegation of expropriation or taking in violation of international law. It is uncontested that the alleged taking of the building did not occur

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[42] *The Boeing Company v. The Government of the Islamic Republic of Iran and the Iranian Air Force,* Iran-US Claims Tribunal, February 17, 1984, Case No. 222 (34-222-1), Lagergren (Chairman), *Yearbook Commercial Arbitration* 1985, vol. X at 312.

[43] See *supra* note 41.

[44] *International Technical Products Corporation, ITP Export Corporation v. The Government of the Islamic Republic of Iran, the Islamic Republic Iranian Air Force et al.,* Iran-US Claims Tribunal, October 28, 1985, Case No. 302, Mangard (Chairman), *Yearbook Commercial Arbitration*, 1987, vol. XII, at 341.

> through formal expropriation. This, however, does not exclude the possibility of an expropriation having taken place. In other cases the Tribunal has ruled 'that a taking of property may occur under international law even in the absence of a formal nationalization or expropriation, if a government has interfered unreasonably with the use of property. (*Harza Engineering Company and The Islamic Republic of Iran,* award No. 19-98-2 at 9 (December 30, 1982), reprinted in 1 *Iran-US C.T.R.* 499,504).

The possibility of the Tribunal accepting claims based on previous arbitral decisions has been excluded by the Tribunal in *Bendoni Derossi*:[45]

> Bendoni Derossi International claimed payment from Iran of the amount which the latter had been ordered to pay in an award rendered by a sole arbitrator in an ICC procedure. The Tribunal held that to accept such a claim would amount to granting *exequatur* to another award, which was not within its jurisdiction.
>
> The Tribunal reasoned that:
>
> 'The Tribunal at this stage of the proceedings does not consider it a reasonable interpretation of the Algiers Declarations that it should sit as a court issuing *exequatur* or that it should otherwise be empowered to enforce arbitral awards of *other* (emphasis added) independently constituted arbitral tribunals. This Tribunal is not a national court; it has a specific international character. It is not a manifestation of any one national public authority, and it cannot invest such other awards with any validity or status under any system of national law that those awards do not already possess'.

Decisions by the Tribunal on interpretation, correction and additional decisions are rare. Although the Convention provides for the correction and interpretation of the Tribunal's decisions, nearly all the applications in this connection have been rejected because they were filed after the 30-day time limit specified by the arbitration rules. However, it must be added that[46] even an application made within that time limit was rejected since the Tribunal held that its decision was sufficiently clear.

Likewise in *Woodward-Clyde*,[47] the application for an additional award was summarily rejected:

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[45] *Bendoni Derossi International v. The Government of the Islamic Republic of Iran,* Iran-US Claims Tribunal, interim award June 7, 1984, Case No. 375 (40-375-1), Lagergren (Chairman), *Yearbook Commercial Arbitration,* 1985, vol. X, at 320.

[46] Iran-US Claims Tribunal, award in Case No. 159, see *Yearbook Commercial Arbitration,* 1987, vol. XII, at 235.

[47] *Woodward Clyde Consultants v. The Government of the Islamic Republic of Iran and Atomic Energy Organization of Iran* Iran-US Claims Tribunal January 5, 1984 Case No 67 Mangard (Chairman). *Yearbook Commercial Arbitration* 1985 vol. X at 291.

> The Tribunal has determined that no portion of the claim or counterclaim has been omitted from the above award so as to warrant an additional award as requested by AEDI. Furthermore, AEDI does not point to any errors in the award which call for correction.

An application for revision of the decision made in *Khuzestan Water*[48] had the same result:

> Respondents' motion filed on November 9, 1983 to cancel the Interlocutory Award No. ITL 23-120-2 of July 27, 1983 cannot be considered, because the Claims Settlement Declaration and the Tribunal Rules, while providing in Articles 35 and 36 a thirty day period for the interpretation of awards and the correction of technical errors, do not provide for the substantive reconsideration or revision of awards.

And in *Dallal v. Bank Mellat*:[49]

> Mark Dallal has filed a letter in which he requests 'reconsideration' of the award in this case ... which dismissed his claim. He further requests that the Tribunal rescind its award.
>
> With respect to the request for reconsideration, neither the Algiers Declarations nor the Tribunal Rules provide for the case to be reopened in the manner contemplated by Mr. Dallal.

The Tribunal has requested on several occasions that the provision in the Declarations forbidding the institution before state courts of the same proceedings as before the Tribunal be respected.

This was the case in *Touche Ross*:[50]

> The claimant asked the Tribunal to award remuneration for auditing services it had rendered. The Iranian Ministry of Defence instituted proceedings before the General Court of Tehran claiming damages. The Tribunal confirmed its exclusive jurisdiction on such claims:
>
> 'In response to a request for interim measures of protection, the Tribunal issued two interim awards requesting the Respondent to take all appropriate measures to ensure that the proceedings before the General Court

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[48] *Chas T. Main International Inc v. Khuzestan Water and Power Authority and the Ministry of Energy of the Islamic Republic of Iran,* Iran-US Claims Tribunal November 23, 1983 Case No. 120, Riphagen (Chairman) *Yearbook Commercial Arbitration* 1985 vol. X at 299.

[49] *Dallal v. Islamic Republic of Iran and Bank Mellat* Iran-US Claims Tribunal, January 12, 1984, Case No. 149, Lagergren (Chairman), *Yearbook Commercial Arbitration,* 1985, vol. X, at 306.

[50] *Touche Ross & Company v. The Islamic Republic of Iran,* Iran-US Claims Tribunal, October 30, 1985, Case No. 480 (197-480-1), Lagergren (Chairman), *Yearbook Commercial Arbitration,* 1987, vol. XII, at 345.

> of Tehran be stayed until it had determined its jurisdiction over the claims and counterclaims in this case'.

Likewise in *Ford Aerospace*: [51]

> The claimant had applied to the Tribunal for an interim award ordering the defendant to end proceedings instituted by the latter before the General Court of Tehran. The Tribunal reaffirmed its authority on such matters:
>
> '1. The Full Tribunal has ruled that the Tribunal has an inherent power to issue such orders as may be necessary to conserve the respective rights of the Parties and to ensure that this Tribunal's jurisdiction and authority are made fully effective ... It has exercised such power to require a stay of Tehran Court proceedings pending completion of Tribunal's action where it is obvious that the claim initiated before the Iranian Court had been admissible as a counterclaim before the Tribunal, even though no counterclaim had been asserted'.

A final mention must be made of the enforcement of the Tribunal's decisions. The Declarations give to the Tribunal's decisions a binding and non appealable nature.[52]

However, as held in *Iran Aircraft Industries et al v. Air Corp.*:[53]

> The final and binding language in the Accords does not bar consideration of the defenses to enforcement provided for in the New York Convention.

Since it is arguable whether these can be treated as arbitral decisions, the question of the international conventions concerning arbitral awards, above all the New York Convention (1958), being invoked for their enforcement or recognition requires careful consideration.

The Tribunal has indeed performed a considerable task and the study of its awards is often inspiring.[54]

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[51] *Ford Aerospace Corporation and Aeronutronic Overseas Services Inc. v. The Air Force of the Islamic Republic* of *Iran,* Iran-US Claims Tribunal, June 4, 1984, Case No. 159 (3W159-3), Mangard (Chairman), *Yearbook Commercial Arbitration* 1985, vol. X at 308.

[52] L. RADICATI DI BROZOLO, *op. cit.* 340-341.

[53] U.S. Court of Appeal, 2nd Circuit Nov. 24, 1992 no. 92-7217, 980 *Federal Reporter*, Second Series (2nd Cir. 1992, 141).

[54] C.N. BROWNER, *Lessons to Be Drawn from the Iran-U.S. Claims Tribunal, 9, J. Int. Arb.*, 1, 51; J. SEEFI, *Procedural Remedies against Awards of the Iran-US Claims Tribunal, Arb. Int.* 1992, 1, 41; H. M. HOLTZMANN, *Streamlining Arbitral Proceedings, Some Techniques of the Iran- US Claims Tribunal, Arb. Int.* 1995, 1, 39.

5.6 ARBITRAL OR NON-ARBITRAL NATURE OF THE TRIBUNAL

The Courts have been required to rule on whether or not the Iran-US Claims Tribunal is an arbitral body. This question arises even though the Claims Settlement Declaration states :[55]

> An international arbitral tribunal (note: the Iran-U.S. Claims Tribunal) is hereby established ...

In *Dallal* v. *Bank Mellat*[56] the Queen's Bench Division of the High Court of England has held:

> An American citizen summoned the Iranian Central Bank before the High Court claiming payment of cheques. The claim had already been made by the same plaintiff before the Iran-US Claims Tribunal which had rejected it, since those cheques would have represented a conversion of Rials into Dollars in breach of the Iranian exchange regulations, rules which the Iran-US Claims Tribunal held to be bound to apply in compliance with the Bretton Woods agreements. The Iranian Bank, when summoned again, this time before the English court, applied that the claim be not heard since it had already been decided by the Iran-US Claims Tribunal. The American claimant on the other hand opposed that the Iran-US Claims Tribunal's decision could not be recognized in Great Britain. The Court consequently had to decide whether the decision of the Iran-US Claims Tribunal could be recognized and came to the conclusion that it could not be recognized under the New York Convention, because of the absence of an arbitration agreement between the parties. The Court held, however, that proceedings before the Iran-US Claims Tribunal arose from a valid international convention and that the principle of international comity obliged English judges to recognize it.

The fact that in proceedings before the Iran-US Claims Tribunal there is no fundamental requirement for a voluntary submission to arbitration has been discussed in greater detail before the Courts of the United States in *Gould*:[57]

> The US claimants argued that they had never entered into an arbitration agreement and that, far from having voluntarily submitted to it, they found themselves obliged to do so because their claims before the US Courts had been:
>
> *involuntarily dismissed.*

---

[55] Art. II.

[56] (1986) 1 *All ER* 239.

[57] *Ministry of Defense of the Islamic Republic of Iran v. Gould Inc.*, US District Court for the Central District of California, Case No. 87-03673 RG (GX).

The United States of America, which joined the proceedings, argued in a Statement of Interest:[58]

> 'The Iran-United States Tribunal qualifies as a permanent arbitral body', and that, even if examining this matter from the point of view of Dutch procedural law, all the decisions of the Iran-US Claims Tribunal had to be treated as valid since they had been filed with the Dutch District Court of The Hague[59] and registered by that Court. They consequently had to be considered as arbitral awards having the right to enforcement in the United States.

An opinion which was shared by the U.S. Court of Appeals, Ninth Circuit in *Ministry of Defence of the Islamic Republic of Iran v. Gould Inc. et al.*[60] which stated:

> We have previously held that the agreement between Iran and the United States creating the Claims Tribunal was the 'submission to arbitration' in this case.

However, the very possibility of obtaining the recognition of the Iran-US Claims Tribunal decisions as *arbitral decisions*, had already been declared by Iran to be:[61]

> highly doubtful.

Iran had further stated to the Dutch Government that:

> The Tribunal is an *international court* in the strict sense and is essentially governed by international public law;

and that:

> the parties to the Declaration did not intend a civil law or international trade arbitration.

The tribunal itself in *Islamic Republic of Iran v. United States,*[62] dealing with the issue whether the Algiers Declarations obligated the United States to satisfy decisions made against U.S. nationals, held that the United States did not have such an obligation but they were bound, under that Treaty, to provide an enforcement mechanism, stating:

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58 Appearance of a joining party.

59 Under Section 623, Dutch Civil Procedure Code.

60 June 30, 1992 no. 91-55135, 969 *Federal Reports, 2nd Series (9th Cir.* 1992), 764.

61 Case A/21, Brief of the Islamic Republic of Iran.

62 Case no. A/21 14 *Iran-U.S. Cl. Trib. Rep.* 324 (1987) *Yearbook Commercial Arbitration* 1988, 263.

> Such procedures must be available on a basis at least as favourable as that allowed to parties who seek recognition or enforcement of foreign *arbitral awards.* (emphasis added)

The language used is not in line with a characterization as arbitral awards, even of those of its decisions which were made between the two States. This view is more clearly expressed by the Iran-U.S. Claims Tribunal in *Buckmaier*:[63]

> As an international Tribunal established by agreement between two Sovereign States ...

Several writers have discussed its nature.[64] It has been referred to[65] as:

> the most significant arbitral body in history

while a more prudent definition calls it[66] a:

> unique international institution

and: [67]

> as hybrid body producing denationalised arbitral awards, since they lack Dutch or other nationality.

In line with international public law arbitration the Tribunal plays an arbitration role in disputes between the two states. The problem arises as the claims by individuals, such as those of American Citizens against the Iranian Government or of Iranian citizens against the US Government. It is submitted that the difficult issue of identifying the arbitral or non-arbitral nature of the Iran-US Claims Tribunal should be decided under US and Iranian law.

In this analysis the Tribunal's name should not be taken into account, since a name cannot prevail on the real nature of an institution.

Furthermore, the distinction between *consensual arbitration* on the one hand, and *statutory arbitration* on the other hand, made by the English High Court in *Dallal v. Bank Mellat,*[68] can be followed up only to a certain extent,

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[63] *Buckmaier v. The Islamic Republic of Iran et al.*, Iran-U.S. Claims Tribunal, March 6, 1992, *Yearbook Commercial Arbitration* 1993, 246.

[64] CROOK, *Applicable Law in International Arbitration. The Iran-U.S. Claims Tribunal Experience, 8, American Journal of International Law* 278 (1985).

[65] LILLICH (ed.) *Preface to the Iran-U.S. Claims Tribunal* 1981-1983 (1984).

[66] CARON, *The Nature of the Iran-U.S. Claims Tribunal and the Evolving Structure of International Arbitration* 104 (1990); LAGERGREN, *Iran-U.S. Claims Tribunal,* 13 *Dalhousie Law Journal* 505, 1990.

[67] A. B. AVENASSIAN, *The New York Convention and Denationalised Arbitral Awards (with Emphasis on the Iran-U.S. Claims Tribunal)* 8, *J. Int. Arb.* 1,5.

[68] See *supra* note 56.

since in several legal systems compulsory (statutory) arbitration is not treated as true arbitration.[69]

Likewise, the reference made by the Algiers Declarations to the UNCITRAL Rules is also of no help since the rules play a merely instrumental role in procedural law.

It is suggested that it might be useful to base this analysis on other grounds. The arbitration agreement, to be valid, must be concluded by the parties, or by third parties having authority to represent them. Similarly, if an agreement is entered into by a father who by law has the statutory authority to represent his son, or by an attorney in fact appointed by a company, the agreement is binding both for the son and for the company. One could also imagine a power of attorney being granted by many members of a community to their parish priest for the purchase of a sports field, or by all the inhabitants of a small village to one of their number for the collective purchase of a field. It can consequently be imagined that collective powers of attorney can be granted by social groups. These examples are given simply to show that extended representation is conceivable and it is suggested that in theory it is conceivable even for settling a dispute through arbitration.

However, the gap between these hypothetical situations and the authority of a state to represent all its citizens in entering into arbitration agreements, in general or into a specific arbitration agreement concerning their individual rights is certainly wide.

This authority generally requires a constitutional rule or an Act of Parliament. In any event, it is suggested that this issue must be governed by the national law of each state. It is by referring to the national law of that contracting party that it can be established whether the arbitration agreement can be validly entered into by the government of that country.

Since the assumption of authority by a Government impinges on citizens' individual rights, it would appear possible to challenge it, when due authority is lacking under the law of that state, lack of a valid Act of Parliament or Executive Order or on the grounds of breach of the Constitution if any. However, if the Government of a State has the authority – granted to it either voluntarily by the parties or by the Constitution or by a valid Act of Parliament or Executive Order – to assume citizens' rights and it enters into an arbitration agreement, it thus commits its citizens because, insofar as they are duly represented by their Government, a valid arbitration agreement is made. This is in fact the position taken by the US Government on joining the proceedings in *Gould*:[70]

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[69] See *infra* Chapter 17.

[70] See *supra* note 57.

> The United States of course had authority to act on behalf of their nationals in this regard.

Likewise, the Government of the United States refers to the Tribunal's Rules of Procedure:

> The Claims Settlement Declaration constitutes an agreement in writing by Iran and the United States, on their own behalf *and on behalf of their nationals,* submitting to arbitration within the frame of the Algiers Declarations and in accordance with the Tribunal's Rules.

It remains then to be seen whether the two Governments had authority on behalf of their nationals when they entered into the agreement.

Where such a requirement is not fulfilled, the arbitral nature of the Tribunal for claims by private individuals must be *excluded.* It may then be a question of *compulsory arbitration*, the validity of which, for internal purposes, will depend on the law of each contracting State. In this case the application of the New York Convention will be arguable. In this connection the Official Report of the United States Delegation to the United Nations Conference on International Arbitration[71] held that:

> If the arbitration was conducted by a permanent body to which the parties are obligated to refer their disputes regardless of their will, the proceedings are *judicial* rather than arbitral in character and the resulting award consequently would not come within the purview of this Convention. (emphasis added)

As discussed earlier, the nature of the Iran-US Claims Tribunal is certainly clearer regarding its other roles in deciding disputes between the two states and in construing the Declarations. In respect of both classes of issue, the public nature of the Arbitral Tribunal has to be recognized. There is abundant literature on the above issues.[72]

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[71] L. QUIGLEY, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards,* 70 *Yale L. J.* 1049,1061 No.54, quoted in *Gould's* pleadings in the proceedings quoted *supra* note 57.

[72] See amongst the many writings on the Iran-US Claims Tribunal: *Iran-United States Claims Tribunal Reports,* Grotious Publications. Cambridge; *Iran- United States Claims Tribunal, Yearbook Commercial Arbitration,* Kluwer, The Netherlands, (from year 1982); J. A. WESTBERG, *International Transactions and Claims Involving Government Parties, Case Law of the Iran-U.S. Claims Tribunal,* International Law Institute, Washington D.C. 1991; G. AKSEN, *The Iran-United Stated Claims Tribunal and the UNCITRAL Arbitration Rules, an Early Commen* in *The Art of Arbitration,* Kluwer 1982, The Netherlands; M. B. FELDMAN, *Implementation of the Iranian Claims – Settlement Agreement – Status, Issues and Lessons: View from Government's Perspective* in *Private Investors Abroad Problems and Solutions in International Business,* Matthew Bender, 1981, 75-101: E. LAUTERPACHT, *The Iran-United States Claims Tribunal – An Assessment* in *Private Investors Abroad Problems and Solutions*

A similar issue was discussed, although in the framework of an ICSID Arbitration, in *American Manufacturing & Trading Inc. v. the Republic of Zaire.*[73] The Arbitral Tribunal raised of its own motion the issue whether a national of a Member State of the ICSID convention could rely upon consent given by its state. The Tribunal found:

> The two states cannot, by virtue of Art. 25 of the Convention, compel any of their nationals to appear before the Centre; this is a power that the Convention has not granted to the states.

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in International Business, Matthew Bender, 1982, 228 *et seq.;* P. D. TROOBOFF, *Implementation of the Iranian Claims – Settlement Agreement – Status, Issues and Lessons: the Private Sector's Perspectives* in *Private Investors Abroad Problems and Solutions in International Business,* Matthew Bender, 1981, 103-155; R. B. van MEHREN, *The Iran-US Arbitral Tribunal, The American Journal of Comparative Law 31, 1983, 713, 730; A.F. LOEWENFELD, The Iran-US Claims Tribunal: An Interim Appraisal, Arbitration Journal,* Volume 38, December 1983; A. J. van den BERG, *Proposed Dutch Law on the Iran-US Claims Settlement Declaration, a Reaction to Mr. Hardenberg's Article, International Business Lawyer,* September 1984; D. L. JONES. *The Iran-United States Claims Tribunal : Private Rights and State Responsibility, The Iran-United States Claims Tribunal 1981-1983, Seventh Sokol Colloquium,* University Press of Virginia, Charlotteville 1984; B. AUDIT, *Le Tribunal des différends Irano-Américains (1981-1984)* (the Iran-US Claims Tribunal), *Journal du Droit International, 1985, 4;* M. Mc CABE, *Arbitral Discovery and the Iran-United States Claims Tribunal Experience, The International Lawyer,* Volume 20, No. 2, 1986; M. STRAUS, *The Practice of the Iran-US Claims Tribunal in Receiving Evidence from Parties and from Experts,* 3 *J. Int. Arb.,* 3, 57, 69; *Ary Spaans v. Iran-United States Claims Tribunal,* Hoge Raad der Nederlanden (Supreme Court of the Netherlands), December 20 (1985) with note by P.J.I.M. de WAART, *Nederlandse Jurisprudentie* 1986, No. 438, 1691-1702; S.M. SCHWEBEL, *International Arbitration: Three Salient Problems,* Grotius Publications, Cambridge 1987; C.D. GRAY, *National Claims Commissions, the Iran-United States Claims Tribunal and International Commercial Arbitration, Judicial Remedies in International Law,* Clarendon Press, Oxford 1987, Chapter 5, 178-209; N. WUHLER, *The Iran U.S. Claims Tribunal, Ten Years of Arbitration Work, 8, J. Int. Arb., 4, 5.*

[73] 36 *International Legal Materials* 1531 (1997).

CHAPTER 6

INTERNATIONAL ARBITRATION LAW

SUMMARY: 6.1 Analysis as to the Existence of a Law of International Arbitration – 6.2 International Commercial Arbitration – 6.2.1 A Fragmentary Body – 6.2.2 Multilateral Conventions – 6.2.3 Bilateral Conventions – 6.2.4 Other International Conventions Dealing Incidentally with Arbitration – 6.2.5 International Arbitration Rules – 6.2.6 Consolidated Principles of International Commercial Arbitration – 6.3 Public International Arbitration Law – 6.4 Conclusions

6.1 ANALYSIS AS TO THE EXISTENCE OF A LAW OF INTERNATIONAL ARBITRATION

One might wonder whether an international arbitration law exists, or whether it is just a non legal term.

According to an old opinion:[1]

> In the legal sense, *no international arbitration exists* ... Every arbitration is a national arbitration, that is to say subject to a specific system of national law ...

This view was in line with the opinion expressed on *international public policy* by the Paris Court in *Banque Ottomane*:[2]

> The principles of an alleged international public policy, the existence of which is not recognised by any system of law and in particular not by French law ...

This approach was understandable during the post second World war years, when many countries had to recover psychologically from the war by raising walls against the external world. But after that time, international trade and transnational exchanges of cultures and legal systems made people understand that the medieval notion of countries as sovereign secluded castles was out of date.

As to international public policy, one of the most distinguished arbitrators of our century,[3] has developed the theory of a transnational public policy.

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1 1957 Resolution of the Institute of International Law, in G.B. BORN, *op.cit.*, at 113.

2 *Bakaljan and Hadjthmar v. Banque Ottomane*, Court of Appeal, Paris, March 19 (1966) *Clunet*, 1968, at 137 (Translation from French).

3 P. LALIVE, *Public Policy and Arbitral Procedures*, ICCA Congress, New York, 1986.

This new attitude towards international public policy encourages the re-examination of the position also as to international arbitration law.

THE TWO BRANCHES OF INTERNATIONAL ARBITRATION LAW

Within international commercial arbitration law, one must distinguish between international commercial arbitration and public international arbitration.

6.2 INTERNATIONAL COMMERCIAL ARBITRATION

The view has been expressed that there cannot be an international commercial arbitration law since the only existing legal systems are on the one hand national legal systems and on the other hand international public law, which regulates the relationships between states and/or international organisations.

This view deserves full respect, since it bases itself on very solid grounds. In fact national legal systems are based on legislation enacted by Parliament (or by the other body which should be entitled to do so in that legal system) while international public law is based on international conventions entered into between States.

However some of these international conventions regulate not only public law issues (like peace, war, boundaries, alliances, the formation of international organisations and so on) but also other ones like recognition of judgments, sales of goods, unified rules, arbitration.

These conventions are then not only sources of public law but, since once the convention is ratified or implemented its provisions have the force of law in such states, they are sources of international private law also as conflicts laws or material law.

Whether one is willing to see all such statutory provisions as forming a branch of law or prefers to look at them separately and to keep them isolated, may be a secondary matter belonging only to subjective classification. If one considers altogether those provisions which are related to arbitration, it is suggested that they belong to a branch of the law: arbitration, and in particular to its subdivision related to international arbitration.

Since this group of Conventions has statutory force in various countries it is submitted that one may then refer to it as international arbitration law.

It is suggested that the effects of such provisions do not depend on whether one accepts such a qualification or not. Even if one does not classify this set of conventional provisions as international arbitration law, one should at least accept the existence in many states of statutory provisions on international arbitration law.

It is submitted that international arbitration law consists of all such provisions and of the national statutory provisions dealing with international arbitration.

6.2.1 A fragmentary body

Based on the traditional method, followed by many national Parliaments, one could expect to come across just one statute dealing thoroughly with international arbitration.

Nevertheless even Parliaments do not always follow this method. On some occasions special statutes are enacted dealing only with some aspects of an area of the law.

The same applies to international conventions. Sometimes, they cover an entire area like international transport law. On other occasions they deal only with some aspects of an area.

This has happened also as to arbitration. This was nearly inevitable, since the arbitration agreement is not only subject to the law of contract, but produces procedural effects and, because of these contractual and procedural aspects, covers many areas such as:

- the law of contract
- arbitrators' jurisdiction and the exclusion of state courts jurisdiction
- state courts' jurisdiction in aid of arbitration
- the substantive law to be applied in arbitral proceedings
- the procedural law applicable to arbitral proceedings
- public policy to be taken into account by arbitral tribunals
- the appointment of arbitrators, their challenge and their replacement
- the venue of the proceedings
- the enforcement of the award
- attacks against the award
- the recognition of non domestic awards.

International arbitration law will then not be found in one very long multilateral convention but in many conventions, each one dealing with some of its aspects.

6.2.2 Multilateral Conventions

The role of the Washington 1965 Convention,[4] in creating a *procedurally* international arbitration, and its being a source of international arbitration law, has already been referred to.[5]

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4 See *supra* Chapter 4.

5 See *supra* at Chapter 2.3.3.

As earlier discussed, arbitration is the object of many other multilateral conventions, some of which will be concisely referred to:

- *The Geneva Protocol 1923*[6] which deals with the validity of arbitration agreements related to disputes between parties respectively subject to the jurisdiction of different adhering States, the state courts of which are under a duty to refer the disputes to arbitration, in the presence of such an arbitration agreement.
- *The Geneva Convention 1927*[7] which deals with the recognition and enforceability of non domestic awards.
- *The New York 1958 Convention*[8] on recognition of non-domestic arbitration agreements and recognition and enforcement of 'foreign' (including international) arbitral awards.
- *The Inter Arab Convention on the Enforcement of Judgments and Awards*[9] followed by the *Convention for Judicial Cooperation between States Belonging to the Arab League*[10] which deal with recognition of non-domestic awards in the Arab world.
- *The European Convention on International Arbitration* (1961)[11] which regulates arbitral proceedings arising from international trade between physical or legal persons residing or having their seat in different adhering States and which *inter alia* contains choice of law rules which aim at identifying the law applicable to arbitration agreements entered into by such parties and deals with grounds for refusal to recognize foreign awards.
- *The Moscow 1972 Convention*[12] which deals with arbitration proceedings between countries belonging to the former Soviet Union commercial area of gravity.

In conclusion it is suggested that the multilateral conventions have given birth to a body of international arbitration law, even if very fragmentary because of the above discussed special features of international arbitration, and of its frequent need to have recourse to rules of conflict, to international procedural rules and to international principles.

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6 Geneva Protocol on Arbitration Clauses, Geneva September 24, 1923.

7 Geneva Convention on the Execution of Foreign Arbitration Awards, September 26, 1927.

8 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, June 10, 1958.

9 Entered into on September 14, 1952, by the States belonging to the Arab League.

10 Riyadh April 4, 1983.

11 Geneva April 21, 1961.

12 Convention on the Settlement by Arbitration of Civil Law Disputes resulting from Economic Scientific and Technical Co-operation, Moscow, May 26, 1972.

It must be accepted that this may make unhappy those who look for solid national grounds and even more those who, for the same reason, tend to nationalise international arbitral proceedings by applying at any cost their national substantive and procedural law.

6.2.3 Bilateral Conventions

Among bilateral conventions are the following:

- the *Bilateral Friendship Commerce and Navigation Conventions* between the U.S: and France,[13] Japan,[14] Germany,[15] USSR[16] and
- the *French Bilateral Conventions* with Greece[17] and Belgium.[18]

It is submitted that all these conventions too are sources of international arbitration law.

This piecemeal production may not satisfy the expectations of the *esprit géométrique*[19] who needs everything to be regulated orderly and consecutively.

However first, this less orderly system of production of international law is not unique to arbitration.

Second, no doubt this makes it not easy to put together the various fragments. However if one looks for a positive aspect of this situation, intellectually it is more stimulating to be involved in the process of putting together the various cards of a mosaic, rather than simply having to read a Consolidated Act.

Even bilateral conventions seem then to be a source of international private arbitration law, when they regulate an issue related to arbitration law, even if this is a small part of their contents and their ambit is limited to the adhering States.

6.2.4 Other international Conventions dealing incidentally with arbitration

Some other International Conventions, although not regulating arbitration, have a link with it.

That is the case of the *European Convention of Human Rights 1950*[20] although it does not refer directly to arbitration, since it deals[21] with the right of citizens vis-a-vis an independent and impartial *tribunal established by law.*

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[13] See Chapter 3.

[14] See Chapter 3.

[15] See Chapter 3.

[16] See Chapter 3.

[17] See Chapter 3.

[18] See Chapter 3.

[19] i.e. of a very orderly mind.

Based on this, a claim made by a citizen against Switzerland on the ground of delays in the conduct of arbitral proceedings has been declared not admissible[22] by the Human Rights Commission. However the Swiss Federal Court [23] has held that the Convention applies not only to state courts but also to private tribunals, as to their *res judicata* effect and enforceability. Even such proceedings have then to:

> provide the same safeguard of the independent administration of justice.

Likewise in *Omnium de Travaux*[24] the Court of Appeal of Paris has held that State Courts must let the arbitrators exercise their own and exclusive power to decide over the case.[25] Mayer[26] applying these concepts has taken the view that if a national legal system – like Belgium used to provide – does not allow appeal against a domestic international award, the aggrieved party, after a national negative decision, could have recourse to the European Court.

The same applies to the *1980 Rome Convention on the Law Applicable to Contractual Obligations*[27] which at art. 1 (2) provides that is shall not apply to:

> .....
> (d) arbitration agreements.....

In spite of this total exclusion, the Rome Convention may be treated in situations as one of the general principles of private international law, which may even assist the arbitrator.

The 1968 *Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters*,[28] at art. 1 provides:

> The Convention shall not apply to:.....
> 4) arbitration.

This is a provision which in *Marc Rich*[29] has been construed by the Court of Justice of the European Communities as excluding from its ambit all proceed-

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[20] Convention de Sauvegarde des Droits de l'Homme et des Libertés Fondamentales, November 4, 1950.

[21] Art. 61 (1).

[22] *Bramelid and Malmström v. Sweden*, Commission on Human Rights, December 12, 1983.

[23] Swiss Supreme Court, April 30, 1991.

[24] *Chambre Arbitrale de Paris, Sté Carfa Trade Group et Omnium de Traveaux v. République de Guinée et al.*, Court of Appeal, Paris, November 18, 1987, *Rev. arb.* 1988, 657.

[25] J.F. BOURQUE, *The Legal Framework for Arbitration in Europe*, ICC Suppl. Int. Bulletin 1994, 12.

[26] U. MAYER, *Conventions Linked to Arbitration in Europe.*

[27] Entered into in Rome on June 19, 1980.

[28] Entered into on September 27, 1968.

ings related to arbitration instituted before state courts, even those in which the existence or the validity of an arbitration agreement has to be decided as a preliminary issue. The same provision has been included in art. 1 of the 1988 Lugano *Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters.*[30]

As to the *Vienna 1980 Convention,*[31] even when the parties have not referred to it, it may be used by the arbitrator, or – when the parties have made no choice of law – as a sort of *lex mercatoria* in the field of international sale of goods, or as an internationally accepted usage.[32]

The Convention may also be applied according to Mayer to determine the law applicable to an arbitration agreement contained in an international sales of goods contract.[33]

Also these conventions, by identifying boundaries to the regulation of arbitration in international relationships, may be seen as contributing, even if from outside, to international commercial arbitration law.

6.2.5 International arbitration rules

As earlier discussed, arbitration is the combined effect of permission from legal systems to the parties to have recourse to such proceedings, and of a meeting of minds of the parties to refer their dispute to arbitration.

International commercial arbitration law does not then consist exclusively of statutory provisions. Aside from them, the arbitration rules related to international disputes, which are incorporated because of the parties reference to them in their arbitration agreement or submission, are a source of international arbitration.

Many of such sets of rules already have an international destination, since they are not linked to a national system. The best example of this source of international law is provided by the *Uncitral Model Law* which is designed for all nations. One must add to it the *Uncitral Arbitration Rules* as well as the ICC Rules, the AAA International Rules, the Stockholm, the London, the European Court of Arbitration arbitration rules and many other sets of arbitration rules.

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[29] *Marc Rich & Co. AG v. Società Italiana Impianti*, Court of Justice of the European Communities, July 25, 1991, *Yearbook Commercial Arbitration* 1992, 233.

[30] Entered into in Lugano on September 16, 1988.

[31] United Nations Convention on Contracts for the International Sales of Goods, (Vienna 1980).

[32] U. MAYER, *op.cit.*, see *supra* note 26.

[33] U. MAYER, *op.cit.*, see *supra* note 26.

6.2.6 Consolidated principles of international commercial arbitration

Several consolidated principles have taken shape in international arbitration.

Ability to sever the Arbitration Agreement

One of such principles is the autonomy of the arbitration agreement from the contract of which it is a part. Even if this is not stated by the applicable procedural law, the ability to sever the arbitration agreement from the contract in which it is embodied has achieved the rank of an international usage and allows the arbitration agreement to work when the nullity of the contract is at stake. In *Municipality of Kohms*[34] the French Court of Cassation has described this as a:

> principle of *international arbitration law* ... without it being required to make reference to national legislation (emphasis added)

Validity of the Arbitration Agreement

A further principle has emerged from the practice of international arbitration, i.e. that the validity of arbitration agreements in international contracts does not depend on the national applicable substantive law.

This tendency to free this validity from national constraints produces effects in respect not only of the *lex contractus*, but also of local restrictions to enter into an arbitration agreement which may apply to public bodies or to state owned companies, an aspect which is very close to the capacity to act.

This has been held in a ICC award rendered in 1986:[35]

> .... A state owned company may not argue that the arbitration agreement entered into is of no effect, since this conflicts with international public policy, which cannot be set aside by national legislation

and is echoed by *Framatome:*[36]

> a *general principle universally* accepted in interstate relationships as well as in international relationships between private parties prevents the Iranian State -even if it had too such an intention, which is not the present case- to deny an arbitration agreement entered into by itself or by a public body such as AEDI (emphasis added)

and amongst authors by Fouchard-Gaillard-Goldman.[37]

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[34] *Comité Populaire de la Municipalité de Khoms v. Société Dalico Contractor*, Court of Cassation (France) December 20, 1993, *Rev. Cr. Dt. Int. Pr.*, 1994, 4, with comments by P. Mayer.

[35] ICC award No 4381/1986, *Clunet* 1986, 1102.

[36] *Framatome v. Atomic Energy Organisation of Iran*, see *infra* note 52.

[37] FOUCHARD-GAILLARD-GOLDMAN, *op.cit*,. at 338 *et seq.*

While some objections have been made to this principle, one must recognize that it has obtained a large consensus.

International Public Policy

The relevance not only of the public policy of the States to which the contracting parties belong, but also of other States, with which the relationship has a link, has been asserted in *Regazzoni v. Sethia.*[38]

As rightly pointed out by Lalive,[39] one must recognize that an international notion of substantive and of procedural public policy has been developed.

It is suggested that this approach belongs to international arbitration law as well.

Costs follow the event

Similarly – except when the parties have agreed otherwise or different local provisions have been chosen or apply – the rule that costs follow the event may be said to be of general application in international arbitration – albeit that it is not universal (see the contrary situation in the U.S. legal system).

This allows to consider them as international arbitration usages and as such as part of international arbitration law.

As to international *substantive* public policy the notions of *bonos mores*, of corrupt practices, of *pacta sunt servanda* and other ones have developed. It is suggested that these *substantive law* principles are not exclusive to arbitration even if they may be used within it.

As to international *procedural* public policy, the right to due process and to impartiality of the arbitrators, as well as the right of each party to appoint its arbitrator – unless the parties have otherwise agreed – appear well established in international arbitration, wherever the venue of the proceeding. It is suggested then that they too are a component of international commercial arbitration law.

Lex Mercatoria and the Tronc Commun

When the parties have not chosen the substantive law to be applied to an international dispute, the arbitrators in the absence of a *lex fori*, may make recourse either to a set of conflict rules, or choose directly (*la voie directe*) the applicable law or apply the *lex mercatoria* or the *Tronc Commun* doctrine.

As is well known, *lex mercatoria* was elaborated by Goldman[40] expressly for international arbitration. It was intended to become an *optional tool* usable in international arbitration, as a formula which is available to the parties and to the arbitrators in order to decide the merits of international disputes.

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[38] *Regazzoni v. Sethia* (1957) 3 *All ER*, 286.

[39] P. LALIVE, see *supra* note 3.

[40] B. GOLDMAN, *Frontières du Droit et lex mercatoria, Arch. de Philosophie du Droit*, Paris 1964, 177.

In this respect it is suggested that even the *Tronc Commun* doctrine, which was elaborated by this writer for arbitration and which construes the silence of the parties as their choice of the common part of their national substantive laws,[41] being a means for the arbitrators to ascertain the intention of the parties as to the substantive law, plays the role of a tool which is available in international arbitration although it may be used also outside arbitration.

6.3 PUBLIC INTERNATIONAL ARBITRATION LAW

The traditional arbitration of disputes between States consisted in the appointment of a head of state (a King, an Emperor, the Pope) as arbitrator on an *ad hoc* basis.

Initial progress in interstate relationships consisted in entering into agreements which provided the duty to enter into an arbitration agreement for each dispute since the adhering states were not ready to refer *a priori* all disputes to arbitration.

Further progress consisted in the creation of the Permanent Court of Arbitration by *the Hague Convention*(1899)[42] and *the Hague Convention* (1907) for *the Pacific Settlement of International Disputes*[43] to which each adhering State could refer a dispute. Here again, due to the opposition of some States, submission of disputes to the Permanent Court was not compulsory.

Several bilateral conventions such as the US-Italy Convention[44] have made reference to the Permanent Court of International Justice, created in 1920,[45] in the framework of the League of Nations. The Permanent Court was designed to serve as a public arbitration body, since the States which had adhered to it remained free to submit each specific dispute to it, although they were entitled and encouraged to agree that they would refer all their disputes to it.

The Permanent Court was replaced in 1945, in the framework of the United Nations, by the International Court of Justice, defined by the Charter[46] as the

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41 M. RUBINO-SAMMARTANO, *Le 'Tronc Commun' des Lois nationales en présence (réflexion sur le droit applicable par l'arbitre international). Clunet* 1987, 133; see also B. ANCEL, *The Tronc Commun Doctrine: Logics and Experience* in 7 *J. Int. Arb.* 3, 1990, at 65.

42 U.N. Convention, July 29, 1899, see J.B. SCOTT, *The Hague Convention and Declaration of 1899 and of 1907*, at 1 *et seq.*

43 The Hague Convention October 18, 1907 see *supra* J.B. SCOTT, note 42.

44 Entered into in Washington on May 15, 1914.

45 Resolution of the Assembly of the League of Nations, December 13, 1920.

46 Charter of the Organisation of the United Nations and By Laws of the International Court of Justice, S. Francisco, June 26, 1945.

body entrusted with the determination of the disputes submitted to it by the parties by consent or in certain cases[47] upon the request only of one party.

These bodies, although structured as permanent jurisdictional bodies, might be treated as public law arbitral bodies or as combining arbitral and jurisdictional elements.

One should mention in this connection the *European Convention for the Peaceful Settlement of International Disputes.*[48]

International public law awards[49] have steadily applied international law principles. They have not created procedural rules but several arbitral procedural rules have been codified by the Hague Convention (1907).

The *Algiers Declaration*[50] and the *Convention for the Settlement of Investments Disputes,*[51] complete the scenario of international public arbitration and of international arbitration in investment disputes between States and nationals of other States.

6.4 CONCLUSIONS

In conclusion it is submitted that international arbitration law exists, a view which is supported by F*ramatome*:[52]

> a general principle, nowadays universally accepted in inter state relationships as well as in international relationships between private parties (be it considered as an international public policy principle, or an international trade usage or a principle accepted by the *jus gentium*, or by *international arbitration law* or by *lex mercatoria).*

This approach is in line also within the Santiago de Compostela resolution of the *Institute of International Law*,[53] which at art. 6 provides:

> The Parties have full authority to determine the procedural and substantive rules and principles that are to apply in arbitration. In particular
>
> i. a different source may be chosen for the rules and principles applicable to each issue that arises
>
> ii. these rules and principles may be derived from different legal systems as well as from a-national sources such as principles of

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47 Art 36, By Laws of the International Court of Justice.

48 Entered into on April 29, 1957.

49 Which have been published in *The Reports of International Arbitral Awards, United Nations* which consist of many volumes.

50 Algiers January 19, 1981, *International Legal Materials*, 1981, 223 *et seq.*

51 Washington March 18, 1965.

52 *Framatome v. Atomic Energy Organisation of Iran*, Award April 30, 1982, *Journal du Droit International*, 1986, 1102, with comments by DERAINS.

53 Passed on September 5 to 13, 1989, *Yearbook of Commercial Arbitration* 1991 at 233.

> international law, general principles of law and the usages of International commerce.
>
> To the extent the parties have left such issues open, the tribunal shall supply the necessary rules and principles drawing on the sources indicated in article 4.

This arbitration law which, as von Mehren[54] points out,

> can be exempted from the application of any and all domestic arbitration law.

may only be described as being international.

Amongst writers this view seems to be shared by Fragistas who in a study[55] (which after 40 years has not lost its relevance) defines as international the:

> arbitration which is detached from any national arbitration law and is solely subject to international law,

while it is authoritatively opposed by Pierre Mayer.

If this view is correct, international arbitration law is to be divided into international commercial arbitration law and international public arbitration law.

The former consists of multilateral and bilateral conventions, of international arbitration rules, of widely established principles and of an international public policy, both in the substantive and in the procedural areas.

The second one consists of multilateral conventions, of the arbitration rules of the international public arbitration bodies to which public law disputes were and are referred, and of international usages.

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[54] A.T. von MEHREN, *Explanatory note to the resolution adopted by the Institute of International Law* at the Santiago de Compostela session September 12, 1989.

[55] Ch. N. FRAGISTAS *Arbitrage étranger et arbitrage international en droit privé, Rev. Critique de droit international privé* 1960, 1.

CHAPTER 7

INTERNATIONAL PUBLIC LAW ARBITRATION

SUMMARY: 7.1. Arbitration and International Public Law Disputes – 7.2. Historical Development of International Public Law Arbitration – 7.3. The Permanent Court of Arbitration – 7.4. The International Court of Justice – 7.5. Settlement of International Trade Disputes – GATT and World Trade Organisation – 7.6. Main Features of International Public Law Arbitration – 7.7. Arbitration between States and Individuals. 7.8. Settlement of Other Public International Disputes

7.1 ARBITRATION AND INTERNATIONAL PUBLIC LAW DISPUTES

International public law arbitrations are proceedings for settling disputes between states[1] through an arbitral tribunal or a sole arbitrator. According to the definition in the Hague Convention (1907) for the Pacific Settlement of International Disputes:[2]

> International arbitration has for its object the settlement of disputes between States by judges of their own choice and on the basis of respect of law. Recourse to arbitrators implies an engagement to submit in good faith to the award.

The concept of inter-state dispute has been the subject of long studies by international public law scholars. In the relationships between states there are no central bodies which perform, according to the specialization rule, the tasks proper to a well- organized legal system (legislature, public administration and administration of justice); these functions are therefore decentralized and thus left to the members of the inter-state community.[3]

The typical method for forming general rules in the international community (the customs) has not been applied to produce arbitration rules and procedures valid for the inter-state community. Arbitral proceedings must consequently take their rules from the other main source of international rules, i.e. the Conventions.

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1 Regarding disputes between States and private individuals (frequently corporations) see *infra* Section 8.

2 Art. 37, The Hague Convention, October 18, 1907, which formed the Permanent Court of Arbitration and which can be read in the collections of treaties published in the various countries.

3 ARANGIO-RUIZ, *Controversie internationali* (International Disputes), *Enciclopedia del Diritto* (Legal Encyclopedia), X, at 383.

According to Morelli's definition, a dispute is the result of opposing positions taken by the various parties whenever their respective interests are conflicting: positions which consist in a claim by one state and its refusal by another one.[4] A dispute is consequently not just an opposition of interests: if it were so, as Arangio-Ruiz[5] has pointed out, states would be permanently in dispute.

Disputes are divided into legal and political disputes. The criteria frequently followed in order to distinguish between them are summarized by Arangio-Ruiz:[6] (a) the degree of importance of the subject of the dispute; (b) the distinction between matters governed by international public law and those not governed by it; (c) the nature of the arguments put forward by the parties or by one of them.

According to this author, the third criterion is the right one, but it may be construed in different ways. For example, according to Morelli:[7]

> There is a legal dispute when the reason of the claim is of legal nature and when, even if the claim is not grounded or its grounds are not of a legal nature, the defence to the claim is based on legal grounds.

All other disputes would be political. Also according to Kelsen:[8]

> legal disputes are those in which at least one of the parties bases its position on legal grounds ...

Nevertheless neither of these definitions, which have been chosen for the particular authority of their authors, seems to correspond to international practice. In fact, very frequently the party which bases its claim on legal grounds is faced with the other party's refusal to submit itself to an impartial decision based on them. For example, when Germany (1938) claimed the *Südetenland* from Czechoslovakia, the latter was in a position to oppose to such a claim its legal title to the territory as a consequence of the formation of Czechoslovakia and of the waiver to sovereignty on it in its favour by the Austrian-Hungarian Empire, to which it previously belonged. However, the matter could not be treated as a legal dispute since Germany did not accept that. Likewise, Italy did not succeed in convincing Austria to discuss in a legal context the dispute which arose in 1960 on the treatment of the German-speaking minority in Italy and the issue was debated before the United Nations,

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4 MORELLI, *Nozione ed elementi costitutivi della controversia internazionale* (Notions and requirements for an international dispute), *Riv. Dir.Int.*, 1960, 405 *et seq.*

5 ARANGIO-RUIZ, *Controversie internazionali, cit.*, at 387.

6 ARANGIO-RUIZ, *op. cit.*, at 392.

7 MORELLI, *Nozioni di diritto internazionale* (Notions of international law), 6th ed., Padova 1963, at 369.

8 The passage from Kelsen is quoted by ARANGIO-RUIZ, *op. cit., at* 388.

which is not an arbitral tribunal, but a political body, and which in fact recommended that the parties should open negotiations.

Political disputes, according to Morelli,[9] exist when:

> The state does not base its claim on the law, or on its rights, but on criteria of a different nature such as principles of justice, of fairness or on advisability and so on.

The friendly settlement of political disputes is generally reached through an agreement between the parties which involves the replacement, or amendment of existing Conventions or statutory provisions. For example, the dispute between Germany and Czechoslovakia ended with the transfer to Germany of that land to which Czechoslovakia had valid international title; in the dispute between Italy and Austria, the Republic of Italy issued internal statutory provisions which Austria accepted as corresponding to the treatment it had requested for its minority in Italy. Political disputes thus frequently produce amendments to statutory provisions.

The dispute may also end by a waiver by the claimant, but in this case it is still merely a question of a conflict of interests and not of a legal dispute.

The above comments show the difference between the methods of settling political disputes and arbitration, even if the latter is also based on an agreement between the parties. Political disputes consist in conflicting claims which are frequently not based on legal rights but on convenience, while in case of arbitration the dispute is settled by an arbitral body by interpreting the existing rules.

7.2 Historical Development of International Public Law Arbitration

There are two essential requirements for international public law arbitration: (1) the proceedings must be based on the consent of the parties (including the appointment of the arbitrators); (2) parties must accept that the arbitrators' decision is binding. The requirement for the consent of the parties distinguishes arbitration from court jurisdiction, while the binding nature of the award distinguishes arbitration from other dispute resolution proceedings the result of which is not binding ,such as good offices, enquiries and mediation, and which in the absence of a commitment by the different states simply aim at facilitating a friendly settlement of the dispute by providing the litigants with more information so that they can more easily reach an agreement.

In ancient times and also in the Middle Ages, arbitration was used to resolve international public law disputes even if at that time the notion of international public law was different from today, when it is seen as statutory provisions

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[9] MORELLI, *op. cit.*, at 369.

directed only to the states.[10] Even later disputes between states were referred to a head of state (the Pope, an Emperor, a King). Amongst Sovereigns acting as arbitrators, one can name King Louis XI of France, the Czar of Russia in *Maria da Luz*[11] and the Pope in the dispute over the *Beagle Canal.*

International public law arbitration was used much less at the beginning of modern times and was formalized by the Yay Convention (187).[12] The Yay Treaty was later replaced by the Treaty of Ghent. Well known are the 'Alabama' proceedings:[13]

> The 'Alabama' was a warship built in England for the Confederates during the Civil War in the United States. When the government formed by the Northern States – which became the lawful representative of the United States – complained of breach of neutrality, the Confederates, to avoid its confiscation by the English authorities, removed the ship from the yards and completed it with supplies from English ships while it was in the Azores. Once the 'Alabama' was completed, it caused vast damage to Northern maritime trade: it was said that before being sunk off Cherbourg in 1864 it had sent to the bottom 70 vessels belonging to the United States. The United States were outraged at England, which refused to be held responsible for the damage caused by the ship. However, in the end England agreed to enter into an arbitration agreement, under which a court of arbitration was formed; the parties dictated the

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[10] For the modern aspect see CONFORTI, *Diritto internazionale* (International law), 3rd ed., Naples 1987, at 407; CAFARI PANICO, *L'inchiesta internazionale come strumento di soluzione pacifica delle controversie tra Stati* (International enquiry as an instrument for the peaceful resolution of interstate disputes), *Diritto Internazionale,* 1971, I at *460 et seq.;* GIULIANO, *Considerazioni sulla 'via diplomatica' per la soluzione pacifica di controversie tra Stati* (Comments on the 'diplomatic procedure' for the peaceful resolution of interstate disputes), *Comunicazioni e studi Ist. dir. int. e str.,* Milan University, XIV *Il processo internazionale. Studi in onore di G. MORELLI,* at 365 *et seq*; CAPOTORTI, *Sugli aspetti quasi arbitrali di talune forme di conciliazione* (On the quasi-arbitral aspects of some conciliation procedures), *ibidem,* at 137 *et seq.* Several authors describe *conciliation* as independent proceedings, grouping under this class procedures which are fairly different from each other.

[11] P. LALIVE, *Public Policy and Arbitral Procedures*, ICCA Congress, New York 1986.

[12] From the name of the US Secretary of State who entered into such a Convention with Great Britain. That was the basis for several arbitrations between those two States and was followed by several other similar Conventions between the United States and Latin American countries immediately after their independence.

[13] The dispute was decided by an arbitral tribunal consisting of two representatives of the litigants and by three members respectively appointed by the President of the Swiss Federation, by the Emperor of Brazil and the King of Italy (the latter appointed Count Sclopis, a politician and scholar, who was appointed Chairman of the arbitral tribunal). Important for the history of international law, Alabama was equally important for the history of Geneva. The 'Alabama' room can still be seen today in the old Hotel de Ville. In that same room some years before, on August 22, 1864, the first Red Cross Convention was drawn up.

> rules which the arbitrators had to apply. These stated that a neutral government has a duty:
>
> a) to prevent the construction and the fitting-out in its territory of ships destined to operate against a state with which the former is at peace;
>
> b) not to allow any of the parties to that war to use its ports as a base for naval operations;
>
> c) to prevent with due diligence breaches of the obligations and duties above stated.

The arbitral tribunal met in Geneva and on September 14, 1872 made its award which declared that Great Britain had not respected its neutral status and was therefore ordered to pay substantial damages.

7.3 The Permanent Court of Arbitration

Nevertheless, at the end of the last century there were no general rules – even if formed with the consent of the parties – on the formation of international public law arbitral tribunals and no standard rules for arbitrators applicable to a series of disputes. These rules were all drawn up during the First Peace Conference in The Hague (1899), during which a Convention for the Pacific Settlement of International Disputes was drafted. This was reviewed during a Second Conference in 1907. The multilateral conventions governing international public law arbitration are thus the Hague Conventions (1899)[14] and (1907)[15] which formed the Permanent Court of Arbitration.

Various treaties or agreements refer to them, such as the Treaty between Italy and the United States,[16] which under Art. 1 submits to this kind of arbitration:

> all disputes concerning international trade (in which the Contracting States are involved) which it has not been possible to settle through diplomatic channels

which have not been settled by the Permanent International Committee, formed under the Convention between Italy and the United States and:[17]

> which because of their nature are capable of a legal solution.

The Hague Conventions, besides governing good offices and mediation, form the first permanent public law arbitral body, the Permanent Court of

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[14] UN-Convention, July 29, 1899. Its text is published in J. B. SCOTT, *The Hague Convention and Declarations of 1899 and 1907*, at I *et seq.*

[15] See *supra* footnote 2.

[16] Entered into on April 19, 1928.

[17] Entered into in Washington on May 15, 1914.

Arbitration in The Hague, which still exists.[18] Under this Convention, the Contracting States are not obliged to submit their disputes to the Court, but confine themselves to declaring it is desirable that disputes related to the interpretation or application of international treaties be referred to arbitration:

> when the circumstances allow it.

The duty to submit international disputes to peaceful resolution appears for the first time in the Covenant of the League of Nations (1919):[19]

> If there should arise between them any dispute likely to lead to a rupture, they will submit the matter either to arbitration or judicial settlement or to enquiry by the Council.

In the period between 1920 and 1995 the Permanent Court of Arbitration was referred 17 cases, amongst which *Timoco* opposing Great Britain and Costarica, heard by U.S. Chief Justice Taft as arbitrator, and *Island of Palmas* opposing the Netherlands and the United States, heard by arbitrator Max Huber.

While recourse to the Permanent Court of Arbitration was limited, mixed arbitral tribunals appointed subsequent to the Peace Treaty of Versailles, gave rise to a great number of cases, dealing with damages claimed by the winning States. The Franco-German Tribunal heard above 20,000 cases, the Anglo-German and the German-Italian tribunals heard each around 10,000 cases. While the period 1850-1930 was very active in interstate arbitration, after that a decline was registered, apart from some boundary disputes.[20]

7.4 The International Court of Justice

The other international public law body, the Permanent Court of International Justice,[21] started to function in 1923 and, after the Second World War, was

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[18] However this is not, as its name would suggest, a permanent court with authority to take direct action, but merely an institution which aims at facilitating recourse to arbitration in the event of international disputes. An international *Bureau* has been formed for this purpose, controlled by a permanent administrative body with a list of potential arbitrators from which the arbitrators appointed to decide a specific dispute are chosen. The Court is reported to have examined about 25 disputes: 14 before the First World War; 6 in the period between the two World Wars; one in 1940; one in 1956 and one in 1970. In spite of the promotional effort made by the Secretary General of this body (with a circular letter in 1960 which stressed the advantages of referring disputes to the Court: quicker decisions and confidentiality vis-a-vis the International Court of Justice; and the possibility of deciding *ex aequo et bono),* its activity has not increased See SCHLOCHAUER, *Permanent Court of Arbitration, Encyclopedia of Public International Law,* 1 Settlement of Disputes, at 157 *et seq.*

[19] Art. 12, Covenant of the League of Nations.

[20] J. WERNER, *Interstate Political Arbitration,* 9 *J. Int. Arb.,*1, 69.

[21] Instituted in compliance with Art. 14 of the Covenant of the League of Nations.

replaced by the International Court of Justice provided for in the Charter of the United Nations.[22]

The International Court of Justice is the main judicial body of the United Nations and it is linked to the program of friendly settlement of disputes imposed by the United Nations on their member states.[23] Even if its jurisdiction depends each time on the willingness of the parties to submit to it, both the International Court of Justice and the Permanent Court of Arbitration were considered[24] as true international courts of justice and not as arbitral tribunals.

It is submitted that, as long as the states are free to choose whether to submit a specific dispute to the International Court of Justice, the latter might be considered as a public law arbitral body.

It could then be concluded that both Courts are arbitral bodies, whether they sit permanently or temporarily. As in private law the parties, when referring disputes to a third party and appointing him as an arbitrator, may also describe him as the judge of a dispute, likewise the states may certainly define these bodies as tribunals.

But as long as those bodies cannot sit unless the parties grant their consent as to that specific dispute, it is suggested that their arbitral, and not judicial, nature ought to be considered.

Several other international conventions specify a general duty to refer matters to arbitration even in cases of conflicts of interest, which are not legal disputes.[25] However, the efficacy of such conventions has been limited.

In spite of the statement made by the Charter of the United Nations[26] the International Court of Justice is:

> the main judicial body of the United Nations.

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22 Art. 92.

23 Art. 33.

24 According to this opinion, an international Tribunal must be distinguished from a Court of International Public Law Arbitration because it is permanent, there is a possibility to refer disputes to it at any time, and it has well-defined rules of procedure . Still this would not allow real use to be made of the proper criterion to distinguish arbitration. The only existing international tribunal, open exclusively to the states would consequently be the International Court of Justice (the Hague Court, also referred to as the World Court), while several international Courts exist at a regional level, such as the Court of Justice of the European Communities and the European Court of Human Rights.

25 Similarly, the Geneva General Resolution of September 26, 1928, (revised by a resolution of the General Assembly of the United Nations of April 28, 1949) or in Europe the *European Convention for the Peaceful Settlement of International Disputes* of April 29, 1957. See on such conventions VEEDROSS- SIMMA *Universelles Volkerrecht Theorie und Praxis* (Universal human rights, theory and practice); 3rd ed., Berlin 1984, at 96 et *seq.* and more specifically ARANGIO-RUIZ, *Controversie internazionali, op. cit.*, at 410 *et seq.*

26 Art. 92, United Nations Charter.

Provisions governing it can be found only in part in the Charter.[27] The other provisions are to be found in the Statute attached to the Charter, to which the member states of the United Nations, as well as other states which belong to that organization, have adhered.

Regarding the settlement of legal disputes, as seen above, a specific acceptance of the Court's jurisdiction is required,[28] related to a specific dispute or to a class of legal disputes.

A general role of the Court is established by the Charter, consisting in advising on legal issues,[29] at the request of the General Assembly or of the Security Council.

The Court consists of 15 members, chosen from a list prepared by the Secretary-General with the cooperation of the member states and which includes persons:

> of high moral standing, who possess the requirements set out in their respective states for the appointment to the highest judicial offices or who are scholars of well-known competence in international law (Art. 2 of the Court's Statute).

No state may have more than one Court member. The members are elected by the General Assembly and by the Security Council, each voting separately.[30] The candidates who obtain the absolute majority of votes in each of these two elections are appointed.[31] The judges of the Court do not represent the states of which they are citizens, but are appointed on a personal basis, are elected for nine years and may be reappointed on expiry of their term of office. If litigants have no citizens of their country amongst the judges, they can appoint an *ad hoc* judge. Under the Statute:[32]

> The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in the Treaties and Conventions in force.

Therefore, the dispute may be referred to the Court by a submission agreement, a Convention, an arbitration clause or even by conduct as in *Corfu Channel* (1949):[33]

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[27] Arts.92 and 96, United Nations Charter

[28] This is frequently treated as implied. In order to implement it, however, an amendment to the United Nations Charter (Art. 108) would be required.

[29] Art. 96, United Nations Charter.

[30] Art. 8, Statute.

[31] Art. 10, Statute.

[32] Art. 36.1 Statute

[33] Likewise in the case of the American diplomatic hostages in Tehran (1979), the Court's judgment of 1980 (in which Iran did not appear, since it challenged its jurisdiction). The Court in order to declare its jurisdiction, first took into account the letter sent to it by the Iranian revolutionary government; in its judgment the Court remarked that its

> Great Britain was claiming damages from Albania for mines (relicts of the Second World War) blowing up English warships in transit in Albanian territorial waters; the jurisdiction of the Court was maintained because Albania had written to the Court stating that it accepted the recommendation of the Security Council to refer the matter to the International Court of Justice.

Each Contracting State (i.e. all the member states of the United Nations, since the Statute is attached to the Charter of the United Nations) and also other states[34] may at any time declare, even by unilateral statement – i.e. by accepting the so called 'optional clause' – that they recognize the compulsory nature of the Court's jurisdiction in their relationship with other states which make a similar commitment.[35]

This should be the *compulsory* jurisdiction of the Court as opposed to the previous *consensual* jurisdiction; in reality, compulsory jurisdiction has been accepted only for limited classes of disputes. Those concerning the independence, territorial integrity, honour and vital interests of states have been excluded. Similarly, in the recent dispute *Nicaragua* v. *United States*:[36]

> The United States tried to avoid such proceedings taking place by declaring that their acceptance of the Court's jurisdiction did not apply, for a period of two years, to 'disputes with any Central American States or arising out of or related to events in Central America'.
>
> This statement was put before the Secretary-General of the United Nations on April 6; the application by Nicaragua to the Court declaring that the United States had breached various international conventions with Nicaragua, as well as various duties arising from international public law, and that it was the duty of the United States to cease using weapons against Nicaragua, was filed with the Clerk of the Court on April 9. A first procedural stage took place, at the end of which the Court unanimously declared its jurisdiction to hear the dispute since it concerned the interpretation or application of the Treaty of Friendship, Trade and Navigation between the USA and Nicaragua, dated January 21, 1956. The judgment was rendered on November 26, 1984; the United States notified the Court through their agent that the decision was 'manifestly wrong, both in fact and in law' and they did not attend the following stage which dealt with the merits of the claim and ended with the judg-

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jurisdiction arose from the Protocol which accompanied the Vienna Convention of 1961 on diplomatic relationships, and which entitles a party to apply to the Court for any issue concerning the interpretation of the Convention (from which the Iranian revolutionary government had not withdrawn).

34 In this way the jurisdiction of the Court was accepted by some states, such as Liechtenstein and San Marino, at a time when their joining the United Nations was not considered.

35 Art. 36.2, United Nations Charter.

36 The text of the judgment can be read in *Riv. dir. int.* 1986, at 350 *et seq.*

> ment June 27, 1986, in which the Court declared that the United States, with their activities 'in Nicaragua and against such country', had breached international public law customs which prohibit recourse to violence, the violation of sovereign rights and interference in the internal affairs of another state, and that in the end they had breached the Treaty of Friendship (1956).

Judgments rendered by the Court must be approved by the majority of the judges in attendance; if necessary, the President of the Court has a casting vote. The judgment must be fully reasoned in fact and in law. The by-laws of the Court, in line with common law practice, allow for insertion in the judgment of the dissenting opinion of one or more judges.[37] The judgment is final and binding for the litigant states.

The judgment is binding even if, according to the prevailing opinion,[38] it cannot be enforced. The statute of the International Court of Justice[39] provides, in the case of non-performance of the judgment, that an application may be made to the Security Council against the party in default and that the Council may adopt the measures which it deems fit to enforce the judgment. However, the enforcement of a judgment is always limited by its lack of the effects of an instrument directly enforceable in the national legal systems.

Still the general practice has construed the Convention as containing an implied commitment by the States to enforce the judgment, the non-compliance with which would be an international tort giving rise to international public law sanctions.[40]

The judgment is final since no appeal is allowed; a revision procedure is provided for only in exceptional cases.

The International Court of Justice may make judgments as does an ordinary Court of Justice; that is, it may order a payment or grant a right. However it has been stated[41] that the judgments of the International Court are different from those of an ordinary court in as much as the former, when applying the rules of natural justice, create 'new legal provisions' which may become a source of international public law.

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37 SERENI, *Le opinioni separate dei giudici di tribunali internazionali* (The Dissenting Opinion of Judges of International Courts), in MORTATI, *Le opinioni dissenzienti dei giudici costituzionali e internazionali* (The Dissenting Opinions of Constitutional and International Judges), Milan 1964, at 113.

38 PERASSI, *Lezioni di diritto internazionale* (Lectures on international law), 4th ed., Padova 1939, at 150; MORELLI, *La sentenza internazionale* (International Judgments), Padova, 1931, at 69; BOSCO, *Rapporti e Conflitti fra giurisdizioni internazionali* (Relationships and Conflicts between International Jurisdictions), Rome 1932, at 24.

39 Art. 94.

40 R. MONACO, *Manuale di diritto internazionale pubblico* (Manual of Public International Law), UTET 1971, at 611.

41 MORELLI, *Nozioni di diritto internazionale* (Notions of International Law), 7th ed., Padova 1967.

A monograph on the International Court has recently been produced.[42]

7.5 SETTLEMENT OF INTERNATIONAL TRADE DISPUTES (GATT AND WORLD TRADE ORGANISATION)

Settlement of international trade disputes was originally governed by Art. 23 of the 1947 *General Agreement on Tariffs and Trade* (GATT). It has been restated in Annex 2 to the *Marrakech Agreement* establishing the *World Trade Organisation*. This agreement includes the Disputes Settlement Understanding (DSU) the full title of which is the *Understanding on Rules and Procedures Governing the Settlement of Disputes.*

World Trade Organisation panels have the authority to investigate claims of violation of WTO obligations, following the Working Procedures contained in Annex 3 to the DSU.

Art. XV.1 of the GATT has further provided for cooperation with the International Monetary Fund, and art. XV.2 of GATT provides that the contracting parties will accept IME's determinations as to what constitutes a serious decline in the monetary reserves of a given part, or a very low level or a reasonable increase of them, as well as to whether action by a member of the two organisations complies with IMF's Chapter.[43]

Resolution of NAFTA Disputes

An Investor Dispute Resolution Mechanism has also been set out in the framework of the North American Free Trade Agreement.[44]

Resolution of International Financial Institutions Disputes

The approach of public international financial institutions to resolution of disputes and the different solutions adopted by them are also to be taken into account when analysing international public law arbitration.[45]

Resolution of International Civil Aviation Disputes

The *Convention of International Civil Aviation*[46] has adopted a resolution mechanism which provides for a decision by the Council of the International Civil Aviation Organisation. The Council's decision may be appealed either to the Court of Justice or to an arbitral tribunal. This alternative formula is provided for in multilateral agreements and in many bilateral agreements. The

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[42] ROSENNE, *The World Court: What It Is and How It Works*, NIJHOFF 1995.

[43] R.S.J. MARTHA, *Presumptions and Burden of Proof in World Trade Law*, 14 *J. Int. Arb.*, 1, 67; P. PESCATORE, *The Gatt Dispute Resolution Mechanism*, 10 *J. Int. Arb.* 1, 27.

[44] G.N. HORLICK – F.A. DE BUSK, *Dispute Resolution under NAFTA*, 10 *J. Int. Arb.*, 1, 51.

[45] M. AUGENBLICK – D.A. RIDGWAY, *Dispute Resolution in World Financial Institutions*, 10 *J. Int. Arb.*, 1, 73.

[46] Entered into in Chicago in 1994.

Council of ICAO may act as an arbitral body, and the ICJ may institute a Chamber to act as an arbitral tribunal.[47]

7.6 Main Features of International Public Law Arbitration

The fact that international public law arbitration has been practised for more than one century makes it possible to identify its main features.[48]

Several of its rules are codified by the *Hague Convention* (1907) for the *Pacific Settlement of International Disputes*. Arbitration may take place before an *ad hoc* body or a permanent tribunal. The *ad hoc* body is formed, after the dispute arises, by agreement between the parties, known as a submission agreement, which states the nature of the dispute and the composition of the Court. However, the submission agreement rarely states, as in Alabama, the exact rules of international law to be followed by the arbitrator.[49]

Permanent arbitral tribunals are formed, by consent of the parties, to decide disputes which may arise between them. Some of the agreements contain detailed rules on the formation of the tribunal, its jurisdiction and the procedural rules to be followed, in which case they are frequently referred to as

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[47] ATHERTON, The Resolution of International Civil Aviation Disputes, 9 *J. Int. Arb.* 1, 105.

[48] The main reporters of public international arbitration are: DE LAPRADELLE-POLITIS, *Recueil des arbitrages internationaux* (Report on international arbitrations) (3 vol., Paris 1905-1923-1954) which encompasses the period 1798-1875; MOORE, *International Adjudications.* Ancient and Modern (New York 1929-36) which covers years 1798-1817; LA FONTAINE, *Pasicrisie internationale. Histoire documentaire des arbitrages internationaux* (International Pasicrisie. Documentary history of international arbitration), 1794-1900 (Bern 1792). The *Reports of International Arbitral Awards* promoted by the United Nations from 1949 are devoted to modern arbitration: volumes 1-8 cover the period 1920-41; volumes 9-11 the period 1902-20; the volumes from 12 onward cover the period after 1941. Among the most relevant arbitral tribunals in the period after the Second World War it is worth mentioning the Conciliation Committees, instituted by the Peace Treaties, which worked in the first instance as conciliation bodies and, with the addition of one member, as arbitral tribunals and the Arbitral Committee on property, rights and interests in Germany.

The single arbitration which has attracted the greatest attention in the last years is that related to the *Beagle Channel*, a channel located at the southern tip of the American continent and which unites the Atlantic and the Pacific Ocean. At the entrance to the channel, from the Atlantic, are three islands which had been the subject of a dispute since 1881 between Argentina and Chile. When the parties eventually reached an agreement on arbitration and the arbitral tribunal (consisting entirely of British arbitrators) made its award (1977), Argentina rejected it and declared its intention to refer the dispute to the Hague Court. Eventually the parties agreed to submit the dispute to the arbitration of Pope John Paul II, and on October 4, 1984 they accepted his decision.

[49] Sometimes however one can find regulations on specific issues. Fore example, in the Treaty which referred to arbitration the disputes concerning the boundaries between British Guyana and Venezuela, it was established that the possession of a territory for more than 50 years gives title to property.

primary arbitration agreements; other agreements contain an arbitral clause for the settlement by arbitration of certain disputes which could arise between the parties, and in particular all those which might damage the friendly relationship between them.

In general, it can be said that there are two different types of international public law arbitration agreements: on the one hand, those which merely express an intention subsequently to refer a dispute to arbitration and, on the other hand, those which refer the dispute to arbitration and provide for the enforcement of the award by legal means. The United Nations Commission on International Trade Law which takes care of the codification of international law, has been trying since its first meetings (1950) to draft a convention which could serve in general as an arbitration agreement. It has not managed to produce a Convention, but the General Assembly of the United Nations did approve its Model Rules on Arbitral Procedure in 1958, which also have a role in international practice and which inspired the 1985 UNCITRAL Model Law.

The composition of arbitral tribunals reflects the conventional nature of the procedure: each party appoints its arbitrator(s); who then choose the third (or fifth) arbitrator, who acts as Chairman of the panel and who may also be chosen directly by the parties.[50] If the parties do not agree on the Chairman of the arbitral tribunal, there are various ways of appointing him. The most frequent one is to give authority to the President of the International Court of Justice to appoint him. The arbitrators must fulfil requirements which are generally those of the Hague Convention.

Only states may be parties to international public law arbitration. However, the claim made by one state against another may arise from claims by individuals of one state against another state related to a conduct which the first state considers contrary to international law. In making such a claim the state discharges its task of diplomatic protection of its citizens. The scope of the jurisdiction of arbitral tribunals, when not stated in the arbitration agreement, frequently gives rise to disputes. As earlier discussed generally States take care to specify that their commitment to submit matters to arbitration does not apply to disputes which concern their vital interests or their independence.

There have been situations in which matters of a purely political nature have been referred to arbitration, and in which arbitrators have been given the authority to decide *ex aequo et bono.*

In the absence of any provision in the arbitration agreement concerning the applicable law, the arbitrator applies international law. As asserted by ICSID's Arbitral Tribunal (Jimenez de Arechaga, Chairman, El Mahdi and Pietrowski,

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[50] The method, no longer used, of entrusting the solution of a dispute to a Head of State as sole arbitrator has recently been used again in the Pope's arbitration of the *Beagle Channel* dispute (see *supra*, note 48).

arbitrators,) in *Southern Pacific Properties v. Arab Republic of Egypt*[51] the arbitral tribunal is not bound by the interpretation of State law by that state:

> The jurisprudence of the Permanent Court of International Justice and [of] the International Court of Justice makes clear that a Sovereign State's interpretation of its own consent to the jurisdiction of an international tribunal is not binding on the tribunal or determinative of jurisdictional issues.

The proceedings generally consist of two separate stages, one written and one oral, and the parties may appoint counsel and be represented by their agents. The oral stage is supervised by the Chairman of the Tribunal.

The award is generally final and without any right of appeal against it. It defines the dispute and must be performed in good faith. The 1907 Convention provides that any dispute arising over the construction and enforcement of the award has to be submitted, unless the parties have otherwise agreed, to the same body which has made the award. The Hague Convention does not provide for a review of the award. However, the parties may provide in the arbitration agreement for the arbitral tribunal to review its award on request if new facts are discovered, which were not revealed during the proceedings, and which have a decisive influence.

The *Institut de Droit International,* in its *Projet de règlement pour la procedure arbitrale internationale,* in 1875, states that an award will be null in the following situations: invalidity of the arbitration agreement, corruption of the arbitrators, excess of arbitrators' powers and substantial error in law. While the first two situations are mainly theoretical, the last two have frequently occurred in particular when international public law arbitration first began, even if the awards have not been treated as null and void, but have simply been revised.

The difficulties of inter-state arbitration and the tendency towards permanent international courts are highlighted by Böckstiegel.[52]

7.7 Arbitration between States and Individuals

Since the end of the Second World War, the practice has developed of arbitration between states and private individuals. A brief reference to it will be made here, since it will be dealt with in more detail in another part of this study. On the one hand these disputes do not concern international public law. On the other hand, the state frequently tries to avoid being placed on the same footing as the other litigant and tries to obtain recognition of its sovereign prerogatives even in a private dispute.

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[51] *Yearbook Commercial Arbitration* 1991, at 21.

[52] K. BÖCKSTIEGEL, *The Effectiveness of Inter-State Arbitration in Political Turmoil,* 1 *J. Int. Arb.* 1993, 43.

The first arbitrations of this type arose from agreements, containing an arbitral clause, entered into between a state and an oil company. It has been questioned whether these contracts come under domestic or international law; some scholars have referred to 'quasi-international law' in this connection.[53]

These arbitrations were followed by others concerning commodities or large supply or construction contracts, or investments by traders in another state.

In this respect international practice has consequently developed sophisticated contracts which frequently provide: (a) a choice of law by which the parties avoid the contract being governed, in whole or in part, exclusively by the law of one of the parties to the contract; (b) a stabilization or unchangeability clause by which the parties avoid the state validly changing unilaterally its duties or rights under the contract by modifying its legislation; (c) a clause providing for international arbitration, by which the parties avoid future disputes being decided by the courts of one state.

In spite of this, the applicable law is not always clearly defined in contracts between states and private individuals. In this situation the arbitrators are frequently in difficulty since they cannot ignore the fact that one of the litigants is a sovereign state and must also take into account that they are dealing with commercial agreements. The problem was faced in *Aramco,* the first arbitration of this series.[54]

An American company, which had been granted the right to extract and transport oil from Saudi Arabia, complained that the government had subsequently granted a priority right to a Saudi company -formed by the Greek

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[53] On this issue see G. CASSONI, *I contratti di concessione stipulati fra Stati o enti pubblici statali e società commerciali straniere* (The Granting of Rights by States or Public Bodies to Foreign Commercial Companies), *Diritto Internazionale, 1965,* I, 235 *et seq.;* VERDROSS, *Quasi international agreements and international economic transactions, The Yearbook of World Affairs,* 1964, at 230 *et seq.;* G. SACERDOTI, *I contratti tra Stati e stranieri nel diritto internazionale* (Contracts between States and Foreigners in International Law), Milan, 1972; A. GIARDINA, *State contracts :national versus international law, Italian Yearbook of !nternational Law,* Vol. 5 (I98~81), at 147 *et seq.;* P. LALIVE, *Contrats entre Etats ou Entreprises étatiques et personnes privées. Développements récents* (Contracts between States or Government Corporations and Private Companies. Recent developments), *Recueil des Cours, Acad. de droit int. de La Haye,* Vol. 181 (1983), at 9 *et seq.;* SINAGRA, *Natura e contenuto della internazionalità dei contratti* (Nature and Contents of International Contracts). *Il diritto internazionale al tempo della sua codificazione, Studi in onore di Roberto Ago,* Milan, 1987, at 349-382.

[54] *Saudi Arabia v. Arabian American Oil Company.* The English text of the award is published in *International Law Reports,* vol. 27 (1963), at 117 et *seq.* The French version, an unofficial translation, can be read in *Revue critique de droit international privé* 1963 at 272 *et seq.* On their role see the study by BATIFFOL, *La sentence Aramco et le droit international privé* (The Aramco Award and Private International Law), *ibidem,* 1964 at 647 *et seq.* and the study by VERDROSS, *Quasi international agreements* , see *supra* note 53.

businessman Onassis – to transport all the oil extracted in that country. The arbitral tribunal therefore had to decide which was the applicable law, since the agreement did not provide for it.

The arbitral tribunal pointed out that it was not bound to apply Saudi Arabian law, since the parties had agreed that their possible disputes would be settled by a tribunal outside Saudi Arabia: neither American nor Swiss law applied (the arbitration was taking place in Switzerland) because of the sovereign status enjoyed by Saudi Arabia. For this reason the arbitration proceedings had to be subject to international law. The arbitral tribunal

> by taking the circumstances of the case into consideration

since the nature of the dispute concerned rights which *lato sensu* were private, held:

> that the governing law should coincide with the economic milieu where the operation is to be carried out,

and it concluded that the Aramco agreement had not been affected by the Onassis contract because of the principle that vested rights are to be respected.

Two other conventions must be mentioned. Firstly, the Convention entered into on March 18, 1965 in Washington,[55] at the initiative of the World Bank, to settle disputes between states and nationals of other states related to investments, which produced the *International Centre for the Settlement of Investment Disputes: ICSID.*

Secondly, the Algiers Declarations[56] which formed the basis for the Iran-US Claims Tribunal for settling disputes even between nationals of one of such states and the other state. These agreements both aim at settling the abovementioned type of disputes.

7.8 SETTLEMENT OF OTHER PUBLIC INTERNATIONAL DISPUTES

The United Nations Compensation Commission

The United Nations Compensation Commission has been established to compensate claims made by individuals or states against Iraq as a consequence of the Gulf War.[57] It is not an arbitral tribunal, as clearly expressed in the Secretary General's report:[58]

> The Commission is not a court or an arbitral tribunal before which the parties appear, it is a political organ that performs an essentially fact

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55 See *supra* chapter 4.

56 See *supra* chapter 5.

57 Established by the United Nations Security Council on April 3, 1991 by Resolution no. 687.

58 S/22559.

> finding function of examining claims, verifying their validity, evaluating losses, assessing payment and resolving claims.

While its nature of political body may be arguable, the exclusion of any arbitral nature seems accurate.[59]

The U.N. Compensation Commission has been the object of many legal writings.[60]

The U.S. Foreign Claims Settlement Commission

The same nature has to be recognized to the U.S. Foreign Claims Settlement Commission which adjudicates claims of U.S. nationals against foreign Governments, and which has adjudicated 660,000 claims. As the Chair of such Commission defines it[61] is a:

> quasi judicial, independent agency of the United States Government within the U.S. Department of Justice.

The Permanent Court of Arbitration

On July 1, 1996 the Permanent Court of Arbitration has put into force Arbitration Rules governing arbitration between international organizations and individuals.

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[59] B. G. AFFAKI, *United Nations Compensation Commission. A New Era in Claims Settlement*, 10 *J. Int. Arb.* 3, 21.

[60] C. AZZAMORA, *Reflections on the U.N. Compensation Commission*, 9 *Arb. Int.* 4, 349; M. BALL, *The Iraq Claims Process – A Progress Report*, 9 *J. Int. Arb.* 1, 37; L. NEWMAN, *Dealing with Claims Arising out of the Gulf Crisis*, 7 *J. Int. Arb.* 4, 49; N.C. ULMER, *The Gulf War Claims Institution*, 10 *J. Int. Arb.* 1, 85.

[61] D.A. RIDGWAY, *The Legal Legacy of the Gulf War Claims against Iraq*, 13 *J. Int. Arb.* 1, 5.

CHAPTER 8

ARBITRATION OF COMMERCIAL DISPUTES BETWEEN A STATE AND A PRIVATE PARTY

SUMMARY: 8.1 International Arbitral Tribunals Alleged to Be Instruments of a Western Policy Detrimental to Developing Countries – 8.2 The Task of the Arbitral Tribunal to Apply the Contract and Law – 8.3 Temptations to Be Resisted

8.1 INTERNATIONAL ARBITRAL TRIBUNALS ALLEGED TO BE INSTRUMENTS OF A WESTERN POLICY DETRIMENTAL TO DEVELOPING COUNTRIES

The view has been expressed[1] that international commercial arbitration would be examined with suspicion from developing countries, since arbitration rules would favour private investors. Sornarajah and Maniruzzaman[2] support this view so fully that their arguments need to be examined in detail.

In their view, when colonisation was over, international arbitration between states would have replaced the use of *gun boat diplomacy*[3] International arbitration of investment disputes would have followed the path of arbitration between states.

Bias would transpire from the very substantive law to be applied, because of the efforts made to exclude the municipal law of the host state, and of the attempts made to equate investment contracts to international treaties, forgetting that the investor had no international law personality. The doctrine of quasi international agreements which was developed by Verdross[4] would therefore not survive.

Eventually references to international law, or to the general principles of law were aimed either at making them the substantive law of contract between a state and private parties, or at mitigating the possible excesses of the law of the host state. Stabilisation clauses by which the host state waived its right to alter the terms of a given contract by amending its legislation were also introduced in a further effort to control the municipal law.

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1 M. SORNARAJAH, *The Climate of international arbitration,* 8 J.Int.Arb. 4, 47.

2 A. F. M. MANIRUZZAMAN, *State contracts with aliens* , 9 J. Int.Arb. 4, 141.

3 As Sornarajah puts it.

4 A.VERDROSS, *Quasi international agreements and international commercial transactions* , (1964)18 YBW, 240.

The arbitration clause would complete such a design, in order to oust the jurisdiction of local courts, which could be biased in favour of the host state.

The final product of this mechanism, the award, would then – according to this doctrine – combine these various elements to the detriment of the host state.

While earlier awards applied the general principles of law only when the law of the host state contained no provision applicable to the contractual relationship in issue, the *Sapphire* award[5] held that the investment contract would by nature be subject to the general principles of law and not to the municipal law. In this way the doctrine of general principles of law was theorized.[6]

Subsequent awards have marked development. While the three Libyan awards, *Texaco,*[7] *BP*[8] *and Liamco*[9] held that disputes arising from investment contracts should be decided based on international public law, *Aminoil*[10] held that a state could commit itself not to nationalise an investment for a limited period of time, but not for such a substantial period of time that it might affect the progress of its country.

Sornarajah submits that none of the doctrines, which characterise investment contracts as contracts of international public law, withstands criticism.

As to *pacta sunt servanda,*[11] Sornarajah suggests that this principle was proper in the *laissez faire* doctrine but that it was eroded by legislation aiming to strike a more effective balance of power, in particular for consumer protection, and is now moderated by the *rebus sic stantibus principle,* so that it is no more inflexible.

He cites Spinosa who stated:

> no holder of state power can adhere to the sanctity of contract to the detriment of his own country without committing a crime.

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5 *Sapphire International Petroleum Ltd. v. The National Iranian Oil Company,* (1964) 13, I.C. L.Q. 1011.

6 MC NAIR, *The general principles of law recognized by civilized nations,* (1957) 33 BYLL, 4.

7 *Texas Overseas Petroleum Company and California Asiatic Oil Company v. The Government of the Libyan Arab Republic* ,(Dupuy, arb.) (1978) 17 *I.L.M.* 3.

8 *British Petroleum (Libya) Ltd v.The Government of the Libyan Arab Republic* (Lagergren, arb), (1979) 53 *L.L.R.* 297.

9 *Libyan American Oil Company v. The Government of the Libyan Arab Republic* (Mahmassani, arb.), (1982) 62 *L.L.R.* 14.

10 *American Independent Oil Company Inc. v. The Government of the State of Kuwait,* (Reuter,Sultan and Fitzmaurice,arb), (1982) 21 *I.L.M.* 976.

11 *Tractatus Theologicus politicus* (1670) cited in WEHBERG *Pacta sunt servanda,* (1959) 53 *A.J.F.L* 775.

As to *sanctity of property* rights, Sornarajah denies that international law protects in an unqualified way the right to property.

As to *acquired rights,* acquisition would not exclude the possibility that such right may subsequently be lost.

Sornarajah concludes by holding that such principles are not sufficient to affirm that state contracts with a foreign investor are subject to international law, rather than to municipal law.

As it was held in *Amoco*:[12]

> In no system of law are private interests permitted to prevail over duly established public interest, making impossible actions required for the public good. Rather private parties who contract with a government are entitled to fair compensation when measures of public policy are implemented at the expense of their contract rights.

The need not to destroy the equilibrium of the contract has forced in fact to take into account changed circumstances.

Bowett[13] has commented:

> If there is a general principle to be applied it is not the absolute sanctity of all contracts for no such principle exists,but rather the principle of the state party's exceptional prerogative powers in relation to the contract.

Provisions alternative to the internationalisation of state contracts were introduced. Sornarajah refers to the *Calvo clause*[14] aiming to reject international arbitration for the settlement of disputes arising from contracts with a foreign party.

In this perspective sovereignty over natural resources has been asserted. An international law of development, recognising a people's right to development has also been identified.[15] Sornarajah concludes that:

> Two competing sets of norms are at work.

Two positions have to be identified. One of them is the:

> universalisation of the Calvo clause

which excludes recourse to international arbitration in such disputes.

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[12] *Amoco International Finance Corporation v. The Government of the Islamic Republic of Iran et al.,* Iran U.S. Claims Tribunal July 14, 1987.

[13] D.W.BOWETT *Claims between States and private entities. The Twilight Zone of International Law,* 35 *Cath.Univ. L.Rev.* 1986, 4, 935, cited by MANIRUZZAMAN, *cit,* see *supra* note, 157.

[14] K.LIPSTEIN, *The Place of the Calvo clause in international law,* (1945) 24 BYLL.

[15] O. SCHACHTER, *The Evolving International Law of Development* (1976), 15, Col. J. Transl. L.1.

The other one:

> does not deny the relevance of international principles or of international arbitration,

provided they:

> apply the evolving principle of the international law of development.

This analysis is completed by a reference to ICSID arbitration. The Washington Convention while dealing with the applicable law provides that in the event of absence of a choice of law by the parties, not only the national law of the state party shall apply but also the rules of international law which may be applicable.

Sornarajah advocates that this provision should not be construed as bringing back international law but as enforcing:

> the rules associated with the international law of development"

with a view:

> [to] balance them with rules necessary to confer protection on investments.

In this way new rules may be created:

> acceptable to both parties.

The right of the state party unilaterally to modify the terms of the contract, into which it has entered, is emphasised by Maniruzzaman with the only proviso that this be done without an abuse of rights and in good faith. The writer suggests then:[16]

> to insert into the agreement clauses of reasonable and balanced terms providing for a mechanism of adjustment or renegotiation

and that the parties should foresee adaptation or termination of contract, the state party being under a duty to compensate the private entity for its exercise of its sovereign rights.

8.2 The Task of the Arbitral Tribunal to Apply the Contract and Law

A response to the delicate question whether arbitration aims to favour developed countries will be attempted after making several preliminary comments.

Unhappiness is a normal consequence of the loss of a dispute. This is occasionally due to that party being wrong, while in other situations that party may have been right and the arbitrator wrong.

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[16] See *supra* note 2.

That applies both to arbitral proceedings and to court litigation . Unhappiness may be felt even more by developing countries should they realise that they have not conducted the proceedings in the best way.

Unfortunately developing countries have frequently lost arbitration in the past. On some occasions this may have been due to their having been wrong. However, as it was earlier suggested, they may not have always been wrong. If that is the case, something else must have gone wrong. In an earlier study[17] it was suggested that this may be due to various reasons, such as:

- not having raised from the outset adequate information about the other contracting party;
- not having identified the best contractual protection;
- not having negotiated an appropriate arbitration agreement;
- not having been familiar enough with arbitration;
- not having performed the contract in compliance with its time requirements and other terms;
- not having conducted the arbitral proceedings in the best way possible.

A state entity will ensure that the rights and duties of the parties be clearly stated in the contract and that if the contract is terminated for excessive hardship, or if the factual premise of the meeting of minds fails[18] – situation which is not too distant from the common law doctrine of frustration –, the consequences of this situation are to be clearly dealt with. Likewise the right of a party not to perform if the other party has not performed may be helpful.

Lack of negotiation of a suitable arbitration agreement may produce serious damage. The choice of a very distant venue or the acceptance that the proceedings should be conducted in the language of the other contracting party may place the developing country in a weak position. Similarly the choice of an arbitrator – if not made in a careful manner – may be decisive.

Arbitration rules such as those of the European Court of Arbitration (which allow a review of the merits by an appellate arbitral tribunal) – may be helpful. Choice of Counsel too has to be made taking into account the specialities of the dispute. A team consisting of a local and international Counsel may be advisable.

Rigid sanctity of contracts is not always compulsory. But it is suggested that one should avoid a contracting party – including a state party – running away from its commitments by twisting some contract term or doctrine to its advantage. When changes of the situation occur, the needs of the country so

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[17] M.RUBINO-SAMMARTANO, *Developing Countries vis-a-vis International Arbitration,* 13 *J.Int.Arb.* 1, 21.

[18] YELPAALA, RUBINO-SAMMARTANO-CAMPBELL, *Drafting and Enforcing Contracts in Civil and Common Law Jurisdictions,* Kluwer Deventer 1986, at 69.

require, or in case of excessive hardship, States may have to modify their laws and ask to be released from their contracts.

The private party may not be entitled to oppose it. Here, depending on the circumstances, it may be entitled to adequate compensation.

There should be a fairly wide consensus on such basic points.

One may now turn to international arbitral tribunals in disputes between states and private parties. Apart from insufficient or unsatisfactory grounds which may occasionally be given in some awards, (such as choice of law or doctrines which are arguable), it is suggested that one should concentrate on the essence of the decision. Sometimes the right decision may have been reached even if not all its reasons are shared.

Some awards may be wrong. This is unfortunately inevitable just as in court proceedings. What seems vital is to identify the fundamental reasons for this mishap and to learn the lesson for future disputes.

A review of the merits of the decision by an appellate arbitral tribunal both as to points of fact and of law, may – as earlier suggested – be a way to reduce risks.

In any event, it is suggested that no arbitral tribunal, which deserves this title, favours a party or a policy, be it that of a developed or of a developing country.

As earlier stated:[19]

> The arbitrator's task it to be neither conservatory nor revolutionary, to protect neither the investor nor the government but to apply fairly the contract and the law.

It is submitted that once the agreement has been carefully drafted and the arbitrator, the venue, the language and the applicable procedural and substantive laws have been duly chosen, international arbitration as a rule is the *proper mechanism* to settle international disputes.

8.3 Temptations to Be Resisted

Therefore it is suggested that arbitral tribunals, if properly selected, may not be seen as instruments of anything else but justice.

It has further to to be accepted that all litigants want to win and that many of them tend to use all available arguments and attacks. When a litigant is a government or a government owned entity, it may be difficult for it to forget that in business life it disposes of a very wide authority and it may be tempting for it to try to use as much of its authority as possible.

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[19] See *supra* note 17.

Governments may not disregard the needs of their citizens in order that the country develops its potential. In extraordinary situations it may then become necessary for a government to terminate a contract earlier even if no legal grounds justifying it exist. This is in line with the conclusions drawn by the arbitral tribunal in *Amoco*:[20]

> The State is entitled to withdraw the approval it granted for reasons which could not be invoked by a private contracting entity.

The government should then be liable to pay adequate compensation to the other contracting party.

Apart from extraordinary situations, likewise governments will have to resist the temptation to use the authority which they have in their own state in order to obtain an undue advantage on the other contracting party. A similar situation arose in *Agip*[21] where the government of Congo, after nationalising the local subsidiary of the foreign investor, occupied its offices through its army and refused to deliver to the investor documents contained therein which were needed for the arbitral proceedings. That gave rise to an application by the investor to the ICSID tribunal for an injunction to the government of Congo to allow the investor to retrieve its documents and the tribunal issued a recommendation to the government to do so.[22]

Similarity in *Strau*[23] the Greek government was involved in a dispute with a refinery which claimed damages for undue rescission of the contract. The arbitral tribunal found against the government. The government then caused a statute to be passed which entitled it to repudiate contracts and expressly declared that the specific arbitral proceedings in issue, as well as the awards rendered in such proceedings, were annulled.[24]

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[20] *Amoco International Finance Corporation v. The Government of the Islamic Republic of Iran et al*, Iran-US Claims Tribunal July 14, 1987.

[21] *Agip v. People's Republic of Congo,* ICSID arbitral award November 30, 1979, *Riv. dir. int.* 1981, 863.

[22] P.BERNARDINI, *Le prime esperienze arbitrali del Centro Internazionale per il regolamento del contenzioso relativo ad investimenti, Riv. dir. int. priv. proc.* 1981, 36.

[23] *Raffineries grécques Strau et al. v.Grèce,* Cour Européenne des droits de l'homme, series A, volume 301 B, Court's judgments.

[24] A.BENCHENEB, *La contrariété à la Convention Européenne des droits de l'homme d'une loi anéantissant une sentence arbitrale, Rev. arb.* 1996, 181.

CHAPTER 9

DISPUTES CAPABLE OF ARBITRATION AND ARBITRAL REMEDIES

SUMMARY: 9.1 Disputes Capable of Settlement by Arbitration – 9.2 Connection between Disputes, which are Capable of Settlement by Arbitration, and Disputes which are not Capable of Settlement by Arbitration – 9.3 Arbitral Remedies – 9.4 Punitive Damages – 9.5 Pre- and Post-Award Interest – 9.6 Authority to Amend or Terminate a Legal Relationship – 9.7 Treble Damages

9.1. DISPUTES CAPABLE OF SETTLEMENT BY ARBITRATION

It is generally agreed in the various national legal systems that not all disputes are capable of settlement by arbitration. However, they do not always follow the same method in order to identify the disputes which are capable of settlement by arbitration. In some of them this is done by stating which disputes are capable of settlement by arbitration, in others by excluding those that are not. Let us examine first the disputes covered by international conventions and by arbitration rules.

International Conventions

The Geneva Convention (1923) defines[1] as capable of settlement by arbitration:

> any differences that may arise in connection with such contract relating to commercial matters or to any other matter capable of settlement by arbitration.

The New York Convention (1958)[2] concerns differences:

> 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.

The Washington Convention (1965)[3] applies only to:

> any legal dispute arising directly out of an investment between a Contracting State (or any constituent subdivision or agency of a Contracting

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1 Art. 1, Geneva Protocol (1923).

2 Art. II, New York Convention (1958).

3 Art. 25, Washington Conveniton (1965)

> State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.

There are consequently several requirements for disputes to be capable of settlement by arbitration under the Washington Convention:

1. a subjective requirement concerning the nature of the parties;
2. an objective requirement concerning the direct relationship with an investment;
3. consent of the parties.

The first two requirements are then not sufficient to start up the arbitration mechanism.

The United Nations' Model Law (1985)[4] refers to:

> disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

Arbitration rules

The arbitration rules generally leave it to the applicable law to identify the disputes which are capable of settlement by arbitration.

The rules of the International Chamber of Commerce specify[5] that they apply to arbitration agreements for settling:

> business disputes of an international character.

The Commercial Arbitration Rules of the American Arbitration Association provide that:[6]

> The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association (AAA) or under its Commercial Arbitration Rules.

The Rules of the London Court of International Arbitration do not seem to put a limit on the disputes which may be referred to it.[7] The Uncitral Arbitration Rules (1976)[8] refer to:

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4 Art. 7, United Nations' Model Law (1985).

5 Art. 1, ICC Rules.

6 Art. 1, American Arbitration Association Rules, as amended and in force as from March 1, 1986.

7 If one compares the preamble to the London Court of Arbitration Rules (January 1, 1985) with the preamble of the previous rules (January 1, 1981), one finds that the limit consisting in the requirement that one of the parties normally reside, or carry on business, or be formed, run or be controlled outside the United Kingdom, has been removed.

8 Premise No. 1 to the Rules adopted by the General Assembly on December 15, 1976.

> disputes arising in the context of international commercial relations.

The Rules of the European Court of Arbitration make[9] provision for wide application:

> These rules apply to all arbitral proceedings which come within the jurisdiction of the Court of Arbitration.

The Inter-American Convention states:[10]

> Where the parties to a contract have agreed in writing that disputes in relation to that contract shall be referred to arbitration, under the IACAC Arbitration rules, then such disputes shall be settled in accordance with these rules, subject to such modification as the parties may agree in writing.

The International Rules of the Milan Chamber of Arbitration[11] provide that:

> Any person who is a party to a dispute appertaining to international business relationships may make a request in writing for the Chamber of International Arbitration to organize conciliation proceedings.

The rules of the Arbitration Institute of the Stockholm Chamber of Commerce,[12] largely used in national commercial disputes and also widely accepted internationally in view of Sweden's independent views and neutrality, do not limit their applicability to given classes of disputes.

An analysis of international conventions and arbitration rules shows that there are two tendencies: firstly, to consider as many disputes as possible to be capable of settlement by arbitration and, secondly, to identify the disputes which are capable of settlement by arbitration rather than concentrate on identifying the excluded ones.

National legal systems

If one examines the classes of disputes which may not be referred to arbitration under the applicable law, it appears that national legal systems frequently prefer to list non-arbitrable disputes.

Italian law[13] excludes the disputes:

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9 Preamble no. 8.

10 Art. 1.1, Rules of the Inter-American Commercial Arbitration Commission, formed in 1934 in consequence of Resolution XLI of the 7th International Conference of the American States held in Montevideo in December, 1933.

11 Art. 12, International Rules of the Chamber of National and International Arbitration of Milan.

12 See the rules of the Arbitration Institute of the Stockholm Chamber of Commerce adopted on January 1, 1988.

13 Sections 806 and 808, Italian Rules of Civil Procedure.

> foreseen by Sections 409 and 442, [those] which concern issues related to personal status, to separation between spouses and all those which cannot be settled (Section 1966, Civil Code).

Previously in Italy an arbitration clause could not be inserted in labour or similar agreements.[14]

English law does not seem to have worked out a general way of distinguishing disputes capable of settlement by arbitration and disputes not capable of settlement by arbitration but rather proceeds in accordance with its traditions on a case by case basis. Arbitrators cannot decide, for example, disputes related to criminal law issues or family rights, or those which fall within the jurisdiction of the Admiralty, or concern insolvency or which are in any way contrary to public policy or arise from an 'illegal contract', i.e. a contract which breaks the law thus nullifying its arbitration clause.[15]

In French law one limit is the invalidity of arbitration clauses in non-commercial disputes. In that connection only disputes which have already arisen may be referred to arbitration.[16]

In France a dispute is treated as commercial when it derives from a commercial relationship, not in the wide sense in which this term is applied (for example in the US) but as a relationship between two traders, not including though relationships between a trader and a non trader. It is interesting to note that while French law still applies this rule as to domestic disputes, which if not commercial may be referred to arbitration only after the dispute has arisen, France – which had taken advantage of the right to limit the New York Convention to commercial disputes – has later withdrawn such a reservation. Arbitration clauses, which fall under the New York Convention, may then be entered into even outside commercial disputes. This may open the door to a similar attitude regarding domestic disputes in the future.[17] This would be in line with the purpose expressed in the old French precedent in *Alliance v. Premier*:[18]

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[14] However this prohibition, which once was absolute, has consequently been modified by the possibility of referring labour disputes to an *arbitrato irrituale* (joint mandate to settle), granted by collective economic agreements; see *Arbitration Law in Europe,* at 221 (5).

[15] On this issue see MUSTILL and BOYD, *Commercial Arbitration,* London, 1982, at 117 *et seq.*, and *Arbitration Law in Europe.* 1981, at 163.

[16] Sections 2059-2060 Civil Code (Statute No. 72-626 of June, 1972) and J. ROBERT, *Droit Interne, Droit International Privé*, Paris, 1983, at 21.

[17] P. FOUCHARD, *La levée par la France de sa reserve de commercialité pour l'application de la Convention de New York, Rev. arb.* 1990, 571.

[18] *Alliance v. Premier*, Court of Cassation July 10, 1843 *Rev. arb.* 1992, 399, the French leading precedent in support of the prohibition to non traders to refer future disputes to arbitration.

> to protect citizens against their own lack of care, which can induce them to enter – without much attention – into agreements referring future disputes to arbitration.

In Fouchard's opinion this caveat aims to protect the weaker party in general, and not just to prevent referral of future disputes by non traders.

Disputes related to insolvency, industrial property and labour disputes are also amongst the disputes not capable of settlement by arbitration.[19]

In Swiss law the *Concordat*[20] states that it shall not affect the application of rules of arbitration of private or public institutions or of arbitration compromises or clauses insofar as they do not contravene any of the mandatory provisions of this Convention.

The *Concordat* also states[21] that the arbitration may relate to any right of which the parties may freely dispose, unless the suit falls within the exclusive jurisdiction of a State authority by virtue of a mandatory provision of the law.

Under Swiss law even disputes on intellectual property rights are capable of settlement by arbitration and awards declaring the nullity of a patent have been recognized[22] as being capable of settlement by arbitration. Likewise the Swiss Federal Court[23] has held that arbitration may decide the issue of whether a cooperation agreement is compatible with the Treaty of Rome.

In Spain the 1988 Arbitration Act provides:[24]

> By entering into an arbitration agreement individuals or legal entities may refer to one or more arbitrators the decision of disputes arisen or which may arise as to matters of which they can dispose according to the law.

and lists[25] the following matters which:

> are not capable of settlement by arbitration:
>
> a) Matters as to which a final judgment has been made except for matters related to its enforcement;
>
> b) Matters which cannot be severed from others of which the parties cannot dispose;

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19 On this issue see J. ROBERT, *op. cit.*, at 33 *et seq.*

20 Art. 1, Swiss Concordat, March 26, 1969, which can be consulted in BERNARDINI, *op. cit.*, at 202.

21 See Art. 5, Swiss Concordat, March 26, 1969, *ibidem.*

22 Federal Office of Intellectual Property December 15, 1975 (PMMBL 1976/9).

23 Swiss Federal Court, April 28, 1992, *S.SA. (Spain) v. G. S.SA. (Belgium), ASA Bulletin* 1992, 368.

24 Art. 1, 1988 Arbitration Act (unofficial translation). The English translation of Spanish Arbitration Law can be found in B.M. CREMADES, *Arbitration in Spain*, Butterworks, La Ley & Carl Heymanns Vorlage KG, 1991 at 146-161.

25 Art. 2.

c) Matters in which the Attorney General must intervene to act for those who are unable to act due to lack of capacity to act or of a duly authorized officer.

Labour disputes are excluded from the scope of this Statute.

In Japanese law,[26] the disputes which cannot be settled cannot be referred to arbitration. This is the case of some disputes concerning the status of individuals, inheritances, trademarks or patents, bankruptcy or anti-trust breaches which cannot be arbitrated. In Argentine law[27] matters which cannot be settled such as disputes relating to the status and capacity of individuals, public property, the validity of wills, *bonos mores,* criminal law, many issues related to bankruptcy or issues regulated by anti-trust laws are not capable of settlement by arbitration. Brazilian law[28] excludes from arbitration rights which are not within the parties' powers such as issues related to the status of individuals, family matters, insolvency or public policy in general.

In the United States, the Federal Arbitration Act has created a strong presumption that disputes are capable of settlement by arbitration. The Supreme Court in *Moses H. Cone*[29] has held that [the FAA] establishes that, as a matter of federal law, any doubts concerning whether an issue is capable of settlement by arbitration issue should be resolved in favour of arbitration.

Since *Gilmer*[30] only a few disputes arising from employment claims are generally held not to be capable of settlement by arbitration. However the issue is still debated in many courts. Consumer claims, even if the consumer frequently signs a standard form contract, and lacks full information and equal bargaining power, have been held by the Supreme Court in *Allied Bruce*[31] to be capable of settlement by arbitration.

Family law disputes tend to be viewed as being within the exclusive jurisdiction of courts. Nevertheless some state courts have held that child custody and child support disputes were capable of settlement by arbitration.

Tort claims have overcome in *Porta John*[32] the obstacle of lack of connection with the subject matter of the contract and have then met the obstacle of state law. The test was met in mass tort claims, like in *Dalkon Schield,*[33] where

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[26] Section 786. Civil Procedure Code, SIMMONDS *et al, op. cit.,* at 87.

[27] Art. 764, Statute February 1, 1968, No. 17.454, which can be consulted in *Yearbook Commercial Arbitration,* 1978, vol.111, at 20.

[28] Section 1072 Civil Procedure Code; Sections 1037-1048 Civil Code, a summary of which can be consulted in *Yearbook Commercial Arbitration,* 1978, vol. 111, at 34.

[29] *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.* 460, U.S. 1 at 24-25 (1983).

[30] *Gilmer v. Interstate Johnson Lane Co.*, 500 U.S. 20 (1991).

[31] *Allied Bruce Terminix Cos. v. Dobson*, 115 S. Ct 834 at 843 (1995).

[32] *Dusold v. Porta John Corp.*, 807 P2nd 526 (Ariz. Ct App. 1990).

[33] A further U.S. judgment.

about 200,000 claimants pressed for payment and the bankruptcy court approved that the settlement agreement could grant the option to arbitrate. The traditional view that bankruptcy disputes are not capable of settlement by arbitrators has not prevailed on the trend to favour international arbitration. Receiver initiated claims have been held in *Hayes*[34] to be capable of settlement by arbitration.

Likewise in *Scherk*[35] international disputes related to anti-trust claims have been held to be capable of settlement by arbitration. Similarly in *Mitsubishi*[36] and in *Shearson*[37] echoed by *Kerr-McGee*,[38] as to claims involving violations of the Racketeer Influenced Corrupt Organizations Act (RICO), international arbitration was held to be valid. To this effect reference is made to contractual arbitration, as compulsory binding arbitration, a term which does not refer – as earlier discussed – to arbitration imposed as a means of settlement of disputes.

Even class actions have been held in *Prudential Bache*[39] to be capable of settlement by arbitration.

In Egyptian law[40] the following matters are reported as not being capable of settlement by arbitration: the status of individuals and public policy. However, the financial aspects of individual status matters are capable of settlement by arbitration.

In Algerian law[41] under section 442 Civil Procedure Code, issues related to the status of persons, family matters, rights arising from successions on death, rights which their holder is not free to dispose of and issues related to public policy are amongst those matters which are not capable of settlement by arbitration. Likewise as to the disputes in which the State or a public legal entity is a party, while national or public entities may refer to arbitration the disputes between themselves.

It is frequently felt that arbitration may only concern contractual disputes only. Other disputes, for example those arising from a tort, would not be capable of settlement by arbitration.

In fact, rather than the referral of those disputes to arbitration being prohibited, there is simply far less recourse to arbitration in non-contractual matters, since the party which feels it is in the wrong generally prefers to refuse a pro-

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34 *Hayes & Co. v. Merril Lynch* 885 F2nd 1149 (3rd Cir.) 1989.

35 *Scherk v. Alberto Culver Co.* 473 US 614 (1985).

36 *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth Inc.* 473 US (614) 1985.

37 *Shearson, American Express Inc. v. McMahon*, 482, U.S. 220 (1987).

38 *Kerr Mc Gee Refining Corp. v. M.T. Triumph et al*, U.S. Court of Appeals, 2nd Circuit January 28, 1991, *Yearbook Commercial Arbitration* 1993, 150.

39 *Lewis v. Prudential Bache,* 225 Cal Rptr 69 (Cal Ct. App. 4th District 1986).

40 SALEH, *op. cit.,* at 204; see also Section 551 Egyptian Civil Code.

41 M. ISSAD, *Le décret législatif algérien du 23 avril 1993 relatif à l'arbitrage international, Rev. arb.* 1993, 377.

posal to take the matter to arbitration, and to leave the dispute to be settled by an ordinary court, since it feels that it will then not have to pay until much later.

If reference to arbitration is certainly rare in non contractual matters, it is not excluded by the various international conventions and national laws. For example, the New York Convention (1958) expressly provides[42] for referral to arbitration of those disputes:

> in respect of a defined legal relationship whether contractual or not,

and the Uncitral Model Law (1985)[43] includes in the arbitration agreements, which fall within its ambit, agreements between the parties to take to arbitration those disputes related to:

> a defined legal relationship, whether contractual or not.

The courts have been asked to rule on the issue of the possibility of referring to arbitration disputes related to a tort, e.g. in *Lonrho:*[44]

Illustration

> In a dispute taken to the High Court of England involving Lonrho et al. on the one hand, and Shell and British Petroleum on the other, concerning the construction and functioning of an oil pipeline in Rhodesia (The *Beira Pipeline),* the agreement between the parties included an arbitration clause which provided that any dispute or issue arising from or related to that agreement had to be taken to arbitration in London.
>
> In such Court proceedings Lonrho made claims based on breach of contract and on tort (conspiracy, unlawful interference with a contract and negligence). The oil companies argued that court proceedings should be stayed since such claims had to be decided by arbitrators. The English court held that even if the arbitration agreement concerned claims arising from a 'breach of contract', that expression had to be defined. The court further held that when a tortious claim has a sufficiently close connection with a contractual claim which is referred to arbitration, and the former also arises from the same relationship, it is covered by the arbitration agreement. The court held that such a close relationship existed in that dispute, since the claims made in tort arose from the contract the parties had taken to arbitration.

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42 Art. 11,1, New York Convention (1958).

43 See Art. 1, Uncitral Model Law (1985).

44 *Lonrho Ltd. (UK) Companhia do Pipeline Mocambique Rodesia S. a. r. L (Mocambique)* v. *The Shell Petroleum Company Ltd. (UK) The British Petroleum Company Ltd. (UK) et al,* High Court, England, January 31(1978), *Yearbook Commercial Arbitration* 1979, at 320.

Authors writing on this have held that the English court could have made reference to the New York Convention,[45] which allows non-contractual disputes to be taken to arbitration. However, it is suggested that the English court first asked itself, correctly, whether the parties had or had not intended to refer also tortious disputes to arbitration. In other words, while the reference to the New York Convention concerning the possibility of the arbitrators deciding tortious disputes is appropriate, it had first to be established whether or not the parties had intended to submit tortious disputes to arbitration as well.

The Indian Supreme Court decided in a similar way in *Renusagar*:[46]

> In the final analysis the question as to whether a claim based on tort is a claim *dehors* the contract which contains the arbitration clause or is directly or inextricably connected with the contract has to be decided on the facts of each case and the language used in the arbitration clause.

The *Tennessee Import* Court[47] has summed up the terms of the problem in a very effective way:

> When the language of an arbitration clause is broad, the Court should focus on the factual allegations in the complaint rather than the legal causes asserted. If the allegations underlying the claims touch matters covered by the parties' [contract] then those claims must be arbitrated whatever the legal labels attached to them.

See also the ICC Award rendered in 1991 in proceedings no. 6159.[48]

The Court of Appeal, Hamburg held[49] that the arbitration agreement also covers claims:

> arising from tortious acts if they coincide with a breach of contract.

In *Prima Paint*[50] the U.S. Supreme Court held that a claim of fraud in the inducement of the contract is capable of settlement by arbitration.

In *Kone*[51] the Court of Appeal, Alberta held that:

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45 van den BERG, *op. cit.*, at 434.

46 *Renusagar Power Co. Ltd. (India) v. General Electric Company (US) and the International Chamber of Commerce(France)*, Supreme Court (India), August 16 (1984), *Yearbook Commercial Arbitration* 1985, at 431.

47 *Tennessee Import Inc. v. P.P. Filippi and Prix Italia S.r.l.*, Tennessee District Court, Nashville Division, August 14, 1990, *Riv. arb.* 1992, 499.

48 *Clunet* 1991, 1065 with comments by DERAINS.

49 *Yearbook Commercial Arbitration* 1990, no. 34 sub. 16, 17.

50 *Prima Paint v. Flood & Conklin*, 3889 US 395, no. 2 (1967).

51 *Kaverit Steel et al. v. Kone Corporation*, Court of Appeal, Alberta January 16, 1992, *Yearbook Commercial Arbitration*, 1994, 643.

> the claim by a distributor for conspiracy to harm by unlawful acts, because the unlawful acts are alleged to be unlawful breach of contract, must go to arbitration. Claims of interference with competition not based upon the existence of the contract may proceed in Alberta.

As to claims for unjust enrichment in *Schlegel*[52] the Iran-U.S. Claims Tribunal held:

> In an earlier case, the Tribunal allowed a claim based on unjust enrichment to be made in a situation where the claimant and the respondent, contractually unrelated, both had contracts with a third party against whom the claimant had a direct contractual remedy. See *Benjamin R. Isaiah and Bank Mellat,* Award No. 35-219-2 (30 March 1983) [reprinted in 2 Iran-U.S. C.T.R. 232]. The Tribunal recognizes, however, that the absence of a binding contract between the party enriched and the party impoverished does not necessarily make available remedies based on unjust enrichment, particularly in construction sub-contract cases.
>
> In a situation somewhat similar to the present case, the Tribunal held that '[t]he circumstances of the instant case have not been shown to be such as to justify any exception from the established principle that generally a subcontractor has no direct right as against the party with whom the contractor has a Contract.'

The non-suitability for arbitration of claims against a corporation in compulsory liquidation is affirmed in *Sohm*[53] where the Court of Appeal, Paris, held that the award was in breach of French international public policy, a decision which was in line with the opinion expressed by the French Court of Cassation in *Thinet.*[54]

The arbitral tribunal hearing a dispute between a Syrian plaintiff and two Italian corporations, in 1994[55] held that the law which establishes whether a claim is capable of settlement by arbitration is not the law of contract but the law of the venue of the arbitral proceedings, in particular if the venue has been chosen by the parties.

Böckstiegel[56] distinguishes between disputes which are capable of settlement by arbitration from the *subjective* and *objective* point of view. The former depends on the possibility of instituting arbitral proceedings against the other

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52 *Schlegel Corporation v. National Iran Copper Industries Co.,* Iran-U.S. Tribunal, Award March 27, 1987 no. 295-834, 2 reprinted in 14, Iran-U.S. CTR 176, 191.

53 *Sohm es qualité v. Sté Sinex,* Court of Appeal, Paris, February 27, 1992, *Rev. arb.* 1992, 4, 590.

54 Court of Cassation March 8, 1988, *Rev. arb.* 1989, 473.

55 ICC proceedings no. 6719, Clunet 1994, 1071; see also ICC proceedings no. 6320, *Clunet* 1995, 988.

56 BÖCKSTIEGEL, *Arbitration and State Enterprises,* Deventer, 1984, Chapt. III.

party; such a problem arises in particular if the public administration of a state is concerned (whether a government or a ministry or a local agency of that government).

As to disputes which are not capable of settlement by arbitration on objective grounds, reference can be made to disputes concerning anti-trust laws, intellectual and industrial property rights, prohibition of trade with given countries, exchange control regulations and statutes related to the bribing of public officers.

Likewise Craig *et al*[57] list among the disputes which are not capable of settlement by arbitration those which involve a breach of *bonos mores,* or which concern competition, trademarks, patents, insolvency or labour.

It has also been pointed out that the law of the place of arbitration sometimes allows to refer to international arbitration disputes which could not be referred to arbitration in domestic proceedings.[58]

In an award made in 1963,[59] Lagergren held that disputes related to relationships in breach of *bonos mores* cannot be arbitrated:

> The claim of an Argentinian exile against an English company for £400,000 in payment for his arranging for it to enter into a contract with the Argentinian government was not even considered by the arbitrator, who held that he could not decide on disputes of that nature.
>
> 'Parties who ally themselves in an enterprise of the present nature must realize that they have forfeited any right to ask for the assistance of the machinery of justice (national courts or arbitral tribunals) in settling these disputes'.

As to trademarks and patents, even if they do not generally fall within the category of arbitrable disputes, some national legal systems allow arbitrators to establish whether there has been a breach of patent and, if so, to decide the resulting damages.[60]

As to insolvency, in an ICC proceeding[61] the arbitrators have held that they had jurisdiction over a defendant (company), even if the latter has been wound up and struck from the trade register of its domicile during the arbitral proceedings.

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[57] CRAIG *et al, op. cit.,* II, 5.07, at 23 *et seq.*

[58] CRAIG *et al, op. cit.,* II, 5.07, at 24.

[59] CRAIG *et al, op. cit.,* II, 5.07, at 25.

[60] On this issue see for Belgium, MATRAY, *National Report, Belgium, Yearbook Commercial Arbitration,* 1980, vol. V, at 5; for Austria, MELIS, *Report in the 1976 ICCA Interim Meeting in Vienna,* II, *Yearbook Commercial Arbitration,* 1977, at 267-269; for France, DAVID, *L'arbitrage dans le commerce international, op. cit.,* at 25-260.

[61] Award No.2139 (1974), published in *Yearbook Commercial Arbitration* 1978, vol.111, at 22-221.

In Italy, the Supreme Court in *Scherck*[62] has held:

> In issues related to trademarks, Section 56, Royal Decree June 21, 1942, No. 929, in providing that – as to claims concerning the effects in Italy of international trademarks – the jurisdiction of the Italian Courts cannot be derogated, refers to disputes related to the protection of the trademarks as immaterial property against claims of whoever challenges their existence or validity under Italian law. This does not consequently apply to claims of a personal nature aiming at protecting rights arising from contractual relationships. Such a provision does not consequently cause the invalidity of an arbitration agreement, which refers to foreign arbitration disputes on rights of which the parties can dispose, arising from a licence agreement relating to a trademark.

The issue whether matters involving EC competition law are capable of settlement by arbitration has been the object of many discussions. Dalhuisen takes the view[63] that anti-trust issues in arbitration are limited to contractual issues and that an award which should order a party to perform a contract could be overridden by a judgment which treats that contract as null for breach of anti-trust law.

Concern as to the lack of direct access to the EC authorities by arbitrators is echoed by Weigand.[64]

An analysis of the various difficulties created to international arbitration by insolvency is due to Mantilla-Serrano.[65] The issue of which matters are capable of settlement by arbitration has been discussed also by Rogers.[66]

In conclusion, it is submitted that there is a general tendency in favour of referring disputes to arbitration, except for some which are expressly reserved to courts, or which involve interests beyond those of the parties involved. Furthermore the arbitrator is entitled to decide on the issue whether the matter is capable of settlement by arbitration, even if his decision may be subject to

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62 *Scherck Enterprises Aktiengesellschaft* v. *Soc. Del Grandes Marques,* Court of Cassation, Joint Divisions (Italy), September 15, (1977), No. 3989, *Giust. Civ. Mass.* 1977, 1617-1618; as to non-arbitrability of disputes related to restricted rentals legislation see *Soc. Eredi Boccanegra et al.* v. *Boccanegra,* Court of Cassation (Italy), January 9, (1976), No.42, *Giust. Civ. Mass.* 1976, 24; *in accord: Ospedale di Avellino* v. *Capone,* Court of Cassation (Italy), March 24 (1982), No.1851, *Giust. Civ. Mass.* 1982, 667.

63 J. H. DALHUISEN, *The Arbitrability of Competition Issues,* 11 *Arb. Int.* 2, 151.

64 F.B. WEIGAND, *Evading EC Competition Law by Resorting to Arbitration, Arb. Int.,* 1993, 249.

65 F. MANTILLA-SERRANO, *International Arbitration and Insolvency Proceedings*, 11 *Arb. Int.* 1, 51.

66 A. ROGERS, *Arbitrability,* 10 *Arb. Int.* 3, 263.

judicial review. This in spite of the diverging conclusion to which the U.S. Supreme Court has come in *First Options*.[67]

The law governing the issue whether the matter is capable of settlement by arbitration is discussed hereafter.[68]

In such situations Born has defined[69] opposition to referrals to arbitration as the 'non-arbitrability exception.'

In many jurisdictions arbitration has been excluded from given areas not because of the existence of mandatory provisions. In other terms , it has been generally held that the arbitrator was not entitled to decide certain types of disputes, like divorce and labour disputes.

However, excluding such areas, which are not capable of settlement by arbitration, for the rest the arbitrator is generally entitled to deal with mandatory provisions, and the need to decide on them does not deprive the arbitrator of jurisdiction.

The logical path followed in the U.S. seems to have been formally different since in *Mitsubishi*[70] and in a line of subsequent judgments the Federal Court held that arbitrators may adjudicate claims based on mandatory statutory provisions like anti-trust law. Later this paradigm was applied to other areas, such as labour mandatory provisions.

However in the substance the result is not dissimilar since while anti-trust law, RICO and labour disputes were outside arbitral jurisdiction, in this way they became capable of settlement by arbitration.

9.2 Connection between Disputes which are Capable of Settlement by Arbitration and Disputes which are not Capable of Settlement by Arbitration

When an arbitration agreement covers disputes which are capable of settlement by arbitration and disputes which are not capable of settlement by arbitration, the extreme solution i.e. nullity of the entire agreement cannot be excluded. However, under the general principle of aiming to keep contracts alive,[71] it seems preferable to ascertain whether the parties' intention is indeed so extreme,

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[67] *First Options of Chicago Inc. v. Kaplan et al,* U.S. Supreme Court, May 22, 1995, 115 S. Ct 1920 (1995).

[68] See *supra* Chapter 9. See B. HANOTIAU, *What law governs the issue of arbitrability?* 12 *Arb. Int.* 4, 391.

[69] BORN, cit. at 300.

[70] *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth Inc.* 473, U.S. 614, 1985.

[71] Section 1367 Italian Civil Code; see *Soc. Immobiliare Costruzioni* v. *Automobile Club di Trieste,* Court of Cassation (Italy), March 8 (1974), No.616, *Giust. Civ. Mass.* 1974, 292, 293 and *Massoni* v. *Manelli and Fumagalli,* Court of Cassation (Italy), October 23 (1969), No. 3472, *Giust. Civ. Mass.* 1969, 1756.

i.e. that all or none of these matters be arbitrated. If so, if some of such issues are not capable of settlement by arbitration this may render the entire arbitration agreement null and void.

When there is no such intention, it is submitted that the arbitration agreement may have the effect of allowing arbitral proceedings when, amongst the various disputes referred to therein, those actually submitted to arbitration are capable of settlement by arbitration, while it does not allow arbitration when the issues actually submitted to it are not capable of settlement by arbitration. When disputes capable of settlement by arbitration and disputes not capable of settlement by arbitration are simultaneously referred to arbitration and are inextricably linked, the agreement would normally have no effect and all these disputes would have to be referred to the courts.

Another problem related to the issue whether a matter is capable of settlement by arbitration is to establish the effects of the co-existence of a (valid) arbitration agreement relating to some disputes, and of court jurisdiction over other disputes connected with the agreement. The effect of this connection varies. According to some legal systems it produces no effects. According to others, such a connection gives rise to the jurisdiction of the court also on the connected disputes which are covered by the arbitration agreement. That was the case in Italy,[72] in the presence[73] of a connection between disputes arising from identity of the claim or identity of its grounds;[74] According to a widespread opinion in the precedents[75] and amongst authors[76] this also took place in the case of a weaker connection, such as when the decision on the various claims merely depended on the decision of the same issues of fact or at law.[77] For this reason this effect was described under Italian law as *vis attractiva* (attracting effect). However the 1994 Arbitration Reform Statute[78] has abolished all these effects of connection.

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[72] *Soc. Favria* v. *Choa,* Court of Cassation (Italy), February 21(1979), No.1108, *Giust. Civ.Mass.* 1979, 491; *Spa Denver* v. *Castellano,* Court of Cassation (Italy), May 28 (1979), No. 3099, *Giust. Civ. Mass., ibidem,* 1340 with further references; *Soc. Sicilprofi* v. *Comune* di *Palermo,* Court of Cassation (Italy), July 15(1982), No.4171, *Giust. Civ. Mass.* 1982,11, 1511.

[73] SCHIZZEROTTO, *Dell'Arbitrato* (Arbitration), 2nd ed., Milan 1982, at 227.

[74] Section 33 Rules of Civil Procedure.

[75] *Fan* v. *Comune di Catanzaro,* Court of Cassation (Italy), April 4, No. 1943, (1979) *Giust. Civ. Mass.* 1979, 879; *in contrast* SCHIZZEROTTO, *op. cit.,* at 228-229.

[76] SATTA, *Commentario al c.p.c.* (Comments to the Rules of Civil Procedure), vol. 1, Milan 1959, at 145.

[77] See *supra* note 73.

[78] Section 11 Statute January 5, 1994 no 25.

9.3 ARBITRAL REMEDIES

The existence of various disputes which are not capable of settlement by arbitration confirms that the legal systems do not allow unlimited reference of disputes to arbitration. A further consequence of this may be found in the widespread tendency to consider that an arbitrator has a much more limited authority to make decisions[79] than ordinary courts, and therefore that the arbitral remedies should be limited to declaratory judgments or to orders to pay. The problem has also been raised whether the arbitrator may, if requested, also issue decisions which *create, modify or terminate a legal relationship.*

The answer to this question depends on the applicable procedural law. Under Italian procedural law, for example, the answer is positive. In *De Ferrari v. Soc. Immobiliare Maremontana,* the Supreme Court has held:[80]

> There is no doubt that arbitrators, *if they have been duly authorized to do so* may, as courts of law, create, modify or extinguish legal relationships under Section 2908, Civil Code. It cannot be denied that in substance such awards create a coercive change in the legal sphere of the parties. (emphasis added).

It will consequently have to be established whether, in a specific dispute, the arbitrators have been expressly granted this authority or whether – as is suggested – it may also be implied.

The authority of arbitrators to decide according to natural justice has been held in *Messianaki Floga*:[81]

> To accept (Charterer's) argument and preclude (owner) from enforcing the award, would render meaningless the arbitrators' power to grant such equitable relief. (Charterer) does not *dispute* that the arbitrators had the authority to reduce the Notice of Claim or eliminate it altogether upon a finding of irreparable harm; as our Court of Appeals has expressly stated, not only do arbitrators have traditional power of equity (u) under New York law (they) have power to fashion relief that a Court might not properly grant. *Sperry Int.l Trade Inc.* v. *Government of Israel* (689 F2nd 301, 306 2nd Cir. 1982). (emphasis added)

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[79] See among the authors E. LOQUIN, *Les pouvoirs des arbitres internationaur à la lumière de l'evolution récente du droit de l'arbitrage international,* (The authority of international arbitrators seen in the light of the recent evolution of international arbitration law), *Clunet,* 1983, at 293.

[80] *De Ferrari* v. *Soc. Immobiliare Maremontana,* Court of Cassation (Italy), January 24, No. 210 (1951), *Foro It.,* 1951, I, 424.

[81] *Southern Seas Navigation Limited* v. *Petroleos Mexicanos,* April 25 (1985), *Yearbook Commercial Arbitration* 1986, vol. XI. at 210.

Even the right to an indemnity for expropriation, dealt with by the arbitrator in *Ina v. Islamic Republic,* is within the authority of the arbitrator:[82]

> I conclude from the foregoing that an application of current principles of international law, as encapsulated in the 'appropriate compensation' formula, would in a case of lawful large-scale nationalisations in a state undergoing a process of radical economic restructuring normally require the 'fair market value' standard to be discounted in taking account of 'all circumstances'. However, such discounting may, of course, never be such as to bring the compensation below a point which would lead to 'unjust enrichment' of the expropriating state. It might also be added that the discounting often will be greater in a situation where the investor has enjoyed the profits of his capital outlay over a long period of time, but less, or none, in the case of a recent investor, such as INA.

This is an issue which has attracted writers as well.[83]

9.4 PUNITIVE DAMAGES

While civil law normally confines itself to financial damages and when consequential damages are claimed it contemplates loss of profits and injury to reputation, common law in the U.S. has gone further and discussions have taken place as to the arbitrators' authority to grant punitive damages as a sanction against behaviour which is considered reproachable.

A group of judgments excludes the arbitrators' right to grant punitive damages, such as *Garrity,*[84] in which it was held that the substantive law (the New York law) did not grant punitive damages. *Fahnenstock*[85] based the same conclusion on the ground that the applicable NYSE were silent in this respect and *Mc. Kinnon*[86] excluded the arbitrator's power to grant punitive damages both under New York law and under the NYSE provisions.

This while other state courts, like in *Baker*[87] and *Willoughby*[88] have held the opposite. Other U.S. courts have held as in *Kerr-McGee*[89] and as the Federal

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82 *INA Corporation v. The Government of the Islamic Republic of Iran*, Iran U.S. Claims Tribunal, August 13 (1985) Lagergren (Chairman) proceedings 161 (184.161.1) *Yearbook Commercial Arbitration* 1986, Vol. XI, at 312.

83 W. C. LIEBLICH, *Determinations by International Tribunals of the Economic Value of Expropriated Enterprises*, 7 *J. Int. Arb.* 1, 37; see also several awards and writings related to ICSID arbitration.

84 *Garrity v. Lyle Stuart Inc.*, 40 NY 2nd, 356-31.

85 *Fahnenstock & Co. v. Waltham,* 935 F 2nd, 517.

86 *Thomson McKinnon Securities Inc. v. Cucchiella,* 594 N.E. 2nd 870 (Ma. App. 1997).

87 *Baker v. Sadik,* 162 Cal. App. 3rd 618 (4th Dist. 1984) quoted by BORN *cit.* at 580.

88 *Willoughby Roofing & Supply Co. v. Kajima International,* US 11th Circuit Court of Appeals, 598 F. Suppl.. 353 (N.D. Ala) 1984.

Court in *Mastrobuono*[90] that the arbitrators did have the power to award punitive damages.

It has been long debated whether arbitrators may grant punitive damages, when the applicable substantive law excludes it.

In *Cunard Line*[91] the U.S. Court of Appeals for the Ninth District has held that although the parties had agreed on New York substantive law which provides for no punitive damages, nevertheless this does not detract from the arbitrator's authority to grant punitive damages.

In accord is *Raytheon*[92] which held that the AAA arbitration rules, which empower the arbitrators:

> to grant any remedy or relief which is just and equitable and within the terms of the agreement of the parties.

were to be construed as including punitive damages.

This issue has been dealt with by many writers.[93]

9.5 PRE- AND POST-AWARD INTEREST

The Iran-US Claims Tribunal expressed its opinion on the right to grant interest in *Reynolds:*[94]

> An item of consequential injury which any claimant may suffer is the loss of the use of money which rightfully belongs to that claimant during the period between the accrual of the claim and the award. Indeed, the respondent in such cases has been unjustly enriched by having wrongfully had the use of the claimant's money during that period. Interest on the amount of the claim is the standard measurement of claimant's damage for being wrongfully deprived of its money.

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89 Ker*r-McGee Refining Corp. v. M/T Triumph Tankers Ltd.* 924 F (2nd Cir. 1991) quoted by BORN, *cit.* at 580.

90 *Mastrobuono v. Shearson Lehman Hutton Inc.*, 64 Ct 1212 at 1215 (1995).

91 *Todd Shipyards Co. v. Cunard Line Ltd.* 943 F 2d 1056, *Bulletin ASA* 1992, 4 552.

92 *Raytheon Company v. Automated Business Systems* U.S. District Court, Distr. Mass. CA1 (Mass) 1989.

93 BORN, *International Commercial Arbitration in the United States,* Kluwer 1994, 379; STIPANOVIC, *Punitive Damages in Arbitration, Garrity v. Lyle Stuart Inc. Reconsidered,* 66 *B.U.L. Rev.* 953 (1986); JONES, *Punitive Damages as an Arbitration Remedy,* 4 *J. Intl. Arb.* 35 (1987); *id. Punitive Damage Awards in International Arbitration; Does the Safety Valve of Public Policy Render Them Unenforceable in Foreign States,* 20 *Loy L. Rev.* 455 (1987). NOTE*: Arbitration: The Award of Punitive Damages as a Public Policy Question:* 43 *Brooklyn L. Rev.* 546.

94 *R. J. Reynolds Tobacco Company v. The Government of the Islamic Republic of Iran and Iranian Tobacco Company,* Iran-US Claims Tribunal, March 1(1985) proceedings No.35 (166-35-3), Mangard (Chairman), *Yearbook Commercial Arbitration* 1986, vol. XI, at 280.

The question of the arbitrators' authority to award interest was dealt with extensively by the Iran-US Claims Tribunal in *McCollough.*[95] The Tribunal's Authority in general to grant consequential damages was held in *Fertilizer*:[96]

> IDI Management had awarded Fertilizer a contract for the construction of two plants, to manufacture methanol and nitrophosphate respectively, close to Bombay. A dispute arose as to whether the plant had reached the desired production level and the parties, based on an arbitration agreement, referred the dispute to ICC arbitration. The award was challenged on various grounds, notably because consequential damages were granted, despite their exclusion under the contract.

The arbitrators, having noted the exclusion, held that it did not apply in case of fundamental breach (as it was the case in this dispute). The court held that the award was adequately reasoned and not subject to re-examination.

The arbitrators' authority to grant post-award interest has been examined in *Waterside.*[97]

The arbitrators, sitting in London, ordered the plaintiff to reimburse the damages it had caused to Waterside Ocean Navigation Co. The latter subsequently applied in the United States for the recognition of the award and also for post-award pre-judgment interest:

> The Court of Appeal held that the English arbitrators had granted pre-award, but not post-award interest, since they had no authority to do so. The Court held that Waterside could have obtained post-award interest if it had sought enforcement of the award in England. In granting the enforcement of the arbitral award the court referred to the district court the task of computing further interest applied for by Waterside and held: 'On a more general note, we point out that the concept of post-award interest is not alien to the Convention, and that arbitrators in many jurisdictions – including New York – have granted such interest. Also, district judges in the Southern District of New York have granted post-award pre-judgment interest in both domestic and foreign arbitration cases'.

The issue whether arbitrators had the authority to grant pre-award interest on damages was rejected in *Kyriakos*:[98]

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[95] *McCollough & Company Inc. v. Ministry of Post, Telegraph and Telephone et al,* Iran-US Claims Tribunal, April 22 (1986), proceedings No. 89 (225-89-3), Virally (Chairman), *Yearbook Commercial Arbitration* 1987, vol. XII, at 316.

[96] *Fertilizer Corporation of India et al.* v. *IDI Management Inc. (US),* US District Court, Southern District of Ohio, Western Division, June 9(1981), *Yearbook CommercialArbitration* 1982, vol. VII, at 382-392; the judgment confirms the award (Lord Devlin, Chairman, Sen and Wilson arbitrators), November 1, 1976.

[97] *International Navigation Ltd. v. Waterside Ocean Navigation Co. Inc.,* US Court of Appeals, 2nd Circuit, June 18 (1984), *Yearbook Commercial Arbitration* 1986, vol. XI, at 568.

> The parties had agreed in writing that the respondent should offer his professional services to the applicants as consultant and/or General Manager of a regional company or companies to be established in Greece for a salary and other benefits mentioned therein (in the contract for services). The respondent was never called upon by the applicants to take up his duties under the agreement. He was instead informed that somebody else had been appointed as General Manager of the regional company. The arbitrator found that there was a binding contract between the parties and awarded the respondent compensation plus interest at the rate of six per cent *per annum* on the amount of damages awarded from a date prior to the date when the cause of action arose. The applicants, feeling aggrieved with the award, sought to have it set aside on the grounds of misconduct, *inter alia,* on account of the interest awarded. The court held that neither a judge nor an arbitrator has, in the absence of an agreement between the parties, any discretion to award interest prior to the date of the judgment or of the award on the amount of the damages awarded. An arbitrator in Cyprus does not have greater power than that of a judge to award interest. Thus, though the arbitrator's award of interest at the rate of 6 per cent *per annum* on the capital sum as from the date of the award was within his power, by awarding interest at the same rate in relation to the period prior to the date of the award, the arbitrator had exceeded his jurisdiction and had erred in law. This error in law appeared on the face of the award. The part of the award, however, which was tainted with this error, was clearly separable and divisible from the residue of the award, which was upheld by the court. In the circumstances the court saw no reason why that part alone should not be set aside. The rest of the award would remain and would be valid. On this point, the court was guided on the "interest" aspect of the case by *Timber Shipping Co. S.A.* v. *London and Overseas Freighters Ltd.* (1972) A.C.I.

9.6 Authority to Amend or Terminate a Legal Relationship

The power of arbitrators, and of courts, to *modify a contract* has not always been recognized.

The award made in 1977 in ICC proceedings No. 2694[99] took this view:

> Arbitrators sitting in Paris, hearing a dispute between a French company and three companies (Swiss, French and one from Luxembourg) concerning a contractual breach, held:

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[98] *N. V. Marketing Ltd. of Nicosia v. Kyriakos Mavronicolas of Nicosia,* District Court of Nicosia (Cyprus), May 5 (1984), application No. 71/83, *Mediterranean and Middle East Arbitration Quarterly* 1987, 1, 4.

[99] Y. DERAINS, *Chronique des sentences arbitrales, Clunet,* 1978, at 985.

> 'Whereas, even in the capacity as *amiable compositeurs* – granted (to them) by the terms of reference provided for by Art. 13 of the ICC rules – the arbitrators have no authority to weigh up a new contract and to put themselves in the place of the parties which have failed in their attempts to renegotiate the contract.'

As to the arbitrator's power to *adjust the contract*, in the event of hardship, see the *Quintette* arbitration in Canada confirmed by the Court of Appeal of British Columbia.[100]

Likewise the authority to terminate a contract in the event of extraordinary and unforeseeable events, which make its performance by a party excessively burdensome, has been excluded unless the applicable law grants it.[101] Italian law, for example, provides for termination of a contract if it becomes excessively burdensome. A further example of this is the Greek award in *Aluminium de Grèce*:[102]

> An arbitration panel sitting in Athens (consisting of a Swiss President, a Greek and a French arbitrator) deciding a dispute between *SA Industrielle et Commerciale Aluminium de Grèce* and the *Public Enterprise for Electricity of Greece,* held that arbitrators may apply section 388 of the Greek Civil Code which entitles them to reduce the debtor's performance or to rescind the contract, whenever its performance has become excessively onerous because of an unforeseeable change of circumstances. The arbitrators further held that such provision had to be applied under the circumstances since the performance of the debtor had become excessively onerous.
>
> The arbitrators consequently amended the values attributed by the parties to certain of their performances.

One may also wonder whether an award is a title which can be recorded in the land register, in view of the effect it may have in some jurisdictions on the protection of the rights of the winner concerning immovables *vis-a-vis* subsequent registrants. The answer to this question may be positive in some jurisdictions; it is positive under Italian law.[103]

The arbitrators may then depending on the applicable procedural law, grant *inter alia*, the following relief:

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[100] *Quintette v. Nippon Steel* (1991) 50 BCLR (2nd) 207.

[101] See amongst writers C. CAVALLINI, *Condanne speciali e arbitrato rituale* (Special Relief in Arbitration) 1996, 681.

[102] *S.A. Industrielle et Commerciale Aluminium de Grèce v. Public Enterprise for Electricity of Greece,* Arbitral Tribunal, Athens, November 25 (1986), *International Business Lawyer* 1987, 360 and *Mediterranean and Middle East Arbitration Quarterly,* 1987, 1, 10.

[103] *Soc. Elettrica della Campania (applicant),* Court of S. Maria Capua Vetere (Italy), April 1 (1958), *Foro pad.* 1959, I, 1169.

- a declaratory award
- termination or creation of a legal relationship
- reduction of price
- damages
- interest.

On the other hand, decisions such as those relating to *annulment of marriages, separation of spouses and bankruptcy* are rightly excluded from the ambit of possible arbitral remedies.

However, if this issue is examined closely, it is suggested that rather than a limit to the arbitrators' authority, it is a matter of the related dispute not being capable of settlement by arbitration. In fact, the arbitrator is prevented from issuing these decisions not because he lacks that authority, but because those disputes cannot be arbitrated. The ambit of the issues non-capable of settlement by arbitration extends also to attachments, vacation orders and the issue of summary *ex parte* judgments. Even here the obstacle is not caused by the arbitrators' authority being limited but by these matters not being capable of settlement by arbitration.

The question of interlocutory injunctions will be dealt with later on in this study.[104]

As to how the arbitrator must exercise his authority, on the one hand, he must decide on the issue whether the dispute is capable of settlement by arbitration under the applicable law, and not under the law of the various countries where his award may be enforced, on the other hand the arbitrator must take care that his award:

> is enforceable at law.[105]

While the authority of the arbitrator and the issue whether the dispute is capable of settlement by arbitration depend on the applicable law, the arbitrator will as far as possible take care of the need that subsequently his award be enforced in the countries where the parties are domiciled. In this connection Fouchard[106] criticizes the opinion that:

> The issue whether the award can be enforced is not within the authority of the arbitral tribunal which, for this reason, may not take it into account.[107]

Arbitrators' use of the authority to issue an order *subject to a condition* is to be found in *Atlantic Triton* v. *République de Guinée*:[108]

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[104] See *infra* Chapter 24

[105] Art. 26 ICC Rules.

[106] FOUCHARD, *Arbitrabilite' des litiges et propriété industrielle* (Arbitrability of disputes and industrial property), *Rev. arb.* 1977, at 66.

[107] In Y. DERAINS, *Arbitrage et propriété industrielle* (Arbitration and industrial property), *Rev. arb.* 1977, at 40.

> The Tribunal holds that the claim for US $ 226,867 to pay certain services is well founded. However, based on its authority as *amiable compositeur,* the Tribunal on its own motion makes such payment conditional on the presentation by the creditor, which in turn owes money to a Norwegian company, of a bank guarantee in favour of Guinea in order that Guinea can be certain that the funds will be paid to the final user and that Guinea will not be called to pay twice.

In the award made in 1981 on ICC proceedings No.3243[109] it was held that the arbitrator is not bound by the *classification of the relationship* made by the parties:

> The arbitral tribunal consequently holds that in spite of the expressions used by the parties to classify the contract, the parties had not entered into a mere sale agreement.

The issue has been analysed by writers.[110]

9.7 TREBLE DAMAGES

Treble damages are a U.S. special statutory remedy for anti-trust and RICO claims.[111]

It has been held that an international arbitral tribunal can award treble damages in case of breach of the American RICO legislation, even though in the end no damages were granted by an arbitral tribunal in 1992 which made reference to the deference of the U.S. Federal Court to arbitration in *Mitsubishi*[112] for breach of U.S. antitrust laws, to the refusal of the U.S. Court of Appeals for the Second Circuit in *Kerr-McGee*[113] to set aside an award dealing with such matters, and in *Trade & Transport*[114] to an arbitral tribunal which, having the matter

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[108] Award April 14 (1986) (Sanders, Chairman, Prat and van den Berg arbitrators), reported by GAILLARD, *Chronique des sentences arbitrales* (ICSID), *Clunet,* 1988, at 181 *et seq.*

[109] *Clunet,* 1982, at 968 et seq.

[110] STIPANOVICH, *Punitive Damages in Arbitration, Garrity v. Lyle Stuart Inc. Reconsidered, Boston University Law Review 1986,* 953 *et seq.;* J.T. McLAUGHLIN, *Arbitrability Current Trends in the United States,* 12 *Arb. Int.* 2, 113 and L.A. NIDDAM, *Comments to Mastrobuono, Rev. arb.* 1995, 301; E.A. FARNWORTH, *Punitive damages in Arbitration,* 7 *Arb. Int.* 1, 3; M. AUGENBLICK – M. STERN, U.S. *Supreme Court Upholds Arbitral Authority to Award Punitive Damages,* 12 *J. Int. Arb.* 2, 149; M.S. DONAHEY, *Damages in International Commercial Arbitration,* 10 *J. Int. Arb.*, 3, 67.

[111] Three times the actual damages, a form of punitive damages provided for by U.S. antitrust law.

[112] *Mitsubishi Motors Corp. v. Soler Crysler Plymouth Inc.,* 473 U.S. 614 (1985).

[113] *Kerr McGee Refining Corp. v. Triumph Tankers Ltd.,* 92Y F.2d 467 (2d Cir. 1991).

[114] *Trade & Transport Inc. v. Valero Refinig Company Inc.,* award August 23, 1990, 8 *J. Int. Arb. 1991,* 38.

been referred to it by the U.S. Court of Appeals for the Fifth Circuit, granted treble damages.

Similarly in *Gateway*[115] the United States Court of Appeals reaffirmed that

> Claims based on RICO are not less arbitrable than those founded on the contract or the law of torts.

An authoritative comment[116] is less warm as to whether arbitrators have the power to grant treble damages.

Nevertheless in *Mitsubishi*[117] the U.S. Federal court determined that the decision whether to award treble damages was to be left to the arbitral tribunal.

In line with this decision is *Shearson*[118] where the U.S. Federal Court rejected the submission that RICO claims would not be capable of settlement by arbitration because in that situation treble damages might be granted.

Both judgments affirm the possibility that treble damages be awarded by the arbitrators. It is submitted that the boundaries up to which this statement might be pushed are still not neat. Born[119] wonders whether, in the event of the arbitrators refusing treble damages, the claimant could claim treble damages in subsequent court proceedings.

On punitive and RICO damages see Zubrod.[120]

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[115] *Hill et al (class action) v. Gateway 2000 Inc. et al*, U.S. Court of Appeals, 105 F. 3d 1147 (7th Circ.) *ASA Bulletin* 1997, 1, 138.

[116] LOWENFELD, *The Mitsubishi Case: Another View*, 2 *Arb. Int.* 1986, 178.

[117] *Mitsubishi Motors Corp. v. Soler Chr ysler Plymouth Inc.*, 482, U.S. 220, 240 (1987).

[118] *Shearson American Express Inc. v. McMahon*, 482, US 2210, 240 (1987).

[119] G.B. BORN, *International Commercial Arbitration in the United States*, Kluwer 1994, 380.

[120] D. ZUBROD, *Punitive and RICO Damages in Maritime Arbitration*, 8 *J. Int. Arb.* 4, 17.

CHAPTER 10

THE ARBITRATION AGREEMENT

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10.1 THE ARBITRATION AGREEMENT AND THE CONTRACT WITH THE ARBITRATORS

The first distinction to be made in examining the arbitration agreement is between it and the contract with the arbitrators.[1]

The agreement to refer a dispute to arbitration, whether in a submission agreement or in an arbitration clause, consists in the agreement of the parties to refer to arbitration one or more disputes which have already arisen, or which made arise. According to the prevailing opinion such an agreement is a contract, between persons or bodies acting in a private capacity to which the arbitrator, who at that time is generally not even appointed, is at least at that time not a party.[2] It could even be said that the arbitrator is in a way the purpose of the arbitration agreement, even if its real purpose is to lead to arbitral proceedings.

However this definition of arbitration agreement is not the only one; for example under Swiss law[3] arbitration agreements:

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1 A. DITCHEV, *Le Contrat d'arbitrage* (Arbitration agreement) (Essai sur le contract ayant pour objet la mission d'arbitre), *Rev. arb.* 1981, at 395 *et. seq.*; G. SCHIZZEROTTO, *Dell'Arbitrato* (Arbitration), Milan, Giuffrè 1982, at 52 and 332.

2 'The structure and functions of the two relationships are different: one (the arbitration agreement) aims to derogate from the court jurisdiction, the other one (the so-called 'contract with the arbitrators') aims to entrust third parties with the authority to decide a dispute (...) the former is the premise of the arbitration proceedings, the latter is a means to implement the former, however the appointment of the arbitrator and the acceptance of the arbitrator have no influence on the life of the arbitration agreement'. SCHIZZEROTTO, *op. cit.*, at 52.

3 Award made in 1985-1986 in ICC proceedings no 4504, *Clunet* 1986, 1118.

> are not mere agreements between individuals, but procedural agreements which are subject to public law.

A similar direction is taken in the decision of the Court of Arbitration of the Polish Foreign Trade Chamber of Commerce in Warsaw:[4]

> The Praesidium of the Court of Arbitration established that according to the procedural law in force at the place of arbitration the arbitral clause – even if it is one of the clauses of the basic contract between the parties – is a judicial contract and therefore has a special independent nature.

The nature of the arbitration agreement was defined as follows in *Sam*:[5]

> The arbitration agreement is an agreement on procedural issues, independent and separate from the main agreement. It must then be treated independently from the existence or the validity of the main contract as it results from the intention of the parties.

The arbitration agreement alone is not sufficient to initiate arbitral proceedings. In order for it to operate, the arbitrator, appointed by the parties in the agreement or after it, must accept the appointment. It is generally only at that time that the appointment of the arbitrator, even if previous, is brought to his attention and it is through his acceptance that the agreement between the parties and the arbitrator, referred to here as the *contract with the arbitrators*, is entered into. The contractual mechanism is similar – in substance – when the appointment of the arbitrator is entrusted by the parties to an arbitral institution, which proceeds accordingly, and the arbitrator accepts.

Even in the very rare situations where the arbitrator is already appointed in the arbitration agreement, his acceptance is equally necessary in order for him to have the authority to make an award.

Thus, the arbitration agreement does not include the agreement between the parties and the arbitrator, but precedes it. This is important since if there are two separate agreements, each may be governed by a different law as to its contents.[6] This point is not simply theoretical and requires further consideration.

In fact, the two contracts might be separate agreements (the first of which is simply a reference for the second), or a single agreement, which is formed progressively. In the latter case, the parties would confine themselves to notifying the arbitrator of the existence of the arbitration agreement and the arbitrator, by accepting the appointment, would merely adhere to it.

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4 Award May 7, 1963, no A/105/61, *Clunet* 1970, 405.

5 *Sam v. Perrin*, Court of Appeal, Paris, October 8, 1998, *Rev. arb.* 1999, 2, 350.

6 See DITCHEV, *op. cit.*, at 395 *et seq.*

Within this framework the arbitration agreement could be seen not only as an agreement between the parties, but also as a proposal to the arbitrator open to his acceptance. However, the arbitration agreement is not addressed to the arbitrator. Whether the latter is appointed in it or only subsequently, he is generally advised of this only when he is asked to accept. In practice the arbitration agreement is thus simply an attachment to the notice of appointment sent to the arbitrator and frequently not even that, when a mere reference is made to it. It is suggested that the arbitration agreement cannot be seen as a contractual proposal, even if in *Langlais*[7] it was held to be a:

> friendly proposal to settle the dispute

and the court added:

> Because of the approval of these by-laws, each member of the G.I.E. ... accepts that any court action concerning issues between such members is null and void ... and undertakes to refer disputes first to arbitrators.

The second interpretation (i.e. a contract, which is formed progressively) might lead to the same legal discipline of the two relationships.

It is submitted that various situations may exist. The parties may enter into a preliminary agreement whereby they undertake to conclude an arbitration agreement at a later stage. If so, the relationship between the two agreements would be the traditional one between the preliminary and the final agreement.

However if the parties entering into a submission or an arbitration clause submit to arbitration a dispute which has already arisen, or will arise, and the appointment is not simultaneous but postponed, it is suggested that the later appointment of the arbitrator and his acceptance (which are also referred to as the contract with the arbitrators) may be seen as successive acts falling, (together with the arbitration agreement) within the framework of one contract which is formed progressively.

10.2 Capacity of the Parties

The first problem, which confronts anyone examining an arbitration agreement, is to establish whether the parties have the capacity to enter into it. This is established according to the applicable law.[8] Generally the capacity of each party is established according to his national law and the capacity to act requires the capacity to hold rights. In rare cases the latter may not exist, for example in the case of a limited company in the process of being formed, but which in the end is not formed or not officially registered. While the capacity

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[7] *Langlais v. Bruneau*, Court of Appeal, Nancy (France), December 12, (1985), *Rev. arb.* 1986, 255.

[8] See Art. V 1(a) New York Convention (1985) and Art. II Geneva Convention (1961).

to hold rights is rarely challenged, the need to verify the capacity to act is frequent. The problem arises for example with natural persons, such as minors or lunatics, and with legal entities, for example in transactions outside the scope of the corporation or entered into by an employee without authority to commit the corporation; his act then falls under the very well-known *ultra vires* doctrine.[9]

In many legal systems, the national law of the party is the one applicable for determining his capacity. Some legal systems[10] may go further and, similar to Italy,[11] may in some matters also grant the capacity to act to individuals who would not have it under their national law. For example, if in some legal systems a woman, *ipso facto*, does not have the capacity to hold rights. Still if she performs an act in Italy she is considered to have capacity to act if she has such capacity under Italian law.

In some legal systems the reference of disputes to arbitration is not treated as a day-to-day management act; therefore an officer having authority to act for day-to-day business cannot enter into an arbitration agreement.[12] However under Italian law[13] the authority to enter into a contract includes the power to enter into the arbitration clause included on it.

In some countries, such as France, only traders may submit to arbitration disputes which have not yet arisen.[14] However this rule has not been invoked and consequently applied in *de la Tour d'Auvergne*.[15]

In this connection the *ISCE* award rendered by the Rumanian Arbitration Committee in 1970[16] can be cited:

> A state owned Rumanian company (ISCE) and an Italian company had entered into an agreement for the supply of cheese; a dispute arose between them concerning payment. The Committee, in verifying the parties' capacity to act, stated that the capacity to enter into an arbitration agreement fell within the procedural capacity (*Parteifähigkeit*) which was governed in that case by the Geneva Protocol.

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9 See CHESHIRE and FYFOOT, *Law of contract,* Buttetworths, London 1976, I ed., at 423.

10 In particular, those which are more sensitive to international relationships governed by rules which may not coincide with the internal rules of that jurisdiction.

11 Art. 17, para. 2. Preliminary Rules Italian Civil Code.

12 Section 807, 2 Italian Rules of Civil Procedure which specifies: 'the provisions which govern the validity of contracts exceeding day-to-day management apply to arbitration agreements'.

13 Section 808, para. 3 Italian Rules of Civil Procedure.

14 Section 631, Commercial Code (France).

15 *Epoux de la Tour d'Auvergne - Lauragais v. Schiffer et al,* Tribunal de Grande Instance, Paris, Referee Order, October 22, 1990, *Rev. arb.* 1994, 556.

16 Award July 7, 1970, no.22, *Clunet* 1971, 636 *et seq.*

However, the national law of the party is not universally accepted. It is reported that in some common law countries the capacity of the parties is established according to a different criterion, namely the law applicable to the merits of that specific contract or act.[17] This criterion has the advantage that the entire matter is governed by one law. However, it has the disadvantage that, through it, one may artificially deny the capacity to act of someone, who would not have it under his national law, or grant it to someone who would not have it under his national law, which is not always a satisfactory situation.

Establishing the capacity of legal entities is more complicated, although the use of the *lex societatis* is, *prima facie*, simple, even if it is construed in different ways. According to some, the *lex societatis* must be identified according to the nationality of the company's shareholders; according to others, it must depend on the place where the capital was subscribed. Another view places it under the law of the country in which the company was formed and another opinion defines it as the law of the registered offices of the company, or the law of its principal place of business.[18] Some of these criteria, such as the nationality of the shareholders, or the place where the capital was subscribed, do not seem acceptable, since they give priority to elements which may not be relevant.

Other criteria, such as the place where the company was formed, the registered offices of the company and the principal place of business, each contain elements which deserve attention.

Illustration

A limited liability company is formed in State A according to its laws. However, it elects State B as its principal place of business and eventually forms a branch in State C. When the company operates in State A the law of that state is applicable. When it operates in State B the law of that state is applicable. When the company operates in State A the law of the place where the company is formed and the law of the principal place of business may conflict, even if priority, in the absence of mandatory rules, might be given to the former (unless the law which is more favourable to the capacity to act is chosen). Likewise, if that company operates in State C, there could be a conflict between the law of the state where the company was formed and the law in force in the state where the branch is located. In the absence of mandatory provisions, priority may be given here too to the former (unless the most favourable law for the capacity to act is chosen).

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[17] See E. VITTA, *Diritto Internazionale Privato* (Private International Law), Turin, Utet, 1973, vol. II, at 28 which contains several citations.

[18] The opinions above reported are analyzed by E. VITTA, *op. cit.*, vol. II, at 62-63.

The problems related to the capacity to perform acts outside the scope of a corporation must then be decided according to the applicable law to be established under the above criteria. Lack of authority was successfully argued in *Sojuznefteexport*[19] by three Russian arbitrators who, allowing Joc Oil's argument, held that the contract was invalid because under Russian law two authorized signatures were required and this had not been complied with.

The solution applied by the states which form the European Economic Community – upon the intervention of the Community authorities – is to grant the Chairman of the Board and the Managing Director automatic and irreducible authority, thereby denying effects *vis-a-vis* third parties to any limits to their authority provided for in the articles or memorandum of association. Such limits consequently produce effects only in the internal corporate relationships (i.e. between the company and its Chairman or Managing Director). This certainly simplifies the problem. However, imposing an unlimited authority against the intention of the parties may seem excessive.[20] In fact, if the shareholders wish, for example, to concentrate all the authority in the Board of Directors, leaving to the Chairman of that Board the authority to implement the Board's resolutions only, it is equally unconvincing to grant the Chairman unlimited authority by statutory provision, even if the importance to allow an easy control to third parties is to be borne in mind.

A similar problem may arise concerning the authority of public administration entities. The problem is generally examined from the point of view of sovereign immunity. This is frequently invoked – sometimes not properly – not only by the central government, but also by public bodies such as central banks and state corporations. Separate from the question of sovereign rank is whether the officer, who acts for it, has due authority. This aspect, clearly different from the other, is frequently not afforded adequate consideration, or tends to be resolved in the same way as a plea of sovereign immunity. In fact, it has been held as to a government, which has entered into an arbitration agreement, that as it cannot later challenge the validity of the arbitration agreement because of its sovereign immunity likewise it would not be entitled to argue later the lack of authority of the signatory.

However, such a solution does not seem acceptable, since the control of the authority, even if sometimes difficult for the other contracting party, should follow the general rules.

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[19] *Sojuznefteexport v. Joc Oil,* Court. of Appeal, Bermuda July 7, 1989, *Yearbook Commercial Arbitration,* 1990, 384.

[20] Even if uniformity of systems is certainly welcome and the chosen solution is clear, it still creates the very serious problem of depriving a company of the possibility to limit *vis-a-vis* third parties the authority of its Chairman of the Board and of its Managing Director.

Therefore if the signatory has no authority, it follows that the government is not committed, in the same way as any natural person or legal entity. The possible unfairness of a strict application of this principle may be remedied by another general rule, the doctrine of *innocent reliance* of one party on the statement or conduct of the other contracting party, a principle to which recourse can be had if there are the premises for its application.[21]

Amongst arbitral precedents, the *Framatome* award[22] deals with irregularities in a party's stipulation of an arbitration agreement, with reference to the *good faith* principle:

Illustration

> The organisation (AFDI) may not avail itself of its mistakes, irregularities, acts or omissions to escape from an arbitral clause on which the other foreign contracting party was entitled to rely in good faith as an essential protection, without which it must be presumed that, according to the general experience in this area of international contracts, the agreement would not have been entered into.

On other occasions, the public administration, after entering into an arbitration agreement, argues that it was forbidden to do so by its Constitution or by a statute.

This matter was addressed in *The State of Senegal:*[23]

> ... the State maintains that the Court of Appeal wrongly allowed the State to arbitrate its dispute ... whereas it results from the combined effect of the above mentioned articles of the Code of Civil Procedure that the State cannot resort to domestic arbitration because of reasons of public policy, it must be noted however that according to art. 32 of the Law no. 81-50 of 10 July, 1985 (the Investment Code) 'The contract of establishment defines ... the arbitral procedure which will take place in the case where there is a dispute between the parties ...'. It results ... that the Investment Code derogates from the Code of Civil Procedure ... the appeal of the Sate must be rejected.

International Conventions do not generally contain provisions concerning the law to be applied to establish the capacity of the parties. Only the Geneva

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[21] On the principle of *innocent reliance* see amongst others *Soc. Saim v Appio,* Court of Cassation (Italy), November 24 no. 6246 (1981), *Mass. Foro It.* 1981,1276.

[22] *Framatome v. Atomic Energy Organisation of Iran,* award April 30,1982 (Lalive, Chairman, Goldman and Robert, arbitrators), *Clunet* 1984, 58 *et seq.,* and in particular 73.

[23] *The State of Senegal v. Express Navigation (Senegal),* Supreme Court of Senegal, July 3 no. 46 (1985), *Yearbook Commercial Arbitration* 1991, 171.

Convention (1961) refers to the law applicable to the parties, without going into more detail.

10.3 Consent and Form

Another element of the arbitration agreement, its form, has to be analysed within the framework of the distinction between submission and arbitration clause.

In fact the submission is generally subject to its own form requirements, which may be different from those of the contract or relationship from which the dispute arises. The form of the arbitration clause, as one of the various clauses of the wider contractual relationship, generally falls under the general discipline of that contract.

International Conventions

Several international conventions refer to the form requirement. The Geneva Convention (1927)[24] requires that the arbitration agreement be valid:

> under the law applicable to it

without dealing further with the issue.

The New York Convention (1958)[25] requires for the validity of the arbitration agreement that it be:

> signed by the parties or contained in an exchange of letters or telegrams.

The Geneva Convention (1961)[26] similarly requires:

> ... the contract or arbitration agreement being signed by the parties, or contained in an exchange of letters, telegrams or in a communication by teleprinter and, in relations between states, whose laws do not require that an arbitration agreement be made in writing, any arbitration agreement concluded in the form authorized by these laws.

The Washington Convention (1961)[27] requires the parties'

> consent in writing.

The United Nations Model Law (1985)[28] states:

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[24] Art. I (a) Geneva Convention (1927), *cit.*

[25] Art. II, 2 New York Convention (1958), *cit.*

[26] Art. I, 2, a) Geneva Convention (1961), *cit.*

[27] Art. 25 (I) Washington Convention (1965), *cit.*

[28] Art. 7 (2) United Nations Model Law, *cit.*

> The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties 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 defence in which the existence of an agreement is alleged by one party and not denied by another. 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 that clause part of the contract.

Thus International Conventions in general require that the arbitration agreement be in writing.

Precedents

This, as held in *Bel Air*[29] does not require neither that the various pages of the contract be initialled, nor that the arbitration agreement be object of a specific acceptance.

As to the written form, the French Court of Cassation has held in *Brittania*[30] that an arbitration agreement made by telephone, even if subsequently confirmed by one of the parties in a letter but not confirmed in writing by the other one, does not give rise to a written agreement. In *Cenni*[31] the French Court of Cessation has mentioned in passing (since it set aside the appellate judgment on an earlier ground) the fact that the arbitration agreement had been printed, at the bottom of a contractual document, in very small types.

However, when dealing with trade usages in purchases and sales through a broker, the Court of Appeal, Paris has found in *Rodriguez*[32] that the issue by the broker of a confirmation letter containing an arbitration agreement committed the seller even if he had not subscribed it.

This conclusion may be insufficient in those legal systems which require that the authority to an agent or broker to commit the principal have the same form of the contract which the agent or broker must conclude, which in this case would make the written form compulsory.

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[29] *Sté Enterprise Guy Broussail v. Sté Marbrerie de Bel Air et al.,* Court of Appeal, Paris, June 26, 1987, *Rev. arb.,* 1990, 905.

[30] *Sté Brittania v. Sté Jézéquel et Maury,* Court of Cassation (France) July 15, 1987, *Rev. arb.* 1990, 627.

[31] *Sté Cenni v. Sté Malagutti,* Court of Cassation (France) December 5, 1989, *Rev. arb.* 1990, 649.

[32] *Sté Abilio Rodriguez v. S. Vigelor,* Court of Appeal, Paris, March 30, 1990, *Rev. arb.* 1990, 691.

In a string of subcontracts, the Hong Kong Court in *Argos*[33] held that the incorporation by reference of the prime contract (containing an arbitration agreement) into a subcontract, producing the effect that the latter be treated as back to back to the prime contract, implied the intention that disputes between contractor and subcontractor be referred to arbitration.

In *Aughton*[34] the English Court of Appeal even if with reluctance held that a written arbitration agreement was missing:

> The arbitration clause, by its words, was applicable only to disputes under the sub-contract. No special rule of construction prevents incorporation of an arbitration clause by general words.
>
> (...) It would be perverse for the court to treat two commercial parties as having incorporated all the [sub-contract's] conditions (suitably modified) except an arbitration clause, [of] the existence of which in such contracts most businessmen are aware. The parties had sufficiently expressed their intention to incorporate all the [sub-contract's] conditions and that included the arbitration clause.
>
> However, the requirement for a written agreement for arbitration, or a written direction to a place where the arbitration clause could be found, was not satisfied in this case. (...) Distinct and specific words were required to incorporate an arbitration clause as opposed to these provisions from another contract and there were no such words so that the clause was not incorporated.

However in *McAlpine*[35] in 1994 the English High Court rejected McAlpine's submission that since the arbitration agreement is collateral to the main agreement, in order that there be an agreement or an arbitration clause incorporated in a separate contract, that clause had to be expressly referred to in the document which incorporated it, distinguishing this situation from *Aughton* since it was not someone else's contract which was incorporated.

The Judge held that:

> the two documents taken together constitute the original writing ... Thus McAlpine's submission that there is no binding agreement must be tested in the context of both documents ... This is in my view an effective incorporation.

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[33] *Astel Reiniger Joint Venture v. Argos Engineering & Heavy Industries Co. Ltd.*, Hong Kong High Court (Kaplan J.) August 14,1994, *Yearbook Commercial arbitration* 1995, 288.

[34] *Aughton Ltd. v. M.F. Kent Services Ltd.*, Court of Appeal, England, November 4 1991, *ASA Bulletin*, 1992, 555.

[35] *Alfred McAlpine Construction Ltd. v. RMG Electrical (1994)*, reported by R. KNOWLES, *Development in Law Related to Arbitration, Arbitration* 1996,188.

In *Stolt Entente*[36] a U.S. District Court held that a party was bound by an arbitration agreement contained in an agreement entered into by the exclusive agent of its affiliate company, since under Restatement (Second) of Contracts par 302 that company was 'an intended beneficiary' of the agreement and was then bound by its arbitration clause'.

In *Kaptan Cebi*[37] a New York District Court held that:

> It does not matter that a consignee or a holder of the bill of lading was not a signatory to the charter party. Nor does it matter if that consignee did not receive the bill of lading until after commencement of the voyage.

since:

> It has been consistently held that an arbitration clause in a charter party may be enforced by the Courts even though the charter party document is neither signed nor dated.

The position of the U.S. Courts has repeatedly been that:[38]

> The mere factor that a party has not signed the form is insufficient to show that it is not bound by the arbitration agreement which is contained in it.

In *Genesco*[39] it was held:

> [I]t is well established that the party may be bound by an agreement to arbitrate even absent a signature. Further, while the [Federal Arbitration] Act requires a writing, it does not require that the writing be signed by the parties.

This view was restated and developed in *McPheeters*[40] which held:

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[36] *GB Marine Services Co. v. M/A Stolt Entente,* U.S. District Court, *International Newsletter,* Wilmer Cutler Pickering Dec. 1990, 11.

[37] *National Material Trading v. M/V Kaptan Cebi et al.*, U.S. District of South Carolina, Charleston Division, Admiralty March 13 1997, NDS 2, 95-3673, *Yearbook Commercial Arbitration* 1998, 923.

[38] *Kahn Lucas Lancaster Inc. v Lark International Ltd. (Hong Kong),* U.S. District Court, Southern District of New York, August 6, 1997, 9 Cir. 10506 (DLCC) *Yearbook Commercial Arbitration* 1998, 1029; in accord *Ronald Borsack, A/K/A Ron Bell. v. Chalk & Vermilion Fine Arts Ltd. et al,* U.S. District Court Southern District of New York August 7, 1997 no. 96 CV6587 (BDP) *Yearbook Commercial Arbitration* 1998, 1035.

[39] *Genesco Inc. v. T. Kakiuchi & Co.,* 815 F2D 840845 (2d Cir.) 1987 *Yearbook Commercial Arbitration* 1998, 1099.

[40] *McPheeters v. McGinn, Smith. & Co.* 953 F2 D 771, 772D (2d Cir. 1992), *Yearbook of Commercial Arbitration* 1998, 1042.

> Under general contract principles, non-signatories [...] fall within the scope of an arbitration agreement where that it is the intent of the parties.

Some national legal systems, such as the German one, treat a contractual offer which has not been refused as sufficient to establish the existence of an agreement. Other systems, such as those of Italy and Switzerland, exclude it. Along the former lines is *Israel Chemicals*:[41]

> Israel Chemicals submitted a purchase order to Oliehandel which responded by sending a contract of sale which included an arbitration clause. Two months after taking delivery of the goods, Israeli Chemicals refused the arbitration clause. The Rotterdam Court held that the arbitration clause was valid since it resulted from an exchange of documents.

Similarly in *Sorvia-Weinstein*:[42]

> In a dispute, concerning a supply of pork, between a corporation in Minneapolis (seller) and a French company (purchaser) the award was attacked by the French company which challenged the existence of an arbitration agreement. The Paris Court of Appeal held that there was a valid agreement because there was an arbitration clause in the order acknowledgement. This had not been refused by the other party, and there had already been several commercial transactions between the parties in which the order acknowledgement contained similar arbitral clauses.

However this form does not seem to be sufficient to comply with the form requirements of the New York Convention. When the referral to arbitration is contained in the arbitration clause itself, in general no special problems arise concerning the form. Difficulties arise when the arbitration agreement is in a document separate from the contract, which makes only a passing reference to it. When reference to the arbitration agreement, contained elsewhere, is expressed the form requirement is generally considered satisfied.[43] A problem arises when there is a non-express reference to a document such as general supply conditions, dealing with a series of contractual matters between the parties, one of which incidentally is arbitration. The form requirement has particular relevance in states, such as in Italy, in which a special and further acceptance is also required. The lack of special and further approval has been

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41 *Israel Chemical Phosphates Ltd.* v. *N. V. Algemene Oliehandel;* Rechtsbank Rotterdam June 26 (1970), *Yearbook Commercial Arbitration* 1976, vol. I, at 195.

42 *Sté Sorvia* v. *Weinstein International Disc. Corp.*, Court of Appeal Paris, March 25 (1983), *Rev. arb.* 1984, 363 *et seq.*

43 See for an approach to this problem and for a large bibliography N. PICARDI, *La forma della convenzione d'arbitrato* (The form of the arbitration agreement), *Rass. Arb.* 1986, 157 *et seq.*

opposed in these legal systems also in the case of arbitration agreements governed by the New York Convention.[44]

However the issue has been repeatedly decided in the sense that the New York Convention, which does not require special and further approval, prevails as *lex specialis*[45] over domestic law.

The problem has consequently moved, in these legal systems, from the form requirement to the issue of establishing the existence of the agreement. It has been held that whenever there is no express reference to an arbitration agreement contained in another document it must be concluded that the intention to refer the dispute to arbitration does not appear.[46] This is the *raison d'être* for the distinction between *relatio perfecta* (full reference) and *relatio imperfecta* (insufficient reference) which is found in several Italian judgments as *Navry*.[47]

Another question is whether the party which has not subscribed the arbitration agreement, but which produces in court the agreement subscribed by the other party, in so doing accepts that agreement. A distinction must be made here between production of an agreement in line with the position taken by that party to accept that agreement, and production intended to challenge its existence or validity. In the former situation, production in court has been considered, in Italian domestic law[48] as valid acceptance. In the latter case, because of the purpose behind production, its construction as an acceptance has been excluded.[49]

Craig *et al*[50] point out that, in the absence of a written agreement, it may be difficult to recognize the award under the New York Convention, while recognition may be sought under the relevant national procedural law, or under another convention which is less stringent on this issue.

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44 See G. MIRABELLI, G. RECCHIA and F. ZUCCONI GALLI FONSECA, *I Giudici italiani e l'arbitrato commerciale internazionale* (Italian Courts and International Commercial Arbitration), *Rass. arb.* 1978, 15.

45 For a complete review of precedents and authors in domestic law see F. BONELLI, *La forma della clausola compromissoria per arbitrato estero* (The Form of the Arbitration Clause for Foreign Arbitration) *Rass. Arb.* 1983, at 141 *et seq.*

46 F. BONELLI, *op. cit.*, at 146.

47 See among the last ones *Janch and Hubner GmbH* v. *Soc. Navry Transocéanique*, Court of Cassation (Italy), Joint Divisions, November 14 no. 6035 (1981), *Rep. Foro It.* 1981, item Giurisdizione Civile, no. 53.

48 *Colella v. Carey Hirsch,* Court of Cassation (Italy), Joint Divisions, July 6 no. 4039 (1982), *Rass. arb.* 1982, 1, 328.

49 *Egel v. Sea Containers,* Court of Cassation (Italy), Joint Divisions, February 12 no. 1168 (1985), *Rass. arb.* 1985, I, 170.

50 See CRAIG *et al, op. cit.*, II, 5.06, at 22.

The form requirements may consequently differ depending on whether the arbitration agreement is examined under the New York Convention or a national law or other international Conventions.

The written form, required by the former, is identified by it in a document subscribed by the parties, or resulting from an exchange of cables or telexes. In *G.S.A. v. T Ltd (UK)*[51] the Swiss Federal Court confirmed that an arbitration agreement may result even from an exchange of telexes.

In *Zambia Steel*[52] the Court of Appeal of England held that since the contract had been concluded on the terms of a written quotation from English Sellers to Zambian Buyers, which contained an arbitration clause, an agreement to submit to arbitration had been made in writing within the meaning of the Arbitration Act 1975, legislation which was more liberal than the New York Convention.

Moreover, the convention maintains the principle of the most favourable treatment. Therefore, if the national applicable law does not require the written form, the arbitration agreement may be valid under that law. This was held by the *Bundesgerichtshof* (the German Supreme Court):[53]

> In a dispute between an Austrian textile company and its German agent the court held that there was a valid verbal arbitration agreement, not under the New York Convention but under German law, which allows that the agreement be made verbally between merchants in the framework of commercial transactions.

On the other hand, when the written form is required, its absence cannot be compensated by evidence from witnesses that the clause was entered into. On the other hand it has been held that, if the national law has more stringent requirements as to form, the New York Convention may be invoked.

Under the New York Convention whenever it is possible to establish that the parties intended to refer a dispute to arbitration, no other elements are required. Therefore when the agreement between the parties refers to general conditions on the back of the document and these include an arbitration agreement, it has been held that the parties must be aware of it. However, when the agreement between the parties refers only to general conditions which are separate and which include an arbitration clause, lost amongst the other clauses, according to the above quoted Italian precedent (which must be ap-

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[51] *G.S.A. v. T Ltd (UK)* Swiss Federal Court, January 12, 1989, *Yearbook Commercial Arbitration* 1990, 509.

[52] *Zambia Steel & Building Supplies Ltd.* v. *Jones Clark and Eaton Ltd.*, [1986] 2 Lloyd's Report 225, see F.A. MANN, *An Agreement in Writing to Arbitrate*, 3, *Arb. Int.* 2, 171.

[53] Bundesgerichtshof May 25 (1970), no. 11, *Yearbook Commercial Arbitration* 1977, at 237. This judgment is based on the combined provisions of Articles 11 (2) and VII (1) New York Convention (1958). *Accord:* A. J. VAN DEN BERG, *op. cit.*, at 89.

plied carefully in other situations), the reference is insufficient and no written arbitration agreement exists.

The basic disagreement between the Italian and English approach to the requirements to assert the existence of consent to arbitration is shown in *Marc Rich*[54] where the Italian Court of Cassation held that there was no arbitration agreement, since Marc Rich's telex to Impianti containing the arbitration clause remain unanswered, while the English High Court was ready to appoint the arbitrator, in spite of the absence of an agreement in writing.

The Italian position is clearly expressed by the Italian Federal Court in *Universal Peace:*[55]

> We must make a preliminary and largely pre-emptive remark, i.e. that Montedipe entered into a contract of transportation ..., but that it does not and cannot derive from this fact that Montedipe also entered into the arbitration clause at issue, not only because the clause was not in writing but also (more importantly) because it was not accepted by Montedipe. Hence the clause is not only null and void but also non-existent ...

The English position is equally expressed in clear terms in the same proceedings by the High Court which *inter alia* held that in a contract for the sale of Iranian crude oil entered into between the Swiss company Marc Rich and the Italian company Italimpianti, subsequent to which Marc Rich has sent a further fax to Italimpianti including a clause providing that Italian law was applicable and disputes referred to arbitration in London, that a fax was binding on Italimpianti even if unanswered.

The position is now governed, under English law, by sections 5(2) to (4) Arbitration Act 1996.

Incorporation of other contractual documents – express reference

In *Psichikon*[56] the French Court of Cessation has held that the mere reference in a bill of lading to a charter party, to which the shipowner had not been a party, was not apt to satisfy it that the arbitration clause had been accepted by the consignee. In *Crouzier*[57] the French Court of Cassation has held that the mere fact that the arbitration clause is not referred to in the contract, and that

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[54] *Marc Rich & Co. AG v. Società Italiana Impianti*, Court of Justice of the European Communities, July 25, 1991, Case C 190 189, *Yearbook Commercial Arbitration,* 1992, 233.

[55] *Universal Peace Shipping Enterprise SA v. Montedipe*, Court of Cassation (Italy) March 28, no. 3362 (1991), *Yearbook Commercial Arbitration,* 1992, 562.

[56] *Psichikon Compañia Naviera Panama v. Sté Sier et al.*, Court of Cassation (France) January 7, 1992, *Rev. arb.* 1992, 553.

[57] *Sté Dreistern Werk v. Crouzier,* Court of Cassation (France) June 26, 1990, *Rev. arb.* 1991, 291.

there be a mere reference to standard conditions which had neither been accepted nor signed, is not sufficient to exclude the existence of a valid arbitration clause. However it further held that before being able to say so, one has to check whether the party which challenges it has not had knowledge of said standard conditions and if so whether it has accepted them by its silence.

The need to ensure knowledge and incorporation by silence has been reaffirmed by the French Court of Cassation in *Bomas Oil*[58] and by the Court of Appeal, Paris in *Spice and Food.*[59]

The French position on this issue had been even more basically stated in the earlier judgment in *Bomas Oil – ETAP:*[60]

> Art. II of the New York Convention June 10, 1958 does not exclude the adoption of an arbitration clause by making reference to a separate document. However, as under French law, the existence of such a clause must be stated in the contract, unless the parties entertain regular relationships which produce the result that the parties are fully aware of all the terms which regulate their business.

Writers have discussed this issue at length.[61] The general rule is affirmed by Boucobza[62] that, in international arbitration, the arbitration agreement in which a document is incorporated by reference, is valid also for the party who has been aware of the existence of that clause at the time he entered into the contract and has accepted such a reference.

In *Mediterranean Shipping*[63] the French Court of Cassation held that acceptance, by the stevedores, of the arbitration clause contained in the bill of lading does not bind the consignee if he has not accepted too the arbitration clause.

Consent to an arbitration clause may consist also, as held in *Casa Città*[64] of the appointment by the other party of its arbitrator and service of the notice of appointment. This provided the first party in the meantime has not waived the arbitration agreement.

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58 *Bomas Oil N.V. v. ETAP*, Court of Cassation (France) November 9, 1993, *Clunet* 1994, 690.

59 *Trafidi v. Sté International Spice and Food,* Court of Appeal, Paris, *Clunet* 1996, 110.

60 *Bomas Oil N.V. v. ETAP*, Court of Cassation (France) October 11, 1989, *Clunet* 1990, 633.

61 B. OPPETIT, *La clause arbitrale par référence, Rev. arb.* 1990, 551.

62 X. BOUCOBZA *Clause compromissoire par référence en matière d'arbitrage commercial international, Rev. arb.* 1998, 495.

63 *Sté Mediterranean Shipping Co. v. GAFL,* Court of Cassation (France) June 20, 1995, *Rev. arb.* 1995, 622.

64 *Di Stefano v. Casa Città S.r.l.*, Court of Appeal, Rome, June 5 no. 1964 (1995) *Rev. arb.* 1995, 71.

The possibility that, even in the absence of written form, an arbitration agreement could be validly entered into was asserted by the Swiss Federal Tribunal in *Mediterranean Shipping:*[65]

> in special circumstances a given behaviour may – under the rules of good faith – supplement lack of written form.

This shows that the construction of the requirement for written form set out by the New York Convention is not uniform.

The requirement of an express reference to the arbitration clause, when incorporating standard conditions, was asserted in *Aughton.*[66] However in *McAlpine*[67] the Court held that since the parties were familiar with the incorporated contract, an express reference to the arbitration clause was not required.

The English High Court held in *Ben Barret*[68] that the arbitration agreement had not been incorporated into the conditions of contract:

> if the self contained contract is to be incorporated, it must be expressly referred to in the document which is relied on as the incorporating writing. It is not incorporated by mere reference to the terms of the conditions of contract to which the arbitration clause constitutes a collateral contract.

The unsatisfactory result of such decisions has been stressed by Knowles.[69] Incorporation is now clarified and widened by sections 5(2) to (4) Arbitration Act 1996.

As earlier discussed, whenever the New York Convention is not applicable, the form requirement is governed by the other international conventions or by the relevant national law. In the states where the form requirement is less stringent than in other national systems, such as Japan, the Netherlands and Sweden, the arbitration agreement does not require a written form.

Arbitration rules

The arbitration rules generally confine themselves to proposing a standard clause or assume the existence of an arbitration agreement.

This is the case for the following rules: ICC,[70] London Court of International Arbitration,[71] Arbitration Institute of the Chamber of Commerce of

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[65] *Compagnie de Navigation et Transports SA v. MSC Mediterranean Shipping Co.*, Swiss Federal Court, January 16, 1995, *ASA Bulletin* 503.

[66] See *supra* note 31.

[67] See *supra* note 32.

[68] *Ben Barret & Son (Brickworth)Ltd. v. Henry Boot Management Ltd.* (1995).

[69] R. KNOWLES, *Developments in Law Relating to Arbitration,* 62, *Arbitration* (J.C.I.A.) 3, 188.

Stockholm,[72] American Arbitration Association[73] and Milan Chamber of Arbitration.[74] There are thus many standard arbitration clauses and frequently they have similarities.[75]

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[70] See ICC Publication no. 447; the ICC Conciliation and Arbitration rules contain the following standard arbitral clause:

> 'All disputes arising in connection with the present contract shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules'.

[71] The 1985 edition of the LCIA Rules contains the following Recommended Clause:

> 'Parties to an international contract who wish to have any disputes referred to arbitration under these Rules are recommended to insert into this contract an arbitration clause in the following form: Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the Rules of the London Court of International Arbitration, which Rules are deemed to be incorporated by reference into this clause'.

[72] The Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (in their January 1, 1988 edition), recommend the adoption of the following arbitral clause:

> An arbitration agreement may either take the form of a clause in a contract covering many other matters (an 'arbitration clause'), or a special agreement to arbitrate. The SCC Institute suggests the following arbitration clause: 'Any dispute, controversy or claim arising out of or in connection with this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce.

[73] The AAA in the premises to its Commercial Arbitration Rules so provides for the submission and the arbitration clause:

> For the arbitration of future disputes the American Arbitration Association recommends the following arbitration clause for insertion in all commercial contracts: Standard Arbitration Clause: Any controversy or claim arising out or relating to this contract, or the breach thereof, shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrator (s) may be entered in any Court having jurisdiction thereof. For the Submission of Existing Disputes: We, the undersigned parties, hereby agree to submit to arbitration under the Commercial Arbitration Rules of the American Arbitration Association the following controversy: (cite briefly). We further agree that the above controversy be submitted to (one) (three) arbitrator(s) selected from the panels of arbitrators of the American Arbitration Association. We further agree that we will faithfully observe this agreement and the rules and that we will abide by and perform any award rendered by the arbitrator(s) and that a judgment of the Court having jurisdiction may be entered upon the award.

[74] The National and International Milan Chamber of Arbitration in its International Rules recommends the following clause:

> All disputes arising in connection with the present contract shall be settled by one or more arbitrators appointed in accordance with the International Arbitration Rules of the Chamber of National and International Arbitration

In *Marea Producten* it was held that, for the purposes of establishing the existence of an arbitration agreement, the regular prior use of general conditions, not referred to in that specific case, is not sufficient:[76]

> Marea Producten and James Allen had traded in corn for many years, making constant reference, in at least *25* successive transactions, to the *Conditions of the Grain and Feed Trade Association*, London (GAFTA). These general conditions provided for the settlement of disputes in London by arbitration under the auspices of GAFTA. However in their last transaction they did not refer to these conditions. A dispute arose concerning the quality of the goods and James Allen referred it to arbitration.
>
> Marea refused arbitration on the grounds that no reference had been made to the GAFTA conditions. The arbitrators decided in favour of James Allen, which sought enforcement of the award in the Netherlands. However, the President of the District Court of Rotterdam refused to issue the enforcement order since there was no written arbitration agreement. The Hague Court of Appeal confirmed the decision of first instance on the following grounds: 'Also the assertion by Appellant that the applicability of the GAFTA conditions is implied between the parties because of continuous use can be of no avail, whatever may be true about the continuous use. The *25* other contracts on which it relies refer, all without exception, expressly to those conditions, which in case of a continuous use would be redundant. Consequently, the hand written contract dated June 18, 1981, which does not contain an express reference to these conditions, rather indicates, as Appellee has argued and Appellant has insufficiently refuted, that in this case there is a different contract. Moreover, the requirement of the "agreement in writing" referred to in art. IV, para. 1 II of the Convention forecloses the possibility to invoke such continuous use'.

The Italian Court of Cassation in *Federal Biblos*[77] made a distinction about the possible meaning of production in court of a contract, containing an arbitration agreement not signed by the party producing it, as acceptance of that clause and therefore an arbitration:

> of Milan. The arbitrator or arbitrators shall decide in accordance with the said rules which the parties declare that they know and accept.

[75] Such as not providing for blanks to be filled, for example with the statement of the place and language of arbitration, as well as the substantive and procedural laws (although in the text of the Rules sometimes the invitation is made to the parties to mention them).

[76] *James Allen (Ireland) Ltd. v. Marea Producten B. V. (Netherlands)*, Court of Appeal, The Hague, February 17, (1984), *Yearbook Commercial Arbitration* 1985, vol. X., 485.

[77] *Fritz Egel v. Sea Container,* Court of Cassation (Italy), Joint Divisions, February 12 no. 1168 (1985), *Yearbook Commercial Arbitration* 1986, at 511.

> Egel leased (by a contract subscribed only by Sea Containers and which contained an arbitration agreement for AAA arbitration in New York) containers which were loaded on the ship 'Federal Biblos'. Upon arrival in the port of Beirut they were destroyed during military action.
>
> Engel, which had continued to pay for the containers, applied for reimbursement from the moment of their destruction.

Egel initiated proceedings against Sea Containers before the Court of Trieste and during them asked the Supreme Court of Cassation to rule on jurisdiction. The Supreme Court affirmed Italian jurisdiction for the following reasons:

> Further, the Court considered that the absence of the party's signature cannot be substituted by the party's submission of the contract during court proceedings, given that the validity of the arbitration clause does not depend on the validity of the contract in which it is contained if the contract is submitted with an aim other than proving the intention of the party which has not signed the arbitration agreement referring disputes to arbitration. The Court held that Egel, by initiating court proceedings, had certainly not intended to express its will to agree on arbitration of the dispute. Therefore, the lack of Egel's signature was not cured.

10.4 CONTENTS

The contents of the arbitration agreement vary considerably from standard arbitration clauses drafted by arbitral institutions to clauses drafted by the parties. The parties usually pay little attention to arbitration agreements (the management of commercial companies – at the time a new contract is entered into – is frequently against considering the possibility of disputes arising as they might affect the magical atmosphere which negotiators sometimes try to create at that time). Arbitration clauses are then frequently drafted in a hurry, without consideration of many of the problems which might arise. This creates possible contradictions and ambiguities, which justify such clauses being characterised as *pathological.*[78] Eisemann has divided pathological clauses into two categories: those, which do not give rise to a valid agreement, and those which simply offer a party the opportunity to challenge them.[79] Some clauses may be cited as classical examples of pathology, such as the *Datel-King* clause.[80]

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[78] See in this respect the comment to the award made in 1980 in ICC proceedings no. 3460, *Clunet* 1981, 942 with other references to pathological arbitral clause.

[79] EISEMANN, *La clause d'arbitrage pathologique* (The pathological arbitral clause), Essais in Memoriam Eugenio Minoli, at 129. See also B.G. DAVIS, *Pathological clauses – Frederic Eisemann's Still Vital Criteria*, 7, *Arb. Int. 4*, 365.

[80] *Datel-King*, Award made in 1987 in ICC proceedings no. 5423, *Clunet* 1987, 1048 *et seq.*

Illustration

In 1985 Datel Productions and King Productions S.a.r.l. entered into a contract containing the following arbitration clause:

'Any dispute arising from this agreement shall be settled finally under the rules of conciliation and arbitration of the "*Chambre de Commerce*" by an arbitrator appointed in compliance with such rules; the place of arbitration shall be Paris; French law shall be the applicable law.'

A dispute arose between the parties and King Productions held that '*Chambre de Commerce*' meant the Paris Chamber of Commerce and Industry, commonly called the *Chambre de Commerce,* and argued that there was no international element, which could justify recourse to the International Chamber of Commerce in Paris. It further added that arbitration 'could not proceed because the *Chambre de Commerce* had no arbitration rules.'

The arbitrator:

Having held that in effect there was uncertainty as to whether the parties intended to refer to the International Chamber of Commerce or to the Chamber of Commerce and Industry of Paris held that:

'One could not presume an intention to refer the dispute to the International Chamber of Commerce since that solution implies the application of a high scale of costs and fees, which are justified by the necessity of an international arbitration but not in a domestic arbitration'.

and came to the conclusion that:

it results from this that the arbitration agreement has to be held as null and void. This is true only as to the procedure to designate the arbitrator. The agreement is not null and void as far as reference of the dispute to arbitration is concerned.

On this ground the undersigned arbitrator:

declares to have no jurisdiction to hear the dispute between Datel and King;

invites the parties to better rule this matter...

Another ICC panel came to a different conclusion in proceedings no. 6709[81] in deciding on the validity of an arbitration clause which referred disputes to the Chamber of Commerce of Paris. In its interim award it found that:

The omission of the word 'international' in the final clause of the contract is due a mere clerical mistake. The clear common intention of the parties was to refer the dispute to ICC – Paris.

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[81] Award made in 1988 in ICC proceedings no 5103, *Clunet* 1988, 1207.

as the Paris Court in *European Energy*[82] which held:

> By agreeing to refer the dispute to arbitration before the Official Chamber of Commerce in Paris the parties have manifestly intended to designate the International Chamber Commerce, in Paris.

However in *Viennoiserie*[83] the Court of Appeal, Paris has held that an arbitration agreement just providing 'Arbitral tribunal sitting in Paris' was null and void since it did not state neither the name of the parties, nor the arbitral institution nor the process to be followed to designate them.

The conclusion may be different in those jurisdictions which provide that the number of arbitrators is determined statutorily, in the silence of the parties, and that said arbitrators are appointed by the state court and the national law states how they should proceed.

Another ambiguous clause can be found in *Techniques de l'Ingénieur*:[84]

> The parties agreed that, in the event of a dispute, reference would be made to arbitration by the French Advertising Federation and immediately after: 'in case of dispute the *Tribunal de la Seine* shall have exclusive jurisdiction'.

The same difficulties arise when arbitration agreements refer to an arbitral institution without mentioning its full name, such as reference made to the (non-existent) International Chamber of Commerce of Zurich which, fortunately for the parties, was construed as a reference to the ICC and to Zurich as the place of arbitration.[85]

Even an optional arbitration clause like the one dealt with in *Fujian*[86] may give rise to problems. The arbitration agreement provided:

> All disputes arising under or in connection with this bill of lading shall be determined by Chinese law in the Courts of, or by arbitration in, the People's Republic of China.

Canada Packers, the shipper of red palm olein from Singapore to Huangpu, China, were not paid for the cargo and commenced proceedings against Fujian. Fujian applied for the stay of the court proceedings pending arbitration or

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[82] *Sté Asland v. Sté European Energy Corp.*, Tribunal de Grande Instance, Paris, December 18, 1988, *Rev. arb.* 1990, 521.

[83] *Sté Viennoiserie Fine v. Negie et al.*, *Rev. arb.* 1992, 673.

[84] *Société Techique de l'Ingénieur v. Sofel,* Tribunal de Grande Instance, Paris, February (1979), *Rev. arb.* 1980, 97.

[85] Award made in 1984 in ICC proceedings no. 4472, *Clunet* 1984, 946.

[86] *Canada Packers v. Fujian Shipping Co. (China)* High Court of Singapore, Admiralty Division, March 2, 1992, *Yearbook Commercial Arbitration* 1998, 750.

reference to the Courts of China. The Court ordered Canada Packers to commence arbitration or court proceedings in China.

The arbitration agreement should at least cover the following areas:

- description of the disputes being referred to arbitration;
- direct or indirect choice of the arbitrator;
- choice of the substantive law;
- direct or indirect regulation of the arbitral proceedings;
- choice of the place of arbitration;
- possible waiver of attacks against the award;
- choice of the language of arbitration.[87]

No major differences are reported between the various national systems as to the admissibility of stating these elements. They do not seem to be different even in the Far East; it is reported that this is true for Indonesian law,[88] while under Japanese law the arbitration agreement may be oral and even implied[89] and in India it is reported that the agreement must also state the arbitration rules or applicable law.[90]

However, arbitration agreements frequently do not specify the place of arbitration, the language of the procedure, the substantive and procedural laws, and the nationality and qualifications of the arbitrators.[91]

International conventions

The Conventions generally contain concise provisions concerning the arbitration agreement.

The Geneva Convention (1923)[92] defines it as the agreement:

> by which the parties to a contract undertake to refer to arbitration fully or partly the disputes which might arise in a commercial matter or in any other arbitrable matter.

The New York Convention (1958)[93] provides that:

> Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences

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87 This results from the analysis of the clauses of several of the main arbitral institutions; each set of arbitral rules generally contains a proposal for a standard clause.

88 SIMMONDS *et al., op. cit.*, at 701.

89 SIMMONDS *et al., op. cit.*, at 88.

90 SIMMONDS *et al., op. cit.*, at 44.

91 See in this respect DERAINS, *Le contenu des conventions d'arbitrage* (The Contents of Arbitral Agreements), *Rev. arb.* 1979, 12 *et seq.*

92 Art. 11 Geneva Convention (1923), *cit.*

93 Art. II New York Convention (1958), *cit.*

> 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.

The Geneva Convention (1961)[94] further provides for the non-recognition of an award if:

> ... 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, ...

and declares that it applies:[95]

> to arbitration agreements concluded for the purpose of settling disputes arising from international trade between physical or legal persons.

The Washington Convention (1965) concerns:[96]

> any legal dispute arising directly out of an investment between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that state) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.[97]

The Uncitral Model Law (1965) defines as an arbitration agreement.[98]

> ... 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 transaction, whether contractual or not.

Domestic laws

Domestic laws occasionally govern the contents of arbitration agreements. Italian law, for example, provides:[99]

> Section 806. 'The parties may refer to arbitration the disputes which have arisen between them, except for those which are governed by sections 429 and 459, those which concern issues of status or of separation between spouses and those which the parties are not allowed to settle.'
>
> Section 807. 'Under sanction of nullity the arbitration agreement must be made in writing and must describe the object of the dispute. The pro-

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94 See Art. IX 1, (a) Geneva Convention (1961) *cit.*

95 Art. I a), Geneva Convention (1961), *cit.*

96 Art. 25 (1), Washington Convention (1965), *cit.*

97 The International Centre for Settlement of Investment Disputes instituted by the Washington Convention (1965), Articles 1-24.

98 Art. 7, Uncitral Model Law, June 21, 1985, *cit.*

99 Sections 806-807 and 808, Italian Rules of Civil Procedure.

> visions, which govern the validity of contracts exceeding day-to-day management, apply to arbitration agreements'.
>
> Section 808. 'In the contract or in a subsequent document the parties may agree that the disputes arising from the same be referred to arbitration provided they may be referred to arbitration. The arbitration clause must be in writing under the sanction of nullity'

French law[100] defines as an arbitration clause:

> the agreement under which the parties to a contract undertake to refer to arbitration the disputes which might arise from it.

and as a submission:[101]

> The agreement by means of which the parties to a dispute, which has already arisen, submit it to the decision of one or more arbitrators;

and it further provides:

> that the arbitration agreement must, on pain of nullity, determine the object of the dispute, the arbitrator or arbitrators and must make provision for the manner of their nomination.

The Swiss Concordat on Arbitration of March 26, 1976[102] states:

> The arbitration agreement shall be concluded in the form of a compromise or of an arbitration clause. In a compromise the parties submit an existing dispute to arbitration. Arbitration clauses may refer only to future disputes arising out of a particular specific legal relationship.

From the above examination of international conventions, of arbitration rules and of national laws, one may conclude that the identification of the dispute (or at least of the area of disputes) is a permanent requirement.

The same may be said of the necessity for a direct or indirect choice of the arbitrators. Indeed, in Indonesian law, it is stipulated that the arbitration agreement must, on pain of nullity, contain the name(s) and address(es) of the arbitrator(s).[103] Similarly, Egyptian law requires that the nomination of the arbitrators be made in the arbitration agreement and not be left to a third party: a principle which Egyptian precedents however have on two occasions (in *Gulf Contractors*[104] and in *Misr insurance*[105]) held not to be a part of Egyptian

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[100] Sections 1442 (French Decree no. 81-500, May 12, 1981).

[101] Sections 1447 (French Decree no. 81-500, May 12, 1981).

[102] Art. 4-1, 2, 3, Intercantonal Swiss Concordat, March 26, 1969, *cit.*

[103] SIMMONDS *et al.*, *op cit.*, at 70.

[104] *M.V. Lela v. Gulf Contractors*, Court of Cassation (Egypt), April 26, no. 714 (1 *Mediterranean and Middle East Arbitration Quarterly* 1988, 2, 1). In a dispute between the agent of a foreign purchaser and an Egyptian concrete supplier, concerning a claim for termination of contract and damages because of non-delivery of goods, the Egyptian

public policy and which, therefore, should not be complied with unless the law of the place of arbitration provides otherwise.

In *Gulf Contractors:*

> The Agent of a foreign purchaser instituted proceedings before the Court of First Instance of Alexandria against an Egyptian seller of cement, claiming rescission of the contract of sale and damages for non-delivery of the cement. The Egyptian supplier pleaded lack of jurisdiction because the dispute came under an arbitration agreement (which had not appointed the arbitrators and which had chosen London as the place of arbitration). The plaintiff argued that the agreement was null, being in breach of art. 502 para. 3 ECCP, which requires that the arbitrator be appointed in the arbitration agreement. The Court of First Instance declared the arbitration agreement null and void on that ground. The Court of Appeal of Alexandria confirmed the judgment of first instance. The Court of Cassation reversed the appellate judgment, holding that the validity of the arbitration agreement must be determined under the law of the place of arbitration and that, in this case, the agreement was valid under English law.

Although on the one hand the Geneva Convention (1961) affirms that the parties may nominate the arbitrators in case of *ad hoc* arbitration; on the other hand it stipulates that, if they fail to nominate the arbitrators, they may be appointed by the President of the Chamber of Commerce of the place of arbitration chosen by the parties or of the Chamber of Commerce of the place in which the Defendant has its place of business, or of the place where the original request for arbitration was made or, finally, by the special Committee set up by the Geneva Convention (1961).[106] Thus this provision modifies the traditional mandatory provisions of those contracting states according to which the appointment of the arbitrator (or the choice of the procedure to nominate him) has to be made in the arbitration agreement.

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party argued lack of jurisdiction of the Court of Alexandria because of an arbitration clause. The plaintiff opposed the nullity of the arbitration clause (which specified London as the place of arbitration) on the grounds of conflict with Egyptian law, since the arbitration clause did not appoint the arbitrators. The Court, and later the Court of Appeal, upheld the argument, but the Court of Cassation set aside the appellate judgment affirming the validity of the arbitration clause, since it complied with the applicable law, which in the case (since London was the place of arbitration) was English law.

[105] *Misr Insurance v. M.V. Dominion Trader*, Court of Cassation (Egypt), June 13 no. (1983), *Mediterranean and Middle East Arbitration Quarterly*, no 2, 8.

[106] This can be argued from the combined provisions of Art. IV 1.b) i) and of Art. IV 3. of the 1961 Geneva Convention *cit.* For a pratical application of such principles see also the award rendered in *Malvisi S.p.A.* v. *Trans Air Sud S.A.*, June 24, (1987), *Foro pad.*, 1987, I, 507 *et seq.* with several citations.

The selection of the arbitral procedure to be followed is generally to be made in the arbitration agreement. It can be made directly by the parties, but in general it is made by reference to arbitration rules. Even in the absence of a reference to arbitration rules, the Geneva Convention, exceptionally, treats the agreement as valid.[107]

The waiver of challenges against the award is frequent. However, the extent of the right to waive is often diminished by the applicable procedural law. Indeed, in Italian law:[108]

> Challenges on the ground of nullity are allowed notwithstanding any waiver in the following cases: ... Challenges on the ground of nullity are furthermore allowed where the arbitrators have failed to decide according to the rules of law except when the parties have authorized them to decide according to natural justice, or have otherwise declared the award to be unchallengeable.

Certain of the requirements as to the contents of the arbitration agreement are expressly stated by the national law, such as under Italian law, which *except* when the above-mentioned Geneva Convention (1961) applies, provided:[109]

> The submission or arbitration clause must appoint the arbitrators or at least state their number and the method of their appointment.

Subsequent to the 1994 Reform if the number of the arbitrators is not stated and the parties do not agree, the arbitrators are three and they are to be appointed by the President of the Court of Justice.

The difference between the submission agreement and the arbitration clause might perhaps be further explored. This distinction is generally founded on whether or not the arbitration agreement precedes the disputes.

The arbitration clause has in practice become synonymous with a clause preceding the dispute, while the submission agreement is a synonym with an agreement entered into subsequent to a dispute.

Yet, even though this distinction is undoubtedly correct, it could be completed by the remark that an arbitration clause can be entered into separately from the main contract, even if it remains prior to a dispute arising. In fact, it may be entered into through a further agreement, of which it may be the only contents. In such circumstances, the agreement possesses the contents of an arbitration clause, but formally it is a contract and not a clause. Similarly, in

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[107] In this case even if the Geneva Convention (1961) recognizes the parties' right to choose the procedural rules (Art. IV. I (a) (iii), in the absence of a choice by the parties it still allows the Special Committee to make that choice (Art. IV.4.d).

[108] Section 829, Italian Civil Procedure Code.

[109] Section 809, Italian Civil Procedure Code.

respect of a contract, originally deprived of an arbitration clause, a second contract may be stipulated after the dispute has arisen. This second contract may govern various elements of the previous contract or deal with other aspect of the relationship between the parties, and in addition contain an arbitration clause, which refers to arbitration the already arisen dispute. In such circumstances, the agreement has the nature of a submission agreement but has the form of a clause. Therefore the most acceptable formula to distinguish between a submission agreement and an arbitration clause is the one which rather than being based on the form (which, as we have seen, is changeable) is based on its being stipulated before *or* after the dispute arises.

As to the contents of the dispute and, in particular, as to its identification as the object of the proceedings, the Court of Paris,[110] for example, has set aside an award which had been made in a dispute over a breach of contract, on the ground that the arbitration agreement provided only for the interpretation of the contract. Indeed, Fouchard[111] urges that we should watch out for arbitration clauses, which are, involuntarily, 'too narrow'.

The apparent or real limitation of the scope of arbitration has given rise to innumerable disputes. Thus, for example, the expression:

> all disputes related to the interpretation of the contract

has been construed on one occasion as excluding the disputes related to the *performance* of such contract[112] and, on another occasion, as excluding the disputes concerning damages arising from a breach of contract.

An interesting study of the *caractère monstrueux* ('monstrous character') of pathological arbitral clauses and of their location in the *musée noir* ('black museum') has been carried out by Eisemann.[113]The consequence of these 'pathological' arbitral clauses is that sometimes their author himself is prejudiced by them. In *Bloch:*[114]

> The Swedish company Delatra had sold a consignment of timber to the French company Bloch (Quimper).
>
> A dispute arose between the parties over the quantity supplied (which the French company alleged to exceed the contract) and it was referred to arbitration proceedings. The French company attacked the award insofar as the arbitration agreement provided that the arbitrators' award

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[110] Court of Appeal Paris, January 25, (1972), *Rev. arb.* 1973, 158.

[111] Comments to *Sté Hertzian v. Société Electroska Industrja et autre*, Court of Cassation (France), March 13 (1978), *Rev. arb.* 1979, 339.

[112] See *supra*, note 100.

[113] M. EISMANN, *La clause d'arbitrage pathologique* (Pathological Arbitration Clause), *Essais in Memoriam Minoli*, at 129 et seq.

[114] *Sté Bloch et Fils* v. *Sté Delatrae Mockfjaerd,* Court of Appeal, Paris, January 17, (1984), *Rev. arb.* 1984, 498.

> had to be rendered within ten days of their nomination, if the dispute concerned the goods themselves, and the arbitrators had then decided beyond that time limit. The court held that the award was not valid since the dispute concerned the goods and it had been made '*à convention expirée* (after the arbitration agreement had expired).

While one certainly bears in mind the need for the award to be made in a short space of time, such a short time limit may nevertheless put at risk the validity of the entire proceedings. On the other hand, the need to establish the parties' intention, even when they have used 'an elliptical formula' is reaffirmed in *Epoux Convert.*[115]

The arbitration agreement does not always allow such a broad interpretation. Derains, in his comments on the award rendered in 1974 in ICC proceedings no. 2138,[116] states that:

> the arbitration clause must be construed restrictively in order that there may be no uncertainty as to the intention of the parties to refer the matter to arbitration.

This view is shared by David.[117]

The lack of a precise description of the arbitral institution which the parties have intended to empower to administer the arbitral proceedings has given rise to involved disputes as in *Impac Australia*[118] where the arbitration agreement referred to the rules and procedures of the Australian Arbitration Association. In the absence of any such institution it was sought to obtain the consent of both parties to identify that body as the Institute of Arbitrators Australia. After a first stage of discussions, the New Zealand litigant refused the consent and in the end obtained that arbitration be held in New Zealand.

Regarding the effects of connection on arbitration agreements, one may revert for example to Italian law and to the comments made in Chapter 7. As far as other legal systems are concerned, in the United States for example, the intertwining doctrine has developed, in respect of which the American courts took the following stance in *Perforaciones Marinas*:[119]

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[115] *Epoux Convert v. Sté Droga,* Court of Cassation (France) December 14, (1983), *Rev. arb.* 1984, 483.

[116] Award made in 1974, ICC case no. 2138, *Clunet* 1975 934, see also Y. DERAINS, *Chronique des sentences arbitrales, Clunet* 1981, 943.

[117] R. DAVID, *L'arbitrage commercial international en droit comparé* (International Commercial Arbitration in Comparative law), 1969, at 272.

[118] *Impac Australia Pty Ltd. v. Cavalier Bremworth Ltd.*, in AA de FINA, *Different strokes for different folks, The Arbitrator* 17.3 February 1999.

[119] *Perforaciones Marinas Del Golfo S.A. (Mexico) v. Sedco Inc.(US),* US Court of Appeals, 5th Circuit August 12, (1985), *Yearbook Commercial Arbitration* 1987, vol. XII, at 539.

> (T)he intertwining doctrine ... is triggered when a party asserts several causes of action, at least one of which falls within the exclusive jurisdiction of the federal courts. In such a case, notwithstanding the existence of an arbitration clause, the entire dispute must remain in the federal court to avoid encroachment by the arbitrator into an area that Congress has deemed to be within the Federal court's exclusive jurisdiction ... The Fifth Circuit has been friendly to arbitration except possibly in those limited areas affected by the intertwining doctrine; the securities and anti-trust laws. Now, however, the Supreme Court has rejected the intertwining doctrine and mandated that courts enforce arbitration agreements as part of party's legitimate contractual expectations. *Dean Witter Reynolds v. Byrd*, US 105 S. Ct. 1238, 84 L. ed.2d 158 (1985), involved the securities laws – long held to be an area of special federal concern in our circuit. Based on this special concern for the exclusive federal interest in enforcement of the securities laws, we used the intertwining doctrine to override party's arbitration agreements to prevent the piecemeal adjudication of disputes. As the Court said in *Dean Witter Reynolds:*[120]
>
> [T]he Arbitration Act requires district courts to compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even where the result would be the possible inefficient maintenance of separate proceedings in different forums ... By its terms, the Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.

10.5 Duty to Cooperate

As any other contract, the arbitration agreement gives rise in several jurisdictions to a duty of each party to perform. Unless the contrary is provided by the applicable law one may make also reference to an implied duty to cooperate in order that the contract achieves its result.

Reference to this duty will be made in various parts of this study, as well as to the action which in case of breach may be available to the other contracting party.

This duty is frequently neglected by one of the parties. *Sumitomo*[121] presents a striking situation where one party instructed its arbitrator not to cooperate for the selection of the third arbitrator

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[120] *Dean Witter Reynolds. v. Byrd*, US 105 S. Ct. 1238, 84 L. ed.2d 158 (1985).

[121] *Sumitomo Corp. v. Parakopi Compania Maritima*, 477 F. Suppl. 737 (SDNY 1979).

10.6. AUTONOMY

The autonomy of the arbitration agreement in relation to the contract from which it originates has been widely debated in recent years.[122] In reality, the problem arises more for arbitration clauses than for submissions, which are at least physically separate contracts. It has been argued at length whether arbitration clauses must follow the destiny of the contract to which they belong, or whether they can have an independent life.

On the one hand, supporters of the lack of autonomy doctrine do not see[123] reason why the arbitration clause should not follow the rest of the contract. On the other hand the supporters of the autonomy doctrine hold that the arbitration clause has its own life and therefore must not automatically be affected by the possible nullity of the contract to which it belongs. The autonomy of the arbitration agreement has been reaffirmed by the Court of Appeal, Paris, in *Bin Saud*[124] as arising from a:

> substantive rule of international arbitration law.

However, even the autonomy doctrine accepts that, if no contract has been entered into, and the issue at stake is its non-existence, then the arbitration clause is also affected by it. This even if in *Navimpex*[125] the French Court of Cassation has held that:

> The autonomy of the arbitration agreement allows to act under it even when the contract of which it is a part has been signed by the parties but has not come into force ....

Apart from these extreme hypothesis of a contract being affected by a vitiating factor, such as error or fraud, a distinction must be made between situations where this vitiating factor affects the entire agreement and those in which the arbitration clause is not affected. Amongst the arbitral precedents see the (first) interim award in *Dalmia:*[126]

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[122] P. RESCIGNO, *Arbitrato e autonomia contrattuale, Rev. arb.* 1991, 13.

[123] Under the rule *accessorium sequitur principale* (i.e. the accessory follows the main item) it was believed that the nullity of the contract automatically implied that of the clause also.

[124] *Bin Saud Bin Abdel Aziz v. Crédit Industriel et Commercial de Paris,* Court of Appeal, Paris, March 24, 1995, *Rev. arb.* 1995, 81.

[125] Court of Cassation (France) Civil Division, December 6, 1988, *Rev. arb.* 1989, 641; note: B GOLDMAN, JDI, 1990, 134; note: M. L. NIBOYET-HOEGY.

[126] *Dalmia Dairy Industries Ltd. (India) v. National Bank of Pakistan,* first preliminary award (arbitrator: Prof. Lalive), December 18, 1967, ICC proceedings no. 1512, *Yearbook Commercial Arbitration* 1980, vol. V, at 171.

> The sole arbitrator, Prof. Lalive, sitting in Geneva, in a dispute between an Indian concrete manufacturer and a Pakistani bank held that 'it is superfluous to stress the independent nature of the arbitral clause and the fact that the nature of the arbitral clause does not change because it is inserted in a contract having a different object, be it a sale or warranty, rather than in a separate agreement.

A similar award was made in *Veb K:*[127]

> Even if the licence agreement were to be declared null and void, the nullity of the arbitral clause would not automatically follow. In fact such a clause has the nature of an independent contract even if connected with the licence contract. The arbitration agreement applies then to all the disputes which arise from the licence contract. Therefore the existence of a ground for invalidity of the licence contract is not sufficient to deprive the arbitration clause of its effect.

Even more in favour of autonomy is the award rendered in 1986 in ICC proceedings no. 438:[128]

> Whereas the parties must state, if they so wish, that the law which they have chosen applies to the contract, to the arbitration agreement and possibly to the arbitral proceedings, as it follows from various awards, among which reference is made as examples to the awards rendered in 1983 in case no. 3880 (*Clunet* 1983, at 897) and in 1982 in case no.4131 (*Clunet* 1983, at 889).

In reality, to assess the problem better it seems preferable to distinguish between the substantive aspect (i.e. whether the invalidity of the contract affects the arbitration clause or not) and the determination of who must decide this issue.

As to the substantive aspect, according to the anti-autonomy opinion, the nullity or a vitiating factor of the contract *always* applies to the arbitration clause also. The opposite doctrine holds that in reality the parties have entered into *two agreements*, the main one and a separate one (which governs the disputes arising from it). In some jurisdictions the courts do not hesitate to intervene, as in *Heyman v. Darwins Ltd,*[129] even during arbitral proceedings, and they sometime even rule that the arbitrator may not decide when a party denies the existence of an arbitration clause. It is submitted that in spite of these rulings the arbitrator has the authority (granted even expressly by some

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[127] *Veb K (RDA)* v. *Entreprise W (RFA).* award of the arbitral Tribunal at the Chamber of Foreign Trade of RDA, *Clunet* 1980, 696.

[128] Award made in 1986, ICC case no. 4381, *Clunet* 1986, 1202.

[129] *Heyman v. Darwins Ltd.,* House of Lords (1952) (1) *All ER* 337, also quoted by CRAIG *et al., op. cit.*, III, 11.04, at 22.

arbitration rules[130]) to decide this issue, as this authority reflects the parties' intention that the disputes arising from the contract (frequently without eluding any of them) should be decided by the arbitrator. An example of this is the award rendered in 1983 in ICC arbitral proceedings no.3987:[131]

> Subject to a further court review provided for by the law of the place of arbitration, the arbitrator whose jurisdiction is challenged may not set aside the dispute. He has the authority to decide on his jurisdiction and on the existence or the validity of the arbitration clause or of the contract which contains the arbitration clause.

The same view has been affirmed in *Rio Algom:*[132]

> The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.
>
> For that purpose an arbitration clause, which forms part of a contract, shall be treated as an agreement independent from the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso facto* the invalidity of the arbitration clause.

and by Lord Diplock in *Bremer Vulkan:*[133]

> The arbitration clause constitutes a self contained contract collateral or auxiliary to the ship building agreement itself.

Nevertheless the Swiss Federal Court in *Shobokshi*[134] held that:

> the Convention by no means excludes the possibility for the parties to establish the non existence or invalidity of an arbitration clause in a declaratory action before a state court [but that] the Convention does not prescribe this course, and so leaves it to the courts to decide whether they prefer to allow the arbitrators first to decide on their own jurisdiction.

If a party considers the award to be incorrect it may challenge it. Consequently, the final decision, as in court proceedings, is not left to one authority only, which might wrongfully hold that it has jurisdiction.[135]

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[130] See Art. 8.4, ICC Rules.

[131] Award made in 1983, ICC case no. 3987, DERAINS-JARVIN, *Chronique des sentences arbitrales, Clunet* 1984, 944.

[132] *Rio Algom v. Sammi Steel Co. Ltd et al.,* Ontario Court of Justice, General Division Toronto, March 1, 1991, *Yearbook Commercial Arbitration,* 1993,166.

[133] *Bremer Vulkan v. South India,* (1981) 1 *Lloyd's Law Reports* 253.

[134] *Shobokshi et al v. Saiecom SA et al,* Swiss Federal Court, January 26, 1987 *Yearbook Commercial Arbitration* 1990, 505.

[135] See CRAIG *et al., op. cit.*, part. II, para 5.04, at 15-16 note 20.

International conventions

The Geneva Convention (1923) states:[136]

> Such references (note: to arbitrators) shall not prejudice the competence of the judicial tribunals in case the agreement or the arbitration cannot proceed or becomes inoperative.

The Geneva Convention (1927)[137] requests, for the recognition or enforcement of a foreign award:

> ... that the award has been made in pursuance of a submission to arbitration which is valid under the law applicable thereto.

The Geneva Convention (1961) provides:[138]

> (1) The party which intends to raise a plea as to the arbitrator's jurisdiction based on the fact that the arbitration agreement was either non-existent or null and void or had lapsed shall do so during the arbitration proceedings, not later than the delivery of its statement of claim or defence relating to the substance of the dispute; those based on the fact that an arbitrator has exceeded his terms of reference shall be raised during the arbitration proceedings ...
>
> (2) Pleas as to the jurisdiction referred to in paragraph 1 above that have not been raised during the time limits there referred to may not be entered either during a subsequent stage of the arbitral proceedings ... or during subsequent court proceedings concerning the substance or the enforcement of the award where such pleas are left to the discretion of the parties under the rule of conflict of the court seised of the substance of the dispute or the enforcement of the award. The arbitrator's decision on the delay in raising the plea will, however, be subject to judicial control.
>
> (3) Subject to any subsequent judicial control provided for under the *lex fori,* the arbitrator whose jurisdiction is called in question shall be entitled to proceed with the arbitration, to rule on his own jurisdiction and to decide on the existence or validity of the arbitration agreement or of the contract of which the agreement forms part.

The Washington Convention (1965)[139] expressly states:

> (1) The Tribunal shall be the judge of its own competence;
>
> (2) Any objection that the dispute is not within the jurisdiction of the Centre or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to

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[136] Art. IV, para 2, Geneva Convention (1923), *cit.*

[137] Art. I a), Geneva Convention (1927), *cit.*

[138] Art. V. Geneva Convention (1961), *cit.*

[139] Art. 41 Washington Convention (1965), *cit.*

deal with it as a preliminary question or to join it to the merits of the dispute'.

The United Nations Model Law (1985)[140] provides:

(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause, which forms part of a contract, shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

The arbitral tribunal may then in general decide on its jurisdiction as well on arguments related to the existence or validity of the arbitration agreement without its decision in this respect being automatically barred by the nullity of the contract.

Therefore the autonomy of the arbitration clause may be recognized within the following limits:

- from the substantive point of view the arbitration clause does not automatically suffer the consequences of a vitiating factor of the contract; this depends on each single case;
- from the procedural point of view, unless the arbitration agreement provides otherwise it must be construed in the sense that the validity of the arbitration clause is to be decided first by the arbitrators, their decision being subject to challenges.

The autonomy of the arbitration clause was affirmed by the French Court of Cassation in *Epoux Convert*:[141]

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[140] Art. 16, United Nations Model Law, June 21, 1985, *cit.*

> in the matter of international arbitration the arbitration agreement has full autonomy in respect of the contract;

and by the Federal Court of the United States in 1967 in the leading case *Prima Paint*:[142]

> One of the parties to a contract, which contained an arbitral clause, had hidden its financial difficulties from the other party. One week after entering into the contract it was forced into compulsory liquidation. The other party claimed that fraud had been committed and that the contract was null and void. The Federal Court held that the dispute had to be decided by the arbitral tribunal, since an arbitration agreement cannot be separated from the contract in the absence of elements indicating that the fraud affects the arbitral clause. The arbitration agreement therefore also included a claim for annulment of the contract for fraud.

A similar example is the French decision in *Hecht*[143] in which it was held that:

> In fact in international arbitration the arbitration clause, whether it is entered into separately or it is included in the contract to which it relates, always enjoys full legal autonomy in respect of the same, except in exceptional cases which have not been pleaded in this dispute.

The same opinion was expressed m *Menicucci v. Mahieux*:[144]

> In fact in such a contract the arbitral clause related to international arbitration is valid since it is fully independent (...) apart from any reference to any legal system.

Amongst arbitral precedents the same conclusions were reached in *Dalmia*.[145]

The 'doctrine of separability' has been followed by many writers.[146] As to the United Kingdom, case law and commentary are now overtaken by Sections 3032 Arbitration Act 1996.

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[141] See *infra* note 105.

[142] *Prima Paint Corp. v. Flood and Conklin Mfg. Co.* 388 US 395 (1967) see CRAIG *et al.*, *op. cit.*, II, 5.04 at 16.

[143] *Hecht* v. *Sté Buismans,* Court of Appeal, Paris, June 19, (1970), *Clunet* 1971, 833.

[144] *Menicucci v. Mahieux,* Court of Appeal, Paris; December 13, (1975), *Rev. arb.* 1977, 147.

[145] Interim award December 18, 1967, *Yearbook Commercial Arbitration* 1980, vol. V, 171.

[146] *The Doctrine of Separability of the Arbitration Agreement and 'Compétence de la Compétence' in English Law: A Comment on the Judgment of the Queen's Bench Division*, comments to *Paul Smith Ltd. v. H.C.S. International Holdings Co.* [1991] 2 *Lloyd's Rep.* 127; C.M. SVERNLOV, *The Evolution of the Doctrine of Separability in England: Now Virtually Complete?* 9 *J. Int. Arb.*, 3, 115; *id. Was Isn't Ain't the Current*

It is the object of an in-depth analysis by Mayer.[147]

Mayer's reasoning starts from pointing out that the arbitration agreement is a clause like the other ones contained in a contract. The query which arises is whether that clause may survive the setting aside of the entire contract. The response may be affirmative if the clause has to play, according to the intention of the parties, a dominating role in deciding on the nullity of the contract or as to its consequences. The accessory nature of the arbitration agreement leads in some occasions, such as when the contract is assigned, to its non-severability. Issues like the termination of the agreement because of the expiry of its term or because of unilateral rescission, or of a dispute as to the occurrence or not of a condition precedent, or subsequent, may trigger the arbitration agreement. Likewise the alleged nullity of the contract does not by itself cause the nullity of the arbitration agreement. In such situations, like in the absence of consent of the parties to the contract or of authority of the signatory or of nullity of the contract, the vitiating factors do not put an end to the arbitration agreement, which on the contrary is triggered by the vitiating factor.

It is suggested that the parties have wished that in that very situation the arbitrators decide the issue.

10.7 Applicable Law

There is a wide choice of law applicable to the arbitration agreement; in fact it has been held that the law governing the contract[148] and the procedural law of the arbitration must be applied.[149] The possibility of applying an independent law, which only by chance might be the same law as that governing the contract, has also been advocated.

Amongst French precedents *Gosset*,[150] which had a large following which developed in *Hecht*,[151] stated the general principle that the arbitration clause may be governed by a law which differs from that of the main contract.

The Court of Arbitration of the Bulgarian Chamber of Commerce declared that the validity of the arbitration agreement must be determined under the law

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Statutes of the Doctrine of Separability, 8 *J. Int. Arb.*, 4, 37. See also Oberlandesgericht Hamburg September 22, (1978) *Rass. arb.* 1979, 271 (no. 94).

147 P. MAYER *La limite de la separabilité de la clause compromissoire* (Limits of severability of the arbitration agreement) *Rev. arb.* 1998, 2, 359 *et seq.*

148 See for example the award made in 1983 in ICC proceedings no. 4392, *Clunet* 1983, 902 and the award made in 1970 in ICC proceedings no. 1501, *Clunet* 1974, 913.

149 A doctrine which has stronger grounds when the procedural law of the arbitration is stated in the arbitration agreement.

150 *Gosset,* Court of Cassation (France), May 7, (1963), *Clunet* 1964, 82.

151 *Hecht*, Court of Cassation (France), June 4, (1972), *Clunet* 1977, 846, with note by OPPETIT.

of the place of arbitration.[152] Egyptian precedents take a similar view (see *Misr Insurance*),[153] unless that law conflicts with the public policy of the country in which recognition or enforcement of the award are sought.

Illustration

> A contract was entered into between an Egyptian importer and a French supplier concerning a supply of vinyl; the agreement contained an arbitration clause, which did not appoint the arbitrators and chose Marseilles as the place of arbitration. A dispute arose over the delivery of vinyl, which was alleged to be incomplete and defective. The Egyptian importer's insurer, after having paid its insured, initiated proceedings against the French supplier before the Court of Alexandria, claiming damages. The court declared its lack of jurisdiction because of the arbitration clause. The Court of Appeal of Alexandria confirmed the judgment. The insurer petitioned the Court of Cassation arguing that the arbitration clause was null and void being contrary to Egyptian law, which requires that arbitrators be appointed in the arbitration clause. The Court of Cassation rejected the petition, affirming the principle that the validity of the arbitration clause must be determined under the law of the place of arbitration and that the Egyptian provisions in that respect were not a matter of public policy.

Still from *Gulf Contractors*[154] the conclusion can be drawn that situations where the arbitration clause is subject to a law different from that of the contract, of which it is a part, are *exceptional.*[155] In Switzerland, the Court of First Instance of Affoltern am Albis[156] held:

> It is the prevailing doctrine and it also corresponds with Art. V (1) (a) of the New York Convention that, in the absence of a choice of law provision, the validity of the arbitral clause must be decided according to the law of the site of the Arbitral Tribunal.

Some French precedents have even stated that there is a presumption that the law of the contract and the law governing the arbitration clause are identical. In addition to state courts decisions, arbitral precedents record awards

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[152] Award of the Court of Arbitration, Bulgarian Chamber of Commerce, proceedings 52/65 *Yearbook Commercial Arbitration* 1976, vol. I, 123.

[153] *Misr Insurance v. MV Dominion Trader*, Court of Cassation (Egypt), June 13 no. 1259 (1983), *Mediterranean and Middle East Arbitration Quarterly*, 1988, 2, no. 8.

[154] See *supra* note 96.

[155] Y. DERAINS, *Cronique des sentences arbitrales, Clunet* 1979, at 987; A. TOUBIANA, *La doctrine de la loi du contract en droit international privé* (The Doctrine of the Law of Contract in Private International Law), no. 73.

[156] May 26,1994, *Yearbook Commercial Arbitration* 1998, XIII, 754.

favouring the application of the law of the place of arbitration[157] with the advantage, stressed by Toubiana,[158] that in this way the arbitration clause, the proceedings and the award are all governed by the same law. It must also be borne in mind that in other precedents originating from *Gosset,*[159] like *Menicucci v. Mahieux,*[160] it was held that arbitration clauses inserted in an international contract are totally independent and valid without the need to apply to them a national law.

Another example is the award rendered in 1986 in ICC proceedings no. 5065:[161]

> Whatever the law governing the contract and whether it is a national law or not, it seems to me that when the very existence of the arbitration agreement is at stake and the alleged contract is from every point of view an international contract, the capacity of the parties is not at issue and the parties have voluntarily omitted the choice of the law applicable to the contract, the most appropriate law to decide the issue of the existence of the arbitral agreement is not that provided for by a particular national legal system, but rather the general principles of law and the usages accepted in international trade and in particular the principle of good faith.

Authors have questioned the nature of this principle and have expressed with Franceskakis[162] the view that it would be a substantive rule of international private law, i.e. a rule which provides a direct solution of the issue, instead of using the conflict rules. A survey of effective choice of law clauses has been recently published.[163]

The choice between the various laws which can govern the arbitration clause may cause doubt, as the arbitration clause in fact finds itself between the law which governs the merits of the dispute on the one hand, and that which governs the arbitral proceedings on the other one.[164] It frequently has close

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[157] Award made in 1983, ICC proceedings no. 4392, *cit.,* and in 1970 ICC proceedings no. 1507, *cit.* See *supra* note 139.

[158] A. TOUBIANA, *La doctrine de la loi du contract en droit international privé* (The Doctrine of the Law of Contract in Private International Law), no. 73.

[159] *Supra* note 139.

[160] See *Supra* note 135.

[161] Award made in 1986, ICC proceedings no. 5066, DERAINS-JARVIN, *Chronique des sentences arbitrales, Clunet* 1986, 1039.

[162] FRANCESKAKIS, *Le principe jurisprudentiel de l'autonomie de l'accord compromissoire* (The Jurisprudential Principle of the Autonomy of the Arbitration Agreement), *Rev. arb.* 1974, 67.

[163] J. STEIN, *The Drafting of Effective Choice of Law Causes,* 8 *J. Int. Arb.* 3. 69.

[164] With the result that, in a frontier area between the two laws, it is difficult to obtain uniformity in the choice of the applicable law.

relationships with both even if, in the abstract, it may be distinguished both from the contract which is its premise (and sometimes even its overall material), and arbitral proceedings of which it is a source. However, the situation is partly clarified if the problem is faced by taking as a starting-point the distinction between the submission and the arbitration clause.

The law applicable to the submission may in fact be determined independently under the conflict rules which apply to contracts.

The possibility of the arbitration clause being governed by a law different from that of the contract was affirmed, amongst other arbitral precedents, in *Isover St. Gobain:*[165]

Illustration

> In the arbitral proceedings between Isover Saint Gobain and Dow Chemical France the arbitrators (Prof. Sanders, Netherlands, Prof. Goldaman, France and Prof. Vasseur, France) held that the scope and effect of the arbitration clause could not be identified under the law applicable to the merits (French law), but according to the common intention of the parties and to international trade usage.

The state court held that this finding was correct.

An English sole arbitrator sitting in Paris has held in ICC proceedings no. 5065 (1986)[166] that the law applicable to the arbitration agreement was not a national law, but the general principles of the law and the usages accepted in international trade, and in particular the principle of good faith.

The arbitral tribunal, which decided the dispute in ICC proceedings in 1994, held that the law which has the closest connection with the issue of suitability for arbitration is not the substantive law but the law of the venue of the arbitral proceedings, in particular when the venue is chosen by the parties.[167]

International conventions

The Geneva Convention (1923)[168] states that:

> The arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place ...

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[165] *Société Isover Saint-Gobain* v. *Société Dow Chemical France et autres,* Court of Appeal, Paris October 21, (1983) *Rev. arb.* 1984, 98 *et seq.*

[166] *Clunet* 1987,1041.

[167] ICC Proceedings no. 6719, *Clunet* 1994, 1071

[168] Art. 2, Geneva Convention (1923), *cit.*

The Geneva Convention (1927)[169] provides that, for the recognition and enforcement of an award, it is necessary:

> That the award has been made in pursuance of a submission to arbitration which is valid under the law applicable thereto.

The New York Convention (1958)[170] states that the recognition and enforcement of the award may be refused if it is proved that:

> ... said agreement is not valid under the law to which the parties have submitted it or, failing any indication thereon, under the law of the country where the award was made.

A provision which is construed in *Della Sanara*[171] as referring – in alternative to the choice of law by the parties – to the procedural law, a conclusion which is not always appropriate.

The Geneva Convention (1961) provides that the annulment of an award in a Contracting State will not be a ground for refusing recognition or enforcement in another Contracting State, unless the annulment has been declared on certain grounds, amongst which that:[172]

> ... the said agreement is not valid under the law to which the parties have submitted it or, failing any indication thereon, under the law of the country where the award was made or ...

The Washington Convention (1965)[173] deals only with substantive law:

> The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

Arbitration rules

The ICC Rules provide:[174]

> Where the parties have agreed to submit to arbitration by the International Chamber of Commerce, they shall be deemed thereby to have submitted *ipso facto* to the present rules.

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169 Art. I a), Geneva Convention (1927), *cit.*

170 Art. V, 1(a), New York Convention (1958), *cit.*

171 *Della Sanara Kustvaart BV v. Fall. Coppoli,* Court of Appeal, Genoa, February 3, 1990, *Rev. arb.* 1991, 781.

172 Art. IX (a), Geneva Convention (1961), *cit.*

173 Art. 42 (1), Washington Convention (1965), *cit.*

174 Art. 8.1, ICC Rules of Conciliation and Arbitration.

The London International Court of Arbitration Rules provide:[175]

> The Tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement *independent* of the other terms of the contract. A decision by the Tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause. (emphasis added)

The American Arbitration Association Rules in turn provide:[176]

> The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association (hereinafter AAA) or under its Commercial Arbitration Rules. These rules and any amendment of them shall apply in the form obtained at the time the demand for arbitration or submission agreement is received by the AAA.

The International Rules of the Milan Camber of Arbitration state:[177]

> Unless otherwise provided, the alleged nullity of the contract does not deprive the arbitrator of jurisdiction if he holds the arbitration agreement to be valid. Even though the contract is null and void, he continues to have jurisdiction to ascertain the parties' respective rights and to decide on their claims and submissions.

The Rules of the Arbitration Institute of the Stockholm Chamber of Commerce provide:[178]

> The arbitral tribunal shall determine the manner in which the proceedings will be conducted. In so doing, the arbitral tribunal shall comply with the stipulation of the parties in the arbitration agreement and these Rules and shall have regard to the wishes of the parties.

National legal systems

Italian law deals[179] with suitability for arbitration and not expressly with the law applicable to the arbitration agreement.

French law[180] provides that:

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[175] Art. 14.1, LCIA Rules (ed. 1985).

[176] Art 1 Commercial Arbitration Rules, American Arbiutration Association.

[177] Art 31.4, International Arbitration Rules of the Chamber of National and International Arbitration of Milan.

[178] Para 16 Rules of the Arbitration Institute of the Stockholm Chamber of Commerce.

[179] Section 806, Italian Rules of Civil Procedure.

[180] Section 1494, New French Civil Procedure Code

> The arbitration agreement may (...) decide which procedure is to be followed in the arbitral proceedings by submitting it to the procedural law which it deems fit. In the absence of an agreement of the parties on this issue, the arbitrator chooses the procedural rules either directly or by reference to a procedural law or to arbitration rules.

but does not expressly deal with the law applicable to the arbitration agreement.

In *Dalico*[181] the French Court of Cassation has held that:

> Under a substantive rule of international arbitration law, the arbitration clause is independent from the contract of which it is a part directly or by incorporation and its existence and efficacy are to be established, subject to French mandatory provisions and international public policy, based upon the common intention of the parties without a need to apply a national legislation.

Along the same lines is *Topkapi.*[182]

In the award made by an ICC Arbitral Tribunal in 1990 in proceedings no.3721[183] this reasoning was extended to deciding on the validity of the arbitration clause based on *lex mercatoria.*

Under English law[184] it has been held that no arbitration agreement, however comprehensive it may be, may grant the arbitrator jurisdiction on issues which affect the validity of the contract (from which he derives his authority) and that he therefore cannot decide whether he has jurisdiction or not. This is maintained even though the doctrine, according to which the arbitration agreement is autonomous and has its own life, is also recognized in the English legal system.

The United Nations Model Law (1985) provides:[185]

> The arbitral tribunal may rule on its own jurisdiction, including any objection with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.

The Model Law deals separately with the law applicable to the substance of the dispute[186] (i.e. the law chosen by the parties or, in its absence, that resulting

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[181] *Comité populaire de la Municipalité de Khoms v. Sté Dalico Contractors*, Court of Cassation (France) December 20. 1993, *Clunet* 1994, 690.

[182] *Sté Sonetex v. Sté Charphil and Sté Topkapi*, Court of Cassation (France) March 2, 1992, *Clunet* 1993, 140.

[183] ICC Arbitral Tribunal, award made in 1990 in proceedings no. 5721, *Clunet* 1990, 1019

[184] English Arbitration Act 1996.

[185] Art 16, Uncitral Model Law.

[186] Art 28, Uncitral Model Law.

from the conflict rules which the arbitrator deems applicable), and the law applicable to the proceedings[187] chosen by the parties or by the arbitrators.

An examination of the Conventions does not reveal decisive elements for identifying the law applicable to the arbitration agreement.

The determination of the law to be applied for deciding the suitability for arbitration of disputes is a source of further discussion. It could be held that a party coming from a legal system which does not treat the dispute in question as suitable for arbitration cannot submit it to arbitration. Nevertheless, if the arbitration agreement is governed by another law (unless it has been chosen to avoid applying mandatory rules of the national legal system of the parties), the national law of the parties might not necessarily have to be preferred.

It remains to be seen what effect the *lex fori* may have. The applicable procedural law must be considered if a dispute, which is not capable of being submitted to arbitration in the place where the proceedings take place, is submitted to arbitration. However, when the applicable procedural law is different from that of the place of arbitration, only the mandatory provisions of the procedural law of the place of arbitration need to be taken into account.

Consequently the suitability of a dispute for arbitration may depend on various laws, such as the procedural law, the national law of the parties, the law governing the merits and the *lex fori.*

Finally, the possibility of obtaining recognition of the award in another state may also depend on the suitability of the dispute for arbitration under the law of the requested state (as is generally the case according to the international Conventions).[188]

The applicability of the procedural law to decide on suitability for arbitration will also depend on the classification of the issue of suitability for arbitration. If it is treated as a procedural issue, the procedural provisions of the *lex fori* must be applied, while if it is to be treated as a substantive issue, it should follow that the issue is to be decided under the substantive law. It is submitted that suitability for arbitration is a requirement related both to the validity of the arbitration agreement and to the arbitral proceedings. If it is considered from the point of view of its aspects related to the arbitration agreement, it may be governed by a law different from that which will govern it in its aspects related to the arbitral proceedings.

The solution to this difficult issue may vary in each legal system. The issue is dealt whit in French precedents, in *Compagnie d'Armement Maritime v. Compagnie Tunisienne de Navigation:*[189]

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[187] Art 19, Uncitral Model Law.

[188] Art. 1 c), Geneva Convention (1927); Art. V, New York Convention (1958) and Art. VI, Geneva Convention.

[189] *Compagnie d'Armement Maritime* v. *Compagnie Tunisienne de Navigation,* Court of Cassation (France), March 18 (1980), *Rev. arb.* 1980, 496 with note by MEZGER.

> A dispute arose between a Djibouti and a Tunisian company concerning the transportation of oil products under a contract governed by French law, which contained an arbitration agreement submitting disputes to arbitration under English law. The issue arose whether the arbitration agreement had to be construed under the law of the contract (French law) or under the procedural law (English law). The French Court of Cassation ruled that the conflict of law rules of the *lex fori* (i.e. French law) had to be applied, resulting in the *lex contractus* being applied.

The principle that arbitral proceedings are not subject to a national law was held by the sole arbitrator in ICC proceedings no.5065 in his award made in 1986:[190]

> The dispute was between a Lebanese claimant and two Pakistani companies concerning the asserted unilateral termination by the latter of a contract for services concerning the design of a sports centre. The British sole arbitrator, sitting in Paris, ruled that in an international contract in which the parties have deliberately omitted to choose the applicable substantive law, the law which is most suitable to rule the arbitration agreement is not that of a given legal system, but the general principles of law and the usages accepted in international trade and in particular the principle of good faith.

Of course, if the parties do not choose the law applicable to the arbitration agreement, when recognition is sought, a subsidiary rule of the law of the place where the award was made (criterion followed by the New York Convention 1958) or a different criterion – if any – specified in another international convention, may be applied. If so, the law of the contract can be determined under the applicable conflict rules, and it may be different from the law applicable to the arbitration agreement.

However, it must be stated that the doctrine of autonomy of the arbitration agreement, when applied to determine the law applicable to it, does not always give the best results. This was the case in *Jugomineral*:[191]

> A dispute arose between a Yugoslavian and a German company, as to a contract governed by Swiss substantive law; it provided for the settlement of disputes through arbitration in Bern. The parties subsequently moved the place of arbitration to Soleure so they could avail themselves of the intercantonal Swiss *Concordat* on arbitration. The Yugoslavian company later claimed that the award was null and void since the signatory, who was assistant to the General Manager, had no authority to commit the company. The arbitrator held that the arbitration agreement

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[190] Award made in 1986, ICC proceedings no.5065, *Clunet* 1987, 1039.

[191] *Jugomineral v. Grillo Werke AG*, Federal Court (Switzerland), March 17, (1975), with note by LALIVE, *Chronique de jurisprudence suisse, Clunet* 1976, 729.

> was valid and the tribunal of the Canton of Soleure confirmed his award. The Cantonal Court held that the choice of the applicable substantive law was not relevant for identifying the law applicable to the arbitration agreement, since the latter had to be qualified as a procedural contract and was therefore subject to the *lex fori*, i.e. Swiss law.
>
> The Federal Court confirmed that decision, rejecting the appeal against it.

Lalive rightly points out in his comments on that judgment that it is surprising that an arbitration agreement entered into outside Switzerland between parties who were all non-Swiss, subject to ICC rules (therefore a supra-national arbitration), with a neutral seat in Switzerland, ended up by being governed by the law of the Canton of Soleure.

It must also be stressed that the lack of court jurisdiction, because of the existence of a valid arbitration agreement, in general may not be asserted by the court of its own motion; some international Conventions expressly so provide.[192] Furthermore, the defendant's omission to raise that argument may be construed, according to the applicable legal system, as a waiver of the arbitration agreement, and as his acceptance of the ordinary court's jurisdiction.

The law applicable to the arbitration agreement is expressly dealt with in the Geneva Convention (1961)[193] which, in the absence of a choice by the parties, submits it to the law of the state in which the award is to be made. The aim of giving priority to keeping the arbitration agreement alive *(favor negotii)* by choosing from the various legal systems the one which recognizes its validity, was the subject of an interesting award in 1984 in ICC proceedings no. 4145.[194] The arbitral tribunal, silting in Vienna, had to decide a dispute between a Liechtenstein and an Arab company on the one hand, and a Korean company on the other.

The arbitration agreement was as follows:

> The validity and construction of this agreement shall be governed by the laws of the Canton of Geneva (Switzerland) or (of a specific Arab country) or both.

The arbitrators construed the arbitration agreement as follows:

> The arbitrators recognize that the arbitral clause ... is defective from a language point of view. Nevertheless, they are convinced that it shows

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[192] Art. 1 1.3, New York Convention (1958).

[193] Art. VII, 1.

[194] Award made in 1984 in ICC proceedings no. 4145, *Clunet* 1985, 985 (unofficial translation from French)and award made in 1985 in ICC proceedings no. 4996, *Clunet* 1986, 1130.

sufficiently clearly the intention of the parties to submit to ICC arbitration the disputes arising from it. In fact, no other reasonable meaning can be given to sentences 2 and 3 (of said clause). The application of Swiss law and of the law of the Arab country (both possible *leges contractus*) or of Austrian law (*lex fori*) arrives at the same conclusion. According to such laws the clear intention of the parties must prevail over an incorrect or imprecise wording as far as construction of the arbitral clauses is concerned.

... The arbitrators must decide which is the applicable law, since the arbitral clause contains an alternative (Geneva), either Swiss law or the law of the Arab country or a combined choice ('or both'), since the parties do not agree on the law which should govern their relations: the claimants hold that it is Swiss law, the defendant claims it is the law of an Arab country.

The autonomy rule – widely recognized – allows the parties to chose freely the law which will govern their contract, even if it is not clearly connected to it ...

This is what the parties in fact did by stating Swiss law, even if at first sight it was less connected to the contract than the law of the Arab country.

Mentioning Swiss law before that of the Arab State is an important sign here. Furthermore, Switzerland has a highly sophisticated legal system, which answers all the questions which may arise as to the construction of an agreement such as the one entered into.

Furthermore, the law of the Arab country may question the validity of the contract in whole or in part ... It is reasonable to assume that, of the two possible laws, the parties would choose one which is in favour of the validity of the contract.

It is also a widely accepted general principle that, of two legal solutions, the Judge must choose the one in favour of the validity of the contract (*favor negotii*). Under these circumstances the arbitrators decided to choose Swiss law as applicable, assuming that this is what the parties had in mind when drafting the clause in that way ...

10.8 Validity of the Arbitration Agreement

The arbitration agreement is not valid in all jurisdictions.

The reluctance of several Latin American countries is joined by France which does not allow parties to enter into an arbitration agreement, unless in case of commercial disputes, a rule set out by a 1972 enactment:[195]

[195] Statute no. 72-626, July 5, 1972, embodied in section 2061 Civil code. It is remembered to common law lawyers that France still has, aside of the Civil Code, a Commercial Code to which this limit does not apply.

> Arbitration agreements are null and void unless it is otherwise provided,

a solution chosen under the influence of the French Court of Cassation[196] which held invalid an arbitration agreement included in an insurance contract:

> in order to protect citizens against their own lack of attention, which induces then to enter too lightly into agreements to refer future disputes to arbitration.

Oppetit has pointed out[197] that the Court of Cassation made no distinction between civil and commercial disputes and wonders whether this is still useful.

The consequences of defects in the form or the contents of the arbitration agreement must be decided under the law applicable to it.

Regarding the validity of the clause and the ambiguity of its contents and the consequent invalidity of the arbitration agreement, arbitral jurisprudence took a stand in *Techniques de l'Ingénieur*[198] where the clause was so phrased:

> *Jurisdiction*
> In case of disputes, the parties undertake to submit them to arbitration as provided for by the *Fédération Française de la Publicité*. In case of disputes, the *Tribunal de la Seine* would have exclusive jurisdiction.

This clause has been held to be ambiguous,

> however the tribunal decided that it was valid, construing it in the sense that the disputes were subject to arbitration and that if any matter were referred to the Courts, the *Tribunal de la Seine* would be competent.

However, the same situation, i.e. the provision in a bill of lading of an exclusive jurisdiction clause and in the same instrument or by incorporation from a charter party of an arbitration agreement, was construed by the Hong Kong High Court in *Hissan*[199] as not allowing to apply the arbitration agreement:

> ... it was not clear whether the parties had agreed to resolve their dispute through arbitration or through court proceedings before the Tokyo District Court. In order to apply the arbitration clause the court would have to manipulate the language of the agreement of the parties in a substantial and thus impermissible way.

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[196] Court of Cassation (France) July 10, 1843.

[197] OPPETIT, *La clause arbitrale par référence*, *Rev. arb.* 1990, 551.

[198] *Société Techniques de l'Ingénieur v. Sté Sofel,* Tribunal de Grande Instance, Paris, February 1, (1979), *Rev. arb.* 1980, 97.

[199] *Hissan Trading Co. Ltd. v. Orkin Shipping Corp.*, High Court of Hong Kong, September 8, 1992, Mayo J., *Yearbook Commercial Arbitration* 1994, 273.

Subsequently in *Chu Kong,*[200] the agreement was construed in the opposite way:

> As the bill of lading contained both an arbitration and an exclusive jurisdiction clause, the court addressed the question whether the arbitration clause was void. It was held that the claimant had the choice either to seek arbitration or litigation in China.

The duty of the arbitral tribunal to decide on the validity of the contents of the arbitration agreement was affirmed in *Carbomin SA:*[201]

> Ekton Corporation applied to the first instance tribunal of Canton Geneva to enforce an award made in London concerning a charter-party entered into between the parties. Carbomin opposed the enforcement on various grounds, including the fact that the telexes exchanged between the parties were not a meeting of minds, or an exchange in writing as required by Art. II (2) of the New York Convention. The Court of Appeal criticized the decision of the first judge.
>
> 'The Court must note that the judge of the first instance has not decided on the substantive validity of the arbitration agreement whose formal validity he has rightly accepted. The judge therefore has violated the law. Appeal judges are legally not allowed to render a decision on this question.'

Invalidity of the arbitration agreement, through lack of written form, was affirmed in *Soccer League:*[202]

> After negotiations between Soccer League and Frisol, Admiral International (which at the last moment replaced Frisol) entered into a licence agreement concerning trademarks belonging to Soccer League. A dispute arose between the parties and Soccer League referred it to AAA arbitration in New York claiming against both companies. The arbitrators ordered both companies to pay damages to Soccer League. Soccer League then applied for enforcement of the award to the Tribunal of Dordrecht, in which district the defendants had their registered office. In the meantime Admiral International was declared bankrupt. The President of the Tribunal refused to authorize enforcement on the following grounds:

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[200] *William Company v. Chu Kong Agency Co. Ltd et al.* High Court of Hong Kong, (Kaplan J.) February 17, 1993, *Yearbook Commercial Arbitration,* 1994 274.

[201] *Carbomin S.A. (US)* v. *Ekton Corporation* (Panama), Court of Appeal, Geneva, April 14, (1983), *Yearbook Commercial Arbitration* 1987, at 502.

[202] *North American Soccer League Marketing Inc. (US)* v. *Admiral International Marketing and Trading BV and Frisol Eurosport BV,* Court of First Instance, Dordrecht (Netherlands), August 18, (1982), *Yearbook Commercial Arbitration* 1985, at 490.

> 'Thus, as far as Frisol Eurosport is concerned, the condition of Art. V, para I under (a) and (c) in connection with Art. II, paras. I and 2, of the (New York) Convention has not been met, Frisol Eurosport did not undertake an agreement in writing to submit any dispute with NASL (Soccer League). At least none of this appears from the documents which were submitted to us in accordance with Art. IV of the Convention'.

The validity, or rather the efficacy of the arbitration agreement, because of amendments to the scope of the contract, was dealt with in *Raytheon:*[203]

> SGS agreed with Raytheon to provide transportation and other services related to NATO Hawk missiles. The agreement provided for ICC arbitration. The parties subsequently entered into written amendments, the first of which referred to the general conditions of the basic contract, and the following ones were entered into on a new Raytheon form which provided for AAA arbitration in Massachussetts. However, a typewritten addition stated that the amendment did not modify the contract conditions. With the last amendment, the parties modified SGS's obligations from transportation to on-site testing and inspection. The amendment stated that all the other contractual conditions were unchanged. After a dispute arose between the parties, Raytheon submitted the matter to ICC arbitration in Lausanne. SGS opposed this, arguing that the original contract did not apply since, because of the amendment, the scope of the contract was totally different. Raytheon then submitted the dispute to AAA Arbitration in Boston on the premise that if the original convention was no longer valid, the arbitral clause printed on the back of the variation order should apply.
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> SGS applied to the US District Court of Massachusetts for an order to Raytheon to put an end to the Boston arbitration. The tribunal issued an interlocutory injunction ordering Raytheon not to continue the Boston arbitration, which was confirmed by a court of first instance and in the appellate proceedings.

The Court of Appeal held that it was likely that the amendment had not originated a new contract and that therefore the original ICC arbitration agreement did apply after all. The Court went further:

> Once it is determined that Art. 17 of the basic contract arguably governs this dispute, then it is appropriate to remit the dispute for resolution in *(sic)* the Swiss arbitration. However, even if Art. 17 later turns out not to govern the underlying dispute, referral to Switzerland now is still proper. Whether SGS is correct in contending that the testing of missiles is so different from their transport that Change Order No. 8 (while within the

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[203] *Raytheon European Management and Systems Co. (US) v. Sté Générale de Surveillance*, (US) Court of Appeals, 1st Circuit, February 25, (1981), *Yearbook Commercial Arbitration* 1985, at 514.

> basic contract) was meant to be outside the scope of the arbitrability clause is itself a matter for the International Chamber of Commerce arbitrators. The issue of the scope of an arbitration clause in a contract is an appropriate matter for arbitration. In the present instance, the Rules of Conciliation and Arbitration of the International Chamber of Commerce expressly provide that as long as there is in the opinion of the ICC Court of Arbitration *prima facie* an agreement to arbitrate, 'the arbitration shall proceed', and 'any decision as to the arbitrator's jurisdiction shall be taken by the arbitrator himself'. (Art. 8, para 3). SGS has entered into arbitration proceedings in Switzerland for the purpose of making this determination. Since the arbitrators there are most likely to be familiar with commercial dealings in this area and with French law, and since the proceedings are under way, the order of the district court enjoining arbitration in Boston is well within its direction.

The continuing validity of the arbitration clause, in spite of the termination of the contract of which it is a part, was held in *Gates Energy*:[204]

> However, the Federal Arbitration Act established that an arbitration clause in contract creates substantive rights and that such a clause is not purely remedial. *Standard Magnesium Corporation* v. *Fuchs,* 251 F.2d 455 (10th Cir. 957). Therefore, if one assumes that the Uniform Commercial Code is applicable in this situation, Yuasa's right to arbitrate would survive termination of the Joint Venture Agreement because Sect. 4-2-106 (3) provides that 'any right based on prior breach of performance survives.'

A defence of possible invalidity of the arbitration agreement (different from the sovereign immunity plea) and which comes close to the lack of authority to represent (even if it has to be distinguished from the latter because it concerns external approvals instead of internal approvals by the party itself) is the lack of respect of the procedures provided for by the Constitution of a state in order that such a state enters into an arbitration agreement.

An example of this is approval by Parliament, which is required in some jurisdictions for public enterprises to enter into an arbitration agreement. On this particular issue the arbitrators sitting in Stockholm in 1986, in ICC proceedings no.4381, held:[205]

> Whereas it results from the documents produced in these proceedings that the defendant in its capacity as a state company, under Art. 139 of the Constitution of the Islamic Republic of Iran, could not enter into an

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[204] *Gates Energy Products Inc. US* v. *Yuasa Battery Company Co. Ltd et al.,* (Japan) US District Court, District of Colorado, September 9, (1983), *Yearbook Commercial Arbitration* 1986, vol. XI, at 566.

[205] Award made in 1986, ICC proceedings no. 4381, *Clunet* 1986, at 1106. (unofficial translation from French).

arbitration agreement without being authorized by the competent authority; nevertheless, one must take into account the fact that the defect which affected the arbitration agreement had not been brought to the knowledge of the claimant at the time the agreement was entered into.

Whereas it has been recognized by arbitral precedents that international public policy would strongly opposes the fact that a government entity, while dealing with a party not belonging to its country, might knowingly and willingly enter into an arbitration agreement which creates confidence in the other contracting party; also that later, once the arbitration proceedings or the enforcement proceedings are in process, the government entity might avail itself of the nullity of its own commitment and that the defendant, in its capacity as State company, has manifestly failed in its duty to mention the requirements of the Iranian law concerning the conclusion of contracts by public entities.

The claimant has agreed to the arbitration agreement in good faith and one must then regard this limit to the defendant's right to enter into arbitration agreements as having no effect because of its non-conformity with international public policy, the consequences of which could not be excluded by applying Iranian law (see ICC cases nos. 1526 (1968) and 2521 (1975), *Clunet* 1974, at 915 and 1976 at 997 and ICC proceedings no. 1939 (1971) in P. Leboulanger, *Les contrats entre Etats et entreprises etrangères* (Contracts between States and foreign companies), 1985, 460, ICC proceedings no.3327 (1981), *Clunet* 1982, at 971, Leboulanger, *op. cit.*, 459-461; Derains, *Le statut des usages du commerce international devant les jurisdictions etrangères* (International trade usage in foreign jurisdictions). *Rev. arb.* 1973, 122 *et seq.*, Böckstiegel, *Arbitration and state enterprises,* 1984, at 25, P. Lalive, *L'influence des clauses arbitrales* (The influence of arbitration clauses): Actes du colloque de Louvain, *Les contrats entre Etats et personnes privées etrangères* (Contracts between States and foreign private individuals), at 4: Robert, *L'arbitrage dans le commerce international* (Arbitration in international trade), at 21/51-253, 362-370, Oppetit, comments to the Framatome award, *Clunet* 1984, at 3346; Fouchard, on the Framatome award, *Rev. arb.* 1984, 383 *et seq.* and, in the same line of thought, but supported by reasons based on the prevailing role of the freedom to contract: A. Kassis, *Théorie générale des usages du commerce* (General theory of the trade usages), 1984, 779-781).

It remains to be seen whether the absence of approval external to the contracting party must be treated as the absence of authority of the signatory (and therefore subject to the same rules), or whether these consequences may be overcome, as the arbitrators held, by referring to a conflict with international public policy.

As held in *Sonatrach-Drilling*[206] the arbitration agreement remains valid even if an amendment is made to the original contract, provided the amendment deals only with substantive issues and not with the settlement of disputes; if the amendment puts an end to that contract, the arbitration clause remains valid to deal with disputes arising from that contract.

Validity of an arbitration agreement means a duty to refer the dispute as the case may be to foreign arbitration. Reluctance to accept this is still frequently registered as it is shown by *Silkworm.*[207] Dealing with Silkworm's motion not to refer the dispute to arbitration in China, because of lack of discovery, lack of due process as guaranteed in the United States, interrupted proceedings that may require more than one session, lack of provisions for punitive and treble damages in Chinese law, expense and inconvenience, the Court held:

> We conclude that concerns of international comity, respect for the capacity 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.

Along the same lines is *Gatoil,*[208] in which the English High Court dealt with proceedings instituted before it, in spite of the existence of an arbitration clause under the laws of Iran, the seat of the arbitration being Tehran. The Iranian defendant opposed it.

The Court held that:

> The parties entered into this contract some two and a half years after the enactment of the Iranian law abolishing the pre-revolutionary Appeal Court and replacing it and its functions with the Municipal Court of Tehran. But as Art. 8 is not nullified and as the parties' mutual intention is to arbitrate future disputes, should they arise, in Tehran, according to the substantive and curial laws of Tehran, it seems to me that they must both be bound by the provisions of law ...

The Court declined to examine the question whether Tehran was *forum non conveniens* as it was not convinced that Sect 8 was null and void or inoperative, or incapable of being performed.

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[206] *Sonatrach v. KCA Drilling Ltd.,* Swiss Federal Court March 15, 1990, *Rev. arb.* 1990, 921.

[207] *Silkworm Screen Printers Inc. v. Abrams et al.* U.S. Court of Appeals, 4th Circuit, November 4, 1992 *Yearbook Commercial Arbitration* 1995, 820.

[208] *Gatoil International Inc. v. National Iranian Oil Company,* High Court of Justice of England, Q.B. Division, December 21, 1988, *Yearbook Commercial Arbitration* 1992, 582.

10.9 TIME LIMIT FOR ENTERING INTO AN ARBITRATION AGREEMENT

As to the time-limit within which the arbitration agreement may be validly entered into, it has been questioned whether it is the beginning of court proceedings, or whether it can also be after they have begun, in the first instance or even in the subsequent instances. According to some authors,[209] the arbitration agreement could be entered into only before court proceedings begin. According to another opinion,[210] the arbitration agreement, even if entered into during the first instance proceedings or during the appellate proceedings and even during a possible third instance, can in principle be entered into up to the time a final decision is made. This transfers the entire matter to arbitral jurisdiction.

This view has been affirmed by an ICC award in 1990:[211]

> while it is possible to submit retroactively an existing dispute to arbitration by an arbitration agreement ...

In several jurisdictions there are no obstacles on a practical or theoretical level to such conclusions, or limits to the parties' freedom to contract. Just as the parties may settle the dispute up to the last moment, similarly they can refer it to arbitrators up to the last moment also. The different question of the existence of an arbitration clause is dealt with later.[212]

When the arbitration agreement provides for a time-limit within which the arbitral proceedings must be instituted and it is not respected, it might be concluded that the arbitration agreement is no longer effective and that the parties may refer the disputes to the courts. However, in *Romano* v. *Rinaldi*[213] the Italian Court of Cassation held that not only the arbitration agreement is no longer effective, but also that the parties' right to refer the dispute to state courts could not be exercised.

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[209] This opinion is based on an, in my opinion incorrect, application of the principle of *perpetuatio jurisdictionis* (i.e. unchangeability of the initial jurisdiction) provided for in section 5, Italian Rules of Civil Procedure. For a critical analysis see G. SCHIZZEROTTO, *op cit.*

[210] See *infra* Chapter 9.2.

[211] Award made in 1990 in ICC proceedings no. 5946, *Yearbook Commercial Arbitration,* 1991, 97.

[212] See G. SCHIZZEROTTO, *op. cit.,* at 55 *et seq.; accord: Fonzo* v. *Perini.,* Court of Cassation (Italy), August 6 no. 2397 (1951), *Giur. it.* 1952, I, 1, 491 and *Impresa Laboratori Italiani* v. *Impresa Gravena AG.,* Court of Cassation (Italy), October 21 no. 3445 (1969), *Giust. It.,* 1970, I, 757.

[213] *Romano* v. *Rinaldi,* Court of Cassation (Italy), January 8 no. 111 (1980), *Foro It.* 1980, I, 1, 310.

The court reached those conclusions (which seem to apply both to arbitration and to *arbitrato irrituale,* i.e. joint mandate to settle) on the following grounds:

> the court first distinguished between a joint mandate to settle and arbitration. Within the ambit of a joint mandate to settle, it held that the expiry of the arbitration clause due to objective reasons brings back the right to refer the dispute to a state court. However, as to arbitration, the court excluded this possibility whenever the arbitration agreement is no longer effective because of non-compliance with it by the parties and justified this conclusion as follows: If one should come to a different conclusion one would reach the absurd result that the negative consequences of one party's breach of the arbitration agreement would fall exclusively on the other side.

The non-constitution of an arbitral tribunal within the time-limit agreed by the parties has been interpreted in French precedents as in *Compagnie Fruitière S.A.*[214] as a ground for the arbitration agreement becoming ineffective:

> The purchaser of 500 tons of peanuts instituted proceedings for defective supply against both the supplier and the carrier; in turn the supplier instituted proceedings against the carrier; both proceedings were pending before the Court of Marseilles.

The sale contract provided for arbitration. However, the seller refused to appoint a second arbitrator holding that:

> As far as arbitration proceedings are concerned ... we do not see how they could take place since the arbitrators cannot proceed in the absence of samples taken in the presence of the parties at the time of loading'.

The court inferred from the loss of effectiveness of the arbitration agreement that the courts had jurisdiction:

> in fact between the two actions there is a connection which does not allow them to be severed without risking a conflict of decisions; under these conditions, the existence of the arbitration clause could not be opposed to the court proceedings ...

In the French judgment in *Spie Batignolles*[215] the loss of effectiveness of the arbitration agreement because of lack of appointment within the time-limit

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[214] *Compagnie Fruitière SA et al* v. *Georges Dams et al.* Court of Appeal, Aix en Provence, January 27, (1978), *Rev. arb.* 1978, 52.

[215] *Sté Spie Batignolles v. Sté Sofromex,* Court of Cassation (France), November 26, (1980), *Rev. arb.* 1981, 418.

was avoided simply because this argument was raised late and the parties had entered into a further submission:

> The French Court of Cassation rejected the attack based on the appointment of a third arbitrator after the expiry of the term, since this ground had not been raised before the Court of Appeal and in any event because, by appointing a new arbitrator, the parties had started a new six months' term.

10.10 POSITIVE AND NEGATIVE EFFECTS

The main effect of the arbitration agreement is generally to deprive the courts of jurisdiction to decide the dispute. Therefore whenever a party institutes court proceedings in spite of this, the court, upon finding that an arbitration agreement exists, generally declares its lack of jurisdiction. The effect of the arbitration agreement of preventing disputes, falling within its ambit, from being decided by state courts was confirmed in *McDonnell Douglas:*[216]

> McDonnell Douglas entered into an agreement with the Kingdom of Denmark for the Harpion missile defence system; the agreement contained an arbitral clause. In 1982 the Danish ship Peder Skram, sailing in the waters close to Kattegat Island, tested the missiles and one of them suddenly started its trajectory and exploded on the Danish island of Sjaelland, causing substantial damage. The Danish government instituted arbitration proceedings, but McDonnell Douglas applied to the District Court of Missouri. On application by Denmark, the District Court referred the parties to the arbitrators again on the following grounds:
>
> '(Douglas) further argues that the dispute is not subject to arbitration because the Convention and the Act do not apply where public policy renders the question an inappropriate subject for arbitration or incapable of arbitration.
>
> (Douglas) contends that much of the information necessary to its defense of defendants' claims is classified by the US Government and would be available to this Court under certain circumstances, but will not be available to the panel of arbitrators under the same circumstances.
>
> It is true that under some narrow circumstances public policy may be grounds for denying the enforcement of an arbitration agreement. See, e.g., *Wilko* v. *Swan,* 346 US 427, 74S. Ct. 182, 98 L. Ed., 168 (1953). In this case, however, the arbitrators will not he asked to rule on matters of national security in contravention of a policy of the United States. The

[216] *McDonnell Douglas Corp. US v. Kingdom of Denmark,* US District Court, Eastern District of Missouri, April 9, *(1985), Yearbook Commercial Arbitration,* vol. XI, 1986, at 582.

> more likely result is that availability of (Douglas)'s evidence may be restricted by national security measures imposed on it by the US Government. It does not appear that (Douglas) was unaware of the nature of national security restrictions or secrecy requirements of the government when it contracted with the defendants. (Douglas)'s evidentiary concerns are premature and it would not be appropriate for this Court to speculate as to the various merits of the underlying dispute. Accordingly, the Court will refer the parties to arbitration.

Several writers share this construction of the effects of an arbitration agreement.[217]

In some legal systems, the national court is *bound* to declare its lack of jurisdiction in the presence of an arbitration agreement, while in other systems it can exercise its *discretion* to stay the proceedings, as the court did in Sudan in *Brown International:*[218]

> The Court of Appeal of Sudan was hearing an appeal against a Sudanese first instance decision, which had stayed the proceedings because of the existence of an arbitration agreement (providing for arbitration to be conducted in Switzerland). By a majority decision, the Court decided to exercise its discretion by staying the proceedings and confirmed the decision of the court of first instance.

The opposite view is taken by the ruling of the High Court of Kenya in *De Spina Pontikos;*[219]

> An application was made to the court to stay the proceedings instituted before it (concerning the attachment of the vessel De Spina Pontikos), on the grounds that there was an arbitration agreement which compelled the parties to refer the dispute to three arbitrators, members of the Baltic Exchange, sitting in London. The court, having held that it was not advisable to release the vessel, and that it was able (like the arbitrators) to apply English substantive law, rejected the application to interrupt the proceedings.

In any event, a court's decision to exclude its jurisdiction does not exclude it as to any possible issue, since that court frequently maintains jurisdiction on other issues, such as the appointment or replacement of arbitrators and, depending on the legal system, on assistance for the purpose of hearing evidence

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[217] A. PRUJINER, *La forme obligatoire des clauses d'arbitrage (the binding effect of arbitration agreements), Rev. arb.* 1994, 569.

[218] *Sinco Anstalt* v. *Brown International,* Court of Appeal (Sudan), June 21 -July 3, (1971), *Clunet* 1984, 389.

[219] *J.H. Rajner and Co. Ltd.* v. *Owners of De Spina Pontikos,* High Court (Kenya), November 4 (1974), *African Law Reports Commercial* 1974 (3) 329 and *Clunet* 1981, vol. XI, at 389.

and other ancillary relief, as well as on applications for setting aside the award. As far as the plea of invalidity of the arbitration agreement is concerned, based on the grounds that the award would not be enforceable in the state to which the other litigant belongs (Brazil), the arbitrators held in ICC proceedings no. 4695 (1984):[220]

> 16. The question before this tribunal is not that of enforcing an arbitration clause, among other reasons because this tribunal has no power to enforce arbitration to a reluctant party. It only concerns its power and obligation to exercise its arbitral jurisdiction, if it finds itself in the presence of a contractual stipulation which is a valid one under substantive Brazilian law. This being the case, it must be concluded that it confers jurisdiction to this tribunal to entertain the disputes which have arisen.
>
> 17. Defendant's expert further distinguished between the negative (i.e., depriving ordinary courts of jurisdiction) and positive (i.e., granting jurisdiction to the arbitral tribunal) effects of an arbitration clause in Brazilian law. He contended that since the arbitration clause in Brazilian law has no negative effect, it should also not have the positive effect.
>
> 18. In a more general way, the suggested equivalence of negative and positive effects of an arbitration clause involves again a *non sequitur* When the normal situation occurs, that is to say, when the arbitration clause is not infringed ... the natural effects of the clause of conferring jurisdiction to the arbitral tribunal must take place.

In conclusion, the arbitration agreement may have various effects on court proceedings:

- compel state courts to declare their lack of jurisdiction,
- put the state court under an obligation to transfer the file to the arbitrators;
- cause an order to be issued compelling the parties to refer the dispute to arbitration;
- leave the state court free to decide whether proceedings should be stayed or not;
- be of no effect in a given jurisdiction.

While it is not possible to state a rule applicable in all jurisdictions, it could be said that the arbitration agreement generally results in the state court declaring its lack of jurisdiction.

In many jurisdictions, the state court may not deny *ex officio* its jurisdiction because of the existence of an arbitration agreement, but only if this defence is raised.

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[220] Interim award November 1984 in ICC proceedings no. 4695, Jimenez de Arechaga (Chairman), *Yearbook Commercial Arbitration,* vol. XI, 1986, at 149.

Limits to the effect of the arbitration agreement were pointed out in *Tractorexport:*[221]

> The Indian company Tarapore & Co., Madras, initiated proceedings before the Court of Madras against Tractor-export, Moscow, for breach of contract. In spite of this, the Russian company instituted arbitration proceedings in Russia. The Indian company applied to the Court of Madras for an order to the Russian company to discontinue the arbitral proceedings. The Court of Madras, in its ruling confirmed by the Indian Supreme Court, held that under the New York Convention, courts did not have a duty to stay proceedings because of the mere existence of an arbitral clause, if at the time the proceedings were instituted the dispute had not been referred to arbitration.

It is reported that the Indian statute, implementing the Convention, was modified following this judgment in order to avoid the Convention being construed again in that way.

The effect of an arbitration agreement to deprive courts of jurisdiction has been affirmed in *The West of England*[222] as applying even to a peculiar situation:

> The U.S. Supreme Court plainly stated that under the Arbitration Act an arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement.

A distinction must also be made between the effects of a preliminary arbitration agreement (i.e. a mere promise of each party to the other to later enter into an arbitration agreement) and of an arbitration agreement. Nothing prevents the parties from entering into preliminary arbitration agreements. The agreement between the parties is then limited to the recording of a commitment by the parties to enter into an arbitration agreement if a dispute arises.

However, generally the parties refer future disputes to arbitration from the outset rather than simply entering into a preliminary agreement. When the arbitration agreement is entered into, it produces effects, even in the case of lack of cooperation by the other party; for example the arbitrator will be appointed, even without the other party's cooperation, by applying the agreed procedure.

Regarding the effects of an arbitration agreement on interruption of the time-limit, the Egyptian Court of Cassation ruled:[223]

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[221] *Tractorexport v. Tarapore & Co.*, Supreme Court (India), January (1971) *Yearbook Commercial Arbitration* 1976, vol. I, at 188.

[222] *Oil Transport Group v. The West of England Ship Owners Mutual Insurance Association,* U.S. District Court, Eastern District of Louisiana, February 14, 1992 no. 91-3645, *Yearbook Commercial Arbitration* 1993, 511.

> The Court declared that arbitration agreements do not by themselves interrupt the running of time for limitation purposes since they are generally mere agreements to refer a particular dispute to arbitration and normally do not include a demand for performance. If on the other hand the arbitration agreement contains an acknowledgement of debt and the dispute to be arbitrated concerns the determination of the amount of said debt, then the running of time would be stopped due to this express or implied acknowledgement of debt and not as a result of the arbitration agreement as such.

10.11 CONDITIONS PRECEDENT

However the existence of a valid arbitration agreement is not sufficient to start arbitration proceedings when, as often happens, it is subject to a condition precedent.

In arbitrations concerning international construction works for example, which are frequently governed by general conditions called FIDIC Civil, before the claim may be decided by the arbitrators, it must be submitted a second time to the Engineer (the person or company appointed by the Owner to supervise the works).[224] Whenever a party submits a dispute to arbitration without previously having submitted it to the Engineer, it has been held that the arbitrators may not start the proceedings; this while attempts to make the Engineer's decision always final hAve been made. As it appears from *Yellum*[225] it has also been questioned whether the arbitral proceedings must be actually instituted within the given time period from the Engineer's decision, or whether it is sufficient to express within that period the intention to submit the dispute to arbitration. The issue is important in view of the possible consequent loss of the right to submit the dispute to arbitration. The duty to submit the dispute to arbitration within that period was held in the award made in ICC proceedings no. 3790 (1983),[226] and also in the award made in 1986 in proceedings no. 4707.

However several other decisions have opposed this view and held that a notice of the intention to refer the dispute to arbitration was sufficient. It was so decided in the award made in ICC proceedings no. 3029 (1986); that view

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[223] Court of Cassation (Egypt), January 30, (1979), proceedings no. 577, judicial year 34, *Mediterranean and Middle East Arbitration Quarterly* 1987, 1, 1.

[224] Clause 67, Fidic (Civil) Conditions (1987 ed.).

[225] *Yellum Mohan Reddy v. Rastriyia,* Andhra Pradesh High Court *AIR* 1992, Andhra Pradesh 81, *ICA Arbitration Quarterly* vol. XXV, II, I, April-June 1992, 10-11, quoted by *ASA Bullettin* 1992, 559.

[226] Award made in 1983 in ICC proceedings no.3790, *Clunet* 1983, 911.

was shared by the awards rendered in 1986 in ICC proceedings no. 4862[227] and in 1987 in ICC proceeding no. 5634 too.

On the other hand in 1983, in ICC proceedings no. 3790,[228] in a dispute between a Libyan Owner and a French contractor, the arbitral tribunal held:

> The lack of a request fur arbitration within 90 days from receipt of the engineer's decision causes time limitation.

As to the contents of the request for arbitration, the arbitrators held that:

> The expression of dissatisfaction as to the decision is not enough in itself and it is to be accompanied by a claim to arbitration which is to be communicated to the Engineer himself as an objection to his explicit decision; as mere dissatisfaction has no legal effect on the Engineer's decisions; only an explicit request for arbitration communicated to the Engineer within the 90 days period suspends the effect thereof.

This view was also held by a sole Jordanian arbitrator, sitting in Amman, applying the law of the Emirates, in his award made in proceedings no.4707 (1986).

However, the arbitral tribunal, consisting of three arbitrators, sitting in The Hague, in its award rendered in 1986 in ICC proceedings No 5629 (1986) held that a notice of the intention to submit the dispute to arbitration was sufficient. A similar view was held in proceedings no.5634 (1987) by the arbitral tribunal consisting of three arbitrators, of Irish and British nationality, sitting in Paris, which applied English law in its award.

Jarvin[229] has made a survey of the developments of ICC arbitral jurisprudence in this respect.

Another condition precedent is frequently the prior conduct of conciliation proceedings. However in their partial award in ICC proceedings no.2138 (1974),[230] the arbitrators although the arbitration agreement required the prior conduct of conciliation proceedings, nevertheless held:

> having noted that the dispute concerned a failure by the purchaser in his duties and that there was no reason (because of the seriousness of the breach) to take into account the provision concerning conciliation, they held that arbitral proceedings could be instituted.

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[227] Award made in 1986, in ICC proceedings no. 3029, *Clunet* 1987, 1018.

[228] Award January 20, 1983 in ICC proceedings no. 3790 (arbitrators: Fletcher Cooke, Chairman, Ahdab and Al Alem), *Yearbook Commercial Arbitration* 1986, vol. XI, at 119.

[229] S.J. JARVIN in DERAINS and JARVIN, *Chronique des sentences arbitrales, Clunet* 1987, 1024.

[230] Award made in 1974, in ICC proceedings no. 2138, *Clunet* 1975, 934.

In the case of non-existence of a dispute, instead of a condition precedent not having yet taken place, there are not the premises for arbitral proceedings. This was held by the award made in ICC proceedings no.4265 (1984):[231]

> Whereas in effect any arbitral proceedings require the existence of a dispute between one or more parties ... Whereas the defendant could not seriously state he had no knowledge of this dispute before the arbitration proceedings were instituted.

10.12 WAIVER

It might seem that there can be no problem regarding the waiver of the arbitration agreement, since waivers are subject to the law of contract, which provides that as a rule agreements cannot be waived unilaterally. However, under some circumstances the conduct of a party may produce effects in this area.

It may be preferable first to deal with the practice whereby a party applies to the courts to obtain an interlocutory injunction. Whatever the result of this, (and subject to the possible breach of the arbitration rules if they forbid this) it is generally considered that such an application is not by itself a waiver of the arbitration agreement on the merits of the dispute. In French precedents the coexistence of the two proceedings is clearly affirmed in *La Lagune:*[232]

> The existence of an arbitration clause may not prevent the court from exercising its authority on interlocutory injunctions whenever there is urgency.

The opposite could rather be argued, which is whether entering into an arbitration agreement amounts to a waiver to apply to the courts for interlocutory injunctions. In *Atlantic Triton v. République de Guinée*[233] it was held that this waiver is not implied, and that it cannot be established unless it has been expressly stated. The opposite view has been taken by Swiss and Belgian courts in ICSID arbitrations and seems to be confirmed by the amendment ICSID made to its rules.

The assessment of the effects of proceedings instituted before state courts on the merits of the dispute is more difficult. It is generally held that such an initiative does not imply a valid waiver to the arbitration agreement, but merely

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[231] Award made in 1984, in ICC proceedings no.4265, DERAINS and JARVIN, *Chronique des sentences arbitrales, Clunet* 1984, at 923.

[232] *Société d'exploitation du Cinéma Rex* v. *Société Rex; S.C.L La Lagune et autre* v. *S.à.r.l. Sercif,* Court of Cassation (France), June 7 and July 9, (1979), *Rev. arb.* 1980, 78.

[233] *Atlantic Triton* v. *République de Guinée,* Court of Cassation (France), November 18, (1986), *Mediterranean and Middle East Arbitration Quarterly,* 1988, no. 2, 10.

that the court cannot decide because of the arbitration agreement, which is not affected by the fact that it has been ignored by instituting such court proceedings.

However, on some occasions the institution of court proceedings on the merits, even if it does not produce the consequence that the arbitration agreement is no longer effective, may produce other effects. For example, it may be seen as a proposal for a waiver of the arbitration agreement, which the other party may accept by appearing in court without opposing the arbitration agreement. This view was taken by a Mexican Court in *Mitsui*[234] which held that the lack of refusal of court jurisdiction in the first instance does not entitle to raise this objection in the arbitral proceedings.

In the absence of contrary elements, this proposal for waiver extends to all disputes within the ambit of the agreement, with the result that, if the other litigant accepts the waiver by appearing in court and making counterclaims, the first party has no right to refuse based on that arbitration agreement, to litigate in court such counterclaims, arguing the existence of the very arbitration agreement which he has set aside. This aspect was dealt with in *British Leyland* v. *Richard*:[235]

Illustration

> British Motor Corporation Europe (later British Leyland International Services, a Swiss company) entered with French companies (later taken over by Société d'Exploitation des Etablissements Richard) into three contracts for the distribution in France of cars manufactured in England. The contracts contained arbitration clauses.
>
> After a dispute arose between the parties, British Leyland instituted proceedings against Richard before the Commercial Court of Versailles, seeking an order to pay the sale price of cars and spare parts. Richard appeared and filed a counterclaim applying for damages for breach of contract. British Leyland opposed the counter-claim maintaining that the court had no jurisdiction on it because of the existence of the arbitration agreement. The French Court of Cassation, confirming the Court of Appeal's ruling, held that the plaintiff, by referring the dispute to the ordinary courts, had waived with the consent of the other party the entire arbitration agreement and could not therefore attempt to use it against counterclaims made in the court proceedings which he himself had instituted.

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[234] *Mitsui de Mexico S.A. v. Alkon Textil,* Higher Court of Appeal, Federal District October 21, 1986, *Yearbook Commercial Arbitration* 1991, 594.

[235] *British Leyland* v. *Richard,* Court of Cassation (France), June 6, .(1978), *Rev. arb.* 1979, 230.

Confirmation that the arbitration agreement between the parties can be waived is found *expressis verbis* in the US Court of Appeals ruling in *Perforaciones Marinas*:[236]

> Although arbitration is a contractual right which can be waived and Art. II of the Convention contemplates the possibility of waiver of an arbitration agreement, the facts of this case do not demonstrate such a waiver.

The difficulty then does not consist in the possibility to waive, but in identifying the facts which may involve a waiver.

10.13 EXPIRY

The expiry of the arbitration agreement is a situation different from a waiver, although it produces similar effects.

For a waiver, an express or implied expression of intention is required, while expiry may also be the result of involuntary behaviour.

In other words the behaviour of the parties, even if involuntary, may become relevant in order to establish whether the arbitration agreement is to remain alive, when an unambiguous meaning can be attributed to this conduct. Various examples of such behaviour may be drawn from court precedents.

In *Perforaciones Marinas* the argument that arbitration had expired was rejected on the following grounds:

> Here Permango (Perforaciones Marinas del Golfo) raised the defense of arbitration in its answer. The only foundation for Sedco's assertion of waiver is the passage of time between filing of the limitation proceeding and the filing of Permango's answer. As the Court observed in *Hilti* v. *Oldach* 392 V 2d 368, 371(lst Cir. 1968) 'we start with the fact that defendant's answer in its special defence served notice on plaintiff of the arbitration defence. Given this, the burden is heavy on one who would prove waiver.' Indeed, though the sparring in *Hilti* was for 'nearly two years' the Court thought it more important that the delay in the proceedings was caused by legitimate pre-arbitration discovery ... We hold that there has been no waiver.

On the other hand, the Italian Supreme Court had no hesitation in asserting in *Rocco*[237] the expiry of *any* right of action:

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[236] *Perforaciones Marinas del Golfo SA (Mexico)* v. *Sedco (U.S.),* US Court of Appeals, 5th Circuit, August 12, (1985), *Yearbook Commercial Arbitration* 1987, 539.

[237] *Rocco Giuseppe e Figli S.n.c.* v. *Agenzia Marittima Constantino Tomasos Ltd.,* Court of Cassation (Italy), December 20 no. 7033 (1982), *Foro It.,* 1983, I, 1, 2196.

> Rocco entered with Armadora San Francesco SA (Panama), through the latter's agent Tomasos, into a charterparty to carry a supply of corn. A difference in weight between the bill of lading and the unloaded quantity was found and Rocco instituted proceedings against Tomasos before the Court of Naples. Tomasos filed a statement of defence based on a plea of lack of jurisdiction because of the arbitration agreement contained in the contract, which provided for arbitration in London and placed on the claimant the duty to appoint its arbitrator within three months from completion of the unloading. Since this was not done, the claim was to be considered as waived and totally put aside. Tomasos' argument was held valid by the court of first instance. Rocco argued that the arbitration agreement was not in force since arbitration had not been instituted within the time-limit. The Supreme Court rejected this argument, holding that only when arbitration is really objectively impossible, does the right of the parties to refer the dispute to the courts exist again. However, if a party to an arbitration agreement, which asserts rights under it, does not respect the agreement by not referring the dispute to arbitration, it cannot have those disputes heard by the courts instead of the arbitrator. Even the right to have his case heard in court is then not revived and the applicant must remain without protection both from arbitrators (because he has not requested arbitration) and from the courts (because he waived that right with the arbitration agreement and it is not revived).

The English courts have expressed their views in this respect in *Bremer Vulkan*:[238]

> A dispute arose between a German shipyard and an Indian ship-owner (Bremer Vulkan and South India Shipping respectively). The parties, after having referred the dispute to arbitration, did not conduct any activity in these proceedings for five years. The German shipyard then applied to the English courts and obtained an order not to continue with the arbitration proceedings since the Indian shipowner's lack of activity prevented evidence from being obtained. The English Court of Appeal confirmed the order and held that a duty to pursue the proceedings was implied in an arbitration agreement. However, the House of Lords quashed the decision.

An interesting analysis of the consequences of lack of activity by a party, seen in a less negative light than in *Rocco,* can be found in *CIS Milano*:[239]

> The Italian Court of Cassation held that, since the arbitration agreement is a source of duties for the parties, as is any other contract, in the case

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[238] *Bremer Vulkan Schiffbau u. Maschinefabrik v. South India Shipping Corporation,* High Court, England (1981)1 *All ER* 289.

[239] *CIS Milano* v. *Barbua,* Court of Cassation (Italy), November 9 no. 5459 (1985), *Mediterranean and Middle East Arbitration Quarterly,* 1988, no.2, 2.

> of lack of activity by a party, the other party may avail itself of the remedies provided for by the law of contract and therefore apply to the competent court for the appointment of other arbitrators, or terminate the arbitration agreement, or claim damages.

Along the same line is the decision of the Egyptian Court of Cassation:[240]

> Whenever it becomes impossible to decide a dispute through arbitration, the arbitration agreement must be considered as eliminated, i.e. as if it had never existed, and the applicant again has the right to apply to the courts, as a normal forum for the settlement of disputes.

Criticism as to the finding of the Swiss Supreme Court in *Maran – Vekorne*[241] that, contrary to what had been held by the arbitrators, the arbitration agreement had expired when the request for arbitration was filed since the time limit which had been set out and which was running from the end of the negotiations, had expired earlier than it was held by the arbitrators, is reported.

Amongst arbitral precedents on the expiry of the arbitration agreement the award made in ICC proceedings no. 2730 (1982) held:[242]

> If the rules of the (ICC) Court of Arbitration (1978 edition) contain provisions on the duration of arbitration, they contain no provision concerning the expiry of arbitration. The arbitrators must then decide this issue with reference to domestic procedural law.

In *Ferruzzi*[243] the Court of Appeal, Paris held that the provision in the Arbitration Rules of the Paris Arbitration Chamber that lack of payment of the provision involved the withdrawal of the request for arbitration may be construed as a waiver.

In *Prince Mohamed*[244] the French Court of Cassation held that an application made by the Claimant, after referring a dispute to the ICC, to the Paris Court for the appointment of an expert would amount to a certain and non ambiguous waiver to the arbitral proceedings. This conclusion cannot be shared if (as it seems) the appointment of an expert through the French Referee system was aiming to obtain a quick technical report, and was not to be construed as the first step in order that the said state court decided the merits.

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[240] Court of Cassation (Egypt), March 5 no. 450 (1975), legal year 40, *Mediterranean and Middle East Arbitration Quarterly,* 1987, n. 1.5.

[241] P. D. FRIEDLAND, *The Swiss Supreme Court Sets Aside an ICC Award* (Geneva August 17, 1995) 13 *J. Intl. Arb.* 1, 111.

[242] Award made in 1982 in ICC proceedings no. 2730, *Clunet,* 1984, 915.

[243] *Ferruzzi v. Ucacel,* Court of Appeal, Paris, January 24, 1992, *Rev .arb.* 1992, 640.

[244] *Prince Mohamed Bin Saud Bin Abdul Aziz v. Banque Rivaud et al.,* Court of Cassation (France) October 9, 1990, *Rev. arb.* 1991, 305.

In *Attoch*[245] the Court of Appeal, Paris reiterated that the parties waive the arbitration agreement if they seise a court of law on the merits.

A quite different situation arises when the arbitrators establish that the contract entered into by the parties has been repudiated. In France in *Bienaimé*[246] it was argued that this ruling deprived the arbitration clause of any further effect. The Court of Appeal held that it was so and the Court of Cassation – even if with reasons which do not seem sufficient – did not set aside the appellate judgment. The opposite view seems more convincing that the arbitration agreement is still effective as to claims arising from the contract which was terminated.

The 'dragging' of arbitral proceedings has concerned also state courts. In England this issue has been the object of many decisions and Owsia[247] has referred to an innovative trend, superseded by an orthodox trend and followed by a revival of the innovative trend. The matter in the end has been dealt with by introducing legislation.

Bremer Vulkan[248] is now overruled by Sections 40 and 41(3) Arbitration Act 1996. The former creates a statutory duty to proceed with despatch; the latter gives the arbitrator the power to dismiss a claim for want of prosecution when there has been inordinate *and* inexcusable delay on the part of the claimant in pursuing his claim and ... the delay:

(a) gives rise, or is likely to give rise, to a substantial risk that it is not possible to have a fair resolution of the issues in that claim, or

(b) has caused, or is likely to cause, serious prejudice to the respondent.

The positions taken during such a debate, in spite of peculiarities of the applicable law, are of general interest and are reported since they might be applied in other jurisdictions.

Abandonment of the contract as a way to get rid of the proceeding has been advocated on various grounds.

Repudiatory breach

Some Courts, like in *Bremer Vulkan* have held that the parties to arbitral proceedings are under an *implied mutual obligation* to pursue the proceedings without undue delay. This view, introduced by Donaldson J. (as he there was) in the first instance and developed by Lord Diplock in the House of Lords, treats undue delay by one party as repudiatory breach. However in the event of

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[245] *Uzinen Export Import Romanian Co. v. Attoch Current Co.,* Court of Appeal, Paris, July 7, 1994, *Rev. arb.* 1995, 107.

[246] *Fleuryn Bienaimé,* Court of Cassation (France) June 16, 1993, *Rev. arb.* 1994, 321.

[247] P. OWSIA, *Consensual Abandonment of Contract,* 8 *J. Int. Arb.* 4, 55.

[248] *Bremer Vulkan Schiffbau u. Maschinenfabrik v. South India Shipping Corporation Ltd.,* [1919] I *K.B.* 78.

the other party having too been inactive, it would be prevented from benefiting of the other party's breach of the same duty.

A different approach was taken in *The Hannah Blumenthal*[249] in which Lord Brandon, in the main speech, held:

> Where A seeks to prove that he and B have abandoned a contract in this way, there are two ways in which A can put his case. This first way is by showing that the conduct of each party, as evidenced to the other party and acted on by him, leads necessarily to the inference of an implied agreement between them to abandon the contract. The second method is by showing that the conduct of B, as evidenced towards A, has been such as to lead A reasonably to believe that B has abandoned the contract, even though it has not in fact been B's intention to do so, and that A has significantly altered his position in reliance on the belief. The first method involves actual abandonment by both A and B. The second method involves the creation of B of a situation in which he is estoppel from asserting as against A that he B has not abandoned the contract.

Promissory estoppel

The conduct of a party to the proceedings may cause the other litigant to believe that the former has abandoned the proceedings, and reliance on it.

This view – which applies the doctrine of *promissory estoppel* – was described, (based on Lord Diplock's words) as *detrimental reliance*:

> I use the broader expression 'injurious reliance' in preference to 'estoppel' so as to embrace all circumstances in which A can say to B 'You led me reasonably to believe that you were assuming particular legally enforceable obligations to me ...' whereas 'estoppel' in the strict sense of the term is an exclusive rule of evidence ...

Difficulties to infer abandonment from silence

These views have in common that abandonment would be the result of silence and of lack of action, a conclusion which did not satisfy the Court of Appeal of England in *The Leonidas D*[250] in which Goff L. J. (as he then was) adamantly pointed out:

> We have all been brought up to believe it to be axiomatic that acceptance of an offer cannot be inferred from silence, save in the most exceptional circumstances.

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[249] *Paul Wilson & Co. A/S v. Partenreederei Hannah Blumenthal* [1983] 1 AC 854 [1983] 1 *Lloyd's Rep.* 103.

[250] *Allied Marine Transport Ltd. v. Vale do Rio* [1983] 2 *Lloyd's Report;* [1985] 1 *NLR* 925; [1984] 2 *Lloyd's* 1 WLR 1; [1983] 3 *All ER* 737.

Consensual Abandonment of the Contract

Unhappiness was caused by this conflict with the classic principle – not only of English law – that, in contract formation, silence has no relevance This brought in *The Splendid Sun*[251] to classify the claimant' s lack of action as an implied offer to abandon the arbitration agreement and the defendant's lack of action as an acceptance of that offer giving rise to a new agreement, the object of which was to abandon the arbitration agreement.

This is a view with solid academic basis since a contract may be terminated by consent in the same way because it is the result of consent.

A similar but non-identical view was taken in *The Multitank Holsatia*[252] in which Phillips J described this as follows:

> ... each party is likely by silence or inactivity to have been conveying simultaneously the same message to the other: 'I do not wish to proceed with the arbitration'.

As to English law, such case law seems to have become, in consequence of the Arbitration Act 1996, of only historical interest, although there is perhaps a theoretical possibility that some of the law stated in the cases cited may have survived Section 41(3).

The reasoning of each of such doctrines catches at least one relevant aspect. Still it is submitted that the usage to get rid – for case administration purposes – of never ending proceedings may have forced to take sharp positions.

Looking at this problem from a general point of view and no more limitedly to English law in fact the existence of a mutual duty to pursue the proceedings might not allow, if breached, the Courts to declare – at least without an application from a party – the arbitration agreement terminated.

In the absence of a joint application of the parties, termination by consent, and therefore merely as a result of an intensive effort to construe silence and inactivity, may seem excessive and in conflict with the classic rule of non relevance of silence by itself.

It is suggested that one might reach such a conclusion if evidence is available that both parties have withdrawn from the proceedings not as a result of silence and inactivity by themselves, but *per facta concludentia.*

However even this more prudent conclusion seems to stand only if the applicable procedural provisions do not require a formal withdrawal.

In the absence of this, it is submitted that there is not one solution for all situations in all jurisdictions. The solution of each of them will depend on the

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[251] *The Splendid Sun* [1980] 1 *Lloyd's Rep.* 333 (first instance) at 335 and [1981] I Q.B (C.A.) 694, at 700.

[252] *Tankrederei Ahrenkeil GmbH v. Frauhil*, [1988], 2 *Lloyd's Rep.* 486.

applicable procedural law and on evidence presented as to the conduct of the parties.

However one should perhaps take into account the time period allocated to make the award. In this respect one may distinguish the situations where the parties or the arbitral institution continue to grant time extensions for the filing of the award from situations where no time extension is granted.

In the former case it seems difficult that arbitrators having accepted to act under the arbitration agreement and the arbitration rules referred in it, may declare their appointment terminated by the parties. In fact if the parties or the arbitral institution keep extending the time limit for the filing of the award, this by itself demonstrates the opposite intention, i.e. that the proceedings continue.

What the arbitrators may do – it is suggested – is to withdraw if their acceptance of the appointment was based on the assumption that the proceedings last just a reasonable time period, a condition which might be frequently considered implied in the acceptance, and then the parties drag such proceedings for much more time.

If there is no time limit to make the award and no time limit may be fixed by state courts, the arbitrators should normally be free to issue an order for directions and then to decide even if one or both parties do not perform further activities. One should then expect the general rule to apply, i.e. that if claimant has not proved his case, he will fail.

10.14 Remedies For Invalidity

The question may be asked whether an arbitration agreement which is not valid can be remedied.

The possibility that an arbitration agreement be accepted later, by way of *ratification,* has been asserted in many occasions. That was the situation in *Prince Ben Saud*[253] where the Princess had entered into an arbitration clause, having authority from the Prince to enter into the contract without any reference to an arbitration clause.

However the Prince later entered into an Addendum which approved all the terms of the previous contract, thereby ratifying it.

A distinction must first be made between bringing a remedy and entering into a *new arbitration agreement* which, contrary to remedial situations, will produce only *ex nunc* effects (i.e. since that time).

This is for example one of the main purposes of the ICC Terms of References. However, when a nullity can be remedied, the original arbitration

[253] *Prince Ben Saud v. Crédit Industiel et Commercial de Paris,* Court of Appeal, Paris, March 25, 1995, *Rev. arb.* 1996, 81.

agreement, once purged of the elements which affected its validity, remains alive *ex tunc* (i.e. since the beginning).

On the subject of entering into subsequent arbitration agreements and of the relationships between the various agreements as a result of the first agreement being null and void, the French courts held in *Economats du Centre*:[254]

> In a dispute between holders of shares in a real estate company, the joint ownership rules contained a non-competition agreement and an arbitration clause.
>
> The parties subsequently entered into a submission agreement. The Court of Cassation, confirming the decision of the Court of Appeal of Montpellier, held that the nullity of the arbitration clause did not affect the validity of the subsequent submission. The interest of this decision lies more in its facts than in an analysis of the relationship between the arbitration clause, which was null and void, and the submission which was valid.

10.15 Consummation of the Right to Arbitration

One is entitled to wonder whether and when the arbitration agreement is, so to speak, consummated by the parties.

Effects of setting aside of award

Does reference of a dispute to arbitration under an arbitration agreement or submission produce the extinction of that agreement if the award is set aside (because the appointment of the arbitrators was not correct, or the defendant received no notice, or the arbitrators did not decide within the time limit, or on similar grounds) without being replaced – under the procedural applicable law – by a court decision?

It is suggested that the agreement remains valid and the parties should be entitled to refer that dispute again to arbitration under it.

Referring further disputes

Likewise reference of a dispute to arbitration under an arbitration agreement or submission does not seem to extinguish the possibility that the parties to such an agreement later refer other disputes to arbitration under it.

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[254] *Sté des Economats du Centre v. Perez et al.*, Court of Cassation (France), October 10, (1978), *Rev. arb.*, 1979, 352, with comments by MOREAU.

Referring the same dispute to another arbitrator

One should come to a different conclusion if a party refers a dispute to arbitration, its claim is rejected, but it refers again the same dispute to the arbitral institution for the appointment of another arbitrator. Here the right to arbitration – it is suggested – has been consummated.

Possibility to refer a dispute to arbitration under several arbitration agreements

A more difficult situation arises if a party has entered into an arbitration agreement which provides for future disputes to be referred to arbitration, a dispute arises, that party refers it to arbitration under such an agreement, and, the award being against that party, it challenges it, but its attack is rejected.

At this time that party remembers that it could have referred the dispute to another arbitral tribunal, under an other arbitration agreement, which has not superseded the previous one nor has been superseded by it.

The problem arises then whether that party may start new arbitral proceedings.

This may sound hypothetical. Nevertheless this is what occurred.

In the *Pyramids* arbitration[255] the ICSID Tribunal, being seised of a reference to arbitration, had to deal with Egypt's (the defendant) objection that since Southern Pacific (the claimant) had previously instituted an ICC arbitration, it could not, after losing such proceedings, start afresh ICSID proceedings.

The Tribunal held:

> In principle the Tribunal agrees with this interpretation of Law no. 43. The Claimants are not entitled to both an ICC remedy and an ICSID remedy so long as the arbitral and judicial processes do not produce more than one enforceable remedy; however, it matters not how may different paths be pursued in an effort to obtain that remedy. Therefore the Tribunal finds that the Claimant's pursuit of alternative remedies is not inconsistent with Law no. 43.

It is submitted that, even if this conclusion may be in line with the Egyptian statute, it cannot be consistent with the general principle that if a party refers to arbitration, and having various options as to the type of arbitration, chooses one of them and loses the proceedings, it cannot start afresh with other proceedings. The aim is not to allow a party to pursue all possible paths until it achieves its goal, but to avoid conflicting awards.

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[255] *Southern Pacific Properties et al. v. Arab Republic of Egypt,* ICSID Tribunal (Jimenez de Arechaga, Chairman, El Mahdi, Pietrowski) November 27, 1985, *Yearbook Commercial Arbitration* 1991, 16.

This conclusion is reflected for example in Italian arbitration law which has included in the grounds for setting aside an award that:

> it conflicts with a previous award which has become final or with a final judgment, provided this issue has been made the object of an objection in the arbitral proceedings.

10.16 Loss of Effects if a Public Body Takes Over the Position of a Contracting Party.

In some jurisdictions a rather unexpected turn is registered by arbitration agreements, in the event of a public body taking over the position of a contracting party. Reference is made to legal systems like France and Belgium which provide[256] that public bodies may not refer disputes to arbitration, a rule to which only international arbitration is an exception.

A special situation arises in the event of two private entities entering into a domestic agreement, and of the position of a contracting party being subsequently taken over by a public body.

If a dispute arises out of such a contract, and the other contracting party refers it to arbitration, the public body may lawfully refuse such a referral, arguing that it is not subject to arbitration

This was held by the Belgian Court of Cassation in *Communauté Française:*[257]

> 'LSM' a non profit legal entity instructed architects to design a school complex and a contractor to build it.
>
> The Belgian government purchased the complex and subsequently issued proceedings before a state court against the architects and the contractors.
>
> The architects challenged the jurisdiction of the state court on the ground of the arbitration agreement. The Trial Court and the Appellate Court rejected the defence.
>
> The Court of Cassation upheld the decision of the Appellate Court on the ground that public bodies are not subject to arbitration.

In his comments to the judgment Verbist[258] points out that the Government was aware of the arbitration agreement when it purchased the complex and that the application of the above general principles to the situation in issue was

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[256] In Belgium, section 167, 3, 2, C.J.

[257] *L.S.M. v. Communauté Française*, Court of Cassation (Belgium) October 10, 1996, *Rev. Droit ju. et de la preuve*, 1998, 2, 68.

[258] H. VERBIST, note to Court of Cassation (Belgium) October 10, 1996, see *supra* at note 257.

therefore contrary both to the contractual nature of arbitration agreements and to the principle that, if one takes over a contractual position and the contract includes an arbitral agreement, one is bound by it.

CHAPTER 11

THE PARTIES TO ARBITRATION – CAPACITY TO SUBMIT TO ARBITRATION

SUMMARY: 11.1 Private Parties, Public Administration and Government Enterprises – 11.2 Disputes as to the Existence of an Arbitration Agreement – 11.3 Sovereign Immunity – 11.4 Subjective and Objective Changes in the Original Contract – 11.5 Participation of Several Connected Parties in the Proceedings – 11.6 Connected Agreements and Arbitration Clause in One of Them – 11.7 Succession in the Contract – 11.8 Third Parties – 11.9 Consolidation of Proceedings – 11.10 Multiparty Arbitration.

11.1 PRIVATE PARTIES, PUBLIC ADMINISTRATION AND GOVERNMENT ENTERPRISES

The parties to arbitral proceedings may be divided into four classes:

- natural persons
- legal entities
- public bodies
- states

Arbitral practice frequently records amongst the parties to arbitration agreements not only public administrations, but also public bodies such as central banks, independent branches of the public administration (such as local authorities), and government-owned companies.

None of these classes of litigants is prevented from entering into an arbitration agreement and consequently from being a party to arbitral proceedings. Nevertheless, the arbitral practice has registered a large majority of natural persons and legal entities as parties. Among the latter, enterprises controlled by the public administration have a specific position. Because of their dual position (the form of a legal entity and their being subject to strict control by governmental agencies) they are frequently treated as a sub-category of governmental agencies. In fact, even if they are legal entities, occasionally they behave as public bodies and claim sovereign privileges.

Even if disputes involving states are a minority, in return they frequently register additional difficulties.[1]

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[1] N. RAWDING, *Protecting Investments under State Contracts. Some Legal and Ethical Issues*, 11, *Arb. Int.* 4, 341; L.J. BOUCHEZ, *The Prospects for International Arbitration: Disputes between States and Private Enterprises*, 8 *J. Intl. Arb.*, 81; C.B.

Statistics are published from time to time by the International Chamber of Commerce[2] concerning disputes submitted to arbitration. In 1997, 452 requests for arbitration were filed with the International Chamber of Commerce; its Court of Arbitration approved 170 final or interim awards and 53 interim awards. In this respect, also Oppetit's analysis should be mentioned.[3] The area related to the parties to arbitral proceedings should be one of the less difficult ones in the arbitral scenario. However, it has presented and still presents several arguable issues.[4] For example, non-appearance of the defendant is generally treated as default. That is the position taken by the Spanish Supreme Tribunal:[5]

> The Supreme Court further held that default of the defendant in the arbitration proceedings is not included in the New York Convention as a ground on which enforcement can be refused.

However the notion of default is not accepted in all jurisdictions. This is the case in the Italian legal system, as held by the Court of Cassation in *Vacchelli:*[6]

> Section 798 of the Rules of Civil Procedure, which provides for a review of the merits of the case during enforcement proceedings when the defendant has been in default during the foreign proceedings, does not apply to the enforcement of foreign arbitral awards because default in the technical sense does not exist in the arbitral proceedings, mere absence or indifference of the defendant not being tantamount to default.

The authority to represent a party has already been dealt with in the chapters on the arbitration agreement[7] and on arbitration under the Algiers Declarations.[8] Arbitrators tend to go to the essence of the problem. A decision by an arbitral tribunal in Czechoslovakia is relevant here.[9]

EBENROTH and T.J. DILLON, *Arbitration Clauses in International Financial Agreements*, 10 *J.Int.Arb.* 2,5.

2 Published by Y. DERAINS and S. JARVIN, *Chronique des sentences arbitrales, Clunet,* 1987, 1009 *et seq.*

3 B. OPPETIT, *L'Etat et l'arbitrage international, esquisse de systémation,* (The State and International Arbitration) *Rev. arb.,* 1985, at 493.

4 See Chapter 10.

5 Quoted in Award February 10, 1984, *Yearbook Commercial Arbitration,* 1985 vol. X, at 493.

6 *Vacchelli v. Brueder Groessing,* Court of Cassation (Italy), January 19, no. 465 (1984), *Yearbook Commercial Arbitration* 1985, vol . X, at 475.

7 See Chapter 10. 2.

8 See Chapter 5. 6.

9 Award March 5, 1980, in proceedings R.S.P. 153/79, *Yearbook Commercial Arbitration* 1986 vol. Xl, at 112.

> Mr. K. acted for the defendant in signing the application form. It is not decisive whether he was an employee of the defendant, or stood in any relationship with him; what is decisive is that he did not obtain the defendant's stamp or company stationery by illegal means, but that he received the company stamp and stationery from Mr. L. who is registered in the commercial register as the chief Managing Director of the defendant, with the instruction to use them to sign for the defendant. The logical result of this is that the signature by Mr. K., namely, the stamp of the firm of the defendant with Mr. K.'s signature, is binding on the defendant.

Similarly, in the award made in ICC proceedings no. 4381 (1986):[10]

> The arbitrators, sitting in Stockholm, had to decide a dispute between a French claimant and an Iranian defendant concerning a cooperation agreement for work to be carried out in Iran. The Iranian defendant opposed the lack of authority of its Chairman of the Board and Managing Director. The arbitrators held:
>
> ' ... that it would be against the principle of good faith in international contractual relationships if the letter were deprived of its contractual validity because of a failure of the authority of the General Manager and Chairman of the Board (of the defendant) since the defendant has not proved that (the claimant) was aware of said lack of authority and that under the sources of law to which reference is made a failure of that nature is not open to challenge by third parties; full contractual value must consequently be granted to that letter...'.

and by the Arbitral Tribunal of the Hamburg Commodity Exchange:[11]

> In a company [of] the size of defendant, one may assume that the company stamp bearing the words '(name of the Company) Authorized signature' would only be entrusted to employees whom the defendant to a certain extent wishes to authorize or has authorized to conclude contracts in its name. P. used this stamp continuously from the beginning to the end of the negotiations for the contract at issue and defendant does not allege that the stamp came into Mr. P's possession in an unauthorized or unnoticed way.
>
> It ensues from these facts that there exists a factual presumption that Mr. P., at least during the period from 15 to 19 January was validly authorized by defendant to conclude export contracts.

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[10] Award made in 1986, in ICC proceedings no. 4381, *Clunet* 1986, at 1102.

[11] On March 12, 1984 between a FR German buyer and a Thai seller, *Yearbook Commercial Arbitration*, 1991, 11.

Concerning the law applicable to the authority to represent the party, the ICC arbitrators, in their award made in proceedings no. 2694 (1977),[12] confirmed that:

> The authority to act for a corporation must be established under the *lex societatis.*

11.2 Disputes as to the Existence of an Arbitration Agreement

It seems to be easy to ascertain whether there is an arbitration agreement and this should not give rise to disputes. Nevertheless, on several occasions the existence of an arbitration agreement has been hotly disputed. A leading example of this is the Pyramids arbitration.[13]

Illustration

> A Canadian corporation, Southern Pacific Properties Ltd., entered with a government-owned Egyptian company, Egoth, into an agreement for a real estate development around the Giza Pyramids, which was signed for approval by the competent Egyptian ministry.
>
> Following complaints by the Egyptian Parliament, the authorization for the development was cancelled. The investor started arbitral proceedings, as provided for in the contract, both against Egoth and the Egyptian government. The Egyptian government denied being a party to the agreement and that the arbitrators had jurisdiction over it. The arbitral tribunal, by a majority, in spite of the vigorous dissenting opinion of the Egyptian arbitrator, held that the Egyptian government was a party to the arbitral proceedings.
>
> The Egyptian government challenged the award before the Paris Court of Appeal which, by a decision later confirmed by the French Court of Cassation,[14] set aside the award since the Egyptian ministry had given its approval to the agreement between the parties only from an administrative point of view, without undertaking any contractual obligation vis-à-vis the other contracting party.

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[12] Award make in 1977, in ICC proceedings no. 2694, *Clunet* 1978, at 985.

[13] *Southern Pacific Properties Ltd v. Government of the Arab Republic of Egypt.*, (arbitrators: Bernini, chairman, Italy, Littman, England, and ElGhatit, Egypt), *International Construction Disputes Decisions Quarterly Report* 1986, 3, 1.

[14] *Government of the Arab Republic of Egypt v. Southern Pacific Properties Ltd.* Court of Cassation, (France) January 6, (1987), *Rev. arb.,* 1987, no. 4, at 469-478 with comments by LEBOULANGER.

A completely different situation was examined by an ICC Tribunal in its award made in 1991 in proceedings no. 6769:[15]

> An agreement between an African corporation, as purchaser, and a East European corporation, as supplier, provided for the manufacture of part of such equipment by another company, which had signed the agreement and initialled its enclosure which concerned the part to be manufactured by it. The arbitrators found that under such a contract the third party could not be treated as a party to said contract and its subscription to the agreement did not make it a party to the arbitration agreement.

In the U.S. the *Sphere Drake* Court[16] has surprisingly held that a party was bound by the arbitration clause of an insurance contract even if it had not signed the contract.

In *Granomar*[17] the Paris Court of Appeal rejected the defendant's plea not to be a party to an arbitration agreement, since it had been established that its officer has replaced the name of a previous party to an arbitration agreement with the name of that very corporation, with the consent of all the other parties to the arbitration agreement.

A very liberal – probably too liberal – decision has been rendered by the Paris Court of Appeal in *Cotunav*[18] which held that:

> the arbitration clause of an international contract has a validity and efficacy of its own, which is to be construed as extending its effects to parties directly involved in the performance of the contract, and in the disputes which may arise from it, once it is established that their contractual position and their conduct demonstrate that they have accepted the arbitration agreement its existence and its ambit, although they have not signed it.

A reference to the granting of authority to an agent is made in *Ampafrance*,[19] where the Court held that even assuming that the authority granted to the agent involved the authority to enter into an arbitration agreement, it did not include also the authority to represent that party in the arbitral proceedings.

The opposite situation is more frequent, i.e. that the attorney of record enters into or amends an arbitration agreement. That, in several jurisdictions

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15 *Clunet* 1992, 1019.

16 *Sphere Drake Inc. PLC v. Marina Towing Inc.*, 16F 3d 666 (5th Circ.) 1994.

17 *Granomar v. Interagra,* Court of Appeal, Paris, June 15, 1989, *Rev. arb.*, 1992, 80.

18 *Compagnie Tunisienne de Navigation Cotunav v. Comptoir Commercial André,* Court of Appeal, Paris, November 28, 1989, *Rev. arb.*, 1990, 675.

19 *Sté Ampafrance v. Wasteels et al*, Court of Cassation (France) May 29, 1991, *Rev. arb.*, 1991, 633.

including Italy and possibly France,[20] requires specific authority and is not included in the authority to represent in Court.

The quality of a party to arbitral proceedings was affirmed, piercing the corporate veil, by American Courts, such as in *Oriental Commercial*:[21]

> A Belgian company, having a claim for non-delivery of oil supplies ordered by it to an English trader, referred the dispute to arbitration against both the English trader and its Saudi associate, although the English company did not control the capital of the latter, but both were owned by the same shareholders, the Bokhari family. The Saudi company opposed this claim before the Supreme Court of the State of New York. The Belgian company applied for the action to be transferred to the Federal District Court; the latter ordered the parties to establish whether the Saudi company was bound by the arbitration agreement.
>
> Rosseel (the Belgian company) argued that the Saudi company was a party to the agreement under the *alter ego* doctrine.

The District Court held:

> 11. To apply the *alter ego* doctrine to justify the disregard of a corporate entity, the court must determine that there is such unity of interest and ownership that separate personalities of the corporations no longer exist, and that failure to disregard the corporate form would result in fraud or injustice. *Flynt Distributing Co. v. Harvey,* 734 F. 2d 1389, 1393 (9th Cir. 1984); *accord: FMC Finance Corp. v. Murphree,* 632 F. 2d 413, 422 (5th Cir. 1980); *Kirno Hill Corp. v. Holt,* 618 F. 2d 982, 985 (2d Cir. 1980). However, a stringent showing is required before a court will pierce the corporate veil. *Hidrocarburos y Derivados C.A. v. Lemos,* 453 F. Supp. 160, 172 (S.D.N.Y.1977). The courts do not lightly disregard the separate existence of related corporations, even in deference to a strong policy favoring arbitration of private commercial disputes. *Coastal States Trading, Inc. v. Zenith Navigation SA,* 446 F. Supp. 330, 337 (S.D.N.Y. 1977).
>
> 12. There are insufficient facts before the Court to determine whether Oriental SA should be made a party to the arbitration proceedings. Consequently, by June 1, 1985 the parties shall complete discovery on the issue of whether Oriental SA is a party to the arbitration agreement with regard to this transaction. At that time the Court shall conduct an evidentiary hearing on this issue.

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[20] J.L. GOUTAI, *Comments to Sté Ampafrance v. Wasteels, Rev. arb.*, 1991, 631.

[21] *Oriental Commercial and Shipping Co. Ltd (Saudi Arabia) and Oriental Commercial and Shipping Co. Ltd (UK) v. Rosseel N. V. (Belgium), U.S.* District Court, Southern District of New York, March 4, (1985), *Yearbook Commercial Arbitration* 1987, vol. X11, at 532.

> 13. The Court notes that an alternative procedure suggested in *McAllister Bros.*, 621 F. 2d at 524, may be useful to expedite resolution of this matter. With the assistance of this Court, if required, the parties may stipulate that a final determination of whether Oriental SA is bound by the arbitration agreement would be stayed pending arbitration of Rosseel's claims against both companies. Oriental SA would fully participate in the arbitration proceedings. If Rosseel prevails in its claim, and Oriental UK alone is unable or unwilling to satisfy the arbitration award, this Court, upon Rosseel's motion, will order discovery to proceed in the manner set forth above. An evidentiary hearing would then be held to determine whether Oriental SA was a party to the arbitration agreement and thus bound by the arbitration award'.

The stringest showing of unity of interest test was successfully met according to the *Khashoggi* Court:[22]

> Also to no avail is Kashoggi's claim that the Award should not be confirmed because Khashoggi was not a party to the Memorandum of Agreement and therefore never agreed to submit to arbitration. An individual or entity can be a party to an arbitration agreement by virtue of its status as *alter ego* of a signer of the agreement. See *Fisser v. International Bank* 282 F 2nd 231,234-35 (2nd Cir. 1960).

The *Rhône Poulenc* Court in the U.S.[23] was equally firm:

> when the charges against a parent company and its subsidiary are based on the same facts and are inherently inseparable, a court may refer claims against the parent to arbitration even though the parent is not formally a party to the arbitration agreement.

Along the same lines is the French judgment in *Orri*[24] which held that:

> the trade name Saudi Europe Lines in reality refers to Mr. Orri. It was merely a device which allowed the real contracting party to withdraw, leaving its place to a person of no importance with no evidence that he had the authority to commit it.

As to the consequences of entering into an arbitration agreement with a company about to be formed, and which in the end was not formed, the arbitrators held in their award rendered in 1986 in ICC proceedings no. 5065:[25]

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[22] *National Development Company v. Khashoggi*, U.S. District Court, Southern District of New York, January 23, 1992, *Yearbook Commercial Arbitration*, 1993, 506.

[23] *J.J. Ryan & Sons Inc. v. Rhône Poulenc Textil SA et al*, US Court of Appeals, 4th Cir. December 13, 1988, 863 Federal Reporter 2d Series 315-322, *Yearbook Commercial Arbitration* 1990, 543-549.

[24] *Orri v. Elf Aquitaine*, Court of Appeal, Paris, January 11, 1990, *Clunet* 1991, 141.

[25] Award make in 1986, in ICC proceedings no. 5065, DERAINS and JARVIN, *Chronique des sentences arbitrales, Clunet* 1987, 1039. (free translation from French).

> The traditional problem remains of an existing legal entity contracting for another legal entity to be formed. Under the general principles of international commercial law and of trade customs, and of good faith, it seems to me that in such circumstances the existing legal entity is personally liable. This is certainly the case in English law (see *Kelner v. Baxeter* (1866) L.R. 2 C.P. 174). This seems perfectly in line with the principle of good faith. When the parties clearly intend to give rise to legal relationships for the security of their transactions, one must refuse a construction which would mean that there would be no contract because of the lack of existence of the parties and one must accept the doctrine which validates the acts taken by the parties. The principle of good faith does not allow a party to initial a document containing contractual terms and later to continue for a long period of time to benefit of the work of the other party under these terms and at the same time to pretend yet to be under no duty because the contract had been entered into with a corporation yet to be formed and the formation of which depended only upon itself.

11.3 SOVEREIGN IMMUNITY

The plea of sovereign immunity is frequently raised by States which are sued in arbitral proceedings.

The asserted immunity arises from the old established rule that a sovereign cannot be judged by another sovereign. This principle has been perfectly acceptable in the previous centuries in dealings between sovereigns even if, as every rule, it has had its exceptions as the tragic fate of Mary Queen of Scots[26] for instance, sentenced to death by English judges, whose successors in subsequent centuries became paladins of the most absolute sovereign immunity.

Several legal systems, including the Italian one, for a long time have made a distinction between *acta jure imperii* and *acta jure gestionis.*[27] Under the former, whenever a State uses its sovereign power it cannot be judged by another State, while under the latter, when it enters into a commercial relationship, this implies that it agrees to be judged as to the consequences of such acts. Other legal systems, including the common law ones, have gradually accepted this situation.[28] In this respect the English State Immunity Act (1978)[29] the United States Tate Letter and the Foreign Sovereign Immunities

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[26] Executed in February 1587, (about *4* months after being sentenced on October 11, 1586) for her alleged involvement in the Babington plot.

[27] See under Italian law *Noviss. Dig., VIII, Immunità giurisdizionale degli Stati* (Sovereign Immunity of States), at 199 *et seq.*, with many references.

[28] See A. REDFERN-M. HUNTER, *International Commercial Arbitration, op. cit.*, at 319.

[29] 17 *I.L.M.* 1978, at 1123 *et seq.*

Act (1976)[30] should be mentioned. The English decision in *Trendtex Trading Co. v. Central Bank of Nigeria*[31] clearly holds to this principle:

> The Nigerian Central Bank, which had undertaken to cover payments due by Nigerian companies, was sued for payment of damages caused by the latter's refusal to take delivery of supplies of concrete which exceeded Nigerian needs. The Central Bank pleaded sovereign immunity. The English Court ruled that whenever the sovereign goes into the market-place it agrees to submit to its rules.

One must add that – apart from that – sovereign immunity is frequently pleaded by bodies which are not entitled to assert it.

Sovereign immunity passed from sovereigns to governments down to the branch of the public administration which is in charge of a specific sector. This defence becomes more disputable when it is pleaded for example by local authorities, central banks, independent authorities set up by the public administration, and by companies controlled by the government. It is suggested that the distinguishing factor is the exercise of a share of the sovereign power and furthermore that the sovereign prerogatives cannot be claimed to cover an activity which in substance is commercial.

In arbitral matters the principle of sovereign immunity must be seen in a different light. If the finding by a national Court of its authority over a foreign State is in a way the exception, on the contrary in arbitral proceedings there is generally a voluntary submittal of the foreign sovereign State to the arbitration agreement. The entering by a sovereign into such an agreement in general has the unambiguous meaning that it intends to submit to the arbitral proceedings and this prevents it from arguing later that it is not bound by its own commitment. On this ground a waiver to sovereign immunity is generally not required after an arbitration agreement is entered into, since the waiver is already inherent in it.

Two Draft Conventions on State Immunity exist, the first adopted by the International Law Association in 1982[32] and the second by the International Law Commission in 1991.[33]

Separate from sovereign immunity is the plea of immunity from enforcement, sometimes put forward by the losing State, as in *Liberian Eastern Timber*.[34]

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30 15 *I.L.M.* 1976, at 1388 *et seq.*

31 *Trendtex Trading Corporation Ltd. v. Central Bank of Nigeria*, Court of Appeal of England, January 13, (1977) *Foro pad.* 1978, 1, 299, with comments by RUBINO-SAMMARTANO.

32 Report of the ILA Conference, Montreal 1982 (London 1983) 6-10.

33 *International Legal Materials* 1565/1991.

A government's plea of lack of liability for its own act because it was within the exercise of its sovereign power is within the ambit of sovereign immunity pleas. That was the Republic of Congo's defence in *Agip v. Republic of Congo*[35] against Agip's claim that the Republic of Congo, by carrying out a nationalization, had not complied with the agreed stabilization clause. The arbitrators rejected the argument stating:

> The stabilization clauses which are freely entered into by a Government do not themselves affect its sovereignty to legislate and to issue regulations: the State in fact remains the holder of both of them vis-à-vis its nationals and those foreigners with whom the government has not entered into such agreements ...

Sovereign immunity has been argued in several well-known precedents and awards such as in *Société Tunisienne d'Electricité et de Gas v. Société Entrepose*[36] and in *Société Européenne d'Etudes et d'Entreprises (S. E. E. E.) v. République de Yougoslavie.*[37]

Illustration

> In order to overcome the obstacle of having entered into an arbitration agreement, a state or public body occasionally argues that its own internal law does not allow it to enter into arbitration agreements.

This was argued in *Liamco*[38] before the Svea Court of Appeal, which rejected this argument very clearly:

> Having accepted the arbitral clause contained in Art. 28 of the concession agreements, Libya – which as a foreign State normally enjoys extensive sovereign immunity rights before Swedish Courts – is treated as having waived to the right to plead sovereign immunity.

In the U.S. the same approach was taken by the *Trinidad and Tobago* Court[39] which held:

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[34] *Liberian Eastern Timber Corporation v. Government of the Republic of Liberia,* South District Court, New York, December 12, (1986) 650 F. Suppl. (S.D.N.Y. 1986).

[35] *Agip S.p.A. v. Gouvernement de la République Populaire du Congo,* November 30, 1979 (arbitrators: Trolle, chairman, Dupuy and Rouchain), *Rev. crit. dr. int. pr.* 1982, 92.

[36] *Société Tunisienne d'Electricité et de Gas v. Société Entrepose, Rev. arb.,* 1974, 268.

[37] *Société Européenne d'Etudes et d'Entreprise v. République de Yougoslavie, Rev. arb.,* 1985, 115-140, with comments by DELVOLVE.

[38] *Lybian American Oil Company v. République Arabe Socialiste Populaire Libyenne* in J. PAULSSON, *L'immunité restreinte enterinée par la jurisprudence suédoise dans le cadre de l'exéquatur d'une sentence arbitrale étrangère rendue à l'encontre d'un Etat* (Limited immunity in Swedish precedents within the framework of *exequatur* of foreign arbitral awards rendered against a State), *Clunet* 1981, 549.

> In the instant case petitioners are seeking to affirm an arbitration award that was entered against [the] Respondent pursuant to the [New York] Convention. To accept [the]Respondent's contention that it did not waive its sovereign immunity would defeat the very purpose of the Convention which is to provide for enforcement of foreign arbitration awards.

The argument of invalidity of the arbitration agreement is occasionally based on non-compliance by the State with the resolutions provided for by its Constitution.

Illustration

> This is the case of Art. 139 of the Constitutional Statute of the Islamic Republic of Iran,[40] which requires the consent of the Iranian Parliament in order to submit to arbitration agreements, and of a decision by the Council of Ministers of Saudi Arabia[41] which prevented government entities from entering into international arbitration agreements (which was generally felt to follow the outcome of important arbitral proceedings which was unfavourable to that State).

That plea has not generally been very successful as is clearly shown in *Component Builders*:[42]

> The principle that a State cannot plead the provisions (or deficiencies) of ... its Constitution as a ground for the non-observance of its international obligations ... is indeed one of the great principles of international law, informing the whole system and applying to every branch of it.

The trend in arbitration is not to take into account national laws, invoked by a party which has entered into an arbitration agreement, in order to get rid of it. This is all the more true for a State which, after having submitted to arbitration, tries to avoid its consequences by *introducing ad hoc legislation.*

These arguments are indirectly supported by the grounds given by the arbitrators in *Dalmia-Pakistan* in rejecting the plea that under the national law of one the the parties the dispute was not capable of settlement by arbitration:

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[39] *MBI International Contractors Inc. et al v. Republic of Trinidad and Tobago*, U.S. District Court, District of Columbia, October 30, 1989, *Yearbook Commercial Arbitration* 1991, 630.

[40] *Yearbook Commercial Arbitration,* 1981, vol. VI, at 193.

[41] June 25, 1963, no. 58.

[42] *Component Builders Inc., Wood Components Co. Moshafsky Enterprises Inc. v. Islamic Republic of Iran et al.*, Iran-US Claims Tribunal, January 10, 1985, proceedings no. 395, Mangård (chairman), *Yearbook Commercial Arbitration* 1986, vol. XI, at 359.

> A party, a Pakistani bank, submitted that the dispute was not capable of settlement by arbitration since that was the position under Pakistani law. The sole arbitrator, Prof. Lalive, held that once the parties had decided to submit an international dispute to arbitration under the ICC rules they could no longer invoke their internal law to avoid the consequences of their submission.[43]

Precedents and authors thus seem to set aside the national law in this respect.[44] On the specific issue of sovereign immunity, Goldman for example has held:[45]

> the acceptance by a State of an arbitration clause manifestly and necessarily implies its waiver to sovereign immunity, at least as to arbitral proceedings.

Arbitral precedents have also taken a very firm position in this respect. This was the case in *Soleh v. Uganda:*[46]

> Two Israeli companies entered with a public body of an African State into a contract which had an arbitration clause. The government of this State guaranteed performance by its public body. After a dispute arose a sole arbitrator sitting in Sweden was appointed. The African State pleaded its sovereign immunity.

The arbitrator held:

> I must admit that I have some difficulty in following the reasoning according to which a State, simply because of its sovereign situation, would be unable to make a valid and binding promise. The *pacta sunt servanda* principle is generally recognized in international law and it is difficult to see a reason why it should not apply here. A sovereign State should be sovereign enough to be able to make a promise which commits it in international law as well as in internal law.

Similarly in *Framatome:*[47]

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[43] Preliminary arbitral award January 14, 1970, *Yearbook Commercial Arbitrati,* 1980, vol. V, at 174-177.

[44] See CRAIG *et al., op. cit.,* part 11, 5.01, at 9, as to procedural law; as to freedom to contract see the American judgment in *Prima Paint Corp. v. Flood and Conklin, Mfg. Co, ibidem,* part II, 5.04, at 16; as to the proper law see the judgment in *Isover Agobank v. Dow Chemical France,* CRAIG *et al., op. cit.,* part II, 5.05, at 17.

[45] Comments to *République Arabe d'Egypte v. Southern Pacific Properties*, Court of Appeal, Paris, July 12 (1984), *Clunet* 1985, 130.

[46] Interim Award made in 1974 in ICC proceedings no. 2321, *Clunet* 1975, 938 *et seq.*

[47] *Framatome S.A. Alsthom Atlantique, Spie Batignolles et Framateg v. Atomic Energy Organization of Iran (AEOI),* interim award April 30, 1982, *Clunet* 1984, 58.

> The three arbitrators (Lalive, chairman, Goldman and Jacques Robert), faced with a plea of sovereign immunity made by a party, held that the plea was based on a confusion between sovereignty and its exercise and that it was not supported by any evidence that the arbitration agreement caused a loss of national sovereignty.

and in Elf Acquitaine:[48]

> The sole arbitrator Mr. Gomard, sitting in Copenhagen, hearing a dispute between a French company and an Iranian State entity, which concerned the cancellation by the Iranian party of a concession for oil prospection, held that, in compliance with the principles of international law, a State which has entered into an arbitration agreement may not unilaterally prevent the arbitral proceedings from taking place.

The prohibition to public bodies to submit disputes to arbitration provided by the national law of a contracting State[49] was declared in the well-known *Galakis* judgement[50] to apply only to domestic law and not to international contracts.

This means that the prohibition for the Government and public entities to enter into *domestic* arbitration is valid in France. The same rules applies in Belgium.

On sovereign immunity see also Redfern-Hunter.[51]

11.4 SUBJECTIVE AND OBJECTIVE CHANGES IN THE ORIGINAL CONTRACT

Even the assessment of the effects of subjective and objective changes to the original contract on the arbitration agreement gives rise to problems. Depending on whether this change may be treated as novation, the arbitration agreement contained in the original contract, or referred to by it, may become ineffective or remain effective. The change of the contract in turn may have different effects on the arbitration clause, which must follow the destiny of the contract to which it belongs, vis-a-vis a submission agreement, because of the greater independence of the latter. In any event, several changes and their effects on the arbitration agreement will be examined. A different situation arises in the case of novation of the original contract, the effects of which will depend on the single contract and on the possibility of holding that, depending

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48 *Elf Acquitaine Iran v. National Iranian Oil Company,* interim award January 14, 1982, *Rev. arb.,* 1984, 401.

49 REYMOND, *Souveraineté de l'Etat et participation à l'arbitrage* (State sovereignty and participation in arbitral proceedings), *Rev. arb.,* 1985, 517.

50 *Galakis,* Court of Cassation (France), June 2 (1966), *Clunet* 1966, 648, with comments by LEVEL.

51 REDFERN-HUNTER, *op.cit.*, 2nd edition (French version) at 344.

on the presence or not of a non-ambiguous intention of the parties, the new contract, in spite of its structure which on the whole may be totally new, has left alive or incorporated the old arbitration agreement.[52]

This issue has been discussed also amongst writers.[53]

11.5 Participation of Several Connected Parties in the Proceedings

Several parties belonging to the same group, generally as associated companies, sometimes try to participate voluntarily in arbitral proceedings; on other occasions the opposite party tries to force them to participate. This may happen for example when, even though officially a given company has entered into a contract, it has in fact been performed by other companies, associated to the original party, or when a breach of contract by one party causes damages to companies associated with the other party. In these situations it is sometimes easier for the companies associated with the original party to make a claim, since they are the injured parties, or for the claim to be made against the associated companies when damage has been caused by their breach of contract. *Isovers v. Dow Chemical*[54] is a classical example of these situations:

> A dispute submitted to arbitration opposed Isovers Agobank and Dow Chemical US (the parent company), Dow Chemical France and Dow Chemical Switzerland. Isovers Agobank requested that the Dow parent company and its French associate be excluded from the arbitral proceedings, since Isovers had entered into a contract containing an arbitration clause with the Swiss associate only. The arbitrators, having examined the conduct of the parties, and having held that Isovers had entertained relationships with all the companies of the Dow group in its performance of the contract, came to the conclusion that Isovers had meant to enter into the agreement with the entire group, and therefore that the parent company and the French associated company were entitled to participate to the proceedings.

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[52] See for example *Fratelli Casillo v. Getrende Import GmbH*, Court of Cassation, (Italy) October 7, no. 5378 (1980), *Foro It. Mass.* 1980, 1048-1049; *accord*: *Ferrara S.p.A. v. United Grain Growers Ltd. (Canada)*, US District Court for the Southern District of New York, December 2, (1977) *Yearbook Commercial Arbitration,* 1979, vol. IV at 331-332.

[53] P. DELEBECQUE, *La trasmission de la clause compromissoire, Rev. arb.*, 1991, 19.

[54] *Dow Chemical, France, The Dow Chemical Company (USA) Dow Chemical AG (Switzerland) Dow Chemical Europe (Switzerland) v. Isover St. Gobain, (France)* (arbitrators: Prof. Sanders, chairman (Netherlands), Prof. Goldman (France) and Prof. Vasseur (France)); interim award 1982, ICC proceedings no. 4131, quoted also by CRAIG *et al., op. cit.*, at 34-35.

Along the same lines is the decision made by the arbitrators in ICC proceedings no. 2375 (1975):[55]

> A French company X had submitted to an arbitral tribunal sitting in Paris a dispute between itself, a Spanish company Y and the latter's parent company Z, formed in the Bahamas. The claimant derived the arbitrators' jurisdiction from an agreement between the French company W, which at that time controlled X, and the defendant Z. The defendants challenged the arbitrators' jurisdiction inasmuch as they had not entered into the contract which contained the arbitration clause.

The arbitrators asserted their jurisdiction on the following grounds:

> By entering on January 20, 1969, into the agreement, from which the dispute arises, Z and W have clearly contracted for themselves as well as for their respective subsidiaries;
>
> The role to be played by W in the contract was reserved entirely for 'its X subsidiary' (preliminary part of the agreement);
>
> Art. 3 incorporates into the contract the letter of July 12, 1968, by Y to X, containing the statement 'The letter of July 12 to X from Z's group will become ineffective', which stresses that Y, the signatory of this letter, belongs to Z group;
>
> The capital of the promoting company to be formed had to be split between Y and W Española and the reimbursement of the pre-study costs was to be made to X;
>
> It is not disputable that Y belonged to the Z group and X to the W group;
>
> The notion of group is defined, besides formal independence arising from the creation of separate legal entities, by the unity of financial orientation deriving from a common power;
>
> The Board of Directors of the company, which had to take care of the promotion, should have consisted of two directors 'for the account of Y' and of two directors 'for the account of W Española';
>
> The vice-presidents entrusted with the management of the company were designated respectively 'for the account of Y' and 'for the account of W Española';
>
> One may infer that the protocol of January 20, 1969 forms a unity in which each of the parties controlling or controlled by each group are intimately tied up with the other companies of that group;
>
> It would be inconceivable that out of these complicated rights and obligations the arbitral Tribunal could isolate the specific provision of Art. 9 and decide that it does not apply to these proceedings'.

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[55] In DERAINS, *Chronique des sentences arbitrales, Clunet* 1976, 974.

Arbitrators made a similar decision in their award in ICC proceedings no. 1434 (1975):[56]

> The dispute submitted to the arbitrators sitting in Geneva concerned the alleged breach of a contract for the construction of a factory by a multinational group in a developing State. The parties were two companies of such a multinational group. The liability of the entire group was respectively argued and denied. The arbitrators held:
>
> 'In these circumstances it must be held, in line with the spirit of the contract and with the financial reality, that neither group A, nor its chairman, nor one or other of the companies which are members of this group, can hide behind the drafting of that specific clause, interpreting it literally and isolating it from the context of the entire agreement, to apply for withdrawal from a dispute which directly concerns group (or organization) A.'

A similar decision was made in ICC proceedings no. 4131 (1982):[57]

> In a dispute between two multinational groups, it was argued whether some companies of such groups were committed and, even before that, whether they were bound by the arbitration agreement. The arbitrators held:
>
> A group of companies, in spite of the different legal nature of each of them, is a unique financial reality which the arbitral tribunal must take into account when it decides on its jurisdiction in compliance with Art. 13 (1955 issue) or Art. 8 (1975 issue) of the ICC Rules.
>
> It is not without interest to mention that an American arbitral tribunal has recently decided this issue in the same way, referring to American Courts precedents and stating 'that it is neither reasonable nor practical to exclude (from the jurisdiction of the arbitrators) claims of companies which have an interest in this dispute and which are members of the same family of companies'.

However, in an award made in 1985, in ICC proceedings no. 4504[58] it was held that the entire group of companies must not be involved in arbitral proceedings on the following grounds:

> As to the notion of 'group of companies' and as to the doctrine of 'the financial reality', to which the precedents quoted by the claimant make reference, the arbitral tribunal points out that the issue of the extent of

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[56] Award made in 1975, in ICC proceedings no. 1434, *Clunet* 1976, 980. (Unofficial translation from French).

[57] *DERAINS-JARVIN, Chronique des sentences arbitrales, Clunet* 1983, 899. (Unofficial translation from French).

[58] *DERAINS-JARVIN, Chronique des sentences arbitrales, Clunet* 1986, 1118. (Unofficial translation from French).

the arbitration agreement, in particular when a company negotiates a contract, but does not subscribe it and entrusts this task to a subsidiary, was the subject of a study made by arbitrators in Paris on October 5, 1982, within the framework of the *Institut du Droit et des Pratiques des Affaires Internationales (Rev. arb.*. 1982, 495-497). The arbitrators asked themselves whether in the case of a dispute between such a subsidiary and the other side, they could hold that the clause also commits the parent company.

In this respect it is surprising that the claimant relies on the notion of group of companies although it has not made its claim against the parent company.

If it is true that some arbitrators have declared themselves to be in favour of the notion of group, still the above gathering of arbitrators pointed out that the Swiss Federal Tribunal in the *Cartier* judgment October 10, 1979 (unreported) construed the arbitral clause restrictively, holding that the commitment of only one company was not sufficient to involve all the companies of that group before the arbitral Tribunal.

In *Cartier* a contract was entered into between company A, claimant, and two companies, B and B^1, represented by the same person, their main shareholder. Based on the arbitration clause contained in the contract, company A requested that arbitration proceedings be initiated against the group of companies to which B and B^1 belonged and which were hinted at in the contract.

The arbitral tribunal, and later the cantonal tribunal before which the award was attacked pursuant to Art. 36 C.I.A. accepted this argument. However, the Swiss Federal Tribunal held that a group of companies is not a legal entity *(Commentaire Jolidon,* at Art. 4, no. 34, at 121) and that only companies A and B were bound by the arbitration clause, not the other companies belonging to that group, 'in spite of the interpenetrability and intermixing of these companies controlled by only one man'.*(Dutoit, Knoepfler, Lalive et Mercier,* no. 75).

This brief review of arbitral decisions on this issue shows, in any event, a prevailing arbitral trend towards overcoming the formal barriers existing from a legal point of view between companies belonging to the same group, taking a less formal position than the Courts, which are generally still defending the precise boundaries of legal entities.

The Swiss Federal Court has held[59] that a corporation belonging to a group is not bound by a contract, if it has not entered into it, at least by conduct, while in *Sponsor v. Lestrade*[60] the Court of Appeal of Pau held that the Swedish parent company which had agreed to form a subsidiary which would have

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[59] Swiss Federal Court, June 11 1992 *ASA Bulletin* 1996, 611.

[60] *Sté Sponsor v. Lestrade*, Court of Appeal, Pau November 26, 1986 *Rev. arb.*, 1988, 153.

bought two corporations from the other group, was bound for its subsidiary's breach, since the latter was a mere instrument of its parent company, which had inspired the deal.

The opposite was neatly held by the English Court of Appeal in *Cape Industries*:[61]

> ... there was nothing illegal in the defendants using their corporate structure to ensure that future legal liabilities to third parties would fall on another member of the group rather than on the defendant, and in those circumstances the Court would not lift the corporate veil so that the presence of the subsidiary and the independent corporation be treated as the presence of the defendants ...

See amongst writers Poudret.[62]

In *Westland*[63] the Swiss Federal Court held that the arbitrators had erroneously found that they had jurisdiction over the four founding states of the Arab Organization for Industrialization:

> We do not agree with the arbitrators' conclusion that AOI is a kind of *société en nom collectif* behind which the four states did not intend to disappear but rather accepted to participate as 'responsible members' ... [The] arbitrators started from the presupposition that the four states, by participating in commercial operations, waived *ipso facto* their immunity. This would be true if the States had engaged themselves directly. However in this case they created an entity with a legal personality of its own, which was to act on their behalf. It is this organization, and not the States, which signed the contract containing the arbitration clause.

The issue has been debated amongst writers.[64]

11.6 Connected Agreements and Arbitration Clause in One of Them

The situation of several contracts connected to a main contract is also delicate when no reference to the arbitration clause existing in the main contract is made in the other ones. A decision on this issue inevitably depends on the

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61 *Adams v. Cape Industries plc*, [1991] 1 *All.ER* 929, *ASA Bulletin*, 1995, 147.

62 J.F. POUDRET, *L'extension de la clause d'arbitrage: approches française et suisse*, *Clunet* 1995, 893.

63 *Westland Helicopters v. The Arab Republic of Egypt et al*, Swiss Federal Court, July 19, 1988, *Yearbook Commercial Arbitration*, 1991, 174.

64 I. FADLALLAH, *Clause d'arbitrage et groupes de sociétés, Travaux Comité Français* DIP 1984-85, 105.

construction of each contract. In *Universal Pictures*[65] one such situation is dealt with:

> By signing an agreement, a Yugoslavian government entity had guaranteed to an American company that another Yugoslavian entity, Inex Film, would produce a film for it in Yugoslavia. It was held that by signing the agreement the government entity intended to accept its arbitration clause.

The applicability of the arbitration clause in the main contract to a connected contract was also held by a Bulgarian arbitral tribunal.[66]

> In a dispute between German and Bulgarian parties the German company obtained from the Court of Nuremberg a denial of its jurisdiction, although the arbitration clause was not contained in the main agreement (a loan agreement), but only in a separate, even if connected, contract of sale.
>
> This decision was confirmed by the German Federal Supreme Court. The arbitrators to whom the dispute was later referred agreed with the view of the German courts; they held that the loan granted was closely connected to the contract of sale and had to be considered as a clause of the former, even if drafted separately from it. Disputes relating to the loan consequently came under the arbitration clause.

In *Westland,*[67] the non-unity of the various arbitration agreements was argued:

> The Egyptian government submitted that all the defendants would have been improperly made parties of only one arbitral proceedings.

However, by a majority vote the arbitrators (their chairman, Bucher, was in the minority and therefore rendered a dissenting opinion) held that:

> Everything depends in this case on the intention expressed by the parties in the arbitration clause. It is necessary and therefore sufficient in principle that they wished to bind themselves for the arbitrators to have jurisdiction at the same time against all of them and for one of them to be able to initiate proceedings against all the other parties within one set of

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[65] *Inex Film and Sté Interexport v. Universal Pictures,* Court of Appeal Paris, March 16, (1978) *Rev. arb.,* 1978, 501, with comments by ROLAND-LEVY, quoted also by CRAIG, *et al., op. cit.,* II, 5.10, at 37-38.

[66] Award October 1, 1980, in proceedings no. 60/1980, Stalev (chairman), *Yearbook Commercial Arbitration 1987,* vol. XII, at 84.

[67] *Westland Helicopters Ltd (UK) v. Arab Organisation for Industrialisation, United Arab Emirates, Kingdom of Saudi Arabia, State of Qatar, Arab Republic of Egypt and Arab British Helicopter Company (Egypt),* interim award March 25, 1984, ICC proceedings no. 3879 (arbitrators Bucher (chairman), Bellet and Mangård), *Yearbook Commercial Arbitration* 1986, at 127.

> arbitral proceedings. It thus matters little that there are several arbitration clauses when their content shows that they make up a whole in the minds of the parties.

In a different scenario, involving only one of the parties to various interrelated contracts, in *Anaconda Iran*[68] the Iran-U.S. Claims Tribunal held that:

> Even if Anaconda Iran and Parsons Jurden International Corporation operated under the individual terms of separate contracts concluded by National Iran Copper Industries Company, it is obvious that their tasks in this complex multiparty transaction were interrelated.

In *Kis*[69] the notion of group of companies and its impact on arbitration is emphasized:

> The arbitrators did not rely only on the notion of group of companies in order to recognize the obligation of KIS France and KIS Photo with respect to Société Générale. The arbitrator's main consideration was that the parties intended by their agreement to carry out one economic operation by establishing a contractual unity, in which the subsidiairies would be very dependent on the respective parent company which retained the decision making power.

In *Soabi*[70] the ICSID Tribunal held that, when two contracts have been entered into separately by two parties but they are strictly connected, both of them being required to achieve the same project, even if the arbitration clause is in one of them it applies to both contracts.

11.7 Succession in the Contract

A situation different from succession in the contract has arisen before the Moscow District Court in *Technopromexport*[71] where Sokofl Star Shipping Co. Ltd. (Panama), which had entered into a time charter with Technopromexport, issued arbitral proceedings and obtained an award against the latter. When Sokofl applied to the Russian Court for enforcement, the Moscow District Court rejected the application on the ground that Socofl Star Shipping Co. Inc.

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[68] *Anaconda Iran Inc. v. The Government of the Islamic Republic of Iran and the National Iranian Copper Industries Company*, Iran-U.S. Claims Tribunal Award October 29, 1992, *Yearbook Commercial Arbitration*, 1993, 270.

[69] *Sté KIS France et al. v. Sté Générale et al.*, Court of Appeal, Paris, October 31, 1989, *Rev. arb.*, 1992, 1.

[70] *Société Ouest Africaine des Bétons Industriels (SOABI) v. Republic of Senegal*, Arbitral Tribunal (Broches Chairman, Schultz and Mbaye [dissenting]) *Clunet* 1990, 193.

[71] *Sokofl Star Shipping Co. Inc. v. GPVO Technopromexport,* Moscow District Court, April 11, 1997, *Yearbook Commercial Arbitration*, 1998, 742.

(Panama), which had applied for enforcement, was an entity different from the former and as such was not entitled to obtain enforcement.

The effects of succession in a contract, containing an arbitration clause, have also been debated. It has been denied that the successor or the assignee take in the arbitral proceedings the place of the assignor or of the other party.

Succession in a contract may occur through an assignment,[72] or the sale of an ongoing business with the taking over by a new entity of all the rights and obligations of the assigned or sold business under its various contracts, or in case of a merger between corporations. The effects of the assignment, sale of business, or merger, i.e. whether the successor takes over or steps into the rights and duties and the procedural position, will be governed by the substantive law applicable to the assignment, sale of ongoing business, or merger, or by the law governing the arbitration agreement.

As to *mergers* in some legal systems the merging company takes over all the relationships of the merged company and therefore also the contract containing the arbitration clause. A universal succession taking place, there is no obstacle to the merging company being bound by the arbitration agreement.

The Supreme Court of Sweden held in 1997[73] that the arbitration clause *travels* with the contract in which it is incorporated and that consequently it binds:

> a party which acquires rights under the contract.

A conclusion which seems more convincing in case of a valid assignment of a contract, rather than in the event of a mere assignment of a credit arising from that contract.

A more complicated situation arises from the *sale of a ongoing concern*, or a subscription of capital takes place by a contribution in kind, consisting of the transfer of a ongoing concern. If the transfer of the contract is not provided for by the applicable substantive law, as a consequence of the sale of an ongoing business or of its contribution in kind, then respectively the purchaser, and the corporation to which the ongoing concern has been contributed, do not take over the arbitration clause or the arbitration submission. In those jurisdictions, like Italy, where the purchaser of a business takes over,[74] except when agreed otherwise, the contracts entered into for the conduct of that business (provided they do not have a personal nature), the purchasing company should also take

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[72] D. GIRSBERGER-C. HAUSMANINGER, *Assignment of Rights and Agreement to Arbitrate*, 8, *Arb: Int.* 2, 121.

[73] Supreme Court of Sweden, October 15, 1997, *Nytt Jurisdixkt Arkiv* 1997, 866.

[74] Under Italian law see section 2558 Civil Code.

over the seller's position in arbitral proceedings. The award made in *Ipisystem*[75] shows that such consequences are not always exempt from discussion.

Illustration

> In a dispute between a sub-contractor and a contractor, concerning the construction of various buildings, the right to additional payment, either for extra-contractual works or for additional work, was argued. In the meantime the sub-contractor transferred that branch of its business, including the subcontract, to another company which intervened in the pending arbitral proceedings. The contractor objected to the original sub-contractor being allowed to withdraw from the proceedings. The arbitrators expressed doubts as to the applicability of voluntary joinder to arbitration.

As to *subrogation*, in an award made in ICC proceedings no. 1704 (1977)[76] the arbitrators held, concerning the subrogate party's right to institute arbitral proceedings:

> The dispute, which was heard by an arbitrator sitting in Brussels, between a French bank, claimant, and an Indian bank, defendant, concerned which party had to suffer the consequences of the devaluation of the rupee, which had occurred between payment by the Indian company and crediting the amount to the French company. The French bank was acting in subrogation of the French company. The Indian company challenged the right of the bank to institute arbitral proceedings. The arbitrators held:
>
> 'When the party acting in subrogation exercises the right of his creditor instead of the latter, he is bound by the arbitral clause which governed that action and may institute arbitral proceedings under it.'

Since the consequences of subrogation will depend on the applicable substantive law, the result will not necessarily always be the same.

In *Casco Nobel*[77] the Paris Court of Appeal held that:

> the arbitration agreement is transferred to the insurer together with the claim and the rights of the insured, because of the effects of subrogation.

The arbitrators expressed their opinion on this issue in broad terms in the award rendered in ICC proceedings no. 2626 (1977):[78]

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[75] *Ipisystem v. Pizzarotti,* majority award, January 19, 1988, attacked before the Court of Milan.

[76] Award made in 1977, in ICC proceedings no. 1704, *Clunet* 1978, 977.

[77] *Sté Casco Nobel France v. Sico Inc. et al*, Court of Appeal Paris November 12, 1992, *Rev. arb.,* 1993, 632.

[78] Award made in 1977, in ICC proceedings no. 2626, *Clunet* 1978, 981.

> An Italian defendant (a limited company) argued that it was no longer bound by the arbitration clause entered into by it while it was a partnership, since after that it transformed itself into a company limited by shares, which had produced a different legal entity. The arbitrators held:
>
> '... According to the prevailing opinion, an arbitration agreement is not valid only between the parties, but imposes itself also on their universal successors and on their assignees and on whoever takes over their contractual position. The only exception to this is when the arbitral agreement is drafted in a way that it excludes the successors or assignees'.

The award made in ICC proceedings no. 3281 (1981)[79] is along similar lines:

> Z ... is subrogated in all the rights and duties of company X ... and namely in those arising from these contracts.

As to *assignment of a contract* containing the arbitration clause, or of the arbitration submission and of the rights arising from the contractual relationships related to it, the first test to be met is whether the consent of the other contracting party/ies is required. If so, either it is granted and there should be no further problems, or it is not and the assignee will be unable to take advantage of the arbitration agreement. The need for the other party's acceptance of the assignment will exist in various legal systems. If the consent is granted, no specific reference to the arbitration clause seems to be required. This situation is echoed by the Bundesgerichtshof (the German Court of Cassation):[80]

> Pursuant to constant jurisprudence of the Bundesgerichtshof, the one who is being assigned rights to which an arbitral clause is connected is bound by the same.

In *Emja*[81] the Supreme Court of Sweden held that:

> while the assignment of a contract, as a consequence of the transfer of all the rights and liabilities of the transferor to the transferee in general is valid, when the assignment is limited to that contract the right to assign, without the consent of the other contracting party or without the latter having been aware of the existence of that arbitration agreement, is less evident.

On another occasion, the German Supreme Court held:[82]

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[79] Award made in 1981, in ICC proceedings no. 3281, *Clunet* 1982, at 990.

[80] BGH 277, 33, 35.

[81] *MS Emja Braack Shiffahrts KG v Wärtsilä Diesel Aktievebolag,* Supreme Court of Sweden October 15, 1997 *Rev. arb.* 1998 n° 2, 431.

[82] Bundesgerichtshof November 12, 1990, II, ZR 249/89.

> Irrespective of its wide scope – 'in connection with' – the arbitral clause cannot be understood to mean that contrary to the rule pursuant to which such agreements do not extend to unrelated third parties, it would, by way of an exception, be valid for claims which belong to single partners. Since the 715 partners came from the Federal Republic or neighbouring countries, and since the promotion was directed from the outset towards them, the extension of the arbitral clause to personal claims of all the investors would have been an unusual regulation which would have needed a clear and unambiguous stipulation in the contract.

Without dealing with the need that the assignment of contract be accepted by the other contracting party, in *Filmkunst* it was held:[83]

> The 'Films modernes Corporation' has assigned to EDIF all its rights arising from the contract ... Such an assignment necessarily involves the transfer of the arbitration clause which cannot be separated from the contract.

This decision is interesting also because it refers to non-separability which is not in line with the separability doctrine used to protect the autonomy of the arbitration clause.

Along the same line is the French decision in *Guyapêche*[84] where the assignment of the rights arising from a contract was construed as including the arbitration agreement. This decision takes into account also the reference in the assignment to the credit being disputed and the commitment of the assignee to pursue such a litigation.

A situation involving assignment of contract is dealt with by a U.S. Court in *Arkwright*:[85]

> As Ocean's assignee, Sosa must comply with the terms of the contract under which he seeks recovery.

In the U.S. in *Gesco*[86] the Court was more liberal. Having noted that Han Yang America was being liquidated and was disposing of assets of Han Yang Corp. (Republic of Korea) of which it had control, it observed:

> that the relationships between Han Yang America and Han Yang Corporation may be such that this Court may 'pierce the corporation veil'.

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[83] *CCC Filmkunst GmbH and Co. KG v. Edif*, Court of Appeal, Paris, January 28, 1988, *Clunet*, 1989, 1021.

[84] *Sté Guyapêche v. Abba Import Aktiebolag*, Court of Appeal, Paris, May 26, 1992, *Rev. arb.*, 1993, 624.

[85] *Arkwright Boston Manufacturers Mutual Insurance Co. et al v. Ross et al.*, U.S. District Court, Southern District of Texas (Houston Division) May 8, 1990, *Yearbook Commercial Arbitration*, 1992, 617.

[86] *Gesco Ltd. v. Hang Yang Corp.* (U.S. no. 94 sub 1-2).

As to succession because of assignment, the Moscow District Court in *Aero Imp.*[87] held:

> However, if the assignment of the rights from the agreement is recognized valid, this cannot be extended to the arbitration clause. Based on the principle of autonomy of the arbitration clause, according to which an arbitration clause that forms part of a contract shall be considered as a procedural agreement independent of other terms of the contract, assignment of rights from the arbitration agreement is to be formulated especially by written agreement or by conclusion of a new arbitration agreement with Aeroimp.

This conclusion may seem too formalistic.

As to *assignment of credits* the right of the assigned party to oppose to the assignor the arbitration clause of the contract between the assignee and itself will depend on the applicable substantive law. In order to decide on this, one has to establish whether the assignment of the credit has involved the assignment of the contract from which it derives and if so whether under the applicable law the consent of the debtor is required.

The right to oppose it was asserted in *Banque Générale du Commerce*[88] stating that this applied even if the sale had taken place under the French *Dally* Statute.

The various issues related to assignment of the arbitration agreement have been discussed by writers.[89]

With regard to the effects of assigning a contract, and the arbitration clause contained in it, the Italian Supreme Court has held in *Zimmer*:[90]

> An American company, Zimmer, appointed an Italian company as its distributor for Northern Italy; the contract included an arbitration clause.
>
> The distributor assigned the contract to a third party which sued Zimmer before the Milan Court seeking performance of contract and damages.

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87 *Imp. Group (Cyprus) Ltd. v. Aeroimp.* (Russian Fed.) Moscow District Court, IV 21, 1997, *Yearbook Commercial Arbitration* 1998, 745.

88 *Snmm Hypric v. Banque Générale du Commerce*, Court of Appeal, Aix en Provence, January 9, 1997, *Riv. arb.*, 1997, 76.

89 D. GIRSBERGER and C. HAUSMANINGER, *Assignments of Rights and Agreement to Arbitrate*, 8 *Arb.Int.* 2, 121; J. WERNER, *Jurisdiction of Arbitrators in Case of Zimmer (USA) Europe S.A. (Belgium) v. Giuliana Cremascoli (Italy)*, Court of Cassation, (Italy) Joint Divisions, June 3, no. 3285 (1985), *Yearbook Commercial Arbitration* 1986, 101. XI, at 518 *id. Jurisdiction of Arbitrators in Case of Assignment of an Arbitration Clause*, 8 *J. Int. Arb.* 2, 13.

90 *Zimmer (USA) Europe S.A. (Belgium) v. Giuliana Cremascoli (Italy)*, Court of Cassation, (Italy) Joint Divisions, June 3, no. 3285 (1985), *Yearbook Commercial Arbitration* 1986, 101. XI, at 518.

> Zimmer challenged the Italian jurisdiction because of the existence of an ICC arbitration clause.
>
> The distributor denied being bound by the clause. The Court of Cassation held that an assignment of contract which makes a general reference to standard conditions of sale without mentioning the arbitration clause is not sufficient to be treated as acceptance of that clause. In fact, even if Art. 2 of the New York Convention does not require specific acceptance of the clause, it does require that the consent to arbitration be clear and unambiguous.

11.8 THIRD PARTIES

A large debate arose as to whether an arbitration agreement may commit parties which have not entered into it. This is the case of groups of companies which have given rise in Europe to several precedents.

In the U.S. the *DiGhello*[91] Court held that:

> the arbitration agreement involved corporations even if they had not been signatories to it, since they 'directly benefited' from the parties' agreement and they were 'clearly owned, dominated and controlled by a party to the arbitration agreeement'.

In the U.S., in *Fiat*[92] the Court held that:

> DiGhello is distinguishable from the present case in that there is no evidence here that the arbitration clause at issue here was intended to be binding on Fiat. The arbitration panel DiGhello did not exceed its authority in affording relief against four non-signatory corporations that were nevertheless covered by the arbitration agreement. In the present case, the arbitration panel exceeded authority when it purported to bind the non-signatory who was not expressely covered by the arbitration agreement. Nor is the relationship between ONYX and FIAT as close as that between DiGhello and its four subsidiaries . Although ONYX and FIAT clearly benefit from each other's transactions and some connections between the two existed, the relationship here is not nearly as intertwinned as that in DiGhello. 673 Supp. at 89-90.

This having been said as to the identification of the parties to the arbitration agreement, the parallel between court proceedings and arbitral proceedings does not help when it comes to joining third parties. Several national proce-

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[91] *DiGhello v. Busconi*, 673 F.Supp 85.87 (D. Conn 1987).

[92] FIAT *S.p.A. v. the Ministry of Finance and Planning of the Republic of Suriname, Suriname Rice Export Co. N.V, ONYX Development Corporation et al.*, U.S. District Court, Southern District of New York, October 12, 1989, 88 Civ. 6639 (SWK) *Yearbook Commercial Arbitration*, 1998, 881.

dural laws provide, even if in different ways, the possibility for the parties to join third parties or to obtain from the Court an order joining third parties, besides allowing the voluntary joining of third parties to assert their own rights (independent joinder) or to support the reasons of one of the parties (joinder *ad adiuvandum).* See amongst writers Sperduti.[93]

This cannot happen in arbitral proceedings, since they are based on a contractual relationship which exists only between the parties to the contract and their successors.

Intervention by a third party may then take place only with the consent of the parties to the original arbitration agreement. This is rarely given, because this intervention is generally in favour of one party only. Third parties are thus not generally joined to international arbitral proceedings.

The contractual nature of the arbitration clause or agreement might induce to believe that the arbitral proceedings and the award produce effects limitedly to the parties.

Joinder of third parties to the arbitral proceedings

That conclusion would be accurate as to the arbitral proceedings, but inaccurate as to the award.

In arbitral proceedings third parties may not become parties to them unless specific legislation provides otherwise.

The contractual nature of arbitration further prevents arbitral proceedings being used by third parties who are not a party to the arbitration agreement. The possibility of the creditor acting as a substitute for the debtor, if the latter takes no action,[94] may thus be argued. The same doubts arise as to American *class actions,* where the plaintiff asserts a right, arising from an arbitration clause, on behalf of an entire category or group of persons injured by the same event, and which he represents *de facto.*

However, the possibility of third parties intervening in arbitral proceedings in specific situations at the request of one of the parties to the arbitration agreement was held by the Polish Court of Arbitration:[95]

> If the result of the case may bear upon a party's recourse claim or claim for damages against a specific third person, this party may bring, before the end of the first hearing, a motion for the notification of the pending proceedings to such third person summoning him to take part in the proceedings as an intervenor.

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93 G. SPERDUTI, *Etude sur l'intervention dans le procès international,* 1992, 3, 407.

94 Cause of action provided for by various legal systems.

95 Par. 21, Rules of the Court of Arbitration of the Polish Chamber of Foreign Trade in Warsaw.

While the consequences of this are generally not too serious as to joinders *ad adiuvandum*, since it is only a matter of supporting one party, the consequences may be more severe as to independent joinders and even more as to the inability of other parties, to which the dispute is common, to take part in the proceedings.

As to the former, in effect they are deprived of the possibility to assert their rights in a *simultaneus processus* (i.e. in simultaneous proceedings). However since the award produces effects only limitedly to the parties, this does not prevent a third party from commencing proceedings against the parties (even if in their internal relationships the latter are bound by the award).

The situation is more difficult when the participation of a third party is essential in order that the arbitral proceedings may take place. This is the case of a claim to rescind an agreement made by three parties, out of which only two have entered into an arbitration agreement. The consequence of the third contracting party being unable to participate in the arbitral proceedings will at least in many legal systems produce the result that the arbitrators will be unable to decide.

It has been suggested[96] that this affects the right of such parties to due process with all the other contracting parties. However this seems to be an inevitable consequence of the contractual nature of the arbitration agreement.

It is suggested that the opposition to the award allowed in some legal systems to the third party, the rights of which are affected by the award, for example because his title derives from the one which has been rejected in the award, provides a remedy, while remaining in line with the nature of the arbitration agreement.

Effects of the award vis-a-vis third parties

It has been held that the award produces no effects vis-à-vis third parties.

This conclusion does not seem accurate. The award made in a dispute between other parties should produce the same effects of a judgment made between third parties.

The first issue to be examined is when the award will produce such effects. This in general would be from when it is final and binding for the parties, an issue which will depend on the *lex fori*.

The award as well as a judgment may produce effects in favour of a third party or against it. In the former situation, it is submitted that the third party may not be deprived of such effects without its consent. In such a situation the

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[96] E. RICCI, *Il lodo rituale di fronte ai terzi, (*The award and third parties*) Riv.dir.proc.* 1989, 649, E. FAZZALARI, *Le difese del terzo rispetto al lodo rituale, (*The defences available to third parties vis-a-vis the award*) Riv.arb.* 1992, 613.

parties to the arbitral proceedings may consequently not just waive the award by a stipulation, without the consent of the third interested party.

If the effects of the award are negative for a third party, in the sense that the award affects the rights of a third party, that party must have a remedy. In some jurisdictions this remedy consists in the right to oppose the award,[97] in order to obtain a decision which sets it aside. That is the case if a party to a contract finds out that the two other contracting parties have disputed about the existence of that contract and that the arbitrator (or judge) has rescinded it. That is also the case if a party finds out that in a litigation between two other parties the title of one of them to real estate has been recognized as belonging to him, while he believes to be the rightful owner of that property.

The joinder of parties was decided on the ground of connection in ICC proceedings in 1994[98] in a situation where a Syrian plaintiff had instituted separate proceedings, both under ICC Rules, against two Italian companies. The joinder was decided by the ICC Court, based on art. 13 of the Internal Rules of the Court.

11.9 CONSOLIDATION OF PROCEEDINGS

Another problem in arbitral proceedings is the existence of various connected, but separate, proceedings. This frequently occurs for example when several main contracts are entered into separately, by the same party (for example the owner of a plot of land) with various contractors concerning, for example, respectively the installation of equipment and civil engineering works, and in string contracts such as in case of disputes between the Owner and the Main Contractor on the one hand and between the Main Contractor and the Subcontractor on the other hand, when they are based on the same legal issues. The same dispute, when it concerns several parties, may give rise to various proceedings which are connected, but separate. In this situation a consolidation of the proceedings could be useful. However, because of the contractual nature of arbitration, this is generally not possible, unless all the parties consent. Only some legal systems allow consolidation, generally through a Court Order.[99] Consolidation of the proceedings was ordered by the Iran-US Claims Tribunal in *Gould*:[100]

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[97] G. RUFFINI, *L'intervento nel giudizio arbitrale, Riv.arb.* 1995, 647.

[98] ICC proceedings no. 6719, *Clunet* 1994, 1071.

[99] Such is the case in the United States. See A. REDFERN and M. HUNTER, *International Commercial Arbitration, op. cit.*, at 43.

[100] *Gould Marketing Inc. v. Ministry of Defence of the Islamic Republic of Iran,* award June 29, 1984, in proceedings no. 49 and 50 (136-49/50-2), Riphagen (chairman), *Yearbook Commercial Arbitration,* 1985, vol. X, at 281.

> While claims 49 and 50 have proceeded as separate cases, they involve the same parties and related contracts, sequential hearings in the two cases were held by Chamber 2 on successive days, and the two cases can be dealt with together without delaying any award. In view of these considerations and the fact that the tribunal has decided to render an award in favor of the Respondent in Case 49 and an award in favor of the Claimant in Case 50, the Tribunal considers it appropriate to decide the two cases together so that they can be dealt with in a single award for a net amount.

Consolidation is now provided for in the new Dutch Arbitration Act (1986).[101]

An analysis of the advantages and disadvantages of consolidation has been done by Chiu.[102] In his analysis the writer points out that consolidation may affect the parties' equal right to appoint arbitrators and expose a party to an unforeseen liability.

An alternative to consolidation of proceedings are *parallel* proceedings, which are possible where the arbitrators are the same. The conduct of the two proceedings becomes then comparable to that of proceedings which are heard by the same judge without being consolidated. Identical arbitral tribunals are rare, but it is less infrequent for the chairman of the two tribunals to be the same, while the arbitrators appointed by the parties are different. Two arbitral tribunals may also be found having two arbitrators in common. However, this solution, rather than helping, may give rise to difficulties because such arbitrators may be inclined to use in the second proceedings information acquired in the first one. If so, part of the arbitral tribunal has information not available to the other arbitrators and, even worse, sometimes unknown to one of the parties to the proceedings. This situation may then be very similar to that in which an arbitrator uses his own technical knowledge without informing the parties, which affects due process.

The English *Abu Dhabi Gas*[103] judgment can be quoted in this respect:

> The judge, even in the presence of various arbitrations in which the same matters are to be decided, is deprived of the authority to appoint an arbitrator subject to acceptance by the parties of the joining of the proceedings and this even if their consolidation is desirable.

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[101] van den BERG, *The Netherlands, Yearbook Commercial Arbitration* 1987, vol. XII, at 3; consolidation is ruled by section 1046 Arbitration Act (1986).

[102] J.C. CHIU, *Consolidation of Arbitral Proceedings and International Commercial Arbitration,* 7 *J.Int.Arb.* 2, 53.

[103] *Abu Dhabi Gas Liquefaction Co. Ltd. v. Eastern Bechtel Corporation and Chiyoda Chemical Engineering & Construction Company Limited,* Court of Appeal of England, (Lord Denning M.R.), June 23, (1982), *Rev. arb.,* 1983, at 119. (Head notes translated from French).

> The Court may on the other hand appoint the same arbitrator in both proceedings. The arbitrator shall try to identify the issues which interest all the parties and those which concern only one of the proceedings and which will have to be decided separately. If situations should arise which make it advisable, the arbitrator will be entitled to request to be replaced in one of these proceedings.

Very interesting for the way in which various proceedings submitted to different arbitration agreements are dealt with is the award made by the Maritime Arbitral Chamber of Paris in *Bilitis*:[104]

> Export S.A. *armateur disposant* of a vessel claimed for demurrage against the *affréteur au voyage* (Lancelot) before the Maritime Arbitral Chamber in Paris.
>
> The seller of the goods, Céréales S.A. (which had acquired them from Grain Ltd.) sought from Lancelot in other proceedings pending before the same Court compensation for damages caused during the carriage of the goods. This claim was also made against Export S. A., and Island Corp (the owner of the vessel) which had chartered it to Interop (arbitral clause: London), which in turn had subchartered it to Export S.A.
>
> Lancelot, in third proceedings, claimed demurrage from the purchaser of the carried goods (Office d'Importation), Céréales, Grain Ltd., Export S.A. and Island Corp.
>
> The Arbitral Chamber:
>
> - having established that the Office d'Importation had no legal relationship with Lancelot and had to be allowed to withdraw from the proceedings;
>
> - having held that Island Corp. had entered into an arbitration agreement which provided for arbitration in London and could not consequently be a party to proceedings before the Arbitral Chamber;
>
> - having held that Lancelot's claims against Export S.A. and Céréales S.A. were counterclaims,
>
> appointed the chairman of the first arbitral tribunal (for the dispute between Export S.A. and Lancelot) and decided that such a tribunal would also hear Lancelot's claim against Export S.A., which had been made separately;
>
> - having held that in the second dispute (Céréales S.A., Lancelot and after others) the claim against Island did not come under the arbitration agreement,
>
> appointed the chairman of the second arbitral tribunal (different from the chairman of the first) and ordered this tribunal to decide not only Céréales S.A.'s claims against Lancelot (second proceedings), but also Lan-

[104] *Bilitis* award , Committee of the Maritime Arbitral Chamber of Paris, April 13, 1979, *Rev. arb.*, 1979, 381.

> celot's claim against Céréales S. A. (claim made in the third proceedings).
>
> The Chamber asked the second arbitral tribunal to decide the remaining issues raised in the third proceedings asking it to:
>
> 'take into account even the solutions given in the two other awards to the claims made by Lancelot against Export S.A. and Céréales S.A. and to decide if necessary the claims made by Lancelot against Grain Ltd.'.

The Chamber further held:

> For the purposes of a proper administration of justice the two arbitral tribunals appointed above shall be entirely free to meet together to hear the representatives of the parties and any witnesses.

While in the U.S., as held in *Nereus*,[105] Courts may order the consolidation of arbitral proceedings, the same U.S. Court of Appeal has later excluded in *Boeing*[106] that such authority exists if the disputes arise from different arbitration agreement and has held that such a power is limited to arbitrations arising from the same arbitration agreement.

Even if the ambit of such power has been limited in the U.S., that power is not granted in many other countries. Consolidation is handled by the Rules of the International Court of Justice[107] and was the policy adopted by the Iran-U.S. Claims Tribunal, on many occasions, for example in *Ebrahimi*.[108]

In *Sofidif*[109] an arbitral tribunal consolidated several proceedings which had arisen between French and Iranian parties to separate contracts, containing arbitration clauses which referred the dispute to the ICC, providing for different locations or not stating the venue of the proceedings. The Court of Appeal, Paris set aside the award on the ground that consolidation was not allowed, unless all the parties had consented to it.

For many years consolidation of related arbitrations could be ordered even in case of objections by the parties. See *Nereus*.[110] In the *United Kingdom v. The Boeing Company*,[111] the U.S. Court of Appeals for the Second Circuit prohibited consolidation in the absence of consent by the parties. The Federal

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[105] *Compania Española de Petroleos SA v. Nereus Shipping S.A.*, 527, F 2d 966 (2nd Cir. 1975).

[106] *The Government of the United Kingdom of Great Britain and Northern Ireland v. The Boeing et al.*, U.S. Court of Appeals, 2nd Circuit, June 29, 1993, *Yearbook Commercial Arbitration*, 1994, 240.

[107] Art. 47.

[108] *Ebrahimi v. Islamic Republic of Iran*, Iran-U.S. Claims Tribunal, July 26, 1991, *Yearbook Commercial Arbitration*, 1992, 382.

[109] *Oiaeti v. Sofidif et al.*, Court of Appeal, Paris, December 19, 1986, *Rev. arb.*, 1987, 339.

[110] *Compania Española de Petroleos S.A. v. Nereus Shipping S.A.*, 527 F2d , 969.

[111] See *supra* note 106.

Arbitration Act does not contain provisions as to consolidation. However the Federal Rules of Civil Procedure:

> authorize courts to consolidate civil cases if the cases involve common issues of fact or law.

The Federal Court has not addressed the issue of consolidation. The *Boeing* Court held:[112]

> We think the liberal purposes of the Federal Arbitration Act clearly require that this Act be interpreted so as to permit and even to encourage the consolidation of arbitration proceedings in proper cases, such as the one before us.

In *Weyerhauser*,[113] the Court of Appeal's Ninth Circuit has disagreed, holding:

> In so far as [*Nereus*] holds that Federal Courts may order consolidation in the absence of consent, we decline to follow it.

Other Circuits followed the Californian view. In *Boeing* the Second Circuit decided to follow this new opinion and held:

> recent Supreme Courts case law has undetermined our previous conclusion that the FAA's liberal purposes and the Federal Rules of Civil Procedure allow us to consolidate arbitration proceedings without consent. To the extent that Nereus relied on that conclusion it is no longer good law.

The Court relied in particular on a passage of the Supreme Court's decision in *Volt*[114] which holds:

> ... The FAA contains no provisions designed to deal with the special practical problems that arise in multiparty contractual disputes where some or all of the contracts at issue include agreements to arbitrate. California has taken the lead in fashioning a legislative response to this problem, by giving courts authority to consolidate or stay arbitration proceedings in these situations in order to minimize the potential for contradictory judgments.

Wallace[115] suggests that the real ground for this change of view by the Second Circuit is that five other Circuits disagreed with it.

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[112] See *supra* note 106.

[113] *Weyhauser Co. v. Western Seas Shipping Co.*, 484 U.S. at 855.

[114] *Volt Information Sciences Inc. v. Board of Stanford University*, 489 US 468 (1989).

[115] R.E. WALLACE Jr., *Consolidated Arbitration in the United States. Recent Authority Requires Consent of the Parties*, 10 *J.Int.Arb.*, 4,5.

The consolidation of arbitral proceedings is observed with great interest, particularly by jurisdictions which are not familiar with that system. However it may cause considerable inconvenience, since it may involve a party, which has made only a small claim, in a large arbitration, causing him to suffer the length and costs of all the proceedings, which may be much higher than they would have been in the absence of consolidation.

11.10 MULTIPARTY ARBITRATION

It must be recognised that consolidation proceedings can produce very good results in some situations, while in others the negative effects may outweigh the positive ones. It is because of its possible inconveniences and of the need for the consent of all the parties, which in the majority of jurisdictions is required for consolidation, (because of the private nature of the arbitration agreement) that another instrument has been sought which could allow the various disputes to be discussed from the outset in only one proceeding. This form of arbitration is generally known as Multiparty Arbitration. It has been studied by a working group, formed by the International Chamber of Commerce in Paris, which has reached positive conclusions. A Standard Multiparty Arbitration Clause to be submitted to users has been drafted and finalized by the ICC.[116] The desire to avoid imposing on the parties a mechanism unknown to them and which they might find difficult to assess, has induced ICC to avoid making such a clause a part of its standard arbitration agreement, which inevitably considerably limited the possibility of using it, while other arbitral institutions have incorporated that.[117] Eventually ICC too has incorporated this provision in its last Rules.[118]

Multiparty arbitration may be a very useful tool, but like consolidation of proceedings it may create serious inconveniences, whenever one of such parties is compelled to become a party to a large litigation, even if its role is limited. The arbitration clause could be drafted in such a way as to allow a party in such situations to obtain from the tribunal leave, based on sound grounds, to walk out of the multiparty agreement. A further major difficulty consists in the appointment of the arbitrators, whenever each party has a position separate from all the other ones. In that case, one cannot deprive that party of the right to appoint the arbitrators on an equal footing, and it is suggested that waivers of that right, before the dispute arises, are not valid. Some Arbitration Rules did not provide for this.[119] For this reason in *Dutco*[120] the ap-

[116] ICC Publication no. 404, 1982.

[117] Such as art. 9.6 Rules of European Court of Arbitration, 1997 Edition.

[118] Art. 10 ICC Arbitration Rules (1998 Edition).

[119] The majority of them.

pointment of arbitrators was held to be in breach of public policy:[121]

> The Court of Cassation overturned the decision of the Court of Appeal and referred the case to the Versailles Court of Appeal, holding that the principle of equality of the parties in appointing arbitrators is a matter of public policy and can be waived only after the dispute has arisen.

Its reasons were as set out below:

> [2] Considering that the principle of the equality of the parties in the appointment of arbitrators is a matter of public policy (*ordre public*) which can be waived only after a dispute has arisen;
>
> [3] Considering that on 26th March 1981, a consortium agreement was concluded between Dutco (Dubai) and two German companies, BKMI and Siements, for the construction of a cement plant in Oman; that it was stipulated in that agreement that all differences would be settled according to the Arbitration Rules of the International Chamber of Commerce by three arbitrators to be appointed according to the ICC Rules; that upon the single request for arbitration submitted by Dutco against its two contractual partners separately in respect of separate credits concerning the two firms, an arbitral tribunal was constituted consisting of three arbitrators, one of whom was appointed – under protest and with all due reservations – jointly by the two defendants; that the arbitral tribunal decided that it had been regularly constituted and that the arbitral procedure should be continued in the form of a multi-party arbitration against the two defendants;

The new ICC Rules (1998) provide:[122]

> 1. Where there are multiple parties, whether as Claimant or as Respondent, and where the dispute is to be referred to three arbitrators, the multiple Claimants, jointly, and the multiple Respondents, jointly, shall nominate an arbitrator for confirmation pursuant to Article 9.
>
> 2. In the absence of such a joint nomination and where all parties are unable to agree to a method for the constitution of the Arbitral Tribunal, the Court may appoint each member of the Arbitral Tribunal and shall designate one of them to act as chairman. In such case, the Court shall be at liberty to choose any person it regards as suitable to act as arbitrator, applying Article 9 when it considers this appropriate.

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[120] *Sté BMKI and Siemens v. Sté Dutco*, Court of Cassation, France, January 7, 1992, *Rev. arb.*, 1992, 470.

[121] A decision which induced comments from ICC officials. See E.A. SCHWARTZ, *Multiparty Arbitration and the ICC. In the Wake of Dutco*, 10 *J. Int.Arb.* 3, 5.

[122] Art. 10, ICC Rules of Arbitration (1998).

In fact, whenever there is a risk that a party may be deprived of the right to appoint arbitrators, it may be preferable that the single arbitrator or the entire panel be appointed by the arbitral institution.

This is the formula selected by the European Court of Arbitration (1997) Arbitration Rules:[123]

> If it appears that there is the possibility of one or more of the parties not receiving equal treatment as to the appointment of arbitrators or if it appears impossible to constitute a tribunal, the Executive Committee of the Court or the National Executive Committee having jurisdiction shall appoint a sole arbitrator.

The fundamental requirement that the parties be placed on an equal footing as to the appointment of arbitrators has been asserted also by the Italian Court of Cassation in *Borgotaro.*[124]

A special situation arising from the interpretation of the intention of the parties, in the sense that they intended to initiate only one arbitral proceeding, albeit through various arbitration clauses, was affirmed in *Westland* as earlier discussed from the point of view of connected contracts.[125]

One of the defendants, the Republic of Egypt, argued that Westland was not entitled to initiate one arbitral proceeding against the six defendants. However the arbitral tribunal held:

> Everything depends in the case on the intention expressed by the parties in the arbitration clause.
>
> It is necessary and therefore sufficient, in principle, that they wished to bind themselves for the arbitrators to have jurisdiction at the same time in respect of them all and for one of them to be able to initiate proceedings against all the other parties within one set of arbitration proceedings. It thus matters little that there are several arbitration clauses when their content shows that they make up a whole in the minds of the parties. Such are the circumstances of the present case.

A decision which was reversed by the Swiss Federal Tribunal[126] which held:

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[123] Art. 9.6.

[124] *Coop. Vigili Fuoco Borgotaro v. Mariani*, Court of Cassation (Italy) July 5 no. 2304, (1995), *Foro pad.* 1995 I, 206.

[125] Interim award on jurisdiction March 5, 1984, *Yearbook Commercial Arbitration* 1991, 174.

[126] *Westland Helicopters (UK) v. The Arab Republic of Egypt et al.,* Swiss Federal Court, July 19, 1988, *Yearbook Commercial Arbitration* 1991, 174.

> [The arbitrators] started from the presupposition that the four States, by participating in commercial operations, waived *ipso facto* their immunity.
>
> This would be true if the States had engaged themselves directly. However, in this case, they created an entity with a legal personality of its own, which was to act on their behalf. It is this organization, and not the States which signed the contract containing the arbitration clause.

Multiparty arbitration has raised much interest also amongst writers.[127]

In *Sofidif*[128] the Court of Appeal in Versailles vacated the award which, dealing with several contracts, each containing an arbitration clause, decided that since these contracts had a common objective, one could argue from this that the parties wished to have only one arbitral proceeding. The Court found that there was no evidence of a common intention of the parties for all their disputes to be decided in one proceeding and that the award had then to be vacated.

See also the Final Report of the Working Group of the ICC Arbitration Commission.[129]

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[127] M. MUSTILL, *Multiparty Arbitration. An Agenda for Law-makers*, 7 *Arb.Int.*, 4, 393; F. NICKLISCH, *Multiparty Arbitration and Dispute Resolution in Major Industrial Property*, 11 *J.Int.Arb.* 4, 57; E.A. SCHWARTZ, *Multi Party Arbitration and the ICC*, 10 *J.Int.Arb.* 1,5.

[128] *Société Franco Iranienne pour l'Enrichissement de l'Uraniun par Diffusion Gazeuse (Sofidif) et al. v. Organisation pour l'Investissement et Aides Economiques Techniques de l'Iran*, Court of Appeal, Versailles, March 7, 1990, *ASA Bulletin* 1991, 56.

[129] J.L. DELVOLVE, *Rapport final sur les arbitrages multipartites*, *ICC Bulletin* 1995, 26.

CHAPTER 12

THE ARBITRATOR

SUMMARY: 12.1 Relationship Between the Parties and the Arbitrator: Contract to Arbitrate – 12.2 Sole Arbitrator or Arbitral Tribunal – Even or Odd Number – the Umpire – 12.3 Criteria for Choosing the Arbitrator – 12.4 Direct or Indirect Appointment – *Intuitus personae* – 12.5 Appointment – Acceptance – Lack of Designation – 12.6 Capacity of the Arbitrator, Sex and Nationality – 12.7 Physical Person or Legal Entity – 12.8 Training of Arbitrators – 12.9 Impartiality – Absence – Misconduct – Challenge -12.10 Termination – Replacement – Truncated Arbitration – Effects – 12.11 Revocation, Dismissal and Challenge – 12.12 Rules of Conduct – 12.13 Liability – Immunity – 12.14 Remuneration – 12.15 Possibility of Appointing a Secretary to the Arbitral Tribunal – 12.16 Substitute Arbitrators – 12.17 Arbitrator's Involvement Before State Courts

12.1 RELATIONSHIP BETWEEN THE PARTIES AND THE ARBITRATOR: CONTRACT TO ARBITRATE

The attention of scholars and of arbitration users is usually absorbed by the relationship between the parties, which on the one hand gives rise to the arbitration agreement and on the other hand derives from it.

The contractual basis of the arbitration agreement and its procedural effects have given rise to a very large discussion amongst writers. Some have held that the arbitration agreement is just a contract, disregarding its procedural effects, giving in that way rise to the *contractual theory*. Other ones have focused their attention on the procedural effects, giving so rise to the *judicial theory*.

The *battle of theories* – as Sanders rightly points it out[1] – goes back to the *Del Drago* arbitral proceedings (2) which concerned the estate of the late Queen Marie Christine of Spain.

The conclusions reached in this respect, consisting of recognizing that the arbitration agreement is a contract which aims at giving rise to arbitral proceedings,[2] have frequently exhausted the examination of this aspect of arbitration.

The study of the relationship between the arbitrator and the parties has then been limited.

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1 P. SANDERS, Chapt.12 Arbitration, Volume XVI Civil Procedure *International Encyclopedia of Comparative Law*, Mohr, Tubingen 1996, at 12-6.

2 Tribunal de la Seine, March 16, 1989, *Clunet* 1989, 744.

Common law jurisdictions

In common law jurisdictions the issue is examined in a practical way, generally by qualifying this relationship as contractual and more precisely as a contract for services. Mustill and Boyd[3] point out that this relationship may be treated as quasi-contractual, or a matter of *status* or of restitutory rights or a contractual relationship. Once the relationship between the parties has been classified as contractual, the same classification might be given to the relationship between the parties and the arbitrators. However, for them this conclusion would not be appropriate since the parties, when appointing an arbitrator, do not generally think that they are entering into a contract. In the opinion of Mustill and Boyd a distinction must then be made between this appointment and that of an accountant, of an architect or a solicitor. They conclude that, rather than forcing the relationship between the arbitrator and the parties into an unsuitable theoretical framework, it is preferable to examine directly the rights and duties arising from the arbitrator's position. In this respect see also Lew.[4] Large doctrinal writing has followed. Lew and Mustill and Boyd seem to be in a minority as to this aspect.

Civil law jurisdictions

In French law there are two tendencies. According to some authors, the arbitration agreement has a contractual nature. This view was confirmed in *Duval.*[5] According to others, the arbitrator discharges a public and, more precisely, a judicial task.[6]

In German law, there is a contractual relationship between the parties and the arbitrator.[7]

Under Italian law[8] the prevailing opinion is that, when the acceptance of the arbitrator is notified to the parties, a contractual relationship is established.

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3 M. J. MUSTILL and S.C. BOYD, *Commercial Arbitration,* London, Butterworths, 1982, at 185 *et seq.*

4 See J. LEW, *Applicable Law in International Commercial Arbitration,* Dobbs Ferry 1978.

5 *V. v. Société Raoul Duval*, Court of Appeal, Paris, October 12, 1995, *Rev. arb.* 1999, 2, 324.

6 R. DAVID, *L'Arbitrage dans le commerce international* (Arbitration and international trade), Paris, 1982; PH. FOUCHARD, *L'Arbitrage commercial international,* (International commercial arbitration) Paris, 1965; J. ROBERT, *L'Arbitrage droit interne – droit international privé* (Arbitration, Domestic Law and International Private Law), Paris, 1983; de BOISSESON *Le droit français et l'arbitrage (interne et international)* Joly, Paris 1990; FOUCHARD-GAILLARD-GOLDMAN, *Traité de l'arbitrage commercial international*, Paris, 1996.

7 P. SCHLOSSER, *Das Recht der Internationalen Privaten Schiedsgerichtsbarkeit* (International Private Arbitrability Law), Tuebingen, 1975.

8 G. SCHIZZEROTTO, *Dell'Arbitrato* (Arbitration), Milan, Giuffré 1982, at 125 *et seq.*

There are several views on the classification of this relationship: one opinion treats it as a *mandate* (instructions to enter into a contract or to give an undertaking for the principal)[9] while another one sees it as a *locatio operis,* (i.e. a contract which provides for services, amongst which are intellectual services).[10] Schizzerotto does not agree with the classification as a mandate (since in his opinion this task does not imply performing a contract) nor as a contract for intellectual services (since the arbitrator's task, even if it includes an intellectual activity, is not confined to that). Schizzerotto treats it as an unclassified *contract to arbitrate.*[11] It may be worth considering the distinction between a mandate and a contract for intellectual services. This is not due to the pleasure of making an intellectual exercise, but because in civil law jurisdictions the consequence of the classification is that the supplementary statutory provisions, which deal with that specific contract, will apply, some of which may be mandatory. This distinction has been made by the Italian Courts:[12]

> A mandate must be distinguished from a contract for services on various grounds, for example, because the former covers the entering into contracts or the giving of undertakings, while the latter covers the performance of a physical activity or of intellectual services.

Some authors also recognize that the entering into contracts or the giving of. undertakings is the discriminating factor between a mandate and a contract for intellectual services, and that there is a contract for intellectual services when the result will not be the entering into a contract or the giving of an undertaking.[13] Such a distinction is confirmed by Luminoso:[14]

> The former (a contract for intellectual services) covers the performance of activities which may modify factual situations ... while the second (mandate) covers the entering into contracts or the giving of undertakings.

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9 MORTARA, *Commento al Codice di Procedura Civile* (Comment to the *Civil* Procedure Code) *op. cit.,* at 326, and SCHIZZEROTTO, *op. cit.,* at 326.

10 VECCHIONE, *op. cit.,* at 401; for other quotations see SCHIZZEROTTO, *op. cit.*, at 327.

11 SCHIZZEROTTO, *op. cit.,* at 332.

12 *Comuzio v. Clemente,* Court of Appeal, Milan, May 12, 1950, *Foro pad.*, 1950,II, 58

13 *Novissimo Digesto* (The Most Recent Digest) item *Mandato (Diritto civile)* (Mandate, Civil Law), vol. X, F.M. DOMINEDO', at 116.

14 A. LUMINOSO, *Mandato Commissione e Spedizione* (Mandate, Commission and Forwarding Agent Contracts), *Collana Cicu-Messineo,* Giuffré 1984, at 127.

Whenever the activity which is performed includes both intellectual services and acts having a contractual content, the prevailing activity shall be taken into account.[15] Intellectual services shall then prevail when the performance of an act having contractual contents is merely part of a wider service.

Differences of opinion in this respect are being registered: in Germany the relationship between the arbitrator and the parties is classified as a contract for services.[16]

Islamic law

In the Arab countries, Saleh[17] points out that under *Sharia,* according to the *Hanafi* school, there is a close link between arbitration *(Wikala)* and conciliation *(Sulh)*[18] and that there is agreement amongst scholars as to the classification of the arbitration agreement as a valid contract (even if not binding for the *Hanafi* school, while permitted according to the other schools). The appointment of arbitrators is expressly treated by Saleh[19] as a contractual act. Under Syrian law[20] according to Saleh authors have stressed the contractual nature of the relationship between the parties and the arbitrators. It has been argued that arbitration agreements are binding contracts[21] under the modern trends of the 'Fiqh'.[22]

In Saudi law the arbitration agreement must be confirmed by the authority originally having jurisdiction.[23]

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15 C. SANTAGATA, *Commentario del Codice Civile* (Commentary to the Civil Code), *Scialoja e Branca,* Section 1203, at 135-136.

16 *Schiedsrichtervertrag* (Contract to arbitrate), *Arbitration Law in Europe, ICC,* Paris, 1981, at 20.

17 SALEH, *Commercial Arbitration in the Arab Middle East,* Graham and Trotman, London, 1984, (Saleh), at 21.

18 AL TARABULISI, I.N. *A. L. – Ukkam* at 23 *et seq.*

19 SALEH, *op. cit.,* at 39.

20 SALEH, *op. cit.,* at 108.

21 EL AHDAB, *Arbitration with Arab Countries*, Kluwer, 1999 at 24.

22 I.e. academic writings and case law.

23 EL AHDAB, *Arbitration with Arab Countries*, *cit* at 587.

Other legal systems

In Japanese law, according to Simmonds *et al,*[24] a contractual relationship is established between the parties and the arbitrator; this is a generally accepted view which is also adopted by the courts.

In various jurisdictions a special contract, separate from the arbitration agreement, is deemed to exist between the parties and the arbitrator who has accepted the appointment.

References to the mandate are frequently traced in the reasons for awards as in *Utexbel*:[25]

> ... the role of *mandataire* (i.e. agent), which a part of the Belgian doctrine assigns to the arbitrator.

Conclusions

The relationship between the parties and the arbitrator is generally treated as a *contract*, the *meeting of minds'* consisting on the one hand of the appointment of the arbitrator and on the other hand of the latter's acceptance.

As far as the classification of the contract is concerned, in the legal systems in which this is relevant, it is suggested that the arbitrator's task is a mandate *sui generis,* not consisting of the task of merely entering into a contract such as a sale of goods, or of the giving of an undertaking, but of a decision reached progressively. This seems to justify distinguishing it from the traditional mandate. Reference is made to the opinion previously[26] expressed that such a 'meeting of minds' is not always independent from but may be a part of a wider contract between the parties which is formed progressively.

The appointment of the arbitrator and his acceptance may also be seen as the conclusive phase of the contract originating from an arbitration clause or submission agreement. This view was shared by the English Court of Appeal which held in *Hyundai*[27] (per Sir Nicholas Browne Wilkinson V.C.):

> The arbitration agreement is a bilateral agreement between the parties to the main contract. The appointment of the arbitrator makes him become the third party to the arbitration agreement, which becomes multilateral.

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[24] SIMMONDS-HILL-JARVIN, *Commercial Arbitration in Asia and the Pacific,* Oceana, 1987, (SIMMONDS *et* al.), at 90.

[25] *Egetran S.A. v. Utexbel S.A.,* Federal Court (Switzerland), January 25 (1967) *Clunet* 1970, at 437.

[26] See *supra* Chapter 10.

[27] *K.S. Norjarl AS v. Hyundai Heavy Industries Co. Ltd.,* (1991) *LL Rep.* 1, 524.

The contractual notion of the relationship between the arbitrator and the parties is well established even in French law, as held in *Hotelière de Montagne*:[28]

> the arbitration contract, a synallagmatic agreement whereby the parties are bound to pay fees to the arbitrators, and the latter to decide the dispute.

while in *Saint Rapt* the French Court of Cassatioin defines the limits of this relationship by holding that:

> The arbitrator is not bound to the party which has appointed him by a mandate.

12.2 Sole Arbitrator or Arbitral Tribunal – Even or Odd Number – the Umpire

Determination of number of arbitrators from the beginning

While numbers may vary all the time, generally there is either a sole arbitrator, or a tribunal consisting of three arbitrators.

In *ad hoc* arbitration (i.e. those proceedings in which the parties do not request the intervention of an institutional body) arbitrators are occasionally appointed at the outset while in institutional arbitrations, (i.e. those in which an arbitral institution is involved) the appointment is generally not made at that time.

One or more arbitrators

In institutional arbitration, the decision over the number of arbitrators is generally left to the institutional body which makes that decision by applying its rules. Under the ICC Rules:[29]

> Where the parties have not agreed upon the number of arbitrators, the court shall appoint a sole arbitrator, save where it appears to the court that the dispute is such as to warrant the appointment of three arbitrators. In such a case the parties shall each have a period of 15 days within which to nominate an arbitrator.

The American Arbitration Association's International Arbitration Rules (1997) provide:[30]

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[28] *Société Hotelière de Montagne v. Epoux d'Amade et al.*, Court of Appeal, Paris, September 23, 1994, *Rev.arb.* 1996, 393.

[29] Art. 2, para. 5, ICC Conciliation and Arbitration Rules.

[30] Art. 5, International Commercial Arbitration Rules.

> If the parties have not agreed on the number of arbitrators, one arbitrator shall be appointed unless the administrator determines in its discretion that three arbitrators are appropriate because of the large size, complexity or other circumstances of the case.

The Arbitration Rules of the European Court of Arbitration provide:[31]

> If the parties have not specified the number of arbitrators, the Court shall decide their number, having regard to the nature of the dispute and to the specific problems and features of the dispute.
>
> Generally the Court shall favour the appointment of a sole arbitrator to facilitate a speedier settlement of the dispute and lower costs of the proceedings.

Under the rules of the Arbitration Institute of the Stockholm Chamber of Commerce:[32]

> If the parties have not agreed on the number of arbitrators, they shall be three in number. If the parties have agreed that the dispute is to be decided by a sole arbitrator, then the appointment shall be made by the Institute. In other cases each party shall appoint an equal number of arbitrators and the Institute one arbitrator, who shall be the chairman of the Tribunal ...
>
> If a party fails to appoint an arbitrator within the time prescribed by the Institute, then the Institute shall make the appointment.

Although at first sight reference of disputes to a sole arbitrator may seem more likely, the appointment of an arbitral tribunal is much more frequent since, according to many, this is safer. It is suggested that this practice should not be approved. A greater sense of security might be more justified if all the arbitrators were appointed by the institutional body. In fact, when the designations are made by the parties, the institutional body, apart from any other consideration, generally finds itself in the position of having to ratify them. Furthermore it is submitted that the number of arbitrators does not by itself give more security, while it certainly triplicates the cost. In reality, a guarantee may be found in the criteria for choosing arbitrators rather than in their number. In other words, a good arbitrator should be able to decide on his own as well as a good judge.

In the opposite view, the arbitrator's decision will then not benefit from the exchange of views which takes place when a tribunal decides. However, that can be avoided if the arbitrator creates a *constructive* relationship and a real *dialogue* with the parties, without confining himself to hearing their comments and then making his decision in secret.

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[31] Art. 9.5, Arbitration Rules of the European Court of Arbitration.

[32] Art. 5, Rules of the Arbitration Institute of the SCC.

Even or Odd Number of Arbitrator

In the case of an arbitral tribunal, the main alternative is between an even (generally two) and an odd number (generally three) of arbitrators.

International Conventions

The international conventions make provision in this respect. The European Convention (1961) refers only to an odd number of arbitrators.[33]

The Washington Convention (1965)[34] provides:

> The Tribunal shall consist of a sole arbitrator or any uneven number of arbitrators appointed as the parties shall agree.

Arbitration rules

Arbitration rules frequently deal with this issue. The rules of the Italian Arbitration Association (AIA)[35] state:

> (2) Where the parties have agreed that the dispute shall be settled by a sole arbitrator, they may, by agreement, appoint the arbitrator themselves and communicate this information to the secretariat within the time limit within which the answer to the request for arbitration must be made; failing this, the arbitrator shall be nominated by the Court.
>
> (3) Where the parties have agreed that the dispute shall be settled by three arbitrators, each party, in the request for arbitration and within the time limit for the answer, as the case may be, shall appoint an arbitrator. If one of the parties fails to do this, the appointment shall be made by the court. The third arbitrator, who shall act as presiding arbitrator of the arbitral tribunal, shall be appointed by the court, unless the parties have agreed that they themselves or the arbitrators whom they have nominated shall select the third arbitrator within a pre-determined period of time. If no time limit is indicated, the court shall set such time limit. If at the expiry of the time limit established by the parties or by the court, the parties or the arbitrators, whom they have appointed, have not appointed the third arbitrator, that appointment shall be made by the court.

The rules of the Euro-Arab Chamber of Commerce provide:[36]

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[33] See Art. IV 4)a) and Art. IV 3), Geneva Convention (1961).

[34] Art. 37 (2) (a), Washington Convention (1965), *cit.*

[35] Art. 9, paras. 2 and 3, of the National Rules of Arbitration of the Associazione Italiana per l'Arbitrato (1994 ed).

[36] Articles 21-1, 21-2, Rules of Conciliation Arbitration and Expertise of the Euro-Arab Chambers of Commerce.

> 21.1. The arbitral tribunal shall consist of a sole arbitrator, if the arbitration clause so provides, or the parties inform the Secretariat of the Board that they have so agreed within thirty days of the request made by the Secretary-Registrar under Art. 20.1.
>
> 21.2. Otherwise the tribunal shall consist of three arbitrators ....

The arbitration rules of the Netherlands Arbitration Institute[37] state:

> 1. If the parties have not agreed on the number of arbitrators, the number shall be determined by the Administrator after the filing of the short answer or, in the absence thereof, after expiration of the period of time for filing the short answer.
>
> 2. The Administrator shall determine that the number.of arbitrators be one or three, taking into account the preference of the parties, the amount of the claim and of the counterclaim, if any, and the complexity of the case.
>
> 3. If the parties agreed on an even number of arbitrators, the latter shall appoint an additional arbitrator who shall act as chairman of the arbitral tribunal ...

The Swiss Federal Court in 1995[38] held that in view of the ambiguous provision of the arbitration agreement:

> not less than two arbitrators

and in view of the lack of subsequent agreement of the parties, a third arbitrator had to be appointed by the state court.

Similarly in *Sterlite*[39] the Supreme Court of India held that arbitration agreements providing for an even number of arbitrators had to be read as referring to a panel of three arbitrators. By this purposive construction, the Supreme Court allowed the arbitration agreement to remain valid.

National laws

Domestic laws also deal with this issue.

In England under the Arbitration Act 1996 a sole arbitrator is appointed, unless the parties provide otherwise. In Scotland the appointment of one arbitrator is the rule.

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[37] Art. 12, Arbitration Rules of the Netherlands Arbitration Institute.

[38] Swiss Federal Court March 20, 1995, *ASA Bulletin* 1995, 511

[39] *MMIC v. Sterlite Industries (India) Ltd.*, Supreme Court of India, November 18, 1996, *ASA Bulletin* 1997, 136.

Under Islamic law it has been reported that originally a sole arbitrator was contemplated[40] and that later the *Hanafi* school allowed the appointment of more arbitrators provided they decided unanimously; the other schools of Islamic law do not generally provide for the appointment of more arbitrators No reference to this is to be found in El Ahdab[41], who refers to the *Madjella* as providing that each party shall appoint one arbitrator and that the appointment is to be made at the time one resorts to arbitration. Under Italian law the arbitrators may be one or more, provided they are an uneven number, and if an even number is appointed the state court shall appoint another arbitrator in order that their number becomes odd.[42]

When under the submission agreement or the arbitration clause the arbitrators must be appointed by the parties, each of them, by a notice to be served through a process server, may notify to the other party the name of the arbitrator or arbitrators whom it appoints, inviting the latter to appoint its own arbitrators. The party which has received an invitation to appoint arbitrators must serve, within twenty days, a notice with the name of the arbitrator or arbitrators whom it appoints.

Failing that, the party which has requested the other one to appoint arbitrators may file an application that the appointment be made by the President of the Court of the place where the seat of the arbitral tribunal has been established. If it has not yet been established, the application is filed with the President of the Court of the place where the agreement or the arbitration clause has been entered into.[43] If such a place is abroad, the application is made to the President of the Court of Rome. The President, after hearing the other party, if needed, issues an order which cannot be appealed against.

Under French law:

> The arbitral tribunal consists of a sole arbitrator or of more arbitrators, but they must be an uneven number.[44] If the parties appoint an even number of arbitrators, the arbitral tribunal will be completed by an arbitrator appointed in conformity with the agreement of the parties or, in its absence, by arbitrators designated by the parties or, if they do not agree, by the President of the *Tribunal de Grande Instance.*[45]

When arbitration takes place in a given state under a procedural law which is not the law of that state, and that law allows there to be an even number of

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40 SALEH, *op. cit.*, at 53.

41 EL AHDAB, *Arbitration with Arab Countries*, *cit* at 43.

42 Section 809, Italian Rules of Civil Procedure.

43 Section 810, paras. 1 and 2, Italian Rules of Civil Procedure.

44 Section 1453, *Nouveau Code de Procédure Civile.*

45 Section 1454, *Nouveau Code de Procédure Civile.*

arbitrators, it may be unwise to appoint a number of arbitrators when this is not allowed by the procedural law of the place of arbitration.

It should be reported that in the case of the appointment of a *troisième arbitre* (third arbitrator) after the taking of evidence, the French Court of Cassation in *Filatis*[46] quashed the attacked judgment because the arbitral tribunal had not reopened the debate.

In the end, one should not forget that one of the many reasons for the extraordinary long duration of *SEEE v. Yugoslavia*[47] was the appointment of two arbitrators.

The umpire

The umpire is a typical common law institution. As Mustill and Boyd point out:[48]

> The tendency in England is to have a sole arbitrator, with the possibility however for the parties to choose an arbitral tribunal consisting of an even number of arbitrators. In fact, the arbitration agreement frequently provides that each party should appoint an arbitrator, and that in the case of disagreement the two parties appoint a third arbitrator (the umpire); from that moment they terminate their function and the umpire decides alone. It should be mentioned in this respect that the two former arbitrators may even act from that moment for the parties which appointed them.
>
> The appointment of two arbitrators has generally been construed as including the implied provision that, in the case of disagreement, they could appoint an umpire.

Mustill and Boyd also point out that, because of recent legislation, the appointment of the third arbitrator is now interpreted to mean that he joins the other two in deciding and that if the parties wish to refer a dispute to an umpire, they must expressly so state.

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[46] *Sté Filatis v. Sté Lauterne and Co. Inc.*, Court of Cassation (France), January 31, (1979) *Rev. arb.* 1979, 366, in which a distinction is made between the *troisième arbitre* (in which case the Tribunal has a duty to reopen the debate), and the *tiers arbitre* (where it has not to do so).

[47] *Société d'Etudes et d'Enterprises. (SEE) v. Socialist Federal Republic of Yugoslavia et al,* Court of Appeal, Rouen,Nowember 13, 1984, *Yearbook Commercial Arbitration,* 1986, vol XI, at 491.

[48] MUSTILL and BOYD, (*op. cit.*, at 10-11) by referring to the practice of the umpire and of the arbitrators advocates, mention the London Court of International Arbitration whose rules (see now their last edition) take care to exclude the possibility that an arbitrator acts as advocate (Art. 5.2). 'All arbitrators (note: i.e. whether or not nominated by the parties) conducting an arbitration under these Rules, shall be and remain at all times wholly independent and impartial, and shall not act as advocates for any party'.

In arbitration with an umpire, in practice then the two arbitrators try to reach a decision; if they cannot, they appoint a third arbitrator who (and this is the difference vis-à-vis the appointment of the three arbitrators from the outset) then proceeds alone.

The Bombay Court's judgment in *Eurrestra*[49] shows one of the problems to which the appointment of two arbitrators, to be replaced by an umpire may lead:

> The two arbitrators were hearing oral evidence. At a given stage one of the arbitrators expressed the view that the questions which counsel for one of the parties was putting to a witness were unnecessary, while the other arbitrator felt they were relevant.
>
> The claimant requested the umpire to decide on this matter but the arbitrators informed the parties that there was no difference between them.

The notion of difference which triggers the replacement of the two arbitrators with an umpire, is – depending on the applicable law – an important or essential difference and it must be final as shown by a notice by the arbitrators to the parties and to the umpire.

The new English Arbitration Act (1996) still leaves to the parties the possibility of appointing an umpire.

This system may create doubts in other jurisdictions and it should not be used when it is not allowed by the law of the place of arbitration.[50]

12.3 CRITERIA FOR CHOOSING THE ARBITRATOR

The criteria for choosing an arbitrator are not generally stated by the parties to the arbitration agreement since, as we have seen, when it is entered into they frequently do not pay much attention to the possibility of the contract which they are negotiating not having a happy ending. Even less frequent is a mention of the qualities required for the arbitrator, such as his belonging to a given profession or having a given experience, or other elements.

The most one might find is a stipulation that the decision must be made by a technician, or by a businessman or by a lawyer.

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[49] *Eurrestra Industries Ltd. V. Karnataka Soaps and Detergents Ltd.*, Court of Bombay February 11, 1992, *AIR* 1992, Bombay, 252.

[50] Section 21, English Arbitration Act (1996).

It is even more surprising that the criteria for choosing arbitrators are frequently not stated by the parties even to the institutional bodies when they request them to make the appointment. This does not exclude the existence of arbitration clauses which state at least the nationality of the arbitrator or arbitrators. This is sometimes done positively, by stating a precise nationality, and sometimes negatively by excluding a given nationality. In any event, it is the general practice of institutional bodies to appoint a third arbitrator who is not of the same nationality as any of the litigants. The ICC rules provide:[51]

> ... The sole arbitrator or the chairman of the arbitral tribunal shall be of a nationality other than those of the parties. However in suitable circumstances, and provided that neither party objects within the time limit fixed by the Court, the sole arbitrator or the chairman of the Arbitral Tribunal may be chosen from a country of which any of the parties is a national.

The rules of the London Court of International Arbitration state:[52]

> ... In selecting arbitrators consideration will be given, so far as possible, to the nature of the contract, the nature and circumstances of the dispute and the nationality, location and languages of the parties. Where the parties are of different nationalities, then, unless they have agreed otherwise, sole arbitrators or chairmen are not to be appointed if they have the same nationality of any party (the nationality of the parties being understood to include that of controlling shareholders or interests) ...

The Commercial Arbitration Rules of the American Arbitration Association in turn specify[53]

> Where the parties are nationals or residents of different countries, any neutral arbitrator shall, on the request of either party, be appointed from among the nationals of a country other than that of any of the parties ...

The international rules of the Milan Chamber of Arbitration[54] provide:

> When it appoints the sole arbitrator or the president of the tribunal, the Arbitral Council shall appoint a person of a nationality other than that of the parties, when they do not have the same nationality.

The establishment of lists of arbitrators is generally unofficial. However, it is official for the Indian Council of Arbitration, the rules of which provide:[55]

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51 Art. 9.5, ICC Rules of Conciliation and Arbitration (1998).

52 Art. 33, Rules of the London Court of International Arbitration.

53 Art. 16, Commercial Arbitration Rules of the A.A.A.

54 Art. 5.4, International Rules of the Milan Chamber of Arbitration.

55 Art. 11, Rules of Arbitration of the Indian Council of Arbitration.

> A Panel of Arbitrators shall be appointed by the Committee from amongst persons who are qualified and willing to serve as arbitrators generally or in specific fields and who are from time to time recommended by the members of the Council or any other person or organisation.

Likewise the Court of Arbitration of the USSR Chamber of Commerce and Industry[56] states:

> The capacity to act as an arbitrator shall belong to a person included in the list of arbitrators and possessing adequate special knowledge in resolving disputes ...

Similarly, the American Arbitration Association, the International Arbitral Centre of the Federal Economic Chamber of Vienna, the Chartered Institute of Arbitration , CIETAC and the ICSID Centre have an official Panel.

In Argentina[57] since the arbitrators have to apply strictly the law,both as to the substance and as to procedure, the arbitrators must be lawyers. This requirement does not apply when the arbitrator is instructed to act as *amiable compositeur*. Legal entities may not be appointed as arbitrators. Judges may not act as arbitrators unless the state or a province is a party to the dispute.

If the parties do not mention the requirements for making the appointment, the choice is then made by the court of arbitration according to the information in its possession and based on its previous experience. The criteria for the choice of arbitrators are in reality multiple:

- nationality;
- experience of the arbitrator, preferably in the specific area which is the subject of the dispute;
- possession of a balanced mind;
- independence
- impartiality
- arbitrator's knowledge of the languages of the litigants or of the language in which the proceedings will take place;
- time availability;
- availability to travel, when this seems likely.

A further element must be mentioned, i.e. the problem of the choice between lawyers or technical experts.

There are two opposite views in this respect. According to one of them, arbitrators should be selected only among lawyers; according to the other view,

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[56] Para. 4. 1, Rules of the Arbitration Court of the USSR Chamber of Commerce and Industry.

[57] H. D. GRIGERA NAON, *Argentina, International Handbook on Commercial Arbitration*, Kluwer.

only technical experts are able to take a decision going straight to the root of the problem without wasting time on procedural issues.

In reality, as it frequently happens, both views contain a portion of truth. Technicians certainly have the great advantage of being able to go straight to the issue without being hampered by legal arguments. However, they frequently lack legal training and experience of disputes which, since arbitration is an instrument for dispute settlement, is a very important element and probably one which cannot be waived.

Those trained in the law sometimes indulge in slow and outdated proceedings, or may even try to imitate court proceedings, which is exactly what the parties usually wish to avoid by referring the dispute to arbitration. In this respect it is submitted that the general opinion that a good lawyer is necessarily a good arbitrator is not correct. In fact, the requirements for discharging the function of judge or of arbitrator are different from those for the making of a good advocate. An excellent advocate might not possess the requirements of a balanced view, calm and distance from the parties, which are needed for a good decision (by a judge or by an arbitrator). Consequently good counsel being equal to good arbitrator is not always true. Similarly, the problem arises for those who have only an academic background, because they may remain restricted to purely mental abstractions, rather than dealing with pratical realities.

The position is different regarding the appointment of a judge as an arbitrator. The wealth of experience he has gained by full-time work in his profession certainly weighs in favour of the appointment of a good judge as an arbitrator, whether he is still in office or retired. If there is an obstacle in this respect, particularly in international arbitration, it is the difficulty for a judge to proceed differently from the way he has been accustomed to; i.e. the difficulty of his moving into a dispute which is international from a procedural point of view. The difficulty is not simply that the litigants come from countries with different legal systems; it is also necessary to understand their way of reasoning, to be able to interpret their intentions and behaviour, and to apply different procedural rules when necessary. All this needs time, the right attitude and specific experience.

A very special situation arose from the French judgment in *Lux Air*:[58]

> Lux Air terminated its sales representative agreement with Italiban which provided that, in the case of dispute, a sole arbitrator would be appointed. If the appointment could not be agreed upon, the Commercial Court of the Grand Duchy of Luxembourg would hear the dispute and apply its own proceedings.

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[58] *Sté Italiban v. Sté Lux Air*, Court of Appeal, Paris, November 14, (1975) *Clunet* 1976, 429.

> Italiban, instead of contacting Lux Air for the appointment of a sole arbitrator, initiated proceedings before the Court of Beirut. The Paris Court of Appeal refused to grant *exequatur* to the Lebanese judgment.

This decision has been seen as an acknowledgement of the validity of the arbitration agreement, and as a recognition of the possibility of *appointing a tribunal as arbitrator*. In fact, the reference to the Court's 'own proceedings' could be construed as a reference to Luxembourg arbitration law and not to the procedural rules which apply to court proceedings.

If this interpretation is correct, this would mean that the Court could sit as an arbitral tribunal. In support of this it could be argued that, if a judge can be appointed as an arbitrator, nothing prevents the parties from appointing three judges. If they accept, they form an arbitral tribunal. However, state courts frequently have more than three judges; if so the choice of that court does not automatically amount to forming a panel of three judges. If the method for appointing the three arbitrators has not been chosen, it could be argued that the choice is left to the President of that court, and that even in institutional arbitration the choice of the arbitrators is made by the court of arbitration. However, it is suggested that it is difficult to treat as valid an arbitration clause which does not clearly state the method for choosing arbitrators within a state court and that beyond such precise limits the arbitration clause would mix together arbitration and court proceedings.

The clause seems then to have to be construed as providing for arbitration only if the parties could agree on the appointment of the sole arbitrator. In the absence of this the arbitration clause would produce no more effects and the dispute should be tried before the Court of Luxembourg.

It has been debated whether the same person may first act as Conciliator or Mediator and then as Arbitrator. A prudent solution seems to be to provide that the Arbitrator must not be the same person who acted as Conciliator or Mediator if, while descharging such task, he has expressed his views in some manner.

12.4 Direct or Indirect Appointment – *Intuitus Personae*

The tendency in international arbitration is not to appoint the arbitrator in the arbitration agreement but to leave the appointment to the chosen institutional body.

The reasons for this, even though they are varied, might be summarized as follows. The main reason is the difficulty for the parties, from the psychological point of view, at the time of entering into a contract, to deal from then with the hypothetical case of the most negative event which might occur, i.e. the failure of the contract. The other main reason is generally the difficulty for several parties to make a satisfactory choice of international arbitrators.

However, in this way the problem is simply delayed and not solved since, if a dispute arises, the arbitrator or the third arbitrator will still have to be chosen at a time when the relationship between the parties has worsened. Since the parties will not be able to agree on this, the choice will have to be made by a third party. The importance of choosing a good arbitrator for the success of arbitral proceedings cannot be sufficiently emphasized. For this reason it is suggested that the parties should choose their arbitrators themselves whenever possible. Particular reference is made in this respect – in the case of an arbitral tribunal – to the choice of the third arbitrator. To leave to a third party, even if it has the best possible organisation as an arbitral institution, the key element of arbitral proceedings, i.e. the appointment of the third arbitrator, to whom one of the parties will probably later attribute a wrong decision, does not seem to be the ideal solution. On various occasions, several officers of institutional bodies have agreed on a personal basis that it would have been preferable for the parties to designate themselves the third arbitrator. The reason for *intuitus personae* (the choice of a person as a sign of trust in him only), is found in the need for a direct choice of the person who must make complicated, delicate and sometimes imponderable decisions, in which the subjective element will frequently be sovereign. It is suggested that it is advisable that the third arbitrator be chosen by the parties from the outset with the cooperation of an arbitral institution which should submit to them various possible arbitrators. A meeting at the institutional body, even when it has been designated for the appointment, with the attendance of the parties or of their counsel, in order to have their views and suggestions, seems desirable, even if they are not binding, so that a choice which takes into account as much as possible the desires of the parties can be made. The parties should be allowed to assess – if they so wish – the personality of the proposed arbitrators at a *pre-appointment conference* since a random choice is not advisable from any point of view. This is the formula adopted by the European Court of Arbitration:[59]

> The parties shall be summoned by the Secretariat of the Court to a preliminary meeting chaired by the member of the Executive Committee designated for this purpose, unless such a meeting is clearly unnecessary. At this meeting the parties will be invited by the Court to form the Arbitral Tribunal, ...
>
> In the absence of an agreement by the parties as to the Chairman, his nomination will be made by the two party – appointed arbitrators or, in the event of disagreement between them continuing for 10 days after the preliminary meeting, the Chairman will be appointed by the Court ...

[59] Art. 9.1.

12.5 APPOINTMENT – ACCEPTANCE – LACK OF DESIGNATION

As we have seen, the appointment of the arbitrator and his acceptance are essential requirements for the arbitration agreement to become operational. Such appointment and acceptance must in general be made in writing. Even in jurisdictions where the written form is not required this is advisable at least *ad probationem* (i.e. in order to prove it). Lack of designation is generally the first problem to arise in arbitral proceedings. Let us begin the analysis of this problem by the international Conventions.

The combined effects of the European Geneva Convention (1961)[60] and the Paris Agreement (1962)[61] lead to the conclusion that, when the arbitrators are not designated, the competent body shall appoint them at the request of the more diligent party.

The Washington Convention (1965) provides that:[62]

> If the Tribunal shall not have been constituted within 90 days after notice of registration of the request has been dispatched by the Secretary-General in accordance with paragraph 3 of Art. 36, or such other period as the parties may agree, the Chairman shall, at the request of either party, and after consulting both parties as far as possible, appoint the arbitrator or arbitrators not yet appointed ...

Regarding arbitration rules, the ICC provides as reported above.[63]

The British Columbia Rules of Procedure provide[64] in the case of lack of designation:

(1) Where a single arbitrator is to be appointed, and the parties have not yet agreed upon an arbitrator 21 days after the arbitration has commenced, a party may request the Centre to appoint the single arbitrator.

(2) Where three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators so appointed shall choose a third arbitrator within 14 days of the date on which the second arbitrator was appointed.

The third arbitrator will act as the presiding arbitrator of the tribunal.

The arbitration rules of the *Associazione Italiana per l'Arbitrato* (Italian Society for Arbitration)[65] provide:

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60 Art. IV 1) i), Geneva Convention (1961), *cit.*

61 Art. 1, Agreement Implementing the European Convention (1962).

62 Art. 38, Washington Convention (1965), *cit.*

63 See *supra* note 29.

64 Art. 12, Arbitration Rules of the British Columbia International Commercial Arbitration Centre, 1998 ed.

65 Art. 12, paras. 4-5, A.I.A. Rules of arbitration, 1994 ed.

> 4. If the parties within the time-limit provided for the answer to the request for arbitration, have not expressed mutual agreement concerning the number of arbitrators, the Court shall appoint a sole arbitrator, unless the particular aspects of the controversy suggest the opportunity of appointing a panel of arbitrators. In this case each party shall appoint an arbitrator and, by common agreement, the presiding arbitrator, within the time-limit fixed by the Court, ... [The Court] shall proceed to the appointment of the presiding arbitrator and of the arbitrator not appointed within the time-limit.
>
> 5.Where the parties are more than two or are composed of a plurality of subjects or where there are more than three arbitrators, and where the agreements between the parties in regard to the appointment of the arbitrators are lacking or inadequate or where the parties fail to set-up the arbitral tribunal within the time-limit provided for the answer to the request for arbitration, the Court, if need be, shall set the number and the manner for the appointment of the arbitrators and can proceed to their appointment directly. Likewise the Court shall proceed to the appointment of a further arbitrator where, in violation of the provisions of the applicable law, the parties have appointed an even number of arbitrators.

Under Italian law if the arbitrator has not been designated or no mention has been made of the procedure to be followed to appoint him, the arbitration agreement[66] could be declared null and void. The 1994 Arbitration Act[67] has amended this as follows:

> In the absence of agreement of the parties as to the number of the arbitrators, the arbitrators shall be three and in the absence of their appointment they are appointed, unless the parties have provided otherwise, by the President of the Court, according to section 810.

Under the Geneva Convention (1961), in arbitration involving nationals of states which have adhered to the Convention, similar requirements are no longer grounds for nullity since they are replaced by the provisions of the Convention. An example of this is the Italian award in *Malvisi v. Trans Air*:[68]

> The arbitration agreement entered into between the litigants (an Italian and a French party) did not appoint the arbitrators, or did not specify how to appoint them. The nullity of the arbitration agreement was argued on this ground. However, the arbitrators held that the agreement

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66 Sections 809 and 829, no. 2, Italian Rules of Civil Procedure.

67 Section 809, Italian Rules of Civil Procedure.

68 *Malvisi S.p.A. v. Trans Air Sud S.A.,* Arbitral Tribunal, Milan, June 24, 1987, *Foro pad.*1987, 1, 507.

> was valid since the European Convention (1961) applied, and it had abolished such a requirement.

Generally, the lack of designation of the arbitrator is remedied by applying to the body which has been referred to or to the courts so that they make the appointment. This is also done when the parties, or the two arbitrators appointed by them, cannot agree on the appointment of the third arbitrator.

In institutional arbitration, non-appointment of the third arbitrator directly by the parties, when so provided, is remedied, as a matter of course, by the appointment by the institutional body. Even on this issue the solution depends in any case on the wording of the arbitration agreement.

A further problem arises when a party does not appoint an arbitrator within the specified time limit but makes that appointment after its expiry and the arbitration agreement or the rules of arbitration do not govern this matter directly. In the absence of a rule covering this situation and when the express or implied intention of the parties as to the nature of this time limit cannot be inferred from the arbitration agreement, the consequences of non-respect of the time limit will be decided by the appropriate authority, be it state courts or an arbitral institution. It is suggested that, after the expiry of that term, the appointment ought to be made by the designated authority, which, if it deems it convenient, will take into account the information received – even if late – by the party which should have made that appointment.

12.6 Capacity of the Arbitrator – Sex and Nationality

Even the capacity of the person appointed as an arbitrator has to be checked. This issue will be examined first in relation to the international Conventions and arbitration rules and then under some national laws.

Starting with the international Conventions, the Washington Convention (1965) must be mentioned first, since it contains detailed provisions in this respect:[69]

> (1) Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry and finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of arbitrators.
>
> (2) The Chairman, in designating persons to serve on the Panels, shall in addition pay due regard to the importance of assuring representation on the Panels of the principal legal systems of the world and of the main forms of economic activity.

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[69] Art. 14, Washington Convention (1965), *cit.*

The same Convention later provides:[70]

> (1) Arbitrators may be appointed from outside the Panel of arbitrators, except in the case of appointments by the Chairman pursuant to Article 38.
>
> (2) Arbitrators appointed from outside the Panel of arbitrators shall possess the qualities stated in paragraph (1) of Article 14.

The ICC Arbitration Rules,[71] while not dealing in detail with this issue, state:

> An arbitrator shall also be replaced on the Court's own initiative when it decides that he is prevented *de jure* or *de facto* from fulfilling his functions, or that he is not fulfilling his functions in accordance with the Rules or within the prescribed time limits.

Likewise the arbitration rules of the Italian Society for Arbitration provide:[72]

> The arbitrator appointed ... shall promptly communicate his acceptance to the Court, declaring that no factors exist which could influence his independence in performing his task ...

The Vienna Stock and Commodity Exchange rules[73] are more precise when they list among the grounds for termination of office:

> a final sanction for irregularities or dismissal from his office.

However, even here there are no specific provisions describing the requirements to be fulfilled in order for an arbitrator to be considered capable.

Sex and Nationality of the Arbitrators

Whether an arbitrator can be of foreign nationality or may be female should go without saying in the third millenium. However such a shift in thinking has only occurred a relatively short time ago even in Europe and sex is still a problem in some although not in all Muslem countries, which apply *Sharia*, since the *Fiqh* reserves judging and arbitrating to men. As to nationality, religious laws do not always award to persons of a different faith the right to sit as an arbitrators at least in domestic disputes. For example in some Arab Countries the requirement for appointment is to know the *Sharia*.

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70 Art. 40, Washington Convention (1965), *cit.*

71 Art. 12.2 ICC Arbitration Rules (1998).

72 Art. 11, AIA (Italian Society for Arbitration) Rules.

73 Art. 15 of the Vienna Stock and Commodity Exchange.

Even state laws may give rise to obtacles. In 1991 the Supreme Court of Columbia[74] has held that an Executive Order allowed foreigners to act as arbitrators if the litigants were foreigners, or if the dispute arose abroad. The decision was based on the ground that acting as an arbitrator is a civil right which may only be enjoyed by citizens.

Capacity to act as arbitrators may be excluded by specific statutory provisions. That is the case of the exclusion, in some legal systems, of judges.

In some Latin America countries, only attorneys may act as arbitrators, since the requirement for that is knowledge of the law.

The capacity to act as arbitrator may be excluded by the arbitration agreement. This exclusion may be specific to a given category e.g. public officers, or may derive from the express indication of the requirements of the arbitrator: e.g. he must be an attorney or a law professor, which excludes all other professions or activities.

It is submitted that the arbitrator's capacity must go beyond the obvious capacity to hold rights and to act, and must also include that of being able to decide, which means he must have an adequate specific preparation, conduct and moral stature which place him on the same level as a judge. The lack of these requirements might prevent his appointment or cause his challenge, or his replacement by the institutional body or, depending on the circumstances, by state courts.

12.7. PHYSICAL PERSON OR LEGAL ENTITY

Traditionally only physical persons were appointed as arbitrators. However in the last decades the possibility of appointing a legal entity as arbitrator has been contemplated.

In some legal systems this has been considered possible if the task is to discharge joint instructions to settle, but not to act as an arbitrator.

The general view still is that a legal entity may not act as an arbitrator. However in *Delattre*[75] a French Court of Appeal held that in disputes between the main contractor and a subcontractor the appointment of the Engineer as arbitrator is valid even if the Engineer is a legal entity. In fact the legal entity may discharge the task to organize the proceedings and appoint one of its officers as arbitrator.

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[74] Supreme Court of Columbia (Joint Divisions) March 21, 1991, *Rev.arb.* 1991, 720.

[75] *Delattre es qualité et al. v. Sté Ascinter Otis*, Court of Appeal, Grenoble, April 26, 1995.

This view, which does not seem to represent the general opinion in France[76] cannot be shared because even if a legal entity *may* appoint one of its officers to act as arbitrator – which is far from being settled in many jurisdictions – this does not mean that such an entity is appointed for that purpose. It is then suggested that the appointment of a legal entity does not stand on this ground.

Nevertheless, the possibility exists that an arbitral institution, instead of administering arbitral proceedings, decides them itself. Even the Court of Justice of the European Communities is statutorily empowered[77] to act as the arbitrator in labour and other disputes between the European Commission and third parties. This was neatly held by that Court in *Feilhauer*:[78]

> A German contractor challenged the validity of the arbitration agreement under German law. The Court rejected the argument, holding that it derived its authority from the Rome Treaty and that national laws had no relevance in this respect.

The same Court confirmed this in *Bauer*[79] adding that if the parties have agreed that arbitration be preceded by conciliation, the Court will be unable to hear a submission to arbitration unless conciliation has taken place.

12.8. TRAINING OF ARBITRATORS

A peculiarity of arbitrators is that they may be appointed suddenly even if they have never dealt with arbitration before. Admittedly this is rare but possible in particular with regard to party – appointed arbitrators.

Without reaching such an extreme situation, the increase in the number of arbitral proceedings has brought into this arena people who have not been previously involved in it to any great extent.

While each party is and must remain free to make its own choice, some training would in general be useful to those who are available to become arbitrators.

Some arbitration courses are held over the world, frequently in an informal way, even if many of them at the end issue a certificate. The Chartered Institute of Arbitrators must be praised for its training of arbitrators, which is a requirement in order to get on to its arbitration panels and which is needed in

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[76] Ph. FOUCHARD, *Le statut de l'arbitre dans la jurisprudence française*, *ICC Bulletin*, special issue 1995, 12.

[77] Art. 181, Rome Treaty.

[78] *Feilhauer v. European Commission*, Court of Justice of the European Communities, April 1992, *International Arbitration Report*, vol. 7 no. 5, May 1992, 15.

[79] *Bauer v. European Commission*, Court of Justice of the European Communities April 6, 1995 no. 299/93, *Rev.arb.* 1996, 105.

particular by those who have no legal background. This example could be usefully followed in other parts of the world.

On this subject reference is made to the many articles and notices contained in Arbitration (the Journal of the Chartered Institute of Arbitrators) and to Caldwell.[80]

12.9 IMPARTIALITY – ABSENCE – MISCONDUCT – CHALLENGE

Distinction between independence and impartiality

Independence and impartiality are frequently considered as synonyms, with the consequence that reference to both of them would be unnecessary.

It is submitted that the two notions are different even if on some occasions some overlapping may occur between them.

Independence literally means lack of dependence. There can then be no independence if the potential arbitrator is the employee of or a consultant or an advisor to one of the parties or to its shareholder, or manager, or to counsel for one of the parties.

Other situations may lead at least to psychological dependence. That may be the case of an arbitrator who belongs to the same law firm of Counsel for a party, or of an arbitrator who is a citizen of a State in a dispute to which that State is a party. These grounds too may prevent independence.

A psychological dependence might – depending on the circumstances – exist when an arbitrator is regularly appointed as an arbitrator by one party, if such regular appointments and their financial relevance are such that they have become an important source of income for that person.

This might in fact act as a deterrent for him or her against finding against such a party.

Similarly, a promise to hire the arbitrator or to grant him advantages of any kind, after the completion of the proceedings, or to make the arbitrator benefit from the award, as in *Pottberg*[81] where the arbitrators were also potential claimants; in *Readington*[82] where the award was vacated because the winning party was a debtor to the arbitrator and the money which he collected out of the award was used to repay him; and in *Friedman*[83] where the arbitrator borrowed money from one of the parties during the proceedings.

In *Icori*[84] dependence was defined as:

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[80] P.S. CALDWELL, *The Training of Arbitrators and Quality Assurance of Arbitration*, 9 *J.Int.Arb.* 3, 99.

[81] *Hyman v. Pottberg's Ex'rs* 101 F2d 262 (2nd Cir. 1939) in BORN, *cit,* at 611.

[82] *Rand v. Readington* 13 N.H. 72 (1842).

[83] *In re Friedman*, 213 NYS 369 (App. Division 1925).

[84] *KFTCCIC v. Icori Estero*, Court of Appeal, Paris, June 28, 1991, *Rev.arb.* 1992, 568.

> a material or intellectual link with one of the litigants, such as to affect the decision of the arbitrator, showing a risk of bias vis-à-vis one of litigants.

Along the same lines are *Engrais de Gabès*[85] et *Gemanco*.[86]

However, this definition does not seem sufficient to distinguish independence from impartiality.

While independence and impartiality are well-identified notions, the possession of other requirements such as good conduct, moral stature and a good training might be seen as belonging to the capacity to act as arbitrator.

It is submitted that impartiality is to be distinguished from independence, since it refers to a state of mind which is not necessarily the result of psychological dependence.

A friend and even more a close friend of a party will rarely be able to be impartial.

An Arab or Israeli arbitrator might have great difficulties in being impartial in a dispute between Arab and Israeli parties.

In trade disputes, an arbitrator who is a member of that trade may have difficulties in being impartial in a dispute between another member of his trade and a third party.

In general while one can say that someone who is not independent cannot be impartial, someone who is independent may be not impartial.

Both requirements are consequently to be taken into account in checking the position of a potential arbitrator.

Lack of independence and/or impartiality and lack of capacity to act

A fundamental requirement for the arbitrator is his impartiality. The arbitrator has an authority similar to that of a judge, and sometimes a wider one. Therefore he must place himself in a position of absolute impartiality vis-à-vis the parties.

This matter will be examined first in relation to the international Conventions and to some national legal systems.

International Conventions

The Washington Convention's (1965) provisions have already been reported above.[87]

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[85] *Sté T.A.I. et al. v. Stés SIAPE, Engrais de Gabès et al*, Court of Appeal Paris, June 2, 1989, *Rev.arb.* 1991, 87.

[86] *Sté Gemanco v. Sté SAEPA et al.*, Court of Appeal, Paris, June 2, 1989 *Rev.arb.* 1991, 87.

[87] See *supra* note 67.

Arbitration Rules

The procedural rules of the Arbitration Chambers of Commerce of the CMEA countries[88] state that:

> The arbitrators are impartial and unbiased in discharging their duties. They are not representatives of the parties.

The international rules of the Milan Chamber of Arbitration state:[89]

> The Arbitral Council shall choose arbitrators in such a way as to guarantee maximum independence and impartiality.

and the ICC Rules:[90]

> Every arbitrator appointed or confirmed by the Court must be and remain independent of the parties involved in the arbitration.

Similarly, the Rules of the London Court of International Arbitration specify:[91]

> ... All arbitrators (whether or not nominated by the parties) conducting an arbitration under these Rules shall be and remain at all times wholly independent and impartial and shall not act as advocates for any party,

(thus echoing the practice of the arbitrator/advocate of a party, to which reference was made above when dealing with the umpire) and the Arbitration Rules of the European Court of Arbitration:[92]

> The Arbitrators must be, have been and remain completely independent of the parties and impartial.

The need for the arbitrator's independence is also affirmed by the Court of Arbitration of the Polish Chamber of Foreign Trade in Warsaw:[93]

> An arbitrator is independent, he shall not be bound by any instructions. He shall perform his functions according to the best of his knowledge and skill, in an impartial way. He shall not represent any of the parties.

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88 Art. 4.2, CMEA Uniform Rules of Procedure.

89 See *supra* note 54.

90 Art. 2.7, ICC Rules of Conciliation and Arbitration.

91 Art. 3.1, Rules of the London Court of International Arbitration.

92 Art. 9.9.

93 Para. 16, Rules of the Court of Arbitration at the Polish Chamber of Foreign Trade.

National legal systems

The Italian Rules of Civil Procedure Code make reference[94] as to arbitrators to Section 51 which deals with the challenge of a judge. It follows from this that the arbitrator's independence is protected as that of members of the judiciary.

In French law the *Nouveau Code de Procédure Civile*[95] provides:

> The formation of an arbitral tribunal is not complete until the arbitrator or arbitrators accept their appointment. The arbitrator who assumes that there may be a ground for challenge of his appointment must inform the parties. If so, he cannot accept his appointment without the consent of the parties.

Lack of impartiality generally means that the decision will be declared null or that the arbitrator can be challenged.

In the U.S. in *Del Monte*[96] the Court of Appeal made a reference to the AAA Code of Ethics for Arbitrators in Commercial Disputes which at Clause VII states as to party appointed arbitrators that they:

> ... may be predisposed towards the party who appointed them but in all other respects are obligated to act in good faith and with integrity and fairness.

which reflects Clause VII of the AAA-ABA Code of Ethics which states that party appointed arbitrators:

> should be considered non-neutrals unless both parties inform the arbitrators that all three arbitrators are to be neutral or unless the contract, the applicable arbitration rules or any governing law requires that all three arbitrators be neutral.

The international Conventions, arbitration rules and finally national legal systems will now be examined.

International Conventions

The Washington Convention (1965),[97] for example, provides that the award can be set aside in the event

> that there was corruption on the part of a member of the Tribunal.

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94 See section 815 Italian Rules of Civil Procedure.

95 Section 1452, *Nouveau Code de Procédure Civile.*

96 *Sunkist Growers Inc. v. The Del Monte Corporation*, U.S. Court of Appeals, 11th Circuit, (10 F. 3rd 753 11th Cir. 1993).

97 Art. 52 c), Washington Convention (1965), *cit.*

Arbitration rules

The international rules of the Milan Chamber of Arbitration[98] provide:

> When giving notice of his acceptance, the arbitrator shall state in writing:
> - any relationship with the parties or their Counsel which may affect his independence and impartiality;
> - any personal or economic interest, either direct or indirect in the subject matter of the dispute;
> - any prejudice or reservation as to the subject matter of the dispute which may affect his impartiality.

The ICC Rules in substance are along the same lines.[99] The possibility of replacing the arbitrator who appears to be 'suspect' is also provided for in the rules of the London Court of International Arbitration.[100]

Precedents

In *Utexbel*[101] the Swiss Federal Tribunal, examining the arbitration rules of the Court of Arbitration of the Cotton Market in Gand under an arbitration clause referred to as the 'Gand Contract', confirming its previous decisions on such issues, stated that:

> although the executive committee and the board of directors exercise a considerable influence on the appointment of the arbitrators, it does not follow that the award should not be confirmed.

This is in line with the previous jugment in *Ligna*[102] in which the German Court had held that the appointment of the arbitrators by the Czechoslovakian institutional body being limited to Czechoslovakian citizens was not in itself evidence of incompatibility. Derains comments:[103]

> In fact, the Cotton Market of Gand, in a way which shows fairly clearly the idea some commercial circles have of arbitration, invited the parties to appoint their arbitrator, i.e. 'the person entrusted with the defence of their interests' and the arbitrators did not hesitate to describe themselves as 'arbitrator-advocates.'

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98 Art. 6.2, International Rules of the Milan Chamber of Arbitration.

99 Art. 2, paras. 7-8, ICC Rules of Conciliation and Arbitration.

100 Art. 3.6, Rules of the London Court of International Arbitration.

101 *Egentran v. Utexbel S.A.*, Federal Court (Switzerland), January 25, (1967) *Clunet* 1970, 437.

102 *Ligna v. Baumgartner*, Federal Court (Switzerland), February 12, 1958 quoted by van den BERG, *op. cit.*, at 379, note 403.

103 See *infra* note 178.

The essential nature of the impartiality of arbitrators requirement is reaffirmed by the Hamburg *Landgericht* in the herebelow reported *Netherlands Coffee Trade* decision:[104]

> 3. Given the judicial functions of arbitral tribunals, any arbitral tribunal has to warrant that it is independent and impartial. An arbitral tribunal of an association, including the arbitral tribunal of the Netherlands Coffee Trade Association, does not satisfy this requirement when, being dominantly or exclusively composed of association members, it has to decide a dispute between a member and a non-member of the association. The Chamber adheres insofar – also on the merits – to the opinion of the Federal Court of Justice (BGHZ 51, 255) and of the Swiss Federal Supreme Court (NJW 1955; see, e.g., BGE 97 I 490) and does not follow the contrary view of the Hamburg Court of Appeal (MDR 1975, 409).
>
> 4. An arbitration agreement that provides for the decision by an arbitral tribunal of an association in a legal dispute between a member and a non-member does not only violate mandatory law (BGH id.), but also public policy (Swiss Federal Supreme Court id.) since the principle of the parties' equal right in appointing arbitrators – principle of arm's length – and the neutrality of the arbitral tribunal towards both parties are part of the fundamental principles of the law of arbitration.'

Etat du Dubai[105] describes as follows the requirements for challenge:

> an arbitrator may be challenged on the ground of partiality only if circumstances show a risk that the arbitrator is certainly biased in favour of one party and justify reasonable doubts as to his independence.

The life of members of the arbitration circuit is indeed very varied. This is shown also by a good number of precedents. In one case the defendant was confronted with a situation where the chairman of the arbitral tribunal (male) was sharing a hotel room with Counsel for Claimant (female).[106] It is reported that the award, which was in favour of claimant, was vacated by stipulation of the parties.

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[104] Landgericht Hamburg, December 10 (1985) and December 30, (1985) *Yearbook Commercial Arbitration* 1987, at 488.

[105] *Etat de Dubai and Sté Dubai Drydocks v. Sté Halcron and F. McWilliams*, Court of Paris, April 1, 1993, *Rev.arb.*, 1993, 45.

[106] R.B. SCHNITT, *Suite Sharing: Arbitrator's Friendship with Winning Lawyer Imperils Huge Victory*, *Wall Str. J.*, Feb. 14, 1990.

The fact of having been involved in the dispute at a prior stage is generally considered as an element which may affect impartiality. An example of this is the well-known French judgment in *Galéries Lafayette*[107] concerning an arbitrator who had previously given an opinion to a party.

However in *Résidence du Bois d'Aurouze*[108] the French Court of Cassation, in the absence of challenge of the arbitration by the other party, held that:

> the mere fact that the arbitrator, before the dispute arose, prepared an expert report for one of the parties does not affect the composition of the arbitral tribunal.

A statement of independence is required by the ICC International Court of Arbitration.[109]

> The Secretary General may confirm as co-arbitrators, sole arbitrators and chairmen of arbitral tribunals persons nominated by the parties or pursuant to their particular agreements, provided they have filed a statement of independence, without qualification or a qualified statement of independence has not given rise to objections ...

The Arbitration Rules of the European Court of Arbitration require[110] ... that:

> The arbitrators shall be, have been and in future during the arbitration proceedings, remain completely independent of the parties and act impartially in their role as arbitrators.
>
> Within the ambit of the arbitral proceedings the arbitrators shall have formal contacts with Counsel for the parties and the parties themselves only as provided by the arbitral proceedings.
>
> In the event of exchange of correspondence between a party and the arbitral tribunal, the tribunal shall ensure that each party's rights to have full knowledge of the statements made by the other party or parties are met in all circumstances.

The independence of the arbitrators has been the object of a series of reports which have appeared in 1991 in a special issue of the ICC Bulletin and of an interesting and rich study by Rau.[111]

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[107] *Ury v. Galéries Lafayette*, Court of Appeal, Paris, May 8 (1970), *Rev.arb.* 1970, 80.

[108] *Sté Résidence du Bois d'Aurouze v. Sté Devoluy Vacances*, Court of Cassation (France), April 19 (1985) *Rev.arb.* 1986, 57.

[109] Art. 9.2 ICC Arbitration Rules (1998).

[110] Art. 9.9 Arbitration Rules, European Court of Arbitration (1997).

[111] A.S. RAU, *Integrity in Private Judging*, 38 South Texas Review 2, 485.

The arbitrator's duty to describe facts which might give rise to a challenge has been dealt with by Bader[112] and held in *Icori:*[113]

> The arbitrator's duty to disclose in order to allow the parties to challenge him must be assessed in respect of whether the situation in issue is known and of its effect on the arbitrator's decision.

In *Bettens*[114] the Court of Vaud handled a situation where the arbitrator had previously acted as arbitrator in a matter related to the liquidation of one of the litigants in that company.

The duty of the arbitrator to inform the parties as to situations which might give rise to doubts as to his independence or impartiality was reaffirmed in *Milan Press*[115] where the Court of Appeal, Paris held:

> The duty of the arbitrator to inform the parties has to be considered taking into account also the fact that the situation may or may not be known and considering its effects on the decision of the arbitrator. The fact that the arbitrator did not tell the parties that he was married to the mother of Counsel to one of the parties no longer allowed any further the other parties to be certain of his independence and impartiality.

These precedents introduce a wider question. Is there a breach of the duty of independence or impartiality if a party-appointed arbitrator has been appointed by that party as arbitrator in other proceedings?

This by itself does not seem to amount to partiality and be a ground for non-confirmation of the appointment by an arbitral institution or for challenge. If the chairman of an Arbitral Tribunal has been appointed or is later appointed by one party as arbitrator in other proceedings, that may or may not, depending on the circumstances, amount to loss of impartiality.

Another ground for challenge was discussed in *Sherif Ben Nasser*[116] where Prof. Poudret, the Chairman of two parallel arbitrations, between different parties concerning the same matter, was challenged by Mr. Ben Nasser on the ground that he had decided *ex officio* an issue which had not been raised and that as Chairman he had not advised the parties of an award which he had made in the other proceedings involving the guarenteeing banks and on the third ground that when he decided in their proceedings, he had already decided in the other proceedings in a way which was prejudicial to that party.

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[112] J.L. BADER, *Arbitrator Disclosure Probing the Issues,* 12 *J.Int.Arb.* 3, 39.

[113] *KFTCCIC v. Icori Estero*, Court of Appeal, Paris June 28, 1991, *Rev.arb.* 1992, 568.

[114] *Bettens v. Pasche*, Court of Vaud, March 15, 1994, ASA *Bulletin* 1995, 72.

[115] *Société Milan Presse v. Société Média Sud Communication*, Court of Appeal, Paris, January 12, 1999, *Rev. arb.* 1999, 381.

[116] *Sherif Ben Nasser et al. v. Banque Nationale de Paris et Crédit Lyonnais*, Court of Appeal, Paris, October 14, 1993, *Clunet* 1994, 446.

The Arbitral Tribunal had decided that the main debt (which had been guaranteed by the bank, and in relation to which the second arbitral proceedings had been instituted) existed.

The Court of Appeal excluded that there had been any breach of due process, when the arbitrators reached decisions in two parallel procedings and held that an arbitrator may sit in parallel proceedings. The Court pointed out that this conclusion might differ if the arbitrator decided the other proceedings in a way which was unfavourable to a party.

According to *Roche:*[117]

> misconduct ... will not be found unless the aggrieved party was denied a 'fundamentally fair hearing.'

A good number of challenges have been brought against arbitrators. This allows to examine specific situations and to try to identify trends.

On some occasions the arbitrator gets so involved in polemics with Counsel for a party that he antagonizes that party and loses impartiality. That was the case in *R. v. Butler*[118] where the New South Wales Court in Australia held that an arbitrator like a referee should:

> not descend in the dust of the arena.

Likewise in *Tousek:*[119]

Both judgments were following *Liversey*[120] in which the High Court of Australia, while reviewing the decision of a lower court which had removed an arbitrator on the grounds of reasonable suspicion of bias, substituted the words 'reasonable apprehension' for 'reasonable suspicion'.

In turn in *Pimas*[121] the Court held that the referee had said things which should convey to a fair minded observer the impression that the referee held strong views which were contrary to the way in which the claimant's case was generally conducted.

The judge, in ordering his removal, stated that the referee's conduct:

> was apt to deny irrevocably natural justice to the dissatisfied party by presenting him with a possibly biased referee.

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[117] *Roche v. Local 32 B – 32 J Serv. Employees Intl. Union*, 755, F. Suppl. 622, 624 (S.D.N.Y. 1991).

[118] *R. v. Butler*, (1953) 53 SR (NSW) 328 at 331.

[119] *Tousek v. Bernat* (1960) 77 WU 838 at 842 – 843.

[120] *Liversey v. New South Wales Bar Association* (1983) 151 CLR 288 at 294.

[121] *Pimas Construction Pty Ltd. v. Metropolitan Waste Disposal Authority* (1988) 74 ACLR 68.

In other words a descent into the dust of the arena, by antagonizing counsel for a party, makes the arbitrator – as well as a judge or a referee – lose the required impartiality.

In *Schmitz*[122] an arbitrator had not disclosed that his law firm had represented one of the litigants in 19 cases for more than 35 years. The award was vacated for 'evident partiality'.

In other arbitral proceedings it was said that the arbitrator, who was an elderly gentleman, always sat with his wife and during the hearings consulted with her each time before deciding.

In *Pacific & Arctic*[123] the Chairman of the Tribunal and the arbitrator for one party were very close friends and even during the hearings they took meals together at the expense of the party which had appointed the latter. The chairman of the tribunal refused to allow the other party's remarks on that issue to be put on record and in the end found in favour of the former The Court was very severe, holding that such actions were:

> the functional equivalent of fraud.

The test of bias in this respect has been stated as follows in *Grassby*:[124]

> The test which is to be applied when bias is raised has been clearly laid down. It is whether in all the circumstances the parties ... might entertain a reasonable apprehension that the judge might not bring an impartial and unprejudiced mind to the resolution of the matter before him.

Nevertheless in the U.S. the *Whitaker*[125] Court held that the trial court had erred in removing an arbitrator on the ground that he was representing the party which had appointed him in other court proceedings. The *Astoria*[126] Court held that a party could appoint a member of its Board of Directors as party-appointed arbitrator, making an interesting comment:

> The right to appoint one's own arbitrator ... would be of little moment were it to comprehend solely the choice of a 'neutral'.

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[122] cited by J.S. MURRAY-A.S. RAU-E.F. SHEARMAN, *Processes of Dispute Resolution: The Role of Lawyers*, 729-39 (2d ed. 1990).

[123] *Pacific & Arctic Ry*, 952, F 2d at 1148, in RAU, *op.cit.* at 489.

[124] *Grassby v. The Queen*, (1989) 168 CLR 1 per Dawson J, *The Arbitrator* (Australia) 1992, 8.

[125] *Whitaker v. Citizens Ins. Co. of Am*, 476 NW 2nd 161-162, 143 (Mich. Ct. App. 1991) in RAU, *op.cit*

[126] *Astoria Med Group v. Health Ins. Plant of Greater N.Y.*, 182 N.E. 2d 85,88 (N.Y. 1982) in RAU, *op.cit.* at 499.

The *City of St. Kilda* Court in Australia[127] pointed out that receipt of direct communication from one party, which was not revealed to the other one, was a breach of due process. The Court held:

> It is a basic principle of the law that justice must not only be done ... but justice must clearly and obviously be seen to be done in that way, ... the objectors or members of the public might have given information favourable to Evindon's case ... might not have brought an impartial and unprejudiced mind to the decision of the appeal.

In *Bethlehem*[128] a US Court heard an interesting case :

> In a dispute concerning police salaries a party-appointed arbitrator found in favour of the police.
>
> After the award, he returned to the police as a captain, benefiting from the raise in pay for which he had voted.

In Australia the *Giustiniano* Court[129] found that the conduct of the arbitrator who, during the proceedings, conducted private seminars for employees of the defendant, was paid by defendant for this, and did not disclose such circumstance, gave rise to a reasonable apprehension of bias.

In *Hon*[130] the Supreme Court of Austria held that under German law the creation or the concealing by an arbitrator of a ground for his challenge is a breach of one of his main duties. Consequently under these circumstances a clause which purports to exclude his liability would not be valid.

The appeal was allowed, the interim award set aside, and the arbitrator removed.

In reality rather than to bias, one should refer – as Born rightly points out[131] – to *'appearances'* of bias, since bias can rarely be proved. As the *Morelite* Court[132] held:

> Bias is always difficult and indeed often impossible to prove. Unless an arbitrator publicly announces his partiality, or is overheard in a moment of private admission, it is difficult to imagine how proof would be obtained.

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[127] *City of St Kilda v. Evindon Pty Ltd et al.*, Supreme Court of Victoria, November 3, 1989 [1990] V.R. 771.

[128] *Bethlehem Steel Corp. v. Fennie*, 383 NY S. 2d 948 (Sup. Ct 1976) in RAU, *op.cit.*, 499.

[129] *Giustiniano Nominees Pty Ltd. V. The Minister for Works and others*, Supreme Court of Western Australia, November 10, 1995, 15, *The Arbitrator* (Australia) 1, 40.

[130] *H. GmbH v. Hon*, Supreme Court of Austria, April 28, 1998, *Rev. arb.* 1999, 392.

[131] BORN, *op.cit.* at 605.

[132] *Morelite Construction Corp. v. N.Y. Carpenters Benefit Fund* (District Council) 748 F 2d 79 (2 Cir. 1996) in BORN *op.cit.* at 605.

Likewise the *Continental Casualty* Court[133] held:

> I agree that failure of an arbitrator to volunteer information about business dealings with one party will, prima facie, support a claim of partiality or bias.

Rau[134] rightly points out that it is not surprising that in view of the lenient approach to the duties of party appointed arbitrators, a party seeks to appoint itself, which was excluded in *Garrison*[135]even if merely with reference to custom:

> custom in arbitration dictates that a party may not appoint itself,

while it was considered possible, if the parties so agree, in *Pisciotta*[136] which held that the parties:

> have power ... by agreement between themselves to so act [as arbitrators].

Similarly it happened in *Veritas*[137] that:

> Dr. W.K. Wallersteiner acting on behalf of a party, Anglo Canadian Cement Ltd., appointed himself as arbitrator.

In the U.S. the *Wausau* Court[138] did not react to the conduct of an arbitrator who had consulted with the party which had appointed him. The Court, accepting the arbitrator's statement that he had not formed a personal view on the matter, and the panel's statement which 'unanimously [affirmed] its belief in each member's impartiality', took the view that this was merely to give him some 'familiarity' with the matter in issue.

Discussion by a party-appointed arbitrator of the merits of the dispute with that party, examination of documentary evidence and acceptance of hospitality by that party were also discussed in *Penney*[139] in which case the defendant's proposed arbitrator had travelled to Dallas

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[133] *Commonwealth Coatings Corp. v. Continental Casualty Co.* 393 US 145 (1968) in BORN, *op. cit.* at 585.

[134] RAU, see *supra* note 111.

[135] *Edmund E. Garrison Inc. v. International Union of Operating Engineers*, 283 F. Supp. 771, 773, (S D N Y 1968), in RAU, *op.cit.*, 500.

[136] *Pisciotta v. Newspaper Enter Inc.* 171, NYS 2d 555, 557 (Sup. Ct 1958) in RAU, *op.cit.*, 500.

[137] *Veritas Shipping Corp. v. Anglo Canadian Cement Ltd.*, [1966] 1 *Lloyd's Rep.* 76 (Q.B. 1965) in BORN, *op. cit.* at 592.

[138] *Employees Ins of Wausau v. National Union Fire Ins Co. of Pittsburgh*, 933, F 2d 1481-1484-85 (9th Cir. 1991), in RAU, see *supra* note 109.

[139] *Metropolitan Property & Cas. Ins. Co. v. J.C. Penney Cas. Ins. Co.*, 780 F.Suppl. 885, 890 (D.Conn. 1991).

> prior to being selected as an arbitrator by the defendant where he engaged in *ex parte* meetings with the defendant's officials about the pending arbitration, discussed the merits of the case and accepted hospitality from the defendant without giving notice to the plaintiff. He further received documentary evidence from the defendants regarding material facts of the dispute prior to being selected to the panel and without giving notice to the plaintiff. Further he attempted to discuss the substance of these *ex parte* communications with the arbitrator named by the other side prior to the selection of the third neutral arbitrator and he engaged in deliberations and considered material evidence received from the defendants prior to the selection of the full arbitral panel.
>
> The Court whilst recognising that, at least in America, party selected arbitrators are not invariably expected to be neutral, held that this does not however mean 'that such arbitrators are excused from their ethical duties in the obligation to participate in the arbitration process in a fair, honest and good faith manner'. The Court decided that this arbitrator's alleged failure to reveal these *ex parte* activities to the other side violated the rule that an arbitrator must disclose at the time of his appointment 'any circumstances likely to create a presumption of bias or which he believes might disqualify him as an impartial arbitrator.'

and in *Sunkist*[140] in which a party appointed arbitrator assisted that party, attended meetings with potential witnesses

> suggested lines or areas of testimony,

and

> advised an expert witness on how to improve a chart related to the expert's testimony.

Rau takes the view that such a conduct by a party appointed arbitrator

> is far from constituting 'dishonesty' or 'active partiality'

and that in the real world would be

> not only unobjectionable but commonplace.

This view echoes the finding of the *Omsil* Court[141] in the US that:

> as everyone knows, the party's named arbitrator in this type of tribunal is an *amalgam* of judge and advocate. (emphasis added)

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[140] *Sunkist Soft Drinks Inc. v. Sunkist Growers Inc.*, 10 F 3d 753, 159 (11 Cir. 1993) in RAU, *op.cit.*, 506.

[141] *Cia de Navigation Omsil S.A. v. Hugo Neu Corp.*, 359 F. Suppl. 898 (SDNY 1973).

In *Quatar*[142] an arbitrator was challenged on the ground that before being appointed he had helped the party, which subsequently appointed him, to choose Counsel to act for it and because in the past he had sat as an arbitrator in a dispute between that party and one of its sub-contractors related to the same project. The challenge was rejected.

In *Tiki Village*[143] an Australian Court found that the arbitrator was guilty of *misconduct* for not having informed the parties of the legal advice which he had obtained.

Misconduct may involve the arbitrator's duty to refund fees received for the proceedings and to pay the costs of the proceedings, plus the costs for the proceedings to set aside the award.

There is a tendency by the parties to refer to the arbitrator appointed by them as 'their own' arbitrator.

One will then not be surprised of the existence of 'partisan', or as Rau rightly suggests, *'captive'* arbitrators, who are 'sympathetic' to that party's point of view.

The review of the litigation, related to the arbitrator's conduct in this respect, seems to show the following trends:

- an easier approach in several jurisdictions to the duties of party-appointed arbitrators;
- a duty of the neutral arbitrator to disclose any fact which may give rise to concern as to the arbitrator's dependence or bias;
- the absolute prohibition from accepting or maintaining appointment if he is not or ceases to be independent;
- a prohibition that an arbitrator accepts or maintains appointment if he lacks impartiality;
- a variety of situations which give rise to bias;
- a tendency to exclude that acting or having acted as arbitrator in other proceedings, or having expressed views unrelated to the proceedings on legal issues which subsequently arise in a proceeding, prevent an arbitrator from deciding a dispute;
- the requirement that an arbitrator entertains no unofficial contacts with the party which has appointed him;
- the advisability of selecting arbitrators who are impartial also from a cultural and legal culture point of view.

The matter has been discussed amongst writers.[144]

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[142] *Etat du Quatar v. Société Creighton Ltd.*, Court of Cassation, France, March 16, 1999 *Rev. arb.* 1999, 308.

[143] *Tiki Village International Ltd. v. Riverfield Tiki Holdings*, Supreme Court of Queensland May 6, 1994, 13 *The Arbitrator* (Australia), 2, 72.

[144] M.L. SMITH, *Impartiality of the Party Appointed Arbitrator, Arbitration* (JCIA) 1992, 30; J. WERNER, *The Independence of Arbitrators in Totalitarian States*, 14 *J.Int.Arb.* 1,

National legal systems

In French law the award made by an arbitral tribunal (or by a sole arbitrator) which is not impartial can be attacked:

> if the arbitrator has breached a public policy rule.[145]

In such a case Italian law provides for the challenge of the arbitrators[146] and for the award to be set aside in the case of the arbitrator's lack of capacity.

The question arises in connection with this whether action can be taken against the lack of impartiality only by a challenge to the arbitrator or, later as a *ground for nullifying* the award. No difficulties will arise when the lack of impartiality becomes known after the award. The problem may arise if it was known before then and if the arbitrator was not challenged.

This issue necessarily has to be decided on a case by case by depending on the applicable procedural law and on the circumstances. However, there are two opposite approaches to this. The first one views impartiality only as a way to protect a party's rights; according to this approach, after the expiry of the frequently short term within which the challenge is allowed, that remedy will no longer be available. According to the other approach, which mainly aims to ensure the validity of the award, granting only to a party the right to prevent an award being made by a biased arbitrator is unsatisfactory. It is in the general interest of justice that decisions be made by a judge or by an arbitrator who is impartial. Comparison with court proceedings will not help in this situation since only a party has the right to challenge the judge, and the legal system may only intervene when a decision has been made by a judge who is incapable of acting, for example because of mental illness.

However the important parallel with court proceedings does not always lead, as one has seen earlier, to identical results. It is submitted that whenever the impartiality of the arbitrator is relevant enough to exceed the limits of a mere protection of rights actionable by the parties, the court which reviews the award might be entitled in some legal systems – and in general *de jure condendo* (i.e. as a proposal for revision of existing legislation) – to take into account on its own initiative the lack of such an essential requirement for the appointment of the arbitrator, which might amount to a lack of capacity to decide.

141; M.S. DONAHEY, *Independence and Neutrality of Arbitrators*, 9 *J.Int.Arb.*, 4,31; W.O. FORBES, *Rules of Ethics for Arbitrators and their Application*, 9 *J.Int.Arb.*, 3, 5.

[145] Section 1484, para 6, Nouveau Code de Procédure Civile.

[146] Sections 815-831, Italian Rules of Civil Procedure.

12.10. TERMINATION – REPLACEMENT – TRUNCATED ARBITRATION – EFFECTS

The arbitrator may terminate his function on various grounds, including death, illness, and resignations. Leaving aside resignations for the time being, which will be dealt with later on, the events which cause an interruption in the discharge of the arbitrator's office may produce lasting effects, as in the case of death, or only temporary ones. An illness, for example, may last a short time and when it is over the proceedings can start again, or it may be without remedy or for an unpredictable duration as in case of mental illness. In that case the problem of replacing the arbitrator arises. Arbitral practice has unfortunately registered situations where an arbitrator, for example after the final addresses of the parties, has fallen ill for a long time, sometimes for many months and therefore has been incapable of participating in the arbitrators' decision. In this extreme situation, in which replacement of the arbitrator would have meant starting the proceedings afresh, the parties and the interested arbitral institution waited patiently. Certainly, when illness (mental or physical) occurs and its duration cannot be assessed, the problem of replacing the arbitrator arises; it is dealt with in different ways depending on the arbitration agreement and the national legal system.

In *Pfiste*[147] the French Court of Cassation has held that:

> if one of the arbitrators is prevented from discharging his tasks for an unlimited duration of time, this puts an end to the arbitral proceedings.

Although the decision is based on a statutory provision, from an international perspective this solution seems rather sharp.

The international conventions, the rules of arbitration and some national laws will now be examined.

International Conventions

The Washington Convention (1965) devotes Chapter V to the issue of the replacement and challenge of the arbitrators:

> (1) After a Commission or a Tribunal has been constituted and proceedings have begun, its composition shall remain unchanged, provided, however, that if a conciliator or an arbitrator should die, become incapacitated or resign, the resulting vacancy shall be filled in accordance with the provisions of Section 2 of Chapter III or Section 2 of Chapter IV.

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[147] *Pfister v. Zugmeyer and Pelle*, Court of Cassation (France) November 17, 1993, *Rev.arb.* 1995, 7.

> (2) If a conciliator or arbitrator appointed by a party shall have resigned without the consent of the Commission or Tribunal of which he was a member, the Chairman shall appoint a person from the appropriate Panel to fill the resulting vacancy.[148]
>
> A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph 1 of Article 14. A party to the arbitration proceedings may in addition propose the disqualification of an arbitrator on the ground that he was ineligible for appointment to the Tribunal under Section 2 of Chapter IV.[149]
>
> The decision on any proposal to disqualify a conciliator or arbitrator shall be taken by the other members of the Commission or Tribunal as the case may be, provided that where those members are equally divided, or in the case of a proposal to disqualify a sole conciliator or arbitrator, or a majority of conciliators or arbitrators, the Chairman shall take that decision. If it is decided that the proposal is well-founded the conciliator or arbitrator to whom the decision relates shall be replaced in accordance with the provisions of Section 2 of Chapter III or Section 2 of Chapter IV.[150]

Arbitration rules

Even the ICC Rules deal with this problem[151] summing up their discipline in the following provision:

> A challenge of an arbitrator whether for an alleged lack of independence or otherwise shall be made by the submission to the secretariat of a written statement specifying the facts and circumstances on which the challenge is based,

to which reference is made for a detailed examination of the replacement mechanism.

The rules of the European Court of Arbitration provide:[152]

> The parties may challenge any arbitrator not appointed by them, if they consider that they have grounds to cast serious doubts on his impartiality or independence or any other reason exists which would prevent him from effectively participating in the activity of the arbitral tribunal.

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[148] Art. 56, Washington Convention (1965), *cit.*

[149] Art. 57, Washington Convention, *cit.*

[150] Art. 58, Washington Convention, *cit.*

[151] Art. 2.12, ICC Rules of Conciliation and Arbitration.

[152] Art. 10,1, Arbitration Rules of the European Court of Arbitration.

National legal systems

The interesting issue of how an arbitrator should proceed if, after he has completed his task by rendering his award, the Courts (for example in Switzerland) order him:

> to rehear the case

is raised by Craig et al.[153]

The Italian legal system regulates replacement as follows:[154]

> Whenever for any reason one or more of the appointed arbitrators cease their function, they are replaced applying the system provided for their appointment in the arbitration agreement or in the arbitration clause. If the party, or the third party which is entitled to appoint the new arbitrator does not so provide, or if the submission agreement or arbitration clause do not provide in this respect, then the provisions of the previous section shall apply.

Under French law it is reported that the ground for the challenge of an arbitrator must have been discovered or have come to light after the appointment and that the right to challenge cannot be exercised if the party has participated in the proceedings without challenging the appointment. It is also held that the arbitrators make the decision on the challenge, the parties having the right to challenge their decision before the courts.[155]

A large number of grounds for challenge, including friendship, or an unfriendly relationship with a party, is provided for by Austrian law.[156] Dutch law also deals with the *discharge* of the arbitrator by the third party which has been given such authority or by the President of the District Court.[157] Similarly, *recusacion* (challenge of the arbitration) is dealt with in Spain.[158]

The effective existence of partiality must obviously not be confused with the frequent and sometimes absurd attempts of a party to stop proceedings by treating as bias behaviour which has nothing to do with it.

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[153] CRAIG et al., *op. cit.*, 22.05, at 141.

[154] Section 811, Italian Rules of Civil Procedure.

[155] DAVID, *op. cit.*, at 363.

[156] W. MELIS, *Austria, Yearbook Commercial Arbitration* 1979, vol. IV, at 28.

[157] A.J. van den BERG, *The Netherlands, Yearbook Commercial Arbitration* 1987, vol. XII at 15.

[158] B. CREMADES, *Spain, Yearbook Commercial Arbitration* 1987, vol. XII, at 45.

This can be seen by the challenge made in *Imperial Ethiopian*[159] against an arbitrator, Mr. David, on the grounds that many years previously he had drafted a bill for the Parliament of Ethiopia. Another famous challenge is the one made against an arbitrator on the grounds that he and his wife, during the long duration of the proceedings, on the occasion of two receptions had expressed the desire to visit the country of one of the litigants, because they found it very attractive. Likewise, in the United States it has been reported[160] that an arbitrator was challenged by a party on the grounds that the attorney for the other party always took the same lift as the arbitrator to go from the arbitral hearing room, in the hall of the hotel, to the upper floors.

This does not mean that the behaviour of arbitrators is always beyond reproach. In *Penne*[161] for example the Court established that the arbitrator appointed by a party had not disclosed that before the appointment, he was engaged in *ex parte* meetings with executives of that party, had discussed the merits of the dispute, had received hospitality, and had been given material documents.The Court stated to be aware that at least in the U.S. party appointed arbitrators are not always expected to be neutral. Nevertheless it held that they are not excused from the duty:

> to participate in the arbitration process in a fair, honest and good faith manner.

Non-disclosure of such facts by the arbitrator consequently had violated a specific duty of the arbitrator.

Absence of misconduct was affirmed by an Australian Court in *Brae Villa,*[162] a construction dispute in which it was alleged that the arbitrator had displayed animosity and bias against the owners, by virtue of their active involvement in a public advocacy group known as the 'victims of Builders Support Group (VOBSG).' The judge held:

> This asks me to assume that the Arbitrator is a bigot. It asks me to assume that he would directly carry with him a bias and a prejudice against any member of VOBSG. Not these owners in particular but generally against any person who is associated with such an organisation. There is simply no evidence to support such a scandalous allegation.

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[159] *Imperial Ethiopian Government v. Baruch Foster,* 335 F 21, at 334 (5th Cir. 1976).

[160] S.M. SCHWEBEL, *International Arbitration: Three Salient Problems*, Grotius, Cambridge, 1987, at 14 *et seq.*

[161] *Metropolitan Property and Casualty Insurance Co. v. Penney Casualty Insurance Co.* (USDC D. Conn. 4 Dec. 1991) *Asian Dispute Report* no. 5, July 1992.

[162] *Haskins and Cassar v. Brae Villa Pty Ltd.*, Supreme Court of Victoria (Australia) December 15, 1995, 15 *The Arbitrator* 1, 35.

This conduct has been studied by Zubrod.[163]

The application to arbitrators of the discipline for the challenge of judges, which does not take into account situations which are typical of arbitrators but which will not arise as to judges, has produced the unacceptable result that in *Searchers*[164] the Court of Genoa held that a party appointed arbitrator although he was acting as Counsel for that party in other proceedings could not be challenged. This view was shared in *Whitaker.*[165] In a comment to the former it was suggested[166] that the limits of such a narrow discipline could be overcome by seeing in that situation a lack of the capacity to decide.

On the challenge of arbitrators see Aguilar Alvarez,[167] Siqueiros[168] and Kaplan.[169]

Regarding the termination of an arbitrator, the study by Schwebel on *Truncated Tribunals*[170] is of particular importance. The problem arises whether, in such situations, proceedings must be started afresh or not. This concern, and the problem which arises from the non-attendance of an arbitrator at the proceedings (combined with him not resigning), make quite attractive – in the abstract – the solution of continuing the proceedings in both cases – in the former with a new arbitrator, in the latter without the arbitrator who does not participate. However this solution must overcome many obstacles and in many jurisdictions may be mainly *de jure condendo* (i.e., a proposal for new legislation).

That is precisely the situation which was decided in *Milutinovic*:[171]

> Two arbitrators, Prof. Bucher and Prof. Böckstiegel, in spite of the resignation of the third arbitrator, Prof. Iovanovic, decided the dispute, holding that, under the ICC Rules and Swiss procedural law, the resignation was not valid and that the third arbitrator, by refusing to attend the arbitrators' discussion in order to decide the dispute, had behaved in the same way as an arbitrator who refused to sign the award

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163 D.E. ZUBROD, *Evident Partiality and Misconduct of Arbitrator*, 11 *J. Int. Arb.* 2, 115.

164 *SEA Searchers S.r.l. v. Società Esercizio Cantieri S.p.A.*, Court of Genoa, March 22, 1995, *Foro pad.* 1996, I, 213.

165 See supra note 125.

166 M. RUBINO-SAMMARTANO, *On party appointed arbitrator who is also Counsel to that party*, *Foro pad.* 1996, I, 213.

167 G. AGUILAR ALVAREZ, *The Challenge of Arbitrators*, 6 *Arb.Int.* 3, 203.

168 J.L. SIQUEIROS, *The Challenge of Arbitrators in the Inter American Commercial Arbitration Commission Proceedings*, 12 *J.Int.Arb.* 4, 91.

169 N. KAPLAN, *An Allegation of Arbitral Misconduct*, 8 *J.Int.Arb.* 3, 17.

170 S.M. SCHWEBEL, *The validity of an arbitral award rendered by a truncated tribunal*, ICC Bulletin 1995, 19.

171 *Ivan Milutinovic PLM v. Deutsche Babcok AG*, Swiss Federal Court April 30, 1991, BGE 117, 160, *ICC Bulletin* 1995, 26 with critical comments from Justice Schwebel.

after attending that conference. Therefore this could not prevent the other arbitrators from going ahead and reaching a decision.

The Swiss Federal Court disagreed and held that, after the third arbitrator's resignation, the Arbitral Tribunal was unable to decide.

The award was consequently set aside.

In some jurisdictions the authority to replace an arbitrator has been recently granted.

The practice of the Iran-US Claims Tribunal has constantly been that non-attendance by one arbitrator to the final deliberations of the arbitrators did not prevent them from continuing the proceedings. This was held *inter alia* in *Saghi v. The Government of the Islamic Republic of Iran.*[172]

This position has been advocated by Schwebel.

The replacement of the arbitrator has been discussed also by writers[173] in particular as to the problems deriving from his possible appointment *intuitu personae.*[174]

As to the consequences of death, in *Globe Galaxy*[175] it was held that the death of an arbitrator required the appointment of a new arbitral tribunal and not merely his replacement.

The state courts' authority to appoint and to replace arbitrators have been exercised by the Italian Federal Court in *Rizzani de Eccher*[176] although as to proceedings which – it is submitted – are not arbitral but merely joint mandates to settle. See *supra* for criticism to such an attitude.[177]

12.11 Revocation, Dismissal and Challenge

With the replacement and resignation of arbitrators we come to another delicate area of the arbitral mechanism. Unilateral replacement is generally not allowed. However it is reported[178] that in Islamic law the appointment of the arbitrator may be revoked until he has been confirmed by the *quadi* (judge) at the beginning of the proceedings.

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[172] *Iran-U.S. Claims Tribunal*, January 12, 1987, Iran-U.S. CTR 3,9,10.

[173] M.A. SOLHCI, *The Validity of Truncated Tribunal Proceedings and Awards*, 9 *Arb.Int.* 3, 303; A.R. BRIGUGLIO, *La sostituzione dell'arbitro, Riv.arb.* 1993, 193.

[174] I.e. in view of his qualities.

[175] *Marine Products Export Corp. v. MT Globe Galaxy*, US Court of Appeals, 1992, 977 F 2d 66 (2nd Circuit 1992).

[176] *Cariboni S.p.A. v. Rizzani de Eccher S.p.A.*, Court of Cassation, Joint Divisions July 3 no. 3189, (1989) *Riv. arb.* 1991, 61.

[177] See *supra* Chapter 1.

[178] SALEH, *op. cit.*, at 25.

In *Philipp Brothers v. Drexel*[179] the Paris Court has rightly reminded that one cannot decide on a challenge without having informed the challenged arbitrator and having heard his comments.

It is suggested that a distinction must be made between the challenge by a party and revocation by both parties, or by the arbitral institution, or by the courts of law.

Revocation will only take place if the arbitrator is not independent or not impartial, or shows that he is not able to take care of the proceedings from a practical point of view, because he does not deal with them or on other more complex grounds. Revocation generally takes place much less frequently than challenges, which are often mere attempts by a litigant to stop or slow down the proceedings or to get rid of an arbitrator who, to that litigant's mind, will find against him.

The arbitrator may in some situations decide to resign. Among the situations one cannot discount is the possibility that an arbitrator comes to the conclusion that he cannot make a decision because of pressure set on him by a party, or because of the impossibility of an adequate discussion with the other arbitrators.

The question of revocations and resignations may cause problems during the proceedings and subsequently before state courts, if the revocation or resignations, or the award itself, are challenged at the end of the proceedings.

Arbitration rules

The London Court of Arbitration Rules provide for liability of the arbitrators in the case of deliberate breaches.[180] The international rules of the Milan Chamber of Arbitration deal in detail with the replacement mechanism:[181]

> 5. In the event of an arbitrator failing to use due diligence or causing an unjustified delay, or being negligent in the performance of his duties, the Arbitral Council shall issue an appropriate admonition and shall proceed to replace the arbitrator if he does not forthwith fulfil his duties after having received such admonition.

In conclusion, revocation of the arbitrator is necessary only in exceptional cases. It is consequently extremely limited and done with care.

As far as resignations are concerned, it is perhaps preferable to start by drawing a distinction between the situations in which resignations are

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[179] *Sté Philipp Brothers v. Sté Drexel et al.*, Court of Paris, June 14, 1989, *Rev.arb.* 1990, 497.

[180] Art. 19.1, Rules of the London Court of International Arbitration.

[181] Art. 22, para. 5, International Rules of the Milan Chamber of Arbitration.

necessary and those where they are made for the convenience of the arbitrator (because of his dissatisfaction with the conduct of the arbitration or his loss of interest in it). In such latter cases the resignations may have to be considered as unjustified and may expose the arbitrator to a claim for damages, particularly if replacing him causes delays or other prejudice to one of the parties.

A different treatment should apply in situations in which an arbitrator waives his appointment because he is put in a position of not being able to decide, for example if the parties do not comply with his directions or because the behaviour of the other arbitrators does not allow him to continue to sit with a clear mind.

It thus appears difficult to make a general rule in respect of resignations.

12.12 Rules of Conduct

The rules of conduct for arbitrators are mainly unwritten, even if some of them are put forward expressly and others may be derived from examining the statutory provisions and the arbitration rules. They consist, in essence, in requiring the correct performance by the arbitrator of the task which has been conferred upon him.[182]

The first rule of conduct is concisely defined in the award rendered in ICC proceedings no. 3344 (1981):[183]

> it is a generally accepted principle of international arbitration that the first duty of the arbitrator, even if he is an *amiable compositeur,* is to apply the contract entered into between the parties, unless it is established that the clauses which are quoted to him are manifestly contrary to the real intention of the parties or that they break a principle of public policy which is generally accepted.

International Conventions

The Geneva Convention (1961) does not contain any rule of conduct for arbitrators.

The Washington Convention (1965) however contains a precise provision on conduct, even if it does not provide equally precise sanctions:[184]

> Any arbitration proceedings shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in

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[182] As to the authority of arbitrators see S. JARVIN, *The Sources and Limits of the Arbitrators' Powers, Arbitration International* 1986, at 140.

[183] Derains, *Chronique des sentences arbitrales, Clunet* 1982, at 985. (free translation from French).

[184] Art. 44, Washington Convention (1965), *cit.*

> accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration ...

Regarding the international rules of the Milan Chamber of Arbitration, reference should be made to what has already been reported.[185]

The ICC Rules deal with single duties related to the conduct of the proceedings:[186]

> Before proceeding with the preparation of the case, the arbitrator shall draw up, on the basis of the documents or in the presence of the parties and in the light of their most recent submissions, a document defining his terms of reference ...
>
> In all cases the arbitrator shall take account of the provisions of the contract and of the relevant trade usages.

Similarly, the Italian Rules of Civil Procedure allow arbitrators[187] in the absence of a provision set up by the parties:

> to regulate the proceedings in the way which they deem more convenient.

Under French law:[188]

> The arbitrators regulate the arbitral proceedings without being bound to follow the rules established for court proceedings ...

The role of the arbitrator was very well defined in *The Argo Leader:*[189]

> We are not bound by the constraints of the courtroom where rules of evidence and narrow interpretations of the law commonly preclude true justice. The majority decision purports to uphold the law, but certainly it does not embrace justice, equity or fairness. Men in our position, entrusted to do the right thing, should not uphold the law at the expense of justice.

With regard to the duties of arbitrators as far as the application of national laws is concerned, in *Mitsubishi*[190] the Supreme Court of the United States held:

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185 See *supra* note 96.

186 Art. 13, 1.5, ICC Rules of Conciliation and Arbitration.

187 Section 816, para 2, Italian Rules of Civil Procedure.

188 Section 1460, para 1, Nouveau Code de Procédure Civile, Title XIII, Book IV.

189 *Argonaut Shipping Inc. v. Iron Ore Company of Canada*, February 14 (1985), no. 2065, Cederholm (chairman), *Yearbook Commercial Arbitration* 1986, vol. IX, at 197.

190 *Mitsubishi Motors Corporation (Japan) v. Soler Chrysler-Plymouth Inc. (US)*, US Supreme Court, July 2 (1985), *Yearbook Commercial Arbitration* 1986, vol. Xl, at 555.

> There is no reason to assume at the outset of the dispute that international arbitration will not provide an adequate mechanism. To be sure, the international arbitral tribunal owes no prior allegiance to the legal norms of particular States; hence, it has no direct obligation to vindicate their statutory dictates. The tribunal however is bound to effectuate the intentions of the parties. Where the parties have agreed that the arbitral body is to decide a defined set of claims which includes, as in these cases, those arising from the application of American antitrust law, the tribunal therefore should be bound to decide that dispute in accord with the national law giving rise to the claim . . . And so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.

It is suggested that in general the rules of conduct of the arbitrator may be summarized in the statement that he must fulfil his task with the care of a good *pater familias* (i.e. in a good fatherly way).

Once such a principle is clearly identified, examples of it should give rise to no difficulties. The arbitrator has to comply with the rules and in the case of breach the consequences depend on the nature and seriousness of such a breach. As stated in the award rendered in 1975 in ICC proceedings no. 1434,[191] arbitrators do not have a duty to follow the national precedents, even if they are constant.

Apart from two specific codes, respectively published by Gafta and by the Singapore Institute of Arbitration, two general codes of ethics exist.

One has been published[192] by the American Bar Association and by the American Arbitration Association, and therefore reflects the U.S. approach to the role of the arbitrator. Its Canon VII letter E provides:

> the non neutral arbitrator is permitted to be predisposed towards deciding in favour of the party who appointed him.

The second code, the IBA *Rules of Ethics for International Arbitrators*,[193] commented on by Branson,[194] requests all the arbitrators to be and remain

> free of bias

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[191] DERAINS, *Chronique des sentences arbitrales, Clunet* 1976, at 981.

[192] *Yearbook Commercial Arbitration* 1987, 199-202.

[193] Approved in 1987 upon the proposal of its Procedures for Settling Disputes Committee.

[194] As to its first edition, D. BRANSON, IBA *Rules of Ethics for International Arbitration, Intl. Bus. Lawyer,* 1987, at 335.

Rules of conduct, aiming to allow the parties to assert their rights as much as possible, are continually on the background of the IBA *Rules on the Taking of Evidence in International Commercial Arbitration* and of the *Standard Rules of Evidence* of the *Mediterranean and Middle East Institute of Arbitration.*[195] One must also quote the *Rules for the Conduct of Commercial Arbitrators* of the *Institute of Arbitrators Australia.*

The rights and duties of the arbitrator have been the object of a careful analysis by a Working Group of the ICC Arbitration Committee[196].See also Yanming.[197]

The exceptional nature of the removal of an arbitrator has been emphasized by Mustill J. (as he then was) in *Succula*:[198]

> In the past, the court has been very cautious in the exercise of its powers under this section. It is a serious matter to remove an arbitrator not only for the arbitrator himself but also for the parties, who must begin the whole proceeding again ... In my respectful submission, however, it remains a remedy of last resort, and the court should not intervene with an established reference unless convinced that this is the only right course to take.

In *Paul Brown*[199] the judge emphasized that a party's lack of confidence in an arbitrator was not sufficient. One requires objective and not subjective reasons. As to the statement made by Counsel for the arbitrator in the challenge proceedings, that he felt insulted by the allegation of inherent bias, the judge pointed out that judges frequently feel insulted by the parties or counsel, but that this feeling does not affect their impartiality.[200]

It has been held in *Spadem* that once the arbitrator has disclosed potential grounds for his challenge and the parties have not objected, this is a proper appointment[201].

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[195] *Standard Rules of Evidence of the Mediterranean and Middle East Institute of Arbitration,* 1987 edition.

[196] Ph. FOUCHARD, *Rapport final sur le statut de l'arbitre, ICC Bulletin* 1996, 28; J.H. CARTER, *Droits et devoirs des arbitres, six aspects de la règle du raisonnable*; C. HAUSMANINGER, *Droits et obligations de l'arbitre à l'égard des parties et de l'institution arbitrale*; A.R. PARRA, *Les droits et obligations des arbitres CIRDI*; M.H. HOELLERING, *Le role de l'arbitre, perspectives de l'AAA*; E.A. SCHWARTZ, *Les droits et les devoirs des arbitres CCI*, in *ICC Bulletin* 1995, Special issue December 1981 edition.

[197] H. YANMING, *The Ethics of Arbitrators in CIETAC Arbitrations*, 12 *J.Int.Arb.* 2, 5.

[198] *Succula Ltd v. Harland & Wolff*, [1980] 2 *Lloyd's Rep.* 381.

[199] *J.E. Taylor and Co. Ltd. v. Paul Brown and Prime Properties Ltd*, High Court, Hong Kong, October 31, 1999,HCMP 1259, 1990.

[200] N. KAPLAN, *An Allegation of Arbitral Misconduct, Arbitration* (JCIA) 1991, 152.

[201] *S.té Spadem v. S.té ADAGP*, Court of Appeal, Paris, March 22, 1990, *Rev. arb.* 1991, 123.

12.13 LIABILITY-IMMUNITY

The first problem which arises in dealing with the issue of arbitrator's liability is whether the arbitrator can be liable, or whether he can claim immunity. The answer to this question must first be sought in the international Conventions and arbitration rules, and then finally in national laws.

The international Conventions do not deal with the liability of the arbitrator, but some arbitration rules refer to it. The rules of the London Court of International Arbitration provide:[202]

> None of the LCIA, the LCIA Court (including its President, Vice Presidents and individual members) the Registrar, any Deputy Registrar, any arbitrator and any expert to the arbitral tribunal shall be liable to any party howsoever for any act or omission in connection with any arbitration conducted by reference to these Rules, save where the act or omission is shown by the party to constitute conscious and deliberate wrongdoing committed by the body or person alleged to be liable to that party.

English precedents have moved from assertion of immunity in *Sutcliffe*[203] to expressing serious doubts as to it in *Arenson*.[204] The Arbitration Act (1996) provides for immunity, except in the case of fraud.

The AAA International Arbitration rules specify:[205]

> The members of the tribunal and the administrator shall not be liable to any party for any act or omission in connection with any arbitration conducted under these rules, except that they may be liable for the consequences of conscious and deliberate wrongdoing.

Italian law expressly states the duty of arbitrators to pay damages:[206]

> Acceptance by the arbitrators must be expressed in writing and may result from their subscription of the arbitration agreement.
>
> The arbitrators must issue their award within the time limit stated by the parties or by the statutory provisions; in case of non-compliance with it and if the award is set aside on this ground they are under a duty to pay damages. They are equally under a duty to pay damages if after their acceptance they resign without justified reason.

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[202] Art. 31, Rules of the London Court of International Arbitration (1998).

[203] *Sutcliffe v. Thackrah*, House of Lords [1974] AC 727.

[204] *Arenson v. Arenson*, House of Lords [1977] AC 405.

[205] Art. 35 International Arbitration Rules of the AAA.

[206] Section 813, Italian Rules of Civil Procedure.

The liability of the arbitrator for breach of his duties has been discussed in Austria,[207] in the Netherlands,[208] in Spain[209] and in France.[210] In Sweden it is reported that it is treated in the same way as the liability of an advocate.[211] The issue of immunity is solved in different ways in the various legal systems.

It seems that one can distinguish between the merits of the decision, i.e. the reasons which made the arbitrator decide in a particular way, and the other duties of the arbitrator. On the one hand one may refer to immunity of the arbitrator in the sense that he should not be responsible for having chosen between two doctrines each of which is based on adequate grounds.

On the other hand the liability for damages may arise from a breach by the arbitrator of his duties such as if the arbitrator does not make his award, or if he files it after the expiry of its time limit, or makes it in a place different from the proper one and this causes damage, for example since – because of lack of international Conventions – the award rendered in that other place cannot be recognized and enforced in the country of the losing party, or does not comply with the rules of procedure stated by the parties or, in deciding, shows a clear negligence, as when he has a duty to give his reasons and does not do so, totally or partly, with the consequence for example that the award is set aside.

In England, in *Arenson*[212] Lord Kilbrandon wondered whether immunity could cover the arbitrator's negligence in carrying out his duties.

This while as reported by Mulcahy[213] the tendency to apply to arbitrators the immunity granted to judges:

> in respect of any act done in his judicial capacity even if he acts maliciously or in bad faith,

in order to avoid, on the ground of public policy to expose judges to suits (what could affect their serenity) is expressed in *Mullan*[214] per Lord Bridge:

> If one judge in a thousand acts dishonestly within his jurisdiction to the detriment of a party before him, it is less harmful to the health of society to leave that party without a remedy than that 999 honest judges should

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[207] W. MELIS, *Austria, Yearbook Commercial Arbitration* 1979, v ol. IV, at 31.

[208] A.J. van den BERG, *The Netherlands, Yearbook Commercial Arbitration* 1987, vol. XII, at 16.

[209] B. CREMADES, *Spain, Yearbook Commercial Arbitration,* vol. XII.

[210] R. DAVID, L'*arbitrage dans le commerce international* (Arbitration in International Trade), Paris, 1982, at 381.

[211] NORDENSON *Svensk Juristtidning,* 1977, at 715, quoted by DAVID, *op. cit.,* at 381.

[212] *Arenson v. Arenson* [1997] AC 405.

[213] C. MULCAHY, *Arbitrator's Immunity Under the New York Arbitration Act, Arbitration* 1996, 202.

[214] *MC v. Mullan* [1984] 3 *All ER* 908.

> be harrassed by vexatious litigation alleging malice in the exercise of their proper jurisdiction.

To this public policy ground, one has opposed as to arbitrators that those who cause damages by a breach of their duties must compensate those who have suffered damage because of such an act.

The result of such a conflict is that the principle of immunity was kept except in case of bad faith which in *Melton Medes*[215] was defined as follows

> Lack of good faith connotes either (a) malice in the sense of personal spite or a desire to injure for improper reasons or (b) knowledge of absence of power to make the decision in question.

The English Arbitration Act 1996 provides:[216]

> An arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his functions as arbitrator unless the act or omission is shown to have been in bad faith.

In the US, immunity has been affirmed in *Chicago Board Options Exchange*:[217]

> By defeating confirmation of the arbitration award the Austerns have already obtained a remedy from another federal court for the wrongs of which they complain with respect to claims within its purview. The Federal Arbitration Act provides the exclusive remedy for challenging conduct that taints an arbitration award.

It has been argued that the availability of direct review of the arbitration award butresses the appropriateness of applying the doctrine of arbitral immunity to preclude these collateral proceedings.

Along the same lines were *Greyhound Lines*[218] and *New York Stock Exchange*.[219]

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[215] *Melton Medes Ltd v. Securities and Investment Board*, [1995] 3*All ER* 990 cited by C. MULCAHY, see *supra* at note 207.

[216] Art. 29 Arbitration Act (1996).

[217] *Austern et al. v. The Chicago Board Options Exchange Inc.*, U.S. District Court, Southern District New York, July 31, 1989, *Yearbook Commercial Arbitration* 1991, 191.

[218] *U.A.W. v. Greyhound Lines Inc.*, 701, F 2d 1181, 1185 (6th Cir. 1982).

[219] *Corey v. New York Stock Exchange*, 691, F 2d 1205, 1211 (6th Cir. 1982).

Arbitrators Liability

In general arbitrators' liability is excluded except in case of conscious and deliberate wrongdoing, also referred to in other rules or provisions as fraud or bad faith.[220] The ICC Rules provide[221] for no liability of their Court, of its members and of arbitrators without any exclusion, a provision which might not be enforceable in every state court. Subject to a careful scrutiny of the circumstances of the specific case, liability of the arbitrator may not be excluded *a priori* (i.e. even before examining the facts).

The issue has been largely visited by writers.[222]

12.14 REMUNERATION

Unless the arbitration agreement or the contract to arbitrate provide otherwise, the arbitrator's right to be remunerated will be presumed.

When proceedings take place under the arbitration rules of an arbitral institution, they generally also include a schedule of fees; the appointment of the arbitrator and his acceptance mean the acceptance of that schedule, eliminating or considerably reducing possible disputes.

It is mainly in *ad hoc* arbitration, where the remuneration is frequently not agreed in the arbitration agreement or at the time of the appointment of the arbitrator and of his acceptance, that disagreements may arise.

In arbitral practice, in *ad hoc* arbitration the arbitrator determines his own fees.

Whenever the parties do not accept this, the arbitrator's remuneration will be determined by the authority which has been designated to this effect in the arbitration agreement, or in the arbitration rules or which is competent under the law applicable to the procedure or under the law of the place of arbitration or, depending on the circumstances, under other laws. It is not possible to exclude concurrent jurisdictions on this issue.

Remuneration includes the reimbursement of expenses reasonably incurred, and a compensation for the arbitrator's activity, which is generally determined on the basis of the issues which have been raised, their complexity, the time spent and the amount in dispute.

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[220] English Arbitration Act 1986, section 29.

[221] Art. 34, ICC Rules, 1998.

[222] LEW, *The Immunity of Arbitrators,* Lloyd's of London Press, 1990; A. REDFERN, *L'immunité de l'arbitre, ICC Bulletin* 1995 Special Issue on *Le Statut de l'arbitre*; C. MULCAHY, *Arbitrator's Immunity under the New Arbitration Act,* 62 *Arbitration* (J.C.I.A.) 3, 202; C. HAUSMANINGER, *Civil Liability of Arbitrators* (Comparative Analysis and Proposals for Reform), 7 *J.Int.Arb.* 4, 7.

12.15 Possibility of Appointing a Secretary to the Arbitral Tribunal

In several jurisdictions, in particular in Europe, there is a tendency of arbitral tribunals to appoint a secretary. This practice is generally not statutorily regulated i.e. neither provided for nor excluded.

Many arbitration rules do not deal with it, while the European Court of Arbitration provides for it:[223]

> In the absence of a secretary having been appointed, as necessary, the Chairman of the Arbitral Tribunal shall designate, at the commencement of the hearing, the person responsible for this function for the remaining proceedings. The written record of the hearing will be signed by the Chairman and by the Secretary if appointed.

While the ICC rules do not deal with this matter, it results from notes[224] issued by its Secretariat that arbitral tribunals were not prevented from appointing a secretary unless a party objects.

The advantages of a legally trained secretary to the Tribunal are various: the secretary can take care of minor and administrative aspects of the conduct of the proceedings such as filing of documents and correspondence, allowing the arbitrators to concentrate on the main issues.

The discharge of such tasks is also important as a way of training that person to become an arbitrator.

Lalive has very rightly pointed out such advantages.[225] A discussion has arisen from it. The ICC Secretariat has expressed concern as to the increase in costs due to such an appointment and, as to the need for the arbitrators to discharge their tasks directly and nor to delegate them to third parties.

Keeping to the substance of such issue, one may accept that the first concern, which was restated by the Secretary General[226] has a factual basis: i.e. that in some situations complaints have been raised because the secretary's fees were too high. This complaint may be justified limited to such situations, without acquiring such a general relevance as to become a deterrent to the appointment of a secretary in general.

As to the other concerns expressed by the Secretary General, one may have to admit that situations may arise where the secretary of the arbitral tribunal is given authority above and beyond administrative tasks. This excessive authority may not be approved but this excess cannot lead to take a general

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[223] Art. 15.3 Arbitration Rules (1997).

[224] Dated October 1, 1995;

[225] P. LALIVE, *Un Post-Scriptum et quelques citations, Bulletin ASA* 1996, 1, 35; *id. Inquiétantes derives de l'arbitrage CCI*, Bulletin ASA, 1995, 4, 634.

[226] E. SCHWARTZ, *On the subject of administrative secretaries, Bulletin ASA*, 1996, 1, 3.

attitude contrary to the appointment of a legally trained secretary, in view of the useful contribution which such a secretary may make. The Tribunal and the Arbitral institutions are there respectively to decide and to supervise the conduct of the proceedings. One should then be confident that they will avoid such risks, even if a reminder of such risks may have been useful.

A new note has been published then by the ICC, which allows ICC arbitral tribunals to appoint a secretary provided he is impartial, the parties have been duly notified and do not object, and he carries on only administrative tasks, without expressing opinions on the issues in dispute. The Chairman of the Tribunal is responsible for the conduct of the secretary and the secretary must be paid out of the arbitrator's fees.

12.16 SUBSTITUTE ARBITRATORS

Although it is rare that the parties appoint from the beginning substitute arbitrators, so that they take over if for any reason an arbitrator is not in a position to act in such a capacity, and although this issue is generally not the object of any statutory provision, it is generally felt that such an appointment falls within the ambit of the parties' freedom to contract.

Different views have been expressed as to the situations where the substitute arbitrator is called to take over.

According to one view, such an arbitrator could step in only if a temporary replacement is needed. It is submitted that the rule should be the opposite of this. In other terms, replacement should be envisaged as definitive i.e. when an arbitrator is unable to act, he is replaced definitively.

In the event of an arbitrator being temporarily hampered from discharging his tasks, a temporary replacement could produce negative effects, because the view of the arbitrator and of his substitute could differ. If one imagines that more than one temporary replacement could be required, it becomes clear that several changes are not advisable.

12.17 ARBITRATOR'S INVOLVEMENT BEFORE STATE COURTS

The involvement of an arbitrator in subsequent court proceedings might be envisaged in several ways. This issue has been studied by Gowan,[227] whose analysis is reported below.

Proceedings based on Misconduct

The first situation arises when the arbitrator's misconduct is at stake.

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[227] G.H. GOLVAN, *Post Award Litigation. The Involvement of the Arbitrator, The Arbitrator* 1997, 222.

The duty to give to the arbitrator an opportunity to make statements is advocated by the English High Court in *Succula*[228] where Mustill J. (as he then was) said:

> At a comparatively early stage I expressed the view that it would be inappropriate to reach a decision without first communicating with the arbitrators. There were two separate reasons for this. First, the removal of an arbitrator by the court is an unusual and serious matter. Sir Gordon and Mr. Barclay are well known and highly respected arbitrators. An order to remove them would inevitably attract widespread comment and could well be misunderstood by persons who did not fully appreciate the circumstances. It therefore seemed quite unacceptable to contemplate such a step without first giving these two gentlemen an opportunity to put before the Court such representations as they might wish to make.Furthermore, Mr. Barclay was at the time in hospital. There were indications that his illness might be relied upon as an additional ground for removing him, and it was therefore important to be sure that any information as to his health should be as reliable as possible.
>
> Second ... The persons best placed to offer an informed and balanced view on the practical consequences of adopting various alternative procedures would be the members of the tribunal themselves.

which was followed by the English Court of Appeal in *Miskin*:[229]

> ... there is no evidence before the court from the arbitrator; neither has he sworn an affidavit setting out the circumstances and the reasons which let him to act as he has done, nor has he written a letter to the solicitors to the parties inviting them to place the letter before the court. I wish to say that I have no doubt that he has done this for some reason unknown to myself, but I would only say that in a case of this kind, as indeed in a case involving misconduct, such information is in my experience very frequently placed before the court, and it is of the utmost assistance to the court to have information from the arbitrator explaining why he has acted as he has done when his actions are the subject of criticism by one of the parties when making an application, and it is a matter of regret for me that I have no such information before me from the arbitrator himself; I would have very much welcomed the opportunity to see the arbitrator's point of view set out by himself at least in a letter to the solicitors of the parties.

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[228] *Succula Ltd. v. Harland and Wolff*, (1980), 2 *Lloyd's Rep.* 381, quoted by G.H. GOLVAN, see *supra* note 224.

[229] *Modern Engineering (Bristol) Ltd v. C. Miskin & So. Ltd.;* 15 *BLR* 82 (per Robert Goff LJ) at 90; quoted by G.H. GOLVAN see *supra* note 219.

Proceedings to Set Aside the Award

The question of whether a writ of summons is required to set aside an award has been discussed. The need for this was excluded in *Port Sudan*:[230]

> To err in fact or law is not only human but an occupational hazard. Unless it is so often repeated as to give rise to some suggestion of incompetence it happily involves absolutely no reflection upon the person concerned, whether judge, umpire or arbitrator. Accordingly, a motion to set aside upon this ground needs not be served upon the umpire or abitrator.

The possibility of obtaining from the arbitrators their records and notes has been the object of a ruling by the Supreme Court in Australia in *Nathan,*[231] where the arbitrators, having been asked to deliver to the parties their records of the hearings and their notes to be used in court proceedings for the setting aside of the award, declared that they would only do so if ordered by the Court. The Court issued such an order, which the arbitrators opposed without success.

The Arbitrator as a Witness

The delicate issue may arise whether an arbitrator may be called as a witness in court proceedings. Some national legislations deal with this issue; occasionally arbitration rules deal with it too. If the arbitrator is not prohibited from being called, or is not protected by any form of privilege, he may be called as a witness. If the parties agreed not to call him, this does not necessarily amount to a valid waiver from a procedural point of view. Even if calling him might be a breach of an undertaking, this might not prevent a party from doing so.

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[230] *Port Sudan Cotton v. Chettiar*, (1977) 1 *Lloyd's Rep.* 166 at 178 quoted by G.H. GOLVAN see *supra* note 219.

[231] *Nathan v. MJF Constructions* (1986) *VR* 75 (per Nicholson J) quoted by G.H. GOLVAN see *supra* note 220.

CHAPTER 13

THE ROLE OF THE COURTS OF ARBITRATION

SUMMARY: 13.1 *Ad hoc* or Administered Arbitration – 13.2 Relationship Between the Parties and the Court of Arbitration – 13.3 Litigation Against Arbitral Institutions – 13.4 Anti-suit Injunctions – 13.5 Relationship Between the Court of Arbitration and the Arbitrators – 13.6 The Award and the Court of Arbitration.

The existence, in the arbitration proceedings, of a Court of Arbitration or of an institutional body entrusted with the administration of the proceedings (hereinafter referred to as 'Court of Arbitration') creates a further link in the relationship between the parties and the arbitrators. Namely it creates a relationship between the Court and the parties and also a relationship between the Court and the arbitrators.

13.1 *AD HOC* OR ADMINISTERED ARBITRATION

One of the many long-debated issues in the arbitration field is whether *ad hoc* arbitration is more effective than administered arbitration.

Views have been expressed from every different angle.

As very correctly summarized by Aksen,[1] each such formula has, or one should rather say may have, advantages.

Amongst the advantages of *ad hoc* arbitration, cost and speed have been mentioned. It is certainly correct that in *ad hoc* arbitration one saves the fees of the arbitral institution. However, this additional cost will have to be compared with the quality of service which such bodies provide.

As to speed, *ad hoc* arbitration may be faster if it does not get involved in long 'terms of reference' debates and if the arbitrators are keen to proceed quickly. The involvement of an arbitral institution tends to add one passage to exchange of correspondence apart from the scrutiny of the award, which is typical of ICC.

Apart from that, it is submitted that one cannot say that the existence of an arbitral institution delays the proceedings.

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[1] G. AKSEN, *Ad hoc versus Institutional Arbitration, The ICC's International Court of Arbitration's Bulletin*, 1991, 8.

A further advantage attributed to *ad hoc* arbitration is *flexibility*. As Redfern has pointed out[2] the proceedings may be shaped to meet the wishes of the parties

However, it could be argued against this that even arbitrators appointed by an arbitral institution enjoy a large amount of flexibility, since in many situations the arbitration rules of that body are not too detailed and stringent.

A disadvantage of *ad hoc* arbitration *was* the absence of a set of arbitration rules. Rightly, Aksen[3] points out that the Uncitral Arbitration Rules have filled this gap and made a set of rules available for *ad hoc* proceedings.

It is suggested that the main advantages of administered arbitration are the administration of the proceedings and the selection of the arbitrators.

This second advantage may have to be qualified, whenever the choice available to a given body is not wide or is restricted by non objective criteria.

The European Court of Arbitration has advocated[4] the importance of helping the parties to select the arbitrators in a preliminary conference, confining its task to suggesting if needed to the parties potential appointees rather than appointing someone who might differ from the expectations not only of one party but occasionally of all of them.

Scrutiny of the award by the Court has also been discussed for a long time. The mechanism for scrutiny which is in place in the ICC, granting to the arbitral institution the right to request amendments as to form, and to draw the arbitrators' attention to matters of substance, has been criticized.

The Keban arbitration[5] (in which the Turkish Supreme Court held that scrutiny to be in breach of its public policy) has not been forgotten. This criticism seems excessive, apart from when the arbitral institution attempts to make the arbitrator change his mind, which would be an unacceptable interference with the arbitrator's duty and right to decide himself. However a less formal scrutiny may be useful.

In his thorough analysis, Aksen refers also to the 'judicial deference' of Courts to institutional arbitration and quotes *Carte Blanche*[6] in which a U.S. Court has held:

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2 D.A. REDFERN, *Why arbitrate transnational dispute. Should institutional or ad hoc arbitration be provided?;* see *supra* at note 1.

3 AKSEN, see *supra* note 1.

4 Art. 9.1 Arbitration Rules.

5 M. RUBINO-SAMMARTANO, *The Keban arbitration, Arbitration* (The Journal of the Chartered Institute of Arbitrators), vol. 46, no. 4, 241.

6 *Carte Blanche (Singapore) Pte Ltd. v. Carte Blanche International Ltd.*, 888 F 2nd 260 (2nd Cir.).

> (the) ICC Court is the best judge of whether its procedural rules have been satisfied and when it certified the award is final, it certified that the procedural rules had been complied to its satisfaction.

Beyond the literal wording – which might be applied also to some *ad hoc* arbitrators – one must recognize that several arbitral institutions rightly enjoy *'judicial deference'*.

This obviously does not mean that it would cover situations where the award deserves criticism.

Returning to the original question, it is not easy to assert that administered arbitration is always 'superior' to *ad hoc* arbitration or vice versa. That will depend on the circumstances.

This writer[7] has in the past criticized the creation of an image of arbitration as a *luxury clinic* and has no reason to change his view. But in no way does luxury clinic mean administered arbitration. It refers to a fashion to deal with arbitration with a spirit of 'élite' and luxury rather than to serve.

This may occur in *ad hoc* as well as in administered arbitration.

It is suggested that administered arbitration, generally speaking, is preferable, provided it ensures that arbitration proceeds with the speed and efficiency which it is reasonable to expect, and provided appointments are made only in the interest of the parties.

An analysis of the various roles of the arbitral institutions, of the parties and of the arbitrators has been carried out by Jarrosson.[8]

13.2 Relationship between the Parties and the Court of Arbitration

Amongst the various relationships which come into existence between the arbitral institution, the parties and the arbitrators, the first is the one between the Court of Arbitration and the parties. Because of the task assigned to it by the parties, in the arbitration agreement or later, the Court of Arbitration is required to play various roles in the proceedings.

As already mentioned, one could wonder whether the distribution by the Court of Arbitration of its own rules is to be treated as *an offer to the public*, with the consequence that an agreement exists between the Court and the parties (except in special circumstances) at the time the Court is informed of its appointment by the parties in accordance with its own rules. However, in the absence of any language which may be construed as an offer, it is suggested

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[7] M. RUBINO-SAMMARTANO, *Is Arbitration to be just a Luxury Clinic?* 7 *J. Int. Arb.* 3, 25.

[8] C. JARROSSON, *The role respectif de l'institution, de l'arbitre et des parties dans l'instance arbitrale, Rev. arb.* 1990, 381.

that the arbitration rules cannot be treated as an offer to the public, but merely as information on how proceedings will be conducted, leaving the Court of Arbitration free to accept or refuse appointment by the parties.

The relationship between the parties and the Court following acceptance of appointment by the latter (whether implied in the distribution of its rules, or expressed after its appointment is made) must be treated as a contract.

The Court of Arbitration is generally appointed by the parties in their arbitration agreement. The request for arbitration, made by one of the parties to the arbitration agreement, puts then the already chosen mechanism in motion. The contractual relationship therefore exists as a rule between the Court and all the parties to the arbitration agreement (and not only the party which later refers the dispute to arbitration).

In *République de Guinéé*:[9]

> After the Paris Court had declared that the Court of Arbitration in Paris was competent to appoint arbitrators, the Republic of Guinea challenged the arbitrators appointed by the latter. The Paris Court rejected the challenge. Nevertheless the Republic of Guinea applied for a stay of the arbitral proceedings until the Paris Court decided its claim (for annulment and termination of the arbitration agreement). Deciding on these claims the Paris Court held that the basis of the authority granted to an arbitral institution lay in the intention of the parties, affirming the contractual nature of the relationship.

Likewise in *Cecobank*:[10]

> The *Tribunal de Grande Instance* of Paris held that submission of a dispute to a permanent arbitral institution and its acceptance of appointment constitute a contractual relationship between them.

The duties of the Court of Arbitration arising from its contract with the parties may be summarized as the duty to perform its tasks with the care of a good *pater familias* (i.e. in a fatherly way). Among these duties is the task to check the existence of an arbitration agreement and, if there is one, to appoint the arbitrators. The Court of Arbitration must also appoint arbitrators suited to the task and choose the place of arbitration (unless already chosen by the parties), in order that the award be enforceable in the place where the parties have their residence. The Court of Arbitration must also check that the arbitral proceed-

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[9] *République de Guinée v. Chambre Arbitrale de Paris,* Tribunal de Grande Instance de Paris, interim injunctions May 30 and October 30, 1986, and judgment January 28, 1987, *Rev. arb.* 1987, 371 *et seq.*

[10] *Cekoslowenska Obchodni Bank AS (Cecobank) v. Chambre de Commerce Internationale (ICC),* Tribunal de Grande Instance de Paris, October 8 (1986) *Mediterranean and Middle East Arbitration Quarterly*, No. 1, 1987, at 3 and also *Rev. arb.* 1987, 367 *et seq.*

ings begin without undue delay and in general that they comply with the Court's rules.

In turn the parties, because of the contract, accept obligations towards the Court of Arbitration such as that of paying the Court and the arbitrators the remuneration determined according to the Court's fee schedule[11] and to pay advances on it.

It is suggested that the contract between the parties and the Court consists of a *mandate* (i.e. instructions to act) which does not grant to the Court the authority to represent the parties (as opposed to instructions to act on behalf of the principal, who in the latter case acquires the right or undertakes the duty directly as the immediate result of the act of his agent). The scope of the mandate covers the determination of the number of arbitrators, their appointment and possible revocation, the choice – if needed – of the place of arbitration,[12] determination of the arbitrators' remuneration and the control over the conduct of the proceedings. In other words, the mandate is to enter with the arbitrators into a contract to arbitrate and to supervise the proceedings.

It is further suggested that this is done by the Court of Arbitration on its own behalf and on account of the parties to the arbitration agreement.

13.3 Litigation against Arbitral Institutions

In recent years several disputes have arisen between the parties and arbitral institutions.

Immunity of arbitral institutions, as a consequence of immunity of arbitrators, has been held in *The Chicago Board Options Exchange*:[13]

> Courts have generally protected arbitrators from suit for their conduct in arbitration proceedings. The *quasi judicial* immunity has been expanded to protect associations, boards and other organizations sponsoring and administering arbitration. See *Corey* 691, F 2rd at 1211.

Along the same lines goes *York Hannover v. AAA*[14] where the U.S. District Court agreed that AAA had shown its:

> absolute determination to preserve total neutrality. The AAA desires to remain 'a Switzerland', surrounded by warring entities,

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[11] DITHCEV, *Le contrat d'arbitrage* (The arbitration contract) *Rev. arb.* 1981, 394 *et seq.*

[12] Art. 12, ICC Rules of Conciliation and Arbitration.

[13] *Austern v. The Chicago Board Options Exchange Inc.*, 716 F. Suppl. 121 (S.DNY 1989) *Yearbook Commercial Arbitration,* 1991, 191.

[14] *York Hannover Holding AG v. American Arbitration Association*, U.S. District Court, Southern District of New York, June 22, 1992, *Yearbook Commercial Arbitration* 1993, 584.

a judgment which echoes the position taken by Counsel for the AAA:

> As the impartial administrator of the arbitration the AAA does not generally appear or participate in judicial proceedings relating to the arbitrators. The AAA should not have been named as a party – defendant.
>
> Sect. 47 (d) of the Rules provides that the AAA is not a 'necessary party'.

In *Van Syoc*[15] the Court, hearing an application which involved criticism of the arbitral institution, held that the plaintiff:

> failed to show that the AAA did ... act arbitrarily or capriciously.

In the framework of such litigation, mention must also be made of the judgment given in *Petroles D'Homs:*[16]

> A Syrian company sued the ICC before the French Courts claiming nullity of the removal of a Syrian arbitrator decided by ICC for previous relationships of that arbitrator with that party. The Paris Court, rejecting the claim, stated that the parties were bound by the ICC rules and that neither these rules nor French law provided for an attack against an ICC decision to remove an arbitrator.

In *Philipp Brothers v. Drexel*[17] the Paris Court has held that referral of a dispute to arbitration is the result of the parties' trust not only in the arbitrators but also in the arbitral institution, which must administer the proceedings.

In order to be in line with such a trust, the arbitral institution must adjust its rules in order to comply with the economic and legal order and to place the parties on an equal footing.

In *Philipp Brothers v. Icco*[18] the Paris Court has pointed out that:

> The issue of independence of the arbitral institution which appoints the arbitrators is not to be distinguished from the independence required from the arbitrators, which is an absolute requirement of all arbitral proceedings.

The Court of Appeal, Basel,[19] dismissed an action against ICC based on the ground that it had extended the time limit for the filing of the award without

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[15] *Van Syoc v. Walter,* 613 A 2nd 490 (N.Y. Super 1992).

[16] *Raffineries de Pétroles D'Homs et Banias v. ICC,* Tribunal de Grande Instance de Paris, March 28 (1984) quoted by CRAIG, *International Ambition and National Restraints in ICC Arbitration, Arb. Int.* 1985, 55.

[17] *Sté Philipp Brothers v. Sté Drexel et al,* Tribunal de Grande Instance de Paris, June 29, 1989, *Rev. arb* 1990, 497.

[18] *Sté Philipp Brothers v. Sté Icco et al.,* Tribunal de Grande Instance de Paris, April 6, 1990, *Rev. arb.* 1990, 880.

[19] Court of Appeal Basel, January 2, 1984 in CRAIG PARK AND PAULSSON, *op. cit.*

hearing the parties on this issue. The court held that ICC had taken an administrative decision which is not subject to judicial review. This view was shared by the German Court of Cassation.[20]

In *Kubik*[21] the Court was sought to declare that ICC had not performed its basic duties, that the contractual relationships between Kubik and ICC should be terminated and that ICC be ordered to return the amount of US $185,000 paid to it. KUBIK complained that ICC had allowed the proceedings to last more than five years and this by itself was evidence of its breach of contract.

The Court of Appeal, in rejecting such a complaint, pointed out that it is not sufficient to complain that instead of 6 months the proceedings had lasted five years, but that Kubik had the duty to satisfy the Court that by granting such extensions ICC had committed a breach of its duties.

Among the tasks of the Court of Arbitration, arising from its relationship with the parties, the ICC rules include the one to decide whether a *prima facie* arbitration agreement exists. This decision is administrative in nature[22] and it does not bind the courts of law or the arbitrators, who may decide otherwise. This was the case in *Cecobank:*[23]

> Cecobank submitted to ICC a dispute between itself and Bank Méditerranée S.à.l. (a Lebanese limited company). The latter challenged the existence of the arbitration agreement and the ICC Court of Arbitration declared that there was no agreement. Cecobank then initiated court proceedings against ICC requiring that it be ordered to form an arbitral tribunal to settle the dispute and, alternatively, claiming damages from ICC for breach of contract. The Court held that ICC had duly examined the issue of a *prima facie* arbitration agreement, having held two meetings with the parties, and that there had been no lack of care in its decision.

This decision is important because it clearly states the contractual nature of the relationship between the parties and the Court of Arbitration and the fact that liability may arise from this relationship, even if in that specific case no liability was established.

The decisions reported above are not the only litigation between parties and Courts of arbitration. In this connection *Japan Time* should also be mentioned.[24]

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[20] Bundesgerichtshof April 24, 1988, in CRAIG PARK AND PAULSSON *op. cit.*

[21] *Société Kubik Défense Systems Inc v. Chambre de Commerce Internationale CCI*, Paris, September 15, 1998, *Clunet*, 1999, 162 et seq.

[22] Y. DERAINS, comments on the interim award made in 1986 in ICC proceedings no. 5065, *Clunet* 1987, 1039 et seq.

[23] Tribunal de Grande Instance de Paris, October 8, 1986, *Rev. arb.* 1987, 367-369.

[24] *Sté Japan Time v. SW Kienzle France et Chambre de Commerce Internationale*, Court of Appeal, Paris July 11, 1980 in FOUCHARD *Les institutions permanentes d'arbitrage*

The ICC Court of Arbitration held that the arbitration agreement affirmed by the parties did not exist. Under the ICC rules, the parties were therefore entitled to submit the issue to a court of law. That was done and the Paris Court held that the arbitration agreement existed and clearly designated that arbitral institution.

Authors have expressed different views[25] on the general issue of litigation against arbitral institutions.

13.4 ANTI-SUIT INJUNCTIONS

The situation arising from a court order refraining the arbitrator from continuing the proceedings is more delicate. In view of the wide use of anti-suit injunctions made by the courts of several states this possibility is not merely hypothetical.

In *Shell International*[26] the Commercial Court, London:

> ... in the exercise of its discretion granted an injunction restraining Coral from bringing any proceedings in the Lebanon against Shell International,

because:(a) otherwise the Lebanese Courts would be required to apply a rule of law contrary to what the parties had agreed; and (b) in similar events effect should be given to the parties' intentions.

It must be pointed out that, as a rule, such orders are issued to the parties rather than to the arbitrators.

However, exceptions do exist. This issue was dealt with in the award made in 1986 in ICC proceedings No. 4862[27] following an order made by a court in the Yemen:

> Whereas the letter no. 515 dated October 24, 1984, addressed by the President of the Commercial Court of Saana (Yemen) to the 'President and members of the International Chamber of Commerce in Paris', cannot be construed as an order to the ICC Court of Arbitration to stop the arbitration proceedings and it cannot even be construed as an order to the Arbitral Tribunal, when notified to it by the defendant on June 26, 1986.
>
> The Arbitral Tribunal unanimously decides:

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devant le juge étatique (Permanent Arbitral Institutional Bodies before State Courts), *Rev. arb.* 1987, 270.

25 FOUCHARD *op. ult. cit.* at 232-233.

26 *Shell International Petroleum Co. Ltd. v. Coral Oil Co. Ltd.*, High Court, Q.B.D., Commercial Court; (per Moore – Bick J. May 22, 1998 in the *CIA Newsletters* 1999.

27 DERAINS-JARVIN, *Chronique des sentences arbitrales, Clunet* 1987, at 1018.

1. That the proceedings pending before the Tribunal in Yemen have no effect on the arbitral proceedings;

2. That the Court in Yemen has made no formal order to stop the arbitral proceedings;

3. That the Arbitral Tribunal is of the view that it has jurisdiction to hear and solve this dispute.

In *Machinery Construction of Pakistan*[28] the Court reassures that, in the event of courts outside the venue of arbitration interfering with its conduct, such orders are likely to be ignored.

Criticism of arbitral institutions was expressed also amongst writers, such as by Fouchard,[29] Hoellering,[30] and by Kassis[31] who in turn was sharply attacked by Paulsson.[32]

For example, arbitral institutions have been criticized for having granted to arbitral tribunals extensions of the time limit for filing their award.

Awards rendered under such time extensions were attacked on this ground in Belgium[33] and in Germany.[34] The Belgian judgment was confirmed by the Belgian *Cour de Cassation.*

The rejection of all such attacks shares a common background i.e. the view that the decisions of the Court of Arbitration are administrative by nature and do not need to give grounds. However De Ly[35] raises various arguments in support of his suggestion to allow a limited review of decisions by arbitral institutions.

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[28] *American Construction Machinery & Equipment Corp. v. Machinery Construction of Pakistan Ltd.,* 659 F. Suppl. 426 (SDNY 1986) in BORN *cit.* at 73.27. Ph. FOUCHARD, *Les institutions permanentes d'arbitrage devant le juge étatique, Rev. arb.* 1987, 225.

[29] Ph. FOUCHARD, *Les institutions permanentes d'arbitrage devant le juge étatique, Rev. arb.* 1987, 225.

[30] M.F. HOELLERING, *Arbitral Immunity under American Law,* AAA *Am. Rep.* 1990-1991, 162-169.

[31] A. KASSIS, *Réflexions sur le règlement d'arbitrage de la Chambre de Commerce Internationale,* Paris 1988; *id. The Questionable Validity of Arbitration and Awards under the Rules of the International Chamber of Commerce,* 6 *J. Int. Arb.* 2, 79.

[32] J. PAULSSON, *Vicarious Hypocondria and Institutional Arbitration,* 6,. *Arb. Int.* 3, 226.

[33] Court of Appeal, Brussels February 25, 1987, *Rev. Jurisprudence Mons, Liège et Bruxelles,* 1988, 59.

[34] Oberlandesgericht Stuttgart December 22, 1986, ZIP 1987, 1213, *IPRA* 1987, 369; Bundesgerichtshof April 14, 1988, W M 1988, 1178, *IPRA* 1989, 228.

[35] DE LY, *Judicial Review of Decisions of the ICC Court of International Arbitration,* 7 *J. Int. Arb.* 11, 53.

It is suggested that the basic view, taken by the Belgian and German Courts, is to be approved: that the decisions of arbitral institutions to extend time limits, when the parties have granted such an authority to them, have no judicial nature. In fact as earlier discussed, the relationship between the parties and the arbitral institution has to be characterized as a grant by the former to the latter of the authority to act on account of the principal *(mandato, mandat, agency).* If these pre-requisites exist, the arbitral institution's exercise of such authority seems in principle to belong to the sphere of the law of contract.

Since the arbitrators have to conduct the proceedings according to the rules which the parties have set out for them, it is hard to envisage how an award made during the time limit set out by the parties or by their agent could be treated as being late, unless a mandatory provision of the applicable procedural law does not allow an extension of this time limit.

The award does not then seem challangeable, when made in such situations. Liability of the arbitral institution might arise if it has delayed the award without good reason. That liability would arise in contract. Such a situation would not be frequent but is conceivable.

13.5 Relationship between the Court of Arbitration and the Arbitrators

The relationship between the Court of Arbitration and the arbitrators is the implementation of the relationship between the Court of Arbitration and the parties, from which it derives. Once the role of the Court of Arbitration has been identified as a *mandate without authority to represent the parties,* the framework within which the relationship between the Court of Arbitration and the arbitrators develops is established. Therefore, it is submitted that the arbitral institution is personally bound to pay compensation to the arbitrator whom it appoints for his activity. The Court of Arbitration must also replace the arbitrator when this is required. In turn the arbitrator is under a duty to deliver the award to the Court and not to the parties, since the Court will forward it to the parties only after they have paid all sums due to the arbitrators and to the Court.

One could disagree with the previous suggestion and hold that the Court of Arbitration has the authority to represent the parties but, if so, the Court would undertake obligations and exercise rights only on behalf of the parties. In that case, the litigation referred to above should have not been instituted against the Court, since its conduct or lack of action would have to be attributed to the parties. The claims made in that litigation should thus be addressed by a party to the arbitration agreement against the opposite party. However, it is submitted that this would not make sense, since the Court decides independently in

the interests of both parties and its decision cannot be treated as that of a party. Therefore the latter cannot be liable for it.

At the end of this short review of this *triangular relationship* one could wonder whether in this framework direct action by a party against the arbitrator is conceivable, as well as direct action by the arbitrator against the parties, or one of them. If the relationship between the Court of Arbitration and the parties on the one hand, and between the Court of Arbitration and the arbitrators on the other hand is to be treated as it has been suggested above, the solution will depend on the applicable law. If, in a legal system, a principal may act directly against the third party with which his agent has negotiated, or may act in subrogation of his agent, then a party to the arbitration agreement may act against the arbitrator, and the arbitrator is entitled to act against a party. It would be conceivable for example (even if it would be a very special situation) that, when the Court of Arbitration takes no action or ceases to exist, the parties directly assume the rights of the Court vis-à-vis the arbitrator. Similarly, the arbitrator (if the Court of Arbitration has ceased to operate or has become insolvent) might request remuneration for his services directly to the parties.

13.6 THE AWARD AND THE COURT OF ARBITRATION

The relationship between the Court of Arbitration and the award is also delicate. In fact, the Court of Arbitration acts under the parties' instructions, but without authority to represent them, and remains in the background of the proceedings, fulfilling mainly an administrative function. One consequence of this is that the arbitrator may decide that the arbitration agreement, which the Court of Arbitration has held to exist *prima facie,* in reality does not exist.

Likewise the decision of the Court of Arbitration, holding that *prima facie* the *arbitration agreement* does not exist, will not prevent the parties from referring the issue to a court of law so that the existence of the arbitration agreement be declared.[36] Even more complicated situations may arise. For example the party who challenges the existence of an arbitration agreement before the Court of Arbitration , if sued in court by the other litigant who has accepted expressly or *de facto* his plea that the arbitration agreement does not exist, is estopped from claiming in such court proceedings that the arbitration agreement exists.

Awards are made by the arbitrators (appointed by the Court of Arbitration, or approved by it in the case of a direct designation by the parties). The Court of Arbitration generally has no authority either to decide the dispute or to

[36] DERAINS, *Chronique des sentences arbitrales, Clunet* 1977, at 1044.

approve the decision of the arbitrators. An exception to this is found in the ICC rules[37] which recognize that its Court of Arbitration has two different powers:

- Firstly, to check the form of the award before notifying the parties of it, and to request the arbitrators to modify it as to its form;
- secondly, to draw the arbitrators' attention to possible issues on the merits, even if the final decision on them is to be made by the arbitrator.

Therefore, in spite of the points raised by the Court as to the merits, the arbitrator is entitled to confirm his decision. The Court's right of intervention therefore ends by its drawing the arbitrator's attention to an issue on the merits; if the arbitrator does not change his mind, the Court cannot create obstacles to the filing of the award.

This special authority has been the subject of disputes, and at least on one occasion in *Keban*[38] it caused, as earlier discussed, non-recognition of the award:

> In a dispute between French and Italian companies, which had built the Keban Dam in Turkey, and the competent general directorate of the Turkish Ministry of Public Works, an ICC arbitration took place and the arbitrators made their decision in Lausanne, Switzerland. The Turkish Court of Cassation, which was requested to recognize the award, refused to do so on the grounds that the decision had been rendered in a state with which Turkey had no international conventions for the recognition of the award, and because the requirement that the award be approved by the Court of Arbitration amounted to a breach of Turkish public policy.

Since every rule has its exceptions, even the rule that the decision belongs to the arbitrators and not to the Court of Arbitration has its exceptions, such as the powers granted by the rules of the Paris Maritime Court of Arbitration to its Committee,[39] which has:

> as its task, following delegation of authority by the Maritime Court of Arbitration, to set in motion and conduct arbitration, all in compliance with the rules of arbitration,

and which

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[37] See Art. 21, ICC Rules of Conciliation and Arbitration:

> Before signing an award, whether partial or definitive, the arbitrator shall submit it in draft form to the Court. The Court may lay down modifications as to the form of the award and, without affecting the arbitrator's liberty of decision, may also draw his attention to points of substance ...

[38] See the well-known *Keban* award, *(Compagnie de Constructions Internationales, Compagnie Française d'Expertise et Société Impregilo v. DSI),* Court of Cassation (Turkey), March 10 (1978), *Arbitration*, vol. 46, 1960, 241.

[39] J.L. DELVOLVE, comments to the *Bilitis* award, *Rev. arb.* 1979, 381.

> permanently decides the disputes which are referred to the Court ...,

powers which allow the Committee to make awards as in *Bilitis* with arbitrators who, in the first as well as in the possible second instance of the arbitral proceedings, in practice simply have an auxiliary role.

CHAPTER 14

THE ROLE OF STATE COURTS AIDING ARBITRATION

SUMMARY: 14.1 Appointment of the arbitrators – 14.2. Intervention to Compel Submission of Dispute to Arbitration or Terms of Reference – 14.3 State Courts' Rulings on Validity of the Arbitration Agreement – 14.4 Challenge of Arbitrators – 14.5 Identification of the Court Having Jurisdiction – 14.6 Intervention During Evidence – 14.7 Consolidation of proceedings – 14.8 Filing of the Award – 14.9 Final or Binding Nature of the Award – 14.10 Interlocutory Injunctions – 14.11 Aid not Interference – 14.12 Whether to Review the Merits of the Award – 14.13 Orders in Respect of Security for Costs.

The relationship between state courts and the arbitrator has been summed up by Goldman as follows:[1]

> The complementarity of the action of the Courts and of the arbitrators is a well-established fact ... in the roles which are attributed to each of them to achieve the common purpose, the efficacy of international commercial arbitration.

14.1 APPOINTMENT OF THE ARBITRATORS

State court intervention in the appointment of arbitrators is more frequent in *ad hoc* arbitration than in the administered ones since in the latter the parties, by submitting to arbitration rules, first generally grant to the institutional body the authority to appoint the arbitrators.

The situation is different in *ad hoc* arbitration, where the rules of procedure are established by the parties, in most cases without a reference to the arbitration rules of an institutional body. In those arbitrations, except for the rare situations where the appointment is made by the parties either directly in the arbitration agreement or later, the appointment of arbitrators is frequently delegated, in the absence of an agreement between the parties, to a state court,[2] to an institutional or professional body, a chamber of commerce or other entity or person. Under French law[3] the President of the T*ribunal de Grande Instance*

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1 B. GOLDMAN, *Rapport Général pour le 60e anniversaire de la Cour d'Arbitrage de la CCI* (General report for the 60th anniversary of the ICC Court of Arbitration), (Publication no. 412), ICC Publishing SA, Paris 1984, at 271.

2 See for example Art. 1 (c) of the Geneva Convention (1927).

can intervene if difficulties arise in arbitral proceedings, for example with the appointment or challenge of arbitrators.[4]

The state court is then requested by one of the parties to appoint the arbitrators and after that its task is finished. If the arbitrators appointed by the parties or the state court, hold that the arbitration agreement is null and void, generally they may declare its nullity in their award (while England might be an exception). However, if on this ground they decide that the proceedings must not even be started and the parties do not accept that decision, they have to go back to a state court for a ruling that the arbitration agreement is valid. In some legal systems, e.g. in France, quicker solutions are available such as an application to the President of the *Tribunal de Grande Instance,* while in other systems a judgment is required.

The state courts, particularly in *ad hoc* arbitrations, may also be requested to intervene when, according to the applicant, the arbitral tribunal has not been formed in accordance with the arbitration agreement.

International Conventions

International Conventions tend to make reference to arbitration rules of arbitral institutions or to *ad hoc* rules as to the appointment of arbitrators. The Geneva Convention (1927) provides:[5]

> To obtain such recognition or enforcement, it shall, further, be necessary:
>
> (c) That the award has been made by the Arbitral Tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure.

Similarly, the New York Convention (1958) lists among the grounds for non-recognition the fact that:[6]

> the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agree-

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3 Sections 1444 and 1493 New French Civil Procedure Code; see Ph. FOUCHARD, *La coopération du Président du Tribunal de Grande Instance et l'arbitrage* (The cooperation of the President of the Tribunal de Grande Instance to arbitration), *Rev. arb.* 1985, 26.

4 See for example Section 1463 of the New French Civil Procedure Code; see Ph. FOUCHARD, *op. cit.,* at 29.

5 Art. 1 (c), *Geneva Convention* (1927).

6 Art. V (d), *New York Convention* (1958); see also J.S. McCLENDON and R.E.E. GOODMAN, *International Commercial Arbitration in New York,* New York 1986, at 169.

ment, was not in accordance with the law of the country where the arbitration took place.

The European Convention (1961) provides[7] that:

> The parties to an arbitration agreement shall be free to submit their disputes:
>
> (a) to a permanent arbitral institution; in this case, the arbitration proceedings shall be held in conformity with the rules of the said institution;
>
> (b) to an *ad hoc* arbitral procedure, in this case they shall be free *inter alia:*
>
> (i) to appoint the arbitrators or to establish means for their appointment in the event of an actual dispute ...

The Washington Convention (1965) provides:[8]

> where the parties do not agree upon the number of arbitrators and the method of their appointment, the Tribunal shall consist of three arbitrators, one arbitrator appointed by each party and the third, who shall be the president of the Tribunal, appointed by agreement of the parties.
>
> If the Tribunal shall not have been constituted within 90 days after notice of registration of the request has been dispatched by the Secretary General, in accordance with paragraph 3 of Article 36, or such other period as the parties may agree, the Chairman shall, at the request of either party and after consulting both parties as far as possible, appoint the arbitrator or arbitrators not yet appointed ...[9]

Therefore, the United Nations Model Law (1985) seems to be the only one which makes express reference to the Courts by providing:[10]

> (2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of this article.
>
> (3) Failing such agreement,
>
> (a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their ap-

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7 Art. IV, 1, *European Convention on International Commercial Arbitration* (1961); see also M. GIULIANO – F. POCAR, *op. cit.*, at 1134.

8 Art. 37.2 (b), Washington Convention (1965) (Convention on the Settlement of Investment Disputes between States and Nationals of other States).

9 Art. 38, *Washington Convention* (1965).

10 Art. 11 (2) and (3), *United Nations Model Law* (1985).

pointment, the appointment shall be made, upon request of a party, by the court or other authority specified in Article 6;

(b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court or other authority specified in Article 6.[11]

Arbitration rules

The appointment of arbitrators is generally reserved by the arbitral institutions to their Court of Arbitration which, as it is well known, does not generally decide the disputes itself, but appoints or confirms the arbitrators according to its arbitration rules accepted by the parties.

The appointment of a sole arbitrator or of a third arbitrator is made by the ICC Court of Arbitration, or must be confirmed by it if made by the parties or by the party appointed arbitrators.[12]

The London Court of Arbitration provides that:[13]

The LCIA Court alone is empowered to appoint arbitrators.

The American Arbitration Association rules state:[14]

1. The parties may mutually agree upon any procedure for appointing arbitrators and shall inform the administrator as to such procedure.

2. The parties may mutually designate arbitrators, with or without the assistance of the administrator. When such designations are made, the parties shall notify the administrator so that notice of the appointment can be communicated to the arbitrators, together with a copy of these rules.

3. If within 45 days after the commencement of the arbitration, all of the parties have not mutually agreed on a procedure for appointing the arbitrator(s) or have not mutually agreed on the designation of the arbitrator(s), the administrator shall, at the written request of any party, appoint the arbitrator(s) and designate the presiding arbitrator. If all of the parties have mutually agreed upon a procedure for appointing the arbitrator(s), but all appointments have not been made within the time limits provided in that procedure, the administrator shall, at the written request of any party, perform all functions provided for in that procedure that remain to be performed.

4. In making such appointments, the administrator, after inviting consultation with the parties, shall endeavor to select suitable arbitrators. At

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[11] Art. 6, *United Nations Model Law*.

[12] Art. 8 (2), ICC Rules of Conciliation and Arbitration.

[13] Art. 3 (3), Rules of the London Court of International Arbitration.

[14] Art. 6, International Arbitration Rules effective April 1, 1997.

> the request of any party or on its own initiative, the administrator may appoint nationals of a country other than that of any of the parties.
>
> 5. Unless the parties have agreed otherwise no later than 45 days after the commencement of the arbitration, if the notice of arbitration names two or more claimants or two or more respondents, the administrator shall appoint all the arbitrators.

The rules of the Inter-American Commercial Arbitration Commission (IACAC) provide:[15]

> (1) When the IACAC is requested to appoint an arbitrator pursuant to Article 6 or Article 7, the party which makes the request shall send to the IACAC a copy of the notice of arbitration, a copy of the contract out of or in relation to which the dispute has arisen and a copy of the arbitration agreement if it is not contained in the contract. The IACAC may require from either party such information as it deems necessary to fulfill its function.

The rules of the European Court of Arbitration involve the parties[16] more extensively by convening them to a preappointment conference

> The parties shall be summoned by the Secretariat of the Court to a preliminary meeting chaired by the member of the Executive Committee designated for this purpose unless such a meeting is clearly unnecessary.
>
> At this meeting the parties will be invited by the Court to form the Arbitral Tribunal.
>
> If the parties have agreed to appoint three arbitrators each party will nominate one arbitrator. The third arbitrator who shall act as the Chairman of the Arbitral Tribunal wil be jointly appointed by the parties by consent.
>
> In the absence of an agreement by the parties as to the Chairman his nomination will be made by the two party-appointed arbitrators or, in the event of disagreement between them continuing for 10 days after the preliminary meeting, the Chairman will be appointed by the Court.

The international rules of the Milan Chamber of National and International Arbitration specify:[17]

> 3. If a sole arbitrator is appointed, the Arbitral Council may confirm the appointment of such person as is designated by the parties. In the absence of agreement between the parties within thirty days from notification of the request for arbitration, or if the Arbitral Council does not

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[15] Art. 8 (1), Rules of the Inter American Arbitration Commission.

[16] Art. 9.1, Rules of the European Court of Arbitration (1997 edition).

[17] Art. 19 (3), Rules of the National and International Chamber of Arbitration of Milan.

> confirm the appointment of the person designated by the parties, the Arbitral Council shall appoint the sole arbitrator.
>
> 4. If the parties have not otherwise agreed, the arbitral tribunal shall be formed in the following manner:
>
> (a) each party shall designate one arbitrator in the request for arbitration and in the answer to the request respectively subject to confirmation by the Arbitral Council;
>
> (b) upon expiry of the time limit for such choice, whether such time-limit was agreed upon by the parties or arises from the provisions of (a) above, the Arbitral Council shall proceed to make the appointment;
>
> (c) save as provided in paragraph 5 of this article, the Arbitral Council shall appoint the third arbitrator who shall act as Chairman of the arbitral tribunal.

The rules of the Arbitration Institute of the Stockholm Chamber of Commerce deal as follows with the appointment of arbitrators:[18]

> If the parties have not agreed on the number of arbitrators, they shall be three in number. If the parties have agreed that the dispute is to be decided by a sole arbitrator, then the appointment shall be made by the Institute. In other cases each party shall appoint an equal number of arbitrators and the Institute one arbitrator, who shall be chairman of the Tribunal. If the parties have so agreed, the Institute shall appoint all members of the Tribunal.

The Rules of Conciliation, Arbitration and Expertise of the Euro-Arab Chambers of Commerce state:[19]

> if the parties fail to agree on the name of the sole arbitrator or if either party fails to nominate an arbitrator as required, the Board shall itself proceed to make the appointment within the said thirty day period.

This overview shows that in institutional arbitration the intervention of state courts is generally carefully excluded by the arbitration rules. It must be also recognized that the arbitration rules do not always contain a detailed procedure for keeping a balance in the constitution of the arbitral tribunal when there are more than two litigants. Inadequate regulation of this issue may cause the incorrect constitution of the arbitral tribunal and subsequent challenges on the award.

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[18] Art. 5, Rules of the Arbitration Institute of the Stockholm Chamber of Commerce.

[19] Art. 21 (3), Rules of Conciliation, Arbitration and Expertise of the Euro-Arab Chambers of European Court of Arbitration, 1997 edition.

14.2. INTERVENTION TO COMPEL SUBMISSION OF DISPUTE TO ARBITRATION OR TERMS OF REFERENCE

The aid provided by state courts to arbitration in many respects has induced some parties to believe that these Courts might intervene by compelling a party, which has entered into an arbitration agreement, to specify that agreement by way of a submission or of terms of reference.

That was the situation in *Milan Presse*[20] where since the chairman of the arbitral tribunal held that he was unable to organize the proceedings, a party applied to the Court of Paris in order that it remedied the other party's inertia in agreeing the terms of reference. The Court of Paris held that this went beyond its authority to intervene in aid of arbitration.

In *Pepsico*[21] the U.S. Court, hearing an application to compel arbitration in New York under an arbitration agreement which provided for arbitration to be held there, having been advised that the other party had initiated court proceedings in Venezuela, in which it contended that the arbitration agreement was 'inoperative' because of its 'obscurity and ambiguity,' rejected the application for an immediate order to compel arbitration, but retained jurisdiction, staying its decision for 60 days in order to allow the Court in Venezuela to decide on the validity of the arbitration agreement. Very shortly afterwards the Court in Venezuela declined jurisdiction.

14.3 STATE COURTS' RULINGS ON VALIDITY OF THE ARBITRATION AGREEMENT

The parties refer to the state courts to challenge the validity of the arbitration agreement and, more rarely, to seek a declaratory judgment affirming its validity, when denied by a Court of Arbitration on its *prima facie* examination.

On the one hand there should be no obstacles in principle to initiating court proceedings to review a decision of the court of arbitration, which asserts the non-existence of an arbitration agreement even if, as we have seen, it is administrative in nature. On the other hand proceedings to challenge a decision which has held the validity of the arbitration agreement do not generally seem to be available after the arbitral proceedings have been commenced. The parties then generally have to wait for that until the end of the arbitral proceedings, and then they may attack the award on this ground. The European Convention (1961) too provides for this.

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[20] *Régimage v. Milan Presse*, Tribunal de Grande Instance de Paris, November 16, 1994, *Rev. arb.* 1995, 565.

[21] *Pepsico Inc. et al. v. Oficina Central de Acessoria Ayuda Tecnica Cia*, U.S. District Court, District Court of New York , October 28, 1996 n° 96 Civ. 7817 (J.S.R.) *Yearbook Commercial Arbitration* 1998, 919.

The solution seems less certain as to court proceedings, started before the arbitral proceedings, for establishing the validity of the arbitration agreement. It must be established whether even this issue comes under the arbitration agreement and must therefore be submitted to the arbitrators. The reply to this query, although it depends in each case on the specific arbitration agreement, might be positive in principle.

Some legal systems require the arbitrators to be appointed in the arbitration agreement for it to be valid. This is the case under Egyptian law where, as earlier discussed, Section 502 para. 3 ECCP expressly required that the appointment of the arbitrators be made in the arbitration agreement. The claim has been made in court proceedings that the arbitration agreement should be declared null and void because this requirement had not been fulfilled. That was the case in the Egyptian judgment in *Gulf Contractors.*[22]

Illustration

> The agent of a foreign purchaser instituted proceedings before the court of first instance of Alexandria against an Egyptian cement supplier claiming rescission of the sale contract and damages for non-delivery of the cement. The Egyptian supplier pleaded lack of jurisdiction because of the existence of an arbitration agreement. It was opposed to this that the arbitration agreement was null, being in breach of Section 502 para. 2 ECCP, which requires that the arbitrators be appointed in the arbitration agreement.
>
> The court of first instance declared the arbitration agreement null and void on this ground. The Court of Appeal of Alexandria confirmed the judgment of first instance. The Court of Cassation reversed the appellate judgment, holding that the validity of the arbitration agreement must be determined under the law of the place of arbitration and that, in this case, the agreement was valid under English law.

This decision was followed by the Egyptian Supreme Court in *Misr Insurance:*[23]

> An Egyptian importer purchased from a French supplier a supply of vinyl to be transported from Marseilles, France, to Alexandria, Egypt. The supply contract contained an arbitration clause which did not appoint the arbitrators, and chose Marseilles as the place of arbitration. On the goods' arrival, it was alleged that there was a shortage and that they

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[22] *M. V. Lela v. Gulf Contractors,* Court of Cassation (Egypt), April 26, 1982, no. 714 judicial year 47, *Mediterranean and Middle East Arbitration Quarterly* 1988, no. 2, at 1.

[23] *Misr Insurance v. M. V. Dominion Trader,* Court of Cassation (Egypt), June 13, 1983, no. 1259, judicial year 49, *Mediterranean and Middle East Arbitration Quarterly* 1988, no. 2, at 8.

were partially damaged. The importer was insured and the insurer, after paying the insured sum, sued the supplier before the Alexandria Court of first instance, claiming damages. The Alexandria Court declared its lack of jurisdiction because of the arbitration agreement. The Court of Appeal of Alexandria confirmed the first instance judgment. The insurer appealed to the Court of Cassation arguing the nullity of the arbitration agreement for breach of Art. 502 par. 3 ECCP, which requires that the arbitrators be appointed in the arbitration agreement. The Court of Cassation held that the validity of the arbitration agreement had to be decided under the law of the place of arbitration and that Section 502 is not a matter of public policy.

Other legal systems, such as the Italian one, required that if the appointment of the arbitrators is not made in the arbitration agreement, at least the method of appointing them is specified. However in *Trans Air*[24] the arbitrators held that this requirement had been superseded by the European Convention (1961) as amended.

An Italian company entered into a sale agreement (with a French company) and later, in the arbitral proceedings provided for by the contract, claimed interest from it for delay in paying its invoices. The French company challenged the validity of the arbitration agreement because there was no mention of the number of arbitrators and of the method for appointing them and issued proceedings in the Court of Milan claiming that the arbitration clause should be declared null and void.

The arbitrators rejected this argument on the basis of Art. IV no. 1 of the Geneva Convention (1961), which in the case of *ad hoc* arbitral proceedings recognizes the parties' right (note: not the duty) to appoint arbitrators or to establish the method for appointing them. The arbitrators held that by the subsequent Convention December 17, 1962 (implemented in Italy on June 19, 1976), replacing paragraphs 2 to 7 of Art. IV of the Convention, it had been agreed that 'if the arbitration agreement does not contain provisions on all or part of the items provided for by paragraph 1 of Art. IV of the European Convention on International Commercial Arbitration, all the problems which may arise as to the constitution or function of the arbitral tribunal will be decided by the court having jurisdiction, upon application of the more diligent party.

The Italian Arbitration Reform Act 1994 has confirmed this by providing:[25]

In the absence of a mention of the number of the arbitrators and of an agreement of the parties as to them, the arbitrators shall be three and, if not appointed and if the parties have not agreed otherwise, the President of the Court which has jurisdiction under the Act, will appoint them.

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[24] *Malvisi S.p.A. v. Trans Air Sud SA*, award June 24, 1987, Milan, *Foro pad,* 1987, 507.

[25] Art. 4.

In the U.S., the Federal Court held in *First Options*[26] that the existence and validity of an arbitration agreement was a matter to be decided by the Court and not to be deferred to the arbitrators, although *in dicta* it suggested that in some other situations the arbitrators should be entitled to decide on their own jurisdiction. These *dicta* have raised discussions. Park suggests[27] thay only the scope of the parties' agreement is capable of being delegated to arbitrators.

In another respect, the *Luckie* Court[28] held that limitation defences are a matter for courts and not for arbitrators, while in *Allied Bruce*[29] the Federal Court held that state laws – such as Alabama's – which did not allow the enforcement of arbitration clauses entered into prior to the dispute, are pre-empted[30] by the Federal Arbitration Act which does not allow total bars to arbitration(by states) to survive.

In *Philipp Brothers,* it was held that there was jurisdiction to intervene to resolve difficulties.[31]

Contrary to this approach, in *Bai Line*[32] while hearing a claim that a referral of a dispute to arbitration was not valid since it had been filed after the time period stated by the parties, the French Court of Cassation denied the jurisdiction of state courts to entertain such a claim even when the arbitral proceedings had not yet started, unless the arbitration agreement is manifestly null and void.

The new *Egyptian Arbitration Law (*1994) no longer requires that the arbitrators be appointed in the arbitration agreement.

An approach which aids arbitration, rather than aiming to establish the boundaries of the respective jurisdictions, is to be found in *European Country Hotel*[33] where the Paris Court held it had jurisdiction to intervene in aid of arbitration not only as to the appointment of arbitrators but also as to:

> any difficulties ... subsequently arisen which could prevent the arbitral tribunal from continuing the proceedings.

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[26] *First Options of Chicago v. Kaplan*, U.S. Supreme Court, May 1, 1995, 115, SCF 1920 (1995).

[27] W.W. PARK, *The Arbitrability Dicta in First Options v. Kaplan. What Sort of Kompetenz-Kompetenz Has Crossed the Atlantic?*, 12 *Arb. Int.* 2, 137.

[28] *Smith Barney v. Luckie*, New York Court of Appeals, 85 NY 2nd 198 (1995).

[29] *Allied Bruce Terminix Cos.Ind. v. Dobson*, N.Y. Federal Court, 130 L.Ed. 2nd 753, (1995).

[30] D.J. BRANSON, *Arbitrability and Pre-emption: More Litigation in the United States*, 12 *Arb. Int.* 2, 161.

[31] *Sté Philipp Brothers v. Sté Drexel Burhan Lambert et al*, Court of Cassation (France) November 22, 1989, *Rev. arb.* 1990, 142.

[32] *Sté Bai Line Shipping v. Sté Recofi,* Court of Cassation France, January 21, 1992, *Rev. arb.* 1995, 56.

[33] *Sté European Country Hotel Ltd. v. Consorts Legrand et autres*, Tribunal de Grande Instance de Paris (ord.réf.) April 10, 1990, *Rev. arb.* 1994, 545.

The two basic principles in this respect are outlined by Pluyette:[34] on the one hand the courts will not interfere during the arbitral proceedings, on the other hand they will act in aid of arbitration if difficulties arise.

This in line with van den Berg's views:[35]

> ... the national assistance of a national court may be needed for the appointment, replacement or challenge of an arbitrator.

14.4 CHALLENGE OF ARBITRATORS

The role of state courts is more important in the challenge of arbitrators. National legal systems in general grant to state courts the authority to decide on challenges. However, the arbitration rules generally reserve the decision on such issue to the institutional bodies.[36]

Consequently, a distinction must be made between *ad hoc* arbitration and institutional arbitration, since in the former the challenge is generally made before state courts, while in the latter the arbitration rules generally reserve to the Court of Arbitration the right to decide on it.

The ICC Rules of Conciliation and Arbitration state:[37]

> The decisions of this Court as to the appointment, confirmation, challenge or replacement of an arbitrator shall be final and the reasons for such decisions shall not be communicated.

The American Arbitration Rules specify:[38]

> Any person appointed as neutral arbitrator shall disclose to the AAA any circumstance likely to affect impartiality, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives.
>
> Upon receipt of such information from the arbitrator or another source, the AAA shall communicate the information to the parties and, if it deems it appropriate to do so, to the arbitrator and to others. Upon objection by a party to the continued service of a neutral arbitrator, the AAA shall determine whether the arbitrator should be disqualified and shall inform the parties of its decision which shall be conclusive.

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34 G. PLUYETTE, *Le point de vue du juge*, *Rev. arb.* 1990, 353.

35 van den BERG, *op.cit.* at 30.

36 P. SANDERS, *L'intervention du juge dans la procédure arbitrale* (The intervention of the judge in arbitral proceedings), *Rev. arb.* 1980, 247.

37 Art. 7.4, ICC Rules of Conciliation and Arbitration (1998).

38 Art. 19, Commercial Arbitration Rules of the American Arbitration Association.

The Rules of the Inter-American Commercial Arbitration Commission (IACAC) state that:[39]

> If the other party does not agree to the challenge and the challenged arbitrator does not withdraw, the decision on the challenge will be made by the IACAC.

The Rules of the European Court of Arbitration provide:[40]

> 4. The Court shall rule on the admissibility and merits of the challenge after having heard the arbitrators and the parties, unless all the parties agree to waive their right to be heard ....
>
> 5. By a decision of the Executive Committee the Court may replace an arbitrator if he does not fulfil his obligations under these Rules and is in serious breach of them and has failed to remedy the breach notwithstanding being requested to do so.
>
> 6. Upon a valid challenge of an arbitrator or his removal, the Court shall appoint a new arbitrator without consultation of the parties.

The rules of the Arbitration Institute of the Stockholm Chamber of Commerce are along the same lines:[41]

> If a party wishes to challenge an arbitrator he shall do so in writing. Such a challenge shall state the reasons therefor and shall be notified to the Institute, the arbitrators and each other party. Any challenge of an arbitrator made by a party must be made immediately but in any event within thirty days of the date on which the allegedly disqualifying circumstance becomes known to the party. A party who fails to notify a challenge within the prescribed time is deemed to have waived his right to make such a challenge. Decisions on challenges will be made by the Institute.

The International Rules of the Milan Chamber of Arbitration state:[42]

> The Arbitral Council shall make a conclusive decision on the challenge. The matter cannot be raised again before the arbitrators.

The Rules of Conciliation, Arbitration and Expertise of the Euro-Arab Chambers of Commerce state:

> Any further challenge of the arbitrators nominated by the other party must be supported by reasons. The Board shall rule on such a challenge,

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39 Art. 12 (1), Rules of the Inter American Arbitration Commission.

40 Art. 10.4, 5 and 6.

41 Art. 7, Rules of the Arbitration Institute of the Stockholm Chamber of Commerce.

42 Art. 21 (2), Rules of the National and International Chamber of Arbitration of Milan.

> either by rejecting it or by accepting it, and giving the party whose arbitrator has been challenged the right to make a further nomination.[43]
>
> Once the proceedings have commenced, the Board alone shall have jurisdiction to deal with any challenge by either of the parties concerning the sole or the third arbitrator. In the event of such challenge the Board may replace the arbitrator in question[44].

The rules of the Canadian Arbitration, Conciliation and Amiable Composition Centre provide:[45]

> If the other party does not agree to the challenge and the challenged arbitrator does not withdraw, the decision on the challenge will be made by the Centre.

The rules of the Italian Society for Arbitration specify:[46]

> Any party may challenge the arbitrator within 15 days of receipt of the Secretariat's communication indicated in Art. 11. Reasons must be given for challenging an arbitrator; the Court shall decide on it without any obligation to give its reasons, bearing in mind – among other things – the required independence which must characterize the arbitrator's function.

The French Courts, dealing with the issue whether the judge may review such a decision, held in *Opinter,*[47] (although more because of the administrative nature of that decision than with a view to affirm the court's exclusive jurisdiction on it):

> A Court of Appeal may not hear any appeal against the decision of an arbitral institution which has decided on a challenge of arbitrators. The Court of Appeal rightly held the view that the decision made by the Court of Arbitration of the International Chamber of Commerce, which had only been instructed to organize the arbitration and was not discharging a judicial role, cannot be treated as an award.

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[43] Art. 22 (2), Rules of Conciliation, Arbitration and Expertise of the Euro-Arab Chambers of Commerce (in force since January 10, 1983).

[44] Art. 22 (3), *ibidem.*

[45] Art. 12 (1), Rules of the Canadian Arbitration, Conciliation and Amiable Composition Centre.

[46] Art. 12 (1), para. 2, Rules of the Italian Society for Arbitration (in force since October 1, 1985).

[47] *Société Opinter France v. S.à.r.l. Dacomex,* Court of Cassation (France), October 7 (1987) *Rev. arb.* 1987, 479.

This view was confirmed in *Chérifienne des Petroles*,[48] where the Tribunal de Grande Instance de Paris has held that once the arbitral tribunal is formed, the state courts may no more interfere, unless the arbitral institution chosen by the parties takes no action. The court may consequently not review the appointment of the arbitrators made by the said institution nor entertain challenges of appointments made by it, unless an appeal is made against the award made by that tribunal.

The rules of the London Court of International Arbitration not only affirm the jurisdiction of the Court of Arbitration in this respect, but also expressly exclude the jurisdiction of state courts:

> An arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to his impartiality or independence. A party may challenge an arbitrator it has nominated or in whose appointment it has participated, only for reasons of which it becomes aware after the appointment has been made.[49]
>
> The decision of the Court with respect to all matters referred to in this article shall be final. Such decisions are deemed to be administrative in nature and the Court shall not be required to give reasons for them. To the extent permitted by the law of the place of arbitration the parties shall be taken to have waived any right of appeal in respect of any such decision to a court of law or other judicial authority. If such appeals remain possible due to mandatory provisions of the law of the place of arbitration, the Court shall, subject to the provisions of the applicable law, decide whether the arbitral proceedings are to continue, notwithstanding an appeal.[50]

However, as shown in *Westland* the right of arbitral institutions to have the last word on challenges of arbitrators is not recognized by all legal systems.[51]

> Westland Helicopters had submitted to arbitration organized by the International Chamber of Commerce its claim against the AOI (Arab Organization Industry) formed by the United Arab Emirates, Saudi Arabia, Quatar and Egypt, to create an industry to manufacture weapons. Westland's claim was based on the winding up of the AOI decided by those Governments. In the meantime the Egyptian Arab Republic had formed an Egyptian company called EAOI to keep the initiative alive. That company had appeared in the proceedings to oppose Westland's claims.

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[48] *Sté Chérifienne des pétroles v. Sté Mannesman Industria Iberica et al*, Tribunal de Grande Instance de Paris, January 18, 1991, *Rev. arb.* 1996, 503.

[49] Art. 3 (7), Rules of the London Court of International Arbitration.

[50] Art. 3 (9), Rules of the London Court of International Arbitration.

[51] *Westland Helicopters Ltd. v. Arab Republic of Egypt, Arab Organisation For Industry, Arab British Helicopters Company*, Federal Tribunal (Switzerland) September 24 (1976) *Mediterranean and Middle East Arbitration Quarterly* 1988, no. 3.

The International Chamber of Commerce formed an arbitral Tribunal choosing Geneva as place of arbitration. The arbitrators, in a partial (i.e. interim) award, held that the Egyptian company EAOI was not a party to the arbitral proceedings. The Court of Appeal of Geneva set aside the partial (i.e. interim) award for lack of reasons. Egypt applied then to the Court of Geneva to challenge the arbitrators so they could not hear the rest of the dispute. The application was rejected by the Court of Geneva which held that it had to be addressed to the International Chamber of Commerce. The appeal against such judgment was rejected by the Court of Appeal of Geneva. The Swiss Federal Tribunal however quashed the appellate judgment holding that Swiss Tribunals had jurisdiction on applications for the challenge of arbitrators and that any contrary arbitration rules could not deprive the Swiss Courts of their jurisdiction.

In conclusion, in institutional arbitration the arbitral institution reserves to itself the jurisdiction to hear challenges, generally excluding a concurrent jurisdiction of state courts. In some jurisdictions the decision of the arbitral institution is treated as non-appealable on the grounds of its administrative nature. In other jurisdictions state courts do not recognize the validity of this claim for exclusive jurisdiction by the arbitral institution, use the procedural rules of the *lex fori* which grant jurisdiction to them and treat them as a mandatory provisions.

Whatever the position which the applicable procedural rules take in this respect, there seems to be a widely held view that as a rule state courts should not entertain applications to set aside the appointment of an arbitrator and may review this aspect only when the award is attacked before them. This principle was held by an Italian Court in *Trans Air*:[52]

Illustration

The Court of Appeal, Milan has held that the appointment of an arbitrator by a state court cannot be challenged before the Court of Appeal. The French applicant had applied for the appointment of the arbitrator, made by the Court of first instance, to be set aside since the arbitration agreement was null and void and French Courts had jurisdiction. The Court of Appeal held that the decision on the validity of the constitution of the arbitral tribunal, must be made by the arbitrators and may only be reviewed by the Courts later, in the proceedings attacking the award.

[52] *Trans Air Sud v. Malvisi,* Court of Appeal, Milan, May 27 (1986*) Mediterranean and Middle EastArbitration Quarterly* 1987, no. 1.

14.5 IDENTIFICATION OF THE COURT HAVING JURISDICTION

When arbitral proceedings take place in a given place under the procedural law of that state, then the courts of law having jurisdiction on such proceedings are normally those of that state. The position is less firm regarding the stage prior to the beginning of the proceedings, where, for example, the nullity of the arbitration agreement might be sought before the courts of the state in which the arbitration agreement was entered into or of the state of the defendant's domicile. Arbitral proceedings, which are governed by a procedural law different from the one of the place of arbitration, may present greater difficulties since one must first determine which courts have jurisdiction to appoint arbitrators or to set aside their appointment. The issue is whether the court of the place of arbitration, or the one whose procedural law is applied in the proceedings, has jurisdiction. Let us assume for this purpose that the choice of that different procedural law is valid. This means that the procedural law of the place of arbitration allows arbitration governed by a different procedural law to take place in that state, and furthermore, that the state, whose procedural law is applied, consents to its procedural law being applied to arbitration proceedings which take place abroad.

If both assumptions can be made, the courts of both States might assert to have jurisdiction (positive conflict of jurisdictions) or might both deny their jurisdiction (negative conflict of jurisdictions).

The hypothesis of negative conflict should be less frequent since it is likely that one of the two courts will declare it has jurisdiction. That might be so in particular for the court of the place of arbitration, because of the mere fact that the arbitration takes place within its jurisdiction.

It is suggested that even a positive conflict should not be frequent since (except in case of applications for the appointment, or for the challenge, of an arbitrator being simultaneously filed with both courts) the second court, on becoming aware of the appointment made by the first one, will generally not decide, because the appointment has already been made, and the jurisdiction of the two courts may be viewed as concurrent and not exclusive. Only if both courts treat their jurisdiction as exclusive does a positive conflict of jurisdictions arise.

The possibility of this conflict is one of the reasons which may play against the choice of a procedural law different from that of the place of arbitration, an aspect on which Redfern and Hunter have taken a strong position.[53]

However such a choice is generally not made with a view to complicating the situation, but because the venue is chosen merely for reasons of conven-

[53] REDFERN-HUNTER, *op. cit.*, at 55 *et seq.*

ience, such as being mid way between the litigants, while the parties are not happy with its procedural law and consequently choose another one.

14.6 INTERVENTION DURING EVIDENCE

One of the less positive aspects of arbitral proceedings is the lack of the arbitrators' power to enforce their orders. In order to be enforced, even an award has first to be accepted by the legal system, by the courts having jurisdiction on the place of arbitration (through its filing or the granting of leave to enforce it) or in other states through recognition and enforcement.

The position is worst for orders issued by the arbitrator during the proceedings, such as orders for a party to appear or to disclose documents, or for witnesses to appear. These orders are carried out voluntarily by the parties, or by the third party, because, contrary to awards which may be enforced, these orders are generally not enforceable. To reduce such inconveniences some legal systems allow their courts, when requested by the arbitrator and sometimes on application by a party, to intervene to help the arbitral proceedings by placing their power at the disposal of the arbitrator for specific acts. If so, courts will *subpoena* witnesses or order the discovery of documents. Unfortunately many legal systems do not provide for any similar support.

Arbitration rules

Arbitration rules generally do *not* provide for court intervention from any point of view, and consequently not even from this one. On the contrary, they tend to avoid it. In fact the ICC Conciliation and Arbitration Rules provide – when dealing with the jurisdiction of the arbitrator – that the arbitrators must decide on their jurisdiction even if parallel proceedings are instituted before a court aiming to obtain the nullity of the arbitral proceedings.[54] In this respect it has been held that an order issued by a court having jurisdiction and directed to the arbitrators may interrupt the arbitral proceedings.[55]

The European Court of Arbitration provides:[56]

> If the witness does not appear or he refuses to make a statement as required, the Arbitral Tribunal may request the competent state court to order that he appears before the Arbitral Tribunal.
>
> If the witness does not comply with such an order, the Arbitral Tribunal may require the party who has called the witness in question to request the competent state court to take evidence from the witness if that is allowed by the *lex fori* of said state court.

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[54] Art. 8, ICC Rules of Conciliation and Arbitration.

[55] CRAIG *et al., op. cit.*, part III, at 23.

[56] Art. 17.9 (1997 edition)

> Where the mandatory rules of the *lex fori* permit, the Arbitral Tribunal itself may apply to the competent state court to take evidence from a witness.
>
> The record of the court hearing shall be delivered to the Arbitral Tribunal. If no record is filed, such evidence will be deemed as not having been provided.

International conventions

International conventions are more open to the intervention of state courts.

The Geneva Convention (1923)[57] makes a vague opening in this direction:

> The arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place.
>
> The Contracting States agree to *facilitate all steps* in the procedure which require to be taken in their own territories, in accordance with the provisions of their law governing arbitral procedure applicable to existing differences. (emphasis added)

The United Nations Model Law (1985) expressly provides for the intervention of state courts:[58]

> The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent Court of this State *assistance* in taking evidence. The Court may execute the request within its competence and according to its rules on the taking of evidence'. (emphasis added)

Some national legal systems have the same rules. For example the Swiss Concordat on Arbitration provides[59]:

> If necessity dictates, the arbitral tribunal may request the assistance of the judicial authority provided for in Art. 3. That authority shall act in accordance with its cantonal law,

a provision which is confirmed by art. 184 Swiss Private International Law Statute 1987[60] which states:

> 1. The arbitral tribunal shall itself conduct the taking of evidence.
> 2. If the assistance of the state judicial authorities is necessary for the taking of evidence, the arbitral tribunal or one party by

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57 Art. 2, Geneva Convention (1923).

58 Art. 23, United Nations Model Law.

59 Art. 17.9, Arbitration Rules 1997.

60 Art. 27 no. 2, Swiss Arbitration Concordat (March 26, 1969).

> agreement with the arbitral tribunal may request the assistance of the state court at the seat of the arbitral tribunal.

Similarly, in English law the High Court judges have express authority in this respect:[61]

> (1) A party to arbitral proceedings may use the same court proceedings as are available in relation to legal proceedings to secure the attendance before the tribunal of witnesses in order to give oral testimony or to produce documents or other material evidence.
>
> (2) This may only be done with the permission of the tribunal or the agreement of the other parties.

The Court has in many other respects the same powers of making orders as it has for the purposes of court proceedings.

German law provides for court intervention not only during the appointment of an arbitrator or a challenge, or if parties do not appoint him,[62] but also to hear witnesses or experts, who do not voluntarily appear before the arbitrators, and the administration of oath to witnesses or experts is made by its courts.[63]

The opportunity for courts to intervene by placing their power at the disposal of the arbitrators certainly contibutes substantially to the better functioning of arbitral proceedings. Unfortunately, court intervention is rarely as wide as in England. Frequently it is confined to the appointment, confirmation, revocation of arbitrators or to the extension of the time limit to make the award.

The Italian Parliament was very close to granting court assistance to the arbitrators for the hearing of testimony, but during the last reading of the Bill its House of Representatives has suddenly dropped this important support for arbitration.[64]

U.S. Courts' intervention is available to help to raise evidence to be used in foreign or international arbitration.[65]

To this effect the US Court may require to be satisfied that the type of evidence, which is sought through it, be obtainable under the law of the State in

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61 Sections 43 and 44, Arbitration Act 1996.

62 Para. 29 – para. 2 and 1031-ZPO.

63 Paras. 1935-1936 ZPO. See W. J. HABSCHEID, *Les jurisdictions et l'arbitrage* (Jurisdictions and arbitration), *Rev. arb.* 1978, 317.

64 See the Legislative History of the Arbitration Reform Act; see also G. TARZIA, *Assistenza e non interferenza giudiziaria nell'arbitrato internazionale*, *Riv.arb.* 1996, 3, 473 *et seq.*

65 Section 1782 of Title 28, United States Court.

which it will be used. On that basis, aid was refused by a U.S. Court in *Commissioner of Patents.*[66]

Although arbitration is not expressly referred to in the US provisions, Born and Westin[67] have expressed the view that rather than being penalized by lack of consideration of comity, applications to introduce evidence should be treated by the U.S. Courts in a 'less severe' way than applications from foreign courts.

In Islamic law, our source for which is Saleh, if a witness does not appear or refuses to provide evidence or to reply to questions, in Syria the arbitrators may seek court intervention to order the witness to appear.[68]

In Iraq, when on various grounds the award cannot be made within the time limit provided for in the arbitration agreement, one of the parties may apply to the state court to decide the dispute or to fix a new time limit or to appoint another arbitrator.[69]

In Egypt, if a witness does not appear or refuses to provide evidence, the court, at the request of the arbitrators, may order his appearance.[70] Such intervention is provided for in Bahrain also.[71]

As to Asia and the Pacific Simmonds *et al.* report that in Hong Kong, when an arbitrator refuses appointment or can no longer act or dies, the court may appoint another arbitrator. Furthermore the court may remove an arbitrator for misconduct.[72] India has now enacted the Uncitral Model Law. In Japan, court intervention may be sought to appoint or replace the arbitrators and to force witnesses or experts to appear.[73]

In Malaysia, the Courts have the authority to appoint or to remove an arbitrator, to extend the time limit for rendering an award and to order discovery or the appearance of witnesses.[74]

It is also reported that the rules of the Arbitration Committee of Bucharest provide that evidence may be taken with the intervention of Rumanian Courts.[75]

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66 *The Court of the Commissioner of Patents for the Republic of South Africa*, 88 FRD 75 (E.D.Pa 1980).

67 BORN & WESTIN, *International Civil Litigation in United States Courts* 1992, at 10-12.

68 SALEH, *Commercial Arbitration in the Arab Middle East,* London 1984, at 111.

69 SALEH, *op. cit.,* at 189.

70 SALEH, *op. cit.,* at 215.

71 SALEH, *op. cit.,* at 285.

72 K.R. SIMMONDS – B.K.W. HILL – S. JARVIN, *Commercial Arbitration Law in Asia and the Pacific,* New York 1987 (SIMMONDS *et al.),* at 35.

73 SIMMONDS *et al., op. cit.,* at 97. See IWASAKI *Japan* in PRYLES, *Dispute Resolution in Asia, cit* at 144.

74 SIMMONDS *et al., op. cit.,* at 129. See LIM *Malaysia* in PRYLES, *Dispute Resolution in Asia, cit* at 171.

Court intervention to help arbitral proceedings could be used for the taking of evidence not only at the place of arbitration but also in other jurisdictions. The arbitrator is generally deprived of the authority to apply to foreign courts in order that they hear evidence. While an application by the arbitrators in this respect will generally not have any effect, the result may be positive if the application is made on behalf of the arbitrators by the state courts of the place of arbitration.

An objection might be made to this because it is desirable that the witnesses be heard directly by the arbitrator and, if the parties do not cooperate, the arbitral proceedings, which are based on that cooperation, cannot take place. However, if the arbitrators cannot obtain discovery of documents or that witnesses appear, the possibility of applying (as provided for by English law) to the state courts to obtain enforcement of their order is useful.

In this respect one may also consider resorting to The Hague Convention Relating to Civil Procedure of March 1, 1954 – if its requirements exist – which provides:[76]

> In civil or commercial disputes the Courts of a contracting State may, according to the provisions of their *lex fori*, apply by letter of request to the competent authority of another contracting State in order that the latter proceeds within its jurisdiction to take any evidence or other judicial activities.

A working group of CNUCED has worked out a draft international convention[77] which provides:

> (1) A foreign Arbitral Tribunal (or a party to foreign proceedings) may request a Court of this State for assistance in taking evidence. (2) The Court shall execute such a request in accordance with the rules for the execution of similar requests from foreign Courts.

14.7 CONSOLIDATION OF PROCEEDINGS

As earlier discussed several connected arbitral proceedings may take place at the same time. It is not always necessary that they be joined. Sometimes it may be useful, while on other occasions it might be to the detriment of expedition, or of one of the parties to one of such proceedings.

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[75] Art. 37.4.

[76] Art. 8, Convention on the Taking of Evidence in Civil or Commercial Matters, The Hague March 18, 1970, (unofficial English translation of French Original), see also *World Litigation Law Practice*, Matthew Bender, 1986 (Italy) by RUBINO-SAMMARTANO.

[77] Unofficial English translation of the United Nations Secretariat's Draft Uniform Law on International Commercial Arbitration, Doc. A/CN 91WS 11/WP 41, 42Z.

However even where it would be helpful that they be joined, it may not be possible. In general that power will go beyond the authority of the arbitrators. The same situation will arise as to arbitral institutions unless the latter have provided for that in their arbitration rules, which have been accepted by the parties.

In general this power will also go beyond the authority of state courts. An exception to this will be found for example in the United States, where in given circumstances consolidation may be ordered by the Court.[78]

14.8 Filing of the Award

The arbitration rules, as we have seen, tend to keep the courts away from arbitral proceedings. In spite of this, state courts' intervention becomes even more important at the end of the proceedings, when the award is made, in those jurisdictions in which the award cannot be enforced, even in the place of arbitration, unless it has first been adopted by that legal system through a court order, such as in Islamic law countries, or at least through the filing of the award.

Under French law the award rendered in France in international arbitration[79] must be declared enforceable by the courts.[80]

The requirement for filing the award with a state court is more common. Under Swiss law, the Swiss Concordat on arbitration (which after January 1, 1989 does not apply to arbitrations covered by the new legislation) provides that:[81]

> (1) The arbitral tribunal shall attend to the deposit of the award with the judicial authority provided for under Art. 3.
>
> ...
>
> (4) Such authority shall notify the parties of the award, and shall inform them of the date of deposit.
>
> (5) The parties may waive the deposit. They may likewise waive notification of the award by the judicial authority; in this event, the notification shall be made by the arbitral tribunal.

To enforce an award in the United States in domestic arbitration it is necessary for the parties to have accepted that:

> judgment be entered on the award,

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78 See R.E. WALLACE Jr., *Consolidated Arbitration in the United States*, 10 *J. Int. Arb.* 3,5.

79 I.e. in a dispute which involves international interests.

80 Section 1498, Decree 81-500, May 12, 1981.

81 Art. 35, Swiss Concordat, March 26, 1969, which may be consulted in BERNARDINI-GIARDINA, *Codice dell'arbitrato*, 541.

which means that the agreement of the parties is needed in order that the award be given the effects of a judgment. However this provision is not frequent in international arbitration agreements, where one of the parties does not belong to the U.S.. It has been held that the absence of such an agreement does not prevent its recognition.[82]

In reality, state courts are present for the entire duration of the arbitral proceedings, even though they remain in the background, and even before the arbitral proceedings commence and after they finish, up to the point that their continuous presence does not always help the:

> efficacy of international arbitration,

which is advocated by Goldman. The filing of the award will also be dealt with separately.[83]

The role of courts in attacks against awards will also be dealt with later.[84]

For a more accurate examination of the relationships between arbitrators and judges, well defined by Fouchard as:

> arbitration depending on the judge,

reference is made to the research made on *Le juge et l'arbitre* (The Judge and the Arbitrator),[85] by Sanders, Droumillar, Perrot, Schlosser, Goldman, Lalive, Cornu and Bellet, which ends with a final report by Fouchard.

14.9 FINAL OR BINDING NATURE OF THE AWARD

Another situation in which the courts of the place of arbitration may have to intervene is when the premises must be created in order that the award be recognized in other States. It is a general requirement for its recognition abroad that the award be, depending on the case, final or binding in the place of arbitration (the state of origin).

In the absence of derogation by international conventions, the requirement for the free circulation of the award is generally its finality in the state of origin. That implies the taking place, in the state of origin, of the court activities which are required in order for the award to be made final, and which may vary considerably from one jurisdiction to another. The notion of finality is not the same in the various jurisdictions. One consequently comes across various degrees of finality required in the different legal systems, from the requirement

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[82] See also Art. V of the New York Convention (1958) which does not include such a requirement among those for which recognition or enforcement of the award may be refused.

[83] See Chapter 20.

[84] See Chapter 21.

[85] *Rev. arb.* at 233-433.

that the award has acquired the status of *res judicata,* to the simple requirement that it should not be subject to a review of the merits. This is consequently a further area where court intervention to assist arbitration is needed.

In other jurisdictions, the existence of any possible attack against the award will exclude its finality. This situation is reflected in the wide formula used by the Geneva Convention (1927) which, amongst the requirements for recognition, lists:[86]

> That the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to opposition, *appel* or *pourvoi en cassation* (in the countries where such forms of procedure exist) or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending.

Many States have eventually decided not to remain passive any longer in the face of the very long delays which the various degrees of court proceedings impose before the award becomes final. Therefore, thirty years after the Geneva Convention (1927), the New York Convention abandoned the requirement that the award be *final* in the state of origin. This has put an end to this requirement (generally referred to as the *double exequatur,* which meant first obtaining the *exequatur* in the state of origin and later the *exequatur* in the state where its enforcement was required [the requested State]).

Among the grounds on which the recognition or enforcement of the award can be refused, the New York Convention states:[87]

> that the award has not yet become binding for the parties or has been set aside or suspended by a competent authority of the country in which or under the law of which the award was made.

The Geneva Convention (1961) provides[88] that:

> (1) The setting aside in a Contracting State of an arbitral award covered by this Convention shall only constitute a ground for the refusal of recognition or enforcement in another Contracting State, where such setting aside took place in a State in which, or under the law of which, the award has been made and for one of the following reasons: ...

The Washington Convention (1965) provides[89] that:

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[86] Art. 1 (d), Geneva Convention (1927); see also GIULIANO *et al., op. cit.,* at 1124.

[87] Art. V (e), New York Convention (1958); see also van den BERG *op. cit.,* at 399.

[88] Art. IX, European Convention on International Commercial Arbitration (1961); see also GIULIANO *et al., op. cit.,* at 1136.

[89] Art. 53 (1), Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965).

> The award shall be binding for the parties and shall not be subject to any appeal or any other remedy except those provided for in this Convention.

The United Nations Model Law (1985) includes,[90] amongst the grounds on which the recognition of a foreign award may be refused, that:

> 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.

However, even 'binding effect' is a notion which is not always construed in the same way. For those who do not follow van den Berg in his attempt to create a uniform construction of the Convention, it must be determined according to the state of origin.

If the notion of binding effect is left to the state of origin, the latter rarely certifies that it has been achieved. This may imply that it is up to the court of the requested state to determine whether, in the state of origin and under the laws of the latter, such binding effects have been obtained or not. The interpretation of procedural rules by the court of another state is not without risks and may bring various requested States to reach opposite conclusions on the same issue.

Illustration

> State B may treat an award rendered in State A as non-binding, while State C may treat it as binding.

Court intervention is consequently conceivable in some jurisdictions in order to ensure that an award becomes binding. That intervention may vary depending on the legal systems. To avoid problems in this respect the Italian Parliament has introduced legislation stating[91] that the award is binding for the parties since the time the last arbitrator has subscribed it, i.e.even before it is filed with the court. It has been argued[92] that this solution is not satisfactory since, based on its literal meaning, on the one hand this binding effect cannot be identified either with contractual binding effects[93] or with the effects of a

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[90] Art. 36, United Nations Model Law (1985.

[91] Art. 2, Italian Statute February 9, 1983, no. 28 (Amendments to the Arbitration Law), Official Gazette of the Republic of Italy, February 15, 1983, no. 44.

[92] E.F. RICCI, *Legge 9 febbraio* 1983, n. 28, *Modificazioni alla disciplina dell'arbitrato* (Statute February 9, 1983, no. 28, Amendments to arbitration law), *Le nuove leggi civili commentate* 1983, at 736 *et seq.*; G. TARZIA, *Efficacia ed impugnabilità del lodo nell'arbitrato rituale* (Effects of and attacks on the award in arbitration), *Rass. Arb.* 1984-1985, at 1 *et seq.*

[93] Section 1372 Italian Civil Code.

judgment which has not yet become final, and on the other hand that the binding nature of the award may not be conceived as something merely provisional so that it disappears if the *exequatur* is not obtained. While the *exequatur* strengthens the above effects, no decrease of the previous effects should take place, if the exequatur is not applied for. If the *exequatur* can no longer be obtained, the original binding effect should then remain, unless attacks against the award are successful.

The Italian Parliament has further removed[94] the provision that the Court's exequatur is required in order that the award produces the effects of a judgment. It follows from this that the exequatur merely makes the award into an enforceable instrument, which implies (it is submitted) that the award already possesses the other characteristics of a judgment.To remain on firm ground, one must recognize that the new legislation does not provide that, at the expiry of the term for applying for the *exequatur,* the effects already produced by the award will be lost. Furthermore the new legislation, by providing that the exequatur is necessary to enforce the award in Italy, proves *a contrariis* that it is not essential for other purposes. It is suggested that the new Italian legislation makes considerable progress towards a modernization of arbitration law since it eliminates the need for other states, in order to enforce an Italian award, to have to establish whether it is binding in the state of origin. In fact the express granting of that binding nature confers *ex lege* to the award the very seal which was required.

Nevertheless, it must be recognized that arbitration law is one of the many areas in which many legal systems would nor require minor amendments but new legislation.

14.10 Interlocutory Injunctions

Another important aspect of court intervention during arbitral proceedings is the one of conservatory measures and interlocutory orders. In various legal systems, arbitrators are deprived of that power and only state courts have authority to order such measures; that is frequently a source of dissatisfaction. If in these jurisdictions even the courts had no authority to decide in this respect, then the party to arbitral proceedings, who can suffer prejudice during the time required to obtain the award, would be deprived of any protection.

In other jurisdictions the arbitrators do have such authority but within certain limits. In Switzerland for example the arbitrators under the intercantonal

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[94] Art. 17, Arbitration Reform Act 1994.

concordat had the authority to propose, but not to order, interlocutory measures.[95]

As to Swiss 'international arbitration,' under the Swiss Private International Law Statute 1987:

> 1. Unless the parties have otherwise agreed, the arbitral tribunal may, on the motion of one party, order provisional or conservatory measures.
>
> 2. If the party concerned does not voluntarily comply with those measures, the arbitral tribunal may request the assistance of the competent state corts; the judge shall apply his own law.

Under section 43 of the English Arbitration Act 1996:[96]

> Unless otherwise agreed by the parties, the court may make an order requiring a party to comply with a peremptory order made by the tribunal.

In those legal systems in which also the arbitrator has such authority the problem arises of a possible conflict between the arbitrator and the courts. Under Hong Kong law it was reported that the arbitrators may order conservatory or interlocutory measures only within the limits of the arbitration agreement, or of the authority granted to them by the parties during the arbitral proceedings[97] and that state courts have discretion in granting provisional measures.[98]

Under the Indian Arbitration law, unless otherwise agreed upon by the parties, the arbitral tribunal has authority to grant any interim measure of protection as it deems necessary in respect of the subject matter of the dispute. Sometimes the arbitration rules grant to the arbitral tribunal authority to issue specific injunctions. This is the case of the Franco-Arab Chamber of Commerce[99] and of the Arbitral Chamber in Paris.[100]

The opposite extreme may also be reached in which the arbitration rules or the applicable procedural provisions grant the arbitrators exclusive jurisdiction, a position which in turn may give rise to disputes.

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[95] Art. 26, Swiss Concordat 1969, and art. 183, Swiss Private International Law Statute 1987.

[96] Section 43, Arbitration Act 1996.

[97] SIMMONDS *et al., op. cit.* at 27.

[98] For a discussion of Hong Kong see MOSER, *Hong Kong*, in PRYLES, *Dispute Resolution in Asia*, cit, at 163-173.

[99] A body not to be confused with ICC.

[100] B.. MOREAU, *L'intervention du tribunal au cours de la procédure arbitrale en droit français et droit comparé* (The intervention of the Courts during arbitral proceedings in French law and in comparative law), *Rev. arb.* 1978, 337.

Because of its importance and because such authority might be exercised both by the courts of the place of arbitration and by the courts of other jurisdictions, this issue will be dealt with later in more detail.[101]

14.11 AID NOT INTERFERENCE

The position adopted by state courts in the various jurisdictions shows tendencies which vary from interference to non intervention, and from non-intervention to aid.

In several situations, considered in this study, one has noted a tendency of state courts to interfere in arbitral proceedings, such as in those countries which prevent foreign attorneys from acting in international arbitral proceedings taking place there. According to a widespread view, even providing that courts may review the merits of the awards would constitute interference.

Interference has probably in its background a notion not only of the supremacy of state courts, but of the need for a senior body to redress the initiatives of junior bodies.

In other jurisdictions an opposite tendency seems to emerge. Here the right of the parties to challenge an award is extremely limited. I would include among such countries Belgium, which for many years has not allowed attacks against those awards which were treated by it as not fully domestic. This absolute exclusion was mitigated by the new Belgian Arbitration Act (1988) which has set aside the previous provision, and confines itself to granting to the parties authority to exclude attacks in the Belgian state courts:

> if none of the parties is either an individual of Belgian nationality or residing in Belgium or a legal entity having its head office or branch there.

In France, the legal system on the one hand is available to help in case of difficulties, but on the other hand it gives the impression of trying to avoid as much as possible being involved in challenges of awards, on the assumption that since the parties have preferred to resort to arbitration, then the Court should refrain from intervening except in the most serious situations. This attitude will be examined more in detail when it comes to challenges on foreign or international awards.

It seems difficult to hold that the EC judgment in *Marc Rich*[102] takes side on this dispute, because it confines itself to ruling that not only arbitration but even court proceedings related to arbitration, such as applications for the

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[101] See *infra* Chapter 17.

[102] *Marc Rich v. Società Italiana Impianti*, Court of Justice of the European Communities, July 25, 1991, *Yearbook Commercial Arbitration*, 1992, 233.

appointment of an arbitrator, are outside the ambit of the Brussels Convention.[103]

Its ruling seems then to be merely a matter of construing the Brussels Convention with reference to the subject matter of the dispute.

The Court further held that:

> if by virtue of the subject matter such as the appointment of an arbitrator, a dispute falls outside the scope of the Convention, the existence of a preliminary issue which the court must resolve in order to determine the dispute (such as the issue concerning the existence or validity of an arbitration agreement) cannot, whatever that issue may be, justify [the] application of the Convention.

14.12. WHETHER TO REVIEW THE MERITS OF THE AWARD

The traditional position adopted by national legal systems is that state courts exercise control over national or foreign awards. The principle of Court control is then not in issue. It is its ambit which is the object of different views.

As to national awards, the award may be attacked straight away. The Uncitral Model Law has suggested applying uniform rules, which exclude a review of the merits, even for errors in law, which are in line with the New York (1958) Convention.

As to foreign awards, the States which have adhered to the New York Convention (1958) have accepted to limit their control to the grounds provided by it to oppose recognition and enforcement of the award.

Generally attacks are based on the absence or nullity of the arbitration agreement, on errors in the appointment of the arbitrators, on lack of notice of proceedings, on non-compliance with the arbitration agreement, on lack of suitability for arbitration, breach of due process or of public policy in the conduct of the proceedings and in the award.

In some jurisdictions the attack may be based also on errors in applying the substantive law.

As a rule a review of the merits is excluded but in some jurisdictions it may be allowed, such as in several Islamic Countries which have not adhered to the New York Convention (1958).

Court control is therefore generally limited to compliance of the arbitral proceedings with the arbitration agreement, with public policy and with due process.

The effect of this approach is that awards which are wrong in fact or in law cannot be reviewed. In 1989 this writer has taken issue with this position[104] on

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[103] Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Brussels, September 27, 1968.

grounds which will be only partly used for the purpose of discussing now this issue, while they are more fully dealt with in the last chapter of the above cited study, and placed in a wider framework.

Criticism on the ground of inadequate Court control has been made in 1990 by Wallace,[105] a leading English counsel and writer in construction law. He objects to English courts having been deprived of the right to redress errors in law committed by arbitrators, in consequence of the abolition of the case stated procedure and of Lord Diplock's *obiter dictum* in *The Nema*[106] that in case of one-off contracts condition for leave to appeal is that the award be:

> obviously wrong on mere perusal of the reasoned award.

For reasons which will be discussed hereafter; Wallace advocates then more and not less control.

A leading French law professor[107] has taken issue with this view, holding that judicial review on the merits is a sign of mistrust and that Parliaments had then better abolish arbitration and send the parties directly to the state courts.

Mustill and Boyd[108] refer, as to the rationale for limiting the courts' control, to the aim of avoiding delays caused by appeals which frequently are made only for that purpose. If one widens the scenario and looks at this problem not merely from a single national point of view, one could indeed be tempted to think that the widespread reason for the general trend to limit court control is to secure for the parties a quick and final decision; in this respect Wallace rightly objects to speed taking precedence over the quality of a decision.

Mayer suggests that the legislature might have chosen to accept a few wrong decisions rather than opening the floodgates to a review of all awards, which would make the courts' backlogs even more extreme.

However in general there are few traces that such a proper concern has been given much attention by the legislature in many countries.

If so, the legislature would have intervened to avoid delays also in courts proceedings, which continue to increase. Since arbitration proceedings are only a small percentage of court proceedings, it would make no sense for the legislature to try to ensure speed in obtaining a final award, and not to act along the same lines as to the more important delays in court proceedings.

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[104] RUBINO-SAMMARTANO, *L'arbitrato internazionale*, Cedam 1989, *id. International Arbitration Law*, Kluwer 1990.

[105] I.N. DUNCAN WALLACE, *Control by the Courts. A Plea for More not Less*, 6 *Arb. Int.* 3, 253.

[106] [1982] AC 724.

[107] P. MEYER *Seeking the Middle Ground of Court Control: A Reply to I.N.D. Duncan Wallace* 7, *Arb. Int.* 4, 311

[108] MUSTILL and BOYD, *Commercial Arbitration* (2nd ed.) 588.

It is submitted that the rationale of this attitude is not that speed prevails over quality. Such a choice would not be in line with proper judicial administration which – it is submitted – must aim to provide a good and at the same time quick decision.

Finding the rationale behind an Act of Parliament is not always an easy task. Seeking to identify the rationale of an international trend is even more difficult, since it would require much more than simply identifying the rationale of each national legislature and then reading and construing carefully these combined results. One might need a very learned Middle Ages monk to spend a good deal of his life in reading and meditating on this issue. With luck, in the end he might be able to produce a lenghtly comparative analysis and to draw some useful conclusions.

One cannot then pretend to identify such rationale with any certainty.

One rationale might be that since the parties have decided to have their dispute decided by arbitrators and not by judges, then one should not nullify their decision by allowing judges to review the merits, be it only from the point of view of errors in law. This is the stance taken by Mayer who points out, in language perhaps stronger than his usual, that allowing state courts to review the merits :

> would strike at the heart of the very concept of the arbitral process.

Wallace[109] defines the deep change of the English case stated procedure as:

> possibly the greatest revolution in the English law of arbitration for more than a century.

Mustill and Boyd in commenting on this held[110] that in England, while initially:

> it was believed to be in the interest of the commercial community that arbitrators should be restrained from binding the parties whether accidentally or by design by an award which did not give effect to their true contractual rights,

the view has suddenly changed as per *The Nema obiter dictum* and:

> it is no more axiomatic that the courts should be allowed to protect parties against decisions made contrary to the system of law which they have selected as applicable to their dispute.

This writer is unable to say whether Lord Diplock meant to strike at 'the very heart' of the arbitral process, particularly since his *obiter dictum* is rather concise.

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[109] See *supra* note 106.

[110] See *supra* note 109.

Lord Diplock seems merely to mean that, in order to allow an appeal (as to one-off contract provisions) there should be good reasons for deciding *prima facie* that the award was wrong. If read in this way, the *obiter* might be seen by many readers as being rich in common sense and intended merely as guidance to judges in deciding whether to grant leave.

Wallace[111] objects that this may not be established on an application for leave lasting ten to fifteen minutes. However, if this were simply a matter of measuring the time available in Court, a solution might have been worked out.

Whether the Court will review errors *in law* varies between countries. Some legal systems allow it, some do not. English law is now contained in Section 69, Arbitration Act 1996 which seems to be a perceptible move in the direction of finality. To use Mayer's expression, although it was not made in relation to this issue:

> This equilibrium is not the same in all the countries.

Mayer suggests that if the merits were reviewed – even if restricted to errors in law – then three alternatives would be available.

First, that the arbitral proceedings be recommenced before another arbitral tribunal, which would amount to starting afresh and could be very long. This alternative will not be further explored not only for this reason, but because it would destroy entirely the first award, while frequently a good part of it could be kept.

The second alternative would be a review of the award, as to a given error in law, by state courts.

Mayer's criticism of this solution is – in his style – concise, clear and effective.[112] He identifies the following three objectives of review of court judgments. First, it allows the party, which does not accept the first instance judgment, to present its case to a 'more experienced judge.' Second, this gives rise to 'a fresh examination' allowing a 'higher degree of concentration.' Third, it creates a body of precedents.

The third objective might be – but perhaps is not necessarily – less important to decide this issue. Mayer does not suggest that a ' higher degree of concentration' in reviewing an award would be less useful than in court proceedings. His main criticism of court control of the merits starts by dealing with the first above stated objective, a review by a more experienced judge.

Mayer rightly wonders whether the state court which would review the award is indeed more experienced or, to use his own words, a 'higher body'.

Responses to this query might vary. According to one view the appellate judge would be always higher (just by definition as if endowed with a sort of

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[111] WALLACE, see *supra* note 106, at 255.

[112] MAYER, see *supra* not 108 at 313.

grace conferred to him because of his status). According to some extreme arbitration circles, the judge would be inferior to arbitrator. No generalized response is probably possible. Only a case by case comparison would perhaps be possible.

It is submitted that usually the judge is not necessarily of 'higher' or 'lower' status than an arbitrator. Let us then assume that he has the same level, in the sense that a judge compensates for possibly lower experience in a specific field with his wide experience of hearing cases. If so, a trial judge would not be 'more experienced' than an arbitrator

One might think that this conclusion supports Mayer's view that the main reason for allowing an appeal does not stand. However the same query might be justified also in court proceedings, when one looks at the relationship between the High Court and the Court of Appeal.

Seniority might provide a response but on many occasions the arbitrator may be senior to the state court judge.

However this was only the initial remark by Mayer.

Mayer goes further[113] pointing out that, if issues of law and of construction of contract can be reviewed by state courts, then the arbitrators would have:

> final authority to decide issues of fact, whilst the other issues would ultimately be for the judge.

He fairly recognizes that if the parties so wish, this is conceivable, but he objects to putting these words into their mouth, if they have been silent.

He moves then to a further argument which – it is submitted – is the most effective. Parties– he says – have referred a dispute to arbitration because they did not want a state court to decide them. If one allows a national court to review the merits of the arbitration's decision, then the intention of the parties is:

> betrayed,

and further:[114]

> one cannot reasonably imagine that the parties intended to limit the effect of this choice to an initial examination of the dispute, allowing the disappointed party to return to the national courts for a second examination of issues of law and contract interpretation.

Mayer further points out that, since the decision made as a result of the review of the merits would prevail, then the arbitral proceedings would become:

> a mere prelude to judicial proceedings.

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[113] MAYER, *supra* note 108 at 315.

[114] MAYER, see *supra* note 108 at 315.

These remarks defeat, it is submitted, Wallace's argument – expressed in the very solid language of a construction lawyer (as he is) – that the arbitrator's decision and a court review of it for errors in law are:

> an essential building block.

Wallace's argument[115] seems less effective, when the matter comes to the review of the merits being made by the courts of the country where the project materializes, since that might go against the reasons which led to the choice of international arbitration.

Wallace in reality is a faithful and convinced supporter of his own legal system and is not deterred from stating:

> the author's advice to a responsible owner would have been [note: prior to Nema and therefore if Nema is removed] to choose English law as the proper law,

and – one could add – preferably to refer the matter directly to English courts or, if arbitration must happen, to be sure that errors in law can be redressed by an English Court.

The defeat of the advocated control of the merits of the award might be seen as the end of this discussion.

However the third alternative mentioned by Mayer has still to be examined.

Mayer points out:[116]

> This line of reasoning does not challenge the principle of appeal *per se* ...
>
> It would be perfectly possible to organize a system of arbitral appeals ... which would give the same additional assurance of quality of justice that is sought by creating appellate jurisdictions.

This comment is strictly in line with the position taken by this writer in 1989, that if a review of the merits is normal in court proceedings and is not in the least seen as offensive to the judge of first instance with a lifetime of experience and training and under the full glare of publicity it must also be good for the arbitrator who frequently does not have the same background.

Wallace rightly adds:[117]

> It is surely common sense to recognise that the further from outside control any person, whether arbitrator or not, believes himself to be, the greater the likelihood of unjudicial or unfair attitudes or conduct emerging ...

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[115] WALLACE, *supra* note 106, at 262.

[116] MAYER, *supra* note 108 at 314.

[117] WALLACE, *supra* note 105 at 267.

It is submitted that a review of the merits of awards seems to be in the public interest, and that one is not entitled to assume that the parties to an arbitration agreement are content to take the risk that the arbitrator makes gross mistakes in law.

Some arbitration circles do not wish to accept that the arbitrator may make a decisive error when deciding an issue of fact or of law and that if a layman is asked:

> is that all right by you if this happens to your detriment?

to expect a positive response is not realistic.

The review, by an appellate arbitral tribunal,of the merits as to issues of fact and of law is the view taken by this writer[118] and is dealt with in the last chapter of this study.

14.13. Orders in Respect of Security for Costs

Lord Woolf, in his speech in the House of Lords in *Kenn Ren*,[119] speaking for the majority, held that the issue of an order for security for costs is 'in aid' of arbitration, since it ensures defendants to recover their costs if they win.

Whether this view is right or not, it compels the issue to be covered in this chapter, which deals with the role of state courts in aid of arbitration.

Before *Ken Ren* the position in England as set by *Bank Mellat*[120] was that with regard to the ICC arbitrations taking place in England, the English Court should not exercise its discretion to order security for costs. The leading speech for the majority had been given by Kerr LJ (as he then was). This conclusion was based on the view that the ICC rules did not provide for security for costs. In fact while the ICC rules deal with payment of deposits to ICC for the arbitrators fees and ICC dues, no mention is made of security for the costs of the opposite side.

Art. 8 (5) ICC Rules, which does not prevent the parties from applying to courts for interim or conservative measures, had been used as evidence that security for costs even if not expressly dealt with, was not prevented by the ICC Rules. Kerr LJ did not accept this construction of Art. 8 (5). Henceforth his conclusion that an application for security for costs was:

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[118] RUBINO-SAMMARTANO, *Third Generation Arbitration, Appeals to a New Panel within Arbitration Proceedings* 4, *J. Int. Arb*, 76; id, *An International Arbitral Court of Appeal as an Alternative to Long Attacks and Recognition Proceedings* 6, *J. Int. Arb.* 1 (1989) at 181.

[119] *Voest Alpine AG v. Ken Ren Chemicals and Fertilizers Ltd (in liquidation in Kenya)*, 2 *All ER* 449.

[120] *Bank Mellat v. Helleniki Techniki SA*, [1984] Q B 29.

> inconsistent with the scheme and spirit of the ICC Rules: not literally inconsistent ... but sufficiently inconsistent ... to make it inappropriate in principle for the court to exercise its statutory discretion in favour of the order sought in this case.

In *Ken Ren:*

> A Kenyan corporation in liquidation had referred to ICC arbitration a dispute with its contractor under a construction agreement for the erection of a chemical plant in Kenya. The venue of the proceedings was London and the substantive law Belgian law.
>
> Copper-Lavalin refused to pay the deposit requested by ICC, on the ground of Ken Ren being in liquidation, and Ken Ren paid not only its share but also the share of the opposite party. At this stage, Copper-Lavalin applied to the English High Court for an order for security for costs. In view of the high amount involved, the matter went up to the House of Lords. Lord Mustill's leading speech was against ordering security for costs. Lord Browne Wilkinson followed but the majority ordered Ken Ren to give the security.

Davenport[121] comments on Ken Ren in the sense that the ICC Rules themselves allow that security for costs orders be issued, and leads from this to the conclusion that Ken Ren does not make the choice of London as the venue for arbitral proceedings less attractive.

If ICC allows the order of security for costs, then Bank Mellat is in fact to be reviewed. Reference in this respect is made to two published papers by former ICC officers. Bond[122] has listed security for costs orders amongst the holding measures which may be sought from courts. Schwartz in turn[123] reports that an ICC Tribunal sitting in Brussels issued an order for security for costs on the basis of the earlier decision of another ICC Tribunal in *Casa:*[124]

The fact that Bond lists security for costs orders amongst those measures which may be sought from national courts, is his personal view on this subject, even if expressed by a writer knowledgeable of the ICC. The Brussels award referred to by Schwartz not having apparently been published, one must rely mainly on *Casa.*

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[121] B. DAVENPORT, *The Ken Ren Case: Much Ado About Nothing Very Much*, 10, *Arb. Int.* 3, 303.

[122] BOND (Former Secretary General ICC, Paris), *The Nature of Conservatory and Provisional Measures,* in Conservatory and Provisional Measures in International Arbitration, ICC, 1993.

[123] E.A. SCHWARTZ, *The ICC Arbitral Process*, Part IV, The Costs of ICC Arbitration, *ICC Bulletin*, May 1993.

[124] *Casa v. Cambior*, ICC no. 6697, *Rev.arb.* 1992, 135.

> Here the Arbitral Tribunal on the one hand had been told by Counsel for Casa that its issue of such an order was possible under the applicable law and the opposite party had in turn offered the same security.
>
> The arbitral tribunal refused to provide that, in the absence of the ordered guarantee, the claim would not be entertained or alternatively the proceedings would be of no effect.

This leads to the first query: whether the procedural applicable law to *Ken Ren* was really English law and if not whether the English Courts were entitled to intervene in arbitral proceedings, – which had no other connection with their legal system than the choice of the venue –, in such a way that the intention of the parties to refer the dispute to arbitration would not be implemented, if Ken Ren was unable to obtain the security.

In fact, although Lord Woolf saw this measure as aiding arbitration, in practice it was – even if by accident – in favour of the defendants who were placed in the position to be able to get rid of Ken Ren's claim if the latter was unable to obtain the security (even if its claim was grounded).

Secondly, the mere decision of one or possibly two of the thousand arbitral tribunals appointed by the ICC, and the mention of such orders in the list made on a personal basis by an ICC official, although both being elements to be taken into account, does not seem decisive in the construction of Art. 8.5 ICC rules and beyond that, as Sir Michael Kerr had rightly held, of the:

> scheme and spirit

of those Rules.

Unless one wishes to argue that ICC would take care only of the money due to itself and to the arbitrators – which is not acceptable – silence as to orders for security for costs seems to have been construed as the absence of any intention of ICC to provide for it. Had this been its intention, it could have easily inserted the provision that in the absence of payment of the advances requested or of the security ordered by itself, the proceedings would be considered as withdrawn.[125]

One could argue that the issue of security for costs orders was deliberately left to state courts, this being included in the large reference made by Art. 8 (5) to conservative measures.

This writer takes the view that the ICC rules have not provided expressly or indirectly for orders for security.

Under English law, jurisdiction to order that claimant provides a security is now granted by A Section 38(3) Arbitration Act 1996 to the arbitrator and not to the state courts. Apart from this the terms of the problem seems to be unchanged. Lord Woolf in his speech in Ken Ren has concluded that lack of

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[125] Rules 16, ICC Arbitration Rules.

means or insolvency were not facts which in ordinary circumstances could justify the grant of a security:

> mere lack of means of a party is not ... in ordinary circumstances sufficient by itself to justify the grant of security ...

Branson[126] in his comments on *Ken Ren* stresses that surprisingly then third party payment of arbitration costs would – contrary to lack of means and to insolvency – justify the order.

It is even more surprising that Ken Ren was put at risk not to be able to continue the proceedings, in case of its non payment of the security, even if it had paid also the share of the arbitration costs which was to the charge of the opposite party.

Rather than limiting the discussion to whether ICC Rules do or do not provide for a similar order, the problem seems wider.

If *Ken Ren* is right, why should it be right only if a third party finances arbitration without accepting the risk of also paying the costs of the opposite party in case of loss, and not also in case of lack of funds or of insolvency?

There are conflicting reasons in favour of each solution.

On the one hand is it right to prevent a party which is poor from obtaining a decision? On the other hand, should a defendant be exposed to the risk not to recover his costs – if he wins –because the claimant is poor?

The solution to this difficult issue belongs to whichever policy is preferred for the administration of justice.

Several legal systems do not recognize the right to prevent a claim because the claimant is poor, i.e. unable to obtain a security for the costs of the opposite party.

It is suggested that only in the most extraordinary situations (which as Branson suggests should not be the presence of a third party which finances the proceedings, but not up to covering the costs of the opposite party in case of loss) when the claim looks:

> obviously wrong on mere perusal,[127]

then the issue of a security might be entertained, which is not the same thing as it being granted.

Sandrock[128] rightly points out that a security may be contemplated only if the opposite party's financial situation has considerably worsened after entering into the arbitration agreement, and not also when that party was in very bad financial condition when that arbitration agreement was entered into.

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[126] D. BRANSON, *The Ken Ren Case. It is an Ado Where More Aid is Less Help*, 10, *Arb. Int.*, 3, 313.

[127] Lord Diplock's very *obiter dictum*, in *The Nema* (see *supra* note 105) seems to be a statement of general effect since if this test is good to decide whether to allow court review of the merits, it should be good also to decide on applications for orders for security.

[128] O. SANDROCK, The *cautio judicatum solvi*, 14 *J.Int.Arb.* 2, 17.

CHAPTER 15

SUBSTANTIVE LAW

SUMMARY: 15.1 Choice of the Parties – 15.1.1 Express Choice – 15.1.2 Tacit Choice- 15.2 Deviation from the Law Chosen by the Parties – 15.3 Choice by the Arbitrators – 15.4 *Lex mercatoria* –15.5 The *Tronc Commun* – 15.6 Lack of Proof of the Foreign Substantive Law

The choice of the applicable substantive law in international arbitration, if not made by the parties, frequently is one of the most difficult issues the arbitrators have to decide.[1]

The alternative to the application by the arbitrators of a national law (apart from the infrequent choice of the principles of international law and of the general principles of the law) is generally *lex mercatoria.* However, although this solution is attractive, it has not been universally accepted. Several judgments and some authors have rejected it.

It is therefore advisable to look for another solution, starting from a review of those already explored. In a similar study it is preferable to base oneself on the assumption that the dispute concerns a contractual relationship – which largely prevails in arbitral disputes – deliberately leaving aside, for simplicity, liability in tort.

15.1 CHOICE BY THE PARTIES

In international arbitration[2] as in court proceedings, the main criterion is of course the choice by the parties. If, faced with a valid choice by the parties, the arbitrator or the judge accords himself the right to make a different choice, his decision is open to challenge. The importance of choice of substantive law by the parties is stressed in *Alberto Culver:*[3]

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1 P. LALIVE, *Le droit applicable au fond du litige en matière d'arbitrage* (The Law Applicable to the Merits of the Dispute in Arbitration), *Rass. Arb.* 1977, 1; O. LANDO, *The Law Applicable to the Merits of the Dispute, Arbitration International* 1986, at 104.

2 P. LALIVE, *Problèmes Spécifiques de l'Arbitrage International* (Specific Problems of International Arbitration), *Rev. arb* . 1980, 342; A. J. van den BERG, *The New York Arbitration Convention of 1958,* Kluwer, Deventer 1981, at 29; M. RUBINO-SAMMARTANO, *Nationality of Awards and Applicable Substantive and Procedural Laws, Arbitration Journal* 1982, 47.

3 *Scherk v. Alberto Culver Co.* 417, U.S. 506, 516-17 (1974).

> Uncertainty will almost inevitably exist with respect to any contract touching two or more countries each with its substantive laws and conflict of laws rules.
>
> A contractual provision specifying in advance the forum in which disputes will be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.

The parties' autonomy in choosing the applicable law is a well established principle, not only amongst writers[4] but also according to precedents such as in England in *Withworth Street*:[5] (per Lord Reid)

> in my view there is no doubt that they [the parties] are entitled to make such an agreement and I see no good reasons why, subject as it may be to some limitations, they should not be so entitled.

Fraude à la loi

However this principle, like any other, may have some exceptions. Even the parties' freedom of choice is not unlimited. In fact, if the choice of a given applicable law is the result of a joint attempt by the parties to avoid mandatory provisions, which would otherwise be applicable, this choice is not valid,[6] since it is a means of avoiding the law. This is generally referred to as *fraude à la loi.*

15.1.1 Express Choice

Express choice by the parties is consequently the main criterion for identifying the applicable law. It generally meets no objections and is openly favoured. Even in legal systems, such as in Italy, where the oppressive clauses are to be accepted expressly, the choice of the applicable law is not treated as oppressive.[7]

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4 see DICEY and MORRIS, *The Conflict of Laws*, 1993, 1180.

5 *Whitworth Street Estates (Manchester) Ltd. v. James Miller and Partners Ltd.* [1970] A. C. 583, 603.

6 L. M. BENTIVOGLIO, *La frode alla legge nel diritto internazionale privato* (*Fraude à la loi* in private international law), Milan 1963, at 77; QUADRI, *Lezioni di diritto internazionale privato* (Lectures on private international law), Naples 1969; G. BALLADORE PALLIERI, *Diritto internazionale privato italiano* (Italian private international law), Milan 1950; BATTIFOL-LAGARDE, *Droit international privé* (Private International Law), II, Paris, 1976; P. FRANCESCAKIS, *Fraude à la loi, Enciclopédie Dalloz II,* Paris 1969, at 57; G. CASSONI, *La compravendita nelle convenzioni e nel diritto internationale privato italiano,* (Sales of Goods in the International Conventions and in Italian Private International Law), *Riv. dir. int. priv. proc.* 1982, 429.

7 *Oleificio Bestetti v. X-Can Grain,* Court of Cassation (Italy), February 27, no. 1273 (1979), *Giur. It.* 1979, 1, 1, 1663.

Amendments to choice

However, at the time each problem seems to be settled by the express choice, the question arises whether it may be amended after a dispute has arisen.

Two doctrines oppose each other in this respect. According to the contractual doctrine, the freedom to contract allows the parties to amend freely their agreement at any time and consequently the choice of the applicable law also. According to a more formal approach,[8] the choice of the applicable law creates a legal situation which must be treated as a fact. While the parties may change the situation produced by the legal framework which they have created, they are not entitled to amend – according to this doctrine – the choice of the law which they have already made and which may have already produced effects.

Choice of the national law of one of the parties

The parties generally choose the national law of one of them. This choice sometimes is made quickly, on other occasions it is imposed, for example by the public nature of one of the contracting parties,[9] and it is merely mitigated by reference to the general principles of law and to international trade usages. On other occasions it is the result of involved negotiations.

Whatever the reasons for it and the logical path which leads to it, this choice, when not clear, is subject to the normal criteria for interpreting the intention of the parties.

Choice of a neutral law

When a litigant does not succeed in convincing the other party that his national law should be accepted, but does succeed in avoiding acceptance of the other's national law, the parties sometimes finally choose the law of a neutral state.

The lawfulness of a choice of the law of a state, with which the contractual relationship should have no link, has then to be checked. The tendency of civil law systems is to require the existence of a link with that neutral legal system in order to accept the choice of its law. However, in practice it is generally considered that a link exists even if it consists only in an effective interest by the parties in accepting such a law[10] or by using Sandrock's definition:[11]

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8 G. CASSONI, *I contratti collegati nel diritto internazionale privato* (Connected Contracts in Private International Law), *Riv. dir. int. priv. proc.* 1979, 23.

9 P. Y. TSCHANZ, *Contrats d'Etat et mesures unilatérales de l'Etat devant l'arbitre international* (State Contracts and Unilateral Measures of States before the International Arbitrator), *Revue critique de droit international privé* 1985, 46.

10 Federal Tribunal (Switzerland), February 12, (1982), *Reports on decisions of the Swiss Federal Supreme Court,* 1952, 11, at 74, 78.

> when the choice is neither occasional nor arbitrary, but it is justified by a reasonable interest of the parties to choose that law.

The choice of the law of a neutral state may at first appear to be the result of a well-balanced compromise. However, when it has not been preceded by careful scrutiny, it is a *leap in the dark*, which might produce unpleasant surprises. It is interesting here to mention one of the problems to which the choice of a neutral law may give rise. When the parties choose it in the belief that it does not regulate their relationships very differently from their own legal system, and it later proves to be substantially different, one may wonder whether that choice remains valid, or should be treated as the result of a common mistake, with the possibility, at least in some legal systems, of its being set aside. Is it sufficient to make a cold, distant interpretation of such a choice, or is it required to establish the real intention of the parties?

Principles of international law and general legal principles

It must also be mentioned that, although not very frequently, the parties refer to the principles of international law, or to the general principles of the law. In such cases, they are occasionally referred to together with a national legal system and, if so, these principles are used to limit the legal system in question, or to fill its possible *lacunae*. For example a reference to a national law (as the law of the contracting state which is a party to the dispute) and to the principles of international law is made by the Washington Convention (1965). However the correct identification of these principles may cause difficulties as stressed by Sandrock.[12]

These difficulties are dealt with in the award rendered in ICC proceedings no. 3380 (1980) by an arbitral tribunal sitting in Geneva. The arbitrators were hearing a dispute between an Italian enterprise, claimant, and a Syrian company, defendant.[13] The arbitrators found themselves faced with an arbitration agreement which was not easy to interpret. The arbitral clause, contained in Art. 19 of the contract, stated:

> Arbitration shall be held in Geneva (Switzerland) and shall judge (note: be judged) according to the general principles of law and justice.

On the other hand, Art. 25 of the same contract provided:

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[11] O. SANDROCK, *Choice of Law and Choice of Forum in Civil Law Jurisdictions,* in *Drafting and Enforcing Contracts in Civil and Common Law Jurisdictions* (eds. YELPAALA, RUBINO-SAMMARTANO and CAMPBELL), Kluwer, Deventer 1986, at 158.

[12] O. SANDROCK, *op. cit.,* at 145.

[13] DERAINS, *Chronique des sentences arbitrales, Clunet* 1981, 928. (Free translation from French).

> This agreement shall be subject to and constructed (sic) in accordance with the laws of Syria.

The arbitrators held:

> Based on general experience and on the practice of international trade in contracts between private companies and Governments or bodies controlled by them, the Arbitral Tribunal is of the opinion that the essential aim of the arbitral clause was to protect the private party against a double risk: on the one hand, the risk of future amendments of Syrian law changing the contractual balance to the damage of the private party (in this sense Art. 19-6 is to be seen as a guarantee or stabilization clause); on the other hand the risk that Syrian law, because of some provisions exceeding the normal rules of legal systems, be unfavourable to the foreign private party, a risk which does not exist in the present case but which is present in the psychology of the trader, who frequently ignores even the main tenets of a foreign legal system.
>
> The Arbitral Tribunal in conclusion is of the view that it has the duty to take into account Articles 25 and 19-6 of the contract and holds that the contract is governed by, and is to be construed under Syrian law in its entirety and without restrictions (and therefore not limited to its mandatory rules or its public policy, as it has been argued) under the reservation of 'the general principles of law and justice' under which the arbitrators are bound to decide according to Art. 16-9. These general principles prima facie include those which arise from the Syrian legal system, as well as those which arise from the international arbitral precedents and one may not exclude that they partly coincide with the 'trade usages' which the arbitrators must in any event take into account in compliance with Art. 13-5 of the ICC Rules of arbitration.

A situation where the general principles of law are chosen not to complete the national law, but to replace it, is provided by the hypothetical arbitration clause submitted by Craig et al:[14]

> This contract shall be governed by the general principles of law, to the exclusion of any single municipal system of law.

a clause which, however, will be found in some contracts.

Lex mercatoria

It is also possible, even if not very frequent, for the parties to choose not to submit their relationship to any national law, but rather to international trade usage. This is done by using formulas which are not always clear and which are sometimes deliberately vague.

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[14] CRAIG, *et al., op. cit.,* 11, 7.04, at 54.

An analysis of the nature and contents of *lex mercatoria* will be made later. It must however be pointed out that when the intention of the parties to apply *lex mercatoria* has been clearly expressed, it has generally been accepted by the arbitrators, while in some jurisdictions the courts may not accept it. Apart from the issue of the validity of the choice of *lex mercatoria*, it may be difficult to identify its precise contents.

15.1.2 Tacit Choice

The role of the arbitrator becomes more difficult when it must be established whether, instead of an express choice, there has been a tacit choice of the parties. To do this the elements from which the choice may be inferred must be identified.

Law of the place of arbitration

Two doctrines conflict as to the influence of the place of arbitration on the choice of the applicable law.

According to the traditional doctrine, of which the Italian system is a paladin,[15] the place of arbitration is generally not relevant in seeking a tacit choice of the applicable law. This is all the more true since, in international arbitration, the parties frequently show that they want to keep their distance from the national legal systems. Furthermore, the place of arbitration is frequently a choice made merely for practical reasons, for example because it is easy for all the parties to reach it. Frequently the place of arbitration is not even chosen by the parties and is subsequently chosen by an arbitral institution. This seems to show even more that a tacit choice of the applicable law by the parties, inferred from the place of arbitration, would be very arguable. It would also result in the applicable law remaining unknown until the place of arbitration is chosen. If that place were Morocco, it would become ex *tunc* (since the beginning) the law of Morocco, while if Tibet were chosen it would become *ex tunc* the law of Tibet.

Practical difficulties also arise regarding the identification of the place of arbitration if, for example, the arbitrators meet in one state, hear witnesses in another one, decide in a third one and make the award in one of such states or in a fourth one.

Further problems arise if, for any reason, for example for convenience, the place of arbitration is changed during the proceedings. Does the substantive law also change accordingly and if so is that retroactive or not?

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[15] M. RUBINO-SAMMARTANO, *Nationality of Awards and Applicable Substantive and Procedural Law,* in *Arbitration* 1982, at 47.

According to another view (fashionable in several states, in particular in England)[16] the choice of the place of arbitration is a precise sign of the choice of the applicable law also. This approach is in fact a result of the English tendency to unify jurisdiction and the substantive applicable law, with the consequence that when the English judge – and also the arbitrator – is called on to decide, he may apply both his national substantive and procedural law.[17]

Still the former doctrine has made progress in England also.[18] Even if mitigated by such subsequent adjustments, the tendency of the second doctrine remains to treat the choice of the place of arbitration at least as an important sign of the parties' intention regarding the applicable law, while in civil law systems the tendency is to consider the parties' intention irrelevant in this respect.

Procedural law

According to the first doctrine, procedural law generally has no influence on the choice of the applicable substantive law because of the clear distinction to be made between the two. In this respect it must be said that frequently the parties do not even bother to choose the procedural law, leaving this choice to the arbitrators, who proceed to establish it *ex tunc* (i.e. retroactively).

If, contrary to this, procedural law should influence the choice of substantive law, the arbitrators would frequently choose both the procedural and substantive law based on their own nationality, or on the place they choose for the conduct of the arbitral proceedings. It is submitted that this conclusion might indeed be very different from the intentions of the parties. The rule *quis eliqit arbitrum eligit jus,* if construed in this sense, does not therefore seem to have a sufficiently firm basis.

Reference to national elements

The reference by the parties to the statutory provisions of a given legal system, to a currency, to a given language or to other national elements might have more bearing on the determination of which substantive law is applicable.

The relevance of these elements depends on their possible concurrence in the same legal system, or on their working in opposite directions and thus being ambiguous and uncertain. These elements must be considered with great

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16 *Hamlyn & Co. v. Talisker Distillery* (1984) A.C. 202 (H.L.).

17 PH. THERY, *Pouvoir jurisdictionnel et compétence* (Judicial power and jurisdiction) (Etude de droit international privé), Paris 11, 1981; KAHN-FREUND, *General Problems of Private International Law, Rec. Cours La Haye,* 1974, 111, at 350.

18 *Compagnie d'Armément Maritime S.A. v. Compagnie Tunisienne de Navigation S.A.* (1971) A.C. 572-609 H.L., criterion which Mustill and Boyd, *Commercial Arbitration* (Butterworths London, 1982, at 317) consider as 'non-exclusive'.

care since, like the currency and the language, they may be signs of choice of the applicable law.

The award rendered in ICC proceedings no. 6560 (1990)[19] took account of several elements going in the same direction:

> ... in my view the destination of the goods, the nationality of the buyer and the place for payment of the price are factors which can and should be given individual weight ..... Here a single country linked these three matters. Taken together it seems to me that these indicia lead inevitably to the conclusion that the proper law of this contract is French law.

Concurring factors, the place of performance of contract and the place where the agreement had been signed, were taken into account by the French Court of Cassation in *Pia Investments* to hold that Pakistani law was applicable.[20]

Even in Sri Lanka[21] in an ICSID arbitration, the arbitrator held that based on the parties' behaviour when entering into the agreement and during the proceedings, the contract was to be treated as the main source of applicable law.

The Vienna Convention

The award rendered in ICC proceedings no. 7153 (1992)[22] after having characterized the agreement as a contract for the sale of goods held that in the absence of a choice of law by the parties, the arbitrators were free, under the ICC rules, to apply the conflict rules which they deemed appropriate, and came to the conclusion that the Vienna Convention on international sale of goods was applicable.[23]

The Rome Convention

Even the Rome Convention is applied by arbitrators. The arbitral tribunal sitting in Paris, hearing a dispute between a Saudi entity and two French corporations, concerning the supply and installation of a factory to manufacture mineral water bottles and to fill them, in an award rendered in 1993 in ICC proceedings no. 7205[24] has held under art. 13 ICC rules:

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19 *Yearbook Commercial Arbitration* 1992, 229.

20 *Sté L. et B. Cassia v. S.té Pia Investments,* Court of Cassation (France) July 10, 1990, *Rev. arb.* 851, 1990.

21 *Asian Agriculture Products Ltd. v. Republic of Sri Lanka,* ICSID Award (El Kosheri, Chairman, Goldman and Asanta, arb.) June 27, 1990, *Clunet* 1992, 217.

22 *Yearbook Commercial Arbitration* 1992, 229.

23 Vienna April 11, 1980.

24 *Clunet* 1993, 1032.

> Since the conflict rules of the said convention, which is in force in France, may be treated as expressing reasonable connecting criteria largely admitted by the international community, the arbitral tribunal in principle will apply, in as much as it will be needed to decide the dispute, French law,

which was the applicable law under the Rome convention.[25]

15.2 Deviation from the Law Chosen by the Parties

If there is no connection between the relationship from which the dispute arises and the law chosen by the parties, that choice is not always acceptable, as it was held in the English judgment in *Wagg*:[26]

> the court will not necessarily enforce a choice of law clause selecting a law with no connection with the transaction.

Likewise, the parties' choice of a law which could prevent the award from being enforced would give rise to difficulties in the presence of arbitration rules like art. 35 ICC Rules. The possibility that the arbitrator deviates from it was expressed by Mr. Miller, sitting as a sole arbitrator in ICC proceedings.[27]

An arbitral tribunal might perhaps deviate from the law chosen by the parties if it appeared that such a choice (if applied by the arbitral tribunal) could prevent the award from being implemented.

Along the same lines is the U.S. judgment in *Indomitable*[28] which held that it would be:

> appropriate to disregard the parties' choice if the chosen law would render any portion of the contract invalid.

It is submitted that this conclusion may be too sharp. While the arbitrators, in selecting the law, must take into account – when the arbitration rules so provide – that the law which they choose allows the enforcement of the award, this should not allow them to rewrite the arbitration agreement and to 'deviate' from the parties' clearly expressed intention.

It is suggested that the extent of this caveat is just to apply the so called 'validation criterion', i.e. to prefer out of the potentially applicable laws the one which allows the enforcement of the award.

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25 June 19, 1980.

26 *Re Helbert Wagg & Co. Ltd.*, [1956] Ch. 323, BORN, *cit.* at 128.

27 ICC proceedings no. 5505 [1987], *Yearbook Commercial Arbitration* 1988, 110.

28 *Konkas Indomitable Corp. v. Fritzen Schiffagentur u. Bereedrungs GmbH* no. 80 Cir. 3230 (SDNY 1981) BORN, *cit.* at 128.

15.3 CHOICE BY THE ARBITRATORS

The absence of choice by the parties is frequent, as it is shown by the award rendered in ICC proceedings no. 5650 in 1989:[29]

> The Agreement ... between the parties does not contain any choice of law.

When the arbitrators choose the applicable law, this means there has not even been a tacit choice by the parties. In fact, when the arbitrators establish that there has been a tacit choice by the parties, they confine themselves to stating a choice which has already been made by the latter.

Absence of a lex fori

In seeking the applicable law the arbitrators are at a disadvantage in respect of the courts. National Courts have in their legal systems the conflict of laws rules which will guide them in this connection, while the arbitrator does not have similar rules at his disposal, except in the very rare situation in which the parties, or the arbitration rules, provide them. Arbitrator Prof. Lalive in *Dalmia*[30] states:

> The international arbitrator has no *lex fori* from which to borrow the conflict of laws rules.

The arbitrator in *Aramco*[31] made a similar statement:

> The arbitral Tribunal has no *lex fori.*

Freedom to choose amongst conflict rules

The arbitrator, not being able to base himself on a specific set of conflict rules, finds himself obliged to choose the applicable law on a less certain basis.

It must first be noted that the arbitrator is not:

> bound to follow the conflict rules of a country rather than those of another one.[32]

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[29] *Yearbook Commercial Arbitration* 1991, 86

[30] In THOMPSON-DERAINS, *Chronique des sentences arbitrales, Clunet* 1974, at 904.

[31] B. STERN, *Trois arbitrages, un même problème, trois solutions* (Three Arbitrations, the Same Problem, Three Solutions), *Rev. arb*. 1980, 3.

[32] H. BATTIFOL, *L'arbitrage et les conflits de loi* (Arbitration and Conflict of Laws), *Rev. arb*. 1957, 111.

The freedom of the arbitrator to choose the conflict rules which he considers most convenient is asserted in the award rendered in ICC proceedings no. 2735 (1976):[33]

> Because of the freedom which the arbitrators enjoy in international arbitrations to apply the conflict rules which they deem more convenient, the Arbitral Tribunal elects to decide the dispute under French law.

The arbitrators normally do not find a solution to this issue in international conventions, since such conventions recognize only the arbitrator' right to make his choice. This authorization generally does not help the arbitrator to exercise the power it gives to him.

The European Convention on Commercial Arbitration[34] provides:

> The parties shall be free to determine, by agreement, the law to be applied by the arbitrators to the substance of the dispute.
>
> Failing any indication by the parties as to the applicable law, the arbitrators shall apply the proper law under the rule of conflict that the arbitrators deem applicable.
>
> In both cases the arbitrators shall take account of the terms of the contract and trade usages.

The United Nations Model Law [35] provides:

> (2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

Only the Convention on Settlement of Investment Disputes between States and Nationals of Other States[36] – the application of which is limited to this specific area of disputes – provides that the tribunal must apply the national law of the contracting state which is a party to the dispute, including the relative conflict rules, and the rules of international law.

Arbitration rules follow the same lines as the international conventions.

The ICC Rules provide:[37]

> ... In the absence of any such agreement, the Arbitral Tribunal shall apply the rules of law which it determines to be appropriate.

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[33] *Clunet* 1977, 947.

[34] Art. VII. The Convention was entered into in Geneva on April 21, 1961, and is published in *Riv. Dir. Int. Priv. Proc.* 1970, 942.

[35] Art. 28 (2) in the English original of the Uncitral document February 16, 1984, of the Working Group on International Contract Practices, 84-04632-129 8C (E).

[36] Art. 42, 1, Convention (entered into in Washington on March 18, 1965, and published in *Riv. dir. int* (RDI), 1965, 359).

[37] Art. 17, ICC Arbitration and Conciliation Rules (1988 ed.).

The English Arbitration Act 1996 has radically changed the position through its section 46 (1) (b). The rules of the London Court of International Arbitration state:[38]

> Unless otherwise agreed by the parties under Article 14.1, the Arbitral Tribunal shall have the widest discretion to discharge its duties under such law(s) or rules of law as the Arbitral Tribunal may determine to be applicable.

As far as the United States are concerned, it is reported that in New York the courts, in the absence of a choice by the parties, tend to choose the law of the State of New York, but that the local conflict rules refer to the law of the place which has 'the greatest interest' in the dispute.[39] The Uncitral Rules provide that:[40]

> 1. Failing such designation by the parties the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.
>
> 2. In all cases the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

The rules of the Arbitration Institute of the Stockholm Chamber of Commerce do not deal with this issue. In practice, a distinction is made between a situation where the parties have chosen the place of arbitration and one where the choice has been made by the arbitrators. In the former case the tendency is to use the Swedish conflict rules, in the latter the place of arbitration is not relevant.[41]

The International Rules of the Milan Chamber of Arbitration[42] state that:

> The arbitrator shall settle the dispute:
>
> (a) in accordance with the principles agreed upon by the parties, or
>
> (b) in the absence of such agreement, according to principles which the arbitrator himself considers applicable;

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38 Art. 14.2, Rules of the London Court of International Arbitration.

39 In the first sense see *Splosna Plovba of Piran v. Agrelak SC Corp.*, 381 7 Supp., 1370 (S.D.N.Y. 1974); in the second sense *Intercontinental Planning Ltd. v. Daystrom Inc.*, 24, N.Y. 2nd 372, 382, 300 N.Y.S. 2nd 817 (1969); the two precedents are quoted by J.S. McCLENDON and R.E. GOODMAN, *International Commercial Arbitration in New York,* Dobbs Ferry, New York, 1986.

40 Art. 33, Uncitral Arbitration Rules (United Nations Publication No. E 77 V 6, New York 1977) recommended by the Resolution of the General Assembly of the United Nations of December 15, 1976.

41 Arbitration in Sweden, Stockholm 1984; LANDO, *supra* No. 1, at 104.

42 Art. 41, International Rules of the Milan Chamber of Arbitration.

(c) the arbitrator shall, in all cases, take into account the terms of the contract and international trade usages.

Lex loci arbitri

The choice by the arbitrator of the applicable law based on the place of arbitration meets the same obstacles which, it is suggested, prevent the parties from making that choice.

That the conflict rules of the place of arbitration have been generally abandoned seems to be an accepted fact, except for some residual contrary decisions, such as the award rendered in ICC proceedings No. 4187 (1982)[43] reported by Derains:

> The claimant being domiciled in Germany, and the defendant in Yugoslavia, one must first establish which is the applicable law. One must for this apply the *lex fori*, i.e. private international law,

and the award rendered in ICC proceedings no. 2735 (1976):[44]

> The only place with which the contract establishes a specific relationship is Paris, which is designated as the place of arbitration. Starting from this, we are of the view that the parties have no objection to applying French law ... The Arbitral Tribunal elects to decide the dispute between the parties under French law.

The same position is taken, even if related to the issue of suitability for arbitration, by the award rendered in 1994 in ICC proceedings no. 6719[45] in a dispute between a Syrian and an Italian party:

> The Tribunal takes the view that the law which has the closest connection with the issue of suitability for arbitration ... is the place of the arbitral proceedings, particularly when that place has been agreed upon by the parties.

The arbitrator does not seem then entitled to apply this criterion, at least automatically.

Lex arbitri

The national law of the arbitrator seems to be even less relevant in choosing the applicable law.

Among the elements which oppose the use of this criterion, the most important is that it may vary, for example depending on whether the nationality of

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[43] Y. DERAINS in DERAINS-JARVIN, *Chronique des sentences arbitrales*, Clunet, 1984.

[44] *Clunet* 1977, 947 (free translation from French).

[45] *Clunet,*, 1994, 1071.

the majority of the arbitrators is referred to, or that of their Chairman; furthermore when the sole arbitrator is replaced by another of different nationality, it should follow that the applicable law changes.

The arbitrator's tendency to apply his national law is frequent, and perhaps even unavoidable, since it is found in awards by arbitrators who belong to countries with very different legal systems from a cultural point of view. The position taken in favour of English law by Lord Asquith in *Petroleum Development v. Sheikh of Abu Dhabi,*[46] which is reported here below, is followed by the Swiss judge in *Jugomineral:*[47]

> In the search for the applicable law, as to the power of the signatory of the agreement to commit a party, the judge not finding an answer in Yugoslavian law, which had been applied as *lex societatis*, referred to Swiss law as a subsidiary criterion.

Although considerable practical difficulties can be then recognised, and although the arbitrator may have the best intentions in choosing this solution, it is suggested that this is not in line with international arbitration. In fact, if the parties have an aspiration, it is exactly that of wanting to depart from national systems and not to have the arbitrator applying his national law whenever he has the opportunity to do so.

The tendency of the arbitrator to apply his national law is in line with the tendency of judges as shown by the view expressed in favour of English law (even if it not brought to its final consequence in the first instance proceedings, but only afterwards by the House of Lords) by the High Court of England (Bingham J.) in *Amin Rasheed:*[48]

> Partly this is due to the long history, the great experience, the professional expertise and the high standard of the market, combined with the traditional dominance of London as a commercial centre. Partly it is due to the process of *imperial fertilization* which has led to reproduction of the Marine Insurance Act 1906 in far corners of the globe.

This tendency has an important precedent in Lord Asquith's award as *umpire* in *Petroleum Development* where the arbitrator's national law, after having been expressly excluded by him, comes back indirectly:

> If any municipal system of law were applicable, it would *prima facie* be that of Abu Dhabi. But no such law can reasonably be said to exist. The

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[46] *Petroleum Development Ltd. v. Sheikh of Abu Dhabi,* award September 1951, *International and Comparative Law* 1, 4, 1952, 247.

[47] *Jugomineral* v. *Grillo Werke A.G.* Federal Tribunal (Switzerland), March 17 (1975), *Clunet* 1976, 729 (free translation from French).

[48] *Amin Rasheed Shipping Corp. v. Kuwait Insurance Co.,* Court of Appeal (England), (1982) 1, 10 LR 961 and (1983) 1 *All ER* 873.

> Sheikh administers a purely discretionary justice with the assistance of the Koran; and it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments. Nor can I see any basis on which the municipal law of England could apply. On the contrary the clause of the agreement, cited above, repels the notion that the municipal law of any country, as such, could be appropriate.
>
> But, albeit English municipal law is inapplicable as such, some of its rules are in my view so firmly grounded in reason, as to form part of this broad body of jurisprudence, this 'modern law of nature.'
>
> For instance, while in this case evidence has been admitted as to the nature of the negotiations ... which evidence is material for construing the contract and might according to domestic English law be largely inadmissible, and to this extent the rigid English rules have been disregarded, yet on the other hand the English rule which attributes paramount importance to the actual language of the written instrument, in which the negotiations result, seems to me no mere idiosyncrasy of our system, but a principle of *ecumenical validity.*

The (traditional) connecting factors

Among the connecting factors offered by the conflict rules, some legal systems[49] give precedence to the formation of the contract (*lex loci contractus),* other systems to the place of performance of the contract (*locus solutionis),* and others to the closest connection or the centre of gravity[50]. This factor was applied for example in the award made in 1993 in ICC proceedings no. 7154[51], by an arbitral tribunal sitting in Geneva, hearing a dispute between an Algerian claimant and a French defendant :

> The arbitrator must check with which law the dispute has the closest connection.

The Rome Convention,[52] which unifies the conflict rules of the contracting states, after having chosen the closest connection criterion, gives precedence – even if subject to possible review – to the law of the domicile of the party which has to effect the performance which is characteristic of the contract.

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49 See Italy and Spain.

50 See Austria and England. For an analysis of the different national conflicts rules see *Arbitration in Europe, ICC,* Paris 1981 and O. SANDROCK, *Handbuch der Internationalen Vertragsgestaltung,* Heidelberg 1980.

51 *Clunet* 1994, 1059.

52 Entered into in Rome on June 19, 1980, *Official Journal of Comparative Law,* The European Communities, October 9, 1980.

Islamic law

According to Saleh[53] the Islamic conflict rules in some states (Syria, Jordan, Iraq, Egypt, Libya, Kuwait) give preference to the *lex loci contractus,* in others (Lebanon) to the law of the place of performance of the contract, or to the law of the place where the assets are located, and in others (Saudi Arabia, Bahrain, Quatar, Abu Dhabi) to the *lex loci arbitri.*

Socialist countries

Solutions for the choice of the applicable law by the arbitrators, which have been reported[54] as the most frequent in Socialist countries, are the *lex loci contractus (USSR,* Hungary and Rumania), the *lex loci solutionis* (Bulgaria) and the law of the domicile of the contractor who provides the characteristic performance (Czech Republic, Slovakia and Poland).

Russia[55] is to be examined, separately, because of its new legislation and of the fact that the two leading Russian Institutions: the International Commercial Arbitration Court (ICAC) and the Maritime Arbitration Commission (MAC) are amongst the major world centres since they handle more than 500 international commercial and maritime disputes per year.

The Russian International Commercial Arbitration Act July 7, 1993 (The Arbitration Law) is based on the Uncitral Model Law. It has two Supplements, the first of which contains 'The Statute of ICAC' and the second one 'The Statute of MAC'. Both institutions are attached to the Russian Chamber of Commerce and Industry and act according to the Rules which have been approved by the Chamber.

There are other arbitration bodies, dealing for example with commodities and exchange, but for international business ICAC and MAC remain the leading institutions.

Russia is a party to the 1958 New York Convention and to the 1961 European Convention on International Commercial Arbitration. The 1972 Moscow Convention on Arbitration has pratically lost its effect.

Many bilateral international conventions on trade, legal assistance and investments contain provisions on arbitration.

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53 S. SALEH, *Commercial Arbitration in the Arab Middle East,* Graham & Trotman, London 1984 (Saleh).

54 Z. STALEV, *Practical Applications of Arbitration in East- West Trade,* International Conference on Arbitration, Chamber of Commerce, Como, 1981; V. STEINER, *Solution of Disputes arising out of International Trade in the Czechoslovak Socialist Republic,* Prague 1984.

55 S. LEBEDEV, *Russian Intenational Commercial Arbitration Act July 7,1993* (based on the Uncitral Model Law with minor amenìdments) in *Riv.arb.* 1993, 589-595.

The conflict of laws rules are contained in the 1991 Fundamentals of Civil Law. Under sect. 166, different conflict rules govern various types of contracts: the law of the seller applies to sales of goods, the law of the agent to agency contracts, the law of underwriter to insurance contracts ,the law of the carrier to carriage contracts . In 1999 a new Merchant Marine Act was enacted.[56]

All these systems, however, contain an artificial element; so on several occasions the view has been expressed that their lowest common denominator is a *legal fiction.*

Three main tendencies

Among the writers on this subject, Lalive[57] has identified three main trends in arbitral awards: the joint application of the conflict rules of the legal systems involved in the dispute, a reference to the general principles of international private law and the *direct line* which avoids applying the conflict rules.

Coinciding of the result of the application of various systems with conflict of law rules

The result of the search for the applicable law is of particular interest when the application of the conflict rules of the legal systems of the contracting parties give the same results; such a happy coincidence seems to many to justify this choice. An example of this is the award rendered in ICC proceedings no. 5118 (1986):[58]

Illustration

> Three arbitrators sitting in Paris were hearing a dispute between an Italian claimant and a Tunisian defendant. The parties did not agree on the applicable law and the arbitrators held:
>
> 'Since the contracts have been signed in Tunis between Tunisian public companies as sellers of goods and an Italian company as purchaser, and the latter had to take delivery in Gabes or in any event in a Tunisian port, the Tunisian conflicts rule leads to the application of Tunisian law. The Italian conflicts rule provides for the application of the law of the place of the formation of the contract, what leads to the conclusion that the law of the seller is applicable and provides then the same result'.

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[56] S. LEBEDEV, *Russian International Commercial Arbitration Law*, *Riv.arb.* 1993, 589-595.

[57] *P.* LALIVE, *Les règles de conflits de loi appliquées au fond du litige par l'arbitre international siégeant en Suisse* (The Conflicts Rules applied to the Merits of the Dispute by the International Arbitrator sitting in Switzerland), *Rev. arb.* 1976, 155.

[58] DERAINS-JARVIN, *Chronique des sentences arbitrales, Clunet* 1987, 1027 (free translation from French).

The direct line

An application of the method for choosing the applicable law, which is called the *voie directe* (direct line), is provided by the award made in ICC proceedings no. 4434 (1983):[59]

> The rules of private international law which may apply are those of French and of Belgian law, since the dispute does not put forward any connection with other legal systems, and possibly those in force in the place of arbitration.
>
> As far as the latter are concerned, it is held by many authors and arbitral precedents that the arbitrator must not take into account the conflicts rules of a legal system which has no other link with the dispute but the localization of the arbitration in this territory.
>
> The solution of the conflicts rules of French law and Belgian law consists in localizing the contract in one or other of the concerned countries and in applying the law of the state so chosen. That localization is effected in French law in an objective way by taking into account the law of the place with which the contract has the closest connection. In Belgian law the criterion is both subjective, basing itself on the research for the likely intention of the parties, and objective.
>
> The arbitrator decides to apply the method of the objective localization of the contract, which provides a simpler and more satisfactory solution than those consisting in searching for signs of an implied intention of the parties.
>
> The two main signs of an objective connection of the contract are the place of performance and the place of formation of the contract. The first criterion however prevails over the second one, which may be only accidental.

In the award rendered in ICC proceedings no. 2689 (1977)[60] the sole arbitrator chose the doctrine:

> according to which applicable law is the law which suits best the characteristics of the contract in issue.

Another solution for overcoming the difficulties created by the application of conflicts rules or by their abandonment is to search for the presumed intention of the parties, which was done in ICC proceedings no. 2654:[61]

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[59] *Clunet* 1983, 893 et *seq.* (unofficial translation from French).

[60] Y. DERAINS, Chronique des sentences arbitrales, *Clunet* 1978, 998. (unofficial translation from French).

[61] DERAINS-JARVIN, *Chronique des sentences arbitrales*, *Clunet* 1984, 915. (unofficial translation from French).

> The common law of the people of [the]English language (common law and equity) may be presumed as having been present in the intention of the parties and, whenever this should be required, I shall consequently consult the common law and statutes of England.

Dépeçage

The solution adopted by the Rome Convention,[62] must be considered within the framework of the previous remarks. It allows various aspects of a contractual relationship to be separated and to be each submitted to the law which is more suitable to it, even if it is different from the law which governs other aspects of the contract.

This solution, generally referred to as *dépeçage,* although opposite to the traditional unified notion of the contract, may produce practical results closer to the real situation.

Determination of the applicable law not required

The award made in ICC proceedings no. 2730 (1982) extends the freedom of choice of the arbitrators to stating that they may decide without applying any conflicts rules:[63]

> The present most authoritative doctrine and international arbitral precedents admit that the arbitrator may set aside the conflict rules in determining the substantive applicable law ...

The award made in ICC proceedings no. 2583 (1976)[64] is along the same lines:

> Whereas it is not necessary to determine the applicable law to establish the unlawfulness of the behaviour ...

Along the same lines is the award rendered in ICC proceedings no. 5650 (1989)[65] which applies the same conclusion to an ICC clause:

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62 E. VITTA, *La convenzione CEE sulle obbligazioni contrattuali e l'ordinamento italiano* (The EEC Convention on Contractual Obligations and the Italian Legal System), *Riv. Dir. Int. Priv. Proc* 1981, 837; T. TREVES, *Norme imperative e di applicazione necessaria nella Convenzione di Roma del 19 giugno 1980* (Mandatory Provisions and Provisions of Necessary Application in the Rome Convention June 19, 1980), RDIPP 1983, 25; A. GIARDINA, *La convenzione comunitaria sulla legge applicabile alle obbligazioni contrattuali e il diritto internazionale privato italiano* (The EEC Convention on the Law Applicable to the Contractual Obligations and Italian Private International Law), RDI 1981, 795.

63 *Clunet* 1984, 915.

64 *Clunet* 1977, 951.

65 *Yearbook Commercial Arbitration*, 1991, at 86.

> Obviously that clause cannot be construed in the light of any national legislation, as was adopted by the ICC. Consequently it is useless to deepen the question of the applicable law ...

Faced with such a variety of solutions and with the uncertainty of each of them, it is not surprising that sometimes the arbitrators avoid establishing the applicable law or that they do so only if it is absolutely necessary, trying to base their decision only on the contract entered into by the parties.

This is shown in the award made in ICC proceedings no. 1990 (1977):[66]

> In so far as the questions in dispute are regulated by the parties in their contract and this contractual regulation does not contravene the mandatory rules of the two laws in question, it is permitted to resolve them on the basis of the contract. These questions can therefore be resolved without a preliminary decision on the applicable law.

Another example is the award made in ICC proceedings no. 2152 quoted by Derains (1972):[67]

> As far as the substantive applicable law is concerned, the defendant has argued that the contract does not deliberately contain any choice of law; and that in view of its position of international organization, the contract should not be submitted to a national legal system; the defendant submitted then that the contract should not be governed by a national legal system, but exclusively by the generally admitted general principles of the law. The claimants have argued that they had not envisaged a possible choice of law. In the light of the above remarks the undersigned arbitrator deems it not necessary to decide whether a national legal system is applicable to the contract.

More reasoned is the view expressed in *Dalmia*:[68]

> In my opinion it is not useful to decide on the issue of the applicable law (an issue to be further examined), for the simple reason that the general principles for the construction of contracts might be applied as well as the rules of common sense which are common to the main legal systems of the civilized countries and in particular to the English common law and to the legal systems of India and Pakistan.

The opposite view seems to be given in *Dallal v. Bank Mellat*[69] (although this view was expressed in a situation in which attention was drawn mainly to

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66 *Yearbook Commercial Arbitration* 1978, vol. III, at 217.

67 THOMPSON, DERAINS, *Chronique des sentences arbitrales, Clunet* 1974, at 888.

68 *Clunet* 1974, 906.

69 (1986) 1 *All* ER 240.

distinguishing between private law and public law) where the English judge has held:

> If private law rights are to exist, they must exist as part of some municipal legal system.

Similarly, reference to the contract always encounters the restriction that the contract must not conflict with mandatory provisions of the applicable law, which is expressed by Derains:[70]

> The arbitrators being in this respect in the same situation as the courts of law, they cannot apply the contract when its wording is incompatible with the mandatory rules of the applicable law.

The award rendered in ICC proceedings no. 3043 (1978)[71] seems to apply both the above criteria given by Lalive:

> In applying these regulations, the Tribunal does not deem it necessary to establish the applicable law according to a given legal system of conflict rules and in particular according to the legal systems which are connected with this dispute, which are the German, South African and French legal systems. Furthermore these three national legal systems do not differ substantially from each other when it comes to determining the law applicable to contract or to tort.
>
> As far as contracts are concerned, the three systems recognize the principle of the freedom of the parties to choose the applicable law and, in the absence of an express or clear choice of that law, they apply the law with which the contract has 'the closest connection', the law of the State where the contract is 'objectively localized' or the law of the place where the *Schwerpunkt* (the main issue) of the contract is located. As far as torts are considered, the three legal systems recognize in principle the generally accepted rule of the *lex loci delicti.*

By stating the law applicable on the one hand to the contract (part 1), and on the other hand to the torts (part 11), the Arbitral Tribunal shall apply the above mentioned general principle. Furthermore the Arbitral Tribunal, in examining the merits of the case, is equally bound to apply Art. 13, para. 5 of the ICC Arbitration Rules which provides:

> In all cases the arbitrator shall take account of the provisions of the contract and the relevant trade usages.

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[70] Y. DERAINS, *Chronique des sentences arbitrales, Clunet* 1979, 998.

[71] *Clunet* 1979, 1000-1001.

In case of doubt, choice of the law which asserts the validity of a contract

An example of the law, which asserts the validity of the contract, being chosen in case of doubt is given in the award made in ICC proceedings no. 4996 (1985):[72]

> A dispute was submitted to an Arbitral Tribunal sitting in Geneva concerning the consequences of the termination of a sales representative agreement between an Italian company (defendant) and its French representative (claimant). The parties had not chosen the applicable law. The arbitrators held:
>
> 'If one applies Italian law to the contract in issue one should wonder how one could request a French sales representative operating in France and being a French resident to register himself in the Italian registry, assuming that this were possible. One consequently risks submitting the contract in dispute to a law which would necessarily declare it null and void for breach of a provision which probably it would have been impossible to observe. This is an important supplementary reason to apply French law to this contract'.

This is in line with the general rule of interpretation, to which reference is made in the award made in ICC proceedings no. 1434 (1975):[73]

> A universally recognized rule of construction requires that, in the presence of two conflicting constructions or of two possible meanings of the same term of a contract, one should in case of doubt prefer the construction which gives to the words a certain meaning rather than the construction which makes them useless or even absurd (the principle of the 'useful effect' is also referred to as the principle of effectiveness: *ut res magis valeat quam pereat*).

15.4 *LEX MERCATORIA*

A report on the various connecting factors would certainly not be complete without dealing with *lex mercatoria*, which has deliberately been left to the end of this study, in order to give more room to it. *Lex mercatoria*, which has raised, and still raises, much interest and concern thanks to a doctrine which for about thirty years has been the subject of particular attention, is frequently believed to be a recent definition. However in 1622[74] already three centuries ago, Maynes, an English writer, published a book on 'Consuedo vel *Lex Mercatoria* or the Law Merchant.

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[72] *Clunet* 1986, 1132. (unofficial translation from French).

[73] *Clunet* 1976, 982. (unofficial translation from French).

[74] G. MAYNES, *Consuedo vel Lex Mercatoria or the Law Merchant*, 9 *Arb. Int.* 3, 323..

Three centuries after that, it has found in Goldman[75] a passionate and authoritative champion, who is not alone to hold this view.[76] Goldman recognizes that this doctrine has:

> a very important ancestor in the *jus gentium* in Rome.

According to this author, *lex mercatoria* is a spontaneous law consisting of usages, of arbitral awards and of the reoccurring solutions concerning international trade which are found in conventions on uniform laws and in national laws, as in the Czechoslovakian Code of International Trade,[77] and in precedents in the various legal systems.

It becomes natural to wonder what the relationship is between *lex mercatoria* and the fundamental principles of international law. Rousseau[78] authoritatively notes that Art. 38 of the Statute of the International Court of The Hague places the fundamental principles of law, recognized by the civilized countries, among the sources of international law.

Goldman sees *lex mercatoria* as the result of the rules and principles arising from various sources: from pluri-national systems, national legal systems and spontaneous sources, including the fundamental principles of international law and the principles which derive their binding nature from the knowledge the international community has acquired of them and not from a given legal system.

Lando[79] refers to:

> the customs and usages of international trade ... the rules of law which are common to all or most of the States engaged in international trade or to those States which are connected to the dispute. Where such common rules are not ascertainable the arbitrator applies the rule or chooses the

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75 G. GOLDMAN, *Frontières du droit et lex mercatoria* (The boundaries of law and *lex mercatoria*), *Arch. de Philosophie du droit*, Paris 1964, 177 and more recently *La lex mercatoria dans le contrat et l'arbitrage internationaux, réalité et perspectives* (*Lex mercatoria in International Contract and Arbitration, Reality and Perspectives*), *Clunet* 1979, V, 461.

76 P. FRANCESCAKIS, *Droit naturel et droit international privé* (Natural law and private international law), *Mélanges offerts à Jacques Maury*, Paris 1960, 1, at 113; R. DAVID, *Il diritto nel commercio internazionale: un nuovo compito per i legislatori nazionali o una nuova lex mercatoria?* (The Law in International Trade: a New Task for National Parliaments or a New *Lex Mercatoria*?), *Rivista di diritto civile* 1976, 1, 577; C. SCHMITTHOF, *The Law of International Trade, its Growth, Formulations and Operation*, 1964, at 3.

77 *Clunet* 1967, 789.

78 C. ROUSSEAU, *Droit international public* (International public law), Paris, 1970, 1, at 38.

79 O. LANDO, *The Lex Mercatoria in International Commercial Arbitration*, 34, *Int. and Comparative Law Quarterly*, October 1985, 747.

> solution which appears to him to be the most appropriate and equitable
> ...
> This judicial process, which is partly an application of the legal rules and partly a selective creative process, is here called application of the *lex mercatoria.*

Schmitthof[80] defines it as:

> the uniform law developed by parallelism of action in the various national legal systems in an area of optional law in which the State in principle is not interested.

The wider concept of *force majeure*, the clauses which aim to remedy hardship, new unclassified contracts such as for the supply of factories on a turnkey basis, and one might perhaps add factoring, lease contracts, franchising) the clause *rebus sic stantibus*, the *pacta sunt servanda* rule, the duty to mitigate losses, would all come under *lex mercatoria.*

Lex mercatoria would not be dependent on any national system. Goldman goes further and states that asserting the contrary would mean denying *lex mercatoria,* even if the *lex mercatoria* does not reach the stage of claiming total immunity from any legislation, but recognizes the possibility of coexistence between itself and a given legal system.

Lex mercatoria would then be formed by statutory provisions at a time when they:

> free themselves from their contractual origin, raising to the dignity of uses which can be applied even in the absence of an express agreement by the parties.

According to its supporters, *lex mercatoria* must consequently be applied when the parties have excluded any national law and have asked the arbitrators to apply only the general principles and usages of international trade.

Lex mercatoria is openly criticized by several authors who see in it the signs of uncertainty and the danger that each judge or arbitrator will distill – in the fog of his own subjective tendencies – his own personal formula for it. Amongst its opposers are Mann,[81] Mustill,[82] Mezger[83] Lagarde[84] who points

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[80] C. SCHMITTHOF, *Nature and Evolution of the Transnational Law of Commercial Transactions*, in HORN and SCHMITTHOF, 1982, 22.

[81] F.A. MANN, *England Rejects Delocalized Contracts and Arbitrations, International and Comparative Law Quarterly* (1984), at 193.

[82] M. MUSTILL, *The New Lex Mercatoria. The First Twenty Five Years* in Etudes Wilberforce, Oxford 1987, 149.

[83] E. MEZGER, *Comment, The International Law Association Report of the 1982 Montreal Conference,* London 1983.

out that it would consist in twenty principles, and that if it is a law, it must have a legal source. Delaume[85] and Kassis[86] also criticize it as being 'vague'.

Gaillard[87] analyses this doctrine in depth and distinguishes between transnational law which steps in when the parties has excluded the application of a national law (excluding situations where the arbitrators use it to fill gaps of a national law) and transnational conflict rules such as the 'voie directe' doctrine, by which arbitrators choose the applicable substantive law from substantive transnational rules without making use of national conflict rules. As to the latter, reference is to be made first to the rules to establish the validity of the arbitration agreement, as to which *Dalico*[88] has given first to arbitrators and then to the French courts the opportunity to hold that its validity is to be decided based on rules of international trade and then on substantive transnational rules. Lalive eventually reminds that the wave of *lex mercatoria* has even reached transnational public policy.[89]

Such rules derive from customs, to which the international conventions like the Vienna 1990 and the Rome Convention 1980 are to be added.

A particular mention is deserved by UNIDROIT's Principles of International Commercial Contracts.[90]

Even North American writers have been attracted by such theory. Wilkinson[91] analyses various components of *lex mercatoria*: general principles of law, uniform laws of international trade, customs and usages, and arbitral awards.

Carbonneau[92] has devoted a monograph to this subject.

Rivkin[93] in turn analyses the ways by which the parties choose expressly or impliedly *lex mercatoria.* Several precedents are favourable to it, like in France *Fougerolle*[94] where the French Court of Cassation held that the arbitrators had duly complied with their task, by applying the general principles of interna-

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84 LAGARDE, *Approches critiques de la Lex Mercatoria*, in *Le Droit des Relations Economiques Internationales*, Etudes Offerts à Berthold Goldman, 125.

85 G. DELAUME, *The Proper Law of State Contracts and Lex Mercatoria,* A reappraisal, 3 *ICSID Rev.* (1988) 79.

86 A. KASSIS, *Théorie générale des usages du commerce*, LGDJ 1984, 561.

87 E. GAILLARD, *Trente ans de Lex Mercatoria, Clunet* 1995, 5.

88 *Dalico,* Court of Cassation December 20, 1993, *Rev.arb.* 1994, 46, a decision criticized by P. MAYER.

89 P. LALIVE, *Transnational (or truly international) Public Policy and International Arbitration*, ICCA Congress series, Kluwer 1987, 257.

90 UNIDROIT, Rome 1989.

91 V.L.D. WILKINSON, *The New Lex Mercatoria, Reality or Academic Fantasy?*, 12 *J. Int. Arb.* 2, 105.

92 T.E. CARBONNEAU, *Lex Mercatoria and Arbitration*, New York 1990.

93 D. RIVKIN, *Enforceability of arbitral awards based on lex mercatoria*, 9 *Arb. Int.* 1, 67.

94 *Fougerolle (France) v. Banque du Proche Orient (Lebanon),* Court of Cassation December 9, 1981 *Rev. arb.* 1982, 183.

tional commerce, since they are part of the law, and in the U.S. such as *Gould*[95] in which the U.S. Court of Appeals for the Ninth District rejected the plea that proceedings must be subject to a national law and held:

> an award need not be made under a national law for a court to entertain jurisdiction or its enforcement pursuant to the Convention, a provision which is to be referred to procedural arbitration law but the rationale of which might be applied, on other occasions, to substantive arbitral law.

Stoecker's[96] analysis starts by identifying the motivation of *lex mercatoria* as stated in Schmitthof's address to the Helsinki University in 1957:[97]

> we are beginning to rediscover the international character of commercial law ... and the general trend of commercial law everywhere is to move away from the restrictions of the law of international trade'

and recognizes a limited ambit to *lex mercatoria* in arbitral proceedings, provided the parties have not excluded its application.

An interesting comparison has been drawn between the Continental European view favourable to awards not having to be based on a national law, which the United States have not rejected,[98] and the English position according to which the award has to be based on a national law.

Valenciana[99] held:

> the arbitrators ... rendered a final decision that none of them justified the application of a [national] law, and decided to apply the body of principles and trade usages called lex mercatoria, i.e. international norms, which can apply to the solution of a dispute in the absence of ... By so deciding the arbitrator conformed to the terms of reference.

That judgment was confirmed by the Court of Cassation[100] which held:

> considering ... that by referring to the body of rules of international trade developed in practice and having been sanctioned in the jurisprudence of various nations, the arbitrator decided according to law as he was obliged to do by the terms of reference.

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95 *Ministry of Defense v. Gould Inc.*, no. 87-63673 (C.D. Cal Jan 14, 1988).

96 C.W.O. STOECKER, *The Lex Mercatoria: To What Extent Does It Exist?*, 7 *J.Int.Arb.* 1, 101.

97 C. SCHMITTHOF, *International Business Law: A New Law Merchant*, 1961, Curr. Law and Soc. Prob. 1961, 129.

98 A.F. LOWENFELD, *Lex Mercatoria: An Arbitrator's View*, 6, 133.

99 *Compania Valenciana de Cementos Portland S.A. v. Primary Coal Inc.*, Court of Appeal, Paris, July 13, 1989, *Yearbook Commercial Arbitration* 1991, 142.

100 Court of Cassation, France October 22, 1991, *Yearbook Commercial Arbitration,* 1993, 137.

In *Polish Ocean*[101] the French Court of Cassation has confirmed that:

> the arbitrator is bound to apply the law expressly chosen by the parties or to construe their implied intention taking into account the different nationality of the parties, the performance of the contract which was to be made in different places and that the parties had intended to submit their dispute to the general principles of international trade.
>
> The arbitrators who in any situation take into account the usages of the trade and who have not acted as amiables compositeurs, have respected their terms of reference.

In *Topfer* the Italian Court of Cassation[102] has pointed out that the arbitrator had rightly applied *lex mercatoria,* which is the result of the regular use of customs and usages by merchants who at a given time do so in force of the *opinio necessitatis.*[103]

The award has been made by the sole arbitrator (X. De Mello) on September 1, 1988.[104]

A stance against *lex mercatoria,* in the absence of an express choice of the parties, was taken in the award made in ICC proceedings no. 4650 (1985) by the arbitrators (Briner, Chairman, Merkt and Morison):[105]

> Based on the evidence presented to the arbitral tribunal the question of the governing law did not appear to have been discussed between the parties and it would seem obvious that no tacit agreement or understanding had been reached. In the absence of any evidence regarding an actual agreement or concurrent intentions of the parties, the arbitral tribunal is of the opinion that one cannot consider that the parties had chosen Swiss substantive law or the *lex mercatoria.* It would seem to the arbitral tribunal that the choice of such a law would require an agreement between the parties which in the present case was not reached.

Several judgments have been delivered on this issue by national courts. In favour of *lex mercatoria* are the Italian Court of Cassation in *Topfer,*[106] as earlier discussed, the *Gotaverken* award[107] and the Court of Appeal of Paris[108] and the Superior Swedish Court[109] both in *Gotaverken.*

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[101] *Sté Polish Ocean Line v. Société Jolarsry*, Court of Cassation (France) March 10, 1993, *Clunet* 1993, 360.

[102] *F.lli Damiano v. August Topfer GmbH, Riv.dir.int.priv.proc.*, 1982, 929.

[103] The belief that given customs and usages have become binding.

[104] In ICC proceedings no. 5953, *Rev.arb.* 1990, 701.

[105] Award, *Yearbook Commercial Arbitration,* 1987, vol. XII, at 112.

[106] *Ditta Fratelli Damiano S.n.c. v. August Topfer & Co GmbH,* Court of Cassation (Italy), February 8, No. 722, (1982), *Riv. dir. int. priv. proc.*, 1982, 829.

[107] *Gotaverken AB v. Libyan General National Maritime Transport Co.*, quoted by J.C. WETTER, *The International Arbitral Process,* New York 1979, 11, at 178.

Against *lex mercatoria is* the House of Lords which, in *Amin Rasheed*[110] held that:

> describing a contract as internationalized would amount to treat it as a 'floating contract, unanchored from any system of law'.

Even more clearly the English Court of Appeal in *Bank Mellat v. Helleniki Techniki* [111] held:

> Despite some suggestions to the contrary by some learned writers under other systems, our jurisprudence does not recognize the concept of arbitral procedures floating in the transnational firmament, unconnected with any municipal system of law.

The Court of Appeal of Vienna held the same views in *Norsolor*:[112]

> The Court set aside part of the award for breach of Art. 13 of ICC Rules, since the arbitrators had not determined the applicable national law by confining themselves to apply *lex mercatoria,* a world law of questionable validity,

but it was reversed by the Austrian Supreme Court.

It must still be recognized that a national judge, who is accustomed to base himself on his own national conflict of laws rules, is not the most suitable person to face the situation of a *vacuum,* i.e. that sort of *legal desert* which lex *mercatoria* has tried to fill.

The international arbitrator is perhaps more suited to face such a situation. In fact, *lex mercatoria* has been met with favour by arbitrators. That was the case in *Norsolor,* a decision made in ICC proceedings no. 3327 (1981),[113] quoted by Fouchard:[114]

> Recourse to the general principles of the law is the most frequent attitude of arbitrators in international trade. It is to be found in awards whether they base themselves or not on international law; this is sometimes expressed and more frequently tacit. The general principles are deducted by a comparative analysis of various legal systems by starting from an abstract reasoning where the legal culture of the arbitrator obvi-

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[108] *General National Maritime Transport Co. v. Gotaverken Arendal AB, Clunet* 1980, 660.

[109] *Gotaverken Arendal AB v. Libyan General Maritime Transport Co., Virginia Journal of International Law* 1980-81, 244.

[110] *Amin Rasheed Shipping Corporation v. Kuwait Insurance Co.,* 2 *All ER* (1983), 884.

[111] *Bank Mellat v. Helleniki Techniki SA, Weekly Law Reports* 1983, 783.

[112] *Pabalk Ticaret Limited Sirketi v. Norsolor SA,* Court of Appeal, Vienna, January *19, 1982, Yearbook Commercial Arbitration, vol. VIII,* 1983, at 365.

[113] DERAINS, *Chronique des sentences arbitrales, Clunet* 1982, 973.

[114] FOUCHARD, *L'arbitrage commercial international* (Commercial International Arbitration), at 427.

> ously plays an important role. The formation of a common law of the nations directly arises from this arbitral method. It is mainly in contractual disputes that the arbitrators have tried to identify general principles. A general doctrine of contracts has been elaborated which creates a really international common law ...

An additional role seems to have been given to *lex mercatoria* by the award rendered in ICC proceedings no. 4761 (1984).[115] The Arbitral Tribunal, which was hearing a dispute between an Italian enterprise and a Libyan party, held in an interim award:

> If Libyan law will not be proven, according to Art. 8 of the Terms of Reference, this arbitral tribunal will apply *lex mercatoria*, i.e. the general principles of the law.
>
> *Lex mercatoria* shall equally apply if Libyan law, as established by one of the other parties, were manifestly incomplete on one or more aspects of the dispute.

Not all the definitions match. Lando sees as a part of it also the subjective choices of the arbitrator. However this does not seem to be a custom of the international trade, but an element separate from this, which is also attackable by criticism.

Lando sees also *lex mercatoria* as being an application partly of rules of law and partly of customs. *Lex mercatoria*, as clearly defined by Goldman, may considerably help to supplement the national law, whenever there is a room for it, while it may not replace it. It has also been seen as a body of substantive law concerning international trade, being:[116]

> a category of international law, separate from any national legal order.

Here one has perhaps gone beyond the frontier of *lex mercatoria* and treating it as a law, a view shared by the French Court of Cassation in *Valenciana* and *Polish Ocean,* has given rise to criticism which may have some merits.

It is submitted that *lex mercatoria* could be better off just as a set of recognized usages of international trade, rather than as a rival to national law, or a legal system by itself.

Whenever the parties exclude national laws, and make reference only to those customs and usages, that choice seems to stand (provided it does not conflict with any applicable mandatory provisions).

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[115] DERAINS-JARVIN, *Chronique des sentences arbitrales, Clunet* 1984, 1137.

[116] BORN, *cit.* at 134.

15.5 THE *TRONC COMMUN*

The negative choice

A search for the intention of the parties may not omit what Hjerner[117] describes as the *negative choice.* This means assessing the consequences of the parties' decision to choose none of their respective national laws (nor the laws of a third country). This generally shows that the parties did not want any of these laws. This must be taken into account in construing the intention of the parties, since it is a *negative choice.*

Le tronc commun

If the parties choose none of their respective national laws, which would be their most natural choice, nor a third 'neutral' law, should the artificial criteria, (provided by the conflicts rules,) be immediately applied in replacement, or should the search for the real intention of the parties first be continued?

Looking deeper into the meaning of the negative choice, it is submitted that it means that the parties intended to avoid accepting provisions which they did not know in order to avoid finding themselves subject to a regulation which might surprise them. Then if because of the conflict of laws rules, one of the national laws of the parties is chosen – in spite of the parties not having chosen it -, this would be contrary to the intention of the parties.

However, if each party excludes the national law of the other contracting party, does that mean that they expressly intend their relationship not to be governed *in any way* by their respective national laws? Or rather, if each party certainly intends to exclude the part of the legal system of the other contracting party which is different from his own law and which the former does not know, did he really wish to exclude the relationship being governed *at least* by the *part* of the other and of his own legislation which is *common to them?* If the common part of the two legislations applies, is this solution not more satisfactory, since it is closer to the intention of the parties?

The parties in fact, in choosing the applicable law, have simply reacted normally in front of what was unknown to them. Wishing to avoid surprises, neither party wanted what was *different* from his own internal national law. Apart from this, they did not wish, I think, to *destroy* what was common to their national legislations.

It follows from this that the common part of such legislations must remain applicable. This seems to be a clear, natural and automatic choice.

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[117] *L. HJERNER, Choice of Law Problems in International Arbitration with Particular Reference to Arbitration in Sweden, Yearbook of the Arbitration Institute of the Stockholm Chamber of Commerce,* Stockholm 1982.

That the parties do not wish to expose themselves to surprises is confirmed, for example, by the parties' attempt to draw up contracts which are self-sufficient, i.e. which cover all possible situations, in order to avoid the risk of being subjected to an unknown statutory provision.

An even more marked sign of this concern is the insertion into a contract (in which a party has had to accept, contrary to his will, the law of the other contracting party) of the *handcuffs clause,* reported by Sandrock.[118] This limits the application of a national law, so designated, by providing that, in case of breach of the contract, no statutory remedy different from the remedies which have been expressly agreed upon by the parties can be sought. Such clauses, the validity of which might be challenged in some jurisdictions, bring to the extreme the desperate attempt to avoid the application of a law of which that party has no knowledge.

The issues not covered by the *tronc commun* will still have to be regulated. It is submitted that in this situation the arbitrator will take inspiration from the principles of the legal systems of the parties and from the usages of the parties in their previous relationships and, in their absence, from the current usages in the countries to which the contracting parties belong, letting himself be guided by the principle of looking for a solution which is as near as possible to the expectations of both parties. If this were not achievable, the arbitrator might tend to apply, as to each contractual duty, the national law of the party which is under such a duty.

Each of us, when called on to decide as an arbitrator, or in the framework of a research, will have to determine in his solitude whether this or another one is the best solution to the problem of how to identify the applicable law, and whether this is also in line with the Rome Convention[119] when applicable. In any event, the silence of the parties seems to deserve greater attention, as pointed out by the arbitrators sitting in Geneva in the *Komgrap* award rendered in ICC proceedings no. 3540 (1980):[120]

> The arbitrators were hearing a dispute between a French company (A) and its Yugoslavian sub-contractor (B) concerning the performance of work for a Soviet Owner. The parties had not chosen the applicable law. The Yugoslavian enterprise asked for French law to be applied (probably since it was favourable to it), while the French company asked for the same reason for the application of Swiss law. Neither party asked for Yugoslavian or Russian law to be applied. The French company held

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[118] SANDROCK, *op. cit. supra* note 5 ter, at 159.

[119] Art. 3 (1) (2) foresees: 'The choice must be express or shown with reasonable certainty by the contractual clauses or by the circumstances of the case'.

[120] Y. DERAINS, Chronique des sentences arbitrales, *Clunet* 1981, at 915. (unofficial translation from French)

> that the parties, at the time they entered into the contract, had agreed to exclude French law. The arbitrators held:
>
> "Whereas it is surprising that the contract has omitted to identify the applicable law and silence of the parties may well arise from their disagreement on the choice of the law, and in particular on French law, which would authorize A to argue that the only agreement of the parties was not to choose French law; nevertheless the Arbitral Tribunal, which furthermore must act as *amiable compositeur,* does not deem to have to decide on this possibility by taking evidence; it will search for the applicable law by analyzing the elements which have been submitted to it and applying the general principles which have been asserted on this issue by recent arbitral precedents, particularly by Arbitral Tribunals formed under the ICC Rules."

The need to take into account the tacit choice of the parties is recognized in the award made in ICC proceedings no. 1434 (1975):[121]

> In order to identify the applicable law and in particular the extent to which effect must be given to the express or *tacit* (emphasis added) choice of the contracting parties ...

The unsatisfactory results produced by applying a national law at all cost are echoed in the award made in ICC proceedings no. 2375 (1971) by arbitrators sitting in Paris, hearing a dispute between a French company (claimant) and a Spanish and a Bahamian company as defendants:[122]

> ... One does not see the point of applying a national law which the parties certainly did not consider at the time they entered into the agreement

Lando too accepts *de facto*[123] the essence of the *tronc commun* doctrine, by stating:

> The parties to an international contract sometimes agree not to have their dispute governed by national law. Instead they submit it to ... the rules of law which are common to those states which are connected to the dispute.

It is suggested then that the parties to *ad* hoc arbitration, and the arbitral institutions in their rules, can well identify the applicable law as the common part of the legal systems of the parties to the dispute, with the arbitrator having to fill possible *lacunae* by referring to such legal systems and looking for a solution which is as close as possible to the expectations of the parties and, if

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[121] *Clunet* 1976, 980. (unofficial translation)

[122] *Clunet* 1976, 974. (unofficial translation)

[123] See *supra* note 79.

impossible, the less heavy for the party which is under that specific duty. This solution for such a delicate issue avoids resorting to the conflict of laws rules.

An answer which in the substance is positive, even if it does not also deal formally with this problem, can be found in the award made in ICC proceedings no. 2886 (1977):[124]

> In a dispute between a Yugoslavian company and a German company concerning a sales representative agreement, the sole arbitrator, sitting in Innsbruck, faced with the lack of choice of the applicable law held:
>
> 'In this issue both Yugoslavian and German law are applicable. Any other law is to be excluded since there is no connection with the legal system of any other country. Therefore the arbitrator will base his decision on the merits both on Yugoslavian and on German law'.

A similar example is an award quoted in the other award made in ICC proceedings no. 3327 (1981):[125]

> An arbitral tribunal sitting in France, in a dispute between a Swiss company and a Swedish company, compared the regulation of fraud in Swiss law and in French law to conclude that the two systems had common rules as to the annulment of a contract because of fraud.

A search is also made for the part which is common to the legal systems of the contracting parties, (even if by securing it to the contract and not to the *tronc commun)* in the award made in ICC proceedings no. 1990 (1972):[126]

> In a dispute between an Italian company, licensor, and a Spanish company, licensee, related to a licence and exclusive sales agreement, which the Italian licensor claimed the licensee had broken, the arbitrators held:
>
> 'In so far as the questions in dispute are regulated by the parties in their contract ... it is possible to resolve them on the basis of the contract. This applies in the present case to the validity, execution, rescission and adaptation of the circumstances of the contract, questions on which, moreover, the general principles of Italian and Spanish law are practically identical. These questions can therefore be resolved without a preliminary decision on the applicable law.'

In arbitral precedents one can then trace the various remarks, even if isolated, which form the different logical steps involved in the doctrine of the *tronc commun.* In the award made in ICC proceedings no. 2375 (1971):[127]

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[124] *Clunet,* 1978, 966 *et seq.*

[125] *Y. DERAINS, Chronique des sentences arbitrales, Clunet* 1982, 971.

[126] *Yearbook Commercial Arbitration* 1978, at 28.

[127] *Clunet* 1976, 974.

> The arbitrators, sitting in Paris, hearing a dispute between a French company, claimant, and two companies (Spanish and Bahamian), defendants, in dealing with the applicable law and the possibility of applying one given national law (instead of another national law) held: 'One does not see the point of applying a national law which the parties certainly did not consider at the time they entered into the agreement ...

Furthermore (even if to conclude for the application of the conflicts rules of the various States connected to the factual situation) in the award made in 1975 in ICC proceedings no. 1434:[128]

> In order to identify the applicable law and, in particular, the extent to which effect must be recognized to the express or *tacit choice* of the contracting parties ...

The *tronc commun* formula was taken into account also in ICC arbitral proceedings held in 1996 in alternative to the choice of a third neutral law and to the choice of the general principles of law, the latter being the solution eventually preferred.[129]

Fouchard does not seem to be far from this position,[130] (although he draws conclusions which are close to *lex mercatoria)* when he holds that arbitrators try:

> less to choose a law than to put together various laws by showing that in the end they reach the same conclusion and form a sort of common law which allows a supra-national law to be obtained.

The recent judgment of the English Court of Appeal in *Deutsche Schachtbau*[131] is very interesting both for its contents (frequently seen as approving the different notion of *lex mercatoria)* and because it was made by the Master of the Rolls himself. In deciding the validity of an agreement under which the arbitrators had chosen as applicable law the:

> international accepted principles of law governing contractual relationships.

Lord Donaldson held:

> By choosing to arbitrate under the rules of the ICC and in particular Art. 13.3, the parties have left the proper law to be decided by the arbitrators and have not in terms confined the choice to national systems of law. I

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[128] *Clunet* 1976, 980.

[129] Award made in Geneva on June 5, 1996, no 7375/96 *Riv. arb.* 1999, 129.

[130] FOUCHARD, *op. cit.*, at 390.

[131] *Deutsche Schachtbau und Tiefbohrgesellschaft mbH v. The R'as al Khaimah National Oil Co. and Shell International Petroleum Co. Ltd.,* Court of Appeal (England), March 23, (1978), *Journal of Business Law* 1987, 168, and *Clunet* 1987, 1046.

> can see no basis for concluding that the arbitrators' choice of proper law – a common denominator of principles underlying the laws of the various nations governing contractual relations – is outside the scope of the choice which the parties left to the arbitrators.

A situation calling for the application of the *tronc commun* doctrine seems to arise from the sale contract, on which the award rendered in New York in ICC proceedings no. 7385 (1992) and 7402 (1992)[132] was based:

> Notwithstanding any other provision herein contained, this contract is subject to all valid Canadian *and* / or (emphasis added) United States legislation.

The *tronc commun* doctrine is fully applied by the *Channel Tunnel* contract which provides:[133]

> The construction, validity and performance of the contract shall in all respects be governed by and interpreted in accordance with the *principles common* to both English law and French law and in the absence of such common principles by such general principles of international trade law as have been applied by national and international tribunals. Subject in all cases with respect to the works to be respectively performed in the French and in the English part of the site, to the respective French or English public policy (*ordre public*) provisions.

The *tronc commun* doctrine is then a formula well present in the mind of drafters of contracts.

As it arises from the *Aminoil* award,[134] the parties had agreed:

> Taking into account the different nationality of the parties, the agreements between them shall be given effect and must be interpreted in conformity with the *principles common* to the laws of Kuwait and of the State of New York ...

The search for common principles, albeit between a national law and principles of international law, is to be found in other three major oil concessions disputes, i.e. *BP*,[135] *Topco*,[136] and *Liamco*.[137]

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[132] *Yearbook Commercial Arbitration* 1993, 68.

[133] *The Channel Tunnel Group Ltd and France Manche SA v. Balfour Beatty Construction Ltd et al*, 10 *J. Int. Arb.* 3, 59.

[134] *Government of the State of Kuwait v. American Independent Oil Company (AMINOIL)*, XXI *ILM* 976-1053 (1982).

[135] *British Petroleum Co. Ltd. v. Governent of Libyan Arab Republic*, ILM 53 297 388 (1979).

[136] *Texaco Overseas Petroleum Co. et al. v. Government of Libyan Arab Republic, Clunet* 1977, 350

[137] *Libyan American Oil Co.v. Government of Libyan Arab Republic, Rev.arb.* 1980, 132

The research for common elements seems then to confirm the wish of the parties not to remain *prisoners* of a national law, which they frequently ignore.

Likewise the award rendered in ICC proceedings no. 5163[138] applies the principles common to the Arab Republic of Egypt and to the United States.

On some other occasions, the basis of the *tronc commun* will be wide as:

> the general principles applicable in Western Europe

while on another occasions reference was made to the:

> general principles of law common to Northern Europe.

In ICC Award made in 1992 in ICC proceedings no. 7319[139] the arbitration agreement provided:

> the agreement shall be construed in accordance with and governed by laws and regulations applying to members of the European Economic Community,

a language which, however, the sole arbitrator construed[140] not as referring to the:

> common principles of the ... member states of the European Community,

and not as

> eliminating by mutual consent Irish and French national law,

but simply as meaning that the parties:

> were unable to agree on a particular national law.

This issue was addressed by the High Court of England in *Channel Tunnel*[141] when a dispute arose between the owners of the tunnel and the contractors, and the former tried to take out an injunction against the contractors not to suspend the works:

> Since both Eurotunnel and the contractors were partly French and partly English, I wonder why they did not choose either English law or French law exclusively ... The hybrid system of law which they did choose has a superficial attraction, but I suspect that it will lead to lengthy and expensive dispute,

while in the House of Lords Lord Mustill referred to it more reservedly as an

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[138] E. GAILLARD, *Trente ans de Lex Mercatoria, Clunet* 1995, 5.

[139] ICC *Bulletin,* Supplement November 1994.

[140] In a rather arguable manner

[141] See *supra* note 133

> elaborate process for ascertaining those rights,

without disclosing his views on the level at which this formula exercised attraction.

This comment shows first that a choice of law was made, second that the Court recognized that it had to apply it, and thirdly unhappiness at having to compare English and French law.

The notion of *tronc commun* may apply also to procedural law as it was held in *Dallal v. Bank Mellat:*[142]

> There is no reason in principle why the curial law of a tribunal cannot derive concurrently from more than one system of municipal law. There may be problems involved in the municipal law recognition as between private parties of proceedings which exist solely at a supranational level and have no relationship at all to any system of municipal law (see *Bank Mellat v. Helleniki Techniki SA* (1983) 3 All ER 428 to 431, (1984) 1 QB 291 at 301, per Kerr. L.J.). In the present case there are two systems of municipal law with the requisite international competence which give validity to arbitration proceedings. There is no reason in principle why that validity should not be recognized by the English Courts.

Generally one does not look for complicated formulas and the parties choose a national law. This is then the main criterion. If they do not, it is submitted that the *tronc commun* doctrine rather than an artificial method may be applied.

Amongst writers, the *tronc commun* is dealt with by Ancel[143] and Derains[144] who refer to the combined application of several national legal systems while as earlier discussed Fouchard[145] has noted that arbitrators try to put together various laws in order to form a sort *of common law.*

The contrary view is expressed rather hastily in the judgment rendered by the Court of Appeal of Monaco, in *Condotte-Trivella:*[146]

> Whereas the notion of *tronc commun* of the French and Italian legal systems argued by Trivella does not cover any precise legal reality.

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[142] *Dallal v. Bank Mellat*, High Court of England QB June 27, July 2, 3, 26, 1985 (1986) 1 All ER 239.

[143] B. ANCEL, *The Tronc Commun Doctrine, Logics and Experience in International Arbitration*, 7 *J. Int. Arb.* 3, 65.

[144] Y. DERAINS, *Le choix du droit applicable au contrat et l'arbitrage international*, 6, *ICC Bulletin*, 1, 13.

[145] P. FOUCHARD, *L'arbitrage commercial*, Paris, 1965, at 390.

[146] *Condotte d'Acqua SA (France) v. Sté Trivella (Italy)*, Court of Appeal (Principauté de Monaco), June 28, (1988) (unreported).

Differences between tronc commun *and* lex mercatoria

There is no similarity between *tronc commun* and lex *mercatoria.* In fact, the latter is applicable as a residual notion, i.e. in the absence of the possibility of identifying an express or tacit choice of the parties. Furthermore, it substantially consists of current usages in the international commercial community.

The *tronc commun* consists in identifying a *tacit choice* by the parties, without having to resort to residual criteria. Rather than being a mixture of usages or national principles, it is formed by the common part of the laws of the contracting parties and consequently consists of statutory provisions.

However lex *mercatoria* and *tronc commun* are both the result – even if they are different from each other – of the search for the applicable law in the absence of an express choice by the parties.

Since normally the choice of a third law is merely theoretical, in substance it is generally a matter of choosing between the law of a contracting party and the law of the other one.

Lex *mercatoria is* based on the conclusion that, if it is not possible to choose between two national laws, in case of doubt they must *both be abandoned.* This is confirmed by the award made in *Norsolor:*[147]

> Faced with the difficulty of choosing a national law the application of which is sufficiently compelling, the Tribunal considered that it was appropriate, given the international nature of the agreement, to leave aside any compelling reference to a specific legislation, be it Turkish or French, and to apply the international *lex mercatoria.*

This award has given rise to another of the great legal battles, the various phases of which are marked by five French decisions (Paris Court, Court of Appeal Paris, Court of Appeal Paris again, Order of the President of the Tribunal de Grande Instance, Court of Cassation) and by three Austrian judgements (Handelsgericht Wien, Oberlandesgericht Wien, Oberster Gerichtshof), a battle well summarized by Goldman.[148]

The *tronc commun,* however, *avoids destroying both laws* and *keeps* just the part of each of them which is common to both.

It is therefore not necessary to resort to *lex mercatoria* if the relationship is governed by the *tronc commun* of the legal systems of the parties. It is suggested that this has the great advantage that the parties are subject to a law (the

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[147] *Pabalk Ticaret Limited Sirketi, v. Norsolor S.A.,* (arbitrators B. Cremades, chairman, Ghestin and Steiner), award October 26, 1979, *Yearbook Commercial Arbitration* 1986, vol. XI, at 485.

[148] B. GOLDMAN, *Une bataille judiciaire autour de la lex mercatoria* (A legal battle around *lex mercatoria*), *Rev. arb.* 1983, 378; the judgement of the French Cassation is published in *Rev. arb* 1985, 431.

tronc commun) which they both know well, and which does not expose them to surprises, and that such a law will be made up of statutory provisions.

It is submitted that lex *mercatoria* is thus an instrument *subsidiary* to the *tronc commun* and which is applicable only if the *tronc commun is* not applicable for any reason. It is suggested that it is preferable not to try to treat *lex mercatoria* as a legal system, because the issue whether a system of law detached from the national legal systems can exist is much debated, and its solution is probably not necessary. It is this very aspect of the doctrine of *lex mercatoria* which maybe has acted negatively by preventing a wider acceptance of it.

Tronc commun and *lex mercatoria* perhaps have in common, *vis-a-vis* the conflicts rules, that they are not artificial criteria at high risk consisting in frequently taking at least one party by surprise and submitting it to a legal system which it did not want.

15.6 Lack of Proof of the Foreign Substantive Law

Difficulties may have to be met in order to become aware of the contents of the applicable substantive law once it has been identified

In some jurisdictions, the judge or the arbitrator is expected to research the law, under the old rule *jus novit curia.*[149]

However in many other jurisdictions foreign law is treated as a question of fact. In this sense, the arbitrator will not even cooperate in researching it and the burden to prove it is placed on the shoulders of the party claiming under it.

A further negative aspect in several jurisdictions is that in the absence of evidence of the foreign law, the assumption prevails that the foreign law is the same as the local law. This is the conclusion reached under English law by the sole arbitrator, an English lawyer sitting in London, in 1987 in ICC proceedings no. 5460:[150]

> ... failing evidence to the contrary, English private international law compels me to assume that any foreign law is the same as English domestic law,

a conclusion which, if correct under English and other national laws, in general – it is submitted – is artificial and as such is unsatisfactory.

The duty of the judge to assist in researching the applicable law has been advocated by this writer in the past.[151]

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[149] The Court knows the law.

[150] BORN, *cit.* 107.

[151] M. RUBINO-SAMMARTANO, *Il giudice nazionale di fronte alla legge straniera* (The national judge in front of the foreign law), *Riv.dir. int. priv. proc.* 1991, 315.

The only additional difficulty which derives from the *tronc commun* is that one has to be aware not just of one law, but of two laws, in order to establish which parts of the said two laws are common to them. Admittedly this is not easier, but if this is the proper solution, it simply has to be implemented.

CHAPTER 16

EX BONO ET AEQUO DECISIONS AND AMIABLE COMPOSITION

16.1 *Ex Bono et Aequo* – 16.1.1 Common Law Hostility – 16.1.2 *Aequitas* in Roman law – 16.1.3 Equity in England at the Time of Norman Kings – 16.1.4 Similarities Between the Two Notions – 16.1.5 Actual Application of *Ex Bono et Aequo* – 16.1.6 *Ex Bono et Aequo* and the Modern Legal Systems – 16.1.7 *Aequitas* in International Arbitration and Public Policy – 16.1.8 Limits to Discretionary Authority under *Aequitas* – 16.1.9 Conclusions – 16.2 *Amiable Composition* – 16.2.1 Original Notion – 16.2.2 Authority as *Amiable Compositeur* – 16.2.3 The French Notion – 16.2.4 Distinction Between *Amiable Composition* and *Ex Bono et Aequo* – 16.2.5 Situations where the *Amiable Compositeur* is instructed to decide.

16.1 EX BONO ET AEQUO

16.1.1 Common Law Hostility

Several common law jurisdictions meet difficulties in court proceedings, as well as in domestic arbitration, in front of applications to decide *ex bono et aequo*. This is due to their legal systems having provided for state courts to decide according to law.

In *David Taylor & Sons Ltd. V. Barnett Trading Co.*[1] the Court of Appeal (per Denning L.J.) held:

> there is not one law for the arbitrator and one for the Court. There is only one law for all of them.

An opinion which was shared by Singleton L. J.:

> The duty of an arbitrator is to decide the issues which are referred to him according to the legal rights of the parties and not depending on what he considers to be just and fair in the circumstances.

This position was emphasised in *Orion Compania Española de Seguros v .Belfort Maatshappj Voor Algemene Verzekgringeen:*[2]

> ... Arbitrators cannot be allowed to apply some different criterion such as the views of the individual arbitrator or umpire on abstract justice or equitable principles ...

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1 (1962) *WLR*, 570.

2 (1962) 2 *Lloyds Report*, 257.

Amongst writers, Mann[3] has argued that:

> The reason for such nullity is that the courts have a control over legal issues arising from arbitration and such a jurisdiction cannot be ousted.

Drawing from this the conclusion that:

> ... the consequence is that arbitrators must apply English law,

a position which is mitigated by Mustill and Boyd[4] who are more open:

> if on the other hand the presence of the clause can be reconciled with the substantive contract which creates a legal right, there seems no reason why the proceedings should not amount to an arbitration.

Christie,[5] even if he applies this to *amiable composition* rather than to *ex bono et aequo* due to the absence in general of a clear distinction between the two, shows he has perceived neatly the rationale since he qualifies this development as:

> a dispensation foreseen by the law itself from strictly applying the rules of law.

Redfern and Hunter's[6] concise statement

> ... amiable composition may come to be established in England

suggests that this would not be the present position.

The matter continues to be the object of discussions. Amongst other writings one may refer to Mulcahy[7] and to Poznanski.[8]

The traditional position is clearly expressed in *Eagle Star*,[9] in an *obiter dictum* by Parker L.:

> I have no hesitation in accepting that the submission of Counsel for Home that a clause which purported to free arbitrators to decide without regard to law and according for example to their own notions of what would be fair would not be a valid arbitration clause,

a view which is echoed in *Orion:*[10]

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3 A. MANN, *Lex facit arbitrum*, Liber amicorum for M. Domke at 157.

4 MUSTILL and BOYD, *Commercial Arbitration*, Butterworth, 1982 at 605 *et seq.*

5 R.H. CHRISTIE *Amiable Composition in French and English law*, 58 *Arbitration* 259.

6 REDFERN and HUNTER, *International Commercial Arbitration*, Sweet & Maxwell 1986. At 22 8.

7 MULCAHY, *Ex Aequo et Bono* in *Arbitration,* 1988, 105.

8 POZNANSKI, *The Nature and Extent of an Arbitrator's Powers in International Commercial Arbitration,* 4 *J. Int. Arb.* 3, 71.

9 *Eagle Star Insurance Co. Ltd. v. Yuval Insurance Co. Ltd.* (1978) 1 *Lloyds Report.* 357.

10 See *supra* note 2.

> It is of the policy of law in this country that ... arbitrators must in the general apply a fixed and recognisable system of law ... .

The issue arises whether arbitral proceedings, taking place in such legal systems but which are not conducted under their procedural law, may be decided *ex bono et aequo.* The same difficulty arises as to recognition of foreign or international arbitral proceedings which have been decided *ex bono et aequo.*

The difficulty to accept *ex bono et aequo* may also be due to a matter of terminology. The notion of *aequitas* , on which the decision should be based, seems to be *alien* to common law systems. It is translated by them with reluctance into fairness, natural justice or equity. None of these translations is satisfactory in general to common-law lawyers. As it is well known, in common law *equity* is a well-established part of the legal system and it entitles to remedies which are referred to as equitable remedies.

Fairness is also not acceptable since in common law this term describes a natural judicial quality and therefore does not add anything to the normal attitude which is expected from the judge or arbitrator.

Natural justice, much to the surprise of civil lawyers, is even less acceptable since it is considered to be a vague and subjective notion. The sharp remark made by Kerr L. J. in *Bank Mellat v. Helleniki Techniki*[11] who described *lex mercatoria* as *floating in the transnational firmament* could be equally applied to *ex bono et aequo.*

Contrary to this, the Australian legal system is open to natural justice.

The International Arbitration Act[12] provides that:

> (a) an award is in conflict with the public policy of Australia if ...
>
> (b) a breach of the rules of natural justice occurred in connection with the making of the award,

and the New South Wales CAA provides[13] that:

> if the parties to an arbitration agreement so agree in writing, the arbitrator or umpire may determine any question that arises for determination in the course of the proceedings under the agreement by reference to considerations of a general justice and fairness.

In England in the last decades the judicial approach to this matter has become more open. In *Eagle*[14] it has been held:

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[11] (1983) 3 *All ER.* 428.

[12] Section 19.

[13] Section 22.

[14] See *supra* note 9.

> this clause is wholly reasonable and it does not oust the courts control, but only technical rules and strict construction.

A view which has been maintained, even if with some reluctance, 10 years afterwards in *Cassidy*[15] where the Lord Chancellor, the Earl of Selborn said:

> Their Lordships would no doubt hesitate much before they held that to entitle arbitrators named as *amiables compositeurs* to disregard all law, and to be arbitrary in their dealings with the parties, but the distinction must have some reasonable effect given to it, and the least effect which can reasonably be given to the words is that they dispense from the strict observance of these rules of law, the non-observance of which, as applied to the awards, results in no more than irregularity.

In the United States,in *Fudickar*[16] it was held:

> arbitrators may, unless restricted by the submission, disregard strict rules of law or evidence, and decide according to their sense of equity.

A similar view was expressed in *Main Street:*[17]

> the fact is that an agreement to arbitrate, as authorised by statute, is a contractual method for settling disputes in which the parties create their own Forums, pick their own judges, waive all but limited rights of review or appeal, dispense with the rules of evidence, and leave the issues to be determined in accordance with the sense of justice and equity that they may believe reposes in the breasts and minds of their self chosen judges the judges.

Miller[18] points out that the Model Law does not define these terms. However the present secretary general of UNCITRAL comments[19] that:

> the arbitral tribunal would seek a fair and equitable solution,

a basic statement which might be borrowed to express the essence of a decision *ex bono et aequo.*

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[15] *Rolland v. Cassidy,* (1988) 12 App. Cas, 770.

[16] *Fudickar v. Gardian Mutual Life Insurance Co.* G2 NY, 3.

[17] *Spectrum Fabrics Corp. v. Main Street Fashion,* April 12, 1955, *Arb. Journal* 1955, no 2, 101 quoted by LOQUIN *cit infra* note 70, at 85.

[18] D. MILLER, *Public Policy in International Commercial arbitration in Australia,* 9 *Arb. Int.* 2, 186.

[19] G. HERMANN, *The Uncitral Model Law, Its Background, Salient Features and Purposes,* 1 *J. Int. Arb.* 6, 23.

16.1.2 Aequitas *in Roman law*

The notion of *aequitas* is typical of Roman law. However, it is first recorded as having been used by the great Greek philosopher Aristotle in *Nichomachean Ethics:*[20]

> what creates the problem is that the equitable is just, but not the legally just, but a correction of legal justice. The reason is that all law is universal, but about some things [it] is not possible to make a universal statement which will be correct. In those cases, then, in which it is necessary to speak universally, but not possible to do so correctly, the law takes the usual case, though it is not ignorant of the possibility of error. And it is none the less correct; for the error is not in the law nor in the legislator but in the nature of the thing since the matter of practical affairs is of this kind from the start. When the law speaks universally then, and a case arises on it which is not covered by the universal statement, then it is right, when the legislator fails us and has erred by simplicity, to correct the omission to say what the legislator himself would have said had he been present, and would have put into his law if he had known. Hence the equitable is just, and better than one kind of justice not better than absolute justice ... And this is the nature of the equity, a correction of law where law is defective being applied universally.

Aristotle's *eipieikeia*[21] means then justice and proportion.

Cicero[22] bases himself on the distinction between *summum jus* and *aequitas* and defines *jus civile*[23] as *aequitas constituta.*

As Broggini[24] points out, this principle achieves its top in Celsius:[25]

> *jus est ars boni et aequi.*

The Roman *praetores* (judges) made a large use of aequitas. Papinianus describes *jus praetorium* as:

> *quod praetores introduxeront adiuvandi vel supplendi vel corrigendi juris civilis gratia*

Marcianus[26] describes *jus praetorium* as:

> *viva vox juris.*

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[20] V. 1136 a 1138 8 (free translation from Greek) in J. BARNES (ed.) *The complete works of Aristotle: the revised Oxford Translation*, Princeton, 1984, Vol. II at 1795-1796.

[21] Equity.

[22] *Cicero pro Caecina,* 23, 65.

[23] The law governing legal relationships between Roman citizens.

[24] BROGGINI, *Riflessioni sull'equità,* Jus 1975, 11.

[25] *CELSIUS* D1, 1.1 pr.

[26] *MARCIANUS* D.1, 1.8.

A constitutio issued in AD 314 by Emperor Constantine[27] stressed the role of *aequitas:*

> *Placuit in omnibus rebus praecipuam esse iustitiae aequitatisque quam stricti juris rationem.*

Emperor Justinianus[28] declared that courts had a wide discretionary power to decide *ex bono et aequo.*

16.1.3 Equity in England at the time of Norman Kings

When Norman kings were fountains of justice, they exercised their special judicial powers (the prerogative) to decide according to equity, when a litigant, whose claim did not stand in law, applied to the King and prayed that he exercise his prerogative. Such prayers having become frequent, the King probably during the reign of Edward I delegated his prerogative to the Lord Chancellor who subsequently delegated it to the Court of Chancery. In this way equitable rights were developed. They consisted in rights granted in equity, whenever that right did not exist in law.

The power to grant equitable rights remained discretionary for centuries. Only in the 18th century did equity become a rigid system of law.

Equity seems then to have been used in England, at the beginning for the same purposes which had induced the Roman legal system to use it many centuries before. This is in line with Brackton's definition[29] which is very close to the definition given to this term by Roman law:

> *rerum convenientia quae in paribus casis paria desiderat et omnia bene coaequiparat.*

16.1.4 Similarities between the two notions

The Roman notion of *aequitas* and the one existing at the time of the Norman kings are indeed very close. Today's notion of equity in civil law is in the substance still the Roman concept. The only difference between today's *ex bono et aequo* and the Norman equity seems to be that under Norman kings it was a prerogative of the king, while in civil law the parties are entitled to grant jointly to the Court or the arbitral tribunal the authority to mitigate the effects of a strict rule when it produces unjust results.

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[27] *F.W. MAITLAND, Bracton and Azo.* Vol. VIII, *Selden Society,* at 27.

[28] *Istit.* 4, 6, 31.

[29] *Inst.* 3, 1, 8.

16.1.5 Actual application of ex bono et aequo

Some concern arises as to the situations to which equity may be applied. However it should first be noted that the arbitrator is to apply equity *only* if strict law produces unjust results. In all the other situations equity will not have to be invoked .It is suggested that the situations in which strict law will produce unjust result are very rare and extraordinary. Therefore equity does not replace the entire legal system but only those parts of it which in a given situation would – as earlier discussed – produce unjust results.

A typical example of such situations is provided by time limits. Let us assume that a notice of defect is to be given within eight days and that it is sent by fax which is received as illegible and faxed again the following day in a legible form. The arbitrator who is empowered to decide in equity may consider the notice within time.

In *Westland*[30] the arbitrators dealt in a liberal way with the contents of *aequitas:*

> equity allows the corporate veil to be lifted.

16.1.6 Ex bono et aequo *and the modern legal systems.*

The Italian legal system is referred first, being the direct descendant of Roman law. Its rules of procedure provide:[31]

> the court, in the first instance proceedings as well as in appellate proceedings, decide the merits of the dispute in [*equità* i.e. *ex bono et aequo*] when the dispute concerns rights which the parties are entitled to waive or to settle, and the parties jointly request the Court to do so.

The same powers may be granted to the arbitral tribunal.

As will be discussed later, French law uses the term *amiable composition* to refer to a decision made *ex bono et aequo*. The French rules of procedure provide:[32]

> the arbitrators decide according to law, unless the arbitration agreement entitles them to decide as amiables compositeurs.

In *Najer*[33] it was affirmed:

> granting to the arbitral tribunal amiable composition authority, the parties have expressed their intention that the dispute be decided not just

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30 *Westland Helicopters v. The Arab Republic of Egypt et al.* (interim award), Geneva, March 5, 1984, *Rev. arb.* 1989, 547.

31 Section 114, Rules of Civil Procedure (unofficial translation).

32 Section 12, last para New French Civil Procedure Code (unofficial translation).

33 *Najer v. Sinthelabo,* Court of Fist Instance, Paris May 27, 1987 *Rev. arb.* 1987, 519.

> by applying statutory provisions but also to obtain an *equitable* solution by adjusting the law if needed to the factual circumstances existing within the relationships between the parties. (emphasis added)

This view was subsequently supported by *Phocéenne:*[34]

> In principle the *amiable compositeur* may decide without having to strictly follow the law.

Under Belgian law:[35]

> Unless the parties have agreed otherwise the arbitrators shall decide in accordance with the rules of law. ...

Spanish law allows arbitrators to decide in *equitad (ex bono et aequo)* if the parties have not provided that the decision is to be made in law.[36] This power is construed in Spanish Law as granting to the arbitrator the authority to decide according to his *leal saber y entender.*[37]

In German Law *aequitas* is defined as *Billigkeitrecht;*[38] and frequent references are made to the duty to behave in good faith[39] as well as to the notion of *Zumutbarkeit*[40] notions which Broggini[41] points out to be exceptions to strict law.

The German Court of Cassation has held:[42]

> ... It is correct that the arbitrators may, up to a certain extent, be released from the application of the law by consent of the parties ...

Swiss law too allows to decide *ex bono et aequo* . The Swiss Civil Code provides that a reference in a statutory provision to the *pouvoir d'appréciation*, or the power to take into account the *Umstände*[43] gives rise to a duty of the Court to base its decision not only on the Law but also on *aequitas.*

In a different dispute the Swiss Supreme Court[44] held that:

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34 *Phocéenne de dépôt v. Dépôts pétroliers de Fos,* Court of Appeal, Paris April 28, 1988 *Rev. arb.* 1989, 280.

35 Section 1700, Statute July 4, 1972 (unofficial translation).

36 Section 4, Statute December 5, 1988, no. 36.

37 Fair knowledge and understanding

38 The law of equity.

39 According to *Treu und Glauben.*

40 What is convenient and just.

41 See *supra* note 24.

42 *Bundesgerichtshof,* November 19, 1923, *Juristische Wochenschrift* 1930, 1862, quoted by LOQUIN, *cit. supra* note 17 (unofficial translation).

43 The circumstances.

44 Swiss Federal Court, November 14, 1991, *Yearbook Commercial Arbitration* 1992, 279 (unofficial translation).

> a decision made on the basis of considerations of equity instead of the agreed upon law in any case does not essentially deviate from that which would have been reached with the agreed upon law, i.e. when the deviation is compatible with public policy.

In the Netherlands too the arbitrators may be given the authority to decide as *amiables compositeurs.*

Islamic law, as reported by Al Ahdab[45] is cognizant of decisions in *equity.*

It transpires from this that the legal systems based on Roman Law recognise the right of the parties to request the arbitrators to decide *ex bono* et *aequo* and that this practice has developed also in other legal systems. The reluctance shown by some common law legal systems, but not by all of them, is therefore an exception to the general position but, even in such systems, an evolution is taking place.

An approach in favour of equity clauses is due to Boyd[46] who in quoting *Home v. Overseas*[47] points out that it is not clear what a clause the judge had in mind, whether a clause which entitled the arbitrator to decide according to his caprice, in which case the observation would be correct, or in accordance with fairness and good conscience, in which case the clause would be valid because it authorises the arbitrator to base his decision on the law:

> but will temper it with humanity and commercial common sense.

Boyd quotes then with favour the Lord Chancellor's speech in *Knox:*[48]

> The arbitrator has a greater latitude than the Court in order to do complete justice between the parties: for example he may grant relief from a right which bears hard upon one party but which, having been acquired legally and without fraud, could not be resisted in a Court of Justice,

and the Privy Council in *Moses*[49] which, while hearing a petition for leave to appeal from a decision of the Supreme Court of Tasmania, referred to the statute which provides that in exercising these powers the Court:

> shall be guided by equity and good conscience only ... nor shall the Court be bound by the strict rules of law or equity in any case, or by any technicality or legal form whatever.

Boyd continues that only rarely arbitration has been conceived as a lawless area or using the words of Lord Justice Scrutton in *Czarnikov:*[50]

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[45] AL AHDAB, *L'arbitrage dans les pays arabes*, Economica 1988, at 55.

[46] S. BOYD, '*Arbitrator not to be bound by the law*' *clauses*, 6 *Arb. Int.* 2, 122.

[47] *Home & Overseas Insurance v. Mentor Insurance* (1989) 1 *Lloyds Rep.* 473, 485.

[48] *Moses v. Parker,* (1986) AC 245.

[49] *Knox and Co. v. Symmonds,* (1791) 1 Ves, 369.

> An Alsatia where the King's writ does not run,

and concludes:

> if London will not accomodate equity clauses (and I believe it can) Alsatia undoubtedly will.

There could be no better echo from writers to the very learned comments made by Lord Denning in the *Eagle Star*[51] in which the English Court of Appeal was dealing with an arbitration agreement which was worded as follows:

> The arbitrators and umpire shall not be bound by the strict rules of law but shall settle any difference referred to them according to an equitable rather than a strictly legal interpretation of the provisions of these agreements.

In his speech Lord Denning said:

> The public desires order and dislikes law, though without law there would be no order. The judicial qualities which the public singles out for praise are common sense and humanity; devotion to the law is less admired than a willingness to restrain it. It is not surprising therefore that from the earliest times English law has accomodated various devices designed to enmesh the legal system with the justice of the case.

Section 46 (1) (b) now dominates this subject so far as English law is concerned.

16.1.7 Aequitas *in international arbitration and public policy*

In domestic matters each legal system will apply its own rules and, according to them *aequitas* will be recognised or not. The difficulty arises when a Court of a given legal system which does not recognise *aequitas* is requested to recognize a foreign award based on it. This could be the case when the award has rightly applied Italian French or German law or when the parties have requested the arbitrator to decide according to *aequitas* and the arbitrator has done so. The English Court might try to hold that this is a procedural matter and that it has to apply English procedural law which does not provide for decisions under *aequitas*, but this would be quite arguable.

The difficulty might be greater if the arbitral proceedings are held in England and are governed by foreign procedural rules or by international procedural rules and the parties have instructed the arbitrators to decide *ex bono et aequo* and the applicable procedural law allows it.

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[50] *Czarnikov v. Roth Schmidt and Co.*. (1922) 2 KB 478.

[51] See *supra* note 9.

The arbitrator is bound by the instructions of the parties. Therefore, if he has been instructed to decide *ex bono et aequo* and these instructions are not conflicting with the applicable procedural law, the arbitrator is bound to decide in that way. There would be no problems if the procedural law is Italian or French or German, Spanish or of another legal system which takes the same attitude. The problem would arise if English procedural law is applicable and it is construed in the strict manner discussed above.

As it was held in *Hamlyn*[52] the tendency of English courts has been for a very long time to regard the choice of venue for the arbitral proceedings as the choice of substantive law. However the possibility of selecting a foreign, substantive law was affirmed in *Compagnie d'Armement.*[53]

For a long time the English courts have gone further, holding that the choice of the venue generally meant also the choice of the procedural law of the venue. This view was moderated by conceding , (while the principle remained), that the parties were free to choose a different curial law . This more recent approach was adopted in *Dallal*:[54]

> The curial law is normally, but not necessarily the law of the place where the arbitration proceedings are tried ... English law does not deny the possibility of a different curial law.

16.1.8 Limits to discretionary authority under aequitas

The authority to decide under a*equitas* is not, as earlier discussed, without limits.

Very frequently the arbitrator may find that there is no difference between statutory provisions and *aequitas*. He will then apply the former. It has been argued whether the arbitrator is bound to declare in such a situation that he sees no difference between them or whether this is implied. The prevailing tendency is that such a declaration is not necessary and that it might be implied.

Furthermore the arbitrator will not be entitled to derogate from mandatory provisions.

Eventually the general view is that this discretionary authority concerns only substantive and not procedural law.

It is submitted that this will depend on the wording of the arbitration agreement.

The parties' instructions to the arbitrator to decide based on *aequitas* may be construed, in the absence of language to the contrary, as applying also to

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[52] *Hamlyn & Co. v. Talisker Distillery,* (1894) A.C. 202 H.L.

[53] *Compagnie d'Armement Maritime v. Compagnie Tunisienne de Navigation* S.A., 1971, A.C. 572 H.L.

[54] *Dallal v. Bank Mellat*, High Court Q.B. June 27, July 2, 3, 26, 1985 (1986) 111, 239.

procedural law. If so, where a pleading or documents have been filed one or two days after the expiry of the procedural deadline, it may be accepted by the arbitrator. In several jurisdiction there is even a tendency to proceed in that way independently from *aequitas.*

In *Doña Rosa*[55] a Spanish court has held that the authority to mitigate strict law does not allow issues related to the standing of the parties in the arbitral proceedings to be disregarded, which is the premise of the arbitrators' jurisdiction.

Whether the arbitrator may mitigate not only statutory but also strict contractual provisions has been debated. It has been argued that an arbitrator, even when instructed to mitigate strict law, may not adjust the contract on which the dispute is based, and this prohibition would apply also to an equitable construction of the contract. In an ICC award[56] it has been held that the arbitrators are entitled not to apply a contractual provision, if the assertion of a contractual right by a party amounts to an *abus de droit.*[57]

The arbitrator's right to mitigate a contractual provision, which would conflict with *aequitas*, has been affirmed in 1989 by an ICC arbitral tribunal:[58]

> the arbitral tribunal finds that ... based on its authority to mitigate strict law it may also mitigate, ie not apply in their strict sense, contractual provisions, the application of which would conflict with *aequitas.*

As to court precedents in Dame Krebs[59] it has been held that:

> ... the *amiables compositeurs* who mitigate the excessive effects of a clause, compared with *ex bono et aequo,* in order to strike a balance between the literal wording of an international long duration agreement and its good faith performance in circumstances which would overturn the contractual balance between the parties, have complied with the task ...

Amongst writers, Derains[60] has submitted that the arbitrator who is authorised to disregard statutory provisions, when too strict, may disregard even the contractual provisions, if they are too rigid.

The notion of *aequitas* may change in international *vis-à-vis* domestic arbitration. While in the latter the domestic *aequitas* will apply, in the former

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55 *P.S.A. v. Doña Rosa*, Court of Appeal, Barcelona, Division 15, March 18, 1991, note by F. CRISCUOLO, *Riv. arb.* 1992, 325.

56 ICC award no. 4467, *Clunet* 1984, 924.

57 Exercise of a right in an abusive manner.

58 ICC award no. 4972, *Clunet* 1989, 1000.

59 *Dame Krebs v. Milton Stern,* Court of Cassation (France) April 28, 1987, *Rev. arb.* 1991, 345.

60 Y. DERAINS, note to ICC award no. 2694, *Clunet* 1978, 985.

an international concept of *aequitas,*the *aequitas gentium* or *aequitas naturalis* as Broggini[61] defines it, will apply.

16.1.9 Conclusions

As earlier discussed, deciding *ex bono et aequo* does not mean being totally freed from the application of the law, and being at liberty to create one's own law, in an arbitrary and capricious way. It is suggested that it simply means being authorised to *mitigate strict law*. This will be required only in special situations, while as a rule the *corpus* of the statutory provisions of the legal system will not be affected by this:

Once the problem is clarified, emotional reluctance could be abandoned.

16.2. AMIABLE COMPOSITION

16 2.1 Original notion

The term 'amiabilis compositor' is first met in the thirteenth century, at the law schools of Bologna and of the Sorbonne, in the writings of Bartolus,[62] Baldo[63] and Durand.[64] Boutellier[65] states:

> The amiable compositeur or peacemaker may not make a judgment, but just bring the parties together.

Boutellier refers to the amiable compositeur also as:

> *tractator concordiae*[66]

The term *composition* is still used in many languages, meaning in all of them to settle: in Italian *composizione* (or *transazione*) in French *composition* (or *transaction*) in English composition (or settlement).

While courts or arbitrators decide the dispute, the parties may reach a settlement, either directly or *through their agents.*

16.2.2 Authority as Amiable Compositeur

The view has been held that the authority of *compositeur* is included in the appointment of international arbitrators. However, in the absence of elements which support this in the specific case, such a wide generalization leaves

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61 BROGGINI, *cit. Bulletin ASA* 1991, 95.

62 Bartolo da SASSOFERRATO, *De receptis arbitri,* Fol. 146.

63 Baldo degli UBALDI, D.4, 8, 14, Fol 95 p. 1.

64 DURAND, *Speculum judiciale,* I, Fol. 95 p. 1.

65 BOUTELLIER, *Somme rurale,* II, III, at 693.

66 Friendly settlor.

doubts. These reservations are also confirmed by the United Nations Model Law[67] which provides:

> the arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorized it to do so. (emphasis added)

It seems preferable to limit also the authority of the *amiable compositeur* to make *lex mercatoria* automatically applicable which is advocated by Goldman:[68]

> *Prima facie* this clause relieves the arbitrator from the duty to refer to any rule of law; if it is construed in this way, it does not designate *lex mercatoria,* of which one does not intend to make a non-law, but a combination, even if incomplete, of rules of law. One must admit that the reference to equity or, under a different form, to principles of the law and practices of international trade, in view of the *amiable composition* clause may be treated as impliedly designating *lex mercatoria.*

since it seems arguable that the authority to act as *amiable compositeur* automatically entitles arbitrators to apply *lex mercatoria* or to choose the applicable law at their discretion.

It is suggested that in various jurisdictions the *amiable compositeur* has to *settle* the dispute. In any event, in an analysis of the reasoning to be made by an arbitrator who acts as *amiable compositeur*, settlement comes at a second stage. The arbitrator must first decide whether the claims of the parties have valid grounds and in which respect they do not; that assessment, in the absence of contrary elements, will have to be made on the basis of the applicable law which the arbitrator will then have to identify. At that stage, having established whether there are grounds or not for each party's claim, the arbitrator must settle them.

In other legal systems, as earlier discussed, *amiable composition* means a decision in equity (in the sense of natural justice). If so, when the arbitrators have to apply the rules of equity (in the sense of natural justice) they may step outside the circle created by the national legal systems so that equity (which is based on natural justice) might lead to conclusions which differ from national law. It could even be envisaged that, as earlier discussed, apart from national equity, an *international equity* formed by the principles of natural law common to civilized countries comes into being, and that equity may or may not coincide with national equity.

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[67] See art. 28.3.

[68] B. GOLDMAN, *La lex mercatoria dans le contrat et l'arbitrage international* (Lex mercatoria in the international contract and arbitration), *Clunet* 1979, 475.

16.2.3 The French Notion

According to the opinion which prevails in France, *amiable composition* and *ex bono et ex aequo* would be synonymous. This view originates from the opinion that the role of the *amiable compositeur* is to decide *en équité (ex bono et aequo)*. This position has been expressed clearly in *Roussey*:[69]

> While hearing an appeal against an award rendered by *amiables compositeurs*, the dispute must be decided according to *aequitas* even by the courts. (Emphasis added).

This view is shared by writers such as Loquin[70] and Robert.[71]

16.2.4 Distinction between Amiable Composition *and* Ex Bono et Aequo

The granting to the arbitrators of discretionary authority to mitigate strict law might be seen as the only alternative to a decision in law. This conclusion is correct as far as *deciding* the dispute is concerned. However, apart from seeking a decision of the dispute, the parties remain free *to settle* it directly. Likewise the parties are entitled to empower an agent to settle the difference on their behalf. Along the same lines, the parties may empower only one agent, who is jointly appointed by them, to settle. This joint agent is then called to discharge the task of an *amiable compositeur*. The distinction between *amiable composition* and deciding according to natural justice has developed in the Italian legal system.[72] Under Italian law, a distinction is made between *procedural arbitration* (in which the arbitrators reach a decision similar to a judge's decision) and *contractual arbitration* (or joint mandate to settle) in which the parties grant to the arbitrators a mandate to settle in their place, a mandate which has contractual instead of procedural contents.

Even in procedural arbitration, although the arbitrator normally bases his decision on the law, he may be instructed to decide in equity.[73]

Settling, not deciding, the dispute is the task of an arbitrator in the Italian *arbitrato irrituale*, and apparently in the *arbitraje informal* in Spain.[74] For the

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[69] *Société d'études v. Roussey*, Court of Appeal, Paris, November 9, 1976, *Rev. arb.* 1978, 389.

[70] LOQUIN, *L'amiable composition en droit comparé et international (Contribution à l'étude du droit dans l'arbitage commercial (*The amiable compositeur in comparative and international law*)* Librairies Techniques, Paris 1980.

[71] ROBERT, *L'arbitrage, droit interne, droit international privé*, Dalloz 1983, at 161.

[72] *Godi v. Godi e Magazzini Generali di Prato,* Court of Cassation (Italy), April 20, no. 1223 (1968) *Mass.* Giust Civ. 1968, I, 613.

[73] *Minozzi v. Minozzi,* Court of Cassation (Italy) March 14, no. 637 (1963) *Giust. Civ.* 1963.

[74] Section 3, Statute December 5, 1988 no. 36; see also B. CREMADES *L'Espagne étrenne une nouvelle loi sur l'arbitrage*, *Rev. Arb.* 1989, 189 and GONZALEZ SORIA

sake of completeness one should add that some Italian precedents[75] and writers have taken the view that *arbitrato irrituale* does not necessarily consist of settling the dispute but may also be aimed at establishing the rights of the parties. It is suggested that this opinion cannot be shared since either the parties seek a decision of the dispute or they settle it and that, outside the above alternative (state courts and procedural arbitration), a declaration as to the existence or not of rights of the parties is not attributable to a neutral agent.

In this way it is submitted that the limits of scholastic logic would be exceeded, since contractual arbitration cannot have such contents.

The distinction between *amiable composition* and *ex bono et aequo* is not always clearly made in the various jurisdictions. Even in France, which generally equates *amiable composition* and deciding *ex bono et aequo,* in *Duvrenit*[76] the Court of Cassation has held that arbitrators who have the task:

> of settling the rights of the parties,

are *amiables compositeurs*. This point has been expressed more openly by Goldman:[77]

> Strictly speaking, deciding *ex aequo et bono* is not to act as *amiable compositeur* since the *amiable compositeur* may decide what the parties may agree, when settling their dispute.

Along the same line is Amodio:[78]

> Only the judge *amiable compositeur* may settle the dispute outside the ambit of the law. (Emphasis added).

Likewise Ripert:[79]

> *Amiable composition* is not a real proceeding, but merely a contractual situation. (Emphasis added).

It is suggested that a joint mandate to settle has then a content which is fundamentally different from deciding, up to the point that it is not, like

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La intervenciòn judicial en el arbitraje in *Recursos jurisdiccionales y ejecutiòn judicial del laudo arbitral,* Madrid 1988.

[75] *Zucca v. Artiglia,* Court of Cassation (Italy), November 24, no. 3134 (1960) *Giust. Civ.* 1961, I 19.

[76] *Douvrenit v. Roulet*, Court of Cassation (France), Rep. Dalloz Vol. V, Section 1025.

[77] B. GOLDMAN, *Le droit applicable à la Convention BIRD,* in *Cours de droit commercial international*, 1970, 1971.

[78] AMADIO, *Le contentieux international de l'investissement privé*, at 180, quoted by LOQUIN, *cit. supra* at note 45.

[79] RIPERT, *Annuaire de l'Institut de droit international*, 1957, at 42.

arbitration, a quasi judicial activity.[80] In Italy, Vecchione[81] and Schizzerotto[82] refer to *amiable composition* as a settlement and not as a decision. In Switzerland Wengler[83] too distinguishes between settlement and decision, while in France Craig *et al*[84] appear to be influenced by the French doctrine.

Amongst precedents, this distinction is made in *Calaresu v. Pintus*:[85]

> The expression arbitrators *amiables compositeurs* refers to a notion which is wider than that of an arbitrator acting under *aequitas,* dealt with by section 822 Rules of Civil Procedure. The former grants the authority to settle, an authority of which arbitrators deciding under *aequitas* do not dispose.

Before choosing any of the above interpretations of the task of *amiable compositeur*, the intention of the parties and the applicable legal system need then to be carefully identified.

16. 2.5 Situations where the amiable compositeur *is instructed to decide*

A delicate situation arises in those legal systems, where the *amiable compositeur* has the task of settling, when he is requested to decide. These two ingredients being in conflict, it is difficult to construe the parties' intention in a logical and reasonable way. This is the line chosen by an Italian Court of Appeal in *Parisi v. Parisi*:[86]

> The fact that arbitrators must decide as *amiable compositeurs* does not exclude that one envisages an *arbitrato rituale* (i.e. a procedural arbitration) when it appears that the parties have had the intention to grant to the arbitrators the authority to decide according to *aequitas,* authority which may be granted under section 822 Rules of Civil Procedure with any expression, without detracting from the judicial character of the decision to be issued.

This interpretation, being impossible to reconcile the two conflicting elements (decision and settlement), makes settlement become a decision in *aequitas.* While this view, if taken by itself, is not convincing, on the whole the

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80 M. RUBINO-SAMMARTANO, *Amiable Compositeur* (Joint Mandate to settle) and *Ex bono et aequo* (Discretionary authority to mitigate strict law) *Apparent synonims revisited* 9 *J. Int. Arb.* 1,5.

81 VECCHIONE, *L'arbitrato*, Giuffré 1971 at 566 *et seq.*

82 SCHIZZEROTTO, *Dell'arbitrato,* Giuffré 1988, at 523.

83 WENGLER, *Les principes généraux du droit en tant que loi du contrat, Rev. crit. droit int. privé* 1982, 478.

84 CRAIG, PARK and PAULSSON, *International Chamber of Commerce Arbitration,* Oceana, 1984, 8.05 at 68 et seq.

85 Court of Appeal, Cagliari, April 29, 1960, *Rep. Foro It.* 1961, 18, 61.

86 Court of Appeal, Messina, October 24, 1956, *Rep Foro It.* 1957, 174, 24.

Court has come to the conclusion that the parties meant to decide and not to settle, and then qualified that decision as having to be made under *aequitas,* reaching in this way a result which may be acceptable.

Someone might take the view that these are just abstract distinctions, i.e. theories. However deciding (be it in law or in equity) cannot be confused, or mixed up, with settling. Therefore this basic distinction is not just a relic of one of the oldest and most glorious legal civilizations. It is suggested that this is confirmed by the Model Law which states:[87]

> The arbitral Tribunal shall decide *ex aequo et bono or* as *amiable compositeur* only if the parties have expressly authorized it to do so.' (emphasis added)

The use of 'or' instead of 'and' shows the intention to distinguish between them.

It is submitted then that *ex bono et aequo* and *amiable composition* are not synonyms.

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[87] Section 28.3, *Unitral Model Law* adopted on June 21, 1985.

CHAPTER 17

APPLICABLE PROCEDURAL LAW

SUMMARY: 17.1 Parties' Freedom of Choice – 17.2 Lack of Choice – Possibility to Apply a Procedural Law Different from That of the Place of Arbitration – 17.3 Denationalization of Arbitral Proceedings – 17.4 Nationless vis-a-vis International Arbitration – 17.5 No Absolute Need for a National Procedural Law – 17.6 Supranationality of Arbitration Rrules – 17.7 No Need for a National Procedural Law for International Arbitration – 17.8 Several Procedural Laws and Procedural T*ronc Commun* – 17.9 Rationale and Effects of the Choice of a Procedural Law Different from the Law of the Place of Arbitration – 17.10 Procedural Public Policy – 17.11 Conclusions

17.1 PARTIES' FREEDOM OF CHOICE

It has been widely debated in the past whether procedural law may be different from substantive law: a positive conclusion has eventually been reached.[1] In this respect reference can be made to the English judgment in *Compagnie d'Armement.*[2]

> A French and a Tunisian Company concluded a contract for the transportation of crude oil. The contract form used by the parties was a standard charter-party form which, among the other provisions, contained a clause according to which disputes were to be settled through arbitration in London. The arbitrators decided that the applicable substantive law was French. The award was attacked before the English Courts.
>
> The House of Lords held that the award was well grounded, holding in particular that whenever the parties decide that their substantive relationships are to be governed by a given national law and arbitral proceedings by another law, the arbitrators must apply the substantive law referred to by the parties, even if it is different from the procedural law.
>
> The award, which was submitted to the French Courts for enforcement and was enforced by them, was opposed by the French company before the Paris Court of Appeal, on the ground that the arbitrator designated by the Tunisian party (replacing the previous arbitrator who did not have the agreed requirements to hold office) would have been appointed beyond the time limits provided for in the arbitration agreement and that

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1 A conclusion which nowadays may seem obvious, but which was a real struggle to reach.

2 *Compagnie d'Armement Maritime v. Compagnie Tunisienne de Navigation,* Court of Cassation (France), March 18 (1980), *Rev. Arb.* 1980, at 496.

> the other arbitrator should then, according to the arbitration agreement, have proceeded as the sole arbitrator. The Paris Court of Appeal held that the challenge could not be heard since this was a foreign award. The French company challenged the judgment of the Court of Appeal before the Court of Cassation arguing, amongst other grounds, lack of reasons for the award. The Court of Cassation rejected the appeal holding that the replacement of the arbitrator had been lawful and not late, and that lack of reasons was allowed under English procedural law

Reference may be made also to *Ipitrade*[3] which, as to the different but close relationship between substantive law and forum, held that:

> Respondent's choice of law is not equivalent to a choice of forum.

Both Courts have then recognized the choice made by the parties.

It is understandable that, in the abstract, the choice of only one arbitration law dealing with (i) the arbitration agreement, (ii) the relationships between the parties and (iii) the arbitrator, and the arbitral proceedings, has been supported by several writers.[4] However the parties are entitled to choose a procedural law different from the substantive law even if this is bound to complicate the arbitral proceedings.

Once the procedural and substantive law have been separated, it needs to be established how the procedural law should be determined or whether it should always be the law of the place of arbitration.

For a long time it has been held, and not only in England, that the choice by the parties of the place of arbitration *automatically* involved the application of the local procedural law, which in practice prevented the parties from choosing a different procedural law.

Even French precedents – including the above quoted recent judgment – have echoed this approach. This is the view which was held by the Court of Appeal, Paris in *Compagnie d'Armement:*[5]

> Whereas the parties by amending their previous agreements, which had chosen Paris as the place of arbitration, have chosen London as the place of arbitration, and each of them has designated a British arbitrator;
>
> Whereas they have not, by any sign whatsoever, contradicted the assumption, or presumption, which arose from that choice as to the applicable procedural law.

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3 *Ipitrade Int.l v. Federal Republic of Nigeria,* 465 F Suppl. (DC 1978) *Yearbook Commercial Arbitration* 1991, 632.

4 F. KLEIN, *L'arbitrage international de droit privé, nature et perspectives* (International Private Arbitration, Nature and Perspectives), *Annuaire suisse du droit international,* 1963, 1, 18.

5 *Compagnie d'Armement Maritime v. Compagnie Tunisienne de Navigation,* Court of Appeal, Paris, April 28 (1976), *Rev. arb.* 1977, 150, with comments by BOITARD.

Along the same lines are the decisions made in the big oil arbitrations, by Python J. in 1954, sitting as sole arbitrator in *Alsing Trading Co. v. Greece,*[6] and in 1963 by Cavin J., sole arbitrator in *Sapphire.*[7]

However this approach has been reviewed and nowadays even the English courts, which are known to be reluctant to apply a law different from their national procedural law, recognize that this is no longer compulsory. *Dallal v. Bank Mellat* is a good example of such a new ruling:[8]

> It is a fallacy to suppose that arbitral proceedings must take their authority from the local municipal law of the country within which they take place. It is, of course, overwhelmingly the normal position that they acquire their validity and competence from that source. The curial law is normally, but not necessarily, the law of the place where the arbitration proceedings are held. Whilst English law, like most foreign legal systems, may seek to exercise some measures of control over arbitration proceedings taking place in this country, whatever their curial law, English law does not deny the possibility of a different curial law.

The right of the parties to choose, if they wish, a procedural law different from that of the place of arbitration is now then established. The freedom of the parties is thus recognized in this connection.

The choice of the applicable procedural law may be made directly or indirectly. Directly, in *ad hoc* arbitration where the parties are to establish the rules which the arbitrator must comply with during the arbitral proceedings. They will then be either those expressly chosen by the parties, or a national procedural law, or arbitration rules to which the parties have referred, or a combination of them. These rules or provisions will then become the law ruling the arbitral proceedings.

Indirectly, in institutional arbitration which as a rule is governed by the arbitration rules of the institutional body selected by the parties. These rules will either state the applicable procedural law or the way to determine it. The choice of the parties may also be tacit and some authors have dealt with this such as Alexandre in France.[9]

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6 *Alsing Trading Co. v. Greece,* 1954, Python (sole arbitrator), *Rev. Arb.* 1980, at 119.

7 *Sapphire International Petroleum Ltd. v. The National Iranian Oil Co.,* Cavin (sole arbitrator), March 15 (1963), *International Law Reports* 137, 55.

8 *Dallal v. Bank Mellat,* High Court of England, Q. B., June 27, July 2, 3, 26, 1985 (1986) 1 *All ER* 239.

9 D. ALEXANDRE, comments to judgment, *Rev. arb.* 1978, at 491.

17.2 Lack of Choice – Possibility to Apply a Procedural Law Different from That of the Place of Arbitration

In the frequent cases where the parties do not choose the applicable law, the decision whether the law of the place of arbitration must *automatically* be applied by the arbitrators depends on the response to the same question, i.e. whether one may choose a procedural law different from the law of the place of arbitration.

The Russian arbitration rules, drafted prior to the political changes occurred in that area, seem to make a precise national choice:[10]

> 2. The Arbitration Court shall apply to the proceedings the present Rules and legislative norms of the Soviet law related to international commercial arbitration.

That was the choice which was made for a long time in many other arbitral proceedings. It was the case in *Alsing,*[11] in *Sapphire,*[12] where the sole arbitrator, Cavin J. held:

> Thus by agreeing beforehand to whatever seat was fixed by the arbitrator, who would make his choice under express delegation from the parties, they committed themselves to accept the law of procedure which results from his choice. In this case it is the law of Vaud, since the seat of the arbitration has been fixed at Lausanne.

in *Aramco,*[13] and also in *B.P. Libya*[14] in which the arbitrators said:

> The Tribunal has chosen Copenhagen as place of arbitration ... The Tribunal holds that the arbitral procedural law is Danish law. The Tribunal has no competence to decide in a final way the nationality of its award since this can be decided only by the Courts of Denmark and by the other jurisdictions before which recognition of the award may be sought.
>
> Nevertheless the Tribunal holds that this award is Danish and that [the] procedure may be conducted in a way to be compatible with such decision and intention.

Similarly, an arbitral tribunal (Malmberg, Chairman, Fletcher Cooke and Zaazone arbitrators) made its award on July 16, 1986[15] in a dispute between

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[10] Par. 13, Arbitration Rules of the USSR Chamber of Commerce and Industry.

[11] *Alsing Trading Co. v. Greece, cit. supra* note 5.

[12] See *supra* note 7.

[13] *Saudi Arabia v. Aramco, International Law Reports* (1963) 27 ILR 117.

[14] *B. P. Exploration Company (Lybie) v. Gouvernement de la République Arabe Lybienne,* Lagergren (arbitrator), Copenhagen, October 10, 1973.

[15] ICC proceedings no. 5029, BORN, *International Commercial Arbitration in the United States*, at 170.

two French companies which had entered into a joint venture agreement with two Egyptian companies. The dispute had been referred to the ICC. The ICC – in the absence of a choice of the venue from the parties – had selected the Netherlands as the venue of the proceedings. The Tribunal held that:

> ... if the parties had wished that the arbitration be governed by Egyptian procedural law ... they should have made a specific agreement thereon ... Failing such agreement, the arbitration law of the place governs the arbitration.

Along the same line is *National Thermal*:[16]

> the arbitration agreements are conducted, in the absence of any agreement to the contrary, in accordance with the law of the country in which the arbitration is held.

Likewise, in the US, the Restatement (Second) Conflict of Laws (S 218, Comment b. 1971).

However already in *Liamco* the arbitrator (Mr. Mahmassani) held that:[17]

> The arbitrator, in his choice of the procedural law to be applied, will be guided as much as possible by the general principles contained in the draft convention on international arbitration proceedings of the United Nations, prepared in 1978 by its Committee.

The place of arbitration is by now *not* generally treated as a sign of the parties' intention to choose the procedural law of the corresponding state and the prevailing opinion excludes that the procedural law of the place of arbitration has to be applied by the arbitrators in the absence of a choice by the parties.

Even the traditional reluctance found in the English system seemed to have been overcome since England has recognized that in *Bank Mellat v. Helleniki Techniki*:[18]

> In a dispute between an Iranian bank and a Greek construction company, referred by the parties to ICC arbitration in London, the Iranian bank requested that the Greek Company be ordered to provide security. The court held that the choice of London did not automatically mean the choice of English procedural law and rejected the application for security as incompatible with ICC proceedings which, even if not exhaustive, had at least to be recognized as self-sufficient.

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[16] *National Thermal Power Co. v. The Singer Co.*, Supreme Court of India, June 1992, 7 *Mealey's Intl. Arb. Rep.* C 1, BORN, *cit.* at 635.

[17] B. STERN, *Trois arbitrages, un même problème, trois solutions* (Three Arbitrations, One Problem, Three Solutions), *Rev. arb.* 1980, 3.

[18] *Bank Mellat v. Helleniki Techniki,* Court of Appeal, England, June 28, (1983) 3 *All ER* 441, quoted by CRAIG *et al., op. cit.*, part IV, at 45.

Recently in *Dallal v. Bank Mellat,*[19] as earlier discussed, the English High Court held:

> English law does not deny the possibility of a different curial law.

However the opposite tendency shows itself again in the opinion of Robert Goff L.J. (as he then was) in the Court of Appeal in *Bank Mellat v. Helleniki Techniki:*[20]

> ... in international arbitrations which, because held in England, are subject to English law as the curial law.

This opinion, even though in the end it concurs with the above-reported opinion of the majority of the Court, (expressed by Kerr L J.) seems to refer again to the existence of a *presumption* that proceedings be subject to English procedural law, even if this may be overcome by contrary directions by the parties.

This tendency has prevailed once more in the High Court of England in *McDonnell Douglas*[21]. In spite of the very clear wording of the arbitration agreement:

> ... The arbitration shall be conducted in accordance with the procedure provided in the Indian Arbitration Act of 1940 or any enactment or modification thereof. The arbitration shall be conducted in the English language. The award of the arbitrators shall be made by majority decision and shall be final and binding on the parties hereto. The seat of the arbitration proceedings shall be London, United Kingdom.

Saville J., based on the parties' choice of London as the seat of the arbitration, held:

> ... it seems to me that by their agreement the parties have chosen English law as the law to govern their arbitration proceedings, while contractually importing from the Indian Act those provisions of that Act which are concerned with the internal conduct of their arbitration and which are not inconsistent with the choice of English arbitration law.

The rationale of this would be that:

> English law does admit at least the theoretical possibility that the parties are free to choose to hold their arbitration in one country but subject to the procedural law of another,

but

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19 See *supra* note 18.

20 See *supra* note 18.

21 *Union of India v. McDonnell Douglas Corp. (UK)*, High Court, Queen's Bench Division December 22, 1992, *Yearbook Commercial Arbitration* 1994, 235.

> against this is the undoubted fact that such an agreement is calculated to give rise to great difficulties and complexities, as Kerr L. J. observed in the *Amazonica,*[22]

since this could exclude the jurisdiction of English Courts under the Arbitration Act. The Court held that:

> such a state of affairs is clearly highly unsatisfactory ...

and came to the conclusion that the parties intended to refer to Indian law for the internal conduct of the arbitration as opposed to the external supervision of the arbitration by the English Courts.

It is submitted that, contrary to this view, the parties had chosen Indian procedural law, that the agreement of the parties cannot be rewritten and that English courts were entitled to intervene, but in respect of a 'foreign' award.

A modern view is taken in *Channel Tunnel* (per Lord Mustill):[23]

> It is by now firmly established that more than one national system of law may bear upon an international arbitration. Thus, there is the proper law which regulates the substantive rights and duties of the parties to the contract from which the dispute has arisen. Exceptionally, this may differ from the national law governing the interpretation of the agreement to submit the dispute to arbitration. Less exceptionally it may also differ from the national law which the parties have expressly or by implication selected to govern the relationship between themselves and the arbitrator in the conduct of the arbitration: the 'curial law' of the arbitration, as it is often called.

However, even Lord Mustill seems to look for an *express choice* of a different curial law, in order not to apply the procedural law of the venue of the proceedings:

> Certainly there may sometimes be an *express* choice of a curial law which is not the law of the place where the arbitration is to be held: but in the absence of an explicit choice of this kind, or at least some very strong pointer in the agreement to show that such a choice was intended, the inference that the parties when contracting to arbitrate in a particular place consented to having the arbitral process governed by the law of the place is irresistible. (emphasis added)

The Islamic legal systems, as reported by Saleh, seem to be in line with the old approach. According to Saleh, the application of Islamic substantive and

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[22] *Naviera Amazonica Peruana v. C.ia Internacional de Seguros del Peru,* [1988] 1 *Lloyd's Rep.* 116 at 121, *Yearbook Commercial Arbitration* 1988, 156.

[23] *Channel Tunnel Group Ltd. et al. v. Balfour Beatty Construction Ltd. et al., Bulletin ASA* 1993, I, 97.

procedural law is mandatory for arbitrations which take place in Moslem countries.[24]

Many Arab legal systems like Saudi Arabia[25] and Kuwait[26] seem still to be well anchored to *Sharia* and even in Egypt[27], which is since a long time an example of coexistence between *Sharia* and European law and where arbitration law is now inspired by the Uncitral Model Law , one can find the *Sharia* spirit[28] in the statutes and case law.

According to Simmonds[29] this would be less easy in Korea; [30] in Australia and the Far East the national procedural law can be derogated, while in Japan the rule that proceedings are subject to Japanese procedural law would have been made non-binding by a decision of the Supreme Court.[31]

The basic tendency of various legal systems, in particular those belonging to common law, to treat their national procedural law as automatically applicable to arbitral proceedings which take place in their territory was based on the belief that the parties wished to choose that procedural law. But the choice of arbitral proceedings to be conducted according to the rules of an arbitral institution (like ICC), shows that such a presumption is not justified, since reference for example to the ICC rules is by no means a sign of the intention to apply French procedural law or any other one, even more when the parties have not chosen the place of arbitration and the choice is made only later by the arbitral institution (or in ad hoc arbitration by the arbitrators).

The *internationality* of an arbitral institution consists in its being held to be a centre of international disputes, and not a mere tool for applying exactly the procedural law of the country from which it operates.

The possibility of applying a procedural law different from that of the place of arbitration is recognized by the New York Convention, which expressly provides that the arbitration agreement:

> ... shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought,

which is construed as applying to awards rendered in a state, but according to a different procedural law.

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24 SALEH, *op. cit.*, at 54.

25 EL AHDAB, *Arbitration with Arab Countries*, *cit* at 605.

26 EL AHDAB, *Arbitration with Arab Countries*, *cit* at 299.

27 EL AHDAB, *Arbitration with Arab Countries*, *cit* at 155.

28 EL AHDAB, *Arbitration with Arab Countries*, *cit* at 48; AL GHAZALI *Ihia Ulum El Dine*, Commercial Library T11, at 79.

29 SIMMONDS *et al.*, *op. cit.*, at 9 (Australia), 24 (Hong Kong), 70 (Indonesia).

30 SIMMONDS *et al.*, *op. cit.*, at 105 *et seq.*

31 SIMMONDS *et al.*, *op. cit.*, at 89.

In fact, this provision must be read jointly with another passage of that Convention,[32] which provides that recognition can be refused when the award:

> ... has been set aside or suspended by the competent authority of the country in which, or under the law of which, that award was made.

These two provisions seem to confirm the possibility that arbitral proceedings be governed by a procedural law different from the law of the place of arbitration. This will naturally require that the conduct of arbitral proceedings in one state, under a procedural law different from the law of that state, be not prevented by that state; nor must the other state, the procedural law of which is applied, prevent the use of it for arbitrations conducted abroad. Whenever one of these *two obstacles* exists, it is bound to become a source of problems. When there are no similar prohibitions to be found in such two legal systems, it is submitted that there is nothing to prevent arbitral proceedings from being conducted in a given state and governed by the procedural law of another state. This is within *the logic* of *really international* arbitration.

Tommaseo[33] seems to express the view that even if arbitral proceedings take place in a country but not under its local procedural law, if that legal system reserves to state courts the authority to issue injunctions, this provision applies even to such proceedings. It is submitted that this view cannot be supported since the only situation in which the foreign procedural law, or the international arbitration rules which allow to the arbitrators to grant interlocutory injunctions, would not be applicable is when they conflict with the international public policy of the *lex fori.*

It is submitted that this should very rarely be the case because legal systems are generally scarcely interested in foreign arbitral proceedings, even if taking place in their territory, and therefore the mandatory provision reserving these injunctions to their state courts should not apply to foreign or international proceedings taking place in that country.

It is submitted then that the matter cannot be disposed of by noting, as Redfern and Hunter[34] suggest, that, in this way, the parties generally complicate their life. There may be valuable reasons which bring the parties to do so and it is submitted that each case will have to be assessed based on its circumstances. Be that as it may, in a general study of arbitration law this possibility cannot be disregarded.

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[32] Art. 1.1.

[33] TOMMASEO *Lex fori e tutela cautelare nell'arbitrato commerciale internazionale* (*Lex fori* and Injunctions in International Commercial Arbitration), *Riv. arb.* 1999, 1, 9.

[34] A. REDFERN and M. HUNTER, *Law and Practice of International Commercial Arbitration,* Sweet and Maxwell, London 1986, at 52 *et seq.*

17.3 DENATIONALIZATION OF ARBITRAL PROCEEDINGS

The application of a different national procedural law inevitably produces the so-called *denationalization* of international arbitral proceedings, a tendency which is generally believed to have started with the Aramco and Texaco decisions, which are therefore examined on this specific issue in their essential terms. In *Aramco*:[35]

> The Kingdom of Saudi Arabia, after entering into an agreement with Arabian American Oil Company (ARAMCO), according to which the latter was granted for thirty years preemptive rights to carry crude oil, later entered with another company into an agreement for the carrying of that crude oil. Believing that there was a conflict between such new agreement and its rights, Aramco submitted the dispute to arbitration and the arbitrators allowed its claims. The arbitral tribunal held that it was not possible to impose on a State, in view of its sovereign immunity, a procedural law different from its own. Therefore excluding the possibility of applying the procedural law of the place of arbitration, which was Geneva, the arbitrator held that one had to apply international law. One has seen in this ruling the decision to maintain distance from national procedural law.

The same position was taken twenty years later in *Texaco*:[36]

> The Libyan government nationalized its oil concessions to various companies including Texas Overseas Petroleum Company. Arbitral proceedings were instituted during which the sole arbitrator held that arbitration was directly governed by international law to respect the position of the sovereign state of Libya and since the parties, from the beginning, had intended to keep their distance from the jurisdiction of the respective Courts.

The denationalization of arbitral proceedings, in spite of its acknowledged advantages, has given rise to much concern; in substance, the same reservations have been repeated as those made about *lex mercatoria*, i.e. that it would give rise to arbitrations no longer subject to a precise law, and which would therefore be *'floating'*.

As earlier discussed, these are the grounds given by Kerr L.J. in *Bank Mellat v. Helleniki Techniki*.[37]

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[35] See *supra* note 13.

[36] *Texaco Overseas Petroleum Company (US) and California Asiatic Oil Company (US) v. The Government of the Libyan Arab Republic*, January 19, 1977, *Yearbook Commercial Arbitration* 1979, vol. IV, at 177 *et seq.*

[37] *Bank Mellat v. Helleniki Techniki*, see *supra* note 14; the House of Lords has also shown in *Amin Rasheed Shipping Corp. v. Kuwait Insurance* Co., 1 All Er (1983) 873, to prefer

17.4 NATIONLESS VIS-A-VIS INTERNATIONAL ARBITRATION

The tendency to protect the application of national procedural law has brought people to define the opposite solution as *nationless* arbitration.

This possibility has caused many scholars to express the concern that, in such a situation, arbitral proceedings would find themselves in a sort of *legal desert*. This has led some authors to take a position against *nationless* arbitration[38] going so far as to hold that the New York Convention would exclude from its field awards which are not subject to a national law.

Such a concern is a reason for submitting this issue to careful scrutiny. According to van den Berg, the New York Convention provisions (stating that recognition may berefused whenever the arbitration agreement is invalid under the law to which the parties have submitted it or – in the absence of such a choice – under the law of the place where the award is made, and that awards may be set aside by the courts of the state in which, or under the *law* of which, the award is rendered), show that arbitration must *always* be subject to a national law.

It is submitted that this opinion cannot be shared. In fact, the Convention seems only to regulate the consequences of certain invalidities in the arbitration agreement and of its setting aside by given courts of law. It does not state that the award must be rendered under a national procedural *law*, or that an award cannot be recognized if it has not been made under a national procedural law.

If *nationless* meant completely detached from the procedural legal system of the place of arbitration, then this criticism might be more acceptable. However, as Derains[39] rightly points out in this connection, the arbitrator must always consider the procedural law of the place of arbitration, when checking the extent of his freedom to choose the procedural law, and, if the arbitral proceedings take place in a given state, the arbitrator must not ignore the relevant mandatory procedural provisions of that state. Fouchard[40] adds that, fortunately, the large majority of national procedural rules are not mandatory. Amongst arbitral precedents a confirmation of this view can be found in ICC proceedings no. 1512 (1971):[41]

> The arbitrator enjoys a wide freedom as to procedure . . .

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to anchor itself, whenever possible, to its domestic law as to the substantive applicable law.

38 See van den *BERG, op. cit.*, at 40.

39 *Y. DERAINS, Chronique des sentences arbitrales, Clunet* 1979, 994.

40 *P. FOUCHARD, L'arbitrage commercial international* (International commercial arbitration), *cit.*, at 337.

41 Quoted by *Clunet* 1974, 905 *et seq.*

> This freedom does not mean however a full and unlimited discretion. By applying and construing the ICC Rules of Conciliation and Arbitration, by respecting their spirit and in compliance with the nature and essence of international commercial arbitration, the arbitrator may not avoid complying with the fundamental principles of procedural law.

Van den Berg eventually recognizes that a distinction must be made between nationless and international arbitration, i.e. between a situation in which the procedural rules chosen by the parties, or by the arbitrator, are totally independent not only from any national procedural law, but also from the mandatory provisions of the *lex loci arbitri,* and one in which the proceedings are governed by procedural rules chosen by the parties (not a national procedural law), but remain subject to the mandatory provisions of the national procedural law of the place of arbitration. This view may then be fully accepted within such limits, because it disapproves only of arbitral proceedings which are totally *nationless.* Furthermore it is suggested that in any event this could not be achieved, firstly because the parties do not generally exclude the mandatory provisions of the law of the place of arbitration and secondly because, even if they were to do so, such an exclusion would not be valid. The criticism of *nationless* arbitration does not therefore create obstacles to the recognition of arbitration proceedings to be treated as international from a procedural point of view and which are consequently not governed by a national procedural law. This situation has been dealt with in some awards such as *British Petroleum:*[42]

> In a dispute between British Petroleum Company and the government of the Arab Republic of Libya, the arbitrator (Lagergern J.) held that the choice of a-national procedural rules did not affect the prerogatives of a state as a party to arbitral proceedings. However, since the aim of arbitral proceedings is to have the award enforced, he underlined that an award which has no nationality and which is governed, as in the present case, only by international law is less effective than an award based on the procedural law of a given legal system.

17.5 No Absolute Need for a National Procedural Law

Free choice by the parties need not necessarily be that of a national procedural law. International arbitration is in fact frequently the result of the intention of

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[42] *British Petroleum Company (Libya) Ltd. v. The Government of the Libyan Arab Republic,* Lagergren, (arbitrator), *Yearbook Commercial Arbitration* 1980, *vol. V,* at 146.

the parties to avoid submitting themselves to the procedural law of a given legal system.[43]

Now, this result is not achieved if a contracting party submits itself to the procedural law of the other party, since the fact that it be an arbitrator instead of a judge to decide under that 'foreign' procedural law does not seem to change the position radically.

The choice of a procedural law which is not that of any of the parties and which is unknown to both of them does not seem satisfactory. That is why reference to *ad hoc* procedural rules, or to the procedural rules provided by a neutral arbitral institution, seems a more satisfactory solution for the parties, being more in line with their real intention.

It has been discussed at length among scholars and in precedents whether arbitral proceedings not governed by any national law may be conceivable. In arbitral precedents the matter has been considered starting from the fact that an international arbitrator has no *lex fori*[44] and it was held by the sole arbitrator (Mr. Mahmassani) in theAramco award:[45]

> by admitting that arbitral proceedings be governed by *le droit des gens,* the arbitral tribunal does not intend to submit even the merits of the dispute to that law, the latter being independent of procedural law.

17.6 SUPRANATIONALITY OF ARBITRATION RULES

The reference to arbitration rules often does not involve the choice of a national procedural law. For example, the choice of the ICC Rules of Conciliation and Arbitration does not mean – as it has been stressed before – the choice of French procedural law. The same must be said for many other international arbitration rules. In this sense Lalive stated very clearly and authoritatively in *Dalmia:*[46]

> In arbitral proceedings between the Indian company Dalmia Dairy Industries Ltd. and the National Bank of Pakistan, the Pakistani bank argued that the validity of the arbitration agreement had to be decided under Pakistani law. The sole arbitrator, sitting in Geneva, rejecting the argument that reference to ICC arbitration did not change the fact that the dispute was subject to Pakistani law, held that international commer-

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43 This is an aspect which should be taken into account more.

44 See the award rendered in ICC proceedings no. 1512, *Clunet* 1974, 909; such a fact together with the lack of any foreign law are the two basic elements of international arbitration.

45 See *supra* note 12.

46 *Dalmia Dairy Industries v. National Bank of Pakistan,* interim award January 14, 1970, Lalive (arbitrator), *Yearbook Commercial Arbitration* 1980, vol. V, at 174.

> cial arbitration may be severed from the national laws of the parties and may be governed only by the arbitration rules chosen by the parties, with the consequence that once the parties had decided to refer the dispute to international arbitration under the ICC rules, it was no longer possible to apply the provisions of Pakistani or of Indian law against such rules. The arbitrator concluded that the ICC rules, having been accepted by the parties, were the applicable procedural law.

In fact, a set of arbitration rules may be sufficient to settle a dispute without the need to apply a national procedural law also. And when the arbitration rules do not govern all the matters which arise in arbitral proceedings, they generally grant the arbitrators the authority to work out additional rules without having to rely on a national procedural law.

The choice of the rules of an arbitral institution does not consequently show the intention to submit to the procedural law of the place where such arbitral institution is located. This while, as earlier discussed, the mandatory provisions of the *lex fori* shall apply.

17.7 No Need for a National Procedural Law for International Arbitration

Arbitration rules do not generally dictate the procedural law which is applicable in the absence of a choice by the parties. ICC for example has expressly amended its rules[47] which previously stated:

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

The new rules allow a choice to be made even outside national laws and Art 11 provides:[48]

> The proceedings before the Arbitral Tribunal shall be governed by these Rules and, where these Rules are silent, by any rules which the parties, or failing them the Arbitral Tribunal may settle and whether or not reference is thereby made to rules of procedure of a national law to be applied to the arbitration.

The other arbitration rules, while granting wide authority to arbitrators, do not take a position on this specific issue. The Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce state:[49]

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[47] Moving from Art. 16 of the 1955 edition to Art. 11 of the 1985 edition.

[48] See Art. 15, ICC Rules in force (from January 1, 1998).

> The arbitral tribunal shall determine the manner in which the proceedings will be conducted. In so doing, the arbitral tribunal shall comply with the stipulations of the parties in the arbitration agreement and these Rules and shall have regard to the wishes of the parties.

The Rules of the London Court of International Arbitration provide:[50]

> 1. The parties may agree on the conduct of their arbitral proceedings and are encouraged to do so consistent with the Arbitral Tribunal's general duties at all times: ... (ii) to adopt proceedings suitable to the circumstances of the arbitration ....
>
> 3. Unless otherwise agreed by the parties ... the arbitral tribunal shall have the widest discretion to discharge its duties allowed under such law(s) or rules of law as the arbitral tribunal may determine to be applicable ...

Under the Rules of the European Court of Arbitration:[51]

> 11.1 *General Rules* – The rules governing the proceedings are set out in these Rules.
>
> Where these rules are silent and the parties have not agreed otherwise, the Arbitral Tribunal shall decide on any additional procedural rules to be applied.

The International Rules of the Milan Chamber of Arbitration[52] state:

> The rules applicable to the proceedings before the arbitrator are those contained in the present Rules and, where these Rules are silent, they shall be settled by the parties or, failing them, by the arbitrator.

The Uncitral Arbitration Rules provide:[53]

> Subject to these Rules the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given full opportunity of presenting his case.

International conventions

The international conventions deal with procedural law mainly by stating which breaches of it do not later allow the award to be recognized.

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[49] Art. 16, Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC).

[50] See art. 14, LCIA Rules.

[51] Art. 11.1. Arbitration Rules of the European Court of Arbitration.

[52] Art. 34, para. 1 International Rules of the Milan Chamber of Arbitration.

[53] Art. 15, Uncitral Arbitration Rules.

Even the international conventions register a change in their regulation of this issue. The oldest multilateral conventions expressly provide that the law of the place of arbitration is applicable or, in any event, they make reference to a *national* law. The Geneva Protocol (1923) provides:[54]

> The arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place.

Likewise the Geneva Convention (1927) states:[55]

> that the award has been made by the Arbitral Tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure.

The New York Convention[56] expressly refers not only to awards rendered in a state different from that where recognition is requested, but also to those made in the actual state in which recognition is requested, but which are governed by a different procedural law. It thus admits the possibility of the procedural law being different from that of the place of arbitration.

The Geneva Convention (1961)[57] expressly provides for the setting aside of an award made:

> in the State in which, or according to the law of which, the award was made.

The Washington Convention (1965)[58] provides that:

> Any arbitration proceedings shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or by the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.

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54 Art. 2 (1), Geneva Convention (1923), *cit.*

55 Art. 1 (2), Geneva Convention (1927), *cit.*

56 Art. I, New York Convention (1958), *cit.*

57 Art. IX (1), Geneva Convention (1961), *cit.*

58 Art. 44, Washington Convention (1965), *cit.*

The Uncitral Model Law (1985) states:[59]

> *Determination of rules of procedure*
>
> (1) Subject to the provisions of this law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.
>
> (2) Failing such agreement the arbitral tribunal may, subject to the provisions of this law, conduct the arbitration in such manner as it considers appropriate.
>
> The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

The Washington Convention (1965) and the United Nations Model Law (1985) thus do not contain a reference to a national procedural law.

In conclusion, it can be said that it is certainly possible – and not rare – for the parties to submit the arbitral proceedings to *ad hoc* or institutional arbitration rules without making any reference to a national procedural law.

It may also happen, less frequently, that the parties make express reference to several different national procedural statutory provisions, each of which is mandated to regulate a given institution (for example one national procedural law may govern the appointment and challenge of arbitrators and another the taking of evidence).

Only when the parties have not dictated *ad hoc* rules, or referred to the rules of an arbitral institution or to a national procedural law, the arbitrator – after having checked that no tacit choice has been made – must determine the procedure to be followed. In doing so, he will not make any reference to the procedural law of the place of the arbitration if he has reason to believe that the parties intended to denationalize their arbitration.

It should also be pointed out that the *tronc commun* doctrine can be applied also to procedural law.[60] The English judgment in *Dallal v. Bank Mellat,*[61] seems to be along these lines:

> There is no reason in principle why the curial law of a tribunal cannot derive concurrently from *more than one system* of municipal law.

Along the same lines is the invitation made on several occasions by this writer,[62] to apply rules which take the best out of the various legal systems as

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[59] Art. 19 (1-2), Uncitral Model Law (1985).

[60] See *supra* Chapter 13.

[61] *Mark Dallal (US) v. Bank Mellat (Iran),* High Court, England, July 26 (1985), *Yearbook Commercial Arbitration* 1986, vol. XI, at 547 *et seq.* and in particular at 552.

[62] M. RUBINO-SAMMARTANO, *Rules of Evidence in International Arbitration, J.Int.Arb.* 1986, 87; *id.*, *La prova nel processo civile, Foro pad.* 1986, 87.

to the taking of evidence, and to establish the rules of the game before starting. Likewise Derains[63] invites the parties and the arbitrators to be creative by giving rise to a system for the administration of evidence:

> placing itself midway between the common law adversarial proceedings and the inquisitorial tendencies of modern civil law systems.

On other occasions the parties, besides making reference to arbitration rules, also refer to a national procedural law as the background to such rules. In some cases the choice of arbitration rules is followed by a statement that the proceedings will take place in any event *under the auspices* of a national procedural law (which is frequently different from the law of the place of arbitration). Similarly in the award rendered in ICC proceedings no. 4761 (1984)[64] the arbitration agreement stated:

> that the proceedings will be governed by the ICC Rules and by the decisions which the arbitral tribunal may take from time to time inspiring itself to the procedural law of the Canton of Geneva.

The national law will in such cases generally be used to fill the possible *lacunae* in the arbitration rules, while it is suggested that in principle it should not replace the arbitration rules which are contrary to it.

National legal systems

A quick survey of some national legislation is made, based on specialized publications' reports and subject to subsequent changes, which the reader will always have to check locally before taking any action.

In Denmark[65] the parties may submit the arbitral proceedings to the law of another state (in the absence of this determination Danish law is presumed to apply). In German law[66] if the place of arbitration is outside Germany the parties may freely choose a procedural law which is different from German law, except for the provisions of German arbitration law which cannot be derogated from, or grant the arbitrators the power to choose the applicable procedural law. If the place of arbitration is in Germany, German procedural law applies.[67] Austrian law[68] recognizes that the parties have the right to choose the applicable rules of procedure, provided there is no breach of the mandatory rules of Austrian procedural law.

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63 Comment by DERAINS to the award rendered in 1978 in ICC proceedings no. 2879, *Clunet* 1979, 989 *et seq.* and in particular at 991.

64 DERAINS-JARVIN, *Chronique des sentences arbitrales, Clunet* 1986, at 137.

65 See *Arbitration Law in Europe,* Publication no. 353, ICC Services 1981, at 105.

66 Section 1025 to 1066 Civil Procedure Code.

67 Section 1025 to 1066 Civil Procedure Code.

68 *Arbitration Law in Europe, cit.,* at 18-19.

In French law[69] the parties to international arbitrations may freely choose the applicable procedural law, which does not necessarily have to be French, and the parties may also request the arbitrators to choose the applicable law, or to decide the dispute independently of any national procedural law.

In English law the parties are not prohibited from choosing a different procedural law, but if the arbitration proceedings take place in England, that law must not conflict with English public policy:[70]

> The choice of a law other than the law of England and Wales or Northern Ireland as the applicable law in respect of a matter provided for by a non mandatory provision of this Part is equivalent to an agreement making provision about that matter.

If the parties do not make a choice, the earlier discussed tendency is to apply English procedural law if the proceedings take place in England.

It has been reported that the choice of a foreign procedural law may cause serious problems in the Arab countries, the basic principle there being that the procedural and substantive rules of the Sharia are mandatory[71] and that this principle is applied, for example, in Libya[72] and in Bahrain.[73] In North Yemen, in the absence of international conventions or of a special legislation, the procedural and jurisdictional issues are governed:[74]

> by the law of the state where a Court action is brought.

In Egypt[75] and in Saudi Arabia[76] it is reported that arbitration is governed by the law of the place of arbitration.

In practice no room seems to be left to foreign procedural law in line with the traditions of Islamic law.[77] Saleh seems rather despondent in general as to the possibility of obtaining the recognition of an award in a country governed by Islamic law unless it is the result of the application both of substantive and procedural Islamic law.

However the impression, which the introduction of new legislation in several Arab countries conveys, is that the application of *Sharia* is evolving and that ,while *Sharia* remains binding for domestic arbitration, foreign awards,

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69 *Arbitration Law in Europe, cit.*, at 149.

70 Art. 4.5, Arbitration Act 1996.

71 SALEH, *op. cit.*, at 54.

72 SALEH, *op. cit.*, at 257.

73 SALEH, *op. cit.*, at 282.

74 SALEH, *op. cit.*, at 406.

75 See Civil Code sections 22-23; SALEH, *op. cit.*, at 210, EL AHDAB, *Arbitration with Arab Countries, cit.*, at 177

76 EL AHDAB, *cit* at 587.

77 SALEH, *op. cit.*, at 310.

provided they respect procedural and substantive Islamic public policy, may be enforced, although they are subject to a closer scrutiny by the local Courts than in Western countries.[78]

In the last years arbitration law in the Arab world has become more international.

In Egypt in 1994[79] the new arbitration law allows the parties to choose the procedural law, including expressly the right to provide that the proceedings be governed by the arbitration rules of foreign arbitral institutions. If the parties do not choose the procedural law, the arbitrator is free to choose the applicable law which he deems appropriate.[80]

In turn Bahrain[81] has adopted the Model Law on International Commercial Arbitration (1985).

Tunisia too has introduced recent legislation[82] which as to international arbitration grants to the parties the right to choose the procedural law, which includes the right to refer the dispute to an arbitral institution.[83] In the absence of their choice, the arbitral tribunal may choose the procedural rules, without being bound to follow the procedural rules set out for domestic court proceedings.[84]

This while Lebanon[85] sets out the opposite (i.e. the application of the domestic procedural rules for domestic court proceedings) as the rule while the exception is that the parties may release the arbitrator from such a duty, except for mandatory procedural provisions.[86]

Saleh makes a quick survey of the status of the Arab countries belonging to Machrek and to the Gulf area.[87] However none of them makes express reference to foreign procedural laws.

Algeria, thanks to a remarkable effort, has achieved the introduction of new liberal legislation,[88] providing that if the arbitration agreement does not fully

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78 So the problem in practice may consist in identifying which rules of Islamic law are of public policy or whether the entire Islamic *corpus juris* is a matter of public policy.

79 Art. 25 Statute April 21, 1994 no. 27.

80 B. FILLION-DUFOULEUR–P. LEBOULANGER, *Le nouveau droit egyptien de l'arbitrage*, *Rev. arb.* 1994, 665.

81 Emir's Order 9/1994 August 16, *Official Gazette August* 17, 1994 no 2125, *Rev. arb.* 1994, 782.

82 Statute no. 93-42 April 26, 1993, which has approved the Arbitration Code.

83 K.MEZIOU–A.MEZGHANI, *Le Code tunisien de l'arbitrage, Rev.arb.* 1993, 4, 52.

84 Arts. 13 and 64, Statute April 26, 1993, no. 93-42.

85 M. SFEIR-SLIM, *Le nouveau droit libanais de l'arbitrage à dix ans*, *Rev.arb.* 1993, 543.

86 Order September 16, 1983 no. 90.

87 S. SALEH, *La perception de l'arbitrage au Machrek at dans les pays du Golfe, Rev.arb.* 1992, 537.

rule on procedural issues, the arbitrator is entitled to supplement such rules, by applying the national law or arbitration rules which he deems appropriate.

Saudi Arabia's long expected accession to the New York Convention[89] adds to the other national developments, showing that Islam is modernising its approach to international arbitration.[90]

In China the former Statute on Foreign-related Economic Contracts provides::[91]

> ... The parties may submit their disputes for arbitration to the Chinese arbitration institution or to other arbitral organisations,

and the new Contract Law[92] reads :

> ... Parties to a contract involving foreign interests may apply to a Chinese arbitral institution or to other arbitral organisations for arbitration in accordance with their arbitration agreement.

Accordingly, arbitration involving Chinese parties may be conducted by foreign arbitral institutions outside China under foreign arbitration rules.

Arbitration rules other than those of China can be used under Cietac Rules[93] which read:[94]

> ... When the parties agree to submit their dispute for arbitration to CIETAC, it shall be deemed that they have agreed to conduct the arbitration under these Rules. However, if the parties have agreed otherwise, which is also allowed by CIETAC, the parties' agreement shall prevail.

Parties to a contract may choose the substantive law applicable to their contract unless the contract aims to set up Chinese-foreign equity joint-ventures in China.

Article 5 of the former PRC Statute on Foreign related Economic Contracts sets forth:

> Parties to a contract may choose the proper law applicable to the settlement of their disputes arising from their contract ... However, the PRC

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88 Order no. 93-09 April 25, 1993, see M. BEDJAOUI, *Un tournant remarquable dans la legislation algérienne relatif à l'arbitrage commercial international, Bulletin CCI*, 1993, 2, 57.

89 Royal Decree no. 11, December 29, 1993, Official Gazette January 21, 1994.

90 A.H. EL AHDAB, *Saudi Arabia Accedes to the New York Convention*, 11 *J. Int. Arb.* 3, 87.

91 Art. 37.

92 Art. 128, Contract Law, which has come into force on October 1, 1999.

93 Effective as from May 10, 1998.

94 Art. 7.

> law shall apply to contracts to be performed within [the] territory of the PRC namely contracts for Chinese-Foreign equity joint-ventures ...

According to the new Contract Law:[95]

> The parties to a contract involving foreign interests may choose the law applicable to the settlement of their contract disputes, except as otherwise provided for by the law ... contracts for Chinese-Foreign equity joint-ventures ... to be performed within the territory of the PRC shall be governed by the law of the PRC.

Languages other than Chinese can be used for conducting arbitration in China according to the CIETAC Rules[96] which state:

> The Chinese language is the official language of CIETAC. If the parties have agreed otherwise, their agreement shall prevail ... At the hearings, if the parties or their attorneys or witnesses require simultaneous translations CIETAC's secretariat may provide an interpreter for them or the parties may bring their own interpreter ...

Mexico, too, in its new arbitration law,[97] has provided that the parties are free to determine the applicable procedural law and that, in the absence of such a choice, the arbitral tribunal shall be free to proceed as it deems convenient.[98] This confirms that the arbitration law which is introduced to adopt the Uncitral Model Law, or is inspired by it, opens the doors to foreign procedural law.

Also Finland has registered a new legislation[99] which grants to the parties the right to choose the procedure to be followed.[100]

It is regrettable to note with Horsmans[101] that the wide opportunity for a choice of the procedural law offered to the parties and to the arbitrators is not being used in many jurisdictions.

Columbia[102] reportedly allows the parties to a domestic arbitration some latitude as to the applicable procedural law.

Resorting to the Panama Convention[103] allows to take advantage of its acknowledgement that the parties are free to choose the procedural law. Only in

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95 Art. 136.

96 Art. 75, CIETAC Rules (1995 and 1998).

97 Arbitration Law July 22, 1993, *Rev.arb.* 1994, 405.

98 I. ZIVY, *La nouvelle loi sur l'arbitrage au Méxique, Rev. arb.* 1994, 295

99 Statute December 1, 1992.

100 B. BROMS, *La nouvelle loi sur l'arbitrage en Finlande, ICC Bulletin* 1994, 2, 63.

101 G. HORSMANS, *Actualité et évolution du droit belge de l'arbitrage, Rev. arb.* 1992, 3.

102 F. MANTILLA-SERRANO, *La nouvelle legislation colombienne sur l'arbitrage, Rev.arb.* 1992, 41.

103 Convention of Panama, 1917.

the absence of their agreement, the rules of the Interamerican Commission will[104] apply.

Under Japanese law in international arbitrations the parties are entitled to choose the procedural law of a foreign country.[105]

It has been suggested[106] that a distorted image of Japanese arbitration law and rules has been spread.

The parties seem also entitled to choose different procedural rules in Thailand,[107] provided they do not conflict with public policy or mandatory provisions. Likewise in Indonesia,[108] and in India, with the natural reservation that there must be no breach of Indian public policy.[109] In Australia the local procedural law is to be applied to domestic arbitration, but the parties may choose a different procedural law, provided it complies with the requirements of natural justice.[110]

17.8 SEVERAL PROCEDURAL LAWS AND PROCEDURAL *TRONC COMMUN*

As earlier discussed in principle it is possible, even if it is rare, that the parties decide that certain issues of an arbitral proceedings be governed by a given procedural law (e.g. Spanish law) and others (e.g. the taking of evidence) by another procedural law (e.g. English law).[111]

But when it occurs this is an example of *procedural internationality.*[112]

In other situations the parties may decide that the procedural law be drawn concurrently from more than one legal system.[113] *Dallal v. Bank Mellat* deals with one of such situations:[114]

> There is no reason in principle why the curial law of a Tribunal cannot derive concurrently from more than one system of municipal law. There

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[104] SIMMONDS *et al., Commercial Arbitration Law in Asia and The Pacific,* op.*cit.* 1989, at 89, 98; K. IWASAKI, in Pryles, *Dispute Resolution in Asia, cit* at 141.

[105] T. DOI, *Japan, International Handbook on Commercial Arbitration,* Kluwer.

[106] Y. HAYAKAWA, *The Distorted Image of the Japanese System of International Commercial Arbitration,* JCA Newsletter, October 1999 no. 5, 1.

[107] SIMMONDS *et al., op. cit.,* at 228; see T. SUVANPANICH,in PRYLES, *Dispute Resolution in Asia, cit* at 280.

[108] SIMMONDS *et al., op. cit.* at 70.

[109] SIMMONDS *et al., op. cit.* at 45.

[110] SIMMONDS *et al., op. cit.* at 9; PRYLES, *Dispute Resolution in Asia, cit* at 66.

[111] For example, because that second law is considered to be much more effective as to such specific matters.

[112] See *supra* Chapter 2.

[113] By resorting to the *tronc commun* doctrine.

[114] *Dallal v. Bank Mellat,* High Court of England, QB June 27, July 2, 3, 26, 1985 (1986) 1 All ER 239.

> may be problems involved in the municipal law recognition as between private parties of proceedings which exist solely at a supranational level and have no relationship at all to any system of municipal law (see *Bank Mellat v. Helleniki Techniki SA* (1983) 3 *All ER* 428 to 431, (1984) 1 QB 291 at 301, per Kerr L.J.). In the present case there are two systems of municipal law with the requisite international competence which give validity to arbitration proceedings. There is no reason in principle why that validity should not be recognized by the English Courts.

However, while the *tronc commun* may be a *tacit* choice of the parties, since they want that the common part of their legislations applies which may be inherent to their interest, as to procedural rules this seems to require an *express* choice, since this formula seems not to correspond to the natural inclination of the parties. It is suggested then that it requires a specific and express sign of such an intention.

17.9 Rationale and Effects of the Choice of a Procedural Law Different from the Law of the Place of Arbitration

The adoption of a procedural law different from the law of the place of arbitration may seem an awkward and nearly scholastic hypothesis. To the contrary it is not too rare and has a precise background.

Contrary to the following view expressed in the *Yearbook:*[115]

> Practice shows that such agreement is virtually never made by the parties because it can lead to complications as to the court which is competent in matters relating to the arbitration,

the place of arbitration is frequently chosen by the parties, or by an arbitral institution, not because they believe that the procedural law of that country is particularly good, but merely because it is a neutral place and frequently because it is equally inconvenient to the parties.

It is submitted that this rationale is sound and has to be encouraged.

Frequently the parties and their advisors do not make an express choice of the procedural law. In other situations they expressly choose a procedural law which is different from the *lex fori.*

This is frequently done without checking whether the various above referred to obstacles exist, and without considering the difficulties which may arise. In theory these controls should be made in advance, in order not to complicate the arbitral proceedings.

However frequently these decisions are to be made on the spot, and – as earlier discussed – frequently the parties on the one hand are exhausted by the

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[115] *Yearbook Commercial Arbitration*, 1994, 484.

negotiations and on the other hand they feel that detailed discussions on how they shall litigate would spoil the atmosphere of the negotiations.

In such situations, procedural law is to be approached independently from the choice of the venue.

This may give rise not only to some parts of the different applicable procedural rules not being applicable because of mandatory provisions of the *lex fori*, but also to difficulties and unease.

Unease by the Courts which would prefer to apply their national substantive and procedural law. However this is a wish which international arbitration is frequently bound not to satisfy. Difficulties to Counsel for the parties who must be conversant with such a law and keep an eye on *lex fori* since this may lead to lengthy arguments.

On the other hand, as earlier discussed, international arbitration does not only mean arbitration between parties having a different nationality and/or a dispute concerning transnational transactions.

The parties seem to be frequently looking for *really international* (i.e. *non* national) proceedings. In this respect they seem not to wish just to avoid to apply the law of the other contracting party but also to avoid to apply a third national law, which they ignore.

When they choose the arbitration rules of an international arbitral institution, through that choice they may make no reference to a national procedural law. This is a legitimate wish as well as the choice of a venue which be distant in the same way from the parties. These two choices fall within the parties' freedom to contract and it is submitted that they should be both implemented.

Arbitrators, as well as counsel frequently appearing in international arbitration, are accustomed respectively to sit and appear in a venue different from their own country and to apply there the arbitration rules of an international arbitral institution, which are different from the *lex fori.* If this is normal and in general not objected to, the situation is in principle the same if they have to apply in that venue a procedural law which is different from their own and from the one of the *lex fori.* The only problem is that they will in general need advice on that procedural law. As to the panel, the chairman or one of the arbitrators or at least the Secretary to the Arbitral Tribunal will normally have to be conversant with that law. As to the parties, Counsel conversant with the applicable procedural law will have to be added to their general Counsel dealing with international litigation.

If the procedural law had to be the law of the place of arbitration, then only few places would have to be chosen by the parties, and many countries might have to be cancelled from the international arbitration map.

This survey of procedural laws comes to an end with a closing remark from Mayer:[116]

> the procedural rules of arbitration are *leges imperfectae* in as much as the award will be set aside, only if a fundamental principle is breached or at least if it is proved that the breach has influenced the decision of the dispute.

17.10 PROCEDURAL PUBLIC POLICY

Role of the public policy of the place of arbitration

The fact that arbitral proceedings are not subject to a national procedural law does not, as seen above, relieve the arbitrators from the duty to respect the procedural public policy rules in force at the place of arbitration. Public policy may in no case be disregarded; if it is, arbitral proceedings are null and void.[117]

Role of the public policy of the State requested for recognition

Except where it is excluded by the applicable international conventions, the arbitral proceedings will be also subject to control of conformity with the procedural public policy of the state which is later requested to recognize or enforce the award.[118]

This implies that the award is exposed to the risk of conflict with the public policy of various states. However, this problem is not exclusive to arbitration, since also the decisions of state courts are exposed to it. The question of public policy will be dealt with more fully later on.[119]

17.11 CONCLUSIONS

Arbitral proceedings are subject to various controls of procedural conformity: first of all under the procedural rules chosen by the parties (which do not necessarily have to be the law of the place of arbitration or any other procedural law); then under the procedural public policy of the place of arbitration; finally under the procedural public policy of the state which is likely to be requested to recognize or enforce it. Of course this exposes the award to various attacks but, until the law of arbitration is made truly uniform, unfortunately such risks cannot be excluded.

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[116] P. MAYER *Le pouvoir des arbitres de régler la procédure*, *Rev. arb.* 1995, 169.

[117] Which is provided for in the large majority of legal systems.

[118] International conventions take this direction.

[119] See *infra* Chapter 18.

However, one should not remain a prisoner of this sophisticated mechanism up to the point of forgetting the lesson which comes from the Supreme Court of New South Wales (per Rogers C.J.) in *Imperial Leatherware*:[120]

> The heart of the arbitral procedure lies in its ability to provide speedy determination of the real issues. Those aims to a large extent are made impossible of achievement if the procedures of a court are mimicked. Nor is there anything in the requirement to provide 'procedural justice' which requires adoption of the pleadings and procedure of courts.
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> What is required is that the parties enjoy the benefits of natural justice consistently with the requirement of arbitrators for dispensing with technicalities.

[120] *Imperial Leatherware Co. Pty Ltd v. Macia Macellino Pty Ltd*, (1991) 22 NW.SLR 653.

CHAPTER 18

ARBITRATION AND PUBLIC POLICY

SUMMARY: 18.1 The Role of Public Policy – 18.2 Public Policy and *Normes d'Application Immédiate* – 18.3 Public Policy and F*raude à la Loi* – 18.4 Domestic Public Policy and International Public Policy – 18.5 Foreign Public Law – 18.6 Substantive Public Policy and Procedural Public Policy – 18.7 Procedural Public Policy – 18.8 Substantive Public Policy – 18.9 Conclusions

18.1 THE ROLE OF PUBLIC POLICY

It is advisable that an examination of the issue of public policy in arbitral proceedings be preceded by a very short summary of public policy in general, an issue which has already been touched on previously.[1]

A distinction has to be made between statutory provisions which cannot be derogated from, because they protect private interests such as against a stronger contracting party, and other ones which may not be derogated from because they protect the public interest. Only the latter are part of public policy.

As already known, conflicts of laws are regulated by rules which in many legal systems are written. When a relationship contains elements which are external to a particular legal system, the latter must establish the law applicable to it. If a foreign law is applicable, there is no objection to it in principle; however foreign law is generally accepted within given limits only.

The Italian legal system for example provided[2] that:

> In spite of the above provisions, in no case will the laws and acts of a foreign State, the by-laws and the acts of any institutional body and private agreements have any effect on the territory of the State, when they conflict with public policy or *bonos mores,*

a provision which has been amended by the Private International Law Reform Act which has set out the rule[3] that the foreign law is applied if its effects do not conflict with public policy.

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1 See H. CAPITANT, *Introduction à l'étude du droit civil*, 3rd ed. 1911, 37; P. RAYNAUD, *L'ordre public économique*, Cours de droit privé, 1965-1966, 11; P. MAYER, *La sentence contraire à l'ordre public au fond, Rev. arb.* 1994, 615.

2 Section 31, General Provisions Preliminary to the Civil Code.

3 Section 16, Statute May 31, 1995 no 218.

The traditional, or *negative*, role of public policy[4] consists in acting as a limit to the application of foreign law or to the recognition of foreign judgments.

A useful definition of public policy has been given by the Court of Appeal of Hamburg.[5]

> Apart from violations of basic civil rights, an infringement upon public policy will result from the violation of a rule concerning the fundamental principles of political or economic life. Public policy will also be infringed upon when the arbitral award is irreconcilable with German concepts of justice.

18.2 PUBLIC POLICY AND *NORMES DAPPLICATION IMMÉDIATE*

Public policy includes both mandatory provisions *(normes d'application immédiate/norme imperative)* and the principles of public policy.

The former are individual statutory provisions which cannot be derogated from even by a foreign law. Therefore, if the latter tries to enter into a particular legal system, the mandatory provisions may be seen as a *first barrier*. Whenever foreign law encounters one of them in its attempt to enter a legal system, its attempt will fail.

But even if the foreign provision does not encounter any specific mandatory statutory provisions, it has to overcome a *second*, invisible, *barrier* represented by the principles of public policy[6] which further protect that legal system from the risk of admission of incompatible foreign rules into it.

Admission of foreign law without these two protections would in fact – as Raape has well defined it – amount to a *leap in the dark.*[7]

In turn, public policy, as Ballarino [8] points out, is not a synonym of *bonos mores:*

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4 Even if this is not its only role since recently its positive role has been stressed, which will be dealt with later, closing this chapter.

5 Court of Appeal of Hamburg, January 26, 1989, *Yearbook Commercial Arbitration* 1992, 491.

6 RUBINO-SAMMARTANO, *(Italy)* (RUBINO-SAMMARTANO *and MORSE* gen. eds) *Public Policy in Transnational Relationships,* Kluwer (1991).

7 L. RAAPE, *Internationales Privatrecht* (International private law), Berlin 1961, at 190.

8 T. BALLARINO, *Diritto internazionale privato* (Private international Law), 1982, at 432.

Illustration

> The refusal to treat the adoption of a minor as a normal commercial contract belongs to public policy, while behaviour against sexual freedom is a breach of *bonos mores.*

In several jurisdictions *normes d'application immédiate* (ou *nécessaire*), (i.e. mandatory statutory provisions set out in the public interest[9] which compulsorily apply to all relationships which have a connection which that legal system and which prevail on any contrary conflict of laws rule) include the subcategory of *lois de police* (police laws) i.e. provisions which must be complied with to protect the political, social or economic organisation of that state and which mandatorily apply to a situation whichever be the applicable law. Amongst such provisions the following are included: embargoes, exchange control regulations, police regulations, tax laws, boycott, expropriation and nationalisation.

18.3. PUBLIC POLICY AND *FRAUDE À LA LOI*

Public policy must also be distinguished from *fraude à la loi* since, if they both prevent a foreign statutory provision from being applied, the former consists in the protection prepared by the system in order to control the access of foreign rules into it , while the latter is the reaction of a legal system to a behaviour of the parties which aims to avoid the application of the 'national' law.[10]

This while *fraude au jugement*[11] consists in obtaining a judgment abroad, different from the potential national judgment.

18.4 DOMESTIC PUBLIC POLICY AND INTERNATIONAL PUBLIC POLICY

Public policy is divided into *domestic public policy* and *international public policy,* in spite of what the Supreme Court of India has held in *Renusagar:*[12]

> in view of the absence of a workable definition of 'international public policy' it would be difficult to construe public policy as used in Article V of the New York Convention to mean international public policy. Hence, as used in the Indian Foreign Award Act, the expression means

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9 P. FRANCESKAKIS, *Rép. Dalloz, Droit International*, item *Conflit de lois*, no. 137.

10 P. MAYER, *Droit international privé*, 4th ed. 1991, 389.

11 HOLLEAUX, FOYER, DE GEOUFFRE de la PRADELLE, *Droit international privé* 1987, 447.

12 *Renusagar Power Co. Ltd. v. General Electric Co.*, Supreme Court of India, October 7, 1993, 10 *Arb. Int.* 2, 141.

> the doctrine of public policy as applied by the courts of India, and must be construed narrowly.

International public policy represents that part of public policy which is more vital for the legal system, its principles which are more jealously adhered to and which cannot be affected by the access into that legal system of a foreign provision (or decision) which conflicts with them. This is the public policy which is to be taken into account for this purpose.

Domestic public policy includes the remaining principles of public policy which operate *only* in internal domestic relationships and which consequently do not prevent access to the legal system by different foreign provisions.

This distinction is important and seems clearer than the one made by the French Court of Cassation in *Grands Moulins de Strasbourg* :[13]

> international public policy ... is a less strict notion of public policy than the notion applied by the French domestic law.

However, this distinction risks separating too far these two components and inducing us to forget that they are simply two aspects of the same public policy, which operates in its entirety in domestic relationships and which acts only as to its international part (a portion of the *larger circle* represented by public policy), as a limit to the access of foreign provisions.

The important role played by international public policy in arbitration is stressed by Derains.[14]

18.5 FOREIGN PUBLIC LAW

Even within the ambit of foreign provisions, which are to be applied or recognized, a distinction must be made between public policy and the other provisions of that legal system on the one hand, and on the other hand its public law.

While foreign public policy will generally help to establish which foreign provisions are to be applied, with foreign public law the first problem is under which legal system one must establish whether it is public or private law, i.e. whether under the foreign legal system or under the *lex fori.* In *Ammonn v. Royal Dutch*[15] it was held that although the classification as public or private law by the foreign legal system is very important, the final decision belongs to the *lex fori.*

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[13] *Sté Grands Moulins de Strasbourg v. Cie Continentale France*, Court of Cassation (France) March 15, 1988, *Yearbook Commercial Arbitration*, 1991, at 129.

[14] Y. DERAINS, *Le choix du droit applicable au contrat et l'arbitrage international, ICC Bulletin* 1995, 1, 17.

[15] *Ammonn v. Royal Dutch,* Federal Tribunal (Switzerland), February 2, (1954) ATF 80, 11, 1953.

Traditionally it is considered[16] that the entire foreign public law must be rejected since it affects the principle of territoriality. A more recent opinion[17] is that the whole of foreign public law cannot be refused automatically without first a distinction being drawn between criminal and tax provisions, for example, and the other parts of public law. For instance, the foreign Act of State provisions are generally accepted. However, an international arbitrator – as we have seen – does not have, as a judge does, a system of conflicts of laws rules to support him. Generally the notions of *lex fori* and of foreign law are *alien* to him. From this point of view arbitral proceedings are less protected than court proceedings by a set of legal provisions.

The relationship of the arbitrator to public policy is then more difficult since, among the various public policies, the one to be applied must be identified.

Apart from the negative role of public policy, *a positive role* has recently been identified,[18] since by making a distinction between domestic public policy and international public policy and by classifying the relationship as international, public policy identifies the law applicable to that relationship (e.g. a given foreign statutory provision instead of a domestic one).

18.6. Substantive Public Policy and Procedural Public Policy

A final distinction must be made between *procedural* and *substantive* public policy, but this is simply a consequence of the distinction between procedural and substantive law.

It has been argued[19] that the arbitrator should establish whether the parties have intended to oust the *lois de police*, since he is not the custodian of the public policy of the state the substantive law of which has to be applied.

However it is submitted that – in front of a choice of law by the parties – the arbitrator should not disregard the *lois de police* of that legal system.

Procedural issues are normally found in procedural law, and substantive issues in substantive law. One of the areas where the distinction is not always

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[16] H. BATTIFOL–P. LAGARDE, *Droit international privé* (Private Internationa Law), 7th ed., vol. I, Paris 1982, at 248; P. MAYER, *Droit international privé* (Private International Law), Paris 1987, at 199.

[17] P. LALIVE, L'*application du droit public étranger* (The Application of Foreign Public Law), Institute of International Law, Geneva 1975; E. VITTA, *Diritto internazionale privato* (Private international law), 1977, at 15, QUADRI, *Lezioni di diritto internazionale* (Lectures on International Law), 1967, at 89.

[18] P. LALIVE, *Transnational (or Truly International) Public Policy and International Arbitration,* International Council for Commercial Arbitration (ICCA), New York Conference 1986.

[19] Y. DERAINS, comment to the award made in 1992 in ICC proceedings no. 6142, *Clunet* 1990, 1039.

easy is the taking of evidence. The problem is not how evidence is to be taken (an issue which is governed by procedural law), but the possibility of resorting to given procedural means to provide evidence. An example of this is the proof of contract. Under some legal systems not all contracts can be proven by witnesses.

For example, under Italian law, some contracts must be proven in writing; in this case the written form is required *ad probationem* (for purposes of evidence).[20] The whole purpose of this requirement being to provide evidence, this appears to be a procedural issue and therefore it is governed by procedural law. Other contracts in some legal systems must be entered into in writing; in this situation the written form is required *ad substantiam* (in order that the contract comes into existence).[21] This requirement is then treated as substantive and as such is governed by the law which governs the merits, i.e. by the *lex causae.*

The capacity to be a party to a dispute, and to make a claim or to waive it, is based on the capacity to be the holder of a right and to act[22] and belongs to substantive law; while the *jus postulandi,*[23] and the right to appear in specific proceedings is a procedural issue.

Depending on this classification, procedural or substantive law is to be applied and this may lead to different results. Proving a contract by witnesses, for example, may be prevented by substantive law, while such obstacles might not exist if a different procedural law is applied. The problem is not merely theoretical, since it may arise, and has arisen, in specific areas; for example, regarding the capacity of *Anstalten* and *Trusts* to enforce their rights, a capacity which has been challenged by several courts and which was eventually recognized in Italy in *Kenia.*[24]

The same issue arises in *class actions.*[25] These are allowed in some common law jurisdictions and not in other jurisdictions. For example, contrary

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[20] See for example insurance contracts (section 1888 Italian Civil Code) and settlement agreements (Section 1967 Italian Civil Code).

[21] This is the case as to agreements to form a corporation, agreements which transfer title to real estate, lease agreements of immovables having a duration exceeding nine years, contracts to divide immovables as well as the other contracts stated in Section 1350 Italian Civil Code.

[22] Sections 1 and 2, Italian Civil Code.

[23] Section 75, Italian Civil Code.

[24] *Kenia S.p.A.* (applicant), Court of Appeal, Milan, February 25 (1981), *Foro pad.* 1981, at 133; *accord: Kendo Aktiengesellschaft v. Soc. Pierrel,* Court of Cassation (Italy), April 14 No. 2414 (1980), *Foro It.* 1980, 1, at 1303; *Giacomini et al. v. Fallto Saom - Sidoc S.p.A. et al.,* Court of Cassation (Italy), April 10 No. 1659 (1978), *Foro pad.* 1978, 1, 195.

[25] Proceedings instituted by an individual, belonging to a class of citizens, who on his own initiative and without having received any authority from them enforces the claims of all

to U.S. law, under Italian law[26] in the absence of a clear expression of the intention to join the proceedings expressed by the other members of the class, if there is no written authority by all the members of that class to the member who initiated the proceedings, the courts will normally not hear the claim made by one member of the class on behalf of all the other members.

As far as presumptions are concerned, here too it is debated whether this is a matter of substantive or procedural law. Various solutions can be found in the different legal systems. For example, under Italian law a distinction is made between presumptions *juris tantum* (mere presumptions),[27] which are treated as procedural issues and therefore governed by the *lex arbitri;* and presumptions which are *juris et de jure*[28] (absolute presumptions). Since the latter give origin to the presumed right, they are treated as substantive issues and therefore governed by the lex *causae.* Even the classification of a presumption as a procedural or substantive issue may then lead to a different law being applied and therefore may produce different results. If it is treated as a procedural issue, it may be applied even to a dispute governed by a different substantive law.

There is also the question of time bars: if, for example, the merits of the dispute are governed by French law, and an English judge, treating a time bar as a procedural issue (and consequently governed by English law)[29] applies the time limitation set forth in English law (different from the French one), the result may be that it takes the French litigant by surprise declaring his right as no longer existing while, if the *lex causae* were applied, it would still exist. In English law this system has eventually been changed; however, it was a source of problems for a long time and it could still be so in other jurisdictions.

The arbitrator has to decide if a public policy rule is to be applied. In *Labinal*[30] the Court of Appeal Paris has held that:

> the suitability of a dispute for arbitration is not excluded by the fact that a public policy rule is applicable to the relationship between the parties ... the arbitrator has the power to apply principles and rules [of international public policy] and to sanction their possible non respect, subject to the control of the Courts,

a view which was confirmed by the same court in *Velero.*[31]

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the persons belonging to that class. On class-actions see MOORE, *Manual Federal Practice and Procedure,* Matthew Bender 1981, para. 14.07.

26 Section 81, Italian Rules of Civil Procedure.

27 Section 2727, Italian Civil Code.

28 Section 2728, Italian Civil Code.

29 As English courts did for a rather long time.

30 *Labinal v. Stés Mors and Westland Aerospace*,Court of Appeal, Paris May 19, 1993, *Rev arb.* 1993, 645.

The possibility that arbitrators decide issues related to mandatory provisions, when the dispute does not involve deciding as to existence of a right of which the parties may not dispose, has been held by the Italian Court of Cassation in *Quaker Chiari*[32] as well as, on the other hand, by the Swiss Federal Tribunal in *Fincantieri.*[33]

In *Thomson*[34] the Swiss Federal Tribunal rejected an attack by Thompson against an ICC award which had found that the broker was entitled to compensation for a sale by Thompson to Taiwan of several frigates, his claim not being tainted by illegality in securing such a contract.

In *Westacre*[35] the Court discussed at length the argument advanced before it that the award could be enforced, even if related to a contract tainted by illegality, since the award determined that the contract was illegal. The Court came to the conclusion that:

> The public policy of substaining international arbitration awards on the facts of this case outweighs the public policy in discouraging international commercial corruption. Accordingly the defendant's primary point does not bring them within the public policy exception to enforcement of the award under Section 5(3) of the Arbitration Act (1975). That conclusion is not to be read as in any sense indicating that the Commercial Court is prepared to turn a blind eye to corruption in international trade, but rather as an expression of its confidence that if the issue of illegality by reason of corruption is referred to high calibre ICC Arbitrators and duly determined by them, it is entirely inappropriate in the context of the New York Convention that the enforcement court should be invited to retry that very issue in the context of a public policy submission.

Public policy is expressly dealt with by the New York Convention (1958).[36] Its breach is a ground for refusal of recognition of a 'foreign' or 'international' arbitral award. Likewise it is a ground for setting aside an award, both under several national procedural laws and under the Uncitral Model Law.[37]

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31 *Sté Aplix v. Sté Velero*, Court of Appeal, Paris, October 14, 1993, *Rev. arb.* 1994, 164.

32 *Quaker-Chiari & Forti v. Europe Epargne Italia*, Court of Cassation (Italy), May 19 no. 2406 (1989) *Giust Civ.* 1989, 2605.

33 *Fincantieri Cantieri Navali Italiani S.p.A. et al. v. Republic of Iraq et al.*, Court of Appeal, Genova, May 7, 1994, *Riv. Arb.* 1994, 505.

34 *Thomson CSF v. Frontière A.G Berne, et Brunner Sociedade Civil de Administraçao Lda.*, Swiss Federal Court January 28, 1997, *Bulletin ASA* 1998, 1, 118.

35 *Westacre Investment Inc. v.Judoimport-Sdpr Holdings Company Ltd*, High Court of England, QBD, Commercial Court December 19, 1997, *Yearbook Commercial Arbitration* 1998, 836.

36 Art. V.2 (b) New York Convention 1957.

37 Art. 34 (2) Uncitral Model Law.

In order to establish whether there is a conflict between an award and public policy, which is the focus of this chapter, it is then first necessary to identify the procedural or substantive nature of the issue.

The barrier of public policy is less strong when it comes to enforcing a foreign award or judgment rather than when state courts must apply the foreign law directly.

The barrier is even weaker, as held in *Rivière*[38] when one is dealing merely with the effects of rights finally acquired (*droits acquis*) without fraud abroad under the legal system which is to be applied under the conflicts rules of the *lex fori*.

Public policy has been the object of deep study by conflicts of laws scholars.[39]

18.7 PROCEDURAL PUBLIC POLICY

Procedural public policy plays a role in arbitral proceedings which differs depending on the applicable procedural law. In fact, if the procedural law of the place of arbitration *(lex loci arbitri)* applies to the arbitral proceedings, the application of that law will firstly consist in the application of its basic[40] principles.

However, if the proceedings are governed by a national procedural law other than the *lex loci arbitri,* the arbitrator must not only observe the public policy of that procedural law, but also not breach the rules of international

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[38] Court of Cassation (France) Civil Division April 17, 1953, *Rev. cr. dr. int. pr.* 1953, 412, with comments by H. BATTIFOL.

[39] J.M. JACQUET, comments to *Attar v. El Onaryachly*, Court of Appeal, Toulouse, December 10, 1991, *Clunet* 1992, 947; AFM MANHRUZZAMAN, *International Arbitration and Mandatory Public Law Rules in the Context of State Contracts, An Overview*, 7 *J.Int.Arb.* 3, 53; P. FRANCESCAKIS, *Quelques précisions sur "les lois d'application immédiate" et leur rapports avec les règles de conflit des lois*, *Rev. cr. dir. int. pr.* 1966, 7; P. LALIVE, *Transnational (or Truly International) Public Policy and International Arbitration,* ICCA Congress Series No. 3, 257 at 262; K.L. BÖCKSTIEGEL, *Public Policy and Arbitrability*, ICCA Congress Series no.3, 177, 179; J. LEW, *Applicable Law in International Commercial Arbitration,* Oceana 1978: G. DE NOVA, *Conflicts of Laws and Functionally Restricted Substantive Rules*, 54, *Calif. L. Rev.* 1569 (1966); GRAULICH, *Règles de conflits et règles d'application immédiate*, in *Mélanges en honneur de Jean Dabin*, 1963, 629; J. WERNER, *Application of Competition Law by Arbitrators,* 12 *J. Int. Arb.* 1, 23; see also D. MILLER, *Public Policy in International Commercial Arbitration in Australia,* 9 *Arb. Int.* 2, 167; M. BUCHANAN, *Public Policy and International Commercial Arbitration* (1989) 26 *American Business Law Journal* 511; W. KUHN, RICO *Claims in International Arbitration and Their Recognition in Germany*, 11 *J. Int. Arb.* 2, 37.

[40] *Parsons & Whittemore Overseas Co. v. Société Générale de l'Industrie du Papier* (RAKTA), 508, F 2d 969, 974 (2d Cir. 1974), in MCCLENDON and GOLDMAN, *International Commercial Arbitration* in *New York,* cit., at 141, *note* 109.

public policy which apply in the place of arbitration. A similar problem will arise if a supranational set of arbitration rules is applicable.

The arbitrator will also try to ensure that the proceedings comply with the international public policy of the state in which recognition of his award is likely to be requested since, under the international conventions, or in their absence under the domestic law of that State, a breach of the public policy of the state requested to recognize the award will generally be a ground for it not being recognized.

International conventions

International conventions deal with public policy, frequently without distinguishing between procedural and substantive public policy.

The Geneva Convention (1927)[41] in order that the award be recognized requires:

> (b) that the subject matter of the award is capable of settlement by arbitration under the law of the country in which the award is sought to be relied upon,
>
> ...
>
> (e) that the recognition or enforcement of the award is not contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon.

The New York Convention (1958)[42] provides:

> Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition or enforcement is sought finds that:
>
> (a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
>
> (b) the recognition or enforcement of the award would be contrary to the public policy of that country.

The United Nations Model Law (1985)[43] states that the award may be set aside:

> if the Court finds that:
>
> (i) the subject matter of the dispute is not capable of settlement by arbitration under the law of this State; or
>
> (ii) the recognition or enforcement of the award would be contrary to the public policy of this State.

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41 Art. 1, b) and e), Geneva Convention (1927).

42 Art. V, 2, New York Convention (1958).

43 Art. 36, b), United Nations Model Law.

Arbitration rules

The United Nations Arbitration Rules (1976)[44] provide:

> (1) Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given full opportunity of presenting his case.

The Rules of the London Court of International Arbitration[45] refer in several passages to the mandatory provisions of the applicable law:

> Subject to the mandatory provisions of any applicable law, it shall not be improper for any part or its legal representative to interview any witness'[46]

The mandatory rules of the applicable law are also referred to in the Standard Rules of Evidence of the Mediterranean and Middle East Institute of Arbitration:

> Single rules of evidence, which may be found to be in conflict with a mandatory rule of the applicable procedural law, will be replaced by that mandatory rule.[47] Unless it is forbidden by mandatory rules of the applicable procedural law, the witness may be asked to swear an oath or, if his religion prohibits this, to make a solemn affirmation.[48]

National legal systems

Under Italian law the recognition of foreign awards, even when the New York Convention is not applicable, is subject *inter alia,* to the requirement that:[49]

> the award be not in conflict with Italian public policy.

French law states[50] that:

> the awards are recognized in France if their existence is proved by the parties seeking their recognition and if their recognition is not patently in conflict with international public policy ...

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44 Art. 15, 1, United Nations Arbitration Rules.

45 Rules of the London Court of International Arbitration, 1998 edition.

46 Art. 20.6, Rules of the London Court of International Arbitration.

47 Art. 1.2, Standard Rules of Evidence of the Mediterranean and Middle East Institute of Arbitration.

48 Art. 2.12, Standard Rules of Evidence of the Mediterranean and Middle East Institute of Arbitration.

49 Section 839, Italian Rules of Civil Procedure.

50 Section 1498, Nouveau Code de Procédure Civile (France).

As to English law, the Arbitration Act[51] states:

> Recognition and enforcement of the award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to enforce the award.

In conclusion, it can be said that conflict with international public policy of the place of arbitration is a ground for attacking the award in the state in which it is made, while its recognition in another state may be prevented by conflict with the latter's public policy. Domestic procedural public policy does not generally apply when the proceedings are governed by a different procedural law or rule. This was stated in France in *République Malgache:*[52]

> When the arbitral proceedings are governed by a foreign law (although they took place in Paris), international public policy, as existing in France, does not require that, in the absence of a term set up by the parties, the award to be made by the arbitrators be subject to the French statutory time limit.

Term to appear

The issue whether the term for the defendant to appear is adequate must be examined under the public policy of the place of arbitration. It will then be subject to other controls under the possibly different applicable procedural rules and under the public policy of the state requested to recognize the award.

Right to present one's case and to oppose the opponent's case

The Swiss Federal Court has defined these rights as follows in *Fincantieri:*[53]

> The right to be heard and to oppose the opponent's case combines two notions having the same contents. The right to be heard ... and the right to oppose the opponent's case. The right to be heard grants to each party the right to make submissions and to present the facts and to prove its case, as well as the right to attend the hearings and to be represented before the arbitrators. As to the right to oppose the opponent's case, it provides to each party the possibility to comment on the submissions of its opponent, to examine and discuss the evidence produced by the latter and to challenge it through its own evidence.

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[51] Art. 103.3 Arbitration Act (1996).

[52] *Société Bruynzeel Deurenfabrik N. V. v. République Malgache,* Court of Cassation (France), June 30 (1976), *Clunet* 1977, 114.

[53] *Fincantieri Cantieri Navali Italiani S.p.A. and Oto Melara S.p.A. v. M.,* Swiss Federal Tribunal September 3, 1993, ATF 119, II, 386.

The breach of this right is also dealt with in *El Mergeb.*[54]

The public policy principle, (that each party is entitled to oppose its opponent's case) is only breached if the party complaining of it has been placed by its opponent, or by the arbitral tribunal, or by the court expert in a situation which has made it impossible for it to comment on or to participate in the taking of evidence or the expert's involvement. Accordingly, deliberate absence, or absence due to lack of care or to circumstances which are not due to the opposite side do not give rise to such a breach.

The French decisions in *Lemonnier*[55] and in *Uni Inter*[56] are in line with this principle:

> The parties exchanged a pleading after the arbitrators had reserved judgment. The arbitrators, who had received and examined such pleading, were not under a duty to hold another hearing.

In *Ajalbert,*[57] the same principle was asserted with respect to documents exchanged between the parties after the arbitrators had reserved judgment.

Saline d'Einville[58] characterized an award which not only declared the nullity of a preemption clause but – although it had not been requested to do so – also of the entire agreement, as having breached the right of the parties to be heard and to oppose the opponent's case. However, this seems more an *ultra petita* situation.

The protection granted by many legal systems goes further and also applies to a defaulting party. Default on the one hand cannot block the proceedings but on the other hand does not relieve the arbitrators from the duty to check whether the claim is grounded.[59]

To this end, the arbitrator must examine the position of the defaulting defendant, while it must not replace Counsel which could be defending him.[60]

The *Anglo American Grain*[61] case again concerned a breach of international public policy when arbitrators did not allow a party to argue its case and to prove it.

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[54] *Comité Populaire de la Municipalité d'El Mergeb v. Sté Dalico Contractors,* Court of Appeal Paris, March 26, 1991, *Rev.arb.* 1991, 450.

[55] *Lemonnier et al. Sté Cerus*, Court of Appeal Paris, January 31, 1991, *Rev.arb.* 1991, 651.

[56] *Sté Uni Inter v. Sté Maillard,* Court of Appeal, Paris, July 5, 1990, *Rev.arb.* 1991, 357.

[57] *Ganem v. Ajalbert,* Court of Appeal, Paris November 10, 1989, *Rev.arb.* 1991, 651.

[58] *Sté Saline d'Einville v. Cie des Salines du Midi et Salines de l'Est*, Court of Appeal, Paris, July 11, 1991, *Rev.arb.* 1991, 671.

[59] A. REINER, *Handbuch der ICC Schiedsgerichtbarkeit*, Vienna 1989, 210.

[60] J.J. ARNALDEZ, *Comments to the award made in 1992 in ICC proceedings no. 6670, Clunet* 1992, 1010.

[61] *Anglo American Grain Co. Ltd. v. Ionica Navigazione,* Court of Appeal of Catania, September 30 (1961), *Rep. Foro, It.* 1962, item Delibazione No. 23.

Still on the issue of procedural public policy, in French law in *Sporprom*:[62]

> The Court held that the arbitrator, having omitted to give to the parties the opportunity to comment on an opinion, which they had requested from a third party, had broken the rules of due process and that such a breach caused the nullity of the award.

The application by the arbitral tribunal of the arbitration rules chosen by the parties and its exercising the authority granted by said rules to the arbitrators:

> to disallow amendments to the claim or defence of the parties before it

was held to be lawful in *Dallal.*[63]

Impartiality of the arbitrator

Even the impartiality of the arbitrator, being a fundamental procedural principle, comes under international public policy.

Likewise in *Paklito*[64] the refusal by the arbitrators to allow to cross examine a witness and to comment on evidence consisting of the Tribunal appointed expert's report was severely criticized:

> Having concluded that a serious breach of due process has occurred ... I am quite satisfied that even when one takes into account that the parties have chosen an arbitral law and practice which differ to that practised in Hong Kong, there is still a minimum requirement below which an enforcing court, taking heed of its own principles of fairness and due process, cannot be expected to approve. Regrettably this case is a classic example of such a situation.

It was held in *Schweighofer*[65] the alleged breach of public policy should be specific.

A breach of the right of a party to submit a defence was held by a Dutch court in *Kersten:*[66]

> Raoul Duval has acknowledged that he did not send Kersten the documents which he submitted to the arbitral tribunal.

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[62] *Sté Sporprom Service BV v. Sté Polyfrance Immo,* Court of Appeal of Paris, January 18 (1983), *Rev. arb.*. 1984, 88, with comments by MAYER.

[63] *Dallal v. Bank Mellat,* High Court of England, Q.B., June 27, July 1-2-3-26, 1985 (1986) 1 *All ER*, 239.

[64] *Paklito Investment Ltd. v. Klockner East Asia Ltd.*, Supreme Court of Hong Kong, January 15, 1993, *Yearbook Commercial Arbitration* 1994, 669.

[65] *Industria Legnami Trentino v. Holzindustrie Schweighofer*, Court of Cassation (Italy), November 16 no. 12268 [1992], *Yearbook Commercial Arbitration* 1994, 694.

[66] *GWL Kersten & Co. B.U. v. Sté Comm. Raoul Duval et Cie*, Court of Appeal, Amsterdam, July 16, 1992, *Yearbook Commercial Arbitration* 1992, 708.

> Further Raoul Duval did not deny that the arbitral tribunal had failed to communicate to Kersten the document which he had submitted to it. ... The Court is of the opinion that the course of events mentioned above is a violation of a fundamental procedural right, namely the principle of hearing both sides, as relied on by Kersten ...

The refusal by an arbitrator to allow oral evidence was criticised by a U.S. Court in *Inter-Carbon Bermuda*[67] but not treated as misconduct, because that party could have proven its case through affidavits:

> Inter Carbon claims that the arbitrator was 'guilty of misconduct' ... in refusing to hear evidence pertinent and material to the controversy ... Inter Carbon rests its argument upon one basic fact: that the arbitrator decided certain contractual issues without hearing live testimony, contrary to Inter Carbon's express wishes. The Court agrees that the failure to hear live testimony compromised the fullness of Inter Carbon's hearing, and that the arbitrator seems to have ignored Inter Carbon's repeated pleas to present live witnesses. The Court disagrees however that those facts prevent confirmation of the award..... the propriety of the arbitrator's action does depend on the same underlying concern, the extent to which issues of fact were in dispute so that a fuller hearing – including live testimony – would be required to reach a just decision ...
>
> The Court is mindful of the factors weighing against the arbitrator's decision to render judgment on the documentary evidence alone: the importance of hearings to arbitration proceedings, the weakness of affidavits as bases for summary determinations, and the repeated desire to present live testimony. Despite these considerations, the arbitrator's decision is reasonable and does not amount to misconduct. Hearings will not be required just to see whether real issues surface. If Inter Carbon was going to make a clear demonstration of evidence that Messrs White and Selner intended to contradict the damages provisions of attachment 7A, there is no reason it could not have done so through their affidavits ... the arbitrator was entitled to conclude that Inter Carbon's case was no stronger than the ambiguous White affidavit. This case is then distinguishable from those in which the existence of factual disputes was clear. E.g. *Teamers, Chauffeurs, Warehousemen and Helpers, Local Union, no. 506 v. E.D. Clapp.Corp.* 551, F Suppl. 570 (NDNY 1982) 742, F 2d 1441 (2nd Cir. 1983).

The Swiss Federal Court[68] has dismissed a plea of breach of public policy on the following grounds:

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[67] *Inter Carbon Bermuda Ltd v. Caltex Trading and Transport Corp.*, U.S. District Court, Southern District of New York, January 12, 1993 no. 91, *Yearbook Commercial Arbitration* 1994, 802.

[68] Swiss Federal Court, November 14, 1991, *Yearbook Commercial Arbitration* 1992, 279.

> It may indeed correspond to the Zurich rules of civil procedure that the procedure for the taking of evidence should have been opened with an order on the type of acceptable evidence, this enlightening both the Tribunal and the parties as to the points at issue and avoiding the taking of unnecessary evidence; however such a requirement cannot be inferred from either the claim to equal treatment and a fair hearing or from a procedural public policy (*ordre public*) which is also invoked by respondent.

Lack of reasons

The requirement that the award be reasoned is so strongly rooted in several legal systems that in some of them, the Italian one for example, it is specified in the Constitution. The Constitution of the Republic of Italy[69] states in fact that:

> All decisions of courts of law must be reasoned ...

This requirement seems also strongly rooted in Spanish,[70] Dutch[71] and French law.[72]

In Germany[73] reasons are not required, if the parties have agreed otherwise.

Other legal systems do not give so much importance to it and thus relieve arbitrators from the task of giving reasons. This seems to be the case in the American system (as to domestic arbitration)[74] as well as in the Austrian[75] system. In India under the old Arbitration Act 1940 an award had to be filed in court in order to make it become a court order. Objections to it from the other parties were then possible. If no objections were filed or were substainable, the court would pass a judgment in the same terms of the award and the award was then converted into an enforcement decree.

The 1996 Act, which is now in force, requires that reasons be given, except when (ii) the parties have agreed that no reasons be given or (ii) the award is

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69 Art. 11, Constitution of the Republic of Italy.

70 1988 Arbitration Act art.32 (2); *B.* CREMADES, *Spain, Yearbook Commercial Arbitration* 1987, vol. XII, at 49; *id., Arbitration in Spain, cit* at 80.

71 A.J van den BERG, *The Netherlands, Yearbook Commercial Arbitration* 1987, vol. XII, at 23.

72 Section 1471, Nouveau Code de Procédure Civile (France).

73 Section 1054 CCP; LOERCHER/LOERCHER, *Das Schiedsverfahren – national/ international nach neuem Recht,* Jehle Rehm, 1998 nos. 270/27.

74 BORN, cit. at 523.

75 W. MELIS, *Austria, Yearbook Commercial Arbitration* 1979, vol. IV, at 34.

on consent. As to English law the Arbitrator Act 1996, as in Japan[76] allows the parties to enter into an agreement:[77]

> to dispense with reasons,

in the tribunal's award.

Likewise in Australia,[78] and in the People's Republic of China[79] and Hong Kong.[80]

When an award made in a legal system, which does not require it to be reasoned and which is therefore not reasoned, is submitted for recognition or enforcement in a legal system in which reasons are required, enforcement is frequently opposed on the grounds of breach of public policy.

The decisions on such an argument frequently distinguish between domestic public policy (which requires it) and international public policy (which, for example, under Italian law would not be required).

This was the view held in *Compagnie d'Armement Maritime:*[81]

> The Paris Court of Appeal, hearing an attack against an award rendered by arbitrators Barclay, Chesterman and Clark, held that the lack of reasons does not affect international public policy and that therefore it is a ground for nullity only of domestic awards.

This issue was confirmed by the French Court of Cassation in the same dispute:[82]

> whether the reasons of an award are compulsory or not, it must be decided under the applicable procedural law and not under the substantive law.

As regards the adequateness of the reasons, two judgments must be reported, one of which is Italian and the other Swiss.

In *Ente Regionale,* Italy's highest Court while dealing with a domestic arbitration, held:[83]

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[76] Y. TANIGUCHI, *Commercial Arbitration in Japan,* ICCA Congress Series no. 4 Interim Arbitration Congress Tokyo, Kluwer 1989

[77] Except in the cases provided for in the Arbitration Act (1979); see MUSTILL and BOYD, *op. cit.,* at 543.

[78] Uniform Commercial Arbitration Act Australia at 529, in PRYLES, *Dispute Resolution in Asia, cit,* at 69.

[79] M.J. MOSER, *Dispute Resolution in Asia, cit,* at 91.

[80] M.J. MOSER, *Dispute Resolution in Asia, cit,* at 114.

[81] *Compagnie d'Armement Maritime v. Compagnie Tunisienne de Navigation,* Court of Appeal of Paris, April 28 (1976), *Rev. arb.*. 1978, 154.

[82] *Compagnie d'Armement Maritime v. Compagnie Tunisienne de Navigation,* Court of Cassation (France), March 18 (1980), *Rev. arb.*. 1980, 496, with comments by MEZGER.

> Conflicts amongst the reasons do not involve the nullity of the award unless they are so serious as to make it impossible to identify the *ratio decidendi* and they consequently amount to a lack of reasons.

In *Fougerolles* the Court of Justice of Geneva[84] while hearing an attack against an award rendered in Switzerland held:

> The arbitral tribunal must clarify the reasons for its decision. An internal conflict of its reasons or between the reasons and the decision may be compared to a lack of reasons and involves the nullity of the award.

The fact that a foreign award which is unreasoned does not conflict with international public policy was confirmed amongst Italian precedents in *Cornelius:*[85]

> The lack of grounds in arbitral tribunal proceedings governed by a foreign procedural law has been held not to be in conflict with international public policy.

Likewise, the Court of Appeal of Northern Lebanon[86] made a neat distinction, concerning the duty to provide reasons for the decision, between domestic public policy, for which they are compulsory, and international public policy, for which they are not.

Conflict with public policy was excluded in *George*[87] as to the even number of arbitrators:

> The requirement of an uneven number of arbitrators, which has not been respected in proceedings governed by a foreign procedural law, has been held to concern only Italian domestic public policy and not Italian international public policy.

Same Footing in the Appointment of the Arbitrators

Dutco[88] has given to the French Courts the opportunity to assert the clear principle that the parties must be on an equal footing in the appointment of the arbitrators:

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[83] *Ceglie v. Ente Regionale di Sviluppo Agricolo della Puglia,* Court of Cassation (Joint Divisions) (Italy), March 21, No. 2815, (1987), *Foro Pad.* 1988, 1, 220.

[84] *Sté Fougerolles S.A. v. Ministère de la Défense de la République Arabe Syrienne,* Court of Justice, Geneva, December 13 (1985), *Foro pad.* 1988, 1, 220.

[85] *Cornelius v. SCEA S.p.A.,* Court of Cassation (Italy), May 31, No. 2721 (1955), *Giur. It.* 1955, 1, 1, 917.

[86] Court of Appeal, North Lebanon, May 29 (1974), *Clunet* 1979, 414.

[87] *George v. Ceruto,* Court of Appeal of Catanzaro, March 5 (1956), *Rep. Foro It.* 1956, item *Arbitrato estero,* No. 5, 211.

[88] *BKMI and Siemens v. Dutco*, Court of Cassation (France) January 7, 1992, *Rev.arb.* 1992, 470.

> Some time after entering into a contract with BKMI and Siemens, for the construction of a factory in Oman, Dutco, a company having its seat in the Gulf Emirates, referred a dispute to ICC arbitration, which was the agreed method for the resolution of disputes. BMKI and Siemens were invited by ICC to appoint one arbitrator. In spite of their objection and of their request that two separate proceedings be instituted, they were warned by ICC that, in the absence of their appointment of one arbitrator, ICC would have made such an appointment. At this stage BMKI and Siemens made the appointment, reserving to challenge the ICC directions and the regularity of the appointment.
>
> The award which was later made by the panel of three arbitrators, consisting of a Dutco appointed arbitrator, of an arbitrator appointed by Siemens and BMKI, and of a chairman of the tribunal appointed by the ICC, was challenged before the Court of Appeals which confirmed it. However the Court of Cassation reversed the appellate judgment and asserted that each party must be on the same footing even during the stage of the appointment of the arbitrators except when the parties have provided for such a situation and agreed to appoint together just one arbitration. Allowing therefore one party to appoint one arbitrator, and forcing the other two parties to appoint one, was a breach of that right which involved the nullity of the award.

It is submitted that Dutco shall be of guidance for future appointments of arbitrators.

In domestic arbitration, this principle had already been asserted for example in Italy about 40 years before in *Queirolo*.[89]

This principle was asserted also in *Guatelli*:[90]

> The cooperation of all the parties to arbitral proceedings in the choice of the arbitrator is an essential element of arbitration.

A distinction had been made in *Sapori*[91] between on the one hand the impossibility of reconciling the opposite interests of several parties and on the other hand their voluntarily forming a group:

> the arbitration agreement inserted in by-laws, which submits disputes to three arbitrators, out of whom two to be appointed one by each party and the third one in case of disagreement by the President of the Court of Justice, may be applied also if a dispute arises amongst several parties

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[89] *Queirolo v. Caraggio and Saica*, Court of Appeal, Turin, January 4, 1951, *Giust.civ.* 1951, 494.

[90] *Guatelli e Riva v. Italgraf Nord*, Court of Cassation (Italy) March 15, no. 1980 (1983), *Giur.Comm.* 1983, II, 829.

[91] *Sapori v. Arienta*, Court of Milan, November 10, 1988, *Giur. Comm.* 1990, II, 350, in RUBINO-SAMMARTANO, *Il diritto dell'arbitrato (interno)*, Cedam, 2nd ed. 1994, at 259.

> but, even *a posteriori*, it results that the interests of the parties have spontaneously formed two groups, giving rise in effect to two parties.

A further procedural public policy issue was raised by the Turkish judgment in *Keban*[92] which was widely discussed, since it involved a key ICC rule:

> The arbitrators, sitting in Switzerland, had found in favour of the French and Italian contractors against a Turkish ministry. The contractors then sought enforcement of the award in Turkey. The Turkish Supreme Court refused to enforce the award on the grounds *inter alia* of breach of Turkish public policy since:
>
> 'The submission of the award to the Court of Arbitration for its approval is against our public policy'.

It should also be noted that when the procedural law applicable to arbitral proceedings is that of the place of arbitration, its application involves respecting first of all its domestic procedural public policy.

18.8 SUBSTANTIVE PUBLIC POLICY

Control over conformity with public policy must be conducted by the arbitrator with respect to substantive public policy also, generally after making here too a distinction between domestic public policy and international public policy.

This comparison is generally made between the applicable substantive law and the substantive public policy of the place of arbitration – if different – as well as, where possible, the public policy of the state in which the recognition of the award will probably be sought.

Among French precedents it was held in *Atard:*[93]

> When a foreign nationalization does not simultaneously provide for a quick, adequate and effective compensation, then such a rule breaks French public policy.[94]

Likewise in *Beaudouceau*[95] the French Court held that:

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92 *Compagnie de Constructions Internationales, Compagnie Française d'Entreprise et Société Impregilo v. D.S.I.*, Supreme Court (Turkey), March 10 (1976), *Arbitration* (The Journal of the Chartered Institute of Arbitrators), 1980, at 241, with comments by RUBINO-SAMMARTANO.

93 *Compagnie Française de Crédit et de Banque v. Consorts Atard*, Court of Appeal of Amiens, May 25 (1970), *Clunet* 1971, 86.

94 Taking that view in the contrast between the position taken by various legal systems in favour of a review of foreign nationalizations and the opposite doctrine that nationalizations cannot be reviewed by another legal system being an *actum jure imperii*.

> The arbitrator who has held the validity of the mechanism provided for by Art. 25 of the French rules and customs in the trade of corn and derivatives, under which the purchaser – faced with default by the seller – may establish by himself the sale price in order to establish his prejudice, has broken public policy, which involves the nullity of the award.

The issue of whether recognition of a foreign award breaches French public policy has been dealt with in *Grands Moulins de Strasbourg*[96] in which the claimant had submitted that the award could not be enforced, because it was contrary to a ruling of the competent Ministry according to which import compensations are to be paid to importers:

> French international public policy is not violated by the enforcement of an arbitral award which attributes the compensation to Continentale without concretely and effectively affecting the intended aim and goal of a French regulation pertaining to public policy. Only if this were the case ... the intended monetary and economic balance would be sufficiently affected to hold that French international public policy has been violated.

The granting of compound interest was held in *Renusagar*[97] not to be in breach of Indian public policy.

This while still in *Grands Moulins de Strasbourg*,[98] in a parallel dispute the Court of Cassation held that:

> Whenever a Ministry's regulation blocks the margins of importation and of export products imported as measures for monetary adjustment, and regulates in a mandatory way the allocation of monetary compensation granted to importers to assure an economic balance, an award made abroad which alters such allocation under contrary contractual provisions conflicts with French public policy and may not be enforced in France.

The American judgment in *Sun Oil*[99] deals with an interesting situation:

> The American corporation Sun Oil had entered into a contract for oil research and survey with a Libyan state owned company. After some

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95 *S.A. R. L. Michel Verseux Beaudouceau et Cie v. Ernest Collet,* Court of Appeal, Paris, November 3 (1977), *Rev.. Arb.* 1978, 486.

96 *Sté Grands Moulins de Strasbourg v. Cie Continentale France,* Court of Appeal, Versailles October 2, 1989, *Yearbook Commercial Arbitration* 1991, 129.

97 *Renusagar Power Company v. General Electric Co*, High Court, Bombay October 12, 1989, *Yearbook Commercial Arbitration* 1991, 553.

98 *Sté Grands Moulins de Strasbourg v. Cie Continentale France*, Court of Cassation France, March 15, 1989, *Rev.arb.* 1990, 115.

99 *National Ol Corp.* v. *Libyan Sun Oil Corp.* 733F Supp. 800 (D. Del. 1990).

> years, the U.S. Government ordered its nationals not to allow transfers of people or technicians to Libya. Sun Oil stopped performing the contract. In the meantime the U.S. Government's embargo with Libya became stricter.
>
> Sun Oil argued *force majeure.* The Libyan party rejected this argument, claimed damages and referred the dispute to arbitration.
>
> The arbitrators held that other American companies had continued to render services to Libya by hiring non-American staff, and that Sun Oil had a Canadian subsidiary which was particularly fit to take over performance.
>
> Sun Oil attacked the award before a U.S. Court which rejected the appeal on the ground that the conflict of the award with U.S. public policy alleged by Sun Oil did not exist. The judge, referring to *Parsons*[100] held that public policy may be invoked 'only in the event of the enforcement (note: of the award) conflicting with the deepest notions of morals and justice of the *lex fori.*'

which was not the case since one had to distinguish between public policy and foreign policy.

The Court quoted the *Parsons* decision according to which:

> to read the public policy defense as a parochial device protective of national political interests would seriously undermine the advantages of the [New York] Convention's utility. This provision was not meant to enshrine the vagaries of international politics under the rubric of 'public policy'.

The arbitrators, while hearing a claim for payment of royalties and a defence of violation of European Community public policy, found in *Lipski:*[101]

> In a dispute over the existence of the licensee's duty to pay royalties after termination of the patents, the arbitrators held that the duty to pay such royalties continued as long as the licensee was using the patents.

The distinction between domestic public policy and international public policy[102] is constant in French law which, for example, declares that the legal status of sales representatives[103] is a matter of domestic public policy and therefore not applicable to international relationships. French law treats contracts, which under domestic law would be invalid, as valid if they are international contracts; regarding other legal systems reference is made to the

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[100] *Parsons & Whittemore Overseas Co. Inc. v. Société générale de l'industrie du papier,* 508 F 2nd 969 (2d Cir. 1974).

[101] *Préflex v. Lipski,* Court of Brussels, October 15 (1975), *Clunet* 1979, 202.

[102] Court of Cassation (France), January 7 (1964), *Bull. civ.*, I, No. 15.

[103] Court of Cassation (France), January 19 (1976), *J. C. P.* 1977, 11, 18630.

judgments in *Tunisienne d'Electricité*[104] and in the United States in *Alberto Culver.*[105]

The national prohibition against governmental bodies entering into arbitration agreements[106] does not fit into the framework of international public policy.

On the duty of arbitrators to apply public policy, see, amongst other writers, Delvolvé.[107]

As to the violation in particular of *bonos mores,* reference is made to the award made by Swedish arbitrator Lagergren:[108]

> An Argentinian claimant, exiled to Germany, was claiming 400,000 English pounds as a remuneration for his intervention with the Argentinian authorities in favour of an English company so that it was awarded a contract. The arbitrator held the principle that contracts which grossly breach *bonos mores* cannot be enforced in court.
>
> 'This principle is particularly apt for use in international arbitration ... thus jurisdiction must be declined in this case. I must consequently conclude that I cannot decide on such a claim. .. Parties who ally themselves in an enterprise of the present nature must realize that they have forfeited any right to ask for the assistance of the machinery of justice, be it national courts or arbitral tribunals, in settling their disputes'.

In the award made in 1983 in ICC proceedings no. 3916[109] the sole arbitrator concluded:

> Clearly, performance by claimant could only mean the use of its influence on those who had the possibility and the right to decide with whom State A would conclude a contract. It is of little importance, as far as the validity of the agreement between the parties is concerned, whether the influence was used in order to exclude a competitor who had offered more favourable conditions or to remind an official of his

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[104] Sté *Tunisienne d'Electricité et de Gaz v. Sté Entrepose,* Court of Tunis, March 22 (1976), *Rev. arb.*. 1976, 268.

[105] *Fritz Scherk v. Alberto Culver Co.*, U.S. Supreme Court, June 17 (1974), *Yearbook Commercial Arbitration* 1976, vol. I, at 203.

[106] As the decision of the Saudi Arabia Council of Ministers June 25, 1963, No. 58.

[107] J. L. DELVOLVE, *Arbitrage et ordre public dans les pays en développement* (Arbitration and Public Policy in Developing Countries), *Rev. arb.*. 1979, 95.

[108] Award rendered in 1963 in Paris by the sole arbitrator in ICC proceedings no. 1110, published by J. LEW, *Applicable Law in International Commercial Arbitration* Oceana, 1978, at 553.

[109] *Yearbook Commercial Arbitration* 1994, 119 (unofficial translation from French original).

> duty to accept the best offer or else to induce the acceptance of the claimant's offer amongst equivalent offers.

Instead of finding, as Lagergren did, lack of jurisdiction on a claim involving violation of good morals, this second decision held jurisdiction and held that the agreement was a nullity.

Not only corruption but even exercing influence is forbidden in many jurisdictions like Algeria. Practices against good morals have frequently been the object of litigation, such as in *Lockheed*:[110]

> ... Lockheed engaged in the practice of hiring 'consultants' and 'foreign sales agents' and paying them large fees and commissions in connection with foreign sales of Lockheed aircraft and equipment,

and in *Clayco*:[111]

> The fees, commissions, honoraria or payments made to the services companies amount to very large sums. Thus, in all the cases mentioned above, the payments made appear disproportionate to the activities which have in fact been developed by the sales agent or sponsor. Further, there is in general no proof of such activities. Hence we cannot exclude that parts of the sums were used to 'induce' the Algerian officials.

Similarly the sole arbitrator in the award made in 1988 in ICC proceedings no. 5622[112] after distinguishing between lobbying and trading in influence held:

> Now, as we have seen these activities violate the law of Algeria which prohibits the trading in influence and thereby violate the notion of morality laid down in Art. 20 C.O. and Swiss public policy. Hence the contract between claimant and defendant is null and void and the fate of the claimant's claim must be that of all claims arising from contracts which are null and void on the ground of violation of morality, according to the adage *nemo auditur turpitudinem suam allegans*. The Claimant's claim must, therefore, be denied.

The U.S. Court of Appeals in *Northrop*[113] has held:

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[110] *Lockheed Aircraft Corporation v. Ora E. Gaines*, 645 F 2nd 761, *Yearbook Commercial Arbitration* 1994, 116.

[111] *Clayco Petroleum Corporation and France Clayman v. Occidental Petroleum Corporation, Occidenta of Union Al Qaywayk Inc. and Armand Hammer*, 712 F 2nd, 404, *Yearbook Commercial Arbitration*, 1994, 216.

[112] *Yearbook Commercial Arbitration* 1994, 105, award which has been set aside in Switzerland and reportedly followed by a second award which would have allowed the claim.

[113] *Northrop Corp. v. Triad International Marketing SA, Yearbook* U.S. District Court, Central District of California, September 4, 1984, *Commercial Arbitration* 1987, 526.

> Northrop's argument that the courts should decline to enforce the Marketing Agreement because it conflicts with the public policy of Saudi Arabia announced in Decree no. 1275 flies in the face of the parties' agreement that the law of California, and not of Saudi Arabia, would determine the validity and construction of the contract. Northrop has cited no California regulation, statute or court decision demonstrating that enforcement of a contract to pay commissions to a marketing representative is contrary to the public policy of California, whether such commissions are illegal under the law of a foreign state or are not.[114]

More openly, the German Supreme Court[115] held that:

> It is unanimously recognized that trading in influence is a practice which must be sanctioned and does not deserve any judicial protection.

A view which is supported by Lalive:[116]

> It is true that the notion of morality is as fluid and vague in international commercial relationships as it is, *mutatis mutandis*, in national law, ... However it can be said that transnational public policy is jeopardized in this case by hostile behaviour against principles which are generally held to be fundamental from an ethical-juridical point of view. Repression of such behaviour is not only provided for (if not effectively applied) in the national law of the majority of states; the reprehensive character of these practices results from many international texts ...

This principle was also asserted in arbitral precedents such as in the award made in ICC proceedings No. 2730 (1982):[117]

> In a dispute between Yugoslavian companies A and B, Dutch company X, and Swiss company Y, all belonging to the same group, concerning import and export agreements, the nullity of the contract was argued for breach of the Yugoslavian regulations on loans.
>
> The arbitrators held that these transactions, which allowed A to achieve a fictitious credit, were contrary not only to Yugoslavian legislation, but also to good morals.

For the questions of boycott and public policy see the *Gotaverken*[118] award:

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[114] An appeal against such a judgment was rejected by the U.S. Supreme Court on October 19, 1987.

[115] German Supreme Court May 8, 1985, *Clunet* 1985, 914.

[116] P. LALIVE, *Ordre public transnational (ou réellement international) et arbitrage international, Rev.arb.* 1984, 339.

[117] *Clunet* 1984, 914.

[118] *A B Gotaverken v. General National Maritime Transport Company GMTC (as GMTO's assignee),* award April 5 (1978), (arbitrators Jolibois, chairman, Braekhus and Tashani), *Yearbook Commercial Arbitration* 1981, vol. V1, at 133.

> Faced with a submission requesting application of the Lebanese law on boycott (argument raised to justify the refusal to take delivery of vessels), the arbitrator came to the conclusion that Swedish law was applicable and that the boycott rule did not have an effect on the contractual relationship.

This matter has been covered also by writers.[119]

In the award made in ICC proceedings no. 3881 (1984):[120]

> In a dispute between a Swiss and a German company on the one hand, and a Syrian public body on the other hand, concerning the supply of know-how, technical assistance, supervision and technical management of a new factory in Syria, the defendant submitted that the claimant had broken the rules on Israeli boycott, which amounted to a breach of Syrian public policy.
>
> The arbitral tribunal came to the conclusion that the boycott rule did not apply until the company was put on the black list and until that became official.

An ICC sole arbitrator made an award in 1990[121] in Paris between a French licensor and two Spanish licensees:

> The licensor claimed rescission of the license contract on the ground of lack of payment. The Spanish licensees resisted the claim on the ground that the Spanish text of the agreement did not contain such a minimum guarantee and under Spanish law, which undisputedly was the substantive law, such contract in order to be valid had to be filed with the Spanish Ministry of Industry.
>
> The French licensor objected that the parties had agreed in writing that in case of difference between the French and the Spanish version, the French version would prevail.
>
> The Spanish licensees submitted that the requirement of filing with the Ministry was a matter of public policy.
>
> The arbitrators held that substantive law being Spanish, there was no need to examine whether this was a matter of domestic or of international public policy, and held that the French version of the contract, not having been filed, was of no effect since lack of filing was in breach of Spanish public policy.

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[119] P. MAYER, *Mandatory rules of law in international arbitration*, *Arb.Int.* 1986, 214; Y. DERAINS, *L'ordre public et le droit applicable au fond du litige dans l'arbitrage international*, *Rev.arb.* 1986, 735; J.H. MOITRY, *L'arbitre international et l'obligation de boycottage imposée par un Etat*, *Clunet* 1991, 349.

[120] *Clunet* 1986, 1096.

[121] ICC proceedings no. 6142, *Clunet* 1990, 1039.

In his comments to this award, Derains expresses the view that – while state courts have a duty to their state to apply public policy – the arbitrators have a duty to the parties.[122] They have then a duty not to the state but to the *societas mercatorum*.[123]

The application of the *lex contractus* to the rate of interest due for breach of contract was held by another arbitral tribunal in 1993,[124] making reference to other similar awards made in 1990 in ICC proceedings no. 61219.[125]

The distinction between issues of nullity, which in some jurisdictions cannot be submitted to arbitration, since they concern public policy, and other aspects of the same relationship, which can be submitted to arbitration, has been made on several occasions.

This was held in France in *Impex:*[126]

> The prohibition against submitting a dispute to arbitration, because the issue is of public interest, does not involve the nullity of the arbitration agreement, when the dispute concerns only the damages which may be due by one party to the other one, because of liability in the formation, or for breach of, the contract which is null and void.

As far as the Rome Treaty is concerned, the issue of which disputes related to the validity or nullity of a contract under that Treaty may be submitted the arbitration is the object of discussion. In general it is held that the arbitrators may be asked to decide claims related to the financial consequences of the same. Along these lines is the award rendered in ICC proceedings no. 2811 (in 1978):[127]

> The arbitrator, sitting in Lausanne, in a dispute between an Italian company, licensor, and a French company, licensee of carpets, basing himself on the remarks made by the Commission in *Epoux de Norre De Clerq v. N. V. Brouwerij Concordia* (case 47-76, judgment of the Court of Justice February 1, 1977), held that he was entitled to decide, rather than to stay, the proceedings. The contract, which was the subject of the dispute, benefited from the general exemption provided for by Regulation 67/67.

In the award rendered in ICC proceedings no. 1397 (1966):[128]

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[122] Y. DERAINS, comments to ICC award no. 6142 made in 1990, *Clunet* 1990, 1039.

[123] The international commercial community.

[124] ICC proceedings no. 6854, *Clunet* 1995,

[125] And the other ones published in the ICC Bulletin May 1992, 15 and November 1992, 49.

[126] *Impex v. Maltena Adriatica*, Court of Cassation (France), May 18 (1971), *Clunet* 1972, 62.

[127] *Clunet* 1979, 984.

[128] *Clunet* 1974, 879

> The arbitrator, sitting in Belgium, in a dispute between two companies, one French and one Italian, was asked to stay the proceedings because the defendant had argued that the contract was null and void for breach of the Rome Treaty. The arbitrator held that the possible nullity of one of the clauses of the contract because of breach of the Rome Treaty did not necessarily involve the nullity of the entire contract and that in any event:
>
> ' ... The arbitrator may neither enforce a commitment which is contrary to public policy, nor allow a plea to stay his decision, nor unduly extend to an entire system of rights and duties the nullity related to a part of them without having first checked the grounds of such an argument'.

In *Velero*[129] the Court of Appeal of Paris has more recently held:

> the arbitrator, as the state court on the one hand may draw from conduct, which is held to be in breach of public policy, the consequences which concern the relationships between the parties; on the other hand the arbitrator may not, because of the mandatory nature of public policy provisions of EC competition law forbid behaviours contrary to art. 851 Rome Treaty, applying pecuniary fines or granting an individual exemption.

Labinal is along the same lines.[130]

In other words the arbitrator may apply only those provisions which concern the direct relationships between the parties and which produce an *effet plein* (a full effect).[131]

The jurisdiction of an arbitral tribunal sitting in Switzerland to decide on the validity of a contract under section 85 of the Rome Treaty, was decided by the Swiss Federal Court:[132]

> the arbitrator who denies his jurisdiction renders an award which is null and void.

An interesting study into arbitral precedents on this issue, revealing *inter alia* that arbitrators tend to apply the public policy of the *lex causae,* is due to done by Derains;[133] see also Goldman[134] in this connection.

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[129] *Sté Aplix c. Sté Velero*, Court of Appeal, Paris, October 14, 1993, *Rev.arb.* 1994, 164.

[130] *Sté Labinal v. Stés Mors and Westland Aerospace*, Court of Appeal, Paris May 19, 1993, *Rev.arb.* 1993, 645.

[131] G. ISAAH, *Rép. Dalloz de droit communautaire*, item *Effet direct du droit communautaire.*

[132] *G. v. V,* Swiss Federal Court April 28, 1992, *Rev.arb.* 1993, 124.

[133] Y. DERAINS, *Les normes d'application dans la jurisprudence arbitrale internationale* (Mandatory rules in international arbitral jurisprudence), Le Droit des Relations Economiques Internationales, Etudes offertes à Berthold Goldman (1982).

It has been rightly pointed out that two breaches of public policy each to the detriment of the other party do not negate themselves but cumulate.

18.9 CONCLUSIONS

From this brief review of the interrelationship between public policy and arbitral proceedings it seems that it can be concluded that a control must be conducted both from the substantive and the procedural point of view, bearing in mind that the arbitral proceedings do not have a *lex fori.*[135]

This control should consequently be based, both at the substantive and the procedural level, on a comparison between the applicable law and the public policy of the *lex loci arbitri* or of the legal system the procedural law of which has been selected, if different from the *lex loci arbitri,* and of the state where the recognition of the award is likely to be sought. Between the public policy of the place of arbitration and that of the state, which will subsequently be requested to recognize the award, the former will generally deserve more attention since the place of arbitration results in an immediate connection, which is always to be taken into account. Of course, even the second comparison is important since, in case of conflict with it, the award will generally not be recognized.

Difficulties will arise in establishing which state will be requested to recognize the award, in view of the plurality of states which might be requested (for example the state in which the loser at that time has its center of business and the other state where it has substantial assets).

A difficulty may arise when the control under the public policy of the *lex loci arbitri* produces different results from that under the public policy of the state, or of one of the states, which will presumably be requested to recognize the award. One would be inclined to give priority to the public policy of the *lex loci arbitri.* However, for reasons of convenience, in special situations the opposite choice may have to be made.

The distinction between domestic and international public policy is made in several legal system. In French precedents on various occasions it has been held that breach by the arbitrators of public policy in domestic arbitral proceedings involves the nullity of the award. In line with this the Court of Appeal of Paris held in *Sawicki:*[136]

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[134] B. GOLDMAN, *Frontières du droit et lex mercatoria* (Boundaries of the law and *lex mercatoria),* Philosophie du droit, Paris 1964, 177.

[135] P. LALIVE, *Transnational (or Truly International) Public Policy and Inter-national Arbitration,* ICCA, New York Conference 1986

[136] *Roger Sawicki v. Compagnie Française du Sucre et des Produits du sol (COSUCRE),* Court of Appeal of Paris, June 9 (1977), and *René Sulmona v. Compagnie Française du*

> Provisions on financing do not aim merely to protect the interests of the banking world and of the Stock Exchange. They concern also the public interest. This is particularly true for Art. 8 of the General Regulations of the Paris Stock Exchange.
>
> Therefore the arbitrator, by deciding without researching whether the broker had failed in his duty to *appeler en marge* his client, has broken a mandatory provision, which constitutes a breach of public policy by the award, which causes its nullity. In fact even the *amiable compositeur is* not released from the application of mandatory provisions.

The same Court in *Grands Moulins Prodhomme*[137] has held that:

> The appeal against an award can be heard as an exception to the rule, in spite of any *amiable compositeur* provision or of a waiver of such an attack, when it aims to establish the nullity of the award for breach of public policy by the arbitrators.

In Belgian law challenges[138] based on the non-suitability for arbitrarion of the issue, or on breaches of public policy, are always admitted.

Therefore, the decision of the Austrian Supreme Court, which disallowed the request to distinguish between domestic and international public policy, and which denied the enforcement of an award rendered by an arbitral tribunal appointed by the *Union Amsterdamse Graanhandel,*[139] looks rather isolated:

> The Austrian Court, stating that Art. 5, 2 (b) of the New York Convention concerns the breach of public policy of the state requested to recognize the award, rejected the claimant's argument aiming to distinguish between domestic and international public policy.

A special reference to public policy as a reservation is to be found in the award made in ICC proceedings no. 3281 (1981):[140]

> In a dispute between a French licensor and a Spanish licensee the arbitrators declared that French substantive and procedural law were applicable. They added that: 'the award of the arbitral tribunal shall be made subject to the reservation of the provisions of public policy which in Spain might oppose its enforcement'.

Sucre et des Produits du Sol (COSUCRE), Court of Appeal of Paris, December 20 (1977), *Rev. arb.,* 1978, 476 *et seq.* with comments by BOITARD.

[137] *Sté Grands Moulins Prodhomme v. Sté Soja France,* Court of Appeal of Paris, December 12 (1978), *Rev. arb.*. 1979, 372, with comments by BOITARD.

[138] MATRAY and MARTENS, *Arbitrage et ordre public interne* (Arbitration and domestic public *policy), Rev. arb.* 1978, 95; see also G. HORSMANS, *L'arbitrage et l'ordre public belge* (Arbitration and Belgian public policy), *Rev. arb.*. 1978, 79 *et seq.*

[139] Supreme Court (Austria), May 11 (1983), *Clunet* 1986, 395.

[140] *Clunet* 1982, 990.

Comments made on such an award have stressed that, apart from the connecting factors which have been chosen, attention should have been paid to the fact that Spain was the place where the contract was formed rather than to the possibility of the award being enforced in Spain.

It is suggested that the cumulative application of two or more public policies is a solution not without interest, at least in theory but that it is quite difficult to be applied. It should be added that the cumulative application of two public policies may lead to the application of the stricter one.

As far as more specific issues are concerned, reference is made to an analysis by Mayer[141] of the interesting comparison between *loi de police étrangère* (in the sense of the *lois de police* of a legal system different from the applicable law, such as the loi *de police* of the place of performance of the contract) and the applicable substantive law. Van Hecke's views[142] on the *loi de police* of the place of enforcement of a contract, in the EC ambit, when the applicable law is that of a country outside the EC, is also of interest. On public policy, see also Schwebel.[143]

It has been held that the public policy of the *lex causae* would operate in a different way depending on whether the place of arbitration has been chosen by the parties or by the arbitrators.[144] When the parties choose the applicable law, the arbitrators are to apply also its domestic public policy even if the parties have instructed the arbitrator that the public policy of such a law should not be applied. This conclusion seems correct even if it not unanimous.

In the opposite situation, in which the applicable law is established by the arbitrators, they must take into account all the consequences of such a choice, which might later prevent the award from being recognized or enforced. The arbitrator will then use his best efforts to avoid a breach of the rules of international public policy of the state where the arbitration takes place, and if possible also of the state where the recognition of the award will clearly be sought.

This, even if the public policy of other states and not only the public policy of the *lex contractus* and of the *lex fori,* may have to be taken into account, as it was held in *Regazzoni:*[145]

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[141] P. MAYER, *Les lois de police étrangères* (Foreign lois de police), *Clunet* 1981, 277 *et seq.*

[142] VAN HECKE, *Le droit antitrust: aspects comparatifs et internationaux* (Antitrust law: comparative and international aspects), Cours de La Haye 1961, vol. II, at 257 et *seq.*

[143] See the interesting review by S.M. SCHWEBEL and S.G. LAHNE, *Report on Public Policy and Arbitral Procedure, I*CCA Congress, New York 1986.

[144] P. LALIVE, *Public Policy and Arbitral Procedures*, ICCA Congress, New York, 1986.

[145] *Regazzoni v. Sethia* (1957) 3 All ER 286.

> The dispute concerned an international contract related to Indian jute entered into between contracting parties domiciled in England and in Switzerland. The contract, which was perfectly valid under the *lex contractus* (English law), was held to be null and void because Indian law did not allow the trade of jute with South Africa, because of the *apartheid* practised by that country. The Indian legal system was consequently applied to the sale even if Indian law could have been excluded, since it was neither the *lex contractus* nor the *lex fori,* but merely the law of a third State.

The application of the public policy of such a third State is due to the desire to avoid violating foreign laws which govern the performance of the contract. This might be one of the first signs of that transnational public policy, which Lalive has described very well,[146] by putting together various principles of substantive and procedural public law which are constant in decisions by courts of law and by arbitrators.

Certainly a lot of water has flowed under the bridge since the Paris Court refused in *Banque Ottomane*[147] to apply:

> the principles of an alleged international public policy, the existence of which is not recognized by any system of law and in particular not by French law,

and even more distant are the awards made in *Créole* and *Maria Luz,* both concerning the slave trade. In *Créole:*[148]

> the right to own slaves, who during their transport on the vessel Créole had committed a mutiny, was recognized, even after it had been qualified as 'odious'. The Arbitral Committee held in respect of slavery that:
>
> 'since it has been established in several states it cannot be contrary to the Law of the Nations',

while in *Maria Luz:*[149]

> The Czar of Russia, sitting as an arbitrator, declared that Japan, charged with having freed the slaves carried on the vessel 'Maria Luz', 'having

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[146] See *supra* note 9.

[147] *Bakaljan and Hadjthomar v. Banque Ottomane,* Court of Appeal of Paris, March 19 (1966), *Clunet* 1968, 137, (unofficial translation from French) with comments by GOLDMAN.

[148] *Créole* arbitration, award rendered by the Mixed Commission, London, January 15 (1855), quoted by LALIVE, op. *cit.,* at 49.

[149] *Maria Luz* arbitration, award rendered by the Czar of Russia, May 17-19 (1875), quoted by LALIVE, *op. ult. cit.,* at 49 and by NIBOYET, *Le role de la justice internationale* (The role of international justice), at 180-182.

> acted in conformity with its own law and usages, had not breached the general rules of the Law of Nations'.

Although the charm of Lalive's doctrine is appreciated, particularly if seen from the arbitrator's point of view, where he finds himself in the unpleasant position of not having a *lex fori,* it is suggested that it may be preferable at this stage to apply public policy on a national basis, even if several public policies are involved and to be applied.

It happens on some occasions that the arbitrator, even without referring to transnational public policy, or to the public policy of a third state, applies it as well, holding that such a principle arises from the applicable law and claiming breach of the latter's *bonos mores.*[150] In this connection the *Borax cases*[151] are particularly well known:

> The claimant in both disputes had purchased borax in the United States (although it was subject to an embargo there as far as certain countries were concerned), in order to sell it, in the first case, to a Danish company (which had not made the prescribed commitment not to reexport it) and, in the second case, to Poland. In both cases the German *Bundesgerichtshof* held that the purchases were null and void because the violation of the American embargo was against *bonos mores.*

Reference is also occasionally made to a more limited international public policy, consisting of principles applied in a certain group of states, such as:

> the general interests of the entire free Western world.

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[150] Supreme Court (Germany), June 22 (1982), *B. G. H. Z* 1982, 59.

[151] *Bundesgerichtshof* (Germany), December 27 (1960), *B.G.H.Z,* 34, 169 and *Bundesgerichtshof* May 24 (1962), *N.J. W.* 1962, 1436.

CHAPTER 19

EC LAW, THE BRUSSELS CONVENTION AND ARBITRATION

SUMMARY: 19.1 The Brussels Convention – 19.1.1 Arbitration-Ambit of its Exclusion from the Convention – 19.1.2 Referral by Arbitrators of Preliminary Issues to the European Court of Justice – 19.1.3 The European Court of Justice as Arbitrator – 19.2 EC Competition Law and Arbitration – 19.2.1 Disputes Capable of Arbitration – 19.2.2 Foreign Applicable Substantive Law and EC Competition Law – 19.2.3 The Strict Approach – 19.2.4 The More Recent Approach – 19.2.5 Public Policy Nature of Articles 85 – 86 Rome Treaty – 19.2.6 Applicability of EC Law by the Arbitral Tribunal of its Own Initiative – 19.2.7 Arbitral Precedents – 19.2.8 Court Precedents – 19.3 Directive 93/13 EC, Consumers' Protection and Arbitration

19.1 THE BRUSSELS CONVENTION

19.1.1 Arbitration-Ambit of its Exclusion from the Convention

The Brussels Convention[1] has excluded arbitration from its ambit:[2]

> The Convention shall not apply to:
>
> ...
>
> 4. arbitration.

Since then, the issue has been debated whether the Convention also excludes from its ambit court proceedings related to arbitration, including applications in aid of arbitration.

In *Marc Rich*[3] a dispute arose between Marc Rich, a Swiss company, and Italimpianti, an Italian company. Marc Rich held that there was a written arbitration agreement. Italimpianti challenged that and issued proceedings before an Italian court seeking a declaratory judgment that no valid arbitration agreement existed. Marc Rich applied to the High Court, in London, since the place of arbitration was London, for the appointment of an arbitrator since Italimpianti had refused to do so. Italimpianti resisted the application on the

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1 Convention on Recognition and Enforcement of Foreign Judgments, September 28, 1968.

2 Art. 1.

3 *Marc Rich & Co A.G. v. Società Italiana Italimpianti,* Court of Justice of the European Communities July 25, 1991, 7 *Arb. Int* .3, 197.

ground that the Italian proceedings had preempted the English ones under the Brussels Convention.

The English Court submitted to the European Court of Justice the preliminary issue whether the Brussels convention also excluded from its ambit Court proceedings related to arbitration:

> The European Court of Justice ruled that the exclusion applied to Court proceedings concerning the appointment of an arbitrator, even when they involved the issue of whether an arbitration agreement exists or is valid.

Continuing along the line of *Marc Rich*, the Court of Justice of the European Communities has held in *Van Uden*[4] that the Brussels Convention's ruling that arbitration is excluded from its ambit refers to decisions declaring the validity or nullity of an arbitration agreement. The Brussels Convention includes on the other hand interlocutory measures since they do not aim to put arbitral proceedings in motion but are applied for and granted in parallel to such proceedings and aim to support them.

The relationship between the European Union and arbitration is analysed by Bourque[5] and Kaye.[6]

19.1.2 Referral by Arbitrators of Preliminary Issues to the European Court of Justice.

The need for a uniform construction of European law has induced the treaty of Rome to provide[7] that a jurisdiction (i.e. a Court) of a member state, which finds difficulties in construing a provision of European law, may submit it as a preliminary issue to the European Court of Justice. Such a referral is optional for courts of first instance or hearing appellate proceedings, while it is mandatory for courts of last instance.

The issue was raised whether arbitral tribunals too are entitled to avail themselves of that path. Amongst writers see Mackenzie Stuart.[8] The European Court of Justice has been seised with the issue and has ruled on several occa-

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4 *Van Uden Maritime BV v. KG Deco-Line*, Court of Justice of the European Communities, November 17, 1998, *ASA Bulletin* 1999, 1, 68.

5 J. F. BOURQUE, *Le cadre juridique de l'arbitrage dans l'Union Européenne, l'arbitrage commercial international en Europe,* CCF Supplement, 1994.

6 P. KAYE, *The Judgments Convention and Arbitration. Mutual spheres of influence*, 7 *Arb. Int.* 3, 289.

7 Art. 177.

8 MACKENZIE-STUART, *L'arbitrage et la Cour de Justice des Communautés Européennes*, ICC Bulletin 1993, 55.

sions such as in *Nordsee*[9] that as a rule an arbitral tribunal may not be treated as a national jurisdiction since it does not enjoy an exclusive state authority to decide disputes and therefore may not refer preliminary issues. The same court in *Broekmeulen*[10] held that in view of its special standing (it had been granted the exclusive authority to rule permanently on certain matters) a Dutch appellate arbitral tribunal could refer a preliminary issue to it. This limitation does not prevent arbitral tribunals from applying, when available, in aid of arbitration, to the state courts of the venue. If the state court decides, as it did in *Bulk Oil*[11] to put forward the issue, raised by the arbitral tribunal, and refers it as a preliminary issue to the European Court of Justice, then the latter may rule on it.

For the potential impact of the Brussels Convention on arbitration see Wiegand.[12]

19.1.3 The European Court of Justice as arbitrator

In spite of the exclusion of arbitration from the Brussels Convention, the European Court of Justice itself may act as an arbitrator in disputes between the Community and third parties, based on a contract, even if that contract is governed by administrative law, if it contains an arbitration agreement.[13] Likewise the Court may act as an arbitrator in disputes between Member States if they submit a dispute to it.[14]

19.2 EC COMPETITION LAW AND ARBITRATION

It has been debated whether disputes involving EC competition law may be submitted to arbitration.[15] An analysis of this issue probably has to start from identifying first the disputes which are capable of arbitration and then the relief which arbitrators may grant.

19.2.1 Disputes Capable of Arbitration

In order to clear the ground as much as possible, before dealing with the relief which is available from arbitrators, one should first identify the disputes which are capable for arbitration.

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9 *Nordsee Deutsche Hochseefisherei GmbH* [1982] 2 ECR 1095; cited by MACKENZIE-STUART see supra note 8.

10 *Broekmeulen v. Huisarts Registratie Commissie* [1982] 1 CMLR 91.

11 *Bulk Oil (Zug) v. Sun International Limited* [1986] 2 CMLR 731.

12 C. WIEGAND, *Brussels and Arbitration*, 12 *J. Int. Arb.* 4, 5.

13 Art.181 Rome Treaty.

14 Art.182 Rome Treaty.

15 REDFERN-HUNTER, *cit.* 2nd ed. (1991).

Because of the contractual nature of arbitration, an arbitration clause will be found for example in cooperation agreements between business entities as well as in distribution, sales representative or licence agreements.

An arbitration clause will not be found in general in disputes originating from a competitor who feels damaged by a practice or agreement between other traders or by an abuse of dominant position.

Likewise, if submissions to arbitration are also conceivable in tortious liability disputes, that will not be frequent.

If the substantive law to be applied to a dispute concerning competition is the law of a EC member state, European antitrust law will apply being mandatory.

19.2.2 Foreign Applicable Substantive Law and EC Competition Law

If the applicable substantive law is not the law of an EC member state but the arbitral proceedings take place in a EC member state, unless – it is suggested – the dispute has no connection with the EC, European antitrust law may have to be applied as a public policy issue since if it is not applied the award might be set aside by the courts of that state for breach of its public policy.

If the substantive applicable law is not the law of an EC member state, and the venue of the proceedings is not in any EC member state, one might take the view that EC competition law would not apply. However if the agreement or practice on which the dispute is based produces effects on trade between EC member states and or is to be enforced there, EC antitrust law will generally have to be treated as a mandatory provision, and will then necessarily apply.

In the absence of this, the award should not be recognised in any EC member state, the state court seised of such an application having to rule of its own motion[16] that the award is in breach of its public policy.

19.2.3 The Strict Approach

Two approaches as to the applicability of EC law by arbitrators are to be registered. The first one in time was a strict approach, excluding interference by arbitrators whenever EC competition law had to be applied .This strict approach was taken by the Court of first instance, Bologna in *Française des Isolants,*[17] holding that arbitrators cannot decide an issue governed by EC law, since these provisions are imperative and are therefore not capable of settlement which is a prerequisite for arbitration. In line with this view are the

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[16] L. IDOT, *Rev. arb.* 1989, 300.

[17] *Coveme v.Compagnie Francaise des Isolants*, Court of First Instance, Bologna July 18, 1987, *Yearbook Commercial Arbitration*, 1992, 534.

opinions expressed by Bernini[18] and by Goldman[19] reporting the French position.

A distinction was made between rulings on the existence of a breach and rulings excluding this. It was pointed out that the arbitrators would be free to find that the agreement or conduct in issue is not in breach of EC competition law.

It is suggested that one should rather make a preliminary distinction, i.e. between those situations where the issue of breach of EC competition law does not arise, and those where the issue has been raised or is to be raised by the arbitrators of their own motion and that only the latter gives rise to problems.

19.2.4 The more recent approach

The more recent approach has limited the number of issues which cannot be decided by arbitrators. According to Dalhuisen[20] only three issues would be outside the arbitrators' authority:

- exemptions of agreements from EC antitrust law,
- granting negative clearances,
- decisions which would affect that class of traders.

Arbitrators would then have no authority

- to decide whether any agreement has been exempted by the EC authorities or has been granted negative clearance
- to decide whether any agreement falls within a block exemption
- to grant damages or draw financial consequences from a EC decision establishing a violation of EC competition law.

Whenever EC proceedings are instituted, which involve one of such issues, the arbitrators – as well as a national state court – might then have to stay the proceedings.

A further and basic issue is whether the arbitrator may declare the nullity of an agreement or of a practice or the existence or absence of an abuse of a dominant position, or whether this is reserved to EC authorities.

As earlier discussed, a distinction has been made in this respect between declarations of nullity, to be outside the arbitrator's authority, and decisions excluding nullity which would be allowed to them.

Likewise a distinction has been made between situations where such issue is the object of a claim for declaratory judgment and those where it is a mere defence, to be dealt with incidentally.

All these situations turn around the same issue i.e.whether the arbitrator may decide over nullity for breach of EC law.

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[18] G. BERNINI, 'Italy', *Yearbook Commercial Arbitration*, 1981, 33.

[19] B. GOLDMAN, Juris Classeur, *Droit International*, 586-3, no. 48.

[20] J. H. DALHUISEN, *The Arbitrability of Competition Issues*, 11 *Arb.Int.* 2, 151.

The view that the arbitrators might not declare the nullity of an agreement or practice, or that it is in breach of EC mandatory provisions but might entertain a defence of nullity of an agreement for breach of EC law does not seem convincing.

If the response to the query whether the arbitrator may decide over the nullity for breach of EC law is affirmative, the arbitrator should be able to decide in any of the above situations. If negative, it is to be questioned whether the above distinction can produce different results.

The response to the query may be different in those jurisdictions where the arbitrator may not decide issues which the parties may not settle, and in the other ones which do not apply this restriction.

In the former, the parties may not settle and the arbitrator may therefore not decide on rights of which the parties may not dispose. As to nullity, for example, a distinction may be made[21] between nullity due to breach of a mandatory provision and nullity on grounds of which the parties may dispose. The nullity of agreements or practices under EC antitrust law as well as abuses of a dominant position, are not issues of which the parties may dispose and the Court has in such jurisdictions the duty to declare this of its own initiative. However the parties may dispose of the damages and financial rights arising from them.

In these jurisdictions, a tendency not to grant to arbitrators the right to decide such issue will be found, with variations such as a possible distinction between declaratory awards – not allowed – and rejection of a claim or of the defence which would be allowed. The earlier comments on such distinctions are to be confirmed.

In the other jurisdictions, where the arbitrator's authority does not meet such a limit, the arbitrator shall be entitled to declare the nullity. The party which does not accept the award shall be then entitled to apply for the setting aside of the award and the state court will be entitled to submit a preliminary issue as to EC law to the European Court of Justice.

An interesting comparison between EC and US antitrust law is made by Dalhuisen.[22] In the U.S. antitrust matters have been held to fall within the jurisdiction of the arbitrators. A landmark decision in this area in the US is *Mitsubishi*[23] although with the *caveat* that an award which should deny to a US party the right to be paid US antitrust damages would not be recognised.

Comments on whether antitrust disputes are capable of arbitration are also made by Brown and Houck,[24] Werner[25] and Hochstrasser.[26]

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[21] RUBINO-SAMMARTANO, *Il diritto dell'arbitrato (interno)* 2nd ed. Cedam, Padova 1994, 145.

[22] DALHUISEN, see *supra* note 20.

[23] *Mitsubishi Motors Corporation v. Soler Chysler Plymouth Inc.* 473, U.S. 614, 105S, Ct. 3346.

[24] BROWN and HOUCK, *Arbitrating international antitrust disputes, 7 J. Int. Arb.* 1, 77.

Dalhuisen's view seems to have to be supported. As to nullity, the solution might then depend on the general issue whether under the applicable law nullity is capable of arbitration.

19.2.5 Public Policy Nature of articles 85-86 Rome Treaty

While EC law will automatically apply when the applicable law is the one of a Member State, the issue arises whether, when the law of a non-member state applies, the arbitrators are under a duty to take into account even articles 85-86 Rome treaty as a matter of public policy.

The reported awards of arbitral tribunals have taken different views on this issue. In the award made in 1990 in ICC proceedings no. 6503[27] the arbitral tribunal sitting in Geneva and hearing a dispute between a French licensor and a Spanish licensee related to the exploitation in Spain of cosmetic products (contract governed by Swiss law) had to deal with the argument put forward by the French claimant that the licence agreement was null and void being in breach of EC law. The arbitrators were empowered to act as *amiables compositeurs* (in the sense of being free to decide under equity and natural justice); they held that EC law was not a part of the transnational public policy, i.e. not a part of the fundamental principles of legal systems, which the arbitrators had to apply.

However under the NewYork Convention[28] an award which has to be enforced in a EC member state will risk being rejected, if the award is in line with the different applicable law but is in breach of the public policy of the country in which enforcement is sought.

19.2.6 Applicability of EC law by the Arbitral Tribunal of its own initiative

Verbist reports awards made by ICC tribunals, which have taken the view that they could raise this issue of their own initiative.

In particular in 1992[29] in ICC proceedings no. 7181 the arbitral tribunal held:

> In view of the public policy character of article 85, the arbitral tribunal does however have to examine ex officio whether article 1.6 of the agreement is not caught by the the prohibition of restrictive agreements.

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[25] J. WERNER, *Application of Competition Law by Arbitrators*, 12 *J. Int. Arb.* 1, 21.

[26] D.HOCHSTRATTER, *Choice of law and foreign mandatory rules in international arbitration*, 11 *J. Int. Arb.* 1, 57.

[27] H.VERBIST, *L'application du droit communautaire dans les arbitrages de la CCI, Bull. CCI, Suppl. Spec.*. 1994.

[28] Art. V, 2(B) New York Convention (1958).

[29] H.VERBIST, *cit.*, 43.

19.2.7 Arbitral Precedents.

The ICC Bulletin[30] reports three awards dealing with EC antitrust law.

In the interim award made in ICC procedings no. 6106 (1990) the tribunal held that under French and Italian law arbitrators may decide that an agreement is not in breach or articles 85 and 86, Treaty of Rome and that, since there was no violation of the EC antitrust law, the issue was capable of arbitration.

In the final award in ICC proceedings no. 7097 (1993)[31] the arbitral tribunal pointed out that several ICC awards had already held that arbitral tribunals were entitled to decide issues of European competition law.

In ICC proceedings no 7673 (1993), reported by Verbist [32] in his wide su r-vey of ICC awards, the tribunal held that arbitral tribunals may, as state courts, decide the civil consequences of the infringement of article 86.

19.2.8 Court Precedents

In the US the Supreme Court in *Mitsubishi*[33] held that an agreement to submit antitrust claims to arbitration was to be enforced by the US courts as to international disputes.

The Swiss Federal Court in 1992 held[34] that arbitrators may decide on the consequences of a situation which has been declared to be in breach of the Treaty of Rome.

The European Court of Justice in *Ahlstrom*[35] applied EC antitrust law to a situation where the parties were not operating either directly or through subsidiaries in the Common market, holding that their conduct affected its market.

In *G v.V.*[36] the Swiss Federal Court set aside an award on the grounds that it had not decided the issue raised by a party that the agreement was void under article 85, Rome treaty.

In France, *Labinal* held:[37]

> The nature of *loi de police économique* of European competition law prevents the arbitrators from issuing injunctions or imposing penalties. However, the arbitrators may draw civil consequences from a conduct which is in breach of public policy.

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30 *ICC Bulletin* 5, no 2, 41.

31 VERBIST, *cit.*, 40.

32 VERBIST, *cit.*, 38.

33 See *supra* note 27.

34 Swiss Federal Court, ATF/B 118 (1992) II, 193.

35 *Ahlstrom v.Osakeythio et al.*, European Court of Justice, September 27, 1988.

36 *G. v. V.*, Swiss Federal Court, April 28, 1992, *Rev. arb.* 1993, 124.

37 *Sté Labinal v. Stés Mors and Westland Aerospace*, May 19, 1993, *Rev. arb.* 1993, 645.

European competition law was also the subject of judgments of the European Court of Justice.

In *Belgische Radio*[38] the Court held:

> the prohibitions contained in Arts. 85 and 86 are both effective without a prior finding being required from the EC Commission that a particular agreement is restricting trade within the meaning of article 85 or is an abuse of a dominant position as prohibited by Art. 86.

In *Ahmed Saeed*[39] the Court held that in the event of the European Commission not having intervened to put an end to an infringement or to apply sanctions, the national administrative or state courts have jurisdiction to draw consequences from this infringement and to declare the agreement null and void.

19.3 DIRECTIVE 93/13 EC, CONSUMERS' PROTECTION AND ARBITRATION

Within its programme to protect consumers, the EC Commission has issued directive 93/13/EC[40] which aims to protect consumers against oppressive clauses.

The directive includes amongst oppressive clauses those[41] which have the scope or effect:

> to take disputes exclusively to arbitration not governed by legal provisions.

Such clause, if entered into *prior* to the dispute, is then of no effect, unless it has been *negotiated* by the consumer.

It follows from this that, in case of an arbitration agreement subsequent to the dispute, this restriction does not seem to apply. It is submitted that the same result should be achieved if the parties confirm, after the dispute, an arbitration clause entered into before it.

A second requirement, in order that the clause be treated as oppressive, is that arbitration be the *exclusive* remedy. If one of the parties remains free to opt for Court proceedings, then the clause is not treated as oppressive.

Eventually, arbitration must not be 'covered' by legal provisions. This wording is not clear enough. Literally, it could mean that all administered

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38 *Belgische Radio en Televisie v. Sabam et al.*, Court of Justice of the European Communities, January 30, 1974, *ECR* 1974, 51.

39 *Ahmed Saeed v. Flugreisen*, Court of Justice of the European Communities no 66/86, *ECR* 1989, 803.

40 Council's Directive 93/13 dated April 5, 1993.

41 Art.3.3 letter q).

arbitration might be considered oppressive, a conclusion which does not seem acceptable.

The opposite construction seems preferable, according to which if the applicable law includes provisions on arbitration then the clause is not oppressive. This should include administered arbitration, provided it does not derogate from statutory provisions of the applicable arbitration law.

The ambit of these derogations has to be established. It is suggested that one should take into account only major derogations.

Several Member States have implemented the Directive, and on that occasion may have used a different wording. A reference is then to be made to each national legislation situation. Under Italian law,[42] for example, a clause which ousts the jurisdiction of the courts is treated as oppressive unless it has been the object of a specific negotiation. However in general negotiation of the clause seems advisable.

[42] Section 1969-bis, no. 18 Civil Code.

CHAPTER 20

SPEED IN ARBITRATION

SUMMARY: 20.1 Delays During the Proceedings – 20.2 Speed and Quality – 20.3 Due Speed – 20.4 Accelerated Arbitration – 20.5 Fast Track Arbitration – 20.6 ICC Fast Track Arbitration – 20.7 Arbitration On Line

20.1 DELAYS DURING THE PROCEEDINGS

Speed is one of the main reasons why arbitration is chosen rather than Court proceedings. Yet the duration of many arbitral proceedings is frequently much longer than the claimant anticipates.[1]

Even if one forgets the very long duration of proceedings like *SEEE v. Yugoslavia*[2] and some great sagas like *Dame Krebs*[3], *MINE*[4] and the *Pyramids,*[5] a duration of several years is by no means infrequent.

This might lead one to believe that a long duration is inherent in arbitration. This view must be strongly rejected. A long duration of arbitral proceedings is certainly not an inevitable evil. On the contrary, arbitration may be short and, when this is not so, it is frequently due to several pathologies which may be avoided or monitored if the arbitral tribunal pays attention to them.

One of such pathologies is the use of dilatory tactics by the Defendant, and occasionally by the arbitrator appointed by him. Another reason for delay is the lack of adequate attention paid by some arbitral tribunals to the running of time. On other occasions, this may be due to the tribunal's difficulty in mastering the proceedings.

Unless the tribunal decides from the beginning, preferably after hearing the parties, what the duration of the proceedings should be, and unless it works out

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1 Frequently between 2-4 years; much more detailed statistics have been published in this respect by the ICC.

2 *Société d'Etudes et d'Entreprises v. Socialist Federal Republic of Yugoslavia et al,* Court of Appeal, Rouen, November 13, 1984, *Yearbook Commercial Arbitration* 1986, Vol. XI, at 491.

3 *Dame Krebs et al. v. Milton Stern et al*, Court of Cassation (France) June 16, 1976, *Clunet* 1977, 671.

4 *Maritime International Nominees Establishment v. The Republic of Guinea*, Court of Geneva, March 13, 1986, *Yearbook Commercial Arbitration,* 1987, Vol. XII, at 183.

5 *République Arabe d'Egypte v. Southern Pacific Properties*, Court of Appeal, Paris July 12, 1984, *Clunet* 1985, 13°, confirmed by the Court of Cassation (France).

a timetable and it takes care to keep to that as closely as possible, the proceedings definitely will tend to drag.

Another cause of delay may have to be attributed to the number of arbitrators. The more people are to be accommodated in order to fix a hearing, the longer the proceedings will tend to last.

This very short review of some of the reasons for delay confirms that the long duration of some arbitral proceedings is not physiological but is solely due to the way such proceedings are conducted.

20.2 Speed and Quality

An excuse which is occasionally put forward in order to try to justify delay is that speed must not be permitted to affect adversely the quality of the award.

It is suggested that the argument does not stand up. It is admitted that a rushed decision is likely to prejudice its quality. However slow proceedings are not a guarantee for quality. Both slow and rushed proceedings are excesses to be avoided.

Furthermore, no one suggests that quality should be sacrificed to speed. The award should both be good and made quickly, not in the sense that arbitrators have to decide under time pressure, but that they must avoid the proceedings lasting longer than necessary.

In order to achieve this, a reasonable timetable – as earlier discussed – is necessary. This means that a deadline for each procedural step is to be established and that the tribunal must ensure that the timetable is followed. This also means that there will be some pressure compared to the relaxed attitude frequently due to the absence of timetable and or of any monitoring.

20.3 Due Speed

Admittedly it is easy to advocate speed in general terms, while it is less easy to try to identify the ideal duration.

Duration may indeed vary depending on the proceedings. Amongst the relevant factors are the number of parties, of Counsel, of arbitrators, of documents, of witnesses, and the number and difficulty of the issues to be decided. A further element which may considerably influence the duration of the proceedings is the appointment of a neutral expert in those legal systems or proceedings in which this formula is applied.

The duration may be even longer when many claims are made in the same proceedings and each of them could be the object of one proceeding. This is frequently the case in construction disputes. This reflects on documentary and oral evidence since only very rarely are they handled separately for each claim. This requires a much bigger effort from Counsel and the arbitrators.

A reasonable duration will then vary depending on the proceedings. In some national legal systems a deadline is set out for making the award. In some of them a duration of three months is established; in other legal systems a duration of six months is set out. In some jurisdictions, extensions of this time limit may only be granted by consent. In other ones, extensions may also be granted by state courts. It must be admitted that frequently, except for quality arbitration, a three months duration is too short a time limit.

Speed, being a very controversial subject, attracts very different opinions. According to some one should not care about speed; according to others even three months would be too long. It is submitted that neither view can be shared. Neither the former, (since it forgets that one of the main targets of the arbitral process is a quick decision), nor the latter (since the time required for the reply, for the filing of further pleadings, for oral evidence, for deciding on applications for discovery, for hearing expert witnesses or neutral experts) cannot be shortened beyond certain limits without affecting due process.

It is suggested that the arbitration rules which set out a six or a nine month time period and provide for a timetable have struck a reasonable solution between the above two excessive views. That is the case of the Geneva Chamber of Commerce Expedited Arbitration Rules.[6]

Due importance is given to speed by English Law, which at Sections 1(a) and 33(1)(b) lists amongst the principles of arbitration the target to obtain the resolution of the dispute

> without unnecessary delay or expense.

20.4 ACCELERATED ARBITRATION

Although a six month duration should prove sufficient, according to a very wide opinion the duration of administered arbitration should be entirely left to the arbitrators and to the arbitral institution, while arbitration with a fixed time limit for the award could be referred to as *accelerated* proceedings. This definition is correct, if compared to the slow progress of the majority of the proceedings. However a *double rail* cannot be approved, since six months should be the standard duration of proceedings. The use of the term 'accelerated' merely aims to emphasise the attention which is paid to the time element.

If contrary to this one accepts the distinction between quick and slow proceedings, it is not obvious to which category of litigant's arbitration rules should reserve the slow proceedings.

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[6] Rule 31; see P. TSCHANZ, *The Chamber of Commerce of Geneva, Expedited Arbitration Rules*, 7 *J. Int. Arb.* 4,4.

The arbitration rules which provide that the award is to be made within a six-month period, or another short time limit, do not generally provide for another set of rules regulating *slow* proceedings.

The use of the term accelerated in the sense of '*not slow*' is to be found in the arbitration rules of the Italian Delegation of the European Court of Arbitration[7] as a reference to a characteristic of its proceedings and therefore without providing for a separate set of rules for slow arbitration.

The key to speedy or accelerated proceedings is, as earlier discussed, a timetable and close monitoring of it. An example of a timetable of proceedings is provided by the arbitration rules of the European Court of Arbitration.[8]

20.5 Fast Track Arbitration

While the term *accelerated* is a synonym for which all arbitral proceedings, in trade and commodity arbitration the parties are accustomed to faster proceedings.

Maritime and commodity arbitrations provide for a short duration as well as Fosfa[9] and Gafta[10] which for quality arbitration foresee a maximum duration of 60 days from appointment. These may indeed be considered fast-track arbitration.

As to proceedings other than on quality, which Fosfa and Gafta define as technical arbitration, no strict timetable applies, except that submissions and documents are to be exchanged without delay.

Gafta further provides:[11]

> It shall be the duty of the Chairman of the tribunal to see to the proceedings of the arbitration. Any delay in the proceedings on the part of the tribunal may be notified to the Association which shall upon application by either party set down date(s) for hearing(s).

Fosfa too deals with delay:[12]

> If an arbitrator or umpire delays unduly he may be called upon to explain the reasons for the delay to the Executive Committee of the Federation or any other body which the Council may appoint for that purpose and which shall make recommendations to the Council. The Council shall have the power to remove an arbitrator or an umpire from

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7 2000 edition.

8 See *infra* at Chapter 23.20.

9 Federation of Oil, Seeds and Fats Association Ltd., Arbitration Rules (1987 edition).

10 Grain and Feed Trade Association.

11 Gafta, see supra note 10, art. 3.3.

12 Fosfa, see supra note 8.

> the Arbitration and Appeal Panel if it considers that the delay is caused by wilful negligence or that [the delay] is likely to bring the Federation's arbitration system into disrepute ...

On the notion of *creating value by designing the process* in a given way (a notion which may well apply to fast-track arbitration) see Augenblick[13], Mean[14] and Robine.[15]

20.6 ICC FAST TRACK ARBITRATION

By the end of October, beginning of November, 1991 two arbitrations were introduced at the ICC which required the award to be made by December 30, 1991. The cases were complex and several crossmotions had been filed; a 30 day time limit for the answer to the request was to run. On December 5, 1991 the ICC secretariat gave to the parties a deadline up to December 9 to adopt a stance on pending matters and to express their views on the appointment of a common chairman of these tribunals. After further procedural motions and crossmotions on December 20, 1991 the tribunal was eventually constituted, the file was sent to the arbitrators and consent was given by all the parties to extend the deadline for the award up to January 8, 1992.

The terms of reference were completed on December 27 and the tribunal ordered that all written submissions be made by December 30. A one-day hearing was held on January 2, 1992. The draft final award was submitted to the secretariat the second day after the closing of the hearing and was approved by the Court at its session on January 7. The award was notified to the parties on January 7. The various steps of these proceedings are reported by Davis[16] and Silverman.[17]

It is suggested that the ICC fast-track arbitration provides a useful lesson.

First, it is possible to reach a decision within two months. Second, the Defendants have not complained that they were unable to present their case. Third, apart from procedural issues, the case has been tried and decided in the extraordinarily limited time between December 20 and January 7 i.e. in 18 days, furthermore in the very middle of the winter vacations.

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[13] M. AUGENBLICK, *Creating Value through Process Design,* 11 *J. Int. Arb.* 1, 133.

[14] J. P. MEAN, *Creating Value Through Process Design,* 11 *J. Int. Arb.* 1, 134.

[15] E. ROBINE, *Creating Value through Process Design,* 11 *J. Int. Arb* 1, 136.

[16] B. DAVIS, *Fast Track Arbitration, Different Perspectives*, ICC Bulletin no. 3/2, November 1992, 5; *id, Fast Track Arbitration and Fast Tracking Your Arbitration,* 9 *J. Int. Arb.* 4, 43; see also DAVIS-LAGACE VOLKOVITSCH, *When Doctrines Meet,* 10 *J. Int. Arb.* 4, 69 and S. SMID *The Expedited Procedure in Maritime and Commodity Arbitration,* 10 *J. Int. Arb.* 4, 59.

[17] M. SILVERMAN, *The Fast Track Arbitration of the International Chamber of Commerce,* 10 *J. Int.* Arb. 4, 69.

Lastly this miracle is largely due to the great drive of the arbitrator, Prof. Hans Smit. Eventually, as it happens with miracles, it will not be repeated frequently.

Nevertheless Smit's exploit is not totally isolated, which does not deprive it of its merit because it has occurred in situations where such pace is by all means not frequent. The sport arbitral tribunal, which is accustomed to make quick decisions, has provided even at the Olympic Games at Nagano, Japan examples of all its speed. In *Rebagliati*[18] the dispute concerned a Canadian athlete who had won the gold metal for giant slalom. During anti-doping tests it had turned out that his test had showed traces of marijuana. The International Olympic Committee disqualified him and withdrew the medal. The Sport Tribunal had the task of deciding within 24 hours. After hearing the parties, the arbitrators decided within such a time limit that the medical code of the International Olympic Committee did not include marijuana among the prohibited substances. Consequently the resolution of the International Olympic Committee to disqualify Rebagliati was set aside.

Similarly, in *Samuelsson.*[19] In Nagano a hockey player, Uhl Samuelsson was playing for Sweden and participated in several matches through which Sweden qualified for the quarter final against Finland. At that moment it turned out that Samuelsson was playing in the wrong team since he was not a Swede, but an American. The news came as a bombshell; the query arose whether Samuelsson could continue to play for Sweden and whether the matches played by Sweden with his participation were valid or had to be treated as lost.

The International Olympic Committee excluded Samuelsson from the game while it kept Sweden's victories. Samuelsson and Sweden appealed against the first part of the decision before the Sport Arbitral Tribunal. Likewise another national team appealed against the second part of the decision which allowed Sweden to continue, in the hope that it would be disqualified, which would have suited that other team.

The award excluded Samuelsson from the Olympic Games since he had been living and playing in the United States for many years and had become an American national in 1995. What he did not know was that having acquired another nationality he had automatically lost Swedish nationality and therefore could not be a member of the Swedish team.

As to the validity or not of the games played by Samuelsson for Sweden, the Tribunal came to the conclusion that the provision, which disqualifies any team which has played with a non-qualified participant, applies only to cham-

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[18] *Rebagliati v. CIO*, quoted by G. KAUFMANN KOHLER, *Nagano et Arbitrage ou vers une justice de proximité*, *ASA Bulletin* 1998, 2, 314.

[19] *Samuelsson v. Fédération Internationale de Hockey* quoted by G. KAUFMANN KOHLER, see *supra* note 18.

pionships and not to Olympic Games. This allowed the Tribunal not to alter the result of the previous games.

Another example of fast track arbitration is provided by the Contract Recognition Board, which decides in few days disputes arising between Formula 1 teams as to the hiring of drivers.

One owes to Lord Mustill[20] a very interesting reminder that about 40 years ago arbitration was very fast and informal and that, by becoming over formal and over lawyered, it has lost its speed. The learned Lord of Appeal seems mainly to refer to trade arbitration which was so frequent in London and even today is much faster than ordinary arbitration.

20.7 ARBITRATION ON LINE

Due to the ever-increasing capability of the Internet, one has also suggested that arbitration be handled on-line, making reference to *cyber awards*.

It is possible to take oral evidence and to discuss the case on line, and this might even favour conciseness. The transmission of documents and pleadings may be done by e-mail. Oral evidence may be more satisfactorily taken by video conference.

In conclusion there is no technological nor intellectual obstacle to holding arbitration on-line. However, at least for the time being, this may give rise to a real technological *exploit*[21] but it does not seem likely that it will become a normal way of conducting arbitral proceedings, at least not in the immediate future.

Arbitration on line has been discussed by many writers.[22]

The Cyber Tribunal was formed by the Law School of the University of Montreal in 1996 while at the same time the University of Massachussets gave birth to the Online Ombuds Office.

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[20] M. MUSTILL, *Comments on Fast Track Arbitration*, 10 *J. Int. Arb.* 4, 123.

[21] Extraordinary accomplishment.

[22] *The Virtual Magistrate Project, Riv. arb.* 1998, 2, 440; M.E. SCHNEIDER and C. KUNE, *Disputes Resolution in International Electronic Commerce,* 3 *J. Int. Arb.* 1997, 5; B. KAHIN and C. NESSON, *Borders in Cyber Space*, Cambridge (Mass.) – London 1997; D. R. JOHNSON and D. POST, *Law Borders – The Rise of Law in Cyberspace*, – Stanford Law Review, 1996, 48, 1367;Eric A. CAPRIOLI, *Arbitrage et Médiation dans le commerce éléctronique (L'Expérience du Cyber Tribunal) Rev. arb.* 1999, 2, 225, V. GAUTRAIS, K. BENYEKHLEF and P. TRUDEL, *Cybermédiation et Cyberarbitrage: l'exemple du 'CyberTribunal'*, DIT 1998/4, 46; M. S. DONAHEY, *Disputes Resolution in Cyberspace,* 15 *J. Int. Arb.* 4, 126; H. SMIT, *Fast Track Arbitration*, 2 *American Review of International Arbitration* 1992, 138; MÜLLER, F*ast Track Arbitration, Meeting the Demands of Next Millennium,* 15 *J. Int. Arb.* 3,5; R. HILL, *The Internet Electronic Commerce and Disputes Resolutions Comments*, 14 *J. Int. Arb.* 4, 1997, 103; J. ARSIC *International Commercial Arbitration on the Internet*, 14 *J. Int. Arb.* 3, 209.

CHAPTER 21

DOCUMENTS ONLY ARBITRATION

SUMMARY: 21.1 Specific Problems of Middle Size and Small Claims – 21.2 Consumer Arbitration – 21.3 Documents Only Arbitration – 21.4 Documents only Arbitration and Due Process

21.1 SPECIFIC PROBLEMS OF MIDDLE SIZE AND SMALL CLAIMS

As earlier discussed, for the claimant in arbitral proceedings speed is of the essence. It is difficult then, as earlier discussed, to accept that speed could be planned abstractly in different ways i.e. that there could be fast track arbitration, accelerated arbitration, slow and possibly also very slow proceedings.

Speed should depend on the circumstances and on the diligence of the arbitrators, rather than being granted or refused depending on the type of dispute, such as the amount in dispute or the subject matter.

However speed, important as it is, cannot solve by itself all the difficulties which are met in arbitral proceedings, such as the costs of the proceedings. While some very large disputes might be indifferent to costs, when it comes to middle size or small disputes costs become a delicate issue, since frequently they are out of proportion with the amount in dispute. In such situations, reducing the number of the arbitrators from three to one may be the solution.

In spite of this the tendency of arbitration rules is to provide for three arbitrators, without distinguishing between large disputes and the other ones.

Some arbitration rules are very explicit about this, such as the rules of the German Institution of Arbitration which provide:[1]

> The arbitral tribunal shall consist of three arbitrators, unless the parties have agreed to nominate a sole arbitrator.

Other rules make reference to a sole arbitrator, but frequently appoint three arbitrators. That is the case of the ICC arbitration rules[2] which state:

> Where the parties have not agreed upon the number of arbitrators, the Court shall appoint a sole arbitrator, save where it appears to the Court that the dispute is such as to warrant the appointment of three arbitrators.

The arbitration rules of the American Arbitration Association[3] provide:

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1 Art. 3, 1992 edition.

2 Art. 8.2, 1998 edition.

3 Art. 5, *International Arbitration Rules*, 1997 edition.

> If the parties have not agreed on the number of arbitrators, one arbitrator shall be appointed unless the administrator determines in its discretion that three arbitrators are appropriate because of the large size, complexity or other circumstances of the case.

In spite of such wording three arbitrators are frequently appointed in international disputes.

However, as above discussed, when it comes to medium-size arbitrations the appointment of a sole arbitrator frequently becomes a need from a financial point of view.

On these grounds, the European Court of Arbitration has clearly provided for one Arbitrator:[4]

> If the parties have not specified the number of arbitrators, the Court shall decide their number having regard to the nature of the dispute and to the specific problems and features of the dispute. Generally the Court shall favour the appointment of a sole arbitrator to facilitate a speedier settlement of the dispute and reduce the costs of the proceedings.

Furthermore this Court has made the sole arbitrator a basic element of its arbitration rules and has described this as

> A sole arbitrator who is to make the award within nine months'

21.2 CONSUMER ARBITRATION

Nevertheless, when it comes to small claims, even the fees of one arbitrator and of Counsel are out of proportion. One has then to simplify the proceedings in such a way that the fees of the arbitrator be cut down as much as possible remaining reasonable in respect of the activity which he is called upon to perform. The solution to this problem has been found by the Chartered Institute of Arbitrators[5] which was invited to do so by the Office of Fair Trading.

The first body which benefited of this simplified procedure was the Association of British Travel Agents.

Other schemes followed suit, like the Post Office consumers' arbitration scheme for loss in the inland post.[6]

Such schemes are real arbitration which normally is set in motion by the consumer's choice after the dispute arises.

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4 Art. 9.5.

5 Having its seat in London and branches in many other countries.

6 See also the *Consumer Arbitration Act* and D. R. THOMAS, *Consumer Arbitration Act,* 1991, 48.

Another characteristic of consumer arbitration is that the consumer's contribution to the costs of the proceedings is very limited. Only a registration fee is to be paid by the consumer, while a similar or higher amount is to be paid by the other body, which will be an insurance company or the supplier of services or goods.

Another aspect of consumer arbitration is that each party bears its own costs in order to prepare and to present its case, which generally – in view of the small amount in dispute – will be done without legal advice.

A further element of consumer arbitration is the acceptance by the parties of a very simplified procedure which frequently will be a documents-only proceeding.

Other bodies, seeing the benefit of simplified consumer schemes for their customers and for themselves – as an incentive to their customers to trade with them, have adopted similar schemes.

This is for example the case of the Glass and Glazier Federation, of British Telecom and of British Rail.

The consumer arbitration scheme is frequently adopted by a trade association for disputes involving its members. If so, if a member of that association does not comply with the scheme this would amount to a breach of the regulations of that Association.

The whole procedure is reported to take in general from two to three months. The Chartered Institute in 1987 was already dealing with about 1000 consumer arbitrations.

21.3 Documents Only Arbitration

The scheme adopted for consumer arbitration is in general documents – only arbitration[7] which is *not oral* and is based only on claimant's submissions, respondent's submissions and a written reply by claimant.

The submission and its documents are sent to the arbitrator who reviews them initially in order to establish whether the dispute would be suitable for a documents-only arbitration and he may then accept the appointment. If so he may decide to issue Directions in order to receive the relevant documents which in his view are missing.

This preliminary survey of the documents is then followed by a more detailed study of the bundle of documents, putting together each single detail.

If any preliminary matter arises, it is dealt with by the arbitrator by letter, to which the parties shall have to reply in the same way. The parties and their

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[7] L. SLADE, *Documents Only Arbitrations and The Chartered Institute's Low Cost Schemes for Consumer Disputes*, *Arbitration* 1987, 87.

Counsel, if any, are *not* heard and there will be *no oral evidence*, while witness statements or affidavits are allowed.

The arbitrator frequently makes his award within 15 days from receipt of the final documents.

These proceedings are discharging a relevant social task by allowing effective access to justice of small claims as well.[8]

21.4 Documents Only Arbitration and Due Process.

The above described simplified procedure of documents-only arbitration must nevertheless comply with the rules of due process and therefore allow each party to present its case and to comment on the case presented by the opposing party.

The question then arises whether the parties' *waiver to oral evidence and to oral debate* is valid and therefore whether the parties may waive their right to call oral evidence and to address the arbitrator orally.

In England on the one hand it has been held in *Russian Oil*[9] that the parties, by express or implied agreement, may dispense with an oral hearing. On the other hand in *Sokratis*[10] in a situation where the arbitrators proceeded to an award on documents-only without giving any notice to the parties of their intention to cut short the proceedings in that way, it was affirmed that the arbitrators must ensure that the parties know exactly:[11]

> where they stand.

The right of the parties to waive final oral address has been affirmed in *Auckland.*[12]

In France it was held in *Images de France*[13] that under section 1460 *civil procedure code*, only the fundamental principles of court proceedings apply to arbitration, and that a hearing with Counsel and the parties is not essential for the proceedings to be valid.

In other jurisdictions, like Italy, the analysis has gone further.[14]

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8 M. RUTHEFORD, *Documents Only Arbitrations and The Chartered Institute's Low Cost Schemes for Consumer Disputes, Arbitration* 1987, 91.

9 *Russian Oil Products Ltd, v. Caucasian Oil Co. Ltd,* (1928) 31 *Lloyds Report* 109.

10 *Sokratis Rokopoulos v. Esperia*, The Aros (1978)1 *Lloyds Report* 456.

11 *Auckland Metal Corp. Ltd. v. B. Benheim &Co. Ltd,* (1953) 2 *Lloyds Rep.* 1982.

12 MUSTILL AND BOYD, *Commercial Arbitration, Butterworth* 1982,262

13 *Technor v. Sté Images de France*, Court of Appeal, Paris July 12, 1971, *Rev. arb.* 1973, 74; see also de BOISSESON, *Le droit francais de l'arbitrage*, Joly 1990, 376.

14 M. RUBINO-SAMMARTANO, *Arbitrato semplificato e arbitrato solo su documenti, Foro pad.*, 1990, I, 3.

It has been stressed[15] that the concentration of the proceedings is not to the detriment of the parties but, on the contrary, is more in line with the fundamental requirements of a trial.

Second, the concern has been expressed[16] that the arbitrator might find himself obliged to decide without being able, contrary to his own view, to hear oral evidence and/or to hold a hearing. However this concern is set-aside by the provision that the arbitrator is entitled, upon his receiving the file, to advise that the dispute may not be decided on documents only. This right of the arbitrator is set out clearly for example in the documents-only arbitration rules of the Italian Delegation of the European Court of Arbitration.[17]

One has then to examine whether the parties are entitled or not to waive their right to be heard, directly or through Counsel, at a hearing and to call oral evidence. To this end it has been suggested[18] that one should distinguish between the right to prove one's case and the way a party intends to prove it.

The parties should be free to decide how they wish to prove their case, i.e. by what means.

For example in civil law systems in court proceedings the parties may waive the right to file further pleadings after the Defence and/or even to address the court, after filing their final written pleading. Similarly a party may waive the right to hear a witness whom it has called, unless the opposite party refuses to consent to this.

The way a party intends to prove its case before a state court is then left to that party itself.

Arbitral proceedings are more liberal than Court proceedings. The parties are frequently free to choose the procedural rules. This view is fortified by the international conventions.

The Geneva Convention (1923) provides[19] that:

> The arbitral procedure ... shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place.

Amongst the grounds for refusal of recognition of foreign awards, the New York convention 1958[20] provides the following one:

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[15] VECCHIONE, *Arbitrato nel processo civile (Arbitration)*, Milano 1961, 504; see also SATTA, *Commentario al cod. proc. civ.* IV, (Commentary to the Rules of Civil Procedure) 2 sub section 816, 62.

[16] RICCI, *La prova nell'arbitrato rituale*, (Evidence in Arbitration) Milano, 1964.

[17] Art. 6, Documents-Only Arbitration Rules of the Italian Delegation of the European Court of Arbitration.

[18] M. RUBINO-SAMMARTANO, *cit.* 39.

[19] Art. 2.

[20] Art. V, 1 (d).

> ...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.

Amongst the grounds for setting aside the award, the Geneva Convention (1961) includes[21] the situation where:

> ...The arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the provisions of article 4 of this convention.

The Washington Convention (1965) provides:[22]

> Except as the parties otherwise agree, the tribunal may, if it deems it necessary at any stage of the proceedings:
>
> a) call upon the parties to produce documents or other evidence
>
> b) visit the scene connected with the dispute and conduct such inquiries as it may deem appropriate.

And the UNCITRAL Model Law (1985) states:[23]

> Subject to the provisions of this law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.

Several arbitration rules dispense with the oral hearings.
The ICC arbitration rules provide:[24]

> The arbitral tribunal may decide the case solely on the documents submitted by the parties unless any of the parties requests a hearing.

The London Court of International Arbitration Rules state:[25]

> Any party has the right to be heard before the tribunal, unless the parties have agreed on documents-only arbitration.

And the American Arbitration Association Commercial Arbitration Rules (1988) provide:[26]

> The parties may provide, by written agreement, for the waiver of oral hearings. If the parties are unable to agree on the procedure, the American Arbitration Association shall specify a fair and equitable procedure.

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[21] Art. 9.1 d).

[22] Art. 43.

[23] Art. 19.

[24] Art. 20.6 (1998 edition).

[25] Art. 10 (1985 edition).

[26] Art. 37 (1988 edition).

It is suggested that the conclusion of this analysis is that the parties may waive the right (i) to be heard, (ii) that Counsel for them be heard too (iii) as well as to hear witnesses and experts.

In order to avoid any possible outstanding doubt, it is suggested that a distinction should be made between waivers made before the dispute arises and waivers made after it. In fact one might take the view that in the former case (the waiver being made at a time when the party did not yet know what it should prove in the future dispute) this waiver is not very strong while, after the dispute has arisen, the parties are in a better position to assess their needs concerning how to present and prove their case. The waiver at this stage is then stronger.

In view of that, the European Court of Arbitration has provided in its documents-only arbitration rules[27] that, *after* the dispute has arisen, the parties are to *confirm* their earlier waiver.

[27] Arts 2 and 4 (1997 edition).

CHAPTER 22

THE VENUE OF THE PROCEEDINGS

SUMMARY: 22.1 Notion of Venue – 22.2 Effects of the Choice of the Venue – 22.3 Criteria for the Choice of the Venue – 22.4 Delegation of the Choice of the Venue – 22.5 Holding Part of the Proceedings Elsewhere – 22.6 Effects of Non Compliance with the Venue – 22.7 Change of the Venue – 22.8 Lack of Choice of Venue and Lack of Designation of Authority

22.1 NOTION OF VENUE

A first distinction has to be made between the domicile of the arbitrator and the venue of the arbitral proceedings. In some situations they may coincide but in general they are two separate concepts and only the second one will normally matter.

The venue is the place where the arbitral proceedings are to be held, and in this respect it may be compared to the seat of a Court of law.

However in arbitration the role it plays is more important. In court proceedings the place where the judge actually signs his judgment is not material, since that will be treated as a judgment of that court, independently of the place where the judgment is actually signed

In contrast, in arbitral proceedings, the place where the award is actually signed has several consequences which will be considered hereafter. In *Gautier*[1] the French Court of Cassation held:

> The expression 'arbitration in Lyon' does not mean that the entire proceedings must necessarily take place in Lyon but that at least the decision has to be made there by the arbitrator, the place where the decision is made being relevant for challenges against the award.

and therefore that the principle must be firm but its application may be flexible to a certain extent. So the choice by the parties – or by an arbitral institution or by a third party – of a given venue of the arbitral proceedings will not normally prevent some steps of the proceedings from being held outside of it. The French Court of Cassation has shared this view in upholding the opinion expressed by the Court of Appeal, Lyon[2] that:

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1 *Gautier v. S.té Astra Plastique,* Court of Cassation (France), February 9, 1994, *Rev arb.* 1995, 127.

2 In the same proceedings.

> No statutory provision ... obliges the arbitrators to perform *all* (emphasis added) what is required to discharge their task including the discussion of the case in the same place.

However, this opening may not go so far as to allow the entire proceedings to take place outside the venue and that the venue becomes the *facade* of an empty building.

Occasionally one comes across the statement by the parties and/or by the arbitrators that, even if the award is made outside the venue of the proceedings, nevertheless the award is deemed to have been made in it. It is submitted that this is not acceptable since the place where the award is made is a fact, and the parties may not change a fact even by consent.

What the parties may enter into is a waiver to the right to challenge the award on the ground of non respect of the venue, unless the *lex fori* provides otherwise through a mandatory provision.

22.2 Effects of the Choice of the Venue

The choice of the venue of the arbitral proceedings produces effects in various respects.

Its first effect is that the mandatory provisions of the *lex fori* shall apply.

Second, in some jurisdictions, the arbitrators as well as state courts will apply to the proceedings the national substantive law of the *forum.*

Third, the venue may influence the validity of the arbitration agreement. The choice of a given venue may, depending on the chosen State, allow national state courts to interfere with the arbitral proceedings or prevent them from so doing.

Also it may or may not allow national state courts to intervene in aid of the proceedings.

Furthermore the choice of a given venue may favour one of the parties from the point of view of the distance, the costs to be met (for example in order to transfer the parties, Counsel and witnesses) and the need to instruct local Counsel. If so, one of the parties may find itself in a better position than the opposite one and the choice made may affect the possibility for a party to defend its case easily (and this is one of the sources of the *forum non conveniens* defence) or to ensure that its witnesses attend the hearings.

It is sufficient to imagine proceedings taking place in some Arab countries and the consequent impossibility or difficulty of having witnesses of Israeli nationality attending them.

Recognition of the award in the countries where the parties reside may depend on the place of arbitration. An example of this is the *Keban* arbitration:[3]

> The arbitral proceedings between Italian and French contractors and the general management of the Turkish Ministry of Public Works took place in Switzerland, which had not entered into any convention with Turkey for the recognition of awards. When the contractors, who had won the dispute, tried to enforce the award in Turkey, the award was not recognized on this as well as on other grounds.

A clearly local choice is made by the Russian rules:[4]

> 1. The seat of the Arbitration Court and the seat of the hearings shall be the city of Moscow.
>
> 2. In case of necessity an arbitration tribunal may hold a hearing in another place.

There are other effects of the choice of the place of arbitration. Its being chosen by the designating authority, in the absence of a choice by the parties, has a good chance of influencing the choice of the procedural law. Even if it does not, nevertheless the applicable procedural rules must comply with the procedural public policy of that particular state.[5]

A place which is very convenient for one party and inconvenient for the other may then create financial difficulties to the latter and limit its possibility of presenting its case.[6]

Eventually, it may produce effects on the availability or not of challenges, and on the ambit of the review, which may even include a review of the merits.

For all these reasons the place of arbitration is an element of the greatest importance in arbitral proceedings and its choice deserves particular attention.

22.3 Criteria for the Choice of the Venue

The preceding remarks may help to identify the criteria to be followed in order to choose or to exclude a given venue. First the venue must be neutral vis-à-vis all the parties.

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3 *Compagnie de Constructions Internationales, Compagnie Française d'Entreprise et Société Impregilo v. DSI,* Court of Cassation (Turkey), decree No. 76/1052, March 10 (1976), *Arbitration,* vol. 46, No. 4, December 1980, at 241.

4 Para. 6, Rules of the Arbitration Court of the USSR Chamber of Commerce and Industry.

5 It has been pointed out that the *lex loci arbitri* does not only regulate domestic arbitral proceedings, but also provides references for the conduct of the arbitrator.

6 On the problems related to the place of arbitration and on the various doctrines in this respect see REDFERN and HUNTER, *International Commercial Arbitration,* London 1986 (REDFERN and HUNTER, at 53-54), at 61 *et seq.*

For example, interference by the local state courts with the arbitral proceedings may be a decisive criterion to exclude a given venue. Court intervention in aid of arbitration may be a decisive ground for making a choice.

The very strict review of the award made in a legal system by the state courts may for some parties be a criterion in favour of the choice of that venue, while for other ones it will not.

The view taken in that jurisdiction as to the validity of the arbitration agreement may not be ignored.

Similarly the issue of whether the state, where enforcement of the award would later be sought, has made use of the reservation of reciprocity and if so whether the state, which would be considered to be the venue of the arbitral proceedings, has acceded to the New York convention. See in this respect Born.[7]

Equal distance of the parties from the venue may also be a helpful criterion, since it may avoid that one party be heavily disfavoured and in the worst case excluded – for example due to financial or currency restrictions – from access to the hearings.[8]

22.4 DELEGATION OF THE CHOICE OF THE VENUE

The delegation of the choice of the venue to an arbitral institution, or to the arbitrators or to any other third party, may produce the result that the choice is made without bearing in mind – exactly as that party itself would have done – all the negative consequences of it for that party .

In institutional arbitration the choice of the place of arbitration, failing agreement between the parties, is generally made by the arbitral institution before it appoints the arbitrators or the chairman of the arbitral tribunal.

The arbitral institution will frequently concentrate its energies in looking for a neutral arbitrator or chairman of the arbitral tribunal, and its choice of the venue will frequently be the place where he practises.

This method is understandable but in some jurisdictions like England it may produce the result that not only the mandatory provisions of the *lex fori* will be held to be applicable but also the local procedural law.

This may occur even if the parties had made a different choice as to procedural law. In the alternative this method may create conflicts between two procedural laws, or allow a state court to interfere, contrary to what was the expectation of the parties.

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7 BORN, cit. at 71.

8 M. RUBINO-SAMMARTANO, *Developing countries vis-à-vis International Arbitration,* 13 *J. Int. Arb.* 1, 21.

In *ad hoc* arbitration in the case of silence by the parties the choice is generally made by the arbitrators.

In both cases this frequently takes place without consulting the parties, as if, because they have not reached agreement earlier, a discussion with them could not be useful for making a choice.

The arbitrators – when choosing the venue – may not take into account all the various consequences of such a choice or may be guided mainly by reasons of personal convenience.

It is then suggested that it may be preferable that the choice of the venue be made directly by the parties or at least that the parties be consulted before the third party, which is authorised to make such a choice, proceeds to make it.

22.5 Holding Part of the Proceedings Elsewhere

In international arbitration there is a tendency to meet in various places and the choice of the venue of the proceedings is generally not seen as an obstacle to some hearings being held elsewhere. However the arbitral tribunal will frequently seek the parties' consent or at least consult them.

Some hearings may then be held in places different from the venue. The same may apply to meetings of the arbitrators in order to make procedural orders. This might be extended to meetings of the arbitrators at which the award is discussed.

However, as earlier discussed, it is suggested that the venue may not become a mere facade, below which the entire proceedings or a large part of them is held elsewhere.

In *Libye*[9] the Court of Appeal Paris:

> dealing with arbitral proceedings, the venue of which was Geneva although the arbitrators had heard final argument in Paris, the procedural orders had been issued in Paris and the decision made there – while one of the arbitrators had signed the award in Paris and the other two respectively in Tripoli and in Beirut – held that the award had been made in Geneva.

The issue arises whether the award is to be signed at the venue of the proceedings. In this respect for example the Sport Arbitral Tribunal is deemed to have decided in Lausanne, whichever has been the place where the proceedings have taken place.[10]

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[9] *Société Procédés de préfabrication pour le béton v. Lybie,* Court of Appeal, Paris, October 28, 1997 *Rev. arb.* 1998, 399.

[10] G. KAUFMANN KOHLER, *Le lieu de l'arbitrage à l'aune de la mondialisation, Rev. arb.* 1998, 517.

Whenever this matter is not governed by the parties' agreement or by statutory provisions, international arbitrators tend to avoid additional travel to the venue and prefer to sign the award in their respective places of business.

The certainly involuntary tendency not to be strictly factual as to the place where the award is made is reflected in the Uncitral Model Law according to which[11] the award shall be deemed to have been made at the place of arbitration.

This may give rise to difficulties if the view is followed that the award is made where it is signed. First from the point of view of compliance with the arbitration agreement. Second, in establishing in which of these places the award has been made, whether based on the place where the last subscription was appended, or according to a different criterion.

Thirdly if one or more of the places where the award was signed, or the last of them, belong to states which have not acceded to the New York Convention, the question arises whether it is possible to enforce the award in states which had acceded to the New York Convention with the reservation of reciprocity.

22.6 Effects of Non-Compliance with the Venue.

In the rare event that the arbitrators or arbitral institution do not comply with the venue set out by the parties, one should first qualify the breach.

It is submitted that in principle it will have to be characterised as a breach by the agent of the principal's instructions.

This may lead to the duty to pay the damages which a party should suffer because of non-compliance.

If the effects of non-compliance are very modest, no further remedy might be needed. However if its effects are such as to seriously affect the rights or interest of a party, even the setting aside of the award may have to be taken into account.

The choice of a venue different from the one agreed by the parties, or in general the choice of a given venue may expose to the duty to pay a registration tax or stamp duties, while other venues would have not produced such a result .

The New York Convention provides, amongst the grounds for refusal of recognition of the award, the situation where:[12]

> The arbitral procedure was not in accordance with the agreement of the parties.

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[11] Art. 31.3.

[12] Art. V 1 (d).

This may apply when the agreement of the parties includes also the choice of the venue.

22.7 Change of Venue

The venue may be changed by consent of the parties. In this event, if the arbitrator has already been appointed, such a change will also require his consent, whenever the new venue makes the discharge of his tasks inconvenient or more difficult.

In other situations it may become necessary to change the venue. This may be needed in case of official or of *de facto* hostility of the host state to one arbitrator or to one of the parties (due to religious or political reasons or to their nationality) or of refusal of visa to any of them, or of war, riots, or terrorism.

In such situations one should expect the parties and the arbitrators to agree on the need for a change.

Obtaining consent on the new venue may be less easy. In the absence of consent, the change of venue will have to be made by the arbitral institution, if appointed. The parties should be allowed to comment on the change of venue before it is made .In any event the appointing authority will be under a duty not to make a choice which be detrimental to one of the parties. The possibility that the venue be changed by a state court will depend on the applicable arbitration law.

22.8 Lack of Choice of Venue and Lack of Designation of Authority

The *National Iranian Oil v. Israel* dispute[13] gives an opportunity to consider the difficulties which may arise from lack not only of the choice of the venue of the arbitral proceedings but also of designation of an authority empowered to do so.

This dispute is a classic example of an *impasse.*[14] Generally the parties either choose the venue or grant the authority to choose it to an arbitral institution or to the arbitrators, either expressly or by using a general language which implies this. Contrary to this practice, in such a dispute a choice of venue had not been made, nor had authority been granted to any arbitral institution or to the arbitrators to choose it:

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[13] *National Iranian Oil Company v. State of Israel*, Tribunal de Grande Instance, Paris Order January 10, 1996, ASA Bulletin 1996, 2, 319.

[14] Situation without a way out.

> The Iranian party, after appointing its arbitrator, invited Israel to appoint its own arbitrator. Israel refused. The Iranian party applied then to the Court of Paris for the appointment of the second arbitrator.
>
> The Court of Paris held that the mere reference to the ICC, Paris for the appointment of the *third* arbitrator was not creating a link between the dispute and Paris and that consequently that Court lacked jurisdiction to appoint the second arbitrator. In vain the Iranian party submitted that it would then be unable to make use of the arbitration agreement. In the end the Court of Paris rejected the application.

It is submitted that in view of the authority to appoint the third arbitrator granted by the arbitration agreement to the President of the ICC, Paris, a link with Paris did exist and that the Court could have then appointed the second arbitrator, Paris being the only venue with which the arbitration agreement had a link.

CHAPTER 23

PRELIMINARY ISSUES AND INITIAL STAGE

SUMMARY: 23.1 Basic Premise for Arbitral Proceedings – 23.2 Parties' Representation – 23.3 Formation of the Arbitral Tribunal – 23.4 Minutes of Meetings- 23.5 Language of the Proceedings – 23.6 Preliminary Issues – 23.7 Decision on Arbitral Jurisdiction: *Kompetenz-Kompetenz* – 23.8 Nature and Limits of the Terms of Reference – 23.9 Pre-Trial Conference v. Order for Directions – 23.10 The Arbitrator's Duty to Assist – 23.11 The Role of the Chairman of the Tribunal – 23.12 Connection with Non-Arbitrable Disputes – 23.13 Counterclaims – 23.14 *Lis pendens* Between Arbitral and Court Proceedings – 23.15 Multifora Disputes – 23.16 Dilatory Tactics – 23.17 Effects of Lack of Recourse to Earlier Conciliation or of Lack of Referral of the Dispute to the Engineer – 23.18 Exchange of Pleadings – 23.19 New Claims.- 23.20 Timetable of the Proceedings

23.1 Basic Premise for Arbitral Proceedings

The basic premise in order for arbitral proceedings to take place is the existence of a dispute. In the absence of that, the proceedings would not be justified.

The requirement that there is a dispute does not correspond to the claim being indisputable. Saville J. addressed this issue in *Hayter*[1] starting from the remark:

> In some cases the suggestion seems to be made that if it can be shown that a claim under a contract is indisputable, i.e. a claim which cannot be resisted on either the facts or the law, then there is no dispute or difference within the meaning of the arbitration clause in that context,

a view with which he disagrees by holding:

> The fact that it can be easily and immediately demonstrated beyond any doubt that the one (party) is right and the other is wrong does not and cannot mean that a dispute did not in the present exist.

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[1] *Hayter v. Nelson and Home Insurance Co.* [1996] 2 *Lloyds Report* 265.

23.2 PARTIES' REPRESENTATION

Attorneys Exclusivity

In various jurisdictions the parties to arbitral proceedings do not have to be represented by attorneys-at-law and may appear by themselves or be represented by in-house counsel (even if they are not attorneys-at-law) or by non lawyers. However as it is shown by *Gamester*[2] this is not always the best course of action.

The Federal Court of Australia upheld a decision of the High Court which had been attacked for breach of the rules of natural justice for having denied to the appellant the opportunity to prove her case. The trial judge had stated in his reasons:

> I stopped further cross-examination of Mr Wheeler as I sought to elucidate from Ms Cameron, as I had indeed with her examination of Mr Fernando, the subject matters that she wished to ask questions about. It was very difficult to obtain any rational account of those matters and at times impossible to do so, but doing the best I could I allowed her to ask questions where it seemed to me to be appropriate.
>
> I regret to say they did not show any matter that I regard as relevant to this proceedings or even if it were relevant that would have had any probative value whatever. The case has reached a point where I will not allow it to go on any longer. To do so would, I think, be a serious erosion of the resources of this Court and of the Commonwealth and a waste of everybody's time and money. I have on many occasions throughout the two days sought assistance from Ms Cameron as to what she really wishes to achieve and how she seeks to achieve it; but I have not been helped in that inquiry. I do not suggest that she deliberately refrained from helping, or refused to help me, but I think she simply has no case whatever on which she can help me.

In *Trident*[3] the New South Wales Supreme Court has gone further holding that representation by an attorney at law is not even a right of the parties:

> There is no principle of law that in every case where a party may take part in a proceeding, he may as of right be represented by a lawyer.

However it is submitted that such a right is inherent and it does not require to be expressed in a specific statutory provision. In some countries like Spain,

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2 *Gamester Pty Ltd and Anor,* Federal Court, Australia (1993)112 ALR 623, 12, *The Arbitrator* 333, 1993, 146.

3 *Trident Properties Ltd v. Capita Financial Group Ltd* June 1, 1992, 15, *The Arbitrator* 4, 221.

Israel, Indonesia and Saudi Arabia[4] representation by an attorney at law is required. In Belgium *agents d'affaires* (business representatives) are not allowed to represent even before arbitral tribunals.

Power of attorney

The requirement in domestic arbitration that the attorney at law produces a written power of attorney is widespread. In some countries, like Argentina, it is compulsory: in others like Italy, Denmark and Austria, a power of attorney may be required. In other jurisdictions it is not required

In some of the former jurisdictions, the power of attorney has also to be notarised and unless an international convention releases from this further requirement, the notary's signature is to be legalised by the local Consul of the state in which it is to be used ;in some jurisdictions legalisation may be replaced under an international Convention by the Apostille.

Representation by foreign attorneys

A general belief existed for a long time that in international arbitration representation by foreign attorneys was always allowed.

The Singapore judgement in *Turner*[5] raised attention to this issue:

> In arbitral proceeding conducted there, Turner (East Asia) Pte Ltd., a Singapore subsidiary of an American company acting as contractor in a major construction project known as The Gateway, applied to The High Court to enjoin the claimant from being represented in the arbitral proceedings ,which were taking place in Singapore, by US Attorneys from the New York firm Debevoise & Plimpton, which [the] claimant had instructed. The High Court held that the American attorneys were practising law in Singapore in breach of the law which reserves this to Singapore attorneys.

The emotion raised by such unexpected ruling prompted[6] a survey of national legal systems in order to identify other countries which might apply the same restriction. It turned out that Japan applied the same rule except for foreign attorneys registered to practise in Japan.

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4 D.W RIVKIN, *Restrictions on Legal Counsel in International Arbitrations, Yearbook Commercial Arbitration* 1991, 402.

5 *Builders Federal (Hong Kong)Ltd and Joseph Gartner & Co v. Turner (East Asia) Pte Ltd,* High Court, Singapore March 30 1988, *Yearbook Commercial Arbitration* 1989, 224, 231.

6 RIVKIN, see *supra* note 4.

Even Turkey had the same restriction, but the International Arbitration Act provides for its removal:[7]

> The parties may choose who will represent or assist them before the tribunal.

Exclusivity of representation in favour of local counsel applies only to domestic courts and, in the worst case, to domestic arbitral proceedings.

Few years after *Turner*, in the same Continent, in Malaysia in *Zublin*[8] an objection to representation by foreign counsel in domestic arbitral proceeding was rejected.

Eventually on February 27,1992 Singapore introduced legislation which allows foreign counsel to appear in international arbitral proceedings conducted in Singapore.

The right of a party to be represented by foreign Counsel has been affirmed in Barbados in *Lawler,*[9] as reported by Polkinghorne.[10]

However more recently in *Gibb Australia*[11] the High Court of Fiji heard a motion by Counsel for Gibb Australia that the Australian Counsel who had appeared in an arbitration taking place in Fiji had committed an offence, since that amounted to legal practice, which was reserved to lawyers admitted to practise there. On the one hand the court dismissed the motion on the ground that representing in arbitral proceedings rather than before a Court, under instructions received abroad, did not constitute an offence. On the other hand the judge recommended, as a matter of prudence, that overseas practitioners seek admission as Fiji attorneys before starting an arbitration taking place there.

Apart from some countries, the general attitude is then liberal. If the contrary view were right, foreign attorneys might be unable even to take an active part when evidence is taken by the local Consulate for foreign proceedings.

The general principle that local attorneys do not enjoy exclusivity to represent in international arbitration, i.e. in arbitral proceedings taking place in a given country but which are not governed by the local procedural law, seems accurate. This might be different as to arbitral proceedings governed by the

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[7] Section 17 Arbitration Statute August 29, 1996 (Arbitration Act), in force since November 29, 1996.

[8] *Government of Malaysia v. Zublin Muhibbah Joint Venture*, Supreme Court of Malaysia, January 2, 1990, *Yearbook Commercial Arbitration* 1991, 160.

[9] In the matter of an arbitration between *Lawler,Matusky and Skelly, Engineers and the Attorney General of Barbados*, (no 3200 of 1981) August 22, 1983.

[10] M. POLKINGHORNE, *The Right of Representation in a Foreign Venue* 4, *Arb .Int.* 4, 333.

[11] *Gibb Australia Pty Ltd v.Air Pacific Limited et al.* High Court,Fiji August 6, 1996, 16, *The Arbitrator* 2, 148.

local procedural law if under it the parties have to be represented by attorneys at law. Possible doubts should be excluded by local legislation or precedents.

23.3 FORMATION OF THE ARBITRAL TRIBUNAL

The formation of the arbitral tribunal is generally considered to be the first procedural step.

Ad hoc arbitration

In *ad hoc* arbitration the appointment of the arbitrators is sometimes made from the outset; if so, the request for arbitration made by one party is sufficient for the arbitral tribunal, which has already been formed, to start to act. However, in the majority of cases the arbitrators are appointed when the dispute arises. This is done with the cooperation of the parties or, failing this, with the intervention of the authority which has been designated, or which has jurisdiction in this respect.[12]

Administered arbitration

In administered arbitration in general the appointment of the sole arbitrator or of the third arbitrator is left to the arbitral institution. However some arbitration rules grant to the two party appointed arbitrators or to the parties themselves the possibility of appointing the third one and provide that the arbitral institution shall proceed to such an appointment only if the two cannot agree.

If an arbitral tribunal consists of three arbitrators, and each party is entitled to appoint one arbitrator, the appointment of the first two is generally fairly quick. It is the appointment of the third arbitrator (similar to that of the sole arbitrator) which requires more time. As to the International Chamber of Commerce, as a rule its Court of Arbitration appoints the arbitrators upon the recommendation of the National Committees which it has selected or after contacts and consultation with one of them.[13]

The European Court of Arbitration rules[14] provide for a conference with the parties at which the Court's designee helps the parties to choose the arbitrator. The arbitrator is appointed by the Court only if such an attempt is not successful. It is suggested that it is preferable for arbitral institutions to let the parties appoint the arbitrator rather than choosing him themselves.

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[12] On this issue see G. SCHIZZEROTTO, *Dell'arbitrato* (Arbitration), 2nd ed., Milan 1982, at 353 *et seq.*

[13] Art. 9

[14] Art. 9

In *ad hoc* arbitration the intervention of the authority designated for the appointment, in the event of the parties or of the party-appointed arbitrators not agreeing on it, generally delays the formation of the arbitral tribunal.

The same applies to the appointment by the arbitral institution, unless it is made without involving the parties to the arbitration agreement, and therefore through an internal decision of the arbitral institution.[15]

Multiparty arbitration

The appointment of arbitrators, when there are more than two parties to the proceedings, gives rise to problems keeping the balance between the various appointments and avoiding predetermined majorities amongst the party-appointed arbitrators. Problems of multiparty arbitration are discussed in chapter 11.

Challenge of arbitrators

Further causes of delay in both types of arbitration are the possible attacks against the appointment, or the challenge of the arbitrator. Often several months pass between the request for arbitration and the time the arbitral tribunal can start to operate.

Payment of deposits

The start of the proceedings by the arbitral tribunal is further delayed by the need for deposits to be paid to cover the costs of arbitration. Generally the deposit is paid in equal shares by the parties, but from the time the deposit is requested to its full payment frequently more months elapse. If one of the parties does not pay, the claimant is then forced to advance his opponent's share.[16] Because of the size of the fees which are determined, based on the value of the amount in dispute, this sometimes causes a delay of several months. This situation is unsatisfactory. However it must be recognized that if the payments are not made before the start or during the initial stage of the proceedings, it is difficult to have them made at least by the loser after the award, or even earlier, during the proceedings, if a party feels that the outcome will be unfavourable to him. Non-payment during the proceedings may even be due to unrelated reasons. Whichever its reasons, the arbitral institutions and the arbitrators understandably tend to avoid this.

The immediate payment of the entire amount may create financial or at least psychological problems to the parties. The arbitral institutions frequently

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[15] SCHIZZEROTTO, *ibidem,* at 335 *et seq.*

[16] With an option, if he has paid his own share, to give a bank guarantee instead of cash for the other litigant's share.

divide then the deposit to be paid in two instalments, the first one to be paid immediately and the second one during the initial stage.[17]

Appointment of a secretary

The arbitral tribunal may appoint (and frequently does appoint, unless forbidden by the parties, by the applicable procedural rules or by mandatory provisions), a secretary who takes care of the drafting of the minutes, of the notices to the parties and of the administrative matters. The appointment of a secretary is frequent in *ad hoc* arbitration, while in institutional arbitration this role is partly played by the arbitral institution itself. The problems related to the appointment of a secretary are discussed in Chapter 23.2.

23.4 MINUTES OF MEETINGS

Amongst minutes one may distinguish between:

- minutes of ordinary hearings
- minutes of evidentiary hearings
- minutes of meetings of the arbitrators

No minutes are made as a rule of off -the-record meetings in order to respect fully their confidentiality.

No minutes are also drawn up – as a matter of practice – of arbitrators' discussions during their meetings in the same way that no minutes are made of similar discussions made by judges of state courts. Insistence by an arbitrator to draw up such minutes might be a sign of his intention to leave traces of such discussions which could be used either officially, if the arbitrators deliver or are forced to deliver such minutes to the parties or to a state court, or unofficially. Only the result of such discussions, be it a procedural order or the award, will be recorded. Likewise, when an award or an interim award have been discussed by the arbitrators, occasionally only the decision itself is drafted and signed or initialled on the spot by the arbitrators, while the reasons will be drafted later. If so the first document will generally not be circulated outside the arbitral tribunal and when the full award is signed that award is circulated.

As to ordinary hearings attended by Counsel, frequently only summary minutes will be dictated by the chairman of the tribunal.

In evidentiary hearings, the minutes tend to be more accurate. Several arbitrators record the full hearing and provide the tapes to the parties. Occasionally a transcript is made of the recording and delivered to the parties. The inconvenience of recording is that if technical problems arise a part of the hearing may be lost. For this reason some times a double recording is arranged.

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[17] See the amendments made by the ICC, effective January 1, 1998.

Stenographers or typists are frequently involved; however the speed of the depositions is frequently such that it cannot be easily followed. Another formula consists in hiring a stenotypist In this way the transcript is available very quickly.

Some tribunals confine themselves to summarise and dictate the bulk of the witness's depositions which is written either by hand or by a typist. This formula does not allow to review later exactly what the witness has said and rarely much trace will remain of possible cross-examination. Such method is then to be considered unsatisfactory and to be used only if money has to be saved.

The parties may make proposals to the arbitral tribunal in this respect. When no recording is arranged by the arbitrators or depositions are merely summarised one party may wish to arrange for its own recording or stenotyping. If this is allowed neither will have any official standing.

The ICC rules do not deal with minutes of meetings; they provide:[18]

> The arbitral tribunal shall be in full charge of the hearings.

The German Institution of Arbitration rules state:[19]

> A written record shall be made of oral proceedings. Such record shall be signed by the chairman. The parties will receive a copy of a written record.

The European Court of Arbitration provides:[20]

> A written record of proceedings will be taken at the hearings ... The written record of the hearing will be signed by the chairman and by the secretary, if appointed. If the arbitral tribunal so deems, the hearings may be recorded and later transcribed, if considered necessary.

23.5 Language of the Proceedings

The choice of language of the proceedings is important, since it may force one party to express himself in a language which is not his own, while his opponent can comfortably use his own language. It may follow that one party only has to translate his documents and pleadings (and the other party's documents and pleadings), to choose a different counsel from his usual one, and to use interpreters so that his witnesses and he himself can be heard.

In spite of this, the language of the proceedings is frequently given little attention by the parties at the time the arbitration agreement is drafted, although

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[18] Art. 21.3.

[19] Art. 18.

[20] Art. 15.3.

it may create difficulties later on. The language in which the contract was drafted, or in which correspondence was exchanged between the parties before the dispute arose, is one of the elements used as presumptions of an implied intention by the parties. This is true for the rules of the London[21] and Milan[22] arbitral institutions.

The choice of the national language is made by the Russian rules too:[23]

> The hearing shall be conducted in the Russian language; with the consent of the parties the Arbitration Court may conduct the hearing in another language.

In some Arab countries like Saudi Arabia,[24] the national language must be used for the pleadings, the documents, and in arguing the case before the arbitrators and in the award. This requirement does not exist in Kuwait.[25] In other countries, even if the use of the local language is not compulsory under statutory provisions, in practice it is necessary for reasons of convenience, or to avoid increasing the risk of the award not being recognized later. In Syria, for example, a resolution of the General Assembly has established in principle that the language of the *place of arbitration* must be used and that, in any case, a copy of the award must be translated into Arabic if enforcement is applied for.[26] These requirements are generally another source of inconvenience for the party not belonging to the state in question.

The award made in Zurich in 1997 in a dispute between a Greek and an Austrian Company held[27] that:

> in the absence of a contractual choice and of a subsequent agreement of the parties as to the language of the proceedings, that language has to be chosen by the arbitrators taking into account the circumstance that the contract has to be drawn up in the languages of the contracting parties

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21 REDFERN-HUNTER, *op. cit.,* at 122; similarly, see Art. 17 (3) of the London Court of International Arbitration Rules, January 1, 1998, which provides that if the parties have not otherwise agreed, the arbitral tribunal shall decide upon the language(s) of the arbitration ... taking into account the language of the arbitration agreement and any other matter it may consider appropriate in all the circumstances of the case.

22 Similarly Art. 29 (2) International Rules of the Milan Chamber of National and International Arbitration provides that, in the absence of agreement of the parties, the language of the contract must be taken into account.

23 Para. 9, Arbitration Rules of the Court of the USSR Chamber of Commerce and Industry.

24 EL AHDAB, *Arbitration with Arab Countries, cit* at 293.

25 EL AHDAB, *Arbitration with Arab Countries, cit* at 590.

26 Resolution of the General Assembly no. 20 of 1968; see J. EL HAKIM, in *Arab Comparative and Commercial Law, cit.,* at 261.

27 ICC arbitral proceedings no. 7862 *Rev. arb.* 1998, 601.

and therefore respecting the principle of equal treatment and of procedural simplicity.

Subject to statutory provisions, nothing prevents the parties and/or the arbitrators from agreeing that two languages can be used during the proceedings, such as for documents or pleadings or oral evidence. In the absence of this, the choice of an official language, followed by the authorization to use a second language, is made by some arbitral tribunals. Even the choice of language may then, unless properly weighed, put a party at a disadvantage.

An interesting view was expressed by von Breitenstein.[28] According to him, in a situation where the parties have chosen a language (for example the English language) different from the language of the applicable law (Swiss law) that prevents the arbitrators from going to the bottom of the problem, because the language of the proceedings is not suitable to express the concepts involved in the legal language of the applicable law. He further suggests that in order to fully understand a legal concept one must go to the roots which are to be found in the language which is used.

It is submitted that the difficulties which may arise from the use of a language different from the applicable law should be overcome through a very careful analysis by the arbitrators.Without detracting from the importance of that comment, a neutral language vis-à-vis the parties is essential – as it has been discussed – to avoid that a party be damaged. It is suggested that this concern must take priority.

The relationships between language and proceedings had been dealt with also by other writers.[29]

23.6 PRELIMINARY ISSUES

Before dealing with the merits of the dispute, the arbitrators must examine a series of preliminary issues. To simplify matters, they will be dealt with together from a general point of view, i.e. procedural preliminary issues which do not concern the merits, and which therefore come before the merits, and preliminary issues concerning the merits, meaning by the latter those issues which concern the merits and may decide the dispute without a full trial.

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[28] D. von BREITENSTEIN, *La langue de l'arbitrage-Une langue arbitraire, ASA Bulletin* 1995 1, 18.

[29] U.SPELLENBERG, *Fremdsprache und Rechtsgeschaft*, Festschrift fur Murad Ferid 1988, 462; P.MALAURIE, *Le droit francais et la diversité des langues, Clunet* 1965, 565; P. SCLECHTRIEM, *Das Sprachrisiko; ein neues Problem*, Festschrift fur Hermann WEITNAUER, 1980 S. 104.

Procedural preliminary issues

Amongst procedural preliminary issues one should mention the challenges of the arbitrators' jurisdiction, of the existence or validity of the arbitration agreement, the issues related to the choice of the place of arbitration or of the language of the proceedings, as well as disputes concerning the applicable procedural law.

Substantive preliminary issues

Amongst substantive preliminary issues one should mention those related to limitation defences.[30]

The fact that the preliminary issues are to be examined before the merits does not imply that they should also be decided before the merits, since the arbitrators may prefer to decide them together. In this respect the practice is often followed of deciding these issues immediately if that will end the proceedings, and of postponing the decision when the arbitrators take the view that the issues must be rejected and the merits of the dispute examined. This is certainly a practical formula. In fact, if the arbitrators come to the conclusion that they have no jurisdiction, there is no point in hearing evidence on the merits. On the other hand, when the arbitrators deem that the preliminary issues must be rejected, they sometimes prefer to avoid making an interim award and reserve the right to decide such issues later, together with the merits, as do the courts in several jurisdictions.

Arbitration rules do not specifically deal with the time and the manner preliminary issues should be decided. However, some of them provide too for the possibility of rendering interim awards.[31]

This is the case of the A.I.A. Rules:[32]

> Awards, whether they be partial or final awards shall be made by the arbitrator according to the rules of (the) applicable law.

The rules of the Netherlands Arbitration Institute state:[33]

> The arbitral Tribunal may render a final award, a partial final award or an *interim* award.

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[30] As to substantive and procedural law see *supra* chapters 15 and 17.

[31] On this issue see P. BERNARDINI, *L'arbitrato internazionale* (International Arbitration), Rome 1987, at 134.

[32] Art. 26. 1, Arbitration Rules of the *Associazione Italiana per l'Arbitrato* (Italian Society for Arbitration), June 19, 1985.

[33] Art. 44, Rules of the Netherlands Arbitration Institute, December 1, 1986.

The Rules of the London Court of International Arbitration in turn provide:[34]

> The Tribunal may make separate awards on different issues at different times. Such awards shall have the some status and effect as any other awards made by the arbitral tribunal.

Even international conventions do not generally rule on these issues, except for the Washington Convention which deals in passing with the decision on the arbitrators' jurisdiction and which in the end leaves the arbitrators free to decide the issue immediately or together with the merits.[35]

Besides providing for the possibility of interim or partial awards, the arbitration rules and international conventions generally do not specify the position the arbitrator must take vis-à-vis preliminary issues, leaving him free to act as he deems preferable, such as to issue an order for directions or an interim award, i.e. an award dealing with procedural issues and not with the merits.[36]

If, on the one hand, the interim award has the advantage of clearing the field of these issues, on the other hand it has the disadvantage that, if the award is challenged, this may disturb the conduct of the rest of the proceedings and may occasionally induce the parties to try to stop the proceedings, even resorting, as in *Westland,*[37] to a challenge of the arbitrators.

Because of this, some arbitrators are against deciding any preliminary issues immediately by an interim award. However, if the parties do not receive any guidance in this respect, they may have difficulty in knowing how to defend their case. If, for example, two applicable laws are argued, the parties cannot be expected to put their case under both laws just because the arbitrators prefer not to take position on this issue until the award. The solution necessarily depends on the circumstances of each proceedings. In general the parties' right to know how to defend their case will not be disregarded.

Among the preliminary issues related to the merits, the possible foreclosing of a party from making some claims should be mentioned. This issue has been raised in arbitral proceedings and is generally based on the principle stated by Vice President Alfaro in the dispute related to the *Preal Vihear Temple:*[38]

> A State must not be authorized to take advantage of its contradictions to the damage of another State.

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[34] Art. 26 (7), Rules of the London Court of International Arbitration, January 1, 1988.

[35] Art. 41, Washington Convention, March 18, (1965), *cit.*

[36] Art. 21, Rules of the Italian Society for Arbitration which provide that 'the arbitrator is free to settle the manner in which the proceedings will be conducted as he best sees fit'.

[37] *Westland Helicopters United v. Arab Organisation for Industrialisation, United Arab Emirates, Kingdom of Saudi Arabia, State of Quatar, Arab Republic of Egypt, Arab British Helicopters Company (Egypt)*, interim award, March 25, 1984, *Clunet* 1985, 32.

[38] *Cambodja v. Thailand,* International Court of Justice, *Recueil* 1962, at 6 *et seq.*

In fact from this statement the rule has been developed[39] that:

> nobody is allowed to avail himself of his contradictions to the detriment of another party.

As to arbitration rules see as to Switzerland the Private International Law Statute 1987[40] and in particular the Geneva arbitration rules,[41] as to African countries the ACP/EEC Conciliation and Arbitration Rules[42] which cover a Group of African, Caribbean and Pacific States, in Germany the arbitration rules of the German Institution of Arbitration,[43] in England the arbitration rules of the Chartered Institute of Arbitrators and of the London Court of International Arbitration, in Hong Kong the arbitration rules of the Hong Kong International Arbitration Centre,[44] in France the arbitration rules of the *Chambre arbitrale de Paris, de l'Association francaise d'arbitrage*[45] and of many other institutions. See also the *Arbitration Manual* launched by the Securities Industry Conference on Arbitration in order to achieve uniformity in arbitration administered by self regulatory organisations.[46] As to trade arbitration see The Refined Sugar Association and the Sugar Association of London[47] and the London Metal Exchange[48] the London Maritime Arbitration Association's Small Claims Procedure 1989[49] and GAFTA Arbitration Procedures.[50]

As to the practical organisation of the proceedings see also *Some Suggestions for the Use of Computers in Arbitration.*[51] *The Use of Computers for Arbitration*[52] and *Applying Management Principles to Arbitration.*[53]

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39 *E.* GAILLARD, *L'interdiction de se contredire au détriment d'autrui, comme principe général du droit du commerce international* (It is forbidden to contradict oneself to the detriment of another party, as a general principle of international trade law), *Rev. Arb.* 1985, 241.

40 KARRER and ARNOLD, *Switzerland's Private International Law Statute,* Kluwer, 1989; LALIVE POUDRET REYMOND, *Le droit interne et international en Suisse.*

41 G. KAUFMANN, *The Geneva Chamber of Commerce and Industry Adopts Revised Arbitration Rules*, 9 *J. Int. Arb.* 2, 71.

42 A.A. MISSAH, *The ACP/EEC Conciliation and Arbitration Rules,* 8 *Arb.Int.* 2,167

43 H.STROHBACH, *Arbitration in Berlin*, 8 *Arb.Int.* 2, 185.

44 K.LYNCH, *Security for Costs and International Arbitration in England and Hong Kong,* 12 *J.Int.Arb.* 2, 19.

45 de BOISSESON, *Le droit francais de l'arbitrage, Joly Editions,* 1990; *FOUCHARD GAILLARD GOLDMAN, Traité de l'arbitrage commercial international*, Litec 1996.

46 M.B. CANE and P.A. SHUB, *Arbitration Manual,* 9 *J. Int: Arb.* 3, 644.

47 *Arbitration* 1996, 4, 272.

48 L. LUBETT, *Arbitration in the World of Metals, Arbitration* 1995, 13.

49 B. McKENZIE, *The London Maritime Arbitrators Association, Small Claims Procedure* 1989, *Arbitrator* 1990, 113.

50 J.C.S. MACKIE, GAFTA *Arbitration Procedures, Arbitration* 1990, 150.

51 K. PICKAVANCE, *Arbitration* 1992, 182.

Access to the role of arbitrator of a greater number of people, not all of whom have already acquired familiarity with the arbitration process, has induced Uncitral to draw up the *Notes on Organizing Arbitral Proceedings.*[54] These Guidelines have been seen by some very learned arbitrators and scholars[55] as an attempt to overregulate arbitration and to limit the freedom of arbitrators. It is suggested that if such notes are viewed as a check list, they may constitute an useful tool in particular for those who start being involved in arbitration.

23.7 DECISION ON ARBITRAL JURISDICTION: *KOMPETENZ-KOMPETENZ*

The doctrine of autonomy or *separability* of the arbitration agreement results in the arbitrators having to decide on their jurisdiction also *(Kompetenz -Kompetenz).* The *Kompetenz-Kompetenz* principle has two aspects. First it confirms to arbitrators that they may decide on their jurisdiction without need for support from state courts. This has become a well established principle in many jurisdictions. See the *Cauillez* judgment in France.[56]

Second, it prevents state courts from determining the issue of the arbitrator's jurisdiction before they have decided it.

Third, this rule requests the state courts, when seised prematurely of the issue of the arbitrator's jurisdiction, to confine themselves to find that an arbitration agreement exists and to invite the parties to refer the matter to arbitration[57].

It has been pointed out that the arbitrators' decision on their jurisdiction is not final, and that therefore their decision may be attacked by the parties at the time and in the ways allowed by the applicable procedural law.

The Swiss Concordat – replaced only as to 'international' arbitration by new provisions from 1989 – provides for the possibility of the parties to attack before local courts an *interim* award of the arbitrators as to their jurisdiction. This system is known also as *'concurrent control'* and it has the advantage of saving time and money when the arbitral proceedings have not even been

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[52] R.K.R. ROE, *Arbitration* 1993, 205.

[53] D. SHARP *Arbitration* 1996, 1, 6.

[54] *Uncitral Notes on Organizing Arbitral Proceedings, United Nations, Vienna,* 1996

[55] P.LALIVE, *De la fureur reglémentaire, Bulletin ASA* 1994, 213; Ph. FOUCHARD, *Initiatives Contestables de la CNUDCI, Rev. arb.* 1994, 461.

[56] Court of Cassation France, February 22, 1949 J.C.P. 1949, II 4899, comments by MOTULSKY.

[57] E. GAILLARD, *Les manoevres dilatoires des parties et des arbitres dans l'arbitrage commercial international, Rev. arb.* 1990, 759.

started; on the other hand, it has the disadvantage that a party may try to use that possibility as dilatory tactics.[58]

The principle of *Kompetenz-Kompetenz is* well established in arbitral precedents. An example is given by the award rendered in ICC proceedings no. 2521 (1975):[59]

> ... under Art. 13 (para. 3) of the ICC Rules the arbitrator has *jurisdiction to decide on his jurisdiction.* This is an essential principle which is generally recognized by arbitration law.

The arbitrator decides on his jurisdiction either with the final, or with an interim award. The parties are then entitled to challenge the award before state courts, or to oppose applications for its recognition or enforcement. The arbitrator's task is more difficult when, at the same time as the arbitral proceedings, parallel court proceedings are instituted in which the arbitral jurisdiction is debated.

Arbitral institutions sometimes reserve to themselves, in their arbitration rules, the right to decide on the jurisdiction of the arbitral tribunal. This is the case of the Polish rules:[60]

> 1. If the respondent is pleading that the Court of Arbitration lacks jurisdiction, the plea shall be ruled upon by the Presidium of the Court.
>
> 2. If the arbitral tribunal has doubts as to the – not questioned by the parties – jurisdiction of the Court of Arbitration, the presiding arbitrator shall request the Presidium of the Court to rule upon the jurisdiction of the Court.

Under English law, the Arbitration Act 1996 grants (section 12) to the arbitral tribunal the authority to rule on its jurisdiction, and prevents the state courts from ruling on this in the presence of an arbitration agreement, unless all the parties agree *or* with the permission of the arbitral tribunal and provided the court is satisfied that there is a good reason for it to decide.

Interesting comments on *Kompetenz-Kompetenz* are made by Schlosser[61] who points out:

> The term *Kompetenz-Kompetenz* is taken from German terminology. But in the German legal setting it means something very different from what it stands for in the minds of many non German legal writers. According to the case law of the German Federal Court, the parties may vest the ar-

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[58] Tactics which, even if they are not the only reason of the pathological duration of arbitral proceedings, are one of the main ones.

[59] Y. DERAINS, *Chronique des sentences arbitrales, Clunet*, 1976, 997.

[60] Para 17, Rules of the Court of Arbitration at the Polish Chamber of the Foreign Trade in Warsaw.

[61] P. SCHLOSSER, *The Competence of the Arbitrators and of Courts,* 8 *Arb. Int.* 2, 188.

> bitrators with the power to rule in a binding way on the issue of their own jurisdiction. The last word on this issue may then be for the arbitrators.

The learned writer deals then with the widespread international practice that the arbitrators have *only the first word,* a position which is followed by the great majority of legal systems, even of common law.[62]

23.8 NATURE AND LIMITS OF THE TERMS O F REFERENCE

The need to draft the *acte de mission* (Terms of Reference), i.e. a document which summarizes the facts, the claims and defences of the parties and which identifies the issues to be decided by the arbitrators, has since a long time been typical of ICC arbitration:[63]

> *Terms of Reference.* 1. Before proceeding with the preparation of the case, the arbitrator shall draw up, on the basis of the documents or in the presence of the parties and in the light of their most recent submissions, a document defining his Terms of Reference. This document shall include the following particulars:
>
> (a) the full names and description of the parties;
>
> (b) the addresses of the parties to which notifications or communications arising in the course of the arbitration may validly be made;
>
> (c) a summary of the parties' respective claims;
>
> (d) a definition of the issues to be determined;
>
> (e) the arbitrator's full name, description and address;
>
> (f) the place of arbitration;
>
> (g) particulars of the applicable procedural rules and, if such is the case, reference to the power conferred upon the arbitrator to act as *amiable compositeur;*
>
> (h) such other particulars as may be required to make the arbitral award enforceable in law or may be regarded as helpful by the Court of arbitration or the arbitrator.
>
> 2. The document mentioned in para. 1 of this Article shall be signed by the parties and the arbitrator. Within two months of the date when the file has been transmitted to him, the arbitrator shall transmit to the Court the said document signed by himself and by the parties. The Court may, pursuant to a reasoned request from the arbitrator or, if need be, on its own initiative, extend this time-limit if it decides it is necessary to do so.
>
> Should one of the parties refuse to take part in the drawing up of the said document or to sign the same, the Court, if it is satisfied that the case is

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[62] P. GROSS, *Competence of Competence, An English View,* 8 *Arb. Int.* 2, 205.

[63] Art. 18, ICC Rules (1988).

> one of those mentioned in paragraphs 2 or 3 of Article 8, shall take such action as is necessary for its approval. Thereafter the Court shall set a time-limit for the signature of the statement by the defaulting party and on the expiry of that time limit the arbitrator shall proceed and the award shall be made.
>
> 3. The parties shall be free to determine the law to be applied by the arbitrator to the merits of the dispute. In the absence of any indication by the parties as to the applicable law, the arbitrator shall apply the law designated as the proper law by the rule of conflict which he deems appropriate.
>
> 4. The arbitrator shall assume the powers of an *amiable compositeur* if the parties are agreed to give him such powers.
>
> 5. In all cases the arbitrator shall take account of the provisions of the contract and the relevant trade usages.

Such rule has been made less severe in the 1998 edition of the rules, which will be dealt with hereafter.

The practice of the Terms of Reference is followed not only by the International Chamber of Commerce. Even the A.I.A. Rules provide:[64]

> 1. Before proceeding with the preparation of the case, the arbitrator shall draw up on the basis of the documents submitted a document in writing containing:
>
> (a) the name and address of the parties, of their representatives and counsels;
>
> (b) the address of the parties to which communications shall be sent during the course of the arbitral proceedings;
>
> (c) name and address of the arbitrator;
>
> (d) a statement of the facts concerning the dispute and the parties' respective claims;
>
> (e) the issues to be settled;
>
> (f) the place of arbitration and the language to be used in the proceedings;
>
> (g) particulars regarding the type of arbitration and the rules of procedure to be followed.
>
> 2. The terms of reference, signed by the arbitrator, must be transmitted to the parties and to the Court; if there are several arbitrators the terms of reference may be drawn up and signed by correspondence.

Likewise the Rules of the Euro-Arab Chambers of Commerce state:[65]

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[64] Art. 19, Rules of the Italian Society for Arbitration, in force since October 1, 1985. The Terms of Reference are governed also by subsequent Art. 20.

[65] Art. 23.7, Rules of Conciliation, Arbitration and Expertise of the Euro-Arab Chambers of Commerce (in force since January 10, 1983).

> After receiving the papers, the arbitrator may draw up a document defining his terms of reference either on the basis of the papers before him or in the presence of the parties ...

The drafting of the Terms of Reference is a procedural step which frequently meets difficulties, since sometimes one of the parties does not accept the draft submitted to it, either on objective grounds or merely to introduce dilatory tactics. The Terms of Reference may be subscribed by the arbitrators and filed even without being subscribed by the parties. Nevertheless, the arbitrators generally do their best to obtain the parties' subscription and thus more precious time passes.

The litigant is sometimes afraid to make admissions by signing the Terms of Reference. Jarvin[66] comments on the Terms of Reference in respect of ICC arbitral proceedings no. 5302:

> These Terms of Reference are designed to enable the parties and the Arbitral Tribunal to focus on the issues in this arbitration: they are not to be understood as foreclosing the making of arguments or introduction of evidence not expressly referred to herein.

This does not eliminate the uncertainty felt by many litigants, also since no further claims may be made after the Terms of Reference have been accepted (unless the parties had agreed on an *addendum).* This is frequently the object of criticism of the practice of the Terms of Reference.

Those who support this practice stress that through it the possible deficiencies of the arbitration agreement may be remedied.

A deep study on the ICC Terms of Reference has been made by a Working Group of the ICC.[67] The purpose of the Terms of Reference being intended to limit the ambit of the dispute, new claims or counterclaims exceeding such limits are treated as being outside the scope of those proceedings. A party might refuse to sign the terms of reference in order to avoid this consequence and to be able to introduce new claims or counterclaims even beyond such limits. In this event such new claims or counter claims, even if they exceed such limits, might have to be entertained if they remain within the ambit of the arbitration agreement However once the terms of reference are approved by the Court, one shall have to establish whether the above limit applies as well to the parties which have not signed the terms of reference.

A positive response to this question will not satisfy litigants belonging to legal systems in which in arbitral proceedings a party may amend its pleadings

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[66] DERAINS JARVIN, *Chronique des sentences arbitrales, Clunet,* 1986, 1128.

[67] S. LAZAREFF, *L'acte de mission selon le règlement de la CCI* 1988. *Un guide pratique de son usage, ICC Bulletin* 1992, 1, 25.

without consent, even if in court proceedings it needs the consent of the other party or leave by the Court.

In the U.S. the approach to new claims is liberal and the arbitrator enjoys discretion as to permitting or refusing new claims.

In *Carte Blanche*[68] an award which allegedly had gone beyond the ICC terms of reference was upheld. In *Faberge*[69] an award was upheld in spite of the arbitrators having permitted to a party to amend its claim since that was allowed by the AAA arbitration rules.

On the other hand those who support this practice stress that through it a new arbitration agreement is obtained between the parties.

The nature of the Terms of Reference is indeed the subject of argument.

According to the awards rendered in 1985 and 1986 in ICC proceedings no. 4304:[70]

> The Terms of Reference, drafted in compliance with the arbitration agreement, may at the same time state the agreement of the parties or amend or complete the arbitration agreement.

According to this view the Terms of Reference have the nature of an arbitration agreement. Furthermore, according to the general opinion, for example, a challenge of the arbitrator's jurisdiction must be made before the *acte de mission.*[71]

According to the French Court of Cassation in the *Pyramids*[72] dispute, the *acte de mission* is merely an identification of the issues to be decided.

> whereas the Court of Appeal, by dealing in that way with the claims and defences of the parties, has properly held on the one hand that the arbitration agreement consisted only of the arbitration clause contained in the December 12, 1974, contract and not of the Terms of Reference, the purpose of which was merely to identify the issues in dispute and, on the other hand, that the Terms of Reference, in which the Republic of Egypt held that there was no arbitration agreement, could not replace the same; that none of the arguments raised in the appeal against such a judgement is therefore grounded.

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68 *Carte Blanche (Singapore) Pte Ltd v. Carte Blanche Int. Ltd* 888 F 2d 260, cited by BORN at 554.

69 *Faberge Inc. v. Felsway Corp.,* 539 N.Y.S 2d 944 cited by BORN *cit* at 554.

70 JARVIN, *Observations* (Observations), DERAINS-JARVIN, *Chronique des sentences arbitrales, Clunet* 1986, 1128; on the Terms of Reference see also *Clunet* 1986, 1113-1117.

71 DERAINS, *Chronique des sentences arbitrales, Clunet* 1978, 988.

72 *Southern Pacific Properties Limited and Southern* Pacific *(Middle East) Ltd. v. République Arabe d'Egypte,* Court of Cassation (France), January 6, (1987), *Clunet* 1987, 638.

A view which was not shared by the award made in1991 in ICC procceedings no. 6531:[73]

> According to French law, we may therefore hold that the Terms of Reference are tantamount to an arbitration agreement,

and by the court of Appeal of Paris in *Kis:*[74]

> the Terms of Reference made by the arbitrators in conformity with art.13, ICC arbitration rules, which list the disputed issues and which have been signed by the parties without making any reservation as to the jurisdiction of the arbitral tribunal, may well be treated by the arbitrators as an arbitration agreement.

On this issue an authoritative member of the ICC stated:[75]

> The Terms of Reference are an element, typical of ICC arbitrations, which aims at clearly defining the limits of the dispute referred to the arbitrators. It is difficult to admit, as the arbitrators do, that this document is the source of their authority. Their authority arises from the arbitration clause contained in the contract. The role of the Terms of Reference is to state the extent of such jurisdiction on a given dispute. On the basis of the arbitration clause, the arbitrators may be invested of all the disputes which fall under it. This is not so after the Terms of Reference are entered into.

The role of the *acte de mission* is clarified by Derains and Jarvin:[76]

> If the arbitral jurisdiction is challenged, the entering into Terms of Reference is not a waiver to that challenge.

Jarvin[77] adds:

> These agreements between the parties are then to be added to the arbitration clause and have the same authority.

While the terms of references are in general a prerogative of the Arbitral Tribunal, the Argentinean precedent in *Perez*[78] provides an interesting exception. Although the parties had referred a domestic dispute to the ICC, and since the parties could not agree on the terms of reference drafted by the arbitrator,

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[73] *Yearbook Commercial Arbitration* 1992, 221.

[74] *Sté Kis v. Sté A.B.S. et al.*, Court of Appeal, Paris, March 19, 1987, *Rev. arb.* 1987, 498.

[75] Y. DERAINS, comments to the award rendered in 1983 in ICC proceedings no. 3742, *Clunet* 1984, at 913.

[76] DERAINS-JARVIN, *Chronique des sentences arbitrales, Clunet* 1986, 1129. 39.

[77] DERAINS-JARVIN, *Chronique des sentences arbitrales, Clunet* 1986, 1128. 40.

[78] *Perez Company S.A. et al v. Ecofisa S.A. et al*, reported by E.G. CARDENAS, *International Business Lawyer*, vol. XX, 8, Sept. 1992, 402.

the claimants applied to the Buenos Aires Court, to determine the contents of the Terms of Reference.

The Court held that even if ICC rules had been agreed by the parties, in domestic arbitration the rules could not oust the Court and the Court was then entitled:

> to intervene to determine the contents of the Terms of Reference.

To sum up, the *acte de mission* certainly produces an advantage if the original arbitration agreement is invalid or is not complete, since it replaces, or completes, or strengthens it. If such a supporting role is not needed, the advantage of the *acte de mission* is that it sums up the situation.

However the practice of arbitration records many occasions on which the arbitrator limits himself to putting together the claims and defences of the parties through a *collage,* i.e. by putting together clippings from the various pleadings and mentioning the issues which arise from them. The drafting of the Terms of Reference frequently gives rise to a long exchange of drafts between the arbitrators and the parties. It is suggested that if this occurs its advantages are considerably lower.

The effect might be quite different if the Terms of Reference represented the result of a constructive clarification.

An advantage seems then to derive from the Terms of Reference in two situations:

- when they are needed to strengthen the original arbitration agreement,
- when they allow the parties and the arbitrators to understand better the various positions and to identify the issues to be decided.[79]

The Rules of the European Court of Arbitration are more liberal in this respect:[80]

> 1.Claims made by the parties may be amended in the course of the proceedings provided such amended claims remain within the ambit of the arbitration agreement and provided that the facts and acts upon which such claims are founded remain sufficiently proximate to the original claims.
>
> 2.The defendant may make a counterclaim. This must be submitted at the same time as the submission of the Statement of Defence. Its form and contents must comply with the same requirements set out in articles 3 and 4 for all other claims.
>
> 3.The joinder of a third party to arbitral proceedings may only take place if the parties to the arbitration and the third party concerned agree in writing and the joinder is accepted by the Arbitral Tribunal.

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[79] On this issue see REDFERN-HUNTER, *op. cit.,* at 235.

[80] Art. 5 European Court of Arbitration Rules, (1997).

> 4. The Rules as provided in article 4 shall apply to all additional claims, counterclaims and claims by parties joining the proceedings.
>
> The Defendant to the counterclaim will have the right to reply to the counterclaim within the time limit provided for in article 4(1). The counterclaimant will be entitled to reply according to article 4(4) and (5).

Even the Rules (1998) of the ICC have recently become more liberal:[81]

> After the Terms of Reference have been signed or approved by the Court, no party shall make new claims or counterclaims which fall outside the limits of the Terms of Reference unless it has been authorized to do so by the Arbitral Tribunal, which shall consider the nature of such new claims or counterclaims, the stage of the arbitration and other relevant circumstances.

23.9 PRE-TRIAL CONFERENCE V. ORDER FOR DIRECTIONS

The above discussion fits into a comparative study of the Pre-trial Conference, used in common law jurisdictions, and of the simple order, rendered by the arbitrators and notified to the parties,[82] which is frequently found in civil law systems, or in systems which apply other or similar rules.

In common law systems, instead of the Terms of Reference, at the first hearing the parties generally agree on the time-table for the arbitral proceedings and express their views on the conduct of the proceedings;[83] at the end of this the arbitrators issue their Order for Directions; if ICC proceedings take place according to common law rules, the Terms of Reference may be discussed at that hearing.

Regarding the Pre-trial Conference, the AAA Rules (1986) provided:[84]

> At the request of the parties or at the discretion of the AAA a prehearing conference with the administration and the parties will be scheduled in appropriate cases ... to expedite the arbitration proceedings.

Their 1997 edition (International Rules)[85] still makes reference to consultation, but not to a conference:

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81 Art. 19, ICC Rules of Arbitration, (1998).

82 The drafting of Terms of Reference without a discussion between arbitrators and parties, as well as the issuing by the arbitrators of an Order which has not been preceded by a hearing, share the common feature that they deprive the proceedings of a dialogue between the parties and the arbitrators which, in order to be useful, must not be merely superficial but real.

83 *Arbitration Law in Europe*, 1981, at 169.

84 Art. 10, AAA Commercial Rules, (January 1, 1988).

85 Art 6.4.

> In making such appointments, the administration, after inviting consultation with the parties, shall endeavour to select suitable arbitrators.

However, the civil law practice frequently records long exchanges of drafts and counterdrafts of the Terms of Reference, when provided for, and an order by which the arbitrators establish *ex officio* time periods within which pleadings and rebutters may be filed.

23. 10 THE ARBITRATOR'S DUTY TO ASSIST

Reference is occasionally made to the duty of the arbitrator to assist the parties. The first query which arises in this respect is whether that duty exists.

One can easily set aside the formula that the arbitrator must find the solution to the problems raised by the parties, because in this way he is not assisting anyone but himself.

Likewise the arbitrator's duty to issue a good and enforceable judgment may not fall within a duty to assist.

One could then envisage a duty to assist one of the parties, such as the defaulting or the weaker one. However the arbitrator is not under such a duty. On the contrary one might say that he is under a duty *not* to assist any of the parties.

The source of the alleged duty to assist the parties is also arguable.

Those duties which do not include at least a *vague* duty to assist do not help in this research.

By mentioning a duty to assist the parties, reference in fact seems to be made to situations where the arbitrator, even in the absence of a specific duty, must ' assist'.

Furthering this analysis, it seems that one may hold that the arbitrator's duty is to assist the process.

It is less easy to identify the way this duty may be discharged.

A distinction may perhaps be drawn between

- procedural issues and
- substantive issues.

In the procedural field, reference may be made to situations where for example in order to prove its case a party needs that a third party produces a document. Some arbitrators take the view that they cannot order a third party to produce a document. However in reality this sounds as a non-answer or as an excuse. In fact one is not suggesting that the arbitrator may order a third party to produce a document. Nevertheless nothing prevents an arbitrator from asking a party to produce that document and, if that party complies with this request, that evidence will become available. If not, the arbitrator will have done his best to try to obtain it.

Likewise it is not rare that some witnesses refuse to travel from far away to appear before an arbitrator and that they ask, or are available, to be heard by the local Court.

In this situation, whenever the local applicable procedural law does not prevent this, nothing prevents an arbitrator from allowing this. When he does not do so, it is frequently because he believes the such an evidence is not necessary or because he wants to close the proceedings. The former case may be a typical example of an arbitrator believing that he is entitled to decide, instead of that party, how that party's case should be proved. This may amount to a breach of due process.

In the latter case this may be due to the arbitrator's desire to put an end to the proceedings. It is suggested that both reasons do not stand and that the arbitrator may make such decision only if it is *absolutely manifest* that such an evidence will serve no purpose.

As to substantive matters, while on the one hand the arbitrator may not replace Counsel for the parties, nevertheless the arbitrator is free to clarify the parties' position. Putting a question in order to clarify one issue does not mean helping one of the parties but merely that the arbitrator requires clarification. In fact, in order to decide, the arbitrator must understand the issues in dispute. Clarifying the factual position, as well as the legal stance taken by the parties, seems to fall within the arbitrator's authority. Raising a question is not by itself a help to one of the parties. If one places himself in such a perspective even *not* raising a question might assist one of the parties.

Any query aiming to clarify issues of fact and or of law seems then to be within the authority of arbitrators and to be part of the arbitrator's duty to assist the process.

One might wonder whether the arbitrator has a duty in this respect which is different from the judge's one. In general the arbitrator's duty does not seem to differ from the judge's one. Nevertheless one will remember that the parties refer the dispute to arbitration in order to have less rigid and less formal proceedings.

The arbitrator's duty is then to *assist the process*. This duty must be distinguished from the duty to render a good judgment which may be enforced, and to conduct the proceedings in a way that respects the equal position of the parties and each party's right to present its case and to oppose the case of the opposite party.

23.11 The Role of the Chairman of the Arbitral Tribunal

It is easier to discuss the actual role of the chairman of arbitral tribunal rather than summarize what he should not do.

In fact the chairman's role is to preside the hearings and to see that the proceedings progress.

At the same time the chairman must refrain from trying to impose solutions.

Likewise he will not prevent a party or the parties from expressing their views or from discussing an issue or from presenting evidence, except when it is manifest beyond any reasonable doubt that this would serve no purpose at all.

A fortiori the chairman may not prevent a member of his panel from putting questions to the parties and /or from expressing his views, unless in the most extraordinary situations in which this would be an abuse of the arbitral proceedings. The chairman may not prevent a member of his panel (unless the *lex fori* does not allow it) from rendering a dissenting opinion.

Such behaviour would not be acceptable and might affect due process.

23.12 Connection with Non-Arbitrable Disputes

Sometimes the parties submit to arbitration issues suitable for arbitration and issues not suitable for it.

When under the applicable procedural law the disputes which are not suitable for arbitration can be separated from those which can be submitted to arbitration, arbitration shall proceed exclusively as to the disputes which are suitable for arbitration. If they cannot be separated even the disputes, which by themselves would be suitable for arbitration, may become no longer suitable for it. The ICC Rules do not deal expressly with this issue but simply state a general principle:[86]

> In all matters not expressly provided for in these Rules, the Court of Arbitration and the arbitrator shall act in the spirit of these Rules and shall make every effort to make sure that the award is enforceable at law.

The New York Convention provides:[87]

> ... 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; or ...

The European Convention (1961) provides that if an award has decided disputes suitable for arbitration as well as other ones which are not suitable for it, the award cannot be set aside as to the former, if they can be separated from the latter.[88]

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[86] Art. 35, ICC Rules, *cit.*

[87] Art. V (c), New York Convention, June 10, 1958, *cit.*

[88] Art. IX (c), European Convention, April 21, 1961, *cit.*

Regarding the extent of this connection, the decision rendered by the Swiss Federal Court in *Hachette* may be mentioned:[89]

> ... in case of a guarantee, which means in those cases in which the co n-nection with the main claim is the strongest, there is no derogation from jurisdiction; *a fortiori* the conventional rule of the natural judge must prevail in the other cases of connection'. (emphasis added)

The arbitration rules do not generally go into details on this issue. The Rules of the Milan Chamber of Arbitration[90] state:

> ...
>
> 2. If the arbitrator, for reasons to be stated in the award, holds that he is in a position to decide only some of the issues raised in the dispute, he shall make a partial award and prepare, if necessary, a new timetable for the arbitration proceedings.

The Rules of the London Court of International Arbitration state a general principle:[91]

> In all matters not expressly provided for in these rules, the Court and the Tribunal shall act in the spirit of these Rules and shall make every reasonable effort to ensure that the award is legally enforceable.

23.13 COUNTERCLAIMS

The area in which the connection of disputes is more important is that of counterclaims. Apart from the traditional counterclaim, arising from the relationship governed by the arbitration agreement, there are also counterclaims arising from connected contracts. Examples are contracts which may contain no explicit reference to the arbitration proceedings, or contracts connected only financially, or only from the point of view of a common purpose of the parties, or governed by a different arbitration agreement, or which do not come under any arbitration agreement. With such a variety of possibilities, and having to take into account on the one hand the need to respect the contractual nature of arbitration agreements and on the other hand the advantages which generally

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89 *Librairie Hachette et Consorts v. Sté Coopérative d'achats et de distribution des négociants en tabacs et journaux,* Swiss Federal Tribunal, March 21 (1967) *Clunet* 1970, 434.

90 Art. 38 (1-2), International Rules of the Milan Chamber of Arbitration.

91 Art. 32 (2), Rules of the London Court of International Arbitration, January 1, 1998, One had inferred from the language of their earlier edition that when issues suitable for arbitration are referred to arbitration together with issues not suitable for it, and the former may be separated from the latter, the reference to arbitration is treated as valid for the former.

arise from hearing the entire dispute in one proceeding (which may make the proceedings already instituted the *forum* more *conveniens)* it appears difficult to identify one solution applicable to every situation.

The possibility of making a counterclaim is generally recognized by arbitration rules. The Uncitral Arbitration Rules[92] limit this possibility to the right of the defendant to

> ... make a counterclaim arising out of the same contract or rely on a claim arising out of the same contract for the purpose of a set-off.

The ICC Rules deal with this only in passing[93] where they provide that:

> After the Terms of Reference have been signed or approved by the Court, no party shall make new claims or *counterclaims* which fall outside the limits of the Terms of Reference unless it has been authorized to do so by the Arbitral Tribunal, which shall consider the nature of such new claims or counterclaims, the stage of the arbitration and other relevant circumstances, (emphasis added)

a provision which is more liberal than their 1988 edition which governed this matter as follows:[94]

> The parties may make new claims or counterclaims before the arbitrator on condition that these remain within the limits fixed by the Terms of Reference provided for in article 13 or that they are specified in a rider to that document, signed by the parties and communicated to the Court.

Even so, it is not always easy to establish whether a new claim remains within the limits fixed by the Terms of Reference.[95] A solution which is occasionally followed by consent of the parties is to reserve the right to add new claims during the proceedings.

The rules of the London Court[96] refer only to:

> (b) a brief statement of the nature and circumstances of any envisaged counterclaims.

The International Rules of the Milan Chamber of Arbitration specify[97] that:

> The parties mentioned in Art. 26 paragraph 1 may make counterclaims against any other party within the time limit stated in the said Art. 26,

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92 Art. 19 (3), Uncitral Arbitration Rules.

93 Art. 19, ICC Rules, (1998 edition)

94 Art 16, ICC Rules, (1988)

95 CRAIG et al., *International Chamber of Commerce Arbitration*, Oceana, 1985; FOUCHARD GAILLARD GOLDMAN, *cit.* at 685.

96 Art. 2.1 (b), Rules of the London Court of International Arbitration.

97 Art. 27, International Rules of the Milan Court.

> paragraph 1. The arbitrator shall decide whether any counterclaim made subsequently is admissible.

The AAA International Rules provide:[98]

> At the time a respondent submits its statement of defense, a respondent may make counterclaims ...

The Rules of the Inter-American Commercial Arbitration Commission in turn state:[99]

> In his statement of defence or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counterclaim arising out of the same contract or rely on a claim arising out of the same contract for the purpose of a set-off.

The Rules of the European Court of Arbitration provide;[100]

> 1.Claims made by the parties may be amended in the course of the proceedings provided such amended claims remain within the ambit of the arbitration agreement and provided that the facts and acts upon which such claims are founded remain sufficiently proximate to the original claims.

The Rules of the Canadian Arbitration, Conciliation and Amiable Composition Centre[101] are along the same lines. The Rules of the Arbitration Institute of the Stockholm Chamber of Commerce provide:[102]

> ... If the respondent desires to make a counterclaim or plead a set-off, a statement to that effect shall be made in the reply, including an account of the dispute and a preliminary statement of the relief claimed. A counterclaim or a plea by way of set-off must be comprised by the arbitration agreement.

The Rules of the Netherlands Arbitration Institute are even more specific:[103]

> A counterclaim is admissible if it falls under the same arbitration agreement as that on which the request for arbitration is based, or if the same arbitration agreement is expressly or tacitly made to apply to it by the parties.

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98 Art. 63, AAA International Rules, (1997).

99 Art. 19.3, IACAC Rules.

100 Art. 5.1, Rules of the European Court of Arbitration (1997).

101 Art. 19.3, Rules of the Canadian Arbitration Conciliation and Amiable Composition.

102 Art. 11, Rules of the Arbitration Institute of the Stockholm Chamber of Commerce.

103 Art. 25 (2), Rules of the Netherlands Arbitration Institute.

The Rules of the Italian Society for Arbitration refer[104] to:

> (d) any possible counterclaim including a statement of the facts and particulars of the relative remedy sought, together with any documents deemed useful to that end.

The Rules of the Court of Arbitration at the Polish Chamber of Foreign Trade provide[105] that:

> 1. Besides the statement of defence, the respondent may file, not later than before the end of the first hearing, a counterclaim if it falls within the jurisdiction of the Court of Arbitration.
>
> 3. The suspension or termination, after the filing of a counterclaim, of proceedings concerning the principal claim, as well as rejection thereof (para. 17 alinea 31), does not preclude the examination of the counterclaim itself . . .

The Rules of the Euro-Arab Chambers of Commerce state:[106]

> The respondent shall have a period of thirty days from the time it receives the Statement of Claim and the Claimant's documents within which to formulate its observations accompanied by any necessary document and to submit any counterclaim.

The requirement for a connection between the counterclaim and the arbitration agreement prevails, as well as – once such a connection is ascertained – the autonomy and independence of the counterclaim vis-à-vis the principal claim.

Counterclaims receive less attention in the international conventions, which focus mainly on the recognition and enforcement of foreign awards. However, counterclaims, as a part of arbitral proceedings, are referred to here and there. See for example the Uncitral Model Law:[107]

> where a provision of this Law other than in Articles 25 (a) and 32 (2) (a) refers to a claim, it also applies to a counterclaim . . .

and the Washington Convention:[108]

> Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject matter of the dispute provided that they

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[104] Art. 6.2 (d), Rules of the Italian Society for Arbitration.

[105] Art. 20.1, Arbitration Rules at the Polish Chamber of Foreign Trade in Warsaw.

[106] Art. 20.3, Rules of Conciliation, Arbitration and Expertise of the Euro-Arab Chambers of Commerce.

[107] Art. 2 (f), Uncitral Model Law (1985).

[108] Art. 46, Washington Convention (1965)

> are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre.

A limit to the attraction of the counterclaim within the jurisdiction of the arbitrator, who hears the main claim, arises from a decision rendered by the Court of Arbitration at the Polish Chamber of Foreign Trade:[109]

> The practice of the Courts of Arbitration of the CAEM countries limits the notion of counterclaim to a claim strictly connected with the main claim or arising from the same legal relationship (the same transaction).

The position taken by an ICC tribunal[110] in respect of counterclaims arising from a contract different from the one on which the claim is based, but entered into between the same parties in implementing a joint venture agreement already covering all such matters in a broad away, is more liberal:

> The close interrelatedness of the three agreements makes it obvious and necessary that set-off claims arising under either one of those agreements must be heard and considered by the tribunal, applying then the old principle
>
> *le juge de l'action est le juge de l'exception.*[111]
>
> Any other view would appear to be over[ly] formalistic and would deny justice to the parties (in particular here to Defendants).

23.14 *LIS PENDENS* BETWEEN ARBITRAL AND COURT PROCEEDINGS

The reference of some disputes to arbitration and of others to state courts, respectively because of the agreement of the parties and or of statutory provisions, makes it necessary to define the relationships between possibly concurrent proceedings.[112]

The settlement of actual or potential conflicts depends also on the applicable procedural law. In some legal systems state courts exercise a *vis attractiva* (attracting effect) on the arbitral proceedings, which are therefore absorbed

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[109] Award March 24, 1964, no. 189/63, *Clunet* 1970, 406.

[110] ICC proceedings no. 5971 (Blessing, Chairman, Lado and Vukmir, arb.) *ASA Bulletin* 1995, 4, 728.

[111] The judge who decides on the claim decides also on the defences to such a claim.

[112] G. SCHIZZEROTTO, *L'arbitrato rituale nella giurisprudenza* (Arbitration Precedents), Padova 1969, at 191 *et seq.*

within the jurisdiction of the state courts; one of these was, before the Arbitration Reform Act (1994) the Italian legal system.[113]

The international conventions and the arbitration rules normally deal only marginally with the problems related to jurisdiction, while they generally provide only incidentally for *lis pendens.*

The Geneva Convention (1961*)* provides:[114]

> Subject to any subsequent judicial control provided for under the *lex fori*, the arbitrator whose jurisdiction is called in question shall be entitled to proceed with the arbitration, to rule on his own jurisdiction and to decide upon the existence or the validity of the arbitration agreement or of the contract of which the agreement forms part.

And further:[115]

> (3) Where either party to an arbitration agreement has initiated arbitration proceedings before any resort is had to a court, courts of Contracting States subsequently asked to deal with the same subject-matter between the same parties or with the question whether the arbitration agreement was non-existent or null and void or had lapsed, shall stay their ruling on the arbitrator's jurisdiction until the arbitral award is made, unless they have good and substantial reasons to the contrary.
>
> (4) A request for interim measures or measures of conservation addressed to a judicial authority shall not be deemed incompatible with the arbitration agreement, or regarded as a submission of the substance of the case to the court.

The Washington Convention (1965) provides:[116]

> (1) The Tribunal shall be the judge of its own competence.
>
> (2) Any objection by a party to a dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

Arbitration rules in general simply affirm the arbitral jurisdiction, which is in fact their role. However, the Uncitral Arbitration Rules[117] state:

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[113] See G. SCHIZZEROTTO, *Dell'arbitrato* (Arbitration), *cit.*, at 120 and 227 and more extensively chapter 7; see also LEVONI, *La pregiudizialità nel processo arbitrale* (Preliminary Issues in Arbitration) Turin 1975, at 101 et seq.

[114] Art. V (3), Geneva Convention, April 21 (1961), *cit.*

[115] Art. VI (3), Geneva Convention, April 21 (1961), *cit.*

[116] Art. 41, Washington Convention, March 18 (1965), *cit.*

[117] Art. 21 (4), Uncitral Arbitration Rules, December 15, 1976.

> In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award.

The ICC Rules of Arbitration[118] provide:

> If the Respondent does not file an Answer, as provided by Article 5 or if any party raises one or more pleas concerning the existence validity or scope of the arbitration agreement, the Court may decide, without prejudice to the admissibility or merits of the plea or pleas, that the arbitration shall proceed if it is *prima facie* satisfied that an arbitration agreement under the Rules may exist.
>
> In such a case any decision as to the jurisdiction of the arbitral tribunal shall be taken by the arbitral tribunal itself. ...

The Rules of the London Court state:[119]

> The Arbitral Tribunal shall have the power to rule on its own jurisdiction, including any objection to the initial or continuing existence validity or effectiveness of the arbitration agreement. . . .

The English Arbitration Act (1996) provides:[120]

> (1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the Court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.
>
> (2) An application may be made notwithstanding that the matter is to be referred to arbitration only after the exhaustion of other dispute resolution procedures
>
> ...
>
> (4) On an application under this section the Court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed.

Under Swiss law:[121]

> The arbitral tribunal shall decide on its own jurisdiction,

while the Swiss Concordat states:[122]

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[118] Art. 6 (2), ICC Rules (1998).

[119] Art. 23 (1), Rules of the London Court of International Arbitration, January 1, 1985.

[120] Art. 9, Arbitration Act (1996).

[121] Art. 186, Federal Statute on Private International Law, December 18, 1987.

[122] Art. 13, Swiss *Concordat,* March 26, 1969.

Article 13. *Lis pendens.*

1. The arbitral proceedings shall be deemed to be pending:

a. from the time when one of the parties seizes the arbitrator or arbitrators designated in an arbitration clause of the dispute; or

b. in default of such designation in the arbitration clause, from the time one of the parties commences the procedure for the designation of arbitrators, provided for in the arbitration clause; or

c. in default of a procedure for the designation of arbitrators, provided for in the arbitration clause, from the time when one of the parties petitions the competent judicial authority; or

d. in default of an arbitration clause, on the signing of the compromise.

2. When the rules of arbitration accepted by the parties or the arbitration agreement provide for a conciliation procedure, the commencement of this procedure shall be assimilated in the commencement of the arbitral proceedings.

In French law[123] it is provided that:

> If one of the parties challenges before the arbitrator the jurisdiction of the arbitrator or its extent, the arbitrator will decide on the validity or the limits of his appointment.

In Czechoslovakian law under Art. 106 of the Civil Procedure Code:[124]

> The Courts must stop any proceedings as soon as they come to the conclusion that the dispute has to be referred to arbitration under an arbitration agreement.

Under Australian law, when a plea of *lis pendens is* made before arbitrators, and one or more issues submitted to them are simultaneously submitted to another jurisdiction, the arbitrators may either decide on them or refrain from doing so.[125]

Conflicts of jurisdiction between state courts and arbitrators are not infrequent; they are often settled by the courts either by respecting the arbitration agreement, or by a declaration that the arbitration agreement itself does not exist, or is null and void.

A uniform regulation of *lis pendens* is not easy since *lis alibi pendens is* not always relevant even in case of court proceedings pending before various jurisdictions. This was the case of the Italian legal system as to court proceed-

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[123] Art. 1466, Decree no. 81-500, May 12, 1981.

[124] See V. STEINER, *Solution of Disputes Arising out of International Trade in the Czechoslovakian Socialist Republic,* Praha 1984, at 47.

[125] R. SIMMONDS-B.H.W. HILL, J. JARVIN, *Commercial Arbitration Law in Asia and the Pacific,* New York, 1987 (SIMMONDS *et al.*), at 13.

ings, except when the Brussels Convention (1968)[126] applied. The Private International Law Reform Act provides now for the stay of the proceedings before the Italian Court, if it holds that foreign proceedings, instituted prior to the former , may have effect in Italy.[127]

The judgment rendered by the Nigerian Court in *Jammal*[128] is a significant example of lack of evidence of *lis pendens*:

> *Lis pendens* between proceedings instituted before the Court of Antwerp and the subsequent action before the Court of Lagos has not produced the interruption of the latter.

Precedents concerning *lis pendens* (between arbitral and court proceedings), or concerning claims made in one proceeding which are a part of those made in another one, generally report situations in which the issue was whether the dispute was within the jurisdiction of one or another Court. However, the situation can be more involved, such as when a dispute is held to be suitable for arbitration in one jurisdiction, but not suitable for it in another one or if the arbitration agreement is treated as valid in one jurisdiction and null and void in another one.

Conflicts may arise between an award and a judgment of a state court. If this is not satisfactory in arbitration, it must be recognised that even in court proceedings there are conflicts between judgments at an international level. It cannot consequently be expected that this problem be limited to court proceedings.

In *Compañia Minera Condesa,*[129] an order to stay arbitration in view of *lis pendens* with proceedings pending before the state courts in Peru was sought from the Swiss Federal Tribunal. The Federal Tribunal confirmed the award made by the arbitrators holding that the Peru judgments would be unable to be recognized in Switzerland being in breach of Art. 2 of the New York Convention.

In any event the notion of *lis pendens* between arbitral and court proceedings is generally not accepted.

An arbitral *lis pendens* is also conceivable when the same dispute is referred to several arbitral tribunals as if, for example, a sole arbitrator has to be appointed and one party applies for that to an arbitral institution (which in his view has been designated for this purpose in the arbitration agreement), while the other party, not sharing the same view, suggests making a direct appointment, with which the first party does not agree. If that other party then applies

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[126] Convention on Jurisdictional Competence and the Enforcement of Judgments in Civil and Commercial Matters, Brussels, September 27, 1968.

[127] Act May 31 no. 218, 1995.

[128] *Jammal v. Hashem,* Lagos High Court (Nigeria), May 9, (1975), *Clunet* 1981, 389.

[129] Swiss Federal Court, June 23, 1992 ATF 124 III 83.

to the courts to make the appointment,[130] there could be two appointments and therefore a risk of two parallel arbitral proceedings. *Lis pendens* between arbitral proceedings, even if not ruled by multilateral or bilateral conventions, can be solved less easily than *lis pendens* between court proceedings. It should be added that, if both arbitral tribunals assert their jurisdiction, an application by a party to the courts to obtain an interlocutory injunction, which orders the parties not to continue a given arbitral proceedings, is conceivable.

Conflicts of jurisdiction between arbitrators are rare, since it is not frequent that more arbitral tribunals be invested of the same dispute. However they are possible, as shown by the proceedings in *République de Guinée.*[131]

Arbitral *lis pendens* must be solved, whether immediately or through attacks to set aside the award made in the proceedings which were erroneously instituted. These situations, which are fortunately exceptional, can be the source of very involved procedural fights and of considerable delays in arriving at a final and enforceable award.

A party may also institute new and independent arbitral proceedings to assert a new claim which arises from the same legal relationship for which arbitral proceedings are already pending between the same parties. In this case, if the two proceedings are pending before the same court of arbitration, then as provided for by the ICC Internal Rules (1988 edition):[132]

> ... this (note: the Court of Arbitration) may decide to join that claim to the already pending proceedings subject to the provisions of Art. 16 of the ICC Rules.

The dispute may be referred to a second arbitrator, under the same arbitration agreement, when the first award is set aside, if it is considered that referral to arbitration has not been exhausted by the designation of the first arbitral tribunal, which did not settle the dispute or whose decision was set aside.

Less frequent, but certainly conceivable, is referral to a different arbitral institution, or arbitral mechanism, after the setting aside of the first award. This occurred in the *Pyramids* dispute:[133]

> Subsequent to the judgment of the French Court of Cassation, which definitely set aside the award rendered by the arbitrators appointed within the framework of an ICC arbitration, the claimant, *Southern Pacific Properties Ltd.*, has again referred the dispute to arbitration, this time under the Washington Convention (1965).

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[130] Giving rise to a further interaction between arbitral and court proceedings.

[131] *Mine v. République de Guinée,* Court of Geneva, March 13, (1986), *Yearbook Commercial Arbitration* 1987, XIII, at 514.

[132] Art. 13, Internal Rules of the (ICC) Court of Arbitration. 85. See *supra* note 24.

[133] The related request for ICSID arbitration was registered by ICSID's Secretary-General. and was held to be valid. The dispute was subsequently settled.

Still related to interplay between state courts and arbitral proceedings is *Goldshain*[134] where the Iran U.S. Claims Tribunal rejected an application by the Claimant for interim measures consisting in an order directing the Respondent to stay criminal proceedings that apparently had been initiated against the claimant in the courts of Teheran but added

> that it [would] make an independent assessment of the evidence presented to it [and that its] determination ... as to the alleged forgery [would] prevail, insofar as this Tribunal is concerned, over any decisions by any other tribunal or court inconsistent with such determination.

23.15 MULTI-FORA DISPUTES

International trade frequently gives rise to proceedings which are conducted in various states. Up to a certain extent, this is inevitable. This is the case of an award rendered in State A against a party which is a national of State B. The award will have to be enforced in State B The dispute will then take place in two states, but the change of state will here occur at a second stage.

In another situation, if the arbitral proceedings are conducted in Greece under German procedural law and the arbitral tribunal finds in favour of claimant against a Turkish Defendant, then the award may be attacked before German courts.In the meantime the award may be enforced in Turkey and enforcement may be opposed. Turkish proceedings will then arise. Here, proceedings may be pending at the same time in two different jurisdictions and, contrary to the earlier example, they will both be court proceedings. While in some cases this may be inevitable, in other ones this may be due to the loser in one proceeding deciding to try its luck elsewhere. This may give rise to a battery of attacks and counterattacks in various jurisdictions, in the shape of attacks against the award and of simultaneous attempts to enforce in other states ,and of oppositions to such enforcements. That is the case of many disputes amongst which one may quote the *Pyramids* case[135] as well as *S.E.E.E. v.Yugoslavia.*[136]

In other situations the recourse to various proceedings will be due to the existence of several separate contractual relationships.

Schneider[137] contemplates several of such situations when making reference to *multi-fora* disputes. In some of them a real *forum shopping* takes place,

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[134] *Goldshain v. The Government of the Islamic Republic of Iran*, Iran–U.S. Claims Tribunal March 2, 1993 (case no. 812) *Yearbook Commercial Arbitration* 1994, 421.

[135] See *supra* note 69.

[136] *Sociétés d'Etudes et d'Entreprises v. Socialist Federal Republic of Yugoslavia et al*, Court of Appeal, Rouen, November 13, 1984, *Yearbook Commercial Arbitration* 1986, vol. I, 491

[137] M.SCHNEIDER, *Multi Fora Disputes*, 6 *Arb. Int.* 2, 101.

which is not necessarily a negative element since on some occasions a creditor may recover his credit only by resorting to such practice.

A typical case of a multi-fora dispute is represented by the dispute which may arise from a B.O.T. project, in view of the number of agreements which are to be entered into in this framework between different contracting parties and which it will rarely be possible to submit to one adjudicating body only.

Even in less complicated projects, a basic agreement may be subject for example to ICSID arbitration as in *Holidays Inns*[138] while the implementing contracts will be subject to local jurisdiction, in that case of the state courts of Morocco.

Similarly in a construction project, disputes between the Employer and the Main Contractor will frequently be referred to arbitration while disputes between the Contractor and its suppliers may be subject to the jurisdiction of state courts.

Apart from the complications which the overlap between some of these disputes may cause, occasionally these decisions may also conflict.

In one of such situations, *Revere*[139] challenged the imposition of a tax on bauxite by the Jamaican government on the grounds that it had entered into a stabilisation clause excluding any change in legislation. The Supreme Court of Jamaica held that the government could not be bound by a commitment not to levy new taxes. After losing these proceedings, Revere applied to Overseas Private Investment Corporation with which it had insured this risk. The policy provided for arbitration under the AAA rules. The AAA arbitration did not discuss the decision of the Jamaican Court but held that, in the legal relationships between that corporation and Revere, the principles of international law applied and that they allowed a compensation to be paid to Revere.

A further example quoted by Schneider is the litigation in *Deutsche Schachtbau:*[140]

> Here an ICC award made in 1990 in Geneva was enforced in England where a garnishee order was obtained against Shell, on money which was due by Shell to Ras Al Kaimah. At the same time the state of Ras Al Kaimah issued proceedings in its country against Shell and arrested a vessel which had been chartered to a company belonging to the Shell

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[138] *Holidays Inns, Occidental Petroleum v. Government of Morocco*, ICSID Arbitration, 51 *British Yearbook of International Law* (1980) P. LALIVE, *The First World Bank Arbitration,* 123.

[139] *Revere Jamaica v. The Attorney General for Jamaica*, May 30, 1977 in SCHNEIDER, *cit,* supra note 128

[140] *Shell International Petroleum Co. Ltd. and Deutsche Schachtbau und Tiefbohrgesellschaft mbH v. Ras Al Kaimah National Oil Co., Yearbook Commercial Arbitration* 1989, 733.

group. In view of the risk of Shell having to pay twice, the garnishee order in England was lifted.

As earlier discussed, arbitration has its limits and one cannot expect that all the various relationships arising from a project or transaction be decided in one proceeding. Even if this were possible, in many situations the use of one big melting pot could create prejudice rather than accommodate the needs of the various parties.

As to the overlap between attacks and oppositions to enforcement, reference is made to Chapters 31 and 35.

DILATORY TACTICS

The use of dilatory tactics by a party who either wishes to gain time before a decision is made or is aware he/she is wrong is quite frequent.

The start of such tactics may be the deposit of advances for the arbitration costs and the discussions in order to agree the terms of reference.

The delay in the selection of arbitrators or the appointment of a very busy arbitrator may also assist a party who is attempting to drag the arbitral proceedings.

Challenges to arbitrators and or to the validity of the arbitration agreement, before a state court, may also be used in this way.

Applications for security for costs may also be used for the same purpose.

Applications refraining arbitrators from proceeding and court proceedings instituted in other jurisdictions are further means employed in such a strategy.

Similarly change of Counsel during the proceedings cause delay.

To these pre-award tactics, challenges against the award and resisting enforcement are to be added.

An analysis of such tools , wittily headed 'A Respondent's Guide', has been carried out by Harris.[141] See also Donahey[142] Gaillard[143] and Valentine.[144]

One must unfortunately add to the use of such tactics by the parties, the use of similar tactics by some party-appointed arbitrators, consisting in their non attendance of meetings or delaying their taking place or resigning without any grounds.

The right of the arbitral institution or of the parties to replace an arbitrator who does not wish to serve any longer is rare but exists in some jurisdictions

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[141] C. HARRIS, *Abuse of the Arbitration Process-Delaying Tactics and Disruptions, A Respondent's Guide,* 9 *J.Int.Arb.* 2, 87.

[142] M.S. DONAHEY, *Defending the Arbitration against Sabotage,* 13 *J Int. Arb.* 1, 93.

[143] E. GAILLARD, *Les manoeuvres dilatoires des parties et des arbitres dans l'arbitrage commercial international, Rev. arb.* 1990, 759.

[144] D. VALENTINE, *How to Delay Arbitration, Arb.* 1995, 4, 298.

and according to some arbitration rules. The arbitration rules of the European Court of Arbitration provide:[145]

> By a decision of the Executive Committee, the Court may replace an arbitrator if he does not fulfil his obligations under these Rules, and is in serious breach of them and has failed to remedy the breach notwithstanding being requested to do so.

And the 1998 amendment of the ICC Arbitration Rules in turn states:[146]

> An arbitrator shall also be replaced on the Court's own initiative when it decides that he is prevented *de jure* or *de facto* from fulfilling his functions, or that he is not fulfilling his functions in accordance with the Rules or within the prescribed time limits.

Shortening the duration of arbitral proceedings is advocated by Rutherford.[147]

Dilatory tactics rarely reach the stage of intimidation or physical violence. However very difficult situations are reported to have occurred in the first years of the Iran U.S. Claims Tribunal.

An Egyptian attorney has been reported to have forced his way into the Cairo Regional Centre accompanied by a policeman in order to interrupt the arbitrators' deliberations and in order to achieve that it be on record that contrary to local procedural law they were not talking Arabic. The report of this fortunately unusual conduct adds that in doing so that attorney was acting for a party which had entered into an arbitration agreement written in English.

23.17 Effects of Lack of Recourse to Earlier Conciliation or of Lack of Referral of the Dispute to the Engineer

Some contracts provide that before instituting arbitral proceedings a party must attempt to settle the dispute by giving rise to conciliation proceedings. Cohen makes a distinction between a conciliation agreement and a commitment merely to ask the opposite party whether he wishes the dispute to be submitted to conciliation.[148]

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[145] Art.10.5.

[146] Art. 12.2

[147] M. RUTHERFORD, *The Need to Shorten the Duration of Domestic and International Arbitral Proceedings, Arb.* 1994, 46.

[148] D. COHEN, comments to *Brunet v. Artige*, see note 149.

This requirement is not infrequent. Nevertheless on some occasions state courts have held that non-compliance with it does not prevent the courts from hearing the dispute. Along this line is the French judgement in *Artige.*[149]

The rationale of this view is that if one party goes straight to litigation it means that he does not wish to settle and therefore there would be no point in forcing him to go through a stage which is useless.

In international construction agreements governed by the well-known Fidic Conditions, the parties, after a decision made by the Engineer, based on his supervision of the works, must first submit the issue, as well as any other disagreement between them, again to the Engineer who this time would act in a quasi-judicial capacity. Only once he has decided, or has not decided, the dispute may be referred to arbitration. It is submitted that this provision deserves criticism on various grounds.

First because the Engineer, being appointed by the Employer, may not decide in a quasi-judicial way, because of lack of impartiality.

Secondly because once the Engineer has decided the first time it may not be easy for an average man to modify his first decision.

Eventually if a party does not wish to try to obtain such a second decision, it means that it wants to litigate it straight away and the same reasoning above made in case of conciliation agreements seems to apply.

The entire mechanism seems unsatisfactory since, although the Engineer's second decision may be challenged, a limited time period is granted for that. If the interested party does not comply with the requirement to challenge the decision before the expiry of that short time limit, his claim cannot then be entertained. This transpires also from the French judgement in *Hochtief.*[150] It may be of little comfort to the loser to learn that its late request for arbitration does not affect the arbitration agreement but only that claim. It is suggested that the referral of the dispute to the Engineer in a quasi-judicial capacity and the short time period within which that decision must be objected, by referring the dispute to arbitration, sanctioned by the finality of the Engineer's decision, may severely affect the contractor's right to a due process.

A comparison may help to explain this concern. If the decision of a dispute should be left to counsel for one of the litigants and it should be provided that such a decision becomes final unless it is challenged by the opposite party within a given number of days, few people would find this provision balanced and acceptable. It is suggested that the situation is the same when this power is granted to the Engineer.

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[149] *Brunet v. Artige*, Court of Cassation (France) January 15, 1992, *Rev arb.* 1992, 646; *accord:* Court of Cassation (France) February 15, 1978, *Bull civ.* III no. 83, 641.

[150] *Ministère de l'Agriculture d'Irak v. Sté Hochtief,* Court of Appeal, Paris, December 1, 1995, *Rev arb.* 1996, 456.

The role of the Engineer as the solid agent of the Employer, and the view that one cannot expect that he suddenly becomes impartial, seems to suggest that such a clause be construed as simply granting to the Employer the possibility of having the decision by his agent reviewed by the same before the other party can start litigation.

23.18 EXCHANGE OF PLEADINGS

Counsel for the parties are frequently keen to exchange pleadings at a very early stage and to leave no issue of fact and of law, raised by the opposite party, unanswered. The result of this is frequently that the Statement of Claim and the Statement of Defence are followed by a rebutter, and by a counter-rebutter and that it is not rare that while the case is still being prepared for the evidence stage, the parties seek to file further pleadings.

A large number of often repetitive submissions is then filed.

One might have thought that this be typical of civil law proceedings ,where written pleadings play a great role. However an Australian judge, de Jersey J. in a paper given to the Institute of Arbitrators Australia[151] said:

> pleadings frequently *obfuscate* the issue. They are often too long, repetitive and non responsive. The tendency of the Respondent is to put everything into issue from the start.(emphasis added)

He concluded then:

> the better course may sometimes be to dispense with pleadings and to adopt some alternative method of securing any further necessary definition of the issues.

The observations made by Lord Templeman in *Banque Keysen*[152] show that this disease is also rife in other common law jurisdictions:

> The present practice is to allow each litigant unlimited time and unlimited scope so that the litigator and his advisors are able to conduct their case in all respects in the way which seems best to them. The results not infrequently are *torrents of words*, written and oral, which are *oppressive* and which the judge must examine in an attempt to eliminate everything which is not relevant, helpful and persuasive.

Dispensing entirely with pleadings will frequently not be advisable. However it should be possible to improve the situation by issuing directions as to the contents of the pleadings such as by sharply dividing the issues of fact from

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[151] G.R. MOSEL, *Expediting Arbitration Procedures,* 11 *The Arbitrator* 1, 27.

[152] *Banque Keysen Ullmann v. Skandia UK Insurance Co.* (1990), WLR 380 commented by MOSEL, see *supra* note 151.

the issues of law, by requesting the parties to deal before and during the evidential stage with the facts, limiting themselves to listing or summarising the issues of law, and in general handling them after the evidentiary stage and requiring each party not to repeat in subsequent pleadings its earlier submissions but just to respond to the new submissions of the opposite party.

A hearing at which the submissions of each party as to the facts and the documents exhibited by each party are reviewed through a discussion with the parties may be useful to avoid confusion repetitions and delays.

23.19 New Claims

In many jurisdictions, new claims are not welcomed by the arbitrators and by the opposite party, since they may complicate the development of the proceedings.

In some jurisdictions, a distinction is made by the Rules of Civil Procedure between mere *amendments*, i.e. minor changes to the claim or to its grounds such as adding interest to the principal, and *fundamental changes* such as when the cause of action or the remedies which are sought are replaced. Some jurisdictions further provide that amendments are allowed only with the consent of the other parties. In other jurisdictions amendments require leave of the Court.

Basically the same practice is to be found in such jurisdictions also in arbitral proceedings.

A frequent ground for refusal of leave to amend is that it gives rise to additional costs to the opposite party.

On other occasions, leave is refused because it disrupts the Court or the Arbitral Tribunal's Schedule.

This was openly stated by the trial judge in *Queensland and Anor.*[153] When the matter went on appeal to the Full Court the majority held that:

> unless we are to mouth a repeated caution about discretionary judgments, case management, and efficiency practice and procedure and the advantages of the managing judge, only to ignore them when it comes to the crunch, this appeal must be dismissed.

However the High Court of Australia, on hearing the appeal, granted leave to amend the Defence. The Court pointed out that the ultimate aim of a Court is the attainment of justice and no principle of case management can be allowed to supplant that aim.

In spite of the happy conclusion of the proceedings, this precedent shows the risk to which the right to present one's case was exposed.

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[153] *State of Queensland & Anor v. J. L. Holdings Pty Ltd*, High Court of Australia (1997) 141 ALR 353, 16 *The Arbitrator*, 1997, 2, 150.

This should convince that in arbitration in general and in international arbitration in particular there is no need to be unnecessarily strict and that only in exceptional circumstances amendments should not be allowed.

The ICC rules were strict as to amendments which found a very serious obstacle in the Terms of Reference. Overcoming this was rare. One of the few exceptions was *Carte Blanche*[154] where a claim based on different grounds but always on the same facts was approved by the ICC and confirmed by the US Court of Appeals.

One of the major problems caused by practice of the terms of reference does not lie in the terms of reference themselves but in the estoppel from filing new claims, which arose from them, unless:[155]

> they remain within the limits fixed by the terms of reference provided for in article 13 or that they are specified in a rider to that document, signed by the parties and communicated to the International Court of Arbitration.

Remaining within these limits was a rather vague formula, since it might apply to the *petitum* (the remedy which is sought), to the *causa petendi* (the grounds of the claim) or to both of them. Different views were consequently expressed as to whether only amendments to the grounds were allowed, while the remedy should not change, or even amendments to the remedy, such as increasing the principal amount or adding interest or increasing its rate. Latitude was advocated in the construction of such a rule, in particular since this limit might apply even to a party which had not signed the Terms of Reference.

The ICC rules have become more liberal [156] and now grant to the arbitral tribunal the discretion to authorise them taking into account:

> the nature of such new claims or counterclaims, the stage of the arbitration and other relevant circumstances.

The European Court of Arbitration rules are even more liberal in as much as:[157]

> Claims by the parties may be amended in the course of the proceedings provided such amended claims remain within the ambit of the arbitration agreement and provided that the facts and acts upon which such claims are founded remain sufficiently closely proximate to the original claims.

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[154] *Carte Blanche (Singapore) v. Carte Blanche International*, U.S. Court of Appeals 2d Cir (1989) 6297, *ASA Bulletin* 1995, 308.

[155] Art 16 ICC rules (1988).

[156] Art.19, ICC Arbitration Rules (1998).

[157] Art 5.1.

23.20 TIMETABLE OF THE PROCEEDINGS

A timetable of the proceedings is necessary in order to plan and monitor their duration. Few arbitration rules provide for it; many of them prefer not to put pressure on the arbitrator. However if arbitration aims to provide a good but also prompt determination of the dispute, it is suggested that the Arbitral Tribunal must have in mind, preferably after having consulted with the parties, a given duration, which must be the result of the duration of each single phase of it. That amounts to a timetable be it or not so expressly described. As Mosel rightly points out,[158] a timetable must be:

> tight but achievable.

In 1991 the European Court of arbitration has adopted a detailed timetable in the rules for domestic arbitration of its Italian delegation and in 1997 in its international and domestic arbitration rules.[159]

RECOMMENDED TIMETABLE FOR THE PROCEEDINGS

1. Filing of the Request for Arbitration	0 Days	0
2. Communication of the Request to the other parties	7 Days	7
3. Reminder from the Secretariat to the Claimant for additional payment - starting from(1)	7 Days	7
4. Invitation to the parties to attend the preliminary Meeting to choose the Arbitral Tribunal (art.9) – starting from (1)	14 Days	14
5. Preliminary Meeting	15 Days	29
6. Filing with the Secretariat, (except in case of extension of this time-limit) of Statement of Defence and possible counterclaims – starting from (2)	28 Days	35
7. Final appointment of the Tribunal - starting from (5)	10 Days	39
8. Transfer of the files to the Arbitral Tribunal and communication to the Parties of the formation of the Arbitral Tribunal	3 Days	42
9. Notice by the Claimant and possible Counter-Claimant of its intention to file a Reply – starting from (6)	10 Days	45

[158] G.R.MOSEL, see *supra* note 151.

[159] The European Court of Arbitration Rules (1997), at 28.

10. Drafting of the List of Questions to be answered and of the Timetable – starting from (8)	20 Days	62
11. Filing of the Reply (start of time for the Rebuttal – starting from (6) and (10)	21 Days	83
12. Notice of intention to file a Rebuttal	10 Days	93
13. Filing of the Rebuttal – starting from (11)	21 Days	104
14. Hearing to establish the Timetable and the evidence to be heard	21 Days	125
15. Possible evidentary hearing	30 Days	155
16. Final pleading by the parties or filing of '*cotes de plaidoiries*' 2 weeks before the final hearing	60 Days	215
17. Final hearing	20 Days	230
18 Filing of the award with the Secretariat and notice of filing by the Secretariat to the parties accompanied by a request for payment of monies due	40 Days	270

This timetable is certainly tight but if one aims at obtaining an award in 9 months, time is precious. Furthermore the timetable is recommended and not compulsory. The nine month time limit for the award, which is subject to special and not automatic extension, may be reached even through a different sequence.

The ICC new rules (1998) now request the arbitrators to establish a provisional timetable:[160]

> When drawing up the terms of reference, or as soon as possible thereafter, the arbitral tribunal, after having consulted the parties, shall establish in a separate document a provisional timetable that it intends to follow for the conduct of the arbitration and shall communicate it to the Court and the parties. Any subsequent modifications of the provisional timetable shall be communicated to the Court and the parties.

[160] Art.18.

CHAPTER 24

INTERLOCUTORY INJUNCTIONS

SUMMARY: 24.1 In Domestic Arbitration – 24.1.1 Authority of the Arbitrator – 24.1.2 Authority Reserved to State Courts – 24.1.3 Concurrent Authority of the Arbitrator and of State Courts – 24.2 In International Arbitration – 24.2.1 Authority under the Applicable Procedural Law – 24.2.2 Procedural Public Policy of the *Lex Loci Arbitratus* – 24.3 Distinctions Between Holding Measures and Interlocutory Injunctions – 24.4 Judicial and Arbitral Precedents – 24.5 Standards for the Issue of Interlocutory Injunctions – 24.6 State Court's Enforcement of Arbitral Interlocutory Injunctions – 24.7 Arbitrator's Authority to Vacate Injunction Granted by State Court – 24.8 Interlocutory Injunctions in the Form of Awards – 24.9 Interference Between State Court and Arbitral Interim Injunctions – 24.10 Pre-Arbitral Referee – 24.11. Damages for Wrongful Injunction – 24.12 Payment Orders During the Proceedings – 24.13 Conclusions

24.1 In Domestic Arbitration

In domestic arbitration the source of authority for issuing interlocutory injunctions is largely to be found in the national statutory provisions, which generally do not give much space to the arbitration agreement and rules.

Reference is therefore made here mainly to the national legal systems.

24.1.1 Authority of the arbitrator

Under Swiss law, when the intercantonal *Concordat*[1] applies, the authority to order interlocutory measures belongs only to state courts, but the parties may voluntarily submit to interlocutory measures proposed by the arbitral tribunal

1. The public judicial authorities alone have jurisdiction to make provisional orders.
2. However the parties may voluntarily submit to provisional orders proposed by the arbitral tribunal.

However, under the Swiss Federal Private International Law Statute[2] which came into force on January 1, 1989, as to arbitrations held in Switzerland where one of the parties has no domicile in Switzerland:

> Unless the parties have otherwise agreed, the arbitral tribunal may, upon application of one party, order provisional or holding measures.

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1 Art. 26 Swiss *Concordat* on arbitration March 26, 1969.

2 Section 183, no. 1, Swiss Federal Statute on Private International Law, December, 18, 1987.

The arbitrators are then provided such authority without need that the parties grant it to them. On interlocutory injunctions under Swiss law see Broggini[3] and Habscheid.[4]

Under French law arbitrators may order holding measures and interlocutory injunctions.[5] Under English law[6] the parties may, in the arbitration agreement or during the arbitral proceedings, empower the arbitrators to grant relief on a provisional basis (section 39, Arbitration Act 1996). The arbitrators may also make a preliminary order (section 41 (5)) prescribing compliance with any order or directions to the party which has failed to comply with it without showing sufficient reason. This within the framework of the wide authority granted to the arbitral tribunal by section 46 c1).

In the U.S. the requirement that the parties authorise, directly or through arbitration rules, the arbitrators to grant interim injunctions is affirmed by the Massachusetts Supreme Judicial Court in *Charles Construction*[7] (per Wilkins, J):

> because the applicable arbitration rules did not authorise them to do so, the arbitrators had no authority to enter an interim order directing a party to provide security towards the payment of any award the arbitrators might eventually render. We therefore affirm the Supreme Court vacating the arbitrators' interim order for security.

The issue whether the state courts of a given country have authority to order interim relief even if arbitral proceedings take or must take place outside that country, under a curial law different from the one of that country has been answered in the negative by the House of Lords in the *Channel Tunnel.*[8] As to the exercise of discretion to grant interim relief Lord Mustill has held in general that courts will be careful. and added:

> the injunction claimed from the English Court is the same as the injunction to be claimed from the panel.

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3 G. BROGGINI, *I provvedimenti cautelari nell'arbitrato internazionale; analogie e differenze delle soluzioni italiana e svizzera* (Conservatory measures in international arbitration), *Riv. arb.* 1991, 3, 482.

4 W. J. HABSCHEID, *Einstweiliger Rechtschutz durch Schiedsgericht nach dem IPPG* (Conservatory measures by the arbitral tribunal), in IPRAX 1989, 137.

5 *Arbitration Law in Europe, cit.*, at 151.

6 Art. 39, Arbitration Act (1996).

7 *Charles Construction Company v. Derderian*, Massachusetts Supreme Judicial Court 586 N.E. 2d992, BORN, *cit.* at 763.

8 *Channel Tunnel Group Ltd. et al. v. Balfour Beatty Construction Ltd. et al.*, House of Lords, January 21, 1993 [1993] *All E.R.* 664, [1993] A. C. 384, *Riv. arb.* 1995, 4 729.

In *Island Creek*[9] a U.S. court held that the arbitral tribunal may grant interlocutory injunctions.

It is reported that under Dutch law an arbitrator may order interlocutory injunctions only[10] and not conservatory measures[11] and that under Portuguese law an arbitrator may issue both.[12]

It is also reported that under Omani law[13], in which the prevailing doctrine is that of the 'Ibadi' school, the *Board for the Settlement of Commercial Disputes,* which acts both as an arbitral tribunal and a court of law, became a party to the proceedings since a Board member had to act as chairman of the arbitral tribunal. On July 28, 1997[14] a new Arbitration Act was issued, which replaced all the previous provisions which are not in line with it. Under the law of Hong Kong the parties may grant arbitrators the authority to issue interlocutory injunctions or to order holding measures.[15] The Indian Arbitration Act 1996 grants authority to the arbitrators to issue conservatory measures.[16]

It has been further reported that under the laws of Malaysia arbitrators do not have an inherent authority to issue interlocutory injunctions, or to order conservatory measures, but that the parties may grant this authority to them in the arbitration agreement or later on[17] and that one may apply to the state courts for assistance in such respect,[18] and that in the Philippines an arbitrator has the authority to issue interlocutory injunctions and holding measures.[19]

Born[20] raises an interesting point affecting the issue whether arbitrators have any inherent authority to grant interlocutory injunctions. He refers to the New York (1958) Convention, pointing out that denial of recognition of the award is provided for in case of the arbitral tribunal's failure to allow a party to 'present its case', a situation which would arise if relief is granted *ex parte.*

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9 *Island Creek Coal Sales Co. v. Gainesville* 729 F 2d 1046, 1049 (6th Cir. 1984).

10 *Arbitration Law in Europe, cit.,* at 261.

11 *Arbitration Law in Europe, cit.,* at 286.

12 *Arbitration Law in Europe, cit.,* at 314.

13 Sections 173-89, Omani Commercial Company Statute no. 4, 1974, amended by Sultan's Decree no. 74/75 December 3, 1975 and by successive Decree no. 79/81, which has formed the Board for the Settlement of Commercial Disputes; S. SALEH, *Commercial Arbitration in the Arab Middle East,* Graham and Trottman, London, 1984; (SALEH), at 389; EL AHDAB, *Arbitration with Arab Countries, cit.* at 478.

14 EL AHDAB, *Arbitration with Arab Countries, cit.* at 479.

15 K.R. SIMMONDS – B. HILL – S. JARVIN, *Commercial Arbitration Law in Asia and the Pacific,* (hereinafter SIMMONDS *et al.)* at 27.

16 SIMMONDS *et al., op. cit.,* at 49.

17 SIMMONDS *et al., op. cit.,* at 127.

18 P.G. LIM, *Malaysia,* in PRYLES, *Dispute Resolution in Asia, cit.* at 166.

19 SIMMONDS *et al., op. cit.,* at 184, V. P. LAZAMIN, *The Philippines,* in PRYLES, *Dispute Resolution in Asia, cit.* at 193.

20 BORN, *cit. at* 770.

However if an interlocutory injunction is granted after hearing the other party on such an application, this objection would not apply.

The CPR Rules provide[21] that if a party materially fails to comply with the rules, the arbitral tribunal may impose any remedy which it deems appropriate.

An award in default is expressly mentioned amongst such remedies.

Such a remedy might perhaps be used only in extreme situations.

24.1.2 Authority reserved to state courts

While the procedural law of such countries allows an arbitrator to issue interlocutory injunctions or to order conservatory measures, several other legal systems give this authority only to their state courts.

It is reported that in Thailand the parties, in procedural arbitration, may apply to the courts for interlocutory injunctions or conservatory measures,[22] and that Greek law does not entitle the arbitrators to issue interlocutory measures.[23] Italian law provides:[24]

> The arbitrators may neither grant attachments nor other holding measures.

Under the German Arbitration Act (1997) in Germany unless the parties have agreed otherwise the arbitrators may issue interlocutory injunctions or holding measures.[25] It is reported that the opposite system still applies in Austria. However, as in Thailand, the arbitrator and (only in emergencies) even the parties, may apply to the courts for such measures.[26] It has been reported that under the laws of Finland, arbitrators may not issue interlocutory injunctions, this authority belonging only to state courts.[27]

Likewise Danish law recognizes only the District Court's authority to issue interlocutory injunctions or to order holding measures.[28] Reportedly Dutch law grants only to state courts the power to issue holding measures[29] and under Australian law the arbitrators have no authority to issue interlocutory injunctions or to order holding measures. However if the arbitration agreement gives

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21 Art. 15, CPR Rules.

22 SIMMONDS *et al., op. cit.,* at 226.

23 *Arbitration Law in Europe, cit.* at 210.

24 Section 818, Italian Rules of Civil Procedure.

25 Art. 1041 CCP.

26 *Arbitration Law in Europe, cit.,* at 21.

27 *Arbitration Law in Europe, cit.,* at 135.

28 *Arbitration Law in Europe, op. cit.,* at 107.

29 *Arbitration Law in Europe, op. cit.,* at 287 and VAN DEN BERG, *The Netherlands, Yearbook Commercial Arbitration,* 1987, at 20.

the arbitrator the authority to provisionally protect the rights of the parties, then arbitrators may issue interim awards in this respect.[30]

It is reported that in Hong Kong[31] state courts may grant injunctions or interim measures, even if an arbitration agreement has been entered into; that under Indian law, unless otherwise agreed upon by the parties the arbitral tribunal has authority to grant any interim measure of protection as it deems necessary in respect of the subject matter of the dispute,[32] that Japanese law as well gives to state courts the authority to issue interlocutory injunctions *(Karishobun)* and/or preliminary attachment *(Karisashiosae)*.[33] It is further reported that: Malaysia is in the same position as Hong Kong,[34] that New Zealand also grants this authority to state courts;[35] and that under Swedish law such proceedings are dealt with by state courts only; and attachment *(Kvarstad)* is considered the most important holding measure,[36] but:

> the arbitrators may, at the request of a party, decide that unless the parties have otherwise agreed, the other party must take specific action during the course of the proceedings to secure the claim[37]

It is further reported that in New York the authority to issue interlocutory injunctions and to order conservatory measures is generally given to state courts. However, debates have been reported on the question whether the courts have that authority also in the case of arbitral proceedings. The trend seems to be in that direction.

In the US a clear view is expressed in this respect by the *Dongsan* Court:[38]

> the fact that this dispute is to be arbitrated does not deprive the court of its authority to provide provisional remedies ...

Born[39] rightly praises the wisdom which transpires from *Albatross:*[40]

> the courts are not limited in their equity powers to the specific function of enforcing arbitration agreements but may exercise those powers re-

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30 SIMMONDS *et al., op. cit.*, at 11.

31 M.J. MOSER, *Hong Kong* in PRYLES, *Dispute Resolution in Asia, cit.*, at 95.

32 SIMMONDS *et al., op. cit.*, at 58.

33 K. IWASAKI, Japan, PRYLES, *Dispute Resolution in Asia, cit.*

34 SIMMONDS *et al., op. cit.*, at 127.

35 SIMMONDS *et al., op. cit.*, at 142.

36 Art. 3.6. Arbitration Act 1999, 'The Stockholm Chamber of Commerce', *Arbitration in Sweden,* Stockholm 1999, 18.

37 Section 25,The Swedish Arbitration Act (1999).

38 *Rogers, Burgun, Shanine & Deschler Inc. v. Dongsan Construction Co.*, 598 F Supp. 754 (SDNY 1984) in BORN, *cit.* at 788.

39 BORN, *cit.* at 795.

40 *Albatross Co. v. Manning Bros* 95 F Supp. 459, 463 8 SDNY (1951).

> quired to preserve the *status quo* of the subject matter in controversy pending the enforcement of the arbitration provisions. To rule otherwise would in effect permit a party to take the law into its own hands while the proceeding is carried on as a result of the specific direction of the Court [compelling arbitration] ... It would be an oddity in the law if the Court, after compelling a party to live up to his undertaking to arbitrate, had to stand idly by during the pendency of the arbitration which it has just directed and permit him to assert his 'right to breach the contract and to substitute a payment of damages for non-performance.'

It is reported that the parties may give – and generally do give – to the arbitrators the authority to issue interlocutory injunctions.[41]

In India in *Kholi*[42] the Madhya Pradesh High Court has also held that:

> it has power to grant auxiliary relief on an application ... However such interim relief can only be granted for the purpose of and in relation to arbitration proceedings.

It is also reported that under Libyan law the power to issue interlocutory or conservatory measures is held by state courts.[43]

24.1.3 Concurrent authority of the arbitrator and of state courts

Several legal systems – as seen above – grant the authority to issue interlocutory proceedings, or to order holding measures, both to courts of law and to arbitrators. Amongst these Switzerland must be mentioned since it draws – under the *Concordat*[44] – an interesting distinction between the authority to order such measures, reserved for the courts, and the power to *propose* such measures, not binding for the parties, which is given to the arbitral tribunal As earlier discussed, the Swiss Federal Private International Law Statue[45] grants that authority also to the arbitrator.

Under French law also the courts have the authority to order conservatory measures or to issue interlocutory injunctions, even after the arbitrators have been appointed, conditional upon the requirement that the claim appears not to be subject to any serious ground for challenge.[46]

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41 L.S. MCCLENDON–R.E.E. GOODMAN, *International Commercial Arbitration in New York,* The World Arbitration Institute, New York, 1986, at 99.

42 *Manohar Singh et al* v. *Hind Kumar Kholi*, Madhya Pradesh High Court, AIR 1991, M.P. 373, *ASA Bulletin* 1993, 170.

43 Sections 757, 758, 759. Statute on Civil and Commercial Procedure 1954 (LCPP).

44 See *supra* note 1.

45 See *supra* note 2.

46 *Arbitration Law in Europe, cit.,* at 151.

In England, apart from the institutional authority of the courts to issue such orders, such as shown by the *Mareva* relief and apart from the express authority granted to it by section 44 (2/c) the granting of an interim injunction or a similar authority may be expressly given to the arbitrators by the parties within the framework of section 46, Arbitration Act 1996.[47]

In India the court[48] and the arbitral tribunal[49] are empowered to grant interim measures by an Order. As earlier discussed, the same concurrent authority seems to exist in the Philippines:[50]

Without prejudice to the right of the parties to apply directly to the courts, the arbitrator or arbitrators shall have, at any time before they make their award, the authority to order measures aiming at safeguarding or maintaining any matter which is the subject of the arbitral dispute.

In Thailand there is a sort of cooperation between the arbitrator and state courts for the issue of a provisional measure. The arbitral tribunal may file an application to the state court that it grants a provisional measure.[51] Likewise in China if an application for a provisional measure is made to the arbitral tribunal, the tribunal will transfer it to the competent State court.[52] This concurrent authority is excluded from some legal systems, as in Luxembourg, where state courts may order holding or interlocutory measures only until the arbitrators are appointed; after that the courts, with few exceptions, no longer have such authority.[53] Under Portuguese law the parties may apply to the courts for conservatory measures even after the arbitral tribunal is formed. Since those measures do not aim at resolving the dispute which is submitted to the arbitrators such an application is not in breach of the arbitration agreement. Courts and arbitral tribunals have then concurrent authority to order conservatory measures after the arbitral tribunal is formed.

A concurrent authority exists, as above seen, under French law.[54]

In England in *Channel Tunnel*[55] the House of Lords, while dealing with a review of the Court of Appeal's judgment in respect of an application for an

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47 Section 39, Arbitration Act 1996.

48 Section 9 of the Act.

49 Section 17 of the Act.

50 Section 14, Republic Act no. 876, 1953, SIMMONDS *et al., op. cit.*, at 184.

51 Section 181, Thai Arbitration Act 2530 B.E. (1987).

52 M.J. MOSER *People's Republic of China,* in PRYLES, *Dispute Resolution in Asia, cit.*

53 *Arbitration Law in Europe, cit.*, at 261.

54 See Court of Cassation (France) March 14, (1984) with note by G. COUCHEZ, *Rev. arb.*, 1985, 69. See also F. RAMOS MENDEZ, *Arbitrage international et mesures conservatoires,* (International Arbitration and holding measures) *ibidem,* 51.

55 See *supra* note 8.

order for specific performance of the contractors' obligation to continue to work under the contract for the construction of the Channel Tunnel, which they had threatened to interrupt, pointed out per Lord Mustill:

> the injunction claimed from the English Court is the same as the injunction to be claimed from the panel.

Amongst writers see on German law Kuehn,[56] on French law Fouchard,[57] on Italian law Rubino-Sammartano[58] and Luiso,[59] on international arbitration Ramos Mendez,[60] Boesch,[61] Ouakrat,[62] as to English law Shenton,[63] as to American law Brower and Tupman,[64] Hoellering,[65] Pew and Jarvis,[66] Becker[67] and Brody.[68]

24.2 IN INTERNATIONAL ARBITRATION

24.2.1 Authority under the applicable procedural law

The national procedural statutory provisions reported above apply to domestic arbitrations. They do not seem to be automatically applicable to arbitrations which take place in one state but which are governed by a procedural law different from the domestic law of that state. According to some authors, in

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[56] W. KUEHN, *Vorlaufiger Rechtschutz und Schiedsgerichtsbarkeit,* Jahrbuch für die Praxis der Schiedsgerichtsbarkeit, 1987.

[57] P. FOUCHARD, *La coopération du président du tribunal de la grande instance à l'arbitrage, Rev. arb.* 1185, 8.

[58] RUBINO-SAMMARTANO, *Il diritto dell'arbitrato interno* (Domestic arbitration law) Padova, 2nd edition, 1994; *id. Il référé arbitral, Rass. arb.* 1983, 304.

[59] F.P. LUISO, *Arbitrato e tutela cautelare nella riforma del processo ciivle,* (Arbitration and interim relief in the reform of procedural law) Riv. arb. 1991, 2, 253.

[60] F. RAMOS MENDEZ, *Arbitrage commercial international et mesures conservatoires, Rev. arb.* 1985, 51,

[61] BOESCH, *Einstweiliger Rechtschutz in den internationalen Handelsschiedsgericthsbarkeit,* Frankfurt 1989.

[62] OUAKRAT, *L'arbitrage commercial international et les mesures conservatoires, étude générale, Droit et pratique du commerce international* 1988, 2, 258.

[63] D. SHENTON, *Attachments and Other Interim Court Remedies in Support of Arbitration:* The English Courts 1984, *Intl. Bus. Law* 101.

[64] R. BROWER and TUPMAN, *Court Ordered Provisional Measures under the New York Convention,* 80 *Am. I. Int. L.* 24/1986.

[65] M. HOELLERING, *Interim Relief in Aid of International Commercial Arbitration,* 1984 *Wis. Int. L. J.* 1.

[66] See *infra* note 128.

[67] BECKER, *Attachment in Aid of International Arbitration – The American Position, Arb. Int.* 40, 1985.

[68] BRODY, *An Argument for Pre-Award Attachment in International Arbitration under the New York Convention,* 18 *Cornell Int. L. J.* 99, 1985.

these situations, the national procedural law does not apply at all, except as to its international procedural public policy.[69]

When the arbitration agreement specifies that the proceedings must be submitted to the rules of an arbitral institution instead of those of a national procedural law, or the parties have set out procedural rules not linked to any domestic procedural law, then it is suggested that these rules (provided they do not conflict with the international public policy of the law of the place of arbitration) must be considered in order to establish whether the arbitrators have the authority to issue interlocutory measures.

The authority of the courts of the state in which the arbitration takes place, or of another state, to issue holding or interlocutory measures must be examined carefully, case by case.

In France in *Ateliers et Chantiers du Havre*[70] the Court of Cassation has held that the existence of an arbitration agreement does not deprive the state courts of the authority to authorize a holding measure, and more specifically an attachment on a ship.

French courts have distinguished holding measures from the *référé provision* (i.e. an order to pay part of the claimed amount). The latter, amounting in practice to an order for advanced partial performance of a future decision by the arbitrators is, as held in *Eurodif*,[71] outside the authority of the Courts.

The arbitration rules and the international conventions will be examined now.

Arbitration rules

The 1988 edition of the ICC rules did not deal expressly with the authority of the arbitrators to grant interlocutory injunctions. This gave rise to a large debate. On the one hand de Boisseson[72] and Lalive/Poudret/Reymond[73] took the view that the arbitrators did not have such authority. On the other hand the award made in 1984 in ICC proceedings no. 4162 held:[74]

> after the file is transmitted to the arbitral tribunal, normally the latter is entitled to grant interlocutory injunctions.

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69 See *supra* Chapters 14-15.

70 *Sté Nationale du Transport des Hydrocarbures et des produits chimiques v. Sté Nouvelle des Ateliers et Chantiers du Havrè,* Court of Cassation (France) June 8, 1995, *Rev. arb.* 1996, 12.

71 *Sté Eurodif v. Government of the Islamic Republic of Iran*, Court of Cassation (France) *Rev. arb.* 1989, 653.

72 M. de BOISSESON, *Le droit français de l'arbitrage interne et international*, Joly 1990.

73 LALIVE, POUDRET, REYMOND, *Le droit de l'arbitrage interne et international en Suisse* at 361.

74 *Clunet* 1984, 934, with comments by JARVIN.

This view was shared by the award made in ICC proceedings no. 7 in 1993 and by Craig et al.[75] and Derains.[76]

The very wording of art. 8.5 which stated:

> Before the file is transmitted to the arbitrator, and in exceptional circumstances even thereafter, the parties shall be at liberty to apply to any competent judicial authority for interim or conservatory measures, and they shall not by so doing be held to infringe the agreement to arbitrate or to affect the relevant powers reserved to the arbitrator,

seemed to suggest even if in an indirect way that the authority of the arbitrators to make interim or holding measures was recognised. However that very drafting was not considered satisfactory by others who read it as saying that the arbitrator had not an inherent power but only 'if and when' it was granted to him and therefore that such a provision was not a permanent recognition of such an authority.

It is submitted that the absence of a more express ruling in this respect by the ICC rules was probably not involuntary and could not be construed as always excluding or granting such authority. Because of the international nature of these rules, this issue had been left to the applicable procedural law, or to the agreement of the parties provided it did not conflict with the mandatory provisions of the law of the venue of the proceedings. From this point of view one could read such rule as not being an obstacle to either solution. The decision rendered by the arbitral tribunal in ICC proceedings no 21 in 1989[77] seems to be along this line:

> Article 183 Federal Statute on International Private Law grants to the arbitral tribunal the authority to order provisional measures. The ICC rules do not create obstacles to this.

A reference is made by Schwarz[78] in support of such a conclusion to art. 11 ICC arbitration rules, i.e. to the power of the arbitrators to choose the applicable procedural law, which may deal with interlocutory measures.

The 1998 edition of the ICC rules[79] clarifies the position:

> 1. Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the arbitral tribunal may at the request of a party, order

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75 CRAIG PARK and PULSSON, *International Chamber of Commerce Arbitration, cit.* 26.05.

76 ICC Arbitration Rules 1998 Y. DERAINS *Comments to ICC award*, made in 1990 in ICC proceedings no 6503, in *Clunet* 1995, 1022.

77 *ASA Bulletin* 1994, 143.

78 *Ford Aerospace Corporation and Aerospace Overseas Services Inc. v. The Air Force of the Islamic Republic of Iran,* Iran-U.S. Claims Tribunal June 4, 1984, case no. 159 (39-159-3) Mangård Chairman, *Yearbook Commercial Arbitration*, 1985, X, at 308.

79 Art. 23 ICC Rules (1998).

any interim or conservatory measures it deems appropriate. The arbitral tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measure shall take the form of an order giving reasons, or of an award, as the arbitral tribunal considers appropriate.

2. Before the file is transmitted to the arbitral tribunal, and in appropriate circumstances even thereafter, the parties may apply to any competent judicial authority for interim or conservatory measures ...

The Rules of the London Court of International Arbitration state:[80]

Unless the parties at any time agree otherwise in writing, the Tribunal shall have the power, on the application of any party or of its own motion, but in either case only after giving the parties a proper opportunity to state their views:

(d) to order any party to make any property, site or thing under its control and relating to the subject matter of the arbitration available for inspection by the arbitral tribunal, any other party, its expert or any expert to the arbitral tribunal.

(h) to order the preservation, storage, sale or other disposal of any property or thing under the control of any party and relating to the subject matter of the arbitration.[81]

The arbitral tribunal shall have the power upon the application of a party to order any claiming or counterclaiming party to provide security for the legal or other costs of any other party by way of deposit or bank guarantee or in any other manner and upon such terms as the arbitral tribunal considers appropriate.

The International Rules of the Milan Arbitration Chamber provide:[82]

1. The parties may, in their initial submission, request the arbitrator to order measures to be taken forthwith for the purpose of preventing the occurrence of the events which could not otherwise be avoided.

2. The arbitrator may make his order conditional upon the provision of bonds, guarantees or other security by the party or parties who are requesting such measures.

3. The parties shall immediately fulfil the obligations incumbent on them under the terms of the arbitrator's order, or in any event within the time limit fixed therein.

The Commercial Arbitration Rules of the American Arbitration Association state:[83]

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[80] Art. 22, LCIA Rules. (1998).

[81] Art. 25.1, LCIA Rules.(1998).

[82] Art. 25.1, International Rules of the Milan Chamber of Arbitration.(1998).

> The arbitrator may issue such orders for interim relief as may be deemed necessary to safeguard the property that is the subject matter of the arbitration without prejudice to the rights of the parties or to the final determination of the dispute.

The Rules of the Inter-American Commercial Arbitration Commission deal with this issue as follows:[84]

> 1. At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject matter of the dispute, including measures for the conservation of the goods forming the subject matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.
>
> 2. Such interim measures may be established in the form of an interim award. The arbitral tribunal shall be entitled to require security for the costs of such measures.
>
> 3. A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.

International conventions

The New York Convention (1958) contains a provision[85] which has been construed by some authors as an exclusion even of the authority of state courts to issue interlocutory measures.

> The court of a Contracting State, when seised of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall 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.

The Geneva Convention (1961) states:[86]

> A request for interim measures or measures of conservation addressed to a judicial authority shall not be deemed incompatible with the arbitration agreement or regarded as a submission of the substance of the case to the court.

The Washington Convention (1965) provides:[87]

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[83] Art. 34, Commercial Arbitration Rules of the American Arbitration Association.

[84] Art. 26, Rules of the Inter-American Commercial Arbitration Commission.

[85] Art. 11.3, New York Convention (1958), *cit.*

[86] Art. VI A, Geneva Convention (1961), *cit.*

[87] Art. 47, Washington Convention (1965), *cit.*

> Except as the parties otherwise agree the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.

The Uncitral Model Law (1985) deals with this issue in two separate passages:[88]

> *Arbitration agreement and interim measures by court.* It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.
>
> *Power of arbitral tribunal to order interim measures*[89].
>
> Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure.

It appears then from the international conventions that, on the one hand, the authority of arbitrators to issue interlocutory injunctions is not excluded (and on some occasions it is even affirmed); on the other hand, some of them accept the fact that a party may have to apply to state courts to issue urgent measures, even if there is an arbitration agreement, and state that the application must not be seen by itself as a waiver of arbitration on the merits of the dispute.

The existence of the authority to issue interlocutory injunctions, or holding measures, must be established under the applicable law. The problem arises in the case of a choice by the parties of arbitration rules, such as those of the ICC, which are not linked to any national procedural system. This does not – as already seen – mean a reference to any national procedural law. This principle was affirmed by the sole arbitrator (Prof. Lative) in *Dalmia.*[90]

The arbitrator held:

> One thing is clear beyond all question[s]: once the parties have chosen a law to govern the arbitration proceedings, there is no room for the laws of the country of the parties. In other words, once the parties have agreed to submit to international arbitration under the ICC Rules there is no possibility to rely, against the ICC Rules, upon any provision of the law of Pakistan or of the law of India.

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88 Art. 9, Uncitral Model Law (1985).

89 Art.17, Uncitral Model Law (1985).

90 *Dalmia Dairy Industries Ltd. v. National Bank of Pakistan,* preliminary award, Geneva, January 14, 1970, in ICC proceedings no. 1512, *Yearbook Commercial Arbitration,* 1980, Vol. V, at 176.

This principle was confirmed by Fouchard:[91]

> Private regulation is prevailing in international arbitration.

Similarly, Craig et al.,[92] referring to ICC arbitration rules, define them as:

> self-sufficient.

Therefore, if the parties do not choose a national procedural law, one may wonder whether the arbitrators may, in their exercise of the powers granted to them by the relevant arbitration rules, open the door to the national procedural law which the parties have kept out.

Therefore if the proceedings are governed by a national procedural law different from the law of the place of arbitration, or by supranational arbitration rules, it is suggested that the arbitrators (in order to establish whether or not they have the authority to issue injunctions or to order holding measures), must base themselves, also in this respect, on the procedural rules which govern those arbitral proceedings, bearing in mind that their authority under them may be different from the authority which they would have under the law of the place of arbitration.

24.2.2 Procedural public policy of the lex loci arbitratus

Arbitrators may not ignore the international procedural public policy of the place of arbitration, i.e. of the *lex loci arbitratus,* (a definition which seems clearer than the expression *lex arbitri,* which may also be seen as referring to the nationality of the arbitrator, rather than to the place of arbitration).

Therefore, if the arbitration agreement, expressly or because of its reference to arbitration rules or to a procedural law, allows the arbitrators to issue interlocutory injunctions, then, before using their authority, the arbitrators must verify whether it conflicts with the procedural public policy of the place of arbitration. That generally means the international procedural public policy, in other words the principles which are so essential to that particular legal system that they are applicable also to disputes not governed by its national procedural law.[93]

It follows from this, for example, that the requirement that the award be reasoned, even where dictated by a mandatory provision for domestic arbitration, is often not considered as mandatory for international arbitration.

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[91] FOUCHARD, *La coopération du Président du Tribunal de Grande Instance à l'arbitrage* (Cooperation of the President of the Court to arbitration), *Rev. arb.,* 1985, 5.

[92] See also CRAIG *et al., op. cit.,* 11, 5.01, at 9.

[93] CRAIG, *International Ambition and National Restraints in ICC Arbitration, Arbitration International* 1985, at 22.

It is suggested that the local reservation to state courts of the authority to issue interlocutory injunctions must frequently be construed as limited to domestic arbitration, and is not an essential principle of the procedural law of a legal system.

24.3 Distinctions between Holding Measures and Interlocutory Injunctions

As Ramos Mendez[94] has pointed out, few analyses have been made of the various measures included in the wide definition of interlocutory measures.

Orders to the parties and requests to third parties

In the first place, a distinction must be made between interlocutory orders or holding measures addressed to one of the parties to the arbitration agreement, and orders (even recommendations) to third parties. The contractual nature of the arbitration agreement inevitably entitles arbitrators to issue orders addressed only to the parties to the agreement and not to a third party.

Nevertheless, nothing prevents the arbitrators from requesting a third party to cooperate with the implementation of a measure or to produce evidence.

Consequently, the totally negative attitude of some arbitrators towards such requests or recommendations does not seem justified.

Holding measures

Amongst orders addressed to the parties, a further distinction is required between holding measures and interlocutory injunctions (although for the sake of convenience they will be referred to altogether as interlocutory injunctions). The former have a stronger coercive content. In fact, a mere recommendation to a party to allow its assets to be attached, or to deliver some assets to a custodian, does not seem realistic. That measure must necessarily be such as to be enforceable by coercion. Attachments of assets are a typical holding measure, being measures aiming at preserving the status quo, such as appointing an expert to act as a type of *photographer.*

Interlocutory injunctions

Interlocutory injunctions are an order to perform or not to perform a given act. They generally involve the concerned party's own volition, without requiring a relationship between it and a third party (a custodian for example), even if on some occasion the injunction cannot be enforced without the cooperation of a

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[94] F. RAMOS MENDEZ, see *supra* note 60.

third party. For these injunctions a simple recommendation may in theory be more conceivable.

Orders for payment of a part of the claim

The order to make payment of a part of the claim (which is frequent under French law under the name of *référé provision* and which is known in other systems) is not far from an interlocutory measure. However it is different from it, since it is a decision as to a part of the claim. It is generally issued in the form of an interim award and is frequently treated differently from an interlocutory injunction.

Under French law, the jurisdiction of the *juge des référés* (the judge hearing urgent applications) on an application for a provisional payment order is excluded when arbitral proceedings are pending. In *Eurodif*[95] it was held that such a claim may not:

> be treated as a merely provisional measure.

If so the order for payment of part of a claim does not fit into the distinction made – as already seen – between holding measures and interlocutory injunctions in some legal systems which grant to state courts the authority to issue holding measures and to arbitrators the authority to issue interlocutory injunctions.[96]

Orders to comply with the arbitration rules

Amongst the interlocutory injunctions orders to the parties to comply with the arbitration rules must be mentioned. Various breaches of the arbitration rules may be committed by a party. For example, non-compliance with a rule relating to evidence can be remedied by applying another arbitration rule, or by an order for directions by the arbitrator. If the breach is more substantial the arbitrator may be requested to issue an interlocutory injunction putting an end to that breach. It is suggested that in principle there is no obstacle to the arbitrator issuing an order to a party to put an end to a breach of the arbitration rules. On the contrary this measure seems to be the most natural reaction under any procedural system.

A specific breach may be committed in the area of interlocutory injunctions. In fact the arbitration rules may exclude or limit the parties' recourse to the courts for interlocutory injunctions. That is the case of the ICC Rules[97] which, if read in the negative sense, in substance state that:

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[95] *Société Eurodif et autre v. République Islamique d'Iran,* Court of Cassation (France), March 14, (1981), *Rev. arb.*, 1985, at 69.

[96] See CRAIG *et al., op. cit.,* 11, 5.01, at 8 *et seq.*

[97] Art. 8, para. 5, ICC Rules.

> an application to the Courts for an interlocutory injunction, after the arbitration file is transmitted to the arbitrator, is – unless special circumstances exist – a breach of the arbitration agreement.

It is submitted that the breach of such a prohibition may be complained of to the arbitrator with a request that he orders that party to stop court proceedings or to waive the interlocutory injunction obtained from the state court or not to enforce it.

Except in exceptional circumstances, such an order by the arbitrator is merely an order to a party to stop breaching the procedural rules.

Orders to a party to act or to omit

Amongst injunctions one finds also orders to a party to take a given action (such as to continue to work or to provide a security) or to omit a given action or freezing the payment of given amounts.

Orders and recommendations of holding measures

A further distinction must be made between the authority to order a given measure and the authority to recommend or to propose it. As earlier discussed some legal systems for example Swiss law when the Concordat applies, and also Portuguese law seem to make such a distinction. One might object that arbitral decisions are never coercive by themselves, and therefore that there is no justification for distinguishing between an order and a mere recommendation to the parties to adopt holding measures, as provided for by the Washington convention. The "recommendation" formula implemented by an arbitral tribunal in *Holidays Inn v. Morocco*[98] is not necessarily satisfactory since the arbitrator's order can be enforced in some situations while a recommendation cannot be enforced. It is simply a moral reminder in the sense that it places the party which does not comply with it in a negative light even if this does not mean that the claims of that party regarding other aspects of the dispute will be disregarded.

24.4 JUDICIAL AND ARBITRAL PRECEDENTS

As earlier discussed, courts and arbitral tribunals have dealt on many occasions with the issue whether state courts may issue holding or interlocutory measures, even in the presence of an arbitration agreement.

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[98] P. LALIVE, *The First World Bank Arbitration* (Holidays Inns v. Morocco) *Some Legal problems*, 5 *British Yearbook International Law* 123 (1980); PARRA *Pratique et expérience du Cirdi, Mesures conservatoires et provisoires en matière d'arbitrage international, ICC Bulletin* 1993.

Two opposite doctrines exist. According to one an arbitration agreement deprives state courts of the authority to decide not only the merits but also on holding and interlocutory measures. According to the other doctrine an arbitration agreement deprives state courts only of the authority to decide the merits and not of that to issue holding or interlocutory measures.

Judicial precedents

The first doctrine was followed in the United States in *McCreary Tire*:[99]

> The American Court of Appeals held that if courts of law issue an attachment order, this conflicts with the scope of the New York Convention.

The opposite doctrine was held in the United States in *Uranex*:[100]

> In this decision it was stressed that the courts' possibility of issuing interlocutory measures favours the arbitration proceedings instead of creating obstacles to them.

The existence of authority to order provisional measures is to be found in the U.S. *inter alia* in *Huangshi*.[101]

More recently, even if in respect of the Washington convention, in *Atlantic Triton* the French Court of Cassation[102] held that:

> the Washington Convention 1965 does not exclude the power of State courts to order holding measures ... ; such power can be excluded only by express agreement.

The conflict between these decisions clearly shows that the issue is debatable.

Van den Berg[103] has expressed the opinion that the scope of the Convention is to facilitate the application of the arbitration agreement and the enforcement of the award at an international level.

If the scope of the Convention is certainly to facilitate the enforcement of awards, that does not seem to solve the issue of the effects of an arbitration

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[99] *Ceat S.p.a. v. McCreary Tire & Rubber Company,* US Court of Appeals, 3rd Circuit, July 8, (1974).

[100] *Carolina Power and Light Company v. Gie Uranex,* US District Court of California, N.D. September 26, (1977).

[101] *Daye Non Ferrous Metal Corp. Import and Export and Huangshi Non Ferrous Metals Company China et al. v. Trafigura Beheer B.V.,* U.S. District Court, Southern District of New York, July 2, 1997, n° 96 Civ. 9740 (RWS) *Yearbook Commercial Arbitration* 1998, 984.

[102] *Atlantic Triton Co. v. Republic of Guinea*, Court of Cassation (France), November 18, (1986), *Mediterranean and Middle East Arbitration Quarterly,* 1988, no. 1.

[103] van den BERG, *op. cit.*, at 140 *et seq.*

agreement on the authority of the courts to issue interlocutory or holding measures. It is suggested that the issue is whether the exclusion of the jurisdiction of the courts produced by the arbitration agreement is limited to the merits, or is extended to interlocutory measures. The prevailing tendency is to hold that state courts have authority for the latter.

What exactly is taken away from the jurisdiction of the courts by the arbitration agreement has been debated at length. The answer is influenced by some basic attitudes. In fact, one of the two opposing doctrines is based on the belief that the referral to the courts does not create obstacles to, but rather assists in, arbitration proceedings; the other doctrine is based on the belief that interlocutory measures by the courts always interfere with the arbitrators' decision.

It is suggested that the issue cannot always be decided in the same way. In other words, more than as a general and final choice between the two doctrines, the existence or not of court jurisdiction on holding or interlocutory measures must be seen in the light of the scope of the Convention. Whenever the exercise of this authority by courts does not create obstacles to the arbitral proceedings, but aids them by remedying to insufficiencies of the arbitral mechanism, it may be allowed. This may be the case if either the arbitrators do not have the authority to issue orders under the applicable procedural rules, be they a national law or supranational rules, or such an order cannot be made quickly by the arbitrators because of the stage of the arbitral proceedings, or if it cannot be enforced in a particular state, for example for lack of an international convention which allows it to be enforced in the state where that party or its assets are located.

However, when referral to state courts to obtain a holding or interlocutory measure aims to bypass the arbitrators or to create obstacles for the arbitral proceedings, or to obtain an order which would probably be refused by the arbitrators, it is suggested that the courts should not allow a party, which is trying to be too clever, to abuse their authority.

In this way the positive aspects of the arguments put forward by each doctrine can be taken into account.

Lord Mustill confirmed in *Channel Tunnel*[104] that a Court may intervene in support of arbitration by granting interlocutory injunctions:

> the purpose of interim measures of protection ... is not to encroach on the procedural powers of the arbitrators but to reinforce them, and to render more effective the decision at which the arbitrators will ultimately arrive on the substance of the dispute. Provided that this and no more is what such measures aim to do, there is nothing in them contrary to the spirit of international arbitration.

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[104] See *supra* note 8.

In *Snach*[105] the French Court of Cassation has held:

> the existence of an arbitration agreement does not prevent a party, even after submitting a dispute to arbitration, from applying to a state court for permissions to attach assets, if the requirements for it exist.

This view was expressed by that Court also in *Eurodif*[106] and by the Court of Appeal of Paris in *Dumez.*[107]

In *Horeva*[108] even a *référé provision* (an interlocutory injunction to pay a part of the claim) was declared to have been lawfully issued as long as:

> the *ad hoc* arbitral tribunal has not yet been formed and the arbitrators may then not yet examine the claims.

This view is similar to the French Court of Cassation's previous decision in *Cairo-Estram*[109] which held that the state courts may only grant such relief if the matter had not been referred to arbitration.

Horeva raised other interesting issues as to the nature of this measure such as whether it is to be issued by order or as an interim award. Likewise the issue was raised whether the state court may grant an interlocutory injunction even if the parties have submitted the arbitral proceedings to a different procedural law.

The answer to the second question seems to be that a state court, seised of an application for interlocutory injunction, must apply its own procedural law and have no regard for the procedural law which governs the arbitral proceedings. The authority of state courts to grant an interlocutory measure consisting in the payment of part of a claim is affirmed in principle (except for the Tribunal de Commerce) also in *Sainrupt.*[110]

The award made in ICC proceedings no. 5650 in 1989[111] characterised an application for the appointment of an expert to report before the start of arbitral proceeding as a holding measure. The arbitrators further held that the parties were free to apply for such a measure and that the applicant's omission to inform the ICC court's secretariat did not:

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[105] *S.N.T.M. Hyproc v. Snach,* Court of Cassation (France) June 8, 1995, *Rev. arb.* 1996, 125.

[106] *Eurodif v. Islamic Republic of Iran,* Court of Cassation (France) June 20, 1989, *Rev. arb.* 1989, 653.

[107] *Sté Dumez International v. Sté Laurent Bouillet Entreprise,* Court of Appeal, Paris May 22, 199 *Rev. arb.* 1992, 666.

[108] *Sté Horeva v. Sté Sitas,* Court of Cassation (France) March 6, 1990, *Rev. arb.* 1996, 633.

[109] *The General Authority for Supply of Commodities Cairo Estram v. Ipitrade International,* Court of Cassation (France) March 20, *Clunet* 1989, 1045.

[110] *Sté VSK Electronics S.A. v. Sté Sainrupt and Brice International,* SBI, Court of Appeal, Paris January 20, 1988, *Clunet* 1989, 1032.

[111] *Yearbook Commercial Arbitration* 1991, 85.

affect the legitimacy of the request of interim measures.

In *Eurodisney v. Torno*[112] the Court of Cassation (France) held that state courts may on application order urgent measures aiming to preserve evidence, such as the appointment of an expert, even if the parties have entered into an arbitration agreement.

In 1993 in ICC proceedings no. 6653[113] the arbitral tribunal further held that the authority of arbitrators did not go so far as to grant the application made by a party that the arbitrators declare that an authorisation to attach assets, issued by a Syrian Court, be recognised and declared enforceable.

Among the interlocutory measures available to the arbitrators is an order that the parties do not institute court proceedings or pursue them.

These orders have been issued for a long time in several jurisdictions; see for example, in the English legal system the orders rendered in *Lord Portarlington v. Soulby,*[114] *Hope v. Carnegie,*[115] *Armstrong v. Armstrong,*[116] *Moore v. Moore;*[117] *Pena Coppermine v. Rio Tinto Co.*[118] Likewise, more recently in *Castanho v. Root & Browne*[119] it was held:

> Faced with a dispute pending before two jurisdictions, the House of Lords has confirmed an order made by the lower Courts (referred to also as *anti-suit injunction)* stating that England was the most convenient forum.

Likewise in *Lee Kujian*:[120]

> The English Privy Council held that proceedings instituted in Borneo would have caused injustice to the other party. An order was consequently made against the litigant, who was a Borneo citizen, to abandon the Borneo proceedings.

In *Faberge*[121] the American Court stated:

> The use of the injunctive power to prohibit a person from resorting to a foreign court is a power rarely and sparingly employed, for its exercise

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[112] *Sté Eurodisney v. Sté Torno,* Court of Cassation (France) October 11, 1995.

[113] *Clunet* 1993, 1041.

[114] (1834) 3 M & R 40 *Eng. Rep.* 40.

[115] (1866) 1 CM App. 320.

[116] (1982) at 98.

[117] (1986) 12 TLR 221.

[118] (1911-1913) *All* ER Reprint 209 (C. L).

[119] House of Lords, December 1980, [1981] AC 557.

[120] *Société Nationale Industrielle Aérospatiale v. Lee Kui Jak*, Privy Council, April/May 1987 [1987] AC 871.

[121] *Faberge International Inc. v. Felice Di Pino,* Supreme Court of New York County, Appellate Division, July 2, (1985), *Yearbook Commercial Arbitration,* 1987, at 536.

> represents a challenge, albeit an indirect one, to the dignity and authority of that tribunal.

In spite of this, several *anti-suit injunctions* were issued in England and in America in the well-known *Laker* dispute.[122] In the United States anti-suit injunctions were ordered in *Seattle Totems Hockey Club,*[123] *Cole v. Cunningham*[124] and further in *Laker.*[125]

The reasons given for such orders were that:

- the court, to which the application for an order to issue an anti-suit injunction was made, had the authority to issue the same relief applied for to the other court;
- the other court proceedings created difficulties for the other party;
- the new proceedings were intended to create obstacles for the other party or to allow it to waive or settle the dispute.

The extension of anti-suits injunctions to arbitral proceedings is more recent.

Attachments have been generally held to be measures belonging only to the courts. Still, when there is an arbitration agreement, even the authority of the courts to order attachments has been denied by the Appellate Division of the Supreme Court of New York in *Cooper v. Ateliers de Motobécane*[126] and by the tribunal of the Canton of Geneva in *Mine v. Guinea*[127] The latter has held that in ICSID arbitrations the jurisdiction of the arbitrators in this respect was exclusive.

> Recourse to ICSID arbitration must be considered to imply renunciation of all other means of settlement (Art. 26). When a State agrees to submit a dispute to ICSID arbitration and hence to give an investor access to an international forum, this State should not additionally be exposed to other means of pressure or to other remedies.

The position in New York has been clearly described by Pew and Jarvis[128] and Ebb.[129] In *Ateliers de Motobécane*[130] the New York Court of Appeals in a 4 to 3 decision vacated a pre-arbitration attachment on these grounds:

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[122] *Midland Bank v. Laker Airways,* (1986) 1 *All ER* 526.

[123] *Seattle Totems Hockey Club v. National Hockey League,* 652 F 2nd 852 (9th Cir. 1986).

[124] *Cole v. Cunningham,* 133 US 107-1980.

[125] *Laker* 559 *F. Suppl.* 1124 DDC 1983.

[126] *Cooper v. Ateliers de Motobécane,* Supreme Court of New York State, November 19, 1982, *Yearbook Commercial Arbitration* 1984, 482-486.

[127] *Mine v. Republic of Guinea,* Tribunal of Geneva Canton, March 13, (1986), *Yearbook Commercial Arbitration,* 1987, at 514.

[128] C E. PEW and R.M. JARVIS, *Pre Award Attachment in International Arbitration, The Law in New York* 7 *J. Int. Arb.* 3, 31.

> the essence of arbitration is resolving disputes without interference of the judicial process and its structures. When international trade is involved, this essence is enhanced by the desire to avoid unfamiliar foreign law. The United Nations Convention has considered the problem and created a solution, one that does not contemplate significant judicial intervention until after an arbitral award is made. The purpose and policy of the United Nations Convention will best be carried out by restricting pre-arbitration judicial action to determining whether arbitration should be compelled.

This construction of the New York Convention gives then weight to the fact that the New York Convention does not address pre-award attachments.

In 1985 the New York State legislature introduced an amendment to the New York Arbitration Statute, providing that state courts could grant provisional remedies if the arbitral process risked otherwise becoming 'ineffectual'.

The Court of Appeals in New York revisited this issue in *Intermar*[131] and held that the pre-award attachment which had been granted should be confirmed since the applicable arbitral process was not governed by the Convention. The court went further clarifying that in order to establish whether arbitral proceedings fell under the New York Convention or not, one did not have only to take into account the place where the arbitral proceedings would be conducted, but also whether the defendant to that application was from a country which had adhered to the Convention. The Court further referred to the amendment to the New York Arbitration Statute.

Later in *Drexel*[132] the Court of Appeals held that the attachment would have been useful since Drexel had satisfied the test that in the absence of pre-award attachment the arbitral proceedings would have been ineffectual even if it then held on other grounds that the attachment had been improper.[133]

In the more recent *Goldenwave*[134] judgment the Court of Appeals of New York held that since one of the parties belonged to a non-Convention state, the New York Convention did not apply and the attachment could be confirmed, in view of the risk of being unable to enforce the award against the Respondent.

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[129] L.F. EBB, *Flight of Assets from the Jurisdiction in the Twinkling of a Telex; Pre and Post Award Conservatory Relief in International Commercial Arbitration,* 7 *J. Int. Arb.* 1, 9.

[130] See *supra* note 126.

[131] *Intermar Overseas Inc. v. Argocean S.A.* 117 a.d. 2d 736, 303 N.Y.S. 2nd 736 (1st Dept) 1986.

[132] *Drexel Burnham Lambert Inc. v. Ruebsamen* 139 A.D. 2d 323, 531, NYS 2d 547 (1st Dept).

[133] C.E. PEW and R.W. JARVIS, see *supra* at note 128.

[134] *Goldenwave Marine Ltd. v. H. Dantas Comercio Navigacao e Industrias Ltda*, NY Co Sup. Ct August 8, 1988, at 3, Index no. 18488/89.

An application to the court to issue an injunction restraining a party from proceeding with arbitration was rejected in *Renusagar*:[135]

> Renusagar, in spite of an arbitration agreement, applied to the Bombay High Court seeking an injunction restraining General Electric Company and ICC from proceeding with the ICC arbitration and from asking advances on its costs. General Electric Company sought a stay of Renusagar's suit. The Bombay High Court held that the claims fell under the arbitration agreement and stayed Renusagar's claims.

Arbitral precedents

The award made in ICC proceedings no. 4998 (1985) deserves discussion:[136]

> The arbitrators, sitting in Switzerland, were seised of a dispute between a French claimant and several defendants, amongst which was a Moroccan company which, complaining for an attachment made against it in Morocco by the claimant on its assets located with banks and other third parties, sought an interlocutory injunction ordering that this attachment should not be confirmed, and offered security. The arbitrators held:
>
> 'The arbitrators may simply propose conservatory or provisional measures. As to such measures the issue of orders by the arbitrators is excluded. Art. 8.5 of the ICC Rules and Art. 26 of the Swiss *Concordat* on Arbitration deal with the jurisdiction of arbitrators to order provisional measures, but it would be very serious to modify a measure already ordered by a court of law. The arbitral tribunal consequently rejects the defendant's application for an urgent measure. On the other hand since the arbitral tribunal plans to make its award on the merits in a short time it is not deemed necessary to propose that the parties modify the existing provisional measures'.

The opinion expressed by Jarvin[137] that the 1988 ICC rules did not grant to the arbitrators express authority to order holding measures, but they did recognize it as a possibility, is of interest.

The decision made by the arbitrators in *Agip v. Congo Brazzaville Republic*[138] must be mentioned here:

> In order to avoid the possible prejudice to Agip in proving its loss, arising from the impossibility of having available the corporate books, ar-

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[135] *Renusagar Power Co. Ltd (India) v. General Electric Company (US) and The International Chamber of Commerce (France)* Supreme Court (India) August 16, (1984) *Yearbook Commercial Arbitration,* 1985, at 431.

[136] Reported in *Clunet,* 1986, 1139 *et seq.*(translation from French).

[137] In DERAINS-JARVIN, *Chronique de sentences arbitrales, Clunet* 1984, 37 *et seq.*

[138] *See BERNARDINI, Le prime esperienze arbitrali del CIRDI,* (The First ICSID Arbitral Experience) *Riv. Dir. Int. Priv. Proc.,* 1981, 36.

> chives and accounts, consequent to the intervened nationalization and taking over of its offices by the Congo government, the arbitral tribunal recommended putting together and keeping such documents.

In the award made in ICC proceedings no. 4156 (1983)[139] the arbitrators expressed their views on another aspect of applications to state courts for urgent or holding measures in the case of arbitral proceedings, i.e. on the alleged waiver of the arbitration agreement because of an application to the courts for an interlocutory injunction:

> In spite of the formation of the arbitral tribunal, the French suppliers applied to the Libyan Courts for the appointment of an expert. The application was rejected by the Court of Benghasi because of the existence of the arbitration agreement. The arbitrators, having held that the arbitration agreement does not prevent the parties from applying to the courts in urgent cases (applications which must be exceptional since the procedural law grants that authority also to the arbitrators), rejected the plea that such an application to the court had implied the waiver of the arbitration agreement.

In agreement with this is the award made in ICC proceedings no. 4415 (1984).[140]

The award made in 1976 by an arbitral tribunal sitting in Zurich in ICC proceedings no. 2444 held that the existence of an arbitration clause did not prevent applications to the courts for holding measures.[141] The award made in Lausanne in 1982 in *Framatome* by an arbitral tribunal (Lalive, Chairman, Robert and Goldman, arbitrators)[142] is of great interest.

> The European claimants (the contractors) applied to the arbitrators for an award against the Asian Owner for payment of the balance of the contract price. In the meantime because no payment had been made they stayed performance of the works and terminated the contract. During the arbitral proceedings the claimants applied to the arbitrators for an interlocutory injunction stating that the bank guarantees given by them to the Owner and which he had called were null and void. (The claimants in the meantime had applied to the courts and obtained an order that the issuing bank should not pay out until the decision on the merits).

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[139] *Clunet* 1984, 937; see also the award made in 1983 in ICC proceedings no. 156, *Clunet,* 1984, 952.

[140] *Reported in Clunet,* 1984, at 952 *et seq*

[141] Award rendered in 1976 by the Arbitral Tribunal sitting in Zurich in ICC proceedings no. 2444, *Clunet,* 1977, 932.

[142] Award rendered on December 23, 1982 in ICC proceedings no. 3896 *Clunet,* 1983, 917. (Unofficial translation from French).

> Various applications were made to the arbitrators, one of which requested them to state that the call of the guarantees was abusive and fraudulent, and to order the defendant to stay the collection of the guarantees until the final decision on the merits.

The arbitrators having held that:

> In conclusion, the Arbitral Tribunal considers that there exists, undeniably, the risk of the present dispute becoming aggravated or magnified, and that the parties should, in the same spirit of goodwill that they have already demonstrated in signing the Terms of Reference, refrain from any action likely to widen or aggravate the dispute, or to complicate the task of the Tribunal or even to make more difficult, one way or another, the observance of the final arbitral award,[143]

neatly stated the principle that:

> The parties must refrain from any measure which may have negative repercussions on the enforcement of the future award and in general from taking any action, of whatever nature, which may aggravate or widen the dispute.

and proposed:

> that the claimants withdraw the application aiming to obtain a finding that the call of the guarantees was abusive and fraudulent and to the defendant to waive its call of the guarantees formally until the conclusion of the arbitral proceedings.

As to the authority of ICSID arbitral tribunals to issue holding measures, *Ford Aerospace*[144] shows a clear position taken by the Iran-US Claims Tribunal:

> The Full Tribunal has ruled that the Tribunal has 'an inherent power to issue such orders as may be necessary to conserve the respective rights of the Parties and to ensure that this Tribunal's jurisdiction and authority are made fully effective'. *E-Systems Inc. and The Islamic Republic of Iran and Bank Melli,* Interim Award no. 13-388-FT (4 February 1983) at 10.2 *Iran-US C.T.R.* 51, 57).

The tribunal exercised its authority to order the end of proceedings started before a national court:

> It has exercised such power to require a stay of Tehran Court proceedings pending completion of tribunal action where 'it is obvious that the

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[143] See *Yearbook Commercial Arbitration,* 1985, Vol. X, at 49.

[144] *Ford Aerospace and Aeronutronic Overseas Services Inc. v. The Air Force of the Islamic Republic et al.*, Iran US Claims Tribunal, interim award July 4, (1984), *Yearbook Commercial Arbitration* 1985, at 308.

> claim initiated before the Iranian Court had been admissible as a counterclaim before the tribunal', even though no counterclaim had been asserted.

The requirement that the damage is irreparable (as it is currently understood internationally) goes beyond the Anglo-American notion which excludes damages which can be remedied financially. This second and restrictive construction, which was given by the Iran-US Claims Tribunal in *Boeing*,[145] is reported:

> ... Monetary damages are not irreparable harm ...

The same Court in *Behring International Inc. v. Islamic Republic and Iranian Air Force*[146] basing itself on this authority held:

> Applying these standards, the Tribunal determines that the conservation of both the goods and the rights of the Parties requires that the Respondents' property be transferred to an alternate location. Accordingly, we grant the request for interim measures, subject to the conditions set forth below.
>
> The Tribunal first finds that Respondents' property must be removed from its present location in the annex portion of Claimants' Edison, New Jersey warehouse facility in order to prevent unnecessary damage and/or deterioration. The conditions under which the goods are presently stored are inadequate to conserve and protect them and irreparable prejudice to Respondents' asserted rights may result if they are not transferred to a more appropriate facility. The Tribunal made this finding in its Interim Award of 22 February 1985 and reaffirms that conclusion.

As to the difficulties which the arbitrator may be faced with in applications for interlocutory measures, the genuine acknowledgement made in *The Messianaki Floga* must be mentioned:[147]

> This panel has anguished over the wisdom of granting interim relief. Judicial tribunals are more accustomed to segmented proceedings and the creation of flexible remedies. Case law, however, supports our authority

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[145] *The Boeing Company and its subsidiaries Logistic Support Corporation Boeing Technology International Inc., Boeing Construction Equipment Company v. The Government of the Islamic Republic of Iran, the Iranian Air Force*, Iran-US Claims Tribunal, February 17, (1984), proceedings no. 222 (34-222-1), Lagergren (Chairman) *Yearbook Commercial Arbitration,* 1985, at 312.

[146] *Behring International Inc. v. Islamic Republic and Iranian Air Force,* Iran US Claims Tribunal, June 21, (1985), proceedings no. 382, Mangård (Chairman*) Yearbook Commercial Arbitration* 1986, at 349.

[147] *Southern Sea Navigation Ltd. v. Petroleos Mexicanos,* Society of Maritime Arbitrators, New York, interim award no. 2015, August 24, 1985, *Yearbook Commercial Arbitration* 1986, at 209.

> as arbitrators to engage in equitable type relief. While the existence of mere financial harm is not usually the basis for exercising extraordinary power or granting interim relief, (it is clear from the case law that) the potential of a bankruptcy or extraordinary financial consequence (which could) not be repaired by a damage award is a valid reason for disturbing the *status quo.*
>
> ... Based on the unchallenged evidence, it appears the harm to owner is of sufficient magnitude to invoke this panel's authority ... This case involves a financial injury that cannot be recompensed by a damage award. As the relative probability of success on the merits as to the issues discussed favors the party seeking equity relief, we feel an award is justified.

24.5 Standards for the Issue of Interlocutory Injunctions

The standards for the issue of an interlocutory injunction inevitably vary according to the applicable law.

The exercise of this discretionary power largely depends on the views of international arbitral tribunals which will frequently not derive any assistance from the arbitration rules which they have to apply.

The standard set out by the *Dongsan* court[148] may be helpful. It requires:

> a showing of (a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation, and a balance of hardship tipping decisively towards the party requesting the preliminary relief.

In civil law countries the standard is frequently similar, being referred to as *periculum in mora*[149] and *fumus boni juris*[150]

24.6 State Court's Enforcement of Arbitral Injunctions

Attempts at enforcing an arbitral injunction produce different results depending on whether it has been granted or not in the shape of an award. In the positive case in general it may be enforced as any other award. In the negative case this will depend on the legal system, i.e. whether the order may be treated – due to its contents – as an award or if not whether it is enforceable. In those systems in which a mere order is not enforceable the party in whose favour the injunction has been granted may try to apply to a state court for the issue by that court of the same injunction in order to be able to enforce it.

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[148] See *supra* note 38.

[149] Peril during the time period preceding the award.

[150] A *prima facie* sound claim.

Hulbert has reported[151] the involved history of an attempt made in *Sperry International*[152] to enforce an arbitral injunction granted in the style of an award:

> Sperry had provided a letter of credit to the Government of Israel, as a guarantee for the recovery by Israel of the payment to be made by it under a contract for a telecommunications system for the Israeli Air Force. As provided for by the contract, under the American Arbitration Association rules, Sperry referred to arbitration its claim for U.S. dollars 10 million for breach of contract in 1987. Israel filed cross claims for breach of contract by Sperry. Shortly afterwards Sperry issued new proceedings to compel arbitration and to obtain a preliminary injunction, preventing Israel from calling the letter of credit. The New York District Court granted the preliminary injunction but the Court of Appeals reversed that order on the ground that Sperry had not established that it would suffer irreparable damage in the event of the injunction not being granted. Six days afterwards Israel claimed payment under the letter of credit. Sperry made a successful application to the Supreme Court of New York for an ex-parte injunction.
>
> Israel seised the U.S. District Court for New York and moved that the injunction be set aside. On February 8, 1982, before the motion was heard, Sperry applied to the arbitrator for an injunction to Israel to withdraw its call, restraining it from claiming under the letter of credit
>
> On February 9 the arbitrator, giving no reasons, made an award ordering that the amount of the letter of credit be deposited in a joint escrow account in the name of both parties. Sperry applied to the District Court to confirm the award. Israel opposed the application on the ground that the arbitrator, by granting an injunction which had been refused by the Court of Appeals, had exceeded his authority and manifestly disregarded the law, a ground which entitled the Court to set aside the award (under the Arbitration Act). The District Court confirmed the award and the Court of Appeals rejected a motion to reverse that judgement.

24.7 ARBITRATOR'S AUTHORITY TO VACATE INJUNCTION GRANTED BY STATE COURT

Born[153] raises the issue whether an arbitrator may vacate an injunction ordered by a state court and refers to *Merrill Lynch,*[154] a precedent recognising such power to the arbitrators.

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[151] R.W. HULBERT, *Une vue américaine,* in *Mesures conservatoires et provisoires en matière d'arbitrage international*, ICC, 1993.

[152] *Sperry International Trade Inc. v.Government of Israel*, 689 F 2d 301 (2d Cir. 1982).

[153] BORN, *cit.* at 798

It is submitted that the answer to this issue may be this. The arbitrator may deal with this matter but not by vacating a court order, a step for which he would have no authority, but by ordering the party granted the injunction not to enforce it, along the line of anti-suit injunctions.

The opposite issue, i.e. whether a state court may vacate an injunction granted by arbitrators , was dealt with in *Resort Condominiums International Inc. v. Bolwell,*[155] where the Supreme Court of Queensland held, *per* Lee J.:

> that the State Court may not set aside or stay an award or an order made by an arbitrator and having a procedural or interlocutory nature.

24.8 INTERLOCUTORY INJUNCTIONS IN THE FORM OF AWARDS

Arbitrators' orders to the parties not being enforceable, the arbitrators may decide to issue interlocutory injunctions in the form of awards since in this way they can be enforced.

As to ICC proceedings a working group has been appointed[156] to study this specific issue. Its report has recognised that interlocutory injunctions may be made in the form of an award. However the working group has pointed out that this would cause a delay since the award has to be scrutinised by the ICC Court, a feature which is typical of these proceedings.

In *Petroleos Mexicanos*[157] Weinfeld J. recognised that decisions on interlocutory injunctions may be made in the form of an award, to be immediately enforceable.

However in *Resort Condominiums*[158] the Supreme Court of Queensland, Australia held (per Lee J.) that even if formed as an award, a procedural order and an interlocutory injunction do not have the requirements of an award since they do not definitely decide the dispute or a part of it and as such may not be recognised. The so-called award in issue had been issued in Indianapolis in accordance with AAA commercial rules.

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[154] *Blumenthal v.Merrill Lynch,Pierce,Fenner & Smith Inc.,* 910 F 2d 1049 (2d Cir. 1990).

[155] PRYLES, *Interlocutory Orders and Convention Awards: The case of Resort Condominiums International Inc. v. Bolwell,* 10 *Arb. Int.* 4, 385.

[156] In DERAINS-JARVIN, *Chronique des sentences arbitrables in Clunet*, 1984, 942.

[157] See *supra* note 147.

[158] *Resort Condominiums International Inc v. Bolwell*, Supreme Court of Queensland, October 29,1993 reported by M.PRYLES *Interlocutory Orders and Convention Awards,* 10 *Arb.Int.* 4, 385.

24.9 INTERFERENCE BETWEEN COURT PROCEEDINGS AND ARBITRAL INTERIM INJUNCTIONS

If only the state court or the arbitral tribunal has jurisdiction to grant interim injunctions, no conflict will arise between them. Similarly if both of them have such authority but none of them uses it. If both issue the same injunction, no conflict will arise either although some confusion may exist.

The possibility that arbitrators might grant an injunction, when an application for it has been rejected by a state court, has been the object of an analysis by the award made in ICC proceedings no.4126 in 1984,[159] which is reported by Schwartz:[160]

> A state court rejected an application for an injunction which should have prevented a bank from paying a guarantee to the Employer in a construction contract. That party applied to the arbitral tribunal. The tribunal held that although the Employer had not been a party to the former application, nevertheless the injunction being applied for was the same one. Although the rule '*ne bis in idem*'[161] did not apply here, for good procedure's sake one should not be entitled to apply twice unless new circumstances have arisen.

This view does not seem acceptable, when state courts and arbitrators have concurrent jurisdiction. Each body seems in those circumstances free to decide, without being bound to, or prevented from deciding, by the other body's decision.

In view of the situation to which this may give rise in general it is preferable to avoid concurrent jurisdiction.

The worst conflicts between state courts and arbitral tribunals as to interim measures may arise when both have jurisdiction to issue such orders and do so.

If one of them refuses to grant it but the other body grants it, then depending on the procedural applicable law, rather than the two decisions negating each other, the latter may prevail.

24.10 PRE-ARBITRAL REFEREE

The present tendency seems to increase rather than reduce the arbitrators' authority, at least as shown by the initiative taken by the International Chamber of Commerce in forming a working group, (of which the writer was a member)

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[159] *Clunet* 1984, 934.

[160] E.SCHWARTZ, *Pratique et expérience de la Cour de la CCI,* in *Mesures conservatoires et provisoires,* ICC Bulletin 1993 (translation from French)

[161] One shall not decide twice the same claim.

to prepare a procedure which, within the framework of arbitral proceedings, allows urgent orders to be issued even before the proceedings are instituted.

The premise of such initiative is well summed up by Jarvin:[162]

> The practical problem is that arbitral proceedings are not always quick enough, but mainly it is necessary for the arbitrator to have already been appointed and to have received the file.

This system was inspired by the French *Juge des référés* (judge hearing urgent applications).[163] It has resulted in the drafting of rules for a Pre- Arbitral Referee, which allow a very quick provisional decision on urgent matters, which either party must comply with, subject to its right to apply for a review of it by the arbitrators or state court when they hear the merits.

The appointment of a *Pre-Arbitral Referee* is provided for before the arbitral proceedings are instituted. In fact, even if that party promptly refers the dispute to arbitration, the time required for the arbitral tribunal to be formed, and for the *acte de mission* to be subscribed, leaves a long period during which, according to some, the arbitrators cannot issue interlocutory injunctions. Therefore, through the *Pre-Arbitral Referee* the parties can very quickly obtain an urgent order when necessary. The *Pre-Arbitral Referee* proceedings can be summarized as follows:[164]

Upon the application of a party to an arbitration agreement, before the arbitral proceedings have started, the Court of arbitration appoints a person to decide on applications for urgent measures only. That person, after granting very short time limits to the parties, inspecting the site if necessary and after hearing the parties, issues very quickly an order with which the parties must comply although they may apply for its review by the arbitrator once he is in a position to do so.

24.11 Damages for Wrongful Injunction

If the final award or a final judgment sets aside the interlocutory injunction and holds that it should have neither been applied for nor been granted, the party which has obtained it is not automatically liable for damages. It is submitted that it may be liable only if in doing so it has been negligent. If, contrary to this, the situation was such that the application for the injunction was reasonable, no question should arise as to his liability.

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[162] In DERAINS-JARVIN, *Chronique de sentences arbitrales* in *Clunet* 1984, 942 (translation from French).

[163] *Arts.* 482-492 French Civil Procedural Code

[164] See also M. RUBINO-SAMMARTANO, *Il Référé Arbitral* (The Pre-Arbitral Referee) *Foro pad.* 1982, 35.

Born[165] queries whether the arbitrators may award damages for a wrongful injunction granted by a state court and quotes in this respect *Merinda*[166] which confirmed the award made by an arbitral tribunal, which had granted to the aggrieved party damages for undue arrest of a ship by the Belgian courts, and the *Merrill Lynch*[167] award where the arbitrators set aside a state court's interlocutory injunction, but did not award damages.

Awarding damages for an injunction granted by the same arbitrators is conceivable but generally unlikely. If the injunction has been granted by a state court, the awarding of damages by the arbitrators may require a deeper analysis, *inter alia* in order to ensure that such a claim remains within the ambit of the arbitration agreement.

24.12 PAYMENT ORDERS DURING THE PROCEEDINGS

Payment Orders may be distinguished into orders to pay a part of the claim of a party to the proceedings, which the arbitrators consider to be out of dispute or already clearly proven, orders to provide a security for the possible decision by the arbitrators on the merits negative to that party and eventually orders to provide a security for the costs of the proceedings. The first type of orders is in the substance a partial decision and will take the shape of an interim award, whenever the arbitrators overcome the reluctance to slow down the pace of the proceedings and to split the award, exposing the interim award to challenges before the end of the proceedings. The last situation will be dealt separately. As to a security against the possible negative result of the merits of the dispute, the *Charles Construction* court has held:[168]

> we agree in general that, in the absence of an agreement or statute to the contrary, an arbitrator has inherent authority to order a party to provide a security, while the arbitration is continuing. It is reasonable to assume that the parties, in agreeing to arbitration, implicitly intended that the arbitration be not fruitless and that interim orders to preserve the *status quo* or to make a meaningful relief possible would be proper. In such a circumstance, the arbitrators' authority to act would be reasonably implied from the agreement to arbitrate itself. This general principle has no application in this case because we construe the construction industry arbitration rules of the American Arbitration Association, which the contract incorporates by reference, to restrict the authority of an arbitrator to provide interim relief.

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[165] BORN, *cit.* at 822.

[166] *Warth Line v. Merinda Marine Co.Ltd,* 778 F Supp.158 (SDNY 1991), quoted by BORN *cit.* at 823.

[167] See *supra* note 154.

[168] See *supra* note 7.

A view which is opposed by the *Swift* court:[169]

> we have sought to distill from the agreement the essence of the arbitrator's authority. Whatever that authority may be, it is clear to us that it does not include the authority to award a 6 million dollars cash bond to cover a liability which, contrary to the requirements of the applicable breach of warranty clause, has not yet been (and may not be) incurred or suffered in a situation where the parties did not provide for such security in their agreement, although they might have done so. In our view to award as an adjunct to declaratory relief a form of pre-judgement execution which the agreement by its lack of reference to security seems to exclude rather than to intend, is to eclipse the framework of the agreement and to venture on to unprotected grounds.

24.13 CONCLUSIONS

In arbitral proceedings, as in court proceedings, urgent measures are certainly very important. In some situations they are the only instrument available to avoid the prejudice which a party would suffer, while waiting for the final decision.

In other situations they are used improperly in order to damage the other party.

It should not be a surprise then that this *double nature,* or potentiality, of urgent measures exists even in arbitral proceedings. Since the duration of arbitral proceedings is not short, the need to apply for urgent measures exists in them as in court proceedings.

In international arbitration examination of the matter by the arbitrator, to establish whether or not he has the authority to decide on the urgent measures which are applied for, requires the arbitrator to disassociate himself from two elements. First of all, from the legal system to which he belongs. This may be difficult, since everybody is inevitably influenced by his own legal system, but an international arbitrator must be able to do it.

He must also dissociate himself when necessary from the national procedural law of the place of arbitration. It must immediately be stated that disassociation is clearly not total, since the arbitrator must always take into account the international procedural public policy of the place of arbitration. Therefore when, under the applicable procedural rules, the arbitrator has the authority to issue interlocutory measures, which conflict with the international public policy of the place of arbitration, he must refrain from exercising that authority.

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[169] *Swift Industries Inc. v. Botany Ind. Inc.* 466 F 2d 1125 (3d Cir.1972).

Whenever that authority does not conflict with the applicable international public policy of the venue of the proceedings, it is submitted that he must keep to the applicable procedural rules (be they the national procedural law of another legal system expressly referred to, or the arbitration rules of an arbitral institution, or the *ad hoc* rules dictated by the parties). If such rules give him expressly or impliedly such authority he shall be entitled to make use of it.

As earlier discussed the coexistence of arbitral and state court authority to grant urgent measures is a source of problems. It may give rise to positive or negative conflicts of jurisdiction. In theory both an arbitrator and a state court may hold that jurisdiction to issue the urgent measure belongs to the other one, thus giving rise to a negative conflict (i.e. a conflict where each body denies its jurisdiction). However, it may also happen that the court and the arbitrator both hold to have jurisdiction and issue different or opposite orders as to urgent measures, giving rise to a positive conflict (i.e. a conflict where each body holds to have jurisdiction). This shows that concurrent authority is not the ideal solution.

This view is very clearly expressed in the 1997 edition of the Rules of the European Court of Arbitration:[170]

> It is desirable that the decision whether to grant or not, upon a party's application, holding measures or interlocutory injunctions, be made by the arbitral tribunal rather than by state courts.

It is suggested that state courts neither always have, nor always lack, authority to decide on such applications. It is submitted that courts may issue urgent or holding measures only when such measures cannot be issued by the arbitrator at that time, or the arbitrator's order is not enforceable in that jurisdiction or with the required speed.

Under English law the Arbitration Act 1996, at section 44(5) provides:

> In any case the court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively.

In the absence of such premises, it is suggested that state courts should refrain from deciding and that, in any event the arbitrator when he deems that the state court's initiative interferes with the arbitral proceedings, may order the parties to waive that order.

The 1988 ICC Rules[171] allowed the parties to apply to the state courts for such measures only (1) before the file is transmitted to the arbitrator (2) and, after that, only in extraordinary situations.

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[170] Art.21.

[171] Art.8.

Their 1998 edition[172] now first allows the arbitrators to order such measures and then allows the parties to apply to state courts, before the file is transmitted to the arbitrator and even after that 'in appropriate circumstances', which could have been even more helpful if the appropriateness test had been disclosed.

[172] Art.23.

CHAPTER 25

THE EVIDENCE STAGE AND THE FINAL STAGE

SUMMARY: 25.1 The Burden and Standard of Proof – 25.2 Admissibility of Evidence – Substantive or Procedural Issue – 25.3 Leave to Call Evidence – 25.4 The Taking of Evidence – 25.5 Publicity of Hearings – 25.6 Recording of Hearings – 25.7 Documentary Evidence – Discovery – 25.8 Evidence by Witnesses – 25.9 Consequences of False Testimony – 25.10 Tandem Witness Examination – 25.11 Evidence by the Parties – 25.12- Applications to State Courts for Assistance in the Taking of Evidence 25.13 Experts – 25.14 Presumptions – 25.15 Personal Knowledge of the Arbitrator – 25.16 Need for Availability of International Standard Rules of Evidence – 25.17 Time Bars and Non-Mandatory Terms – 25.18 Closing of the Hearings and Final Statement of Claims and Defences – 25.19 Arbitrators Dispensed with Compliance with Strict Rules of Evidence

25.1 THE BURDEN AND STANDARD OF PROOF

As earlier discussed legal arguments as a rule will rarely help a party which has been unable to prove its case.

Discharge of the burden of proof plays in consequence an essential role in arbitral as well as in court proceedings.

This even if in *City of West Branch*[1] the U.S. Supreme Court affirmed that:

> Arbitral fact finding is generally not equivalent to judicial fact finding ... [T]he review of the arbitration proceeding is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trial, such as discovery compulsory process, cross examination and testimony under oath, are often severely limited or unavailable.

The general rule is that each party must prove his allegations. The Uncitral Arbitration Rules state:[2]

> Each party shall have the burden of proving the facts relied on to support his claim or defence.

The International Arbitration Rules of the AAA provide[3] in the same way:

> Each party shall have the burden of proving the facts relied on to support its claim or defence.

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1 *McDonald v. City of West Branch* 466 U.S. 284, 292 (1989).

2 Art. 241.

3 Art. 19 – 1.

The standard of proof required is different in the various legal systems. From the requirement to satisfy the arbitrator beyond any reasonable doubt, which is similar to *'volle Überzeugung'* (full conviction) in Austria, one moves to the balance of probabilities in England, as held in *Miller*[4] (per Denning J. as he then was):

> It must carry a reasonable degree of probability but not so high as required in a criminal case. If the evidence is such that the tribunal can say we 'think it more probable than not' the burden is discharged, but if the probabilities are equal it is not.

The traditional scholarly approach to the judge's or arbitrator's decision is, as reported by Hanotiau,[5] that it is the fruit of a syllogism based therefore on a major, a minor, and a conclusion.

The major element of the syllogism is the fact, *the minor* the statutory provision and *the conclusion* is the result of the application of the statutory provision to the facts.

In international arbitration frequently the parties will not be subject to the technicalities of national rules of evidence.

A caveat comes from *Buckanier:*[6]

> As an international Tribunal established by agreement between two Sovereign States, the tribunal cannot, in the field of evidence as in any other field, make the domestic rules or judicial practices of one party prevail over the other, in so far as some rules or practices do not coincide with those generally accepted by international Tribunals.

Furthermore, depending on the arbitration rules and on the applicable procedural law – if any – the arbitrator may occasionally order evidence of his motion.[7]

As to the right of the arbitrator to call evidence, in *Enoch*[8] the English Master of the Rolls was rather concise stating:

> What right the umpire had to call a witness, I do not understand.

A position which has changed granting with the Arbitration Act 1996 to the arbitral tribunal the power to decide *inter alia* (Act – 34 (I) g)

> whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law.

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4 *Miller v. Minister of Pensions* [1947] 2 All CN 372, cited by A.REINER, *Burden and General Standards of Proof,* 10 *Arb Int.* 3, 328.

5 B. HANOTIAU, *Burden and General Standards of Proof,* 10 *Arb Int.* 3, 328.

6 *Buckanier v. The Islamic Republic of Iran et al,* Iran U.S. Claims Tribunal, March 6, 1992, *Yearbook Commercial Arbitration* 1993, 296.

7 See the part of this study on the arbitrator's duty to assist, Chapter 12.

8 In re *Enoch and Zaretsky Bock & Co* [1910] 1 KB 327.

The same position was taken in Australia in *Titherage*:[9]

> In view of the decision of the Court of Appeal [in re Enoch] and the principles there enunciated, it is impossible to see any reason why a judge has power to call any evidence *ex mero motu* in a criminal trial. ...

The burden and standard of proof has been the object of many writings.[10]

In international arbitral proceedings evidence plays a role even more important than in court proceedings, since even the law, in the legal systems where this issue is not covered by the rule *ius novit curia* (the law is known to the court), must be proven.

This is confirmed by the award made in ICC proceedings no. 4761 (1984):[11]

> The law governing the merits of the disputes will have to be proven by the parties as a fact unless it is known by the arbitrators.

This is even more true since the arbitrator rightly points out in *Dalmia*[12] that:

> The arbitrator enjoys a large discretion as to the proceedings, for example he may control the dispute by all appropriate means.

This is echoed in the award made in ICC proceedings no. 1434 (1975).[13]

It should be noted that in view of the resistence to the American – style discovery expressed by a large number of states, courts and writers, the Uncitral Rules confine themselves to authorize the tribunal to request the production of 'documents, exhibits or other evidence' without making reference to a full discovery.[14] Likewise the CPC rules[15] grant to the arbitration tribunal the authority to:

> permit and facilitate such disclosure as it shall determine appropriate in the circumstances

and the International Rules of the AAA:[16]

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9 *Titherage v. The King* [1917] 24 CLR 107, quoted by A. BARTON, *The Power of a Person Acting Judicially to Call Witnesses: A Game of Litigation or the Search for the Truth?*, 18 *The Arbitrator*, 18, 1, 39.

10 REDFERN, REYMOND *et al.*, *The Standards and Burden of Proof in International Arbitration*, 10 *Arb Int.* 3, 317.

11 DERAINS-JARVIN, *Chronique des sentences arbitrales, Clunet* 1986, 1137.

12 Award made in 1971 (Lalive, arbitrator) in ICC proceedings no. 1512, *Clunet,* 1974, 905.

13 DERAINS, *Chronique de sentences arbitrales, Clunet,* 1976, 982.

14 Uncitral Model Law, Art. 31(3).

15 Art. 16 (4) CPC Rules for Non Administrated Arbitration of International Disputes Center for Public Resources Inc.

16 Art. 19. 2-3 International Arbitration Rules AAA.

> 2. The Tribunal may order a party to deliver to the tribunal and to the other parties a summary of the documents and other evidence which that party intends to present in support of its claim, counterclaim or defense.
>
> 3. At any time during the proceedings, the tribunal may order parties to produce other documents , exhibits or other evidence it deems necessary or appropriate.

The term discovery has therefore even been replaced by the less stringent term 'disclosure'.

25.2 Admissibility of Evidence – Substantive or Procedural Issue

In some jurisdictions – as is well known – each party is entitled to call the evidence, which it deems appropriate and the judge intervenes only exceptionally.

In other jurisdictions leave must be sought by the parties to call their evidence, the parties must then submit to the judge the evidence which they intend to call, and he decides whether it may be called or not. To be admitted the evidence must be admissible in general *and* relevant.

Before deciding whether the evidence is relevant the first issue to be examined is whether it is admissible, i.e. whether that given means of evidence is available in general to the parties. While it is a fundamental principle of due process that the party which has the burden of proof must be allowed to provide that proof, there is not the same general consensus as to the possibility that a party uses any means of evidence. On the contrary, in several legal systems there is the opposite tendency, i.e. not to allow all the facts asserted by a party to be proven by witnesses. A classic example is the prohibition or limitation of proof through witnesses of oral agreements, additional or contrary to a written contract, alleged to be prior or simultaneous to the written agreement.

The first problem in this connection is whether this is a substantive or procedural issue This classification is particularly important in international arbitration since, depending on the decision made on this, a given or a different national law is applicable. Depending on which law it is, evidence by witnesses may or may not be available.

As to the procedural or substantive nature of evidence as to the formation of a contract, the Iran-US Claims Tribunal held in *Teheran Redevelopment:*[17]

> Moreover, although the governing law of the contract itself must be taken to be that of Iran, each forum applies its own procedural and evidentiary rules to the disputes before it, and it is *arguable* that the type of evidence admissible to establish a contract is a procedural or evidentiary matter. Under Article

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[17] *Dic. of Delaware Inc. & Underhill of Delaware Inc. v. Tehran Redevelopments Corp. et al.*, Iran-US Claims Tribunal April 26, (1985), Mangård (Chairman), proceedings no. 255, *Yearbook Commercial Arbitration,* 1986, Vol. XI, at 332.

> V of the Claims Settlement Declaration the Tribunal must look to 'principles of commercial and international law' for guidance. It is widely accepted by municipal systems of law that one can prove the existence of an enforceable oral contract through evidence demonstrating part performance. *See e.g. K.Zweigert & H.Kotz, An Introduction to Comparative Law, The Institution of Private Law 40-41,48-50 (1977)* Such a principle must be taken to constitute a general principle of law. Moreover, it could be argued that, by its conduct, TRC is estopped to assert the non-existence of the contract(emphasis added).

The substantive or procedural nature of the issue whether a given fact or contract may be proven through witnesses has indeed been largely debated.

According to Satta,[18] evidence has two aspects: a *static* one, under which evidence is decisive or relevant for the certainty of a fact. From this point of view the evidence, and its rules, belong to substantive law; this is the case of presumptions which are to be seen as elements from which the truth of a fact can be inferred.[19]

The other aspect of evidence, the *dynamic* one, consists of its being a process to verify a fact, which is a matter of procedural law since such a verification belongs to the trial.

According to Satta, evidence by witnesses, as other evidence, has two profiles: the substantive one, which in practice deals with the limits to the possibility of using that evidence in general and its relationship with documentary evidence, and the procedural one, which concerns the way that evidence may be provided in court proceedings.[20]

In this connection the Swiss Federal Court held in *Zarzycka*:[21]

> In a dispute between French and Swiss litigants, a loan agreement governed by French law was put forward by the parties. Under French law evidence by witnesses is not allowed against documentary evidence. The parties consequently argued whether it was a *règle de forme* (rule as to the form), as such governed by French law, or a *règle de preuve* (rule of evidence), if so governed by Swiss law. The Federal Court classified the issue as related to the form, following the view prevailing also in several other legal systems.

However this review is based on the assumption that a given national procedural law has to be applied. However several international arbitrations are not governed by a national procedural law (because the parties have expressly excluded national procedural laws, or have directly regulated the proceedings without any reference to a national procedural law, or have made reference to arbitration

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[18] SATTA, *Diritto Processuale civile (Civil* Procedural Law), Padua, 1981, at 188-189.

[19] V. VERDE, *Le presunzioni giurisprudenziali* (Court Presumptions), *Foro It.*, 1971, V, 177 *et seq.*

[20] SATTA, *op. cit.* at 343.

[21] *Zarzycka v. Kirch,* Federal Court (Switzerland) June 29, (1976), *Clunet,* 1987, 985.

rules which do not make any specific national law applicable)[22]. As to them, if those who classify the issue of the admissibility of evidence as a procedural issue, there are no other limits to the admissibility of evidence than those which have been expressed by the parties or by the arbitration rules chosen by the parties.

For those who classify the admissibility of evidence as a substantive issue, the matter remains subject to the applicable substantive law.

25.3 Leave to Call Evidence

The taking of evidence is governed by different rules in the various legal systems. Using the easier comparison between the civil law and common law systems, in some civil law jurisdictions it is required that the party who wants to call evidence applies for a leave; to this effect it must itemize each question (the articles of proof) and each witness to whom each question has to be put. The judge is then asked to review such questions, to admit them wholly or partially, or to reject them. In these systems, the arbitrators, in domestic arbitration, generally tend to follow the example of the judge. Leave to call evidence is then subject to a strict control and to the preventive assessment of its relevance by the arbitrator, who often at that stage has not yet a full knowledge of the dispute. On the other hand, the party seeking leave to call evidence cannot explain to the judge or to the arbitrator, at the time he is called to allow or to exclude evidence,[23] why he wants to put those questions, because this means disclosing its tactics to the other parties.

Certain arbitrators tend to limit the number of witnesses, frequently to save time mainly to themselves.

It is submitted that this practice may not be approved. First, as earlier discussed, the arbitrator has a duty to devote to the proceedings the time which they require and not as little time as possible.

Second the arbitrator, save in very special situations, is not in a position to assess, before hearing the witnesses, whether one or more of them is necessary or not, since frequently at that stage the arbitrator is not yet fully familiar with the file. Even if so, he is not in a position to criticise the decision of a party to call eight instead of five witnesses. This is not his task since only the party, who has the burden of proof and must discharge it, must be entitled to choose how to discharge it, and the arbitrator should intervene only when the number of witnesses or the questions are manifestly out of place.

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[22] *P. BERNARDINI, L'arbitrato internazionale* (International Arbitration), Milan, 1987, at 100; Art. IX (e) of the Geneva Convention, concerning the setting aside of awards, for example, makes reference only to the intentions of the parties without any reference to the applicable national law.

[23] M. RUBINO-SAMMARTANO, *Rules of Evidence in International Arbitration*, 3 *J. Int. Arb.*, 87 *et seq.*; *id. La prova nel processo civile (Evidence in Court Proceedings)*, *Foro pad.* 1986, 11, 87 *et seq.*

This regrettable tendency is not typical only of state courts some civil-law systems, but has been copied by some, certainly not by the best, arbitrators.

This is confirmed by the Order made by the arbitral tribunal in ICC proceedings no. 5082:[24]

> The arbitral tribunal invites the parties to attach to their pleading the affidavits of the persons whom they would like to call. In this way the arbitrators shall be able to become aware , even during the stage of the pleadings, of the scope of such oral evidence in order to better prepare and *conduct* the taking of their evidence, which, because *of costs and time factors*, is *never compulsory.* Furthermore the arbitrators advise the parties that they reserve to *determine the witnesses to be heard,*

and by the Order made on September 26, 1988 in ICC arbitral proceedings no. 5926:[25]

> If defendant wishes to present witnesses (*maximum of 3*) it will have to indicate their names to the arbitral tribunal and to the other party not later than
> ...
> The testimony of witnesses will *have to be concluded hopefully* by the end of Monday and in any event no later than Tuesday ...at noon.

Another example of interference with the right of a party to prove his case is Procedural Order June 9, 1987[26] not to hear witnesses unless they have provided a written statement:

> To avoid any misunderstanding the Tribunal points out that, without exceptions, only those witnesses and experts may be presented at the hearing of which written statements (factual or legal) have been filed with the submissions of the Parties

limiting therefore the right of a party to prove his case, if a witness is ready to appear but is not willing to issue a statement.

In other legal systems, such as in France, the *enquête* (the proceedings to hear evidence) very rarely takes place before a judge and sometimes the *sachants* (witnesses) are heard by the expert appointed by the court. This has led some common law commentators[27] to see a sort of *mini-trial* entrusted to the expert or, in more crude words, to feel that the *decision* on the facts is *left* to the expert.

In common law systems, there is no need for leave to take evidence since the basic rule is that each party is entitled to present the evidence which he considers

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[24] *Clunet* 1995, 1043.

[25] *Clunet* 1995, 1037.

[26] ICC proceedings no. 4815 Clunet 1996, 1094.

[27] BEARDSLEY, *Proof of Fact in French Civil Procedure,* in *American Journal of Comparative Law,* 1986, 459 *et seq.*

necessary to prove his case. The judge intervenes during the taking of that evidence if some questions put to a witness are totally outside the dispute or improper.. The advantages of the common law system have been underlined on several occasions[28]. As to the common law approach to evidence, Denning L. J. (as he then was) held in *Jones v. National Coal Board*:[29]

> In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large as happens, we believe, in some foreign countries. Even in England, however, a judge is not a mere umpire to answer the question "How is that?". His object, above all, is to find out the truth , and to do justice according to the law ...

In international arbitration, which is not governed by any national procedural law, the arbitrator is bound to follow the rules specified by the parties. In the absence of a direct or indirect choice by the parties, the arbitrators are *free* to establish these rules themselves.

In view of the great differences amongst legal systems, also as to the burden of proof, the rule set out by the award made in Geneva in 1975 in ICC proceedings no. 1434 is quite balanced:[30]

> The claimant in an action on contract, who claims damages for non-performance, has the burden to prove the existence of the duty of the other party to perform and its extent, while the defendant must prove that such a duty has been discharged. The two parties have a duty to cooperate in good faith, in the taking of evidence, in particular in arbitral proceedings.

The rules of evidence will be examined starting from international conventions and arbitration rules.

International conventions

Less recent conventions do not deal with evidence. The Geneva Convention (1923)[31] confines itself to state that:

> The arbitral procedure ... shall be governed by the will of the parties *and* by the law of the country in whose territory the arbitration takes place'.(emphasis added)

The New York Convention (1958)[32] provides:

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[28] M. RUBINO-SAMMARTANO, *La prova nel processo civile* (Evidence in Court Proceedings), *Foro pad.* 1986, 87.

[29] *Jones v. National Coal Board* [1957] 2 QB 55.

[30] *Clunet* 1976, 982.

[31] Art. 2, Geneva Convention (1923).

[32] Art. V, 1, New York Convention (1958).

> 1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority, where the recognition and enforcement is sought, proof that .....
>
> (d) 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; or ...

The Geneva Convention (1961) provides[33] amongst the grounds for non-recognition in other Contracting States the one that:

> The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, with the provisions of Article IV of this Convention.

The more recent conventions pay more attention to evidence. The Washington Convention (1965) provides[34] that:

> Except as the parties otherwise agree, the Tribunal may, if it deems it necessary, at any stage of the proceedings:
>
> (a) call upon the parties to produce documents or other evidence and
>
> (b) visit the scene connected with the dispute and conduct such enquiries there as it may deem appropriate.

and furthermore:

> Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question[35].

The Uncitral Model Law (1985) states:[36]

> (1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.
>
> (2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power

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33 Art. IX, d), Geneva Convention (1961).

34 Art. 43, Washington Convention (1965).

35 Art. 44, Washington Convention (1965)

36 Art. 19, Uncitral Model Law (1985).

to determine the admissibility, relevance, materiality and weight of any evidence.

The Convention provides[37] also for the appointment of an expert by the Arbitral Tribunal and:[38]

> The Arbitral Tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.

Arbitration rules

The ICC Rules state:[39]

> 1) The Arbitral Tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means.
>
> (2) After studying the written submissions of the parties and all documents relied upon, the Arbitral Tribunal shall hear the parties *together in person* if any of them so requests; and failing such a request it may of its own motion decide to hear them.
>
> (3) The Arbitral Tribunal may decide to hear witnesses, experts appointed by the parties or any other person in the presence of the parties or in their absence provided they have been duly summoned;
>
> (4) The Arbitral Tribunal, after having consulted the parties, may appoint one or more experts, define their Terms of Reference and receive their reports.
>
> At the request of a party, the parties shall be given the opportunity to question at a hearing any such expert appointed by the Tribunal.
>
> (5) At any time during the proceedings the Arbitral Tribunal may summon any party to provide additional evidence
>
> (6) The Arbitral Tribunal may decide the case solely on the documents submitted by the parties unless any of the parties requests a hearing.
>
> (7) The Arbitral Tribunal may take measures to protect trade secrets and confidential information.

The rules of the London Court of International Arbitration deal at greater length with evidence[40]; its individual rules will be examined when the specific means of taking evidence are dealt with.

The Uncitral rules too contain provisions related to each means of submitting evidence; reference to them will be made in the following sub-sections.

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37 Art. 26, Uncitral Model Law (1985).

38 Art. 27, Uncitral Model Law (1985).

39 Art. 14, ICC Rules.

40 Art. 19-20-21-22, Rules of the London Court of International Arbitration.

The Arbitration Rules of the European Court of Arbitration state:[41]

> To enable the establishing of the relevant facts, the Arbitral Tribunal may take such steps as it may deem appropriate and necessary and issue such orders in respect of the taking of any evidence which it may deem to be useful. The Arbitral Tribunal may apply fines which may be based upon each day of non compliance with its order and as quantified by the Arbitral Tribunal, when the applicable statutory procedural law so allows....

The International Rules of the Milan Chamber of National and International Arbitration provide:[42]

> '(1) The rules applicable to the proceedings before the arbitrator are those contained in the present Rules, and where these Rules are silent, they shall be settled by the parties or, failing them, by the arbitrator.
>
> (2) If oral testimony of evidence is to be taken ...
>
> (4) The arbitrator may appoint one or more experts, define their Terms of Reference, receive their reports and hear them.

The Rules of Conciliation, Arbitration and Expertise of the Euro-Arab Chambers of Commerce provide:[43]

> ...The arbitrator shall not be bound by rules of evidence; he may admit and take into account any material which he considers helpful.

In turn the rules of the Arbitration Institute of the Stockholm Chamber of Commerce state:[44]

> The arbitral tribunal shall determine the manner in which the proceedings will be conducted. In doing so, the arbitral tribunal shall comply with the stipulations of the parties in the arbitration agreement and these Rules and shall have regard to the wishes of the parties.

The rules of the Italian Society for Arbitration specify:

> The arbitrator is free to settle the manner in which the proceedings shall be conducted as he best sees fit ....[45].

and further:

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41 Art. 16, Arbitration Rules of the European Court of Arbitration.

42 Art. 34, International Arbitration Rules of the Chamber of National and International Arbitration of Milan.

43 Art. 23.9, Rules of Conciliation, Arbitration and Expertise of the Euro-Arab Chambers of Commerce.

44 Art. 16, Rules of the Arbitration Institute of the Stockholm Chamber of Commerce.

45 Art. 21, Rules of the *Associazione Italiana per per l'Arbitrato* (Italian Society for Arbitration).

> (1) The arbitrator shall proceed with the preparation of the case in as short a time as possible.
>
> (2) The arbitrator, upon his initiative or at the request of a party, can set one or more hearings in order to hear the parties and the witnesses and to acquire any other element pertinent to the case; when the arbitrators are more than one, the arbitral tribunal may delegate one of the arbitrators to collect evidence.
>
> (3) The arbitrator may appoint experts, request information from public authorities and apply to the judicial authorities for the aids permitted by law. He can proceed to the taking of evidence upon his own initiative or at the request of the parties, provided he always ensures the respect of the principle of *audietur et altera pars* ...[46].

As to the acquisition of evidence by the arbitrators, on their own motion, the Indian rules state[47]:

> ... The Bench shall have power to call for any further documents or things and take any oral evidence, if necessary ...

As to the taking of evidence by the arbitrators *ex officio* (on their own motion) the Russian rules provide:[48]

> 1. The parties must prove circumstances relied on by them in support of their demands or objections. The arbitration tribunal may require the parties to present other evidence.

It also may, at its own discretion, direct that expert examination be conducted and obtain evidence from third parties as well as summon and hear witnesses.

This review of International Conventions and Arbitration Rules shows that the taking of evidence has not been the object of detailed rules. This is certainly not because arbitral institutions do not realize the importance of evidence. This seems to be due to respect for the arbitrators, so that in each specific case they may choose in the best possible way. Nevertheless, this has given rise to serious problems, since each time the arbitrators must choose amongst many possible rules of evidence. This has at least two disadvantages. The first one is that the product of the discussion among the arbitrators is inevitably affected by the limited time available and it is generally not the result of a long and careful study of the problem. A further, and probably greater disadvantage, adds to the former: The parties are not in a position to know from the beginning which will be the rules for taking evidence. This may result in a party being taken by surprise. A common law litigant who (as will be seen in more detail later on) is not allowed to cross-examine his witnesses, has to detail in advance all his questions, and who has an expert

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[46] I.e. (due process) Art. 226, Arbitration Rules of the Italian Society for Arbitration (1994).

[47] Art. 44, Arbitration Rules of the Indian Council of Arbitration.

[48] Para. 30, Rules of the Arbitration Court of the USSR Chamber of Commerce and Industry.

appointed by the arbitrator, imposed on him might feel that he is not having a proper trial. His discontent will be equalled by the feelings of a civil law litigant, who discovers too late to be obliged to produce all his documents (which perhaps he would not have created, in the pre-trial phase, if he had known that he would have to produce them all) and who is cross-examined by counsel for the other party, while his counsel is not trained to cross-examine. The seriousness of these disadvantages has been stressed on various occasions.[49]

To avoid this several rules of evidence have been drafted. The first ones were prepared by the International Bar Association[50] and have been very recently reviewed by it. Subsequent to them are the *Standard Rules of Evidence of the Mediterraneum and Middle East Institute of Arbitration.*[51] The difference between the two seems to be that the IBA rules are more influenced by common law, while the Standard Rules of Evidence take inspiration from both civil and common law.

As the drafter of the Standard Rules of Evidence, this writer will refrain from further comments. Readers are invited to compare the two texts and to form their own views.

It may be of interest to point out that even Derains and Jarvin[52] have examined the possibility of parties belonging to different legal systems drafting independent rules of evidence:

> which place themselves half way between the adversarial common law tradition and the inquisitorial tendency of modern continental law.

Among the authors on this subject Perrot[53] has dealt with the taking of evidence.

25.4 THE TAKING OF EVIDENCE

Once evidence has been allowed, the arbitrators fix a hearing to take it. On a general level, the first problem which arises is whether the evidence may be taken by one arbitrator instead of the entire arbitral Tribunal.

There is no unanimous view on this issue.

The Rules of the London International Court of Arbitration are flexible in this respect:[54]

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[49] M. RUBINO-SAMMARTANO, *Rules of Evidence in International Arbitration*, 3 *J. Int. Arb.*, 87.

[50] *The Rules of Evidence, IBA*, London, 1983.

[51] *Standard Rules of Evidence, The Mediterranean and Middle East Institute of Arbitration*, 1st ed., Athens, 1987.

[52] DERAINS-JARVIN, *Chroniques de sentences arbitrales, Clunet*, 1979, 993.

[53] See among the authors PERROT, *L'administration de la preuve de l'arbitrage* (The Administration of Evidence in Arbitration), *Rev. arb.*, 1979, 159.

[54] Art. 14.3.

> In the case of a three-member arbitral tribunal the Chairman may, with the prior consent of the other two arbitrators, make procedural rulings alone,

which seems to apply only to the issue of the ruling and not to the taking of evidence.

National procedural laws do not always prevent delegation to one arbitrator. The rules of the Italian Society for Arbitration state:[55]

> ... If there are several arbitrators, the arbitral tribunal may delegate one of the arbitrators to collect evidence.

This is the case of the Californian judgement in *San Diego College for Women:*[56]

> A Court in California held that there is no rule which obliges the arbitrators to act together and that therefore a sole arbitrator may perform certain acts by himself, such as asking for the opinion of an independent party.

This view is shared in the French precedent *Sté Italo-Ecuadoriana.*[57]

On the other hand the Rules of the European Court of Arbitration do not grant to only one of the Arbitrators the authority to hear the oral evidence.

It is suggested that an arbitral tribunal should not delegate the taking of evidence to one of the arbitrators. It is submitted that it is a fundamental rule that, in order for the arbitral tribunal to decide, all its members must have heard the evidence.

Unfortunately not all legal systems allow the arbitrator, as the English system does,[58] to apply to the courts for some measure of *ancillary relief,* to remove obstacles which can be met in the taking of evidence, even though in 1923 in the Protocol related to Arbitration Agreements[59] the Contracting States undertook:

> to facilitate all steps in the procedure which require to be taken in their own territories,

on the condition that they are in line with their national procedural law on arbitration.

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55 Art. 22.2.

56 *Griffiths v. San Diego College of Women,* 1955, 45 Cal 2nd 289, quoted by R. DAVID, *L'arbitrage dans le commerce international,* (Arbitration in International Trade), Paris, 1982, at 418.

57 *Sté Arenelle v. Std Italo-Ecuadoriana,* Court of Appeal, Paris, April 26, (1985), *Clunet,* 1986, 175.

58 Such an intervention is foreseen for example when a witness does not appear. The arbitrator may apply to the High Court to order his appearance (Art. 12, Arbitration Act (1950)) which may be consulted in the Appendix to M.J. MUSTILL and S. BOYD, *cit.,* at 629-630.

59 Art. 2.

Among the national legal systems, under Islamic law, it is reported that in Kuwait[60] the court may fine a reluctant witness, may order the discovery of documents and may order letters rogatory; that in the procedural system of the United Arab Emirates the court, at the arbitrator's request, may intervene to compel a party or a witness to appear[61] and that in Bahrain the court may intervene to order discovery of documents or the attendance of a witness.[62]

25.5 PUBLICITY OF HEARINGS

Another issue on which there is no unanimous view is whether arbitral proceedings should take place in private. The civil law view, according to which the confidentiality of arbitration is one of its most important elements, is opposed by contrary and intermediary positions.

The ICC Rules of Conciliation and Arbitration state:[63]

> ... Save with the approval of the arbitrator and of the parties, persons not involved in the proceedings shall not be admitted.

Similarly, the Statute of their International Court:[64]

> 2. The work of the Court of Arbitration is of a confidential nature and must be respected by everyone who participates in that work in whatever capacity.

and the Internal Rules of the ICC Court state[65]

> 3. The sessions of the Court, whether plenary or those of a Committee of the Court, are open only to its members and to the Secretariat. However, in exceptional circumstances the Chairman of the Court may invite other persons to attend. Such persons must respect the confidential character of the work of the Court.

The rules of the Inter-American Commercial Arbitration Commission provide[66] that:

> Hearings shall be held *in camera,* unless the parties agree otherwise...

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60 SALEH, *op. cit.,* at 266.

61 SALEH, *op. cit.,* at 952.

62 SALEH, *op. cit.,* at 285.

63 Art. 15.4, ICC Rules of Conciliation and Arbitration.

64 Art. 6, International Rules of the ICC Court of Arbitration.

65 Art. 1, Internal Rules of the ICC Court of Arbitration.

66 Art. 25 (4), Rules of the Inter-American Commercial Arbitration Commission (1ACAC), adopted on April 1, 1982 and which may be found in L.S. McCLENDON and R.E.E.E. GOODMAN, *International Commercial Arbitration in New York,* New York, 1986, at 236.

The opposite solution, which requires arbitral hearings to be public, is found in several socialist countries such as Czechoslovakia[67] and Bulgaria.[68] It could be justified by the classification of arbitration in these countries as a jurisdiction of international trade, which consequently has a public character.

The publicity of hearings is provided for in the Polish rules:[69]

> The hearing shall be, as a rule, held in open Court, unless the Tribunal orders otherwise.
>
> 2. Upon a motion of one of the parties or of an intervenor, the hearing shall be *in camera.*

However, the Russian rules specify:[70]

> The hearing of the case shall be conducted in private.

The International Rules of the American Arbitration Association provide[71] that:

> Hearings are private unless the parties agree otherwise or the law provides to the contrary.

25.6 RECORDING OF HEARINGS

The Rules of the European Court of Arbitration provide:[72]

> A written record of proceedings will be taken at the hearings. In the absence of a secretary having been appointed, as necessary, the Chairman of the Arbitral Tribunal shall designate, at the commencement of the hearing, the person responsible for this function for the remaining proceedings.
>
> The written record of the hearing will be signed by the Chairman and by the Secretary, if appointed.

The Rules of the German International of Arbitration state:[73]

> A written record shall be made of oral proceedings. Such record shall be signed by the Chairman.

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67 V. STEINER, *Solution of Disputes arising out of International Trade in the Czechoslovakian Socialist Republic*, Prague, 1984, at 64.

68 Rules of the Court of Arbitration at the Chamber of Commerce and Industry of Bulgaria, 1979, Art. 30; see also E. GUERGUEV, *Le Règlement de la Cour d'Arbitrage près de la Chambre de Commerce et d'Industrie de Bulgarie* (the Rules of the Court of Arbitration of the Chamber of Commerce and Industry of Bulgaria), *Rev. arb.*, 1980, 198 *et seq*

69 Para. 25, Rules of the Court of Arbitration at the Polish Chamber of Foreign Trade in Warsaw.

70 Para. 25, Rules of the Arbitration Court of the USSR Chamber of Commerce and Industry.

71 Art. 20.4, International Rules of the American Arbitration Association, April 1, 1999.

72 Art. 15.3.

73 Art. 18.

It is argued whether the lack of records of the hearings is a ground for setting aside the award. One will generally not find a provision dealing with this issue. However before coming to the conclusion that lack of recording does not cause a nullity of the proceedings, one has to check the general principles, in order to establish whether recording is an essential requirement.

Under the New York Convention 1958,[74] the award may not be recognized if:

> 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.

Similar provisions exist in many national procedural laws when dealing with the setting aside of the award.

One could argue that, in the absence of any express contractual or statutory provision to this effect, lack of recording gives rise to no nullity.

That may indeed be the conclusion for those who, to use an English expression, *go by the book.*

However if one looks at the scope of arbitral procedure which is to allow each side to present and to prove its case, and to allow the arbitrator to decide based on that, the lack of recording results in no record being made of the evidence, of objections to questions, of argument, of possible oral amendments of claims, of defences and of new claims and new defences.

It is not suggested that lack of recording must always cause the nullity of the proceedings but that this may be the case whenever absence of record prevents a decisive point being established with certainty.

The recording of the hearing may be made in various ways.

In civil law systems the traditional formula is that the chairman of the Tribunal summarises the evidence and the submissions of the parties and that this summary is either handwritten or typed, and signed.

A more modern solution is to tape record the hearings, copies of the tapes being made available to counsel for the parties.

A further solution is to use a stenotypist who produces a written transcript; this is more expensive but it may be safer in as much as it avoids the risks of poor tape recordings made by non professionals.

Occasionally transcripts are made only by a party. It has been debated whether such party-made transcripts are a proof. The response in *Ganz Mozdony*[75] was negative.

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[74] Art. V, (d).

[75] *Sté Ganz Mozdony et al v. SNCFT*, Court of Appeal Paris, November 16, 1993 *Rev. arb.* 1995, 477.

25.7 DOCUMENTARY EVIDENCE – DISCOVERY

Examination of the various types of evidence confirms the large difference between legal systems in this respect.

In some civil law systems, as under Italian law,[76] the discovery of specific documents only can be obtained, provided the applicant proves (i) their existence, (ii) that they are in the possession of the other party and (iii) their contents – in general terms – in order for their relevance to be assessed.

Various common law systems specify the duty of the parties to discover all their documents. Among them, the American system of depositions connected with discovery seems to have reached an advanced level of oppressiveness.

First the international conventions related to this issue will be examined, then the arbitration rules and some legal systems.

International conventions

The Washington Convention (1965) provides:[77]

> Except as the parties otherwise agree, the Tribunal may, if it deems it necessary at any stage of the proceedings:
>
> (a) call upon the parties to produce documents or other evidence and
>
> (b) visit the scene connected with the dispute and conduct such inquiries there as it may deem appropriate.

The Uncitral Model Law (1985) states:[78]

> (1) Unless otherwise agreed by the parties, the arbitral tribunal
>
> ...
>
> (b) may require a party to give the expert any relevant information or to produce, or to provide access to any relevant documents, goods, or other property for his inspection.

Arbitration rules

The ICC Rules of Conciliation and Arbitration start by providing:[79]

> The arbitral tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means,

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[76] On this issue see E.F. RICCI, *La prova nell'arbitrato rituale* (Evidence in procedural arbitration), Milan, 1974, at 53 *et seq.*, and 68, 69; in more general terms S. SATTA, *Commentario al Codice di procedura civile* (Commentary on the Civil Procedural Code), Milan, 1959-1960, at 149 *et seq.*

[77] Art. 43, Washington Convention (1965).

[78] Art. 26, Uncitral Model Law (1985).

[79] Art. 20.1, ICC Rules.

and further state[80] that the arbitrator decides:

> After studying the written submissions of the parties and all documents relied upon ...

This can be construed either as a clarification, i.e. that before hearing the parties the arbitrator must examine the documents which have been produced (an obvious statement), or as a limit to the wide authority given to the arbitrator, this limit being his duty to base himself only on the documents produced by the parties, without having the authority to order on his own motion the discovery of other documents.

The Uncitral Arbitration Rules (1976) state:[81]

> (1) Each party shall have the burden of proving the facts relied on to support his claim or defence.
>
> (2) The arbitral tribunal may, if it considers it appropriate, require a party to deliver to the tribunal and to the other party, within such a period of time as the arbitration tribunal shall decide, a summary of the documents and other evidence which that party intends to present in support of the facts in issue set out in his statement of claim or statement of defence.
>
> (3) At any time during the arbitral proceedings, the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the tribunal shall determine.

The European Court of Arbitration deals with this matter in the following way:[82]

> *Production of Documents and of Other Evidence*
>
> (1)The parties shall voluntarily produce the documents and related evidentiary material which support their claims, together with a list of such documents.
>
> The documents, material and list shall be filed with the Secretariat of the Court together with copies for each of the arbitrators and for each party.
>
> (2) The Arbitral Tribunal may order a party to produce documents or other relevant evidence, subject to the penalties for non-compliance as provided in Article 16 above.
>
> (3) The Arbitral Tribunal may empower an expert to examine such documents or other evidence.
>
> (4) If permitted by the law of the State where such evidence is to be taken, the Arbitral Tribunal may require third parties to produce documents, classes of documents or other evidence, applying, as appropriate, penalties for non-compliance in accordance with Art.16.

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[80] Art. 20.1, ICC Rules.

[81] Art. 24, Uncitral Arbitration Rules (1976).

[82] Art. 18.

The International Rules of the Milan Chamber of Arbitration after having stated[83] that:

> 1. The rules applicable to the proceedings before the arbitrator are those contained in the present Rules and, where these Rules are silent, they shall be settled by the parties, or failing them by the arbitrator.

do not state any arbitrators' power to order discovery of documents. This silence, if read together with the refusal made by the Republic of Italy, when ratifying the Hague Convention (1970),[84] to implement pre-trial discovery of documents in the territory of the Republic, leads to believe that the arbitrators will very rarely order of their own motion a full or a at least a large discovery, even if it is submitted that the parties' free acceptance of compulsory discovery of documents does not conflict with international procedural public policy of the Italian legal system.

Similarly, the Rules of Conciliation, Arbitration and Expertise of the EuroArab Chambers of Commerce state[85] a general principle:

> ... the arbitrator shall not be bound by rules of evidence; he may admit and take into account any material which he considers helpful.

In turn the Rules of the London International Court of Arbitration state:[86]

> Additional powers of the tribunal
>
> Unless the parties at any time agree otherwise in writing, the Arbitral Tribunal shall have the power, on the application of any party or of its own motion,but in either case only after giving the parties a proper opportunity to state their views:
>
> ...
>
> to order any party to produce to the Arbitral Tribunal, and to the other parties for inspection, and to supply copies of, any documents or classes of documents in their possession custody or power which the Arbitral Tribunal determines to be relevant.

The rules of the Inter-American Commercial Arbitration Commission provide:[87]

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[83] Art. 34.1, International Rules of the Chamber of National and International Arbitration of Milan.

[84] The Hague Convention, March 18, 1970, (Convention on Obtaining Evidence Abroad in Civil or Commercial Matters) to which Italy adhered on February 6, 1975. The Convention can be read in M. GIULIANO, F. POCAR, F. TREVES, *Codice delle Convenzioni di diritto internazionale privato e processuale* (Code of Private and Procedural International Law Conventions) 3d ed. Milan, 1999, at 1450.

[85] Art. 23.9, Rules of Conciliation, Arbitration and Expertise of the Euro-Arab Chambers of Commerce.

[86] Art. 22, Rules of the London Court of International Arbitration.

[87] Art. 24, Rules of the Inter-American Commercial Arbitration Commission.

(1) Each party shall have the burden of proving the facts relied on to support his claim or defense.

(2) The Arbitral Tribunal may, if it considers it appropriate, require a party to deliver to the tribunal and to the other party, within such a period of time as the arbitral tribunal shall decide, a summary of the documents and other evidence which that party intends to present in support of the facts in issue set out in his statement of claim or statement of defense.

(4) At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the tribunal shall determine.

The IBA Rules of Evidence state:[88]

1) Each party shall make Production of Documents in respect of all documentation on which such party desires to rely.

(2) No later than sixty days after delivery of the last Introductory Submission made by the Defendant or by the date agreed between the parties or determined by the Arbitrator, each party shall exchange his List with every other party and deliver his List to the Arbitrator. Unless a document has been so listed it shall not be produced at the hearing without the consent of the Arbitrator. All documents in the List shall be numbered consecutively, and shall be produced in their entirety unless otherwise agreed or ordered. Each party shall provide the Arbitrator with a copy of each document in his List.

(3) A party shall at any time be entitled to a copy of any document listed by another party upon offer of payment of the reasonable copying charge. Such document shall be supplied within fifteen days of the request.

(4)A party may by Notice to Produce a Document request any other party to provide him with any document relevant to the dispute between the parties and not listed, provided such document is identified with reasonable particularity and provided further that it passed to or from such other party from or to a third party who is not a party to the arbitration. If a party refuses to comply with a Notice to Produce a Document he may be ordered to do so by the Arbitrator.

(5) The Arbitrator shall have the power, upon application by one of the parties or of his own volition, to order a party to produce any relevant document within such party's possession, custody or control.

(6) If a party fails to comply with the Arbitrator's order to produce any relevant document within such party's possession, custody or control, the Arbitrator shall draw his conclusions from such failure.

Discovery is dealt with also by the *Standard Rules of Evidence* as follows:[89]

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[88] Art. 4, IBA Rules of Evidence.

[89] Art. 5, Standard Rules of Evidence of the Mediterranean and Middle East Institute of Arbitration.

(1) Each party shall deliver to the arbitrator, and exchange with the other parties, a list of all the classes of its documents related to the dispute. (List of Documents).

(2) The other parties shall be entitled to request, within 30 days after receipt of such list, a full list of the documents of one or more of such classes (List of Documents) and to inspect one or more of such documents, inspection to take place in such a way as to minimize the inconveniences to the other parties; the applicant shall advance the costs related to discovery, as fixed by the arbitrator.

(3) In case of refusal to provide the List of Documents or to allow inspection within 30 days after receipt of the notice to this effect, the other party shall be entitled to apply to the Arbitrator for an Order of Discovery. The parties are entitled to be heard on such application.

(4) Before issuing such an order, the Arbitrator shall satisfy himself that such documents are not irrelevant to the dispute, and that the application does not aim totally or partially to confuse the matter through the production of a quantity of unnecessary documents. An application for discovery will have to be examined by the Arbitrator by proceeding to test the relevance of a portion of such documents. On a party's application, before or after his order, the Arbitrator shall conduct a hearing at which the application or his order will be discussed.

(5) Whenever the arbitrator, after such an examination, has the impression that a large number of the documents, production of which is sought, is irrelevant, he shall be entitled to appoint a lawyer as his expert to divide the documents in three classes: those which he considers relevant, the irrelevant ones and those which might be relevant. The party which seeks production of documents, the relevance of which has been challenged, will have to advance the costs of the expert and to deposit an amount that covers the costs caused to the other party by its inspection (such as the time spent by the other side's staff to attend inspection of the documents which are found irrelevant). All the costs caused by the inspection of the irrelevant documents are to be borne by the party which has applied for their production, even if its claim is eventually successful. Likewise the Arbitrator may, on application, appoint an expert to divide already produced documents into said three categories and to report on them and place the expert and the Arbitrator's costs and the other parties' costs to the charge of the party which has produced irrelevant documents even if the claim of that party succeeds.

(6) Apart from general discovery, the production of specific documents may be ordered by the Arbitrator on a party's application at any stage of the proceedings until the hearing for the final addresses of the parties to the Arbitrator.

(7) Before deciding on the application, the arbitrator shall invite the parties to file their written arguments or to be heard if they so wish.

> (8) The unjustified refusal by a party to discover documents as well as the refusal of a party to testify may be used by the Arbitrator as one of the elements of his decision.

A discovery order was issued in *Mobil Oil Indonesia*:[90]

> During arbitral proceedings the arbitrators, deciding by majority vote on an application for discovery, in the absence of regulations in this respect in the arbitration rules, held that the procedural law of the place of arbitration would apply and they authorized limited discovery.

Depositions, combined with discovery, are generally not accepted in arbitral proceedings unless the parties are all from common law systems, and even then only if the arbitrator is accustomed to using that procedure and no serious dispute arises in this respect between the parties.

In fact discovery, to which such a great importance is given in these legal systems, is much less used in arbitral proceedings.

The answer frequently given to queries about the reasons for this is that discovery is contrary to the essential requirement of speed in arbitral proceedings. It is suggested that this answer is not satisfactory. In reality, discovery seems to be abandoned because a breach of the duty to discover documents is not always punishable as automatically as in court proceedings and lacks then the deterrent of contempt of court. This comment is even more appropriate in international arbitration, where only one litigant finally makes discovery, if the other one, because no sanctions can be enforced against him in his jurisdiction, refuses to do so and discovery is not simultaneous.

National legal systems

National legal systems vary in this connection. In civil law systems generally an order is made only concerning specific documents, provided their existence, their summary contents, and their possession by the other party are established.

In common law systems the opposite principle generally prevails that each party must produce all documents in its possession. The various common law systems further differ as to the ways of achieving the target. While the English system allows a large material to be acquired, the US system adds to pre-trial discovery the extended use of depositions and interrogatories, which make the entire discovery proceedings extremely long and expensive. For this reason, in the United States this procedure[91] has been considered oppressive vis-à-vis the party which is financially weaker.

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[90] *Mobil Oil Indonesia v. Asamera Oil (Indonesia) Ltd.* interim award March 30, 1976, CRAIG *et al., op. cit.,* Part III, para. 10.03 at 5 note 71.

[91] See on this issue F. ZICCARDI, *Appunti del corso di diritto anglo americano* (Notes on Lectures on Anglo-American law), Milan, 1986, Appendix at 356 *et seq.*

Under Islamic law it is reported[92] that Kuwaiti procedural law allows the arbitrator to apply to state courts to issue an order to a third party to produce a document in its possession and which is needed.

As to the legal systems of Asia and the Far East it has been reported that in Malaysia the arbitral tribunal may require the parties to produce documents and the High Court may order discovery of documents.[93]

It is submitted that both extreme positions have reached unacceptable excesses. The civil law position requires even the impossible to be proven in order to obtain discovery of a single document, up to the point that all what is missing is just the requirement for the applicant for discovery to produce a photostat of the documents in question. The common law position seems inquisitorial on discovery, in the sense that parties are obliged to produce documents, while civil law systems are adversarial in this respect. The proper solution is probably, as it often happens, *in medio* and the Standard Rules of Evidence try to implement it by introducing the deterrent that those parties which try to use discovery to oppress their opponents are to bear all the costs caused to the other party, even if that party's claim succeeds in the end, as to all the irrelevant documents.

Although a writer has said[94] that:

> most international arbitrations are fact-driven,

nevertheless in arbitration one must register even in the U.S. that arbitral tribunals rarely order discovery. The reason for this is according to another writer[95] the fact that:

> they lack both direct authority to sanction disobedience and resources to supervise the process.

Be that as it may, Courts tend to provide no remedy to the difficulty of obtaining discovery by an arbitral tribunal. In *Burton*[96] a U.S. Court made the following comment:

> when contracting parties stipulate that disputes will be submitted to arbitration, they relinquish the right to certain procedural niceties which are normally associated with a formal trial. One of these is the right to pre-trial discovery. While the arbitration panel may subpoena documents or witnesses, the litigating parties have no comparable privilege.

This view was emphasized in *Local Lodge*:[97]

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92 SALEH, *op cit.*, at 266.

93 P.G. LIM, *Malaysia*, in PRYLES, *Dispute Resolution in Asia*, *cit.*, at 170

94 A. MARIOTT, *Evidence in International Arbitration*, 5 *Arb. Int.*, 280.

95 BORN, *cit.* at 82.

96 *Burton v. Bush*, 614 F2d 389, 390 (4th Cir 1980) cited by BORN *cit.* at 826.

> Arbitration has never accorded to litigants complete freedom to delve into and explore at will the adversary party's files under the pretence of pre-trial discovery.

In *Technostroyexport*[98] U.S. Courts have dealt with discovery orders made by arbitrators:

> Whether or not there is to be pre-hearing discovery is a matter governed by the applicable arbitration rules ... and by what the arbitrators decide,

adding that if a party:

> obtained a ruling from a foreign arbitrator that discovery should take place, the court would be empowered under section1782 to enforce that ruling in the United States.

In *Suarez Valdez*[99] it was further held that save in exceptional circumstances only the Arbitral Tribunal may seek a court order in this respect.

Reluctance to invite third parties to produce a document, i.e. to issue a request (a step which is much different from an order) is registered frequently, as if the arbitrator who admittedly has no authority to issue an order to a third party, could not even make a simple request which that third party is free to comply with or not.

An even more restrictive approach was taken by an arbitral tribunal sitting in Rome[100] which rejected an application for it to order the other party to produce a contract entered into by the latter with such a third party on the basis that:

> this order did not fall under its authority. However the tribunal shall draw conclusions from lack of production of such document, or of the relevant parts of it, by such a party.

In contrast in the U.S. the *Mississipi Power* Court[101] has emphasized that:

> the arbitrator in his discretion may permit and supervise discovery he deems necessary

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97 *Local Lodge 1746 v. Pratt & Whitney Division* 329 F Suppt 283 (D. Conn. 1971) cited by BORN *cit.* at 844.

98 *In re application of Technostroyexport* M19-116 SDNY May 6, 1994, cited by BORN *Court Ordered Discovery in Aid of a Foreign Arbitration, The U.S. Perspective, ASA Bulletin* 1994, 477.

99 *Suarez Valdez v. Shearson (American Express Inc.)* 845 F.2d 850 (11th Cir 1983) cited by BORN see *supra* note 98.

100 (Corapi Chairman, D'Alessandro, Hunt Arbitrators) award November 14, 1990, *Riv. arb.* 1993, 673.

101 *Chevron Transport Corp. v. Astro Vencedar Compania Naviera* 3 F. Suppt. 179 (SDNY 1969).

and in *Stanton*[102] no interlocutory relief was allowed against the arbitration's decisions as to discovery, a decision which is consistent with the ruling in *Henley*[103] excluding judicial review of evidentiary rulings before the final award.

Generally because of the latitude of his powers the arbitrator has no duty to grant a motion to order discovery to another party. However, in *Chevron*[104] the Court held:

> the affirmative duty of arbitrators to insure that relevant documentary evidence in the hands of one party is fully and timely available to the other side before the hearing is closed.

The right of a party to prove his case may be interfered with not only by preventing or limiting it, but by misleading that party ,even if not on purpose, as occured in *Avco*[105] where the Iran-U.S. Claims Tribunal first directed Counsel for Avco, who was seeking guidance from the Arbitral Tribunal as to the production of kilos and kilos of invoices. The Chairman of Chamber 3, Judge Niels Mangård of Sweden directed Avco not to produce them but to follow the alternative of producing a statement of account. Avco submitted then an affidavit of a partner at Arthur Young Co. which certified to have verified that the accounts receivables' ledgers produced by Avco reflected such invoices.

Subsequently the Chairman of that Chamber was replaced by Judge Michel Virally from France and, the Tribunal rejected Avco's claim based on its audited accounts receivable's ledgers on this ground:

> The Tribunal cannot grant Avco's claim solely on the basis of an affidavit and list of invoices, even if the existence of the invoices was certified by an independent audit.

The claimant, Iran Aircraft Industries, sought enforcement of the award in the U.S.. The District Court denied enforcement. The Court of Appeal confirmed, holding (per Lumbard, Circuit Judge):

> We believe that by so misleading Avco, however unwittingly, the Tribunal denied Avco the opportunity to present its claim in a meaningful manner. Accordingly Avco was unable to present [its] case within the meaning of Article V (I) (b) and enforcement of the Award was properly denied.

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[102] *Mississipi Power Co. v. Peabody,* Cal 69 F-R-D 558 (D.D.Miss. 1976).

[103] *Stanton v. Paine Webber Jackson Curtis*, 685 F.Suppt. 1241 (S.D.Fla 1988).

[104] *Compania Panamena Maritima v. J.E. Hurley Lumber Co.*, 244 F 2d 286 (2d Cir. 1957) cited by BORN *cit.* at 727.

[105] *Iran Aircraft Industries v. Avco Corp.* 980 F2nd 141 (2d Cir 1992) cited by BORN *cit* at 547.

The importance of the evidence is such that, if an arbitrator dies or resigns during proceedings, U.S. Courts generally provide as in *Omsil*[106] that evidence must be reheard.

25.8 Evidence by Witnesses

Documentary evidence is generally considered to be the main evidence. In fact, a document cannot be changed but has to be merely interpreted while the doubts which sometimes exist as to the credibility of a witness, or as to his testimony, may give the impression of this evidence not being solid enough. This is the main reason why, in several legal systems, there is a tendency to limit oral evidence. Under Italian law, for example, evidence by witnesses is not allowed as to the formation of contracts which exceed Italian Lire 5,000 (and therefore practically as to all contracts), even if this is mitigated by the court's discretion to allow derogations. Furthermore evidence, except in extraordinary circumstances, is not allowed as to verbal agreements in addition or contrary to a written contract, allegedly entered into before or simultaneously with its formation.[107]

In the taking of evidence, the differences between the various legal systems are substantial. In civil law systems, governed for example by Italian procedural law, – as earlier discussed – a party must first seek leave to hear witnesses, must itemize all his questions and list the witnesses he wishes to be heard as to each question. The arbitrator has discretion to allow or disallow either some questions or some witnesses or all of them. This while in common law systems witnesses belong to the party who calls them and he has no duty to obtain any leave or submit any questions for approval. Second, in common law, the party calls his witnesses and examines them directly, after which the other side may cross-examine him; and if necessary, the first party may then re-examine the witness. In civil law systems, as is generally known, the examination of the witness is conducted by the judge. Although in international arbitration this is frequently mitigated, in reality the examination of a witness by the parties is often the result of kindness or courtesy by the arbitrator who later, if disappointed, has no difficulty in revoking his liberal authorization to the parties and shall examine the witness directly.

It is suggested that any limits to the taking of evidence, such as those in such civil law countries, are totally unacceptable. The general rule of evidence should remain clear and untouched. Each party has the burden to prove the facts on which he bases his claim or defence and he must consequently also have the right to prove them. During the presentation of a party's evidence the arbitrator is entitled to intervene if questions which are totally irrelevant or improper are put to the wit-

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[106] *Cia de Navigation Omsil v. Hugo New Corp.* 359 F. Suppt. 898, 800 (SDNY 1973) cited by BORN *cit.* at 608.

[107] Sections 2721-2722 Italian Civil Code.

ness. It is submitted that to claim an itemization of all the questions, to further submit the taking of evidence to leave by the arbitrator and finally to reserve examination only to the arbitrator (while if he allows the parties to examine the witnesses, this is just due to mere benevolence), amounts to a most serious breach of the right of a party to present his case and deprives the parties of their right to due process.

The international conventions, some arbitration rules and some legal systems can be studied in this respect. First of all, the specific rules of evidence.

The 1983 IBA Rules of Evidence provide:[108]

> (1)Within sixty days of the delivery of the last Introductory Submission made by the Defendant or by the date agreed between the parties or determined by the Arbitrator, all parties shall deliver their Witness Statements to the Arbitrator only.
>
> Each Witness Statement shall:
>
> a. contain the full name and address of the Witness, his relationship to or connection with any of the parties, and a description of his background, qualifications, training and experience if these are relevant to the dispute or to the contents of his Statement;
>
> b. contain a full statement of the evidence it is desired by that party to present through the testimony of that witness;
>
> c. reflect whether the witness is a witness of fact or an expert, and whether the witness is testifying from his own knowledge, observation or experience, or from information and belief, and if the latter, the source of his knowledge; and
>
> d. be signed by the witness, and give the date and place of signature.

After the arbitrator has exchanged the respective witness statements between the parties, the parties may, within a given time limit, submit further witness statements, or ask to hear witnesses whose statement has been submitted by the other party.

The IBA Rules continue by stating that:[109]

> (9) Any witness who gives oral evidence shall in the first place be questioned by the Arbitrator, and thereafter submit to examination by the party calling him, cross-examination by all other parties and re-examination by the party calling him.
>
> (10) The Arbitrator shall at all times have complete control over the procedure in relation to a witness giving oral evidence, including the right to limit or deny the right of a party to examine, cross-examine or re-examine a witness when it appears to the Arbitrator that such evidence or examination is unlikely to serve a further relevant purpose'

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[108] Art. 5, IBA Rules of Evidence (1983).

[109] Art. 5, IBA Rules of Evidence (1983).

The 1999 IBA Rules of Evidence state:[110]

> 1. The Arbitral Tribunal shall at all times have complete control over the Evidentiary Hearing. The Arbitral Tribunal may limit or exclude any question to, answer by or appearance of a witness (which term includes, for the purposes of this Article, witnesses of fact or any Experts), if it considers such question, answer or appearance to be irrelevant, burdensome, duplicative or covered by a reason for objections set forth in Art. 9.2. Questions to a witness during direct and redirect testimony may not be unreasonably leading.
>
> 2. The Claimant shall ordinarily first present the testimony of its witnesses, followed by the Respondent presenting testimony of its witnesses, and then by the presentation by Claimant of rebuttal witnesses, if any. Following direct testimony, any other Party may question such witness, in an order to be determined by the Arbitral Tribunal. The Party who initially presented the witness shall subsequently have the opportunity to ask additional questions on the matters raised in the other Party's questioning. The Arbitral Tribunal, upon request of a Party or on its own motion, may vary this order of proceeding, including the arrangement of testimony by particular issues or in such a manner that witnesses presented by different Parties be questioned at the same time and in confrontation with each other. The Arbitral Tribunal may ask questions to a witness at any time.
>
> 3. Any witness providing testimony shall first affirm, in a manner determined appropriate by the Arbitral Tribunal, that he or she is telling the truth. If the witness have submitted a Witness Statement, or an Expert Report, the witness shall confirm it. The Parties shall agree or the Arbitral Tribunal may order that the Witness Statement or Expert report shall serve as that witness's direct testimony.
>
> 4. Subject to the provisions of Art. 9.2 the Arbitral Tribunal may request any person to give oral or written evidence on any issue that the Arbitral Tribunal considers to be relevant and material. Any witness called and questioned by the Arbitral Tribunal may also be questioned by the Parties.

The Standard Rules of Evidence specify:[111]

> Each party shall be entitled to call its witnesses.
>
> (2) As a rule, the party wishing to call one or more witnesses will do so by submitting its List of Witnesses to the arbitrator and to the other party.
>
> (3) The List of Witnesses shall contain: the full name and address of each party, his address position, qualification, his present and past position with either of the parties and the dispute; the area, or areas, on which each witness shall be examined.
>
> ...

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[110] Art. 8 Rules of Evidence (1999).

[111] Art. 2, Standard Rules of Evidence.

(7) Only in exceptional cases the arbitrator will order that the witness be not called, and if so he shall first invite the parties to argue this point in writing, or to be heard if they so wish; his order shall be fully reasoned. ...

(9) Neither counsel nor the parties nor any agent of them shall interview witnesses and no proof of evidence will be submitted to the witness, by counsel or by the parties or their agents.

(10) Each witness shall be first examined in chief by counsel for the party calling him; then he shall be cross-examined by counsel for the other parties. Re-examination is allowed. The arbitrator is entitled to put questions at the end.

(11)The Arbitrator will bear in mind that it is up to the parties to prove their case and that they must be entitled to some latitude in examining their witnesses and in testing the other parties' witnesses. The credibility of the witness may also be tested by counsel. On the other hand, the arbitrator shall have the duty to prevent totally irrelevant questions or questions clearly aiming at delaying the proceedings, and to prevent that the witness be insulted or subjected to questions contrary to decency. The arbitrator will have to intervene in this area only with great care and wisdom.

...

(14) The Arbitrator may not call witnesses of his own motion.

(15) The purpose of arbitration not being to create restrictions to the parties' right to prove their case, each party is entitled to submit Supplementary Lists of Witnesses even after all other witnesses have been heard and until the date of the final hearing is fixed.

(16) However, in order to avoid that the other parties be taken by surprise by such a new List, they shall be entitled to apply for a postponement, whenever this is reasonable, as well as to submit a Supplementary List or to recall previous witnesses.

(17) The Arbitrator shall be entitled to order that the fees and costs of the other parties and of the arbitrator arising from the late application be borne by the applicant whenever this late application is not justified by special reasons.

...

(20) Witnesses may be put in front of each other, on a party's request, and be examined and be invited to criticize each other's statements and to discuss them together in front of the Arbitrator.

The ICC Rules of Conciliation and Arbitration state:[112]

The Arbitral Tribunal may decide to hear witnesses, experts appointed by the parties and any other person in the presence of the parties or in their absence provided they have been duly summoned.

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[112] Art. 14. 1, ICC Rules.

The Rules of the German Institution of Arbitration provide:[113]

> The Arbitral Tribunal shall establish the facts. It may make orders at its own discretion and in particular it may examine witnesses and experts and order the production of documents. It shall not be limited by application of the parties in the taking of evidence.

In turn the Rules of the American Arbitration Association provide:[114]

> ... The complaining party shall then present evidence to support its claim. The defending party shall then present evidence supporting its defense, Witnesses for each party shall submit to questions or other examination. The arbitrator has the discretion to vary this procedure but shall afford a full and equal opportunity to all parties for the presentation of any material and relevant evidence.

furthermore:

> The Arbitrator may receive and consider the evidence of witnesses by affidavit, but shall give it only such weight as the Arbitrator deems it entitled to after consideration of any objections made to its admission

The Uncitral Arbitration Rules (1976) in turn provide:[115]

> (2) If witnesses are to be heard, at least 15 days before the hearing each party shall communicate to the arbitral tribunal and to the other party the names and addresses of the witnesses he intends to present, the subject upon and the languages in which such witnesses will give their testimony.
>
> ...
>
> (5) Evidence of witnesses may also be presented in the form of written statements signed by them.
>
> (6) The Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.

The rules of the Inter-American Arbitration Commission follow the Uncitral Arbitration Rules. The Rules of the European Court of Arbitration state:[116]

> 1. Counsel for the parties – or the parties themselves if they are not represented- may call upon the other parties to depose and/or call witness evidence. The parties themselves may give evidence provided no mandatory provision of the *lex fori* forbids the giving of such evidence.

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[113] Art. 17.1, Rules of the German Institution of Arbitration.(1992 edition) (unofficial translation from German).

[114] Art. 29 and 32, Commercial Arbitration Rules (1998) American Arbitration Association.

[115] Art. 25. Uncitral Arbitration Rules.

[116] Art. 17.

2. The parties may examine witnesses and the parties directly before the Arbitral Tribunal. The Arbitral Tribunal shall ensure the proper order of such examination at the hearing.

3. A cross-examination of the witnesses and of the parties shall be permitted.

4. The Arbitral Tribunal may after that put questions to the witnesses and to the parties.

5. The Arbitral Tribunal may disallow any unnecessary evidence by witnesses and the parties or any questions which are not admissible, not pertinent or superfluous.

6. The written record of the hearing will be made and signed by the arbitrators, the parties in attendance, the witnesses and the secretary, if appointed.

7. Written statements by witnesses may be admitted as evidence.

8. If permitted by the *lex fori,* the witnesses shall be sworn by the Arbitral Tribunal; if not so permitted and one of the parties requests it, they will be sworn by the competent state court of the place where the evidence has to be taken. If the witness has valid reasons for refusing to be sworn in the form provided for, the witness shall make an affirmation on his honour to be truthful.

9. If the witness does not appear or he refuses to make a statement as required, the Arbitral Tribunal may request the competent state court to order that he appears before the Arbitral Tribunal.

If the witness does not comply with such an order, the Arbitral Tribunal may require the party who has called the witness in question to request the competent state court to take evidence from the witness if that is allowed by the *lex fori* of the said state court.

Where the mandatory provisions of the *lex fori* permit, the Arbitral Tribunal itself may apply to the competent state court to take evidence from a witness.

The record of the court hearing shall be delivered to the Arbitral Tribunal. If no record is filed, such evidence will be deemed as not having been provided.

10. The Arbitral Tribunal may order that the Arbitral Tribunal or one of the arbitrators appointed by the Arbitral Tribunal for this purpose and the parties be given access to a nominated place.

The International Rules of the Milan Chamber of Arbitration state:[117]

2. If oral testimony of witnesses is to be taken, it is the duty of the relevant parties to ensure the presence of such witnesses on the day fixed for them to be heard. The witnesses may be examined directly by the parties if the parties by agreement so request, or if the arbitrator grants leave.

[117] Art. 34, International Rules of the Chamber of National and International Arbitration of Milan.

> 3. If a witness is absent he cannot be heard at a later date unless, upon request by the party concerned, the arbitrator grants leave. The request must be submitted, at latest, on the day on which the witness was to be heard.

The rules of the London Court of International Arbitration provide:[118]

> 20.1 Before any hearing, the Arbitral Tribunal may require any party to give notice of the identity of each witness that party wishes to call, (including rebuttal witnesses) as well as the subject matter of that witness's testimony ,its content and its relevance to the issues in the arbitration.
>
> 20.2 The Arbitral Tribunal may also determine the time, manner and form in which such material should be exchanged between the parties and presented to the Arbitral Tribunal and it has discretion to allow, refuse, or limit the appearance of witnesses, whether witnesses of fact or expert witnesses.
>
> 20.3 Subject to any order otherwise by the Arbitral Tribunal, the testimony of a witness may be presented by a party in written form, either as signed statements or by duly sworn affidavit.
>
> 20.4 Subject to Art. 14.1 and 14.2 any party may request that a witness, on whose testimony another party seeks to rely, should attend for oral questioning at a hearing. before the Arbitral Tribunal. If the Arbitral Tribunal orders that other party to produce the witness and the witness fails to attend the oral hearing without good cause, the Arbitral Tribunal may place such weight on the written testimony (or exclude the same altogether)as it considers appropriate in the circumstances of the case.
>
> 20.5 Any witness who gives oral evidence at a hearing before the Arbitral Tribunal may be questioned by each of the parties, under the control of the Arbitral Tribunal. The Arbitral Tribunal may put questions at any stage of his evidence.
>
> 20.6 Subject to the mandatory provisions of any applicable law, it shall not be improper for any party or its legal representatives to interview any witness or potential witness for the purpose of presenting his testimony in written form or producing him as an oral witness ...

In *Sulzer*[119] examination of a party by surprise has been used as a ground in order to oppose the enforcement in France of a Swiss award:

> Sulzer argued that its representatives, not being advised, and not being accompanied by the staff which was in charge of the matter ,were able to provide only vague and inaccurate replies. The Court of Appeal, rejecting the opposition, held that if that was the situation, Sulzer's representatives could have confined themselves to declare this at the hearing.

---

[118] Art. 120, Rules of the London Court of International Arbitration.(1998 edition).

[119] *Sulzer v. Somagec et al.*, Court of Appeal, Paris, November 27, 1987, *Rev.arb.* 1989, 62.

The Court of Appeal, Paris has dealt in *Epoux Rouny*[120] with the query whether the court, hearing an attack against an award, may allow a party to call the arbitrator as a witness. The Court held that the arbitrator, even if by making his award has discharged his task, enjoys since his appointment the status of a judge. He then has the same rights and duties of a judge. Therefore he cannot be heard except when he is a party himself.

The Arbitration Rules of the China International Economic and Trade Arbitration Committee (CIETAC)[121] empower the Arbitral Tribunal:

> to conduct investigations and collect evidence of its own initiative.

A refusal to allow the parties to examine the witnesses directly is recorded in the Italian *arbitrato rituale* (arbitration governed by the Rules of Civil Procedure),[122] if the procedural rules are applied. The *Cableries de Lens*[123] award which was later attacked:

> Southwire, in attacking the award before the District Court, complained to have been unfairly prevented from offering evidence when the arbitrator prevented their attorney from fully cross-examining LTCL's international project manager with respect to the price adjustment clause.

However the District Court held that it was up to the arbitrators to decide as to the relevance of the evidence.

It is submitted that the need to assess the credibility of a witness, delicate as it may be, does not entitle to treat oral evidence as *second class* evidence vis-à-vis documentary evidence, and that questions aiming at establishing the credibility of the witness must then be allowed. In fact the party, which is unable to examine witnesses, frequently feels he has suffered an injustice, a feeling which should be avoided as much as possible, since it creates mistrust in the administration of justice and in arbitral justice in particular. Nothing prevents the arbitrator from subsequently carefully assessing the evidence presented by each party. Sometimes it is difficult to discover the truth. However this is not a reason for justifying the disregard of oral evidence, even if this means taking more time in collecting evidentiary material.

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[120] *Epoux Rouny v. Sté Holding RC*, Court of Appeal, Paris May 29, 1992, *Rev arb.* 1996, 408.

[121] H.YAN MING, *Some remarks about the 1994 Rules of CIETAC and China's New International Arbitration Rules*, 11 *J. Int .Arb.* 4, 105.

[122] Section 253, Italian Rules of Civil Procedure; on this issue see also M. RUBINO-SAMMARTANO, *Esame diretto dei testi e capitolati di prova* (Direct Examination of Witnesses and Articles of Proof), *Foro pad.*, 1983, part II, 62.

[123] *Laminoirs Tréfileries Cableries de Lens SA (France) v. Southwire Company (United States)*, US District Court, Northern District of Georgia, January 18, (1980), *Yearbook Commercial Arbitration*, 1981, at 247.

It is suggested that the only reason for not allowing some oral evidence may be the patent and total lack of relevance of some issues or of some questions to the witness. This may not generally be the case for questions aiming to assess the witness' credibility.

Unfortunately a trend can be noted in several civil law systems to be superficial in the taking of oral testimony. It is submitted that the experience of those legal systems, which are more advanced in this respect, must be studied carefully.

There are other differences regarding evidence by witnesses, in particular as to the need for the witness to take an oath. In some legal systems the oath is compulsory, in some others it is optional, and in others the arbitrator is prevented from administering an oath.

The Standard Rules of Evidence specify:[124]

> Unless it is forbidden by mandatory rules of the applicable procedural law, the witness may be asked to swear an oath, or if his religion prohibits this, to make a solemn affirmation. The Arbitrator shall have no authority to oblige the witness to swear an oath but, if he refuses to do so, the Arbitrator shall be under a duty to enquire as to the reasons of the witness's refusal and to put them on record.

As to the right of the parties to recall witnesses, in *The Ermoupolis*[125] the Arbitral Tribunal stated:

> The Panel accepts the contention of the Owner that it has the right, if it chooses to do so, to rest its case on the evidence and documentation previously submitted to the Panel. In harmony with that conclusion, the Panel rejects the demand of Charterer that Owner be not allowed to follow that course of action.
>
> The Panel denies the request of Owner that Charterer be not permitted to recall any witnesses or review prior testimony in this arbitration. This ruling is subject to the *caveat* that it is the intention of this Panel during the continuation of this arbitration to deter irrelevancy or reconsideration of matters which, in its considered opinion, are unreasonable and will cause needless delay in arriving at a conclusion of the proceeding: Charterer will be required to show sufficient cause as to why it must be necessary to again present witnesses and evidence previously submitted to the Panel.

The party which calls witnesses must see that the witnesses appear before the arbitrators. However several arbitrators seem not to understand that sometimes a party may meet difficulties in getting hold of independent witnesses, who are not always available at the time which is ideal for the arbitrators, and that the arbitrators' duty is not to create obstacles to the raising of evidence.

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[124] Art. 2.12.

[125] Award February 28,1994 (Raeschke-Kessler, Chairman, Patry and Mitrovic, Arbitrators) ICC proceedings no. 7047/JJA, *ASA Bulletin* 1995, 301.

Only when such difficulties produce the result that the duration of the proceedings becomes much too long, the arbitrator will have to consider whether to proceed without hearing such witness.

In the absence of more particulars, the arbitral tribunal's ruling which is here examined might be seen as affecting due process:

> Defendant 1 deems its right to be heard and its right to due process infringed if an award were made without hearing Mr. D. whom he called as a witness The Arbitral Tribunal does not share this view.
>
> Mr D. was Y's Ambassador to Z. The Arbitral Tribunal has granted Defendant 1 sufficient time to present the witness at the hearing.
>
> Order no.5 sect.2 made Defendant 1 aware that it was obliged to present the witness. The Arbitral Tribunal granted this opportunity on ... by fixing a new hearing for ... Defendant 1 had more than six weeks to produce a witness.

It is submitted that if a witness may be decisive in order to uphold or to reject a claim, one may have to take some more time and give that party a further opportunity and that it is preferable to do justice in 50 weeks rather than to risk doing injustice in 44 weeks.

Occasionally independent witnesses, in particular when living in other countries, may be unwilling to travel to the seat of the arbitral proceedings. If so, the arbitral tribunal may have to contemplate the possibility of moving to that country to hear that witness.

In other situations the witness may advise that while he is not available to travel to the seat of the arbitral proceedings, he is available to be heard by his local court. If so it is submitted that, if that Court accepts to examine the witness such as under a mere request made by arbitral tribunals, the latter is under a duty to make such a request, unless this means having to stay the proceedings for too long a time. It is suggested that not doing so could amount to a denial of justice.

In view of this, one may not share the opinion expressed by a U.S. Court in *Parsons & Whittemore:*[126]

> inability to produce one's witness before an arbitral tribunal is a risk inherent in an agreement to submit to arbitration. By agreeing to submit disputes to arbitration, a party *relinquishes her court room rights* – including that to *subpoena* witnesses – in favour of arbitration with all of its well known advantages and drawbacks. (emphasis added)

This with the mere exception, stressed by Greenstreet[127] by referring to the Guidelines of the American Arbitration Association:

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[126] *Parsons & Whittemore Co. Inc. v. S.té Générale de l'Industrie du Papier,* 508 F 2d 969, 975 *Yearbook Commercial Arbitration,* 1992 622.

[127] R.GREENSTREET, *The Allowance of Unnecessary Evidence. A Potential Factor in the High Cost of Arbitration.* 62, *Arbitration* 2, 113.

> When it is clear that evidence or testimony, which is being introduced is irrelevant or repetitive, the arbitrators have the authority to so rule and direct the party to move forward with its case.

an authority to be indeed exercised only when such irrelevance or repetition is absolutely clear.

25.9 CONSEQUENCES OF FALSE TESTIMONY

Frequently oral evidence is unsworn.

This will generally give to dishonest witnesses the possibility of avoiding committing the crime of perjury, although in some jurisdictions like Switzerland false testimony will be treated as a criminal offence even if not under oath. A distinction is further to be drawn between countries like England, which treat false testimony in arbitration as perjury only if the witness was under oath and countries like Austria in which false testimony before arbitrators is not a criminal offence (unless it amounts to fraud or to another crime) whether the witness was under oath or not.

In a deep study on this matter Roth[128] very properly distinguished between criminal and civil liability.

In fact even where false testimony does not amount to a criminal offence, it may give rise to civil liability when it amounts to a tort. If the witness causes damages to a party to civil proceedings, even if not intentionally, he may become subject to civil liability to the party which has suffered such a damage. In other terms there seems to be no reason why lack of care should not cause, even in this situation, liability for damages under the heading of negligent misrepresentation.

A further consequence of false testimony may consist in the award, which was based on it, being set aside. This, as Roth points out, may occur when the arbitrator has been misled by the false testimony, since this affects due process and deprives the award of its natural basis.

The award may have to be set aside for misconduct of the arbitrator in those jurisdictions where, if the witness had been warned by the arbitrator of the consequences of a possible false testimony, he would have been criminally liable and the lack of such a warning has released him from such a liability or when the arbitrator has given to the witness the possibility to depose without such a deterrent. This consequence is not likely to be shared by other jurisdictions. Unless one is entitled to use the ground of misconduct by the arbitrator, the existence or not of civil liability of the witness should then not by itself cause the nullity of the award. The award may then be set aside or not depending on whether the false testimony has affected the basis of the arbitrator's decision.

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[128] M.ROTH, *False Testimony at International Arbitration-Hearings Conducted in England and in Switzerland*, 11 *J. Int. Arb.* 1, 5.

25.10 TANDEM WITNESS EXAMINATION

Civil law systems, and in particular Italian law, have provided for a very long time that two witnesses may be heard simultaneously under oath, by being both placed in the witness box, and questioned in order that each of them hears the possibly different testimony of the other one. They are then invited to justify that difference, even by discussing it together. This method is called *confronto*.[129]

In common law jurisdictions this method has been looked at with suspicion. Eventually it has been adopted by a U.S. arbitral tribunal, under the name *Tandem Witness Examination* as to expert winesses:

> Two expert witnesses were put in the witness box at the same time and the results were deemed satisfactory.

This method may prove helpful even as to witnesses of fact to sort out the testimony to be preferred.

An examination protocol, which is interesting even if frequently the tandem will be more effective if it is allowed to flow naturally, has been worked out by Sklar[130] and Groton:[131]

> A Tandem Witness Examination Protocol.
>
> 1. At the initial hearing counsel will submit the expert's curriculum vitae to opposing counsel and to the panel.
>
> 2. The witnesses will be accepted as experts by stipulations of the parties. Each party will have the opportunity to challenge the status of the opposing party's expert.
>
> 3. Both experts will be sworn in at the same time and take the 'stand' at the same time. If possible both experts should be seated side by side to facilitate their ability to question each other.
>
> 4. Claimant' counsel will ask the initial questions, which will be answered by the claimant's witness and then by the respondent's witness. The same question will be asked of each expert witness. This will allow them to answer the question and answer each other's response, thus affording counsel and the panel the opportunity to hear both sides of the issue virtually simultaneously. Alternatively, each side will be allowed to ask questions in five questions groups, alternating with each other so as to avoid any perception of undue advantage. The disadvantage of this procedure is that the *continuum* of questions will be interrupted and the testimony may be disjointed. (Emphasis added).

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[129] Confrontation.

[130] S.P.SKLAR, *Innovations in Arbitration. Using the Tandem Witness Examination When Experts Collide, ADR Current Issues* Volume 2 Issue 1.

[131] J.GROTON, *Using ADR Methods to Solve the Dilemma When Experts Collide, Arbitration Journal,* 1992.

5. At the conclusion of questioning by claimant's counsel, respondent's counsel may ask questions that have not been asked or that are relevant to its case using the same procedure set forth in Step 4.

6. At this point there will be a break in questioning to permit counsel to consult with their own expert. This will be followed by an additional round of questions in the format of Steps 4 and 5. At the option of counsel, this second round of questions may be asked by the experts of each other, or counsel may continue the questioning, having had input from their respective experts.

7. The panel should be able to ask questions of the experts at any time and should encourage the witnesses to ask their counterpart expert questions too.

8. The experts should be informed that the flexibility of the arbitration process encourages them to comment on each other's testimony and even engage in direct dialogue with each other, if appropriate and if agreed to in advance by counsel.

The foregoing protocol[132] is a model. It can be modified as needs alter. Neutrals should not be afraid to recommend it as an effective means of obtaining this testimony and one that provides costs saving opportunities as well. It requires the expert to be truly professional, articulate and willing to present the evidence under circumstances far different from the highly structured court room. It is another way in which the alternative dispute resolution process can provide for creative solutions.

A solution very close to Tandem Witnesses has been introduced in Australia under the name of 'conclave of expert witnesses.'[133]

25.11 EVIDENCE BY THE PARTIES

It is not surprising that the various legal systems clearly differ on the giving of evidence by the parties. In common law systems a party not only can be a witness but is often the main witness. In civil law systems a party is generally not treated as a witness, since it has an interest in the dispute and examination merely aims to use only the statements it makes which can be used against it.[134]

Several arbitration rules provide for hearing the parties, but without making any mention as to whether their statements will be treated as testimony The Rules of the Italian Society for Arbitration state:[135]

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[132] Reprinted with permission from *ADR Currents*, Volume 2, Issue 1 (Winter 1996-1997), a publication of the American Arbitration Association, Copyright 1997.

[133] J. MUIRHEAD, *The Arbitrator* 1999, 17, 3, 190.

[134] Art. 228 *et seq.*, Italian Rules of Civil Procedure; see on this issue M.RUBINO-SAMMARTANO, *La prova nel processo civile* (Evidence in Court Proceedings), *Foro pad.*, 1986, 90.

[135] Art. 22.2, Rules of the Italian Society for Arbitration.

> (2) The arbitrator, whenever he considers it appropriate, shall fix one or more hearings in order to hear the parties and the witnesses and to come to the knowledge of any other fact pertinent to the proceedings.

Under the ICC Rules:[136]

> ... the arbitral tribunal shall hear the parties together in person if one of them so requests; or failing such a request it may of its own motion decide to hear them ...

The Rules of Conciliation Arbitration and Expertise of the Euro-Arab Chambers of Commerce state:[137]

> The arbitrator may give an oral hearing to the parties and he must do so at the request of either of them ...

All these rules then do not state that the parties have a right to be heard and do not grant to them the status of witnesses.

The Rules of the Italian Society for Arbitration do not specify anything in this respect:[138]

> (1) The arbitrator shall proceed with the preparation of the case in as short a time as possible.
>
> ...
>
> (3) he may proceed with collecting even that evidence which has not been indicated by the parties, ensuring that each of them is given an opportunity for presenting its case or defending itself...

The role of the parties as witnesses is recognized by other sets of arbitration rules. The Rules of the European Court of Arbitration provide:[139]

> The parties may examine witnesses *and the parties* directly before the Arb i-tral Tribunal. (emphasis added)

The Rules of the London Court of International Arbitration provide:[140]

> Any party which expresses a desire to that effect has the right to be heard orally before the Arbitral Tribunal, on the merits of the dispute unless the parties have agreed in writing on documents – only arbitration.

The IBA Rules of Evidence recognize the right of a party to be heard:[141]

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[136] Art. 20.2, ICC Arbitration Rules.

[137] Art. 23.9, Rules of Conciliation, Arbitration and Expertise of the Euro-Arab Chambers of Commerce.

[138] Art. 22.1-22.3, Rules of the Italian Society for Arbitration.

[139] Art 17.2 Arbitration Rules of the European Court of Arbitration (1997 ed).

[140] Art. 19.1, Rules of the London Court of International Arbitration (1998 ed)..

[141] Art. 5, IBA Rules of Evidence.

> A party may be heard in support of his own case ...

The Standard Rules of Evidence of the Mediterranean and Middle East Institute of Arbitration state:[142]

> (1) Counsel for a party shall be entitled to call his client or another party to the proceedings as a witness.
>
> (7) That party shall be treated as any other witness and consequently all the hereabove provisions related to witnesses shall apply.
>
> (8) The Arbitrator shall establish with much care the weight to attach to the testimony given by the parties.

Arbitrators coming from civil law jurisdictions have difficulty in accepting that a party may depose although frequently the parties are those who are most informed about the facts. This even if their deposition must be weighted with great care.

The Order made on October 30, 1992 in ICC proceedings no.7319[143] is a good example of this difficulty:

> Here a German arbitrator, after hearing argument from Irish and French Counsel, has decided that a member of the Board of a party had authority to represent it and therefore could not be treated as a witness.

The ICC Rules (1998 edition) deal with hearing the parties separately from hearing the witnesses;[144] however the parties have no right to be heard and no mention is made that they will be treated as witnesses.

25.12 Applications to the State Courts for Assistance in the Taking of Evidence

As earlier discussed, State Courts are available in some jurisdictions to assist with the taking of evidence.

Amongst such courts, some may limit their assistance to applications made by other courts, other ones will intervene even on the application of an arbitrator or of a party itself.

Recourse to U.S. courts for assistance as to evidence in international disputes is frequent. As shown by *Commissioner of Patents*[145] they originally wondered whether assistance could be granted by a U.S. court under the broad scope of Section 1782, U.S. Code even if that very assistance was not obtainable in the

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[142] Art. 3, Standard Rules of Evidence.

[143] ICC Award October 30, 1992, proceedings no. 7319, *Clunet*, 1994, 1102.

[144] Art. 20.3 and 20.4, ICC Arbitration Rules (1998).

[145] In re *Court of the Commissioner of Patents for the Republic of South Africa*, 88 F 2d 75 (FD Pa 1980) cited by NEWMAN and CASTILLA, see *infra* note 146.

country where the foreign proceedings, for which assistance was sought, were taking place:

> The Commissioner of Patents was severe in holding that it should not by its exercise of discretion allowed it under Section 1782 allow litigants to circumvent the restrictions imposed on discovery by foreign tribunals.

However, in commenting this judgment, Newman and Castilla[146] have pointed out that whenever the application aims to assist foreign arbitral proceedings, concerns about behaving in a such way as to affect comity of nations do not arise and it is easier for a court to intervene in aid of the proceedings

In *South Carolina*[147] the House of Lords has held (per Lord Brandon of Oakbrook) that even if in England one may not compel third parties to pre-trial discovery, one may obtain it elsewhere:

> I cannot see that the reinsurers, by seeking to exercise a right potentially available to them under the Federal Law of the United States, have in any way departed from or interfered with the procedure of the English Court. All they have done is what any party preparing his case in the High Court here is entitled to do, namely to try to obtain in a foreign country ,by means lawful in that country, documentary evidence which they believe that they need in order to prepare and to present their case.

The Canton Court, Tessin has held that if a party does not allow inspection ordered by the arbitrators, the state courts may not force that party to allow it and the arbitrators will have to assess that conduct when deciding the dispute.[148]

National legal systems

According to reports from Islamic law systems, Kuwaiti law provides only some isolated provisions related to the authority of the arbitrators to examine witnesses and that the courts may order a witness to appear before the arbitrators.[149]

In the United Arab Emirates, when nothing different is specified in statutory provisions, the principles of a clear conscience and justice provided for in *Sharia* apply.[150] In Bahrain parties and arbitrators may request the court, which would have had jurisdiction in the absence of an arbitration agreement, to order witnesses to appear or to produce documents.[151] In Egyptian law, before the Model Law, the

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[146] L.N. NEWMAN and R. CASTILLA, *Production of Evidence Through U.S. Courts for Use in International Arbitration,* 9 *J.Int. Arb.* 2, 61.

[147] *South Carolina v. Seven Provinces,* [1986] *Lloyds Report* 317, cited by NEWMAN and CASTILLA, see *supra* note 146.

[148] Canton Court, Tessin, March 12, 1993, *ASA Bulletin* 1998, 1, 146.

[149] SALEH, *op .cit.*, at 265.

[150] SALEH, *op. cit.*, at 352; see also Statute no. 3 of 1974 (ABCCP).

[151] Section 238, Civil Commercial Procedure Code (BCCP); SALEH, *op. cit.*, at 284.

Code of Civil Commercial Procedure had no provision concerning evidence before arbitrators. However, several provisions assumed the arbitrators' authority to examine witnesses and the courts could order a witness to appear before arbitrators.[152] Egyptian law is now largely inspired by the Model Law

Under Syrian law, arbitrators may administer oaths to witnesses.[153]

One difference should be mentioned regarding deposition by a party. In fact, in some civil law countries a party may have the other parties examined (although they will not be treated as witnesses) but is not entitled to be heard. In some common law countries one party may decide to go into the witness box, but may not oblige the other one to do the same (and may only cross-examine it if the latter decides to go into the witness box). Such opposite limitations are probably not justified in a general framework in which the purpose is to acquire as much evidence as possible.

It is suggested that both limitations should be removed.

25

.13 EXPERTS

Even the area of experts reflects the large difference of positions in the various legal systems. In civil law countries, neither the courts nor arbitrators want to have to choose between frequently conflicting statements from experts chosen by the parties and instructed by them to support their views. Therefore they rely only on the expert whom they have appointed. An arbitrator consequently appoints an expert whom he trusts, puts questions to him and receives his report.

In common law systems the judge and the arbitrator are reluctant to appoint their own expert since the result of the dispute must be the victory of the party which has proven his case. The decision on technical issues is thus made as a result of a comparison of the positions of the various Expert Witnesses.

The position of expert witnesses is clearly and elegantly described by Goodall[154] and dealt with by other writers.[155]

The international conventions, arbitration rules and some legal systems will be examined from this point of view.

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[152] SALEH, *op. cit.*, at 213.

[153] SALEH, *op. cit.*, at 109.

[154] F.R. GOODALL, *The Expert Witness: Partisan with a Conscience,* 56 *Arbitration* 3, 159.

[155] A.J. CANHAM, *The Role of the Expert and His or Her Use in Arbitration and ADR*, 61 *Arbitration* 4, 260; M.J. CHAPMAN, *The Expert in France,* 61 *Arbitration* 4, 264; M. BLACK, *Experts Reports,* 61 *Arbitration* 3, 209.

International conventions

The Uncitral Model Law (1985) provides:[156]

> *Expert appointed by arbitral tribunal*
>
> Unless otherwise agreed by the parties, the arbitral tribunal:
>
> (a) may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;
>
> (b) may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods, or other property for his inspection.
>
> (c) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.

Arbitration rules

The Rules of the American Arbitration Association do not expressly govern the matter; they provide that:[157]

> The parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. An arbitrator or other person authorised by law to *subpoena* witnesses or documents may do so upon the request of any party, or independently.

Also according to the Rules of the Inter-American Commercial Arbitration Commission:[158]

> (1) The arbitral tribunal may appoint one or more experts to report to it, in writing, on specific issues to be determined by the tribunal. A copy of the expert's terms of reference, established by the arbitral tribunal, shall be communicated to the parties.
>
> (2) The parties shall give the expert any relevant information or produce for his inspection any relevant documents or goods that he may require of them. Any dispute between a party and such expert as to the relevance of the required information or production shall be referred to the arbitral tribunal for decision.
>
> (3) Upon receipt of the expert's report, the arbitral tribunal shall communicate a copy of the report to the parties who shall be given the opportunity to

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[156] Art. 26 Uncitral Model Law (1985).

[157] Art. 31, American Arbitration Association (Commercial) Rules.

[158] Art. 27, Rules of Procedure of the Inter-American Commercial Arbitration Commission.

express, in writing, their opinion on the report. A party shall be entitled to examine any document on which the expert has relied in his report.

(4) At the request of either party the expert, after delivery of the report, may be heard at a hearing where the parties shall have the opportunity to be present and to interrogate the expert. At this hearing either party may present expert witnesses in order to testify on the points at issue. The provisions of Article 25 shall be applicable to such proceedings.

The Rules of the European Court of Arbitration deal with experts as follows:[159]

1.The Arbitral Tribunal may, if requested by a party, order that an expert file a report.

Following submissions by the parties the Arbitral Tribunal shall appoint an expert, define his terms of reference after having heard the parties and fix a time-limit for the lodging of the report.

Where permitted, the party tendering this form of evidence shall request that the expert be sworn by the Arbitral Tribunal or by the state court of competent jurisdiction save for experts already sworn by a state court or when a new oath is not necessary.

The Arbitral Tribunal shall direct the party which sought the appointment of an expert to make an advance payment. The amount of such payment shall be fixed upon advice from the expert so chosen.

The advance payment must be deposited with the Secretariat of the Court within the time limit set by the Arbitral Tribunal, and will be paid to the expert at the appropriate time.

Where the deposit of the advance payment is not made within the limit set, the party being in default shall be considered as having abandoned its request that such an expert be appointed.

2. The Arbitral Tribunal may appoint an expert of its own volition, in the manner provided in subclause 1 above.

3. Where deposit of the advance payment of its proportion of the expert's fees is not made by one of the parties, the other party may pay in lieu.

4. If such payment in lieu is not made, the appointment of the expert may be postponed, unless the Arbitral Tribunal orders by way of an interim award the party in default to pay the necessary sum required.

5. The expert's report shall be filed with the Secretariat of the Court of Arbitration, which will send a copy of it to each arbitrator and to each party.

6. The Arbitral Tribunal or the parties may request an examination of the expert, who may be questioned by the Arbitral Tribunal or the parties or by the experts of the parties in accordance with the general provisions for witness evidence of Article 17.

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[159] Art. 19.

The International Rules of the Milan Chamber of National and International Arbitration state:[160]

> The arbitrator may appoint one or more experts, define their terms of reference, receive their reports and hear them.

In turn the Rules of the Italian Society for Arbitration provide:[161]

> (3) The arbitrator may appoint experts, request information from public authorities and apply to the judicial authorities for the aids permitted by law; he may proceed with collecting even that evidence which had not been indicated by the parties, ensuring that each of them is given an opportunity to present its case or to defend itself.

Under the Rules of the London Court of International Arbitration:[162]

> Unless otherwise agreed by the parties the Tribunal
>
> (a) may appoint one or more experts to report to the Tribunal on specific issues;
>
> (b) may require a party to give any such expert any relevant information or to produce, or to provide access to, any relevant documents, goods or property for inspection by the expert.
>
> 2. Unless otherwise agreed by the parties, if a party so requests, or if the Arbitral Tribunal considers it necessary, the expert shall, after delivery of its written or oral report to the Arbitral Tribunal, participate in one or more hearings at which the parties shall have the opportunity to question the expert on his report, and to present expert witnesses in order to testify on the points at issue.

Based on the common law system, which provides for Expert Witnesses, the IBA Rules state:[163]

> (2) Each Witness Statement shall:
>
> (c) reflect whether the witness is a witness of fact or an expert, and whether the witness is testifying from his own knowledge, observation or experience, or from information and belief, and if the latter, the source of his knowledge;

and complete this rule by granting to the arbitrator[164] the authority:

> (f) to appoint experts to assist him or to give expert evidence or reports in the arbitration;

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[160] Art. 34.4, International Rules of the Chamber of National and International Arbitration of Milan.

[161] Art. 22, Rules of the Italian Society for Arbitration

[162] Art. 12, Rules of the London Court of International Arbitration.

[163] Art. 5.2, IBA Rules of Evidence.

[164] Art. 7(f), IBA Rules of Evidence.

The Standard Rules of Evidence provide that:[165]

> 1. The arbitrator shall be entitled to appoint an expert (the Arbitrator's Expert) to advise him on technical or other matters even if the parties call their own expert.
>
> 2. The Arbitrator's Expert shall be given the opportunity to study the file and to collect information.
>
> 3. The Arbitrator's Expert may file a written report.
>
> 4. The Arbitrator shall request clarifications from the Arbitrator's Expert during the hearing and each party is entitled to cross-examine him as any other witness ...

The Uncitral Arbitration Rules (1976) specify:[166]

> 1. The arbitral tribunal may appoint one or more experts to report to it, in writing, on specific issues to be determined by the tribunal. A copy of the expert's terms of reference, established by the arbitral tribunal, shall be communicated to the parties.
>
> 2. The parties shall give the expert any relevant information or produce for his inspection any relevant documents or goods that he may require of them. Any dispute between a party and such expert as to the relevance of the required information or production shall be referred to the arbitral tribunal for decision.
>
> 3. Upon receipt of the expert's report the arbitral tribunal shall communicate a copy of the report to the parties who shall be given the opportunity to express, in writing, their opinion on the report. A party shall be entitled to examine any document on which the expert has relied in his report.
>
> 4. At the request of either party the expert, after delivery of the report, may be heard at a hearing where the parties shall have the opportunity to be present and to interrogate the expert. At this hearing either party may present expert witnesses in order to testify on the points at issue. The provisions of Article 25 shall be applicable to such proceedings.

If one wished to dramatize the difference between civil and common law as to the role of judges related to evidence one could say that the conservative attitude in common law systems is to view the arbitrator as just listening in a mummified position, while in civil law systems the judge statutorily plays the role of the main actor, limiting the freedom of the parties to prove their cases.

Coming down from such extremes to reality, the difference is less defined than it would appear, but does exist.

International Arbitrators could make the two positions become closer but several of them are afraid to take new paths and feel safer by just imitating judges.

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[165] Art. 4, Standard Rules of Evidence.

[166] Art. 27, Uncitral Arbitration Rules (1976).

Apart from such general approach to evidence, a common problem exists related to the advisability or not that the arbitrator decides to hear further evidence.

A reference has been made to the admissibility of such evidence. The existence or not of such power is generally decided by statute or in its silence by the arbitration rules.

The Uncitral Rules[167] and the CPR rules[168] for example grant to the arbitral tribunal the authority to require that the parties produce evidence in addition to the one which they have presented.

Even when the right to do so exists, many arbitrators are reluctant to exercise this authority, due to the fact that by doing so they could be regarded as helping one party.

As earlier discussed, on the one hand the arbitrators may not help any party, but on the other hand they must assist the process.

It should follow from this that, once the parties have stated the facts on which they base their claim, defences and counterclaim and have made reference to their sources of evidence if the arbitrator, in order to decide, deems necessary to obtain further evidence from one of such sources and is allowed to do so by the applicable procedural law or arbitration rules, he is simply discharging his task.

This attitude should not be seen as being germane to a descent by the arbitrator into the arena, by unconsciously arguing the case for one party, and trying to support its case.

It is suggested on the contrary that limited interventions from the bench or the arbitrator may be legitimate, for example, if a party has mentioned several witnesses but has been able to call only some of them, and it transpires that the witnesses – who have not appeared – possess relevant information, or if a witness makes reference to another one who would hold such information, or if a party or a witness have made reference to a given document which is in the hands of a party to the proceedings or of a third party. Such limited arbitral interventions are therefore *ad hoc*, to fill a *lacuna* in a party-organized presentation of evidence , and do not aim at reviewing or strenghtening that party's presentation.

By requesting such evidence the arbitrator simply tries to complete the information required in order that may decide.

The bridge between civil law and common law as to experts has been crossed by the CPR rules[169] which provide that the arbitral tribunal may:

> appoint experts whose testimony shall be subject to cross-examination and rebuttal.

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[167] Art. 24 (3) Uncitral Rules.

[168] CPR Rules, Art. 12.3.

[169] CPR Rules, Art. 12.3.

National legal systems

It is reported that under Egyptian law[170] as well as in Sudan,[171] only state courts could fine witnesses who refuse to appear, that under Saudi law arbitrators may request the production of documents and may examine the parties even of their own motion.[172]

In the United Arab Emirates arbitrators may hear witnesses under oath.[173]

The arbitrator's discretion to appoint experts is affirmed in *Arenco Maschinenfabrik*:[174]

> The Court, rejecting the opposition by defendant Ceramica Pozzi Richard Ginori to the enforcement of an award made in Switzerland, reaffirmed the principle that, unless the arbitration agreement provides that the arbitrators should appoint official experts, the arbitrators have discretion in this respect and the rejection of the application of a party to appoint experts is not in breach of Italian public policy.

In *Thomson*[175] the French Court of Cassation held that:

> the Court of Appeal had rightly confirmed the right of the arbitrators to hear a technician even if he was linked to one of the parties, since he was heard respecting the right of the parties to attend that hearing.

It is suggested that the solution according to which the arbitrator appoints an expert, whom he trusts, is more satisfactory. However, if the official expert confines himself to filing a report which the parties may criticize only in writing, frequently it is not possible to ascertain which technical view is correct. This can be avoided by specifying also that the official expert be heard as a witness.

The arbitrator's right to freely assess the conclusions of the expert whom he has appointed is reaffirmed in the award made in ICC proceedings no. 2444 (1976):[176]

> The parties are reminded that the arbitral tribunal is not tied by the conclusions of the experts, but that it can freely assess them taking into account all the circumstances both in fact and in law.

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[170] EL AHDAB, *op. cit.*, at 182.

[171] EL AHDAB, *op. cit.*, at 592.

[172] EL AHDAB, *op. cit.*, at 535.

[173] EL AHDAB, *op. cit.*, at 628.

[174] *Arenco BMD Maschinenfabrik GmbH (Germany) v. Società Ceramica Italiana Pozzi Richard Ginori (Italy)*, Milan Court of Appeal, March 16, (1984), *Riv. int. dir. priv. proc.*, 1984, 751.

[175] *Thomson CSF v. Groupement Sanitec MEGCO*, Court of Cassation (France) June 17, 1997, *Rev. arb.* 1998, 404.

[176] *Clunet* 1977, at 932.

Apart from the traditional appointment of official experts during arbitral proceedings, the ICC has formed a specific centre for the appointment of experts. Beyond such roles the technical expert may be called in to play a very important role whenever the proceedings to appoint a *Pre Arbitral Referee* are not available. Reference may there be made to the ICC standard clause for the appointment of a technical expert.[177]

A special situation arose in ICC proceedings no. 6653, which were concluded by an award made in 1993:[178]

> A dispute arose between a German seller and a Syrian purchaser under a sale agreement of steel bars. The parties had agreed in the sale contract that if any dispute about conformity of the goods should arise, the purchaser would appoint an expert, the decision of the latter being binding on the parties.
>
> The expert's report being against it, the German seller argued that the binding effects were limited to the prelitigation stage and did not include the arbitral proceedings.

The arbitral tribunal held that the expert's report remained binding on the parties even during the arbitral proceedings and that the arbitrators had not to decide evidentiary issues but to construe the parties' agreement also in this respect.[179]

25.14 PRESUMPTIONS

A first problem is to establish the substantive or procedural nature of presumptions, which is relevant for establishing the applicable law. Under Italian law, for example, the opinion has been expressed that presumptions *juris tantum,* (i.e. which can be overcome by presenting evidence and which therefore in common law systems are referred to as rebuttable) belong – for this reason – to procedure, while presumptions *juris et de jure,* (i.e. which cannot be overruled by contrary evidence and which in common law systems are referred to as unrebuttable) are substantive. This distinction, albeit elegant and sophisticated, probably has, for that very reason, a certain artificial element.

Presumptions belong to the most intimate part of the arbitrator's wisdom; he must make careful use of them, when it is advisable, without hesitation and refuse to use them when this would not be prudent.

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[177] H. HOLTZMANN–R. COULSON, *L'administration de la preuve dans les arbitrages commerciaux américains* (The Administration of Evidence in American Commercial Arbitration), *Rev. arb.*, 1974, 128; see also the ICC Rules of the Technical Expertise Centre.

[178] *Clunet* 1993, 1041.

[179] The parties having agreed to repete the tests, with the attendance of both parties, the problem was superseded by the new arrangements.

The Italian rule of requiring several presumptions to be precise, meaningful and concurrent, cannot be disregarded An international arbitrator must be also guided in this respect by a quality so delicate and untouchable as wisdom.

Under French law,[180] although there is no specific rule dealing with presumptions in arbitration, the arbitrator may base himself on the general rule which provides that presumptions may be used as evidence.

Even under English law[181] reference is made to the general rules of evidence, which provide for recourse to presumptions against which contrary evidence is allowed, for example in the matter of bills of exchange, minors, incapacity to act, death, fraud. In the field of tortious liability, the presumption based on the principle *id quod plerumque accidit,* (i.e. what normally happens) which in English law seems not too far from *res ipsa loquitur*, is widely applied.

The award made in ICC proceedings no. 2216 (1974) is based on a presumption:[182]

> In a dispute between a Norwegian company and a governmental body of an oil producing country, the arbitrators held that the refusal to take delivery of a supply of oil by the Norwegian company gave rise to a presumption of damages suffered by the supplier, which could be overcome only by evidence that that oil had been resold at the same or at a higher price.

The Arbitral tribunal held:

> Whereas the (seller), which until (the date of the telex) had been bound by the terms of the contract, should have since that time used all its best efforts to sell the oil to third parties as soon as possible in order to reduce the damages;
>
> Whereas taking into account the organization and the international importance of the (seller), the tribunal deems it fair to come to the conclusion that such a company could have found an adequate solution at the end of the month of ... ;
>
> Whereas on the other hand beyond the damage arising from the difference in price between the sale price of oil at that time, it is very likely that the immobilisation of the quantity of oil which was kept at the disposal of the purchaser for the two months taken into account has caused certain warehousing costs and has interfered with the normal functioning of the oil installations;

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[180] Section 112 French Civil Procedure Code; on this issue see also Section 776 *et seq.* which deal with the presumption of regularity. Amongst the authors see PERROT, *Rép. pr. civ.* item *Présomptions* (Presumptions); R. BARRAINE, *Thesès,* Paris 1942, R. DE COTTIGNIES, Lille 1949; MIMIN, *Les présomptions quasi légales* (Quasi-Legal Presumptions), *J.C.P.* 1946, 1, 578.

[181] See *Phipson on Evidence,* London 1984, at 56-60, with quotations.

[182] *Clunet,* 1975, 916.

> The tribunal holds that the commercial and industrial damage caused to the seller is a further source of damage which entitles the seller to compensation;
>
> Whereas the tribunal holds that it is nearly impossible to assess in a precise way such a damage, but it considers it has sufficient elements to assess an equitable damage, making use of its authority as *amiable compositeur.*

Derains[183] rightly points out that the arbitrators in these proceedings inferred from known facts, relating to damages arising from breach of contract, conclusions which could be classified as presumptions.

Norwegian law[184] gives the arbitrator the authority to give to the parties a mandatory term to present any types of evidence.

Among the presumptions used in international arbitration, the presumption of *compétence professionnelle* of traders deserves to be mentioned:[185]

> In the commercial field fluctuating factors in particular are one of the great inducements to the formation of contracts. Each party takes into account the benefits from changes of currencies and impliedly accepts the risk that such changes be unfavourable to it.
>
> In order to limit such a risk, the parties are free to include in their agreement clauses of *échelle mobile* or clauses foreseeing the automatic termination of the contract if it becomes too negative for one of them.
>
> No clause of that nature has been inserted into the sale contract entered into between the parties to the present dispute.
>
> It follows from this that the terms of this contract must be treated as binding, whatever the financial circumstances and their development ...

25.15 Personal Knowledge of the Arbitrator

The personal knowledge of the judge has given rise to problems when he has used it without giving notice to the parties and without allowing them to comment. The same rule applies to arbitral proceedings. Reference can be made to the English precedent in *Owen v. Nicholl*[186] in which it has been affirmed that the arbitrator cannot base a decision on his personal knowledge without informing the parties. The impropriety of the arbitrator's using his own specialised knowledge, or infor-

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[183] DERAINS, *Chroniques de sentences arbitrales, Clunet* 1975, 917.

[184] *Norway,* in *Yearbook Commercial Arbitration* 1986, at 89.

[185] Award made in 1976 in ICC proceedings no. 2708, DERAINS, *Chroniques de sentences arbitrales, Clunet* 1977, 943.

[186] *Owen v. Nicholl* (1948) 1 *All ER* 707; see also *Grand Trunk Rly Co. of Canada v. R* (1923) AC 150; *Youroveta Home and Foreign Trade Co. Inc. v. Coopman* (1920) 3 *L Rep* 242.

mation obtained from third parties, without informing the parties was reaffirmed in *Lazarus*:[187]

> The power of the arbitrator to take advice from a third person in order to give basis to his conviction concerning the facts that are decisive for the outcome of the dispute, however, does not dispense him from acting in conformity with the fundamental procedural principles.

A decision of the District Court of Rotterdam[188] is along the same lines:

> It is true that the arbitrator, like a State Court, is not obliged to submit to the discussion by the parties the legal principles on which he will base his decision. However, according to doctrinal opinion, the arbitrator who is specialised and who has access to sources of knowledge, which are not always at the disposal of the parties, has the obligation to bring in advance to the attention of the parties the fundamental technical elements on which his decision will be based ...
>
> With stronger reason, the same applies when the arbitrator takes inspiration from the knowledge of a third person on whom he calls to appear before him as an expert in order to give basis to his conviction. It is irrelevant in this respect that the parties in the present case had apparently concentrated their dispute on the validity of the expertise carried out for determining the degree of oxide in the chrome mineral in question.

When the parties are allowed to object to conclusions which the judge or the arbitrator draws based on his own experience and the debate on them takes place normally, even the personal knowledge of the judge or of the arbitrator can be used for his decision.

Particularly when an arbitrator has been appointed for his special expertise or knowledge in a given area, it is clear that he not only may, but must, make use of his experience, but always within the above limits.

The IBA Rules of Evidence provide[189] that the arbitrator may:

e) rely on his expert knowledge.

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[187] *Chrome Resources SA (Switzerland) v. Leopold Lazarus Ltd.*, Federal Court (Switzerland) February 8, (1978) *Yearbook Commercial Arbitration* 1986, at 538.

[188] Insofar as the practice in the Netherlands is concerned, see P. SANDERS, in *International Commercial Arbitration,* Vol. III, The Hague 1965, at 220-221, quoting a decision of the District Court of Rotterdam.

[189] Art. 7(e) IBA Rules of Evidence.

25.16 NEED FOR AVAILABILITY OF INTERNATIONAL STANDARD RULES OF EVIDENCE

This review of international conventions and arbitration rules shows that evidence has in general not been the object of detailed rules.

As earlier discussed this is certainly not due to the arbitral institutions not realising the importance of evidence but is probably to be explained by the respect which, by not regulating the evidence, they wish to pay to the arbitrators so that in each specific case they may regulate it in the best possible way. Nevertheless this has given rise to serious problems, since each time the arbitrators must choose the rules of evidence amongst the various available sets of rules or create *ad hoc* rules.

As earlier discussed, this has at least two disadvantages. The first one is that the product of the discussion amongst the arbitrators is inevitably affected by the limited time available and is generally not the result of a detailed and careful study of this issue. A further and greater disadvantage is that the parties are not in a position to know from the beginning which will be the rules of evidence. This may result in a party being taken by surprise. A common law litigant who (as it will be seen more in details later on) is not allowed neither to examine his witnesses nor to cross examine the witnesses of the opposing party, and has to submit in advance a list of all the questions which he would like the arbitrator to put to the witnesses, and eventually finds that the expert is imposed on him by the arbitrators, might feel that he has not had a proper trial. His discontent will be equalled by the feelings of a civil law litigant, who is obliged to produce all his documents (even those which he probably would have not created, had he known that he would have had to produce them all) or who is cross-examined by the other party, while his counsel is not trained in the cross-examination of the witnesses of the other party.

The seriousness of these disadvantages has been stressed on various occasions.[190]

To avoid this some sets of rules of evidence have been drafted. The first ones were prepared by the International Bar Association.[191] Subsequent to them are the Standard Rules of Evidence of the Mediterranean and Middle East Institute of Arbitration.[192] Both sets of rule seek to strike a balance between the common law and the civil law systems.

The European Court of Arbitration too has drafted rules of evidence taken from different legal systems.[193]

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[190] M.RUBINO-SAMMARTANO, *Rules of Evidence in International Arbitration, A Need for Discipline and Harmonisation,* 3 *J. Int. Arb.* 2, 87.

[191] The IBA Rules on the Taking of Evidence in International Commercial Arbitration, IBA, London, 1983, 2nd edition, 1999.

[192] Standard Rules of Evidence, The Mediterranean and Middle East Institute of Arbitration, Athens, 1987.

[193] Arts. 16 to 19.

It may be of interest to note that Derains and Jarvin[194] also have considered the possibility that parties belonging to different legal systems draft independent rules of evidence:

> which place themselves half way between the adversarial common law tradition and the inquisitorial tendency of modern continental law.

The difference between the rules of evidence applicable in the various jurisdictions has been dealt with in many writings.[195]

It is suggested that the parties and their advisors should become more attentive to the importance of a set of really international rules of evidence which strike a balance between the different national rules of evidence, choosing the one which be more appropriate.

One might object that the existence of international standard rules of evidence will limit the freedom of the parties and of the arbitrators. However it is suggested that this argument defeats itself. In fact in *ad hoc* arbitration the parties are always free to adopt or not such standard rules or to amend them as they think proper. In administered arbitration the parties may add to the rules of the arbitral institution, which are frequently silent or vague in this respect, or amend some of them in their arbitration agreement or submission. The arbitral institution will check then whether it accepts to administer those proceedings even if its standard rules have been completed or amended.

As to the arbitrators such choice is not necessarily to be left to them. It is suggested that what matters for the arbitrator is that he be aware of such rules before he accepts his appointment and that, if the parties change them afterwards and this creates difficulties for the arbitrator, he may resign.

25.17 Time Bars and Non-Mandatory Terms

The timetable of arbitral proceedings is an important and probably essential element for the arbitrator to control the development of the proceedings and for the parties to organise their defence.

A stringent time table aiming at obtaining a decision within nine months is recommended by the European Court of Arbitration.[196]

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[194] DERAINS-JARVIN, *Chronique de sentences arbitrales, Clunet* 1979, 993.

[195] R.O. EMPERE and S.A. SALTZURG, *A Modern Approach to Evidence* 2nd edition West Publishing Company, St Paul Minnesota, 1982; M. HILL and A.V. SINICROP, *Evidence in Arbitration,* The Bureau of National Affairs, Washington, D.C. 1980; R.W. *WARD The Flexibility of Evidentiary Rules in International Trade Dispute Arbitration; Problems Posed to American Trainees Lawyers,* 13 *J. Int. Arb.* 355, with many references. As to national rules of evidence see J.H.WIGMORE, *Evidence in Trials at Common Law*, Boston 1983 and J.H. FRIEDENTHAL and M. SINGER, *The Law of Evidence*, The Foundation Press, New York, 1951.

[196] Appendix to the Arbitration Rules of the European Court of Arbitration (1997 edition).

In line with this requirement, the International Rules of the Milan Chamber of Arbitration deal with this matter:[197]

> (1) Within thirty days of the day on which, in accordance with the provisions of article 28, the file has been transmitted to the arbitrator, he shall, after hearing the parties, file with the Secretariat the time-table which he intends to follow, and shall indicate time-limits within which any further written submissions may be filed.
>
> (2) The time-table of the arbitration proceedings, and any changes subsequently made to it, shall be promptly notified to the parties by the Secretariat after the same have been filed.

The amendments to claims and counterclaims are so governed by the Indian Arbitration Rules:[198]

> Amendments of the claim, defence statement, counter claim or reply submitted to the Bench must be formulated in writing by the party so desiring. The Bench will decide whether such amendments should be allowed or not.

The Rules of the Arbitration Institute of the Stockholm Chamber of Commerce state in this respect:[199]

> ... If the Institute has requested a party to perform any act within a specified time, such time limit may be extended by the Institute.

Whether a general timetable is prepared, or from time to time deadlines are fixed for specific acts, the parties have to deal with procedural terms.

The distinction made in some legal systems, as under Italian law, between mandatory and non-mandatory terms is not always applied in international arbitral proceedings. It has been argued that the parties are always bound by the term which has been given to them. The consequent risk for a party of being prevented from performing an activity after the expiry of that term may then be greater than in some national court proceedings. It is important to avoid misunderstandings as far as possible.

Another risk in arbitral proceedings is that some arbitrators tend to fix mandatory terms even when this is not required, possibly because they are following local procedural practices. Sometimes they are even stricter about these terms than judges in court proceedings.

A solution to this problem is proposed by the *Standard Rules of Evidence of the Mediterranean and Middle East Institute of Arbitration:*[200]

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[197] Art. 33.

[198] Para. 42, Arbitration Rules of the Indian Council of Arbitration, *cit.*

[199] Art. 12.

[200] Ad. 6.1.

> (1) The Arbitrator, while entitled to fix deadlines for the production of documents, for calling witnesses, for amendments of pleadings, will not treat them as a final bar to later activities whenever that late activity is due to late receipt of information, to late discovery of documents by counsel or by the parties, because of the size of files or of turnover of staff, of pressure, of other commitments and similar reasons.
>
> Only late applications which are clearly for the purpose of delaying or confusing the proceedings are therefore to be rejected.

It is suggested that this solution may avoid to limit the gathering of evidentiary material. In any event, a term should not be mandatory unless it is clearly so stated; different conclusions may have to be reached under the mandatory provisions of the applicable procedural law.

As regards the mandatory nature of terms, amongst the arbitral precedents reference can be made, for example, to the award made in ICC proceedings no. 3327 (1981):[201]

> The arbitral tribunal, sitting in Geneva, in a dispute between a French company and an African State rejected the French company's defence that the filing by the African State of an appearance and documents (made between March 10 and 12 instead of by March 6) was late. The arbitral tribunal held that, although in strict procedural law the filing was late, nevertheless the arbitrators were of the opinion that such a sanction should not be applied, particularly in proceedings in which they had the power to act as *amiables compositeurs.*
>
> The arbitral tribunal further held that, under the precedents of the Geneva Court of Appeal, even the nullity of a procedural act should not be declared unless it had caused a prejudice to the other party.

Similarly, in interim awards made in 1985 and 1986 in ICC proceedings no. 4504:[202]

> The arbitral tribunal sitting in Geneva, in a dispute between an oil producer and a commercial company concerning a supply of condensates, deciding on the defence of lateness of the reply and of counterclaims made in it, and of the subsequent lack of arbitral jurisdiction on the claims made in such a reply, held that 'it would have been excessive to deprive a party of its right to reply because of the expiry of a term which had not been expressly declared as mandatory.

The provision of mandatory deadlines – if any – to call evidence by witnesses, or for the production of documents, or for amendments to claims and defences, should be stated as such to the parties at the beginning of the arbitral proceedings

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[201] *Clunet* 1982, 971.

[202] *Clunet,* 1986, at 1118.

in order to avoid unpleasant surprises. The importance of the effects of these deadlines is shown in a passage of the reasons in *Dallal v. Bank Mellat:*[203]

> It was open to the tribunal, based on the rules which governed its procedure, to disallow amendment to the claim or reference of the parties before it ...

25.18 Closing of the Hearings and Final Statement of Claims and Defences

The taking of evidence stage is ended in some legal systems by an order which formally closes it and invites the parties to state respectively their final claims and defences. However, this is not to be found in all legal systems. In any event practically all arbitral proceedings reach a stage when the taking of evidence is *de facto* considered finished and a hearing is fixed for the final addresses, or the parties are granted a term for filing their last briefs whether followed or not by oral addresses. Even that important procedural step is often not dealt with in arbitration rules and must be inferred as a natural consequence of the completion of the taking of the evidence.

In the legal systems which until then allow amendments to the claims and defences in the fashion of *emendatio* (amendment) even if generally not of a *mutatio* (radical change) of the same, such changes are possible even in the final statement and are barred after it. In other jurisdictions the final statement of the claims and of the defences will simply be a compilation of the previous claims and defences. In other jurisdictions, in which amendments are allowed only on leave, there may be no need for such a final statement.

Amendments to the claims and defences are limited in ICC proceedings, as shown by the Terms of Reference. The 1998 ICC Rules provide that:[204]

> After the terms of reference have been signed or approved by the Court, no party shall make new claims or counter-claims which fall outside the limits of the Terms of Reference unless it has been authorised to do so by the Arbitral Tribunal ,which shall consider the nature of such new claims or counter-claims, the stage of the arbitration and other relevant circumstances.

Apart from the final statement of the claims and defences, when so provided for, the closing of the evidence stage (i.e. when the parties will be entitled only to develop, and often only to repeat, their previous arguments) whether expressly so declared or not, must be seen in relation to the time limits within which the presentation of evidence must be completed and amendments to the claims are allowed.

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[203] *Dallal v. Bank Mellat,* High Court of England, June 27, July 1, 2, 3 and 26 (1985) 1 *All ER,* 239.

[204] Art. 19.

However, authority to reopen the evidence stage before the award is affirmed by the Iran-US Claims Tribunal in *Dames & Moore:*[205]

> (2) The arbitral tribunal may, if it considers it necessary owing to exceptional circumstances, decide on its motion or upon application of a party, to reopen the hearings at any time before the award is made.

On evidence in general in international arbitration see *inter alios* Perrot[206] and Rubino-Sammartano[207] in Europe and Holzmann and Coulson[208] in the United States.

25.19 Arbitrators Dispensed with Compliance with Strict Rules of Evidence

It is generally unwise to make general statements.

However it is felt that one can say that, unless the agreement of the parties or the arbitration rules or any mandatory provision directs them to do otherwise, in general arbitrators are not bound by the rules of evidence which apply in court proceedings and are free to conduct the evidence (within the limits which will be discussed hereafter) without complying with them.

This does not mean that arbitrators frequently disregard such rules. On the contrary, as it has been earlier discussed, many of them feel comfortable only by imitating state courts.

It may help then to see which would be the consequence of not being bound by these rules.

One might start such analysis by reviewing the role of rules of evidence.

This issue has been dealt with in great depth by Mr. Justice Giles.[209]

In 1947 Maguire wrote:[210]

> ... a student of evidence must accustom himself to dealing as wisely and understandingly as possible with *principles which impede freedom of proof.* He is making a study of *calculated and supposedly helpful obstructionism.* (emphasis added)

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[205] *Dames & Moore v. the Islamic Republic of Iran,* Iran-US Claims Tribunal, April 23, (1985), proceedings no. 54, Mangård (Chairman), *Yearbook Commercial Arbitration* 1986, at 281.

[206] PERROT, *op. cit.,* see *supra* note 30.

[207] M. RUBINO-SAMMARTANO, *Rules of Evidence in International Arbitration,* 3 *J. Int. Arb.,* 2 87.

[208] H. HOLZMANN-R. COULSON, *L'administration de la preuve dans les arbitrages commerciaux américains* (The Administration of Evidence in American Commercial Arbitrations) *Rev.arb.* 1974, 182.

[209] GILES J., *Dispensing with the Rules of Evidence,* 11 *The Arbitrator* 1, 31.

[210] MAGUIRE, *Evidence: Common Sense and Common Law,* cited by GILES see *supra* note 209.

Giles points then out that:

> The description of the rules of evidence as *exclusionary of probative material* is generally accepted. (emphasis added)

This is not to be construed as meaning that the rules of evidence aim at keeping useful evidence out of the proceedings, but only that evidence which in the view of Parliament does not come from sound sources (such as evidence by witnesses of the contents of an existing document, or oral evidence that the parties while entering into a written agreement had orally agreed otherwise).

Centuries of court practice and of scholarly study have brought to the conclusion that not all means of evidence may be admitted and that one must accept that in general these restrictions reflect experience and wisdom.

State courts are accustomed to apply such rules while in some jurisdictions some other tribunals, like administrative tribunals, have been dispensed with them.

As any other general rule in given situations the rules of evidence may produce harshness, i.e. they may prevent acquiring good evidence. If so by applying them justice cannot be done.

When the international arbitrator, and frequently even the national one, finds himself in the situation of being able to dispense himself with the rules of evidence, it is suggested that much care is required before imposing them on the parties.

One might think that, by doing so, the arbitrator would open a window on an unknown landscape, on a sort of *Alsatia*, as per the well known dictum of an English judge,where anything could happen.

It is submitted that this reaction would not be justified. In *Bott*[211] the War Entitlement Appeal Tribunal held (per Evatt J.):

> ... This does not mean that all rules of evidence may be ignored as of no account. After all they represent the attempt made through many generations to evolve a method of enquiry best calculated to prevent error and elicit truth. No tribunal can, without grave damages or injustice, set them on one side ...

U.S. Courts have developed, in *Knickerbocker Ice*[212] the rule that, even if a tribunal is not bound by the rules of evidence, a residuum of legal evidence supporting the claim is required.

Australian Courts have based themselves on fairness and natural justice In *Pochi*[213] the President of the Administrative Appeals Tribunal held (per Breman J.):

> ... facts can be fairly found without demanding adherence to the rules of evidence.

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[211] *R. v. War Entitlement Appeal Tribunal* (ex parte *Bott*) 1933,50 *CLR* 228, cited by GILES, *supra* note 209

[212] *Carroll v. Knickerbocker Ice Co.*, 218 NY 435 (1916) cited by GILES, *supra* note 209.

[213] *Pochi v.Minister for Immigration and Ethnic Affairs* (1979) 36 *FLR* 482, cited by GILES, see *supra* note 209.

and in *Mc Donald* the Australian Full Federal Court held (per Woodward J.):[214]

> ... an administrative tribunal ... is not bound by the rules of evidence but may inform on any matter in such manner as it thinks appropriate. Such a Tribunal will still have to determine practical problems such as the sequence of receiving evidence and what to do if it is unable to reach a clear conclusion on an issue, but it is more likely to find the answer to such questions in the statutes under which it is operating or in considerations of natural justice or common sense than in the technical rules relating to onus of proof developed by the courts. However these may be of assistance in some cases where the legislation is silent.

The arbitrator who does not wish to impose on the parties a set of national rules of evidence, can still decide based on evidence but as suggested by Thayer:[215]

> ... the rules of evidence should be simplified and should take on the general character of principles to guide the sound judgement of the judge, rather than minute rules to guide him.
>
> The two leading principles should be brought into conspicuous relief:
>
> (1) that nothing is to be received which is not logically probative of some matter requiring to be proven and
>
> (2) that everything which is thus probative should come into, unless a clear ground of policy or law excludes it.

A point which is even more clearly expressed in *Disputes Industrial Injuries Commission*[216] (per Diplock LJ):

> The requirement that a person exercising a quasi judicial function must base his decision on evidence means no more than it must be based on material which tends logically to show the existence or non existence of facts relevant to the issue to be determined, or to show the likelihood or unlikelihood of the occurrence of some future event the occurrence of which would be relevant.

It is suggested then that the arbitrator, when he is not bound by the strict rules of evidence, should not bind the parties and himself and should handle the evidence stage allowing each party to prove his case and intervening only when a line of enquiry or some facts are manifestly totally irrelevant or improper. In this way,

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[214] *Mc Donald v. Director General of Social Security* (1983) 6 ADL 6, cited by GILES, see *supra* note 209

[215] THAYER, *A Preliminary Treatise on Evidence at the Common Law* 30, cited by GILES, *supra* note 209

[216] *R. v. Disputes Industrial Injuries Commission* (1965) 1 *QB* 456 cited by GILES, *supra* note 209.

without departing from the main lines of the rules of evidence, he will avoid those of them which in the circumstances would be too strict.

CHAPTER 26

BREACH OF DUE PROCESS

SUMMARY: 26.1 Notion of Due Process – 26.2 Equal Treatment in Regard to the Appointment of Arbitrators – 26.3 Partiality or Lack of Independence – 26.4 Term to Appear – 26.5 Time Limits to File Pleadings – 26.6 Discovery of Documents – 26.7 Right to Call and to Examine Witnesses – 26.8 The Right to Present One's Case and to Oppose the Case of the Opposite Party – 26.9 Other Breaches of Due Process – 26.10 Concealed Enemies of Due Process – 26.11 Parties' Right to Representation by Counsel – 26.12 Denial of Justice

26.1 NOTION OF DUE PROCESS

The term due process is a modern translation of the concept of natural justice.

Natural justice is a notion to which common law systems have been traditionally hostile. In *Norwest Holst*[1] Ormerod L.J. expressed the view that 'natural' adds nothing to justice:

> except perhaps a hint of nostalgia.

However even those who do not accept the notion of natural justice cannot deny that common law frequently refers to 'universal justice', 'substantial justice', 'the essence of justice' and similar terms. This has brought De Smith, Woolf and Jowell[2] to assert, as to natural justice, that:

> certainly it did exist in English law.

In *Ridge v. Baldwin*,[3] Lord Reid criticised the view that:

> natural justice is so vague as to be practically meaningless,

as being tainted by

> The perennial fallacy that because something cannot be cut and dried or nicely weighed and measured, therefore it does not exist,

and in *Lloyd v. Mc Mahon*[4] Lord Bridge stressed that:

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1 *Norwest Host Ltd. v., Secretary of State of Trade* (1978) Ch 201, 226 quoted by DE SMITH *et al.*, see *infra* note 2.

2 DE SMITH, WOOLF AND JOWELL, *Judicial Review of Administrative Action*, 5th ed. London, Sweet & Maxwell 1995 at 377.

3 (1964) A. C. 40, 64-65.

4 *Lloyd v.Mc Mahon* (1987) AC 625, 702.

> the so-called rules of natural justice are not engraved on tablets of stone.

More recently the notion of natural justice related to court proceedings was referred to as *procedural fairness* and one generally refers to the duty of decision makers to act fairly.

A few years ago in *Doody*[5] Lord Mustill held:

> The principles of fairness are not to be applied by rote identically in every situation.
>
> What fairness demands is dependent on the context of the decision and this is to be taken into account in all its aspects.

As to the contents of procedural fairness, in *Russell v. Duke of Norfolk*[6] Tucker L. J. said:

> There are in my view no words which are of universal application in every kind of domestic tribunal ... whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case.

The duty to act fairly and the notion of due process encompass the duty to grant to each party an opportunity not only to present its case, but to prove it and to comment the case presented by the opposite party.

The right of litigants to due process is largely indebted to common law. In fact, civil law scholars conduct brilliant analysis of legal issues, build up elaborate doctrines and are strong in substantive law. However in procedural matters regrettably they frequently confine themselves to ensure that litigants enjoy equal treatment, rather than claiming that such treatment be adequate. The awareness of the great power exercised by governments and probably an unconscious resignation to the abuse of power committed by them over the centuries, have contributed not to exercise a strong pressure on Parliament and on the judiciary in order to ensure that the litigants be able to fully enjoy their right to prove their case. This has produced the result of exorbitant authority being granted in many jurisdictions, by means of statutory provisions, to the courts, for example as to oral evidence, of lack of attention paid to discovery of documents and eventually to many judges tending to construe their authority in this respect without much concern for the parties' right to prove their case.

Even when, not a long time ago, in civil law systems one has realised that access to justice meant not only the right to institute court proceedings, but also the right to be placed in a condition to obtain justice, it is submitted that the majority of civil law scholars have not paid the required attention to the right

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[5] *R. v. Secretary of State for the Home Department ex p. Doody* (1994) 1, AC 531, 560 cited by DE SMITH, *cit.* 424.

[6] (1949) 1 *All ER* 109, 118, DE SMITH *et al., cit.* at 424.

of a party to prove its case and to the duty of the legal system to facilitate the litigants in their presenting their case.

Very rarely then the flag of full access to justice has been raised with vehemence in civil law jurisdictions as to the right to prove one's case.

Frequently Continental European courts tend to confine themselves to stating that arbitrators are sovereign not only in their appreciation of evidence,an issue which is out of dispute,but also in deciding whether a party may or may not call evidence. A right to prove rather than the right to specific proof is referred to by Poudret.[7]

It is then suggested that the real paladines of due process have been, and still are, common law systems.

It is submitted that argument on this issue in civil law courts might be characterised as a dialogue between deaf people, further compressed by a formalistic approach.

It is in common law courts that due process has been vindicated and Parliament and judges would not even dream of trying to curtail the right of litigants to present their case and to call their evidence. In such legal systems the judge has only a residual task, i.e. to intervene only when the exercise of such rights is manifestly oppressive, improper or dilatory.

Due process is then a proceeding in which the parties enjoy a fair hearing and are entitled, as of right and not out of courtesy, to present their case, to call their evidence and to comment the case of the opposite party.

The pragmatic approach of common law lawyers has allowed them to achieve for the litigants what their civil law colleagues have not cared to vindicate, since they give less importance to the facts, although lack of proof of them may make the most brilliant argument totally useless. The result of this different approach is that, while in civil law courts and arbitral proceedings the parties are frequently limited in their right to call their witnesses, in common law courts and arbitral proceedings as a rule interference by the judge or arbitrator with the right of a party to call evidence or on the right of a litigant to properly examine or cross-examine witnesses is characterised as a breach of due process, which invalidates the entire proceedings or at least the part of them which is tainted by this abuse.

26.2 Equal Treatment in Regard to the Appointment of Arbitrators

The very premise of due process is the proper appointment of the arbitrators.

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[7] LALIVE, POUDRET, REYMOND, *Le droit del'arbitrage interne et international en Suisse*, 1989.

In this respect there is a tendency to concentrate on the problems related to a biased arbitrator. However the issue of a proper appointing mechanism is prior to that.

It is suggested that if the arbitration agreement grants the authority to appoint the sole arbitrator only to one party then the other litigant is placed on a different footing. The right to equal treatment may not be waived.

The same situation arises if in a multiparty dispute two or more litigants have to appoint together one arbitrator, although their interest diverges. This is the lesson which one may draw from the French decision in *Dutco*[8] where the forced appointment of one arbitrator by two defendants, who had diverging interest, has been held to be invalid.

It is suggested that the negative stance taken by the Swiss Federal Court in *Milutinovic*[9] as to the possibility that, after one arbitrator resigns, the other two continue and issue an award, is based *also* on the concern to protect equality of treatment. The reason for this is that if the arbitrator appointed by one party is no longer a member of the arbitral tribunal, that party no longer contributes in the constitution of the arbitral tribunal. Unless arbitration law provides otherwise, the conclusion may be the same, i.e. the remaining arbitrators may not continue and issue an award, if the party appointed arbitrator remains as a member of the arbitral tribunal but stops taking part in the proceedings because he disagrees with the other arbitrators.

The position may be different only if it is apparent that an arbitrator does not take part in the proceedings only in order to avoid that an award be made against the party which has appointed him.

A replacement of that arbitrator, if allowed by the applicable procedural rules, seems then to be the solution to be adopted, instead of the remaining arbitrators proceeding alone.

26.3 Partiality or Lack of Independence

Due process includes the right that the dispute be heard by an arbitrator who is impartial and independent.

In the absence of that, presentation of one's case and evidence and comments to the opposite party's case would be useless, because such process would be unable to produce the result of a fair hearing, due to lack of fairness by the very one who must 'hear' it. Reference is made here too the earlier analysis of the requirements for independence and impartiality.

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8 *Sté BMKI Industrieanlagen and Siemens v. Dutco Construction,* Court of Appeal, Paris May 5, 1989, *Rev. arb.,* 1989, 72.

9 *Ivan Milutinovic PIM v. Deutsche Babcock AG,* Kassationgericht des Kantons Zurich, February 10, 1988, *in* S.M. SCHWEBEL, *Validité d'une sentence arbitrale rendue par un Tribunal tronqué, Bull. CCI* 1995, 18.

In *Baumgarten*[10] it was held that it is not sufficient to claim that an arbitrator is biased in theory; he must be proven to have been biased in practice:

> On various occasions the lack of impartiality of arbitral tribunals appointed in CMEA countries has been argued, since the arbitrators are appointed from lists prepared by the Chamber of Commerce of that country which consist only of citizens of the same. The argument has been rejected since there had not been any evidence that in practice the arbitrators had been biased.

However, the parties to arbitration may be unable to prove that a given choice made by the arbitrator between two alternatives is due to bias and not to each of such alternatives being suitable for his choice.

When the appointment of the arbitrator is made by a body of the state to which one of the two litigants belongs, and that state is governed by a non-parliamentary regime, it is suggested that the risk of bias or of psychological pressure on the arbitrator is strong.

It is submitted that this may then be a matter of lack of impartiality, rather than of actual bias.

26.4 TERM TO APPEAR

Sufficiency of the term to appear is one of the highest importance, although precedents are frequently not consistent in this respect. *Abati Legnami*[11] has held in a probably too liberal way:

> The term of one month given to the Italian Defendant in an arbitration supervised by the Vienna Stock Exchange has been held (by the Italian court) to be adequate, even if that month was August.

Meanwhile in *Klomps*[12] the Court of Justice of the European Communities, has chosen a stricter ruling which was confirmed in *Debaeker,*[13] which provides that

> The term to appear may be inadequate from the point of view of public policy, even if it is the term granted by the foreign procedural law or even exceeds it.

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[10] *Ligna v.Baumgarten*, Swiss Federal Tribunal, *Arrêts du Tribunal Fédéral Suisse* 84, I, 39, 1958 quoted by van den BERG, *cit.* at 379, note 103.

[11] *Haupl v. Abati Legnami*, Court of Appeal, Milan, May 16, 1983, *Riv. Dir. Int. Priv. Proc.* 1985, 343.

[12] *Peter Klomps v. Karl Michel*, Court of Justice of the European Communities, June 16, 1981 no.166/80 *Riv. dir. int.* 1982, 637.

[13] *L.E.G.C. Debaecker and B. Plouvier v. G .C. Bowman*, Court of Justice of the European Communities, June 11, 1985, case no. 49/84 *Racc. giur. Corte* 1985, 1779.

26.5 Time Limits to File Pleadings

The presentation of the case is generally done through the filing of pleadings. The arbitrator's duty to allow a party to present its case has to be combined with the need to avoid that such a party abuses that right and drags and confuses the proceedings.

While in some situations difficulties might arise it is reminded that the rule is to permit each party to present its case while the way this right may be exercised will depend on the circumstances.

Compliance with the rules of due process will require *inter alia* neither to impose insufficient time limits to the parties nor to treat deadlines as mandatory when this has not been declared in advance and in general not to construe the arbitration rules and the arbitrators' earlier directions in a *formalistic* and too strict way. It will follow from this, for example, that a short delay in filing a pleading in respect of a deadline should not automatically cause that pleading to be disregarded.

In this respect, the French judgment in *Saronis*[14] has held:

> The appellant appealed to the Court of Cassation against the decision of the Court of Appeal which had confirmed an award of the French Maritime Arbitral Court. The award had not declared the nullity of the claimant's claim because the claimant had not filed the brief, in which that claim was made, in the term set for by the related rule of that arbitral institution. The claimant had argued that the other party had suffered no prejudice from such a late filing. The Court of Appeal had excluded that such a delay had prevented the appellant from arguing his case and consequently had rejected the challenge of the award. The Court of Cassation rejected the appeal.

26.6 Discovery of Documents

In many legal systems, the right of a party to obtain discovery of documents by the other party is either not recognised or severely curtailed.

International arbitrators making the excuse that they have no authority to enforce requests for disclosure against third parties frequently reject applications which seek that.

On the other hand in some jurisdictions abuse of pre-trial discovery is frequent. However the possibility of abuse does not seem sufficient to justify a refusal of or a severe limitation to any kind of discovery.

The conduct of full discovery according to American practice may disrupt a party, particularly if not belonging to that jurisdiction. However if a distinction

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[14] *Sté des Etablissements Soulès et Cie v. Sté Saronis Shipping Cy,* Court of Cassation (France) October 15, 1980, *Rev. arb.* 1982, 40.

is made between disclosure of all the documents and the mere disclosure of some classes of documents possibly to a neutral 'inspector', one can see that discovery does not necessarily produce such a negative result.

It is suggested that, except when discovery produces disruption of a litigant's business or is manifestly unnecessary, the right of a party to be informed of the classes of documents held by the opposite party and to inspect one or some of such classes or to have them inspected should prevail. If each party to arbitral proceedings is entitled to produce only the documents which are in its favour – which is what regularly happens in the majority of civil law proceedings – then one remains only on the *surface* of evidence and the party which has applied in vain for production of documents of the opposite party will not be allowed to prove its case.

Nevertheless in *Semabla*[15] the Court of Appeal, Paris has held that the arbitral tribunal's finding, that *Semabla's* refusal to produce the required invoices was lawful, was not to be criticized.

26.7 Right to Call and to Examine Witnesses

Nevertheless what may occur in *ad hoc* proceedings is that the set of rules selected by the arbitrator, or the procedural rules chosen by the parties, do not allow a party to call the witnesses it deems necessary to prove its case and/or to examine them and to cross examine the witnesses of the opposite party. The same may occur in administered arbitration under the rules of evidence of the arbitral institution

In other situations the arbitrator is not obliged to behave in such a restrictive way but he prefers to do so for example because he has become accustomed to this by the behaviour of his national courts.

If one looks at this behaviour from a common law country point of view, all this may sound unbelievable and it would indeed be so for an arbitrator coming from one of such jurisdictions.

However in arbitral proceedings conducted under a different procedural law, such situations do arise. Regrettably one shall come across arbitrators who may refuse to hear witnesses at all or who limit the number of them or put pressure on the parties in order that they limit their number. Some arbitrators will further not allow a party to examine its witnesses and to cross-examine the witnesses of the opposite party In several jurisdictions a party, in order to obtain leave to call witnesses, has to submit to the arbitrator the list of all the questions it wants the witness to answer. When such list is approved, very rarely other questions will be allowed.

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[15] *Semabla*, Court of Appeal, Paris, September 22, 1994 (unreported) in KESSEDJIAN, *Principe de la contradiction et arbitrage*, *Rev. arb.* 1995, 381.

Some arbitrators may allow Counsel for the parties to put some questions to the witness, but just out of courtesy as long as the line of the examiner does not disturb their own views on the examination of the witness, and provided that not too many questions are put to the witness. The arbitrator may occasionally stop a question for the reason that he does not understand its purpose, and will not allow it, unless Counsel first explains why he wants to put it.

Needless to say, no real testing of the creditworthiness of the witness will then be possible, just one or two quick questions being allowed on this issue.

It is submitted that in all these situations the arbitrator, subject to the applicable procedural law, interferes with the right of that party to prove its case, that he misconducts and his award may be tainted with nullity.

It is suggested then to check very carefully the arbitration rules and/or the applicable procedural law, before entering into the arbitration agreement.

If a party has the burden of proof, it must be entitled to discharge it. If it is prevented from doing so this must amount to a *denial of justice* except when the question is totally irrelevant (and this is not the case as to questions concerning for example the witness's creditworthiness) or when the question manifestly has no link *at all* with the dispute, or improper.

An example of indifference to the right of a party to prove its case is provided by *Neptune*[16] where the US Second District held that an exclusion of witnesses by the arbitral tribunal was not to be criticised. However at the appellate level it was held that the arbitrators'

> refusal to hear further evidence amounted to a breach of due process, since the intended witness was the only witness to the negotiations which led to the agreement from which the dispute originated.

Similarly in *Allendale*[17] an award was vacated because the arbitral tribunal had refused to adjourn a hearing although the application for adjournment was aimed at hearing a crucial witness who had become ill. The difficulty which concerns the availability of a witness on a given date, due to illness or earlier commitments, does arise and in principle should not prejudice the right of a party to prove its case.

A breach of the right to present one's case was complained of in *Southwire.*[18]

> In a dispute between two companies, one French and the other one American, concerning the supply of galvanised steel cables, the American company complained that it had been unfairly prevented from

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[16] *Tempo Shain Corporation and Neptune Corporation v. Berten Inc.* 1997 WL 403699 (2nd Cir. 1997)

[17] *Allendale Nursing Home Inc. v. Local 1115 et al.,* 377 F Supp 1208 N. Y. 5, 346 (1964).

[18] *Laminoirs Tréfileries Cableries de Lens S. A. (France) v. Southwire Company (U.S.),* District Court, Northern District of Georgia, January 18, 1980, *Yearbook Commercial Arbitration* 1981, 247.

> offering evidence when the arbitrators prevented their attorney from fully cross-examining the opposite party's international projects manager with respect to the price adjustment clause.

This complaint was not allowed by the state court which was hearing the attack against the award, since it held that the questions, which Southwire had complained to have not been allowed to put to the witness, were not relevant.

Nevertheless this conduct may be seen as an 'interference' by the arbitrators with the examination of the witness by Counsel. It may well be that the questions were not relevant but in answering them the witness might have provided relevant information. In any event it might have been simpler to hear a few irrelevant questions rather than exposing the award to a challenge.

It is submitted that there can be no right to prove one's case if there is no right to call witnesses and to examine them as well as to cross-examine the witnesses of the opposite party.

Arbitral proceedings show the possibility of unexpected conduct not only by arbitrators but also by the opposite party affecting due process. For example in *Texuna*[19] it was argued that a witness had been kidnapped.

26.8 The Right to Present One's Case and to Oppose the Case of the Opposite Party

In *Fincantieri*[20] the Swiss Federal Court has clearly designed the *droit d'être entendu en procédure contradictoire*:[21]

> The right to be heard grants to each party the right to present its case in fact and in law and to provide all the necessary evidence as well as the right to attend the hearings and to be assisted or represented before the arbitral tribunal.

Common law state courts in general are very firm about the right to present one's case and to comment on the case presented by the opposite party. In civil law systems, state courts will in general react only in extreme cases. The French Court of Cassation has held in *Louppe*:[22]

> The decision of the Court of Appeal of Rennes was set aside since it had rejected an appeal against an award without dealing with the need to

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[19] *J. J. Agro Industries (P) Ltd v. Texuna International Ltd.*, Supreme Court of Hong Kong, August 12, 1992, *Yearbook Commercial Arbitration* 1993, 396.

[20] *Fincantieri Cantieri Navali Italiani and Oto Melara v.M.*, Swiss Federal Tribunal September 17, 1993, *Clunet* 1996, 745.

[21] The right to be heard and to oppose the case of the opposite party.

[22] *Albert Louppe v. Léon Thomas*, Court of Cassation (France) November 30, 1978, *Rev. arb.* 1979, 355.

> establish whether, as the appellant was arguing, neither the name of the experts nor their conclusions had been notified to him.

This is in line with the approach which:[23]

> firmly disapproves any practice which would prevent even the mere possibily of a debate.

Along the same lines is the Italian judgment in *Cabassi*:[24]

> The arbitrators were acting as *amiables compositeurs* in a dispute concerning the sale of a large number of corporate shares. The arbitrators were relieved from the duty of complying with procedural law, except for each party's right to present its case and to oppose that of the other party. The defendant argued that the shares had not been transferred to the claimant, but to another company (which was under the claimant's control), and that consequently the claim – even if it had grounds – could be asserted only by that other company and not by the claimant. In order to establish this point the arbitrators, after the case had been argued and while they were deciding, asked the other company (which had allegedly purchased the shares), through Counsel for the claimant, to provide clarification. After learning from this company that the shares in issue had been purchased by the claimant, the arbitrators rejected the defendant's argument of claimant's lack of standing and found in the latter's favour. The Defendant challenged the award, since it had been kept in ignorance of this inquiry and of the reply to it, and therefore its right to present its case had been breached. The award was set aside for breach of due process.

French courts decided on a similar factual situation in *Industrialisation du Bâtiment*:[25]

> The award had been rendered without informing the parties of a supplement of the expert's report on which the award was based. The Court of Cassation confirmed the judgment of the Court of Appeal that the arbitrators had breached the rules of due process.

The right to present one's case has been held – even if related to another issue – in *Tamellini*:[26]

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[23] Ph. FOUCHARD, Comments to *Louppe*, see *supra* note 2.

[24] *SAI Società Assicuratrice Italiana v. Cabassi, Sintesi and Ausonia Assicurazioni,* Court of Turin, April 13, 1987, *Mediterranean and Middle East Arbitration Quarterly* 1998, no. 2.

[25] *Sté Groupement pour l'Industrialisation du Bâtiment v. Sté Industries* et *Technique*, Court of Cassation (France) July 17, 1978, *Rev. arb.* with comments by ROBERT.

[26] *Fall. di Felix Tamellini v. Tamellini*, Court of Appeal, Genova May 24, 1973, *Riv. dir. int. priv. proc.* 1974, 139.

> A breach of due process has been argued and opposed to an application for recognition of a foreign bankruptcy order, since the bankrupt had not been invited to present its case.

The Court of Appeal, Paris, in *Pharmachim*[27] held:

> The arbitrators have breached the rules of due process by taking the initiative of modifying the contractual legal basis of the claim for indemnity made by the claimant. The arbitrators had allowed the claim under the heading of tortious liability, although it had been carachterized by the claimant as contractual, without advising the parties and inviting them to argue this issue.

The French Court of Cassation in *Langlois*[28] held:

> The party, which does not avail itself of the right to make its comments to the arbitrator, cannot later complain about a breach of due process if the arbitrator has made his decision based only on the expert's report and the expert has acted respecting the rules of due process.

In *Mercure*[29] the Court of Appeal, Paris set aside an international award on the ground that neither the parties nor their Counsel had been heard. Along the same line are the rules of several arbitral institutions which provide that a final address is a right of the parties if they so request.

The principle behind this applies to the right to address a relevant issue during the proceedings, whenever that cannot be dealt with merely by way of exchange of pleadings.

As to experts, the duty of a party to provide to the other one the report of his exparte expert has been rightly held in *Unichips*.[30]

As to exchanges of pleadings, in *Boulogne*[31] the Court of Appeal of Versailles has held that a party had no duty to communicate to the opposite party its *cotes de plaidoirie* (a very concise written summary of the party's position, placed on the front page of a new file made *at that time* for each of such issues, containing that party's documents related to it) which are directly delivered to the Court or arbitrator at that hearing immediately after the final address. This solution is peculiar to French rules of procedure. It might make parties belonging to other jurisdictions unhappy since in this way the opposite party is given no opportunity to examine such new files and to check whether

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27 *Société VRV v. Pharmachim*, Court of Appeal, Paris, November 25, 1997, *Rev. arb.* 1998, 4, 684.

28 *Banclet v. Langlois*, Court of Cassation (France) February 16, 1978, *Rev. arb.* 1978, 469 with comments by MOREAU.

29 *Sté Immoplan v. Mercure*, Court of Appeal, Paris January 19, 1990, *Rev. arb.* 1991, 125.

30 *Sté Unichips v. Gesnouin*, Court of Appeal, Paris February 12, 1993, *Rev.arb.*1993, 255.

31 *Sté Samu Achan et al. v. Sté Boulogne Distribution et al,* Court of Appeal, Versailles July 13, 1994 *Rev. arb.* 1995, 494.

they contain any new argument or at least to check how the other party has summed up its position.

However several of the above precedents concern only the right to argue an issue, rather than to prove it.

That is the case of the French judgment in *Ewbank,*[32] where the grievance was raised against an award that such a party had not had the opportunity to argue under Swiss law since the arbitrators had applied it *ex officio,* that grievance was rejected on the ground that Swiss law governed the contract between the parties and had therefore to be taken into account by them in arguing their case.

In *SGN*[33] the arbitrators had heard a late witness, who had read a written statement made by the French government. That document was not produced. It was held by the French Court that the lack of production of such a document was not a breach of due process because the arbitrators had not based their decision on it. It is submitted that even if in the end the tribunal has not based its decision on it, that document might have been relevant to the decision. Therefore if the other party had asked to examine that document and has been unable to examine it, it is submitted that the state court's reasoning, excluding breach of due process, is not convincing.

This while in *Courrèges*[34] a French court has rightly held that if the arbitrators decide to characterise a conduct as termination, they do not have to reopen the debate since the matter has already been long debated and the arbitrators have introduced no new element justifying such a reopening.

A further breach of due process may consist in the arbitrator using his own information without putting it to the parties, in order that they be allowed to take position on it. This breach was rightly asserted in the French judgments in *France Pro*[35] and *Aeroflot.*[36]

Amongst American precedents, in *Goldfinger:* [37]

> A domestic award was refused enforcement since the arbitrator had had private contacts with the party in order to raise information aiming to establish the creditworthiness of the same ...

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[32] *Sté Générale pour l'Industrie v. Ewbank and Partners Ltd,* Court of Appeal, Paris May 28, 1993, *Rev. arb.* 1993, 664.

[33] *PAEC v. SNG,* Court of Cassation (France) January 7, 1992, *Rev. arb.* 1992, 659 in KESSEDIJAN, *cit. Rev. arb.* 1995, 381.

[34] *Sté Courrèges Design v.Sté André Courrèges et al.* Court of Appeal, Paris April 5, 1990, *Rev. arb.* 1992, 110.

[35] *Sté France Pro v. Zirotti,* Court of Cassation (France) June 21, 1995, *Rev. arb.* 1995, 448.

[36] *Compagnie Aeroflot v. AGF et al.*, Court of Appeal, Paris June 10, 1993, *Rev. arb.* 1995, 448.

[37] *Goldfinger v. Lisker,* New York Court of Appeals, 1986, 68 NY 2nd, *Rass. arb.* 1987, 262.

The reason why the right of a party to due process is affected, whenever that party is made unable to comment any private knowledge used by the arbitrator in reaching his decision, is that even if that knowledge is sound the parties are entitled to comment on it and their comments might induce the arbitrator to modify his conclusions.

That right is affected also whenever the arbitrator takes advice from outside, without the parties being able to comment. This applies to those situations where the arbitrator requests and receives information from third parties without disclosing it to the litigants.

In *Bridas*:[38]

> An ICC arbitral tribunal advised the parties that it was intending to appoint an expert on some New York law issues. Bridas opposed the appointment,while the other party, Isec, requested the tribunal to be informed of the criteria which would be followed to select him, of the issues which would be put to him and of his role and impartiality and advised that in its view one should avoid appointing someone who had a link with law firms. The tribunal replied that it was minded to appoint a law professor not involved in law firms. The case report does not show further complaints being made by the parties. During the challenge of the award, the Federal Court criticised that party for having remained silent during the further proceedings, either for tactical reasons or not to displease the tribunal.

Be that as it may as to the specific circumstances of the Bribas proceedings, if a tribunal bases its decision upon, or also upon an expert's advice which has not been made available to the parties for comment, it is submitted that the right of that party to comment has not been respected and that this amounts to a breach of due process, which entitles to have the award set aside.

The breach of such a right was argued also in *Pakistan Atomic Energy*[39] on the grounds that the arbitrators had allowed late oral evidence and the production of an affidavit. The French Court of Cassation held that rather than on late evidence one should focus on the issue whether the other party had been given the opportunity to take a position on such evidence. Since the arbitral tribunal had given such a opportunity to the other party, there had been no breach of due process.

In *Unichips*[40] the Court of Appeal, Paris rightly affirmed that due process requires that the expert's report be submitted to the parties in order that they may discuss it.

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[38] *Sté Isec v. Sté Bridas*, Southern District, New York August 24, 1990, *Rev.arb.* 1994, 739.

[39] See *supra* note 29.

[40] *Pakistan Atomic Energy Commission v. Sté Générale pour les Techniques Nouvelles*, Court of Cassation (France) January 7, 1992, *Rev.arb.* 1992, 659.

26.9 OTHER BREACHES OF DUE PROCESS

Due process may also be breached if the case is argued by someone who has no authority to do so for a party and that party has consequently not regularly attended the hearing. This was held in the Russian precedent in *Arkhangelsk* :[41]

> The management of a foreign insurance company in Russia was a party in a debate before the Russian Maritime Arbitral Committee in a dispute between the port of Arkhangelsk and a company trading under the name of Egon Oldendorf.
>
> The port authority claimed damages caused by the boarding of the towboat Molotoboiets by vessel Islabe Oldendorf. The foreign insurer of the vessel appeared recognising that the claim of the Russian port authority, contrary to the position which had been taken by the Defendant, was grounded and discussing only the quantum.

The Russian Supreme Court set aside the award and remitted the dispute to the arbitrators for re-examination.

26.10 CONCEALED ENEMIES OF DUE PROCESS

In general terms, it is suggested that one might try to identify attitudes which are the potential roots, or the very roots, of various breaches of due process.

Shortage of time is one of them. If the arbitrator is in a rush to put an end to the proceedings, because in his view they have taken enough of his time, or he wants to go to the airport or must attend another meeting, then the basis for a possible breach of due process has been established.

Lack of attention too is potentially suitable to produce the same result. This may be occasional, for example because of the excessive duration of a hearing, which may be understandable, or due to the arbitrator's certainty that he has already fully understood the case and need hear no more. This last attitude is not acceptable; if the arbitrator is unable to listen, the entire process is in danger.

Lack of care, lack of balance, lack of prudence or lack of an open mind may all form the bases for breach of due process.

26.11 PARTIES' RIGHT TO REPRESENTATION BY COUNSEL

The right to be represented by Counsel is well established in international commercial arbitration

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[41] *Port de Commerce Maritime d'Arkhangelsk v. Egon Oldendorf*, Supreme Court (USSR) March 24, 1970, *Clunet* 1971, 387.

In some trade arbitrations the arbitration rules, which are accepted by the parties, exclude parties from being represented by Counsel. This might be understandable as to quality arbitrations or in any event in proceedings involving only a technical issue.

However whenever the arbitrator has to draw conclusions in law from a fact, it is submitted that the exclusion of representation by Counsel affects the right of that party to present its case.

Acceptance of arbitration rules which exclude Counsel amounts to a waiver. However in some jurisdictions such a fundamental right may not be waived. If so the waiver will be of no effect.

In *Argyle Lane*[42] the Supreme Court of New South Wales held that a referee, appointed by the Court in order to file a report, had breached natural justice, by not allowing a party to be represented by Counsel before him,which tainted his proceedings and made it necessary to appoint another referee.

It is submitted then that even prohibition by a legal system to *foreign* Counsel to appear for the client in international arbitral proceedings affects due process and may prevent the enforcement of that award in other states.

26.12 DENIAL OF JUSTICE

The great attention which has been given to the variety of ways in which due process may be breached might appear excessive.

One should then probably underline that a breach of due process is not just a *vulnus*[43] in the abstract to the arbitral process, but it produces serious and actual prejudice.

Whenever a party is prevented from presenting or proving its case or from commenting on its opponent's case, the consequence of this is generally that the party which bears the burden of proof and has then to satisfy the court of the soundness of its claim is prevented from discharging this burden. Its claim will then be rejected, not having been proved. It is submitted that such a situation is a *scholastic* example of *denial of justice.*

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[42] *Argyle Lane Corporation Pty Ltd. v.Tower Holding Pty Ltd and Veriva Pty Ltd*, Supreme Court of New South Wales (per O'Keefe CJ) September 3, 1993, 13 *The Arbitrator* 1,.18.

[43] A wound.

CHAPTER 27

THE AWARD

SUMMARY: 27.1 Possibility of Interim Awards – 27.2 Interim Awards and Orders – 27.3 Final Award – 27.4 Finality of Interim Awards – 27.5 Arbitral Post Award Proceedings: Correction, Interpretation and Additional Award – 27.6 Duty to Decide – 27.7 Time Limit for the Award – 27.8 Lack of Signature by All the Arbitrators – 27.9 Discussion and Decision – 27.10 Non-Attendance at the Decision – 27.11 Decision by a Majority or Casting Vote – 27.12 Dissenting Opinions – 27.13 Inertia of the Parties – 27.14 Contents of the Award – 27.15 Reasons of the Award – 27.16 Delegation by the Arbitrators of Their Authority to Decide – 27.17 Sanctity of Deliberations Chamber or Power of State Courts to Invade – 27.18 Place Where Award Is Made – 27.19 Award by Consent of the Parties – 27.20 Effects of the Award – 27.21 Binding Effects of Precedents - *Stare Decisis* – 27.22 Confidentiality in Arbitration – 27.23 Publication of the Award – 27.24 Scrutiny of the Award by the Arbitral Insitution

27.1 POSSIBILITY OF INTERIM AWARDS

The Swiss Federal Court[1] has provided a very clear definition of an international award:

> An arbitral award[2] is a decision made under an arbitration agreement by a non state tribunal to which the parties have granted the task to decide a financial dispute[3] of an international nature.[4]

As the arbitration agreement is the starting point of arbitration proceedings, so the award is its final step. With the award the arbitral proceedings reach their natural conclusion. The award tends to reflect all the possible defects of the proceedings and by attacking it a party is entitled to complain about them. The first problem which arises in this respect is whether it is possible to issue an award which does not determine the entire dispute but only a part of it. The procedural laws of the various legal systems give interim awards various names such as interim, interlocutory, separate and interim awards. Furthermore a distinction is to be made between decisions which define a part of the dispute and those which deal only with the conduct of the proceedings, or with urgent measures which have a different nature and role from the former.

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1 Swiss Federal Court March 15,1993 ATF 119, II, 271, *Clunet* 1996, 735.

2 Within the meaning of Art 189 LDIP.

3 Art 177, para 1 LDIP.

4 Art 176, para 1 LDIP.

International conventions

There is no reference to interim awards in the New York Convention (1958) and in the Geneva Convention (1961).

The possibility of non-final awards can be gathered indirectly from the Uncitral Model Law (1985), which concisely provides:[5]

> (1) The arbitral proceedings are terminated by a final award or by an order of the arbitral tribunal in accordance with paragraph (2) of this Article.

The qualification of an award as final seems to show that non-final awards may also exist.

Arbitration rules

The rules of the International Chamber of Commerce do not mention any more interim awards.[6] The former provision stating:

> before signing an award, whether interim or definitive, the arbitrator shall submit it in draft form to the Court,

has been replaced in the new edition which provides:[7]

> before signing any award, the Arbitral Tribunal shall submit it in draft form to the Court ...

However they further provide:[8]

> *Every* award shall be binding on the parties ... (emphasis added)

The possibility of interim awards is also mentioned in the Uncitral Arbitration Rules (1976):[9]

> 1. In addition to making a final award, the Arbitral Tribunal shall be entitled to make interim, interlocutory or interim awards ...

Interim awards are also recognised by the rules of the London Court of International Arbitration:[10]

> The Arbitral Tribunal may make separate awards on different issues at different times ...

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5 Art. 32, Uncitral Model Law on International Commercial Arbitration (1985), *cit.*

6 Art. 21, ICC Rules, *cit.*

7 Art. 27, ICC Arbitration Rules (effective from 1998).

8 Art. 28, ICC Arbitration Rules (effective from 1998).

9 Art. 32, (1), Uncitral Arbitration Rules (1976).

10 Art. 26.7, Rules of the London Court of International Arbitration, *cit.*

The rules of the Arbitration Institute of the Stockholm Chamber of Commerce state:[11]

> (1) At the request of a party, a separate issue or a part of the matter in dispute may be decided in a Separate Award.
>
> (2) Where a party has partially admitted a claim, a Separate Award, based on such admission, may be rendered.

The Arbitration Rules of the European Court of Arbitration state:[12]

> 1. Prior to making its final award, the Arbitral Tribunal may make partial or interim awards and issue interlocutory injunctions in accordance with Art 21.4.
>
> 2. When the Arbitral Tribunal considers that a severable part of the dispute may be determined, the Arbitral Tribunal may so determine subject to any contrary mandatory procedural provision.

Interim awards are also provided for by the International Rules of the Milan Chamber of Arbitration:[13]

> 1. The award shall deal with all the issues in dispute.
>
> 2. If the arbitrator, for reasons to be stated in the award, holds that he is in a position to decide only some of the issues raised in the dispute, he shall make an interim award and prepare, if necessary, a new time-table for the arbitration proceedings.
>
> 3. In the event of an interim award, the period of time fixed in Article 39, paragraph 3, within which the arbitrator must file a final award, shall begin to run again from the day on which the interim award has been filed.
>
> 4. If the proceedings concern several heads of claim, the arbitrator may severe such claims, decide only some of them in accordance with paragraph 2 of this Article and issue directions as to the hearing of the remaining claims on the basis of a new time-table as appropriate, for the arbitration proceedings. Paragraph 3 of this Article shall be applied accordingly.

The International Arbitration Rules of the American Association Arbitration provide:[14]

> In addition to making a final award, the tribunal may make interim, interlocutory or interim orders or awards.

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[11] Art. 34, Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, (1999).

[12] Art. 22.1, Arbitration Rules of the European Court of Arbitration (1999), *cit.*

[13] Art. 38.2, Rules of the National and International Milan Chamber of Arbitration, *cit.*

[14] Art. 27.7.

Similarly the rules of the Italian Society for Arbitration state:[15]

> 1. Awards, whether they be interim or final awards, shall be made by the arbitrator according to the rules of the applicable law. ...

Interim awards are apparently not contemplated by the Rules of Conciliation, Arbitration and Expertise of the Euro-Arab Chambers of Commerce which state[16] that the award:

> ... must necessarily incorporate a decision on the substance of the disputes submitted to arbitration.

Contrary to this, the rules of the Inter-American Commercial Arbitration Commission provide such a possibility.[17]

> In addition to making a final award, the arbitral tribunal shall be entitled to make interim, interlocutory or interim awards.

Interim awards are provided for also in India:[18]

> The Bench may make an interim award and may by an award determine and order what shall be done by either or any of the parties respecting the matters referred.

National legal systems

Some legal systems will now be briefly reviewed. This review will be based on the reports which have been published on them and will have to be checked each time in view of the fast speed of changes in many jurisdictions.

In Australia, the domestic statutes do not prevent the arbitrator from issuing interim awards. However in the absence of a different agreement of the parties, the award is required to deal with all the matters which have been referred.

Under Japanese law an interim award is allowed for example on liability, reserving the quantum, or on one of the various claims. Interim awards are known in India[19] and are allowed also in Malaysia.[20] In the Philippines[21] it is reported that interim remedies concern measures to safeguard and/or conserve

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15 Art. 26, Rules of the Italian Society for Arbitration, *cit.*

16 Art. 24 (3), Rules of Conciliation, Arbitration and Expertise of the Euro-Arab Chambers of Commerce, *cit.*

17 Art. 32, Rules of the Inter-American Commercial Arbitration Commission, *cit.*

18 Art. 66, Rules of Arbitration of the Indian Council of Arbitration, *cit.*

19 SIMMONDS *et al.*, *cit.*, at 53.

20 SIMMONDS *et al.*, *cit.*, at 129.

21 V.P. LAZATIN, *The Philippines*, in PRYLES, *cit.*

any matter which is the subject of the dispute in arbitration. The issue of interim awards is recognized in Saudi Arabia.[22]

Under Greek law interim awards which decide a specific issue may be enforced. Under Italian law, after lengthy discussions, interim awards have been recognized.[23] Under French law interim awards are expressly provided for,[24] as in Switzerland,[25] Austria (*Teilschiedsspruch*),[26] Germany[27] and England[28]

> the tribunal may make more than one award at different times on different aspects of the matter to be determined.

The possibility of issuing interim awards involves major issues. In fact, it has been held that the arbitrators need only make one decision, since an interim award which is not followed by a final one does not comply with the arbitration agreement and consequently does not have the status required in order to be enforced. Whenever an interim award is issued and enforced, and is not followed by a final award, what has already been done under the interim award may have to be undone, involving useless activity and in some situations even the impossibility of *reductio ad pristinum,* (i.e. of re-establishing the original position).

This issue is dealt with in particular in Italian precedents. Originally[29] the opinion prevailed that an interim award could not be enforced since it could not be challenged and it was held that it was not possible to have an interim award if it could not be both challenged and enforced. Therefore if it was not open to challenge it could not be enforceable.

The impossibility of challenging an interim award was confirmed by the Court of Cassation, (Italy) in *Terme di Santa Cesarea*[30] which held, that an interim award cannot be challenged separately from the final award, since if the appeal is rejected but the arbitrators do not issue a final award on the

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22 EL AHDAB, *op. cit.*, at 602.

23 See G. SCHIZZEROTTO, *Dell'arbitrato* (Arbitration), 2nd ed., Milan 1982, *cit.*, at 539 *et seq.*, and LEVONI, *La controversa impugnabilità della sentenza arbitrale non definitiva* (The Disputed Possibility of Challenging a Non-Final Award), *Giur. It.*, 1980, 11, 1695.

24 *Arbitration Law in Europe, op. cit.*, at 153.

25 *Arbitration Law in Europe, op. cit.*, at 66.

26 *Arbitration Law in Europe, op. cit.*, at 22.

27 *Arbitration Law in Europe, op. cit.*, at 92.

28 Section 47, Arbitration Act 1996.

29 On this issue see VECCHIONE, *Rassegna di giurisprudenza sull'arbitrato* (Review of Precedents on Arbitration), *Riv. Dir. Proc.*, 1957, 169; see also T. CARNACINI, *Novissimo Digesto Italiano,* item *arbitrato rituale,* at 905.

30 *Spa Terme di Santa Cesarea v. Spa Saverio Sticchi,* Court of Cassation (Italy), July 12, no. 4020 (1979*), Giust. Civ. Mass.*, 1979, 1767 and *Foro It.*, 1979, 1, 2319 with comments by BARONE.

remaining dispute then a final award is made only on a part of the dispute and this conflicts with the arbitration agreement. The Court of Cassation consequently held that immediate appeal, available in court proceedings against interim judgments, was not applicable to interim awards. However the Court while confirming the impossibility of immediate challenge held that in the meantime an interim award could be enforced,[31] a view which was not shared by that court in *Agro di Chilivani*[32] where it held that even enforcement of an interim award had to wait until the final award was made and became enforceable. The Arbitration Law Reform (1994) has now allowed immediate attacks only against awards which decide a part of the merits of the dispute and not just a procedural issue.

In international arbitration the issue also arises of how an arbitrator should behave when his interim award is set aside, and when he is challenged in order to prevent him from hearing the remainder of the dispute, as occured in *Westland.*[33] In this situation an invitation to the arbitrator to take the greatest care before continuing the proceedings is made by Perrot.[34]

The problems of the relationship between challenge and enforcement exists also in international arbitration. Depending on the applicable procedural provisions it is possible for challenges and enforcement to take place independently from each other (i.e. in separate proceedings as provided for at the level of international conventions by the New York Convention). In theory, provided the interim award is binding and always subject to the applicable procedural law, it is conceivable to have recognition or enforcement proceedings for an interim award, even if it is challenged in the state of origin. However, while many cases of attacks against interim awards have been recorded, even in detailed studies such as that by van den Berg[35] there is no trace of a similarly lively debate on such issues.

27.2 Interim Awards and Orders

Another aspect which has not been dealt with in detail in international conventions is the distinction, not merely on a national level, between interim awards

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31 See previous note 36.

32 *Consorzio di Bonifica dell'Agro di Chilivani v. Soc. Ing. Manfredi per Costruzioni ed Esercizi Industriali*, Court of Cassation November 9 no. 6021 (1988) *Foro pad* 1990, 5.

33 *Westland Helicopters Ltd. v. Arab Organization for Industrialisation et al.*, see *supra* chapter 11, note 124.

34 R. PERROT, *Arbitrage interne et arbitrage international. Les recours devant la Cour d'Appel empèchent-ils l'arbitre de poursuivre sa mission?* (Domestic and International Arbitration -Do Appeals to the Court of Appeal Prevent the Arbitrator from Continuing his Proceedings?), *Rev. arb.* 1987, 107.

35 van den BERG, *The New York Arbitration Convention,* Kluwer, 1981.

and orders. In fact there is a unanimous view that the decision on one of the heads of claim or counterclaim must be classified as an interim award; views are less unanimous as to the form of decisions concerning the conduct of the proceedings and urgent measures.

In practice in international arbitration decisions are made which do not define a head of claim, but which deal simply with issues concerning the conduct of the proceedings and which nevertheless are defined as interim awards or

> sentences avant dire droit.

This view has been shared by the Court of Appeal of Paris in *Sardisud*[36] and has been summarised as follows:

> One may apply for the setting aside only of awards i.e. of arbitrators' decisions which decide totally or partly the dispute which has been submitted to them, be it on the merits or on jurisdiction or on another procedural issue which puts an end to the dispute. The decisions which do not meet this criterion, in whatever way they are called, belong merely to the instruction of the dispute and do not decide it. They may be amended subsequently by the arbitrators and may only be challenged together with the award.

This clear distinction has not been followed in *Industrialexport*[37] which treated as awards not only an order by the arbitral tribunal which held that it had been duly formed and had jurisdiction but also a further order dealing only with the procedural rules to be followed and a third one dealing with the application by a party to review the first order. As pointed out by Jarosson[38] the last two orders do not seem to have the nature of an award.

In some legal systems, such as in France and Belgium, such decisions are frequently defined as interim awards.

It is submitted that the traditional opinion is preferable, according to which there is an interim award only if there is a decision on a head of claim or on a preliminary issue which determines the entire proceeding. Decisions concerning the conduct of the proceedings should generally not be defined as interim awards.

The same view was later expressed by the ICSID Secretariat in the *Pyramids*[39] when considering an application for annulment of the Arbitral Tribu-

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[36] *Sté Sardisud et al. v. Sté Technip et al.*, Court of Appeal, Paris, March 25, 1994 *Rev. arb.* 1944, 39.

[37] *Sté Industrialexport-import v. Sté Geci and Gfi*, Court of Appeal, Paris, July 9 1992 *Rev. arb.* 1993, 301.

[38] C. JAROSSON, note to *Industrialexport* see *supra* note 370.

[39] *Southern Pacific Properties v. The Arab Republic of Egypt*, ICSID Award May 20 1992, *Yearbook Commercial Arbitration* 1994, 51.

nal's preliminary decision. The Secretariat's decision not to register the application was based on the ground that such a decision was not an award.

Interlocutory injunctions too are generally not comparable with an interim judgment. However, it must be recognized that they may be defined as an award in order to be enforced in other states since international conventions do not provide for the possibility of recognising orders and recognition proceedings are limited to awards. Therefore the only way for interlocutory injunctions to be enforced is if they are issued as an interim award.

27.3 FINAL AWARD

As was held in *Central of Georgia*:[40]

> Finality is a *mirage* if relied upon to preclude any judicial review of an arbitration award. (emphasis added)

An award is final if the arbitrators completely define the dispute which has been referred to them.

Finality of an award is considered here from the point of view of the arbitral proceedings, within which it is to be distinguished from an interim award, and not from the point of view of it having become binding in the sense that it is still open to recourse (which is frequently construed as referring only to ordinary recourses).

However the situation may arise where the arbitral tribunal finalises the proceedings by making a decision without dealing (inadvertently) with all the matters which it had to decide. If so, the applicable procedural provisions may or may not allow a party to obtain an additional award. If not the award may be challanged on this ground but, from the point of view of the arbitral proceedings, it has to be treated for this purpose as final because it has put an end to them even if wrongly.

The Geneva Convention (1927) provides:[41]

> . . . If the award has not covered all the questions submitted to the arbitral tribunal, the competent authority of the country where recognition or enforcement is sought can, if it thinks fit, postpone such recognition or enforcement or grant it subject to such guarantee as that authority may decide.

As to the classification of awards as final the US decision in *Petroleos Mexicanos is* worth mentioning:[42]

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[40] *Brotherhood of Railroad Trainmen v.Central of Georgia Railway Co* 415 F2d 403, 412-413 (1969) quoted in *Aerojet General Corporation v. American Arbitration Association,* 478 F 2d 248 (9th Cir.1973).

[41] Art. 2, Geneva Convention (1927), *cit.*

> (Charterer) urges the Court not to confirm the award on the grounds it is not final, but rather, as its title 'Interim Ruling' suggests, as only an intermediary step in an on-going arbitral process. (Charterer) relies upon a decision of our Court of Appeals holding that in the absence of a 'final' award, a district court is without power to review the validity of arbitrators' rulings in on-going proceedings, and that in order to be 'final', an arbitration award must be intended by the arbitrators to be their complete determination of all claims submitted to them. *Michaels v. Mariforum Shipping S.A.*, 624 F 2d 411, 413, 414 (2d Cir. 1980). Applying these standards, (Charterer) concludes that the arbitrators' own statement that the award was not intended to be a final disposition of the merits precludes this Court from confirming it.

27.4 FINALITY OF INTERIM AWARDS

Finality of an interim award may sound as a contradiction. It would be so if one were to construe it as meaning that an award may at the same time be an interim and a final award. In fact if it is an interim award it cannot at the same time be final.

However finality may be affirmed in another sense also as to interim awards. In fact the interim award may no longer be amended by the arbitral tribunal. Once the tribunal has decided some matters, by way of an interim award, the party which should not be satisfied with it may only challenge the award.

What is generally not allowed is that the arbitrators review the interim award by way of a subsequent interim award or in their final award.

This position is consistent with court proceedings.

27.5 ARBITRAL POST AWARD PROCEEDINGS: CORRECTION INTERPRETATION AND ADDITIONAL AWARD

Correction, interpretation and additional awards have been defined[43] as *post award* proceedings. By this expression one refers to arbitral proceedings continuing after the award. As such they are to be neatly distinguished from court post award proceedings such as confirmation or vacation of the award or recognition of foreign awards.

Correction, interpretation and additional awards must also be distinguished from revision of the award. Contrary to the latter in the former there is nothing

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[42] *Southern Sea Navigation Limited v. Petroleos Mexicanos,* US District Court, Southern District of New York, April 25, (1985) *Yearbook Commercial Arbitration* 1986, at 210.

[43] D.D.CARON and L.F.REED, *Post Award Proceedings under the Uncitral Arbitration Rules,* 11 *Arb.Int.* 4, 429.

to review as to the essence of the decision. It is simply a matter of putting minor things straight, of clarifying or completing the award, which apart from this is not amended as to its substance. Its realm is limited to corrections of clerical errors, to clarification of an ambiguity, or to making an additional award as to a matter which by mistake has not been decided.

In the absence of interpretation by the arbitrators upon a party application, the Permanent Court of International Justice has held in *Polish Postal Services in Danzing*:[44]

> Once a decision has been duly given it is only the contents that are authoritative, whatever may have been the views of the authors.

A liberal view as to interpretation has been echoed in the *Wintershall* award,[45] based on the Uncitral rules and on the applicable Netherlands Arbitration Act.

A balanced position was taken by the Permanent Court of Arbitration in *UK-France Continental Shelf*:[46]

> A request for interpretation must therefore genuinely relate to the meaning and scope of the decision and cannot be used as a means for its 'revision' or 'annulment', processes of a different kind to which different considerations apply.

One must then exclude in any event interpretations which aim at amending the award.

Interpretation consequently applies only to situations where, as it was nicely put by Knutson,[47]

> there may be a 'pure ' *ambiguity*on a award (emphasis added).

The Uncitral Model Law (1985)[48] proposes a solution for a non-final award, which consists in completing the award:

> Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within thirty days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award.

Likewise the Uncitral Arbitration Rules (1976) provide:[49]

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[44] *Cited* by KNUTSON, see infra note 47, as quoted by BIN CHENG, *General Principles of Law as Applied by International Courts and Tribunals*, Grotius 1987, at 336-372.

[45] *Yearbook Commercial Arbitration* 1990, 30.

[46] ILR 139 (1978).

[47] R.D.A. KNUTSON, *The Interpretation of Arbitral Awards; When Is a Final Award not Final?* 11 *J.Int. Arb.* 2, 9.

[48] Art. 33 (3), Uncitral Model Law, (1985) *cit.*

[49] Art. 37 (1), Uncitral Arbitration Rules, (1976).

> Within thirty days after the receipt of the award, either party, with notice to the other party, may request the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award.

The tendency is clearly to cover the *lacunae* of an award with the very practical solution of an additional award.

In some civil law systems, this solution encounters the opinion that when the judge (arbitrator), makes his decision, he loses all his authority and becomes *functus officio.*

Two tendencies must then be noted in this respect:

- remittal to the arbitrator so that he completes his decision;
- non-remittal, since the award must be treated as the final step in the proceedings and as such can only be reviewed by the courts.

These two opposing opinions apply also to the arbitrators' authority to construe or correct their awards.

The traditional opinion, championed for a very long time by the Italian legal system, holds that an arbitrator, when he renders his decision, loses his authority and may not intervene further either ex officio or upon application of the parties.[50] However the Arbitration Reform Act has modified this principle allowing the arbitrators to correct their award upon application by a party, provided the application is filed prior to the filing of the award with the County Court for leave to enforce.[51]

The opposite common law view, which is more pragmatic and avoids any such problems, allows adjustments which may be useful i.e. both the construction and the correction of the award.

The parallel between arbitral and court proceedings, which is always on the background of studies on the law of arbitration, would have it that where a judge may correct calculating or clerical errors, an arbitrator should have the same authority. However, this is not necessarily so, and each legal system must be referred to. In fact, even the authority granted by the parties to the arbitrators to choose the applicable law, or the choice by the parties of the rules for the proceedings, do not necessarily involve the arbitrators' authority to correct their decision. In fact corrections may have to be treated as the stage subsequent to the award, and not as a part of the proceedings.

International conventions

The older International Conventions (Geneva 1923, Geneva 1927, New York 1958) do not deal with the interpretation of the award.

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[50] On this issue see G. SCHIZZEROTTO, *op. cit.*, at 377.

[51] Arbitration Reform Act, 1994.

This appears for the first time in the Washington Convention (1965) which provides:[52]

> Art. 50–(1) If any dispute shall arise between the parties as to the meaning or scope of an award, either party may request interpretation of the award by an application in writing addressed to the Secretary General.
>
> (2) The request shall, if possible, be submitted to the Tribunal which rendered the award. If this shall not be possible, a new Tribunal shall be constituted in accordance with Section 2 of this Chapter. The Tribunal may, if it considers that circumstances so require, stay enforcement of the award pending its decision.
>
> Art. 51–(1) Either party may request revision of the award by an application in writing addressed to the Secretary-General on the ground of discovery of some fact of such a nature as decisively to affect the award, provided that when the award was made that fact was unknown to the tribunal and to the applicant and that the applicant's ignorance of that fact was not due to negligence.
>
> (2) The application shall be made within 90 days after the discovery of such fact and in any event within three years after the date on which the award was made.
>
> (3) The request shall, if possible, be submitted to the tribunal which rendered the award. If this is not possible, a new tribunal shall be constituted in accordance with Section 2 of this Chapter.
>
> (4) The tribunal may, if it considers that the circumstances so require, stay enforcement of the award pending its decision. If the applicant requests a stay of enforcement of the award in his application, enforcement shall be stayed provisionally until the tribunal rules on such request.

The Uncitral Model Law (1985) also allows the arbitrator to intervene to construe and correct his award:[53]

> 1. Within thirty days of receipt of the award, unless another period of time has been agreed upon by the parties:
>
> (a) a party, with notice to the other party, may request the arbitral tribunal *to correct* in the award any errors in computation, any clerical or typographical errors or any errors of similar nature;
>
> (b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an *interpretation* of a specific point or part of the award. If the arbitral tribunal considers the request to be justified, it shall make the correction or give the inter-

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[52] Arts. 50-51, Washington Convention, (1965) *cit.*

[53] Art. 33, Uncitral Model Law, *cit.*

> pretation within thirty days of receipt of the request. The interpretation shall form part of the award.
>
> 2. The arbitral tribunal may correct any error of the type referred to in para. 1 (a) of this Article on its own initiative within thirty days of the date of the award.
>
> 3. Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within thirty days of receipt of the award, the arbitral tribunal to make an *additional award* as to the claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within sixty days.
>
> 4. The arbitral tribunal may extend, if necessary, the period of time within which it must make a correction, interpretation, or an additional award under paragraph 1 (or 3) of this Article.
>
> 5. The provisions of art. 31 apply to a correction or interpretation of the award or to an additional award. (emphasis added)

Arbitration rules

No reference to corrections, interpretation or revisions was to be found in the ICC rules which provided[54] a remedy which in a way is an alternative to the one described above and consists in the examination of the award by the court of arbitration before it is filed:

> Before signing an award, whether interim or definitive, the arbitrator shall submit it in draft form to the court. The court may lay down modifications as to the form of the award and, without affecting the arbitrator's liberty of decision, may also draw his attention to points of substance.
>
> No award shall be signed until it has been approved by the court as to its form.

However the 1998 edition of the ICC Rules of Arbitration has opened[55] to corrections and to interpretation of the award, after it has been made:

> 1 On its own initiative, the Arbitral Tribunal may correct a clerical, computational or typographical error, or any errors of similar nature contained in an award, provided such correction is submitted for approval to the Court within 30 days of the date of such award.
>
> 2. Any application of a party for the correction of an error of the kind referred to in Articles 29(1), or for the interpretation of an Award, must be made to the Secretariat within 30 days of the receipt of the award by

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54 Art. 21, ICC Rules of Conciliation and Arbitration, *cit.*

55 Art 29, ICC Rules of Arbitration (1998).

> such party, in a number of copies as stated in Article 3(1). After transmittal of the application to the Arbitral Tribunal, it shall grant the other party a short time limit, normally not exceeding 30 days, from the receipt of the application by that party to submit any comments thereon. If the Arbitral Tribunal decides to correct or interpret the award, it shall submit its decision in draft form to the Court not later than 30 days following the expiration of the time limit for the receipt of any comments from the other party or within such other period as the Court may decide.
>
> 3 The decision to correct or to interpret the award shall take the form of an addendum and shall constitute part of the award. The provisions of Articles 25,27 and 28 shall apply *mutatis mutandis.*

The matter is dealt with also by the 1997 edition of the Arbitration Rules of the European Court of Arbitration which provide:[56]

> 1. Mistakes and strictly clerical errors may be remedied by the arbitral tribunal which made the award, provided the matter has not been referred to an appellate arbitral tribunal. The arbitral tribunal which made the award may act upon simple application of one of the parties or by a common request of the parties. The arbitral tribunal may also raise this issue of its own volition. The arbitral tribunal will decide upon correction after having heard the parties or after having summoned them. An application for correction must be filed within one month of the award having been delivered. The decision on an application for correction shall be written on the original award and on the authenticated copies of the award and will become an integral part of it. An application for correction shall only be examined where such application does not conflict with the requirements of the applicable mandatory procedural provisions.
>
> Apart from applications for correction, in all circumstances the parties are permitted to challenge an award under the provisions of these Rules.
>
> 2. An arbitral tribunal which has not ruled on one of the claims may still complete its award provided this does not affect the finality of an earlier award on other claims. In such circumstances the arbitral tribunal may be seised as provided by paragraph 1 above.

The International Rules of the Milan Chamber of Arbitration do not provide for interventions by the arbitrator after the award has been made. The rules of the *Associazione Italiana per l'Arbitrato* (Italian Society for Arbitration) however, provide[57] for the possibility of correcting the award:

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[56] Art 25 Arbitration Rules of the European Court of Arbitration (1997), *cit.*

[57] Art. 31, Rules of the Italian Society for Arbitration, (1985), *cit.*

> (1) Within two months after the award has been transmitted to the parties, the court may, on its own initiative or at the parties' request, draw the arbitrator's attention to any computing or clerical errors in the award.
>
> (2) The arbitrator, while giving each party full opportunity to be heard, shall promptly proceed with an examination of the requested correction and, if he deems that all or part of those corrections have been made, shall invite the parties and the Secretariat to return to him promptly the original text of the award. Once he has received all the copies, the arbitrator shall make the correction in writing in a signed note at the end of the award; he shall also file the corrected decision and communicate it to the parties in conformity with Articles 26 and 29.
>
> (3) The arbitrator shall decide on the request for a correction within the time limit established by the court.

Control of the award by the arbitral institution is also provided for in the rules of the Euro-Arab Chambers of Commerce.[58]

The interpretation and correction of the award (and the issue of an additional award) are also provided for in the rules of the Inter-American Arbitration Commission,[59] They are dealt with in the international rules of the American Arbitration Association:[60]

> 1. Within thirty days after the receipt of the award, any party, with notice to the other parties, may request the tribunal to interpret the award or correct any clerical, typographical or computation errors or make an additional award as to claims presented but omitted from the award.
>
> 2. If the Tribunal considers such a request justified, after considering the contentions of the parties, it shall comply with such a request within thirty days after the request.

Under the Federal Law and under the law of the State of New York[61] the courts have the power to amend or correct the award on the same grounds which entitle them to correct the computing and clerical errors contained in a court decision.

The issue of an additional award is allowed also[62] by the Russian arbitration rules:

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58 Art. 24.5, Rules of Conciliation, Arbitration and Expertise of the Euro-Arab Chambers of Commerce, *cit.*

59 Arts. 35-37, Arbitration Rules of the Inter-American Arbitration Commission, *cit.*

60 Art. 31, International Arbitration Rules, American Arbitration Association (1993), *cit.*

61 McCLENDON-GOODMAN, *International Commercial Arbitration in New York, cit.* at 133.

62 Para. 39, Rules of the Arbitration Court of the USSR Chamber of Commerce and Industry, *cit.*

> (1) On a party's application, filed not later than thirty days from the date of receipt by him of the arbitration award, the arbitration tribunal may render a supplementary award, if it appears that the award does not contain answers to all the demands of the parties. The supplementary award shall be made by the arbitration tribunal after a hearing to which the parties shall be invited.

The rules of the Arbitration Institute of the Stockholm Chamber of Commerce state:[63]

> Any obvious miscalculation or clerical error in an award shall be corrected by the arbitral tribunal. If a party so requests within 30 days of receiving the award, the tribunal may decide a question which should have been decided in the award but which was not decided therein. If a party so requests within 30 days of receiving the award the arbitral tribunal may provide an interpretation thereof in writing. Before the arbitral tribunal takes any action, the parties shall be afforded an opportunity to express their views.

According to national reports, which nevertheless are to be checked on each occasion for review and possible updating, arbitrators' authority to amend the award once it is made is not generally found in Islamic law. Lebanese law expressly states that, once arbitrators have made their decision, they have no further authority in this respect, any decision being reserved to the court having jurisdiction to enforce it.[64]

Under Japanese law, even in the absence of a statutory provision in this respect, it is reported that arbitrators can amend or correct clerical or involuntary errors within a short time limit, while they are not entitled to interpret their own award.[65]

Under Pakistani law an arbitrator, after making the award, ceases his function and may neither interpret nor correct errors, except for clerical ones.[66] The same is reported as to Indian law.[67]

Arbitrators are allowed to correct clerical errors under Hong Kong[68] and Australian law.[69] Under the law of Malaysia an arbitrator has express authority to interpret his award and to correct errors or omissions.[70]

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63 Para. 31, Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, *cit.*

64 SALEH, *op. cit.*, at 142.

65 SIMMONDS *et al.*, *op. cit.*, at 99.

66 SIMMONDS *et al.*, *op. cit.*, at 161.

67 SIMMONDS *et al.*, *op. cit.*, at 155.

68 SIMMONS *et al.*, *op. cit.*, at 31.

69 SIMMONDS *et al.*, *op. cit.*, at 16.

70 SIMMONDS *et al.*, *op. cit.*, at 130.

Under Austrian law an arbitrator may correct clerical errors, but may not interpret his award.[71] Under Italian law the arbitrator, in the absence of express authority, had no power neither to correct nor to interpret his award. It must be pointed out that this view was not unanimously accepted[72] and that it had also been argued that:

> the arbitrator has that authority until the award is filed with the court.

The Arbitration Reform Act (1994)[73] has allowed[74] correction by the arbitrator for omissions or clerical or computation errors if the award has not yet been filed with the County Court. In the latter case it will be the County Court which shall be entitled to correct the award under a party application.

An interpretation of the award has been requested to an ICC arbitral tribunal by a German supplier of iron bars to a Syrian entity. By an additional award made in 1993[75] the arbitral tribunal held that while the ICC rules for arbitration did not provide for any interpretation of the award by the arbitrators, that authority was granted to them by the French procedural rules which had been incorporated by reference in the arbitration agreement, and that the ICC had granted to the arbitrators an extension of time to file their additional award interpreting their previous one. The arbitral tribunal then proceeded to interpret its previous award.

In *Letierce*,[76] the Court of Appeal of Paris has confirmed that under the French procedural law:

> if an arbitrator has omitted to decide on a head of claim, he is entitled to complete his award and that he may also correct his award and interpret it.

A position which has been analysed by Garnier.[77]

Under English law the arbitrator may, on its own initiative or at the request of a party, interpret his award or correct clerical errors .[78]

In general, correcting clerical errors is a power which it is natural to grant to arbitrators even after they have made their award. Interpreting their decision definitely goes further, because if the sense of the award is unclear, the 'clarifi-

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71 *Arbitration Law in Europe*, at 23.

72 M. FERRANTE, *Italy* in *Arbitration Law in Europe, cit.*, at 236.

73 Statute Jauary 5, 1994 no 25.

74 Section 826 as amended by section 18, Arbitration Reform Act.

75 ICC proceedings no.6653, *Clunet* 1993, 1053.

76 *Letierce et al. v. Stolz*, Court of Appeal, Paris April 18,1991, *Rev. arb.* 1992, 631.

77 N.GARNIER, *Interpréter, rectifier et compléter les sentences arbitrales internationales, Rev.arb.* 1995, 565.

78 Section 57, Arbitration Act 1996.

cation' of the arbitrators' decision will not necessarily be a mere explanation and might be the result of further and may be different reasoning on that issue.

Deciding on claims omitted in the award amounts to exercising the function of arbitrator after having decided, and possibly after the expiry of the arbitrator's term of office. In view of that, this last power seems wider than the previous ones. The choice between the restrictive and the liberal solution will depend on the culture and tendency of each legal system.

27.6 DUTY TO DECIDE

By accepting their appointment the arbitrators undertake to make an award. Nevertheless it is natural to wonder whether the duty to do so is absolute or whether there can be exceptions to it.

In the first place a distinction must be made between a mere difficulty of reaching a decision and obstacles which are outside the control of the arbitrators. As far as the former is concerned, following the traditional rule which prevents arbitrators from making decisions of *non liquet* (i.e. that the dispute cannot be decided), the Washington Convention (1965) provides[79] that:

> The tribunal may not bring in a finding of *non liquet* on the ground of silence or obscurity of the law.

A Mere Difficulty

A mere difficulty may consequently not relieve the arbitrator of his duty to make an award, except under very special circumstances.

Obstacles outside the control of the arbitrator

As to obstacles which are outside the control of the arbitrators, such as a total lack of cooperation by the parties or prohibitions by the public authority or prevention from reaching the place of arbitration or staying there or the existence of serious dangers, the Uncitral Model Law (1985) provides:[80]

> The arbitral tribunal shall issue an order for the termination of the arbitral proceedings when: ...
>
> > (c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

and furthermore[81] that:

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[79] Art. 42. 2, Washington Convention (1965), *cit.*

[80] Art. 32.2 (c), Uncitral Model Law, *cit.*

[81] Art. 14, Uncitral Model Law, *cit.*

> If an arbitrator becomes *de jure* or *de facto* unable to perform his functions, or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from his office or if the parties agree on the termination.

Situations where the arbitrator is unable to make the award

Arbitrators may find themselves in the position of not being able to make their award on various grounds such as death or serious illness. If so they will be replaced unless they have been appointed *intuitu personae,* (i.e. because of their personal qualities). In the latter case according to some legal systems replacement may not take place, it is no longer possible to make an award and the court resumes its authority to settle the dispute.

The ICC rules of arbitration provide for replacement of such an arbitrator by the Court:[82]

> An arbitrator shall also be replaced on the Court's initiative when it decides that he is prevented *de jure* or *de facto* from fulfilling his functions, or that he is not fulfilling his functions in accordance with the rules or with the prescribed time limits.

The arbitration rules of the European Court of Arbitration are even more specific:[83]

> By a decision of the Executive Committee, the Court may replace an arbitrator if he does not fulfil his obligations under these rules and is in serious breach of them and has failed to remedy the breach notwithstanding being requested to do so.

The issue of an award may also not be possible if, for example, the parties have decided that the proceedings must take place in a country which does not allow the arbitrators to enter into it, or where arbitral proceedings, in general or those governed by the arbitration rules or procedural law chosen by the parties when different from the local national procedural law, are prohibited (unless the arbitrator feels entitled to construe the arbitration agreement in such a way that it allows him to sit in another place or to decide under different procedural rules).

The situation is the same if the local courts or public authority order the arbitrator not to continue the arbitral proceedings.

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[82] Art.12.2.

[83] Art.10.5.

Lack of cooperation from the parties

As to the obstacle of lack of cooperation from the parties, the Indian arbitration rules provide that the arbitrator may continue the proceedings:[84]

> The Bench may proceed with the reference notwithstanding any failure by a party or parties to comply with any of the directions of the Bench and may also proceed with the reference in the absence of any or both the parties who fail or neglect to attend at the time and place appointed by the Bench.

Amongst court precedents, the English judgment in *Bremer Vulkan*[85] can be mentioned:

> Although the arbitral proceedings had been delayed so long that the defendant suffered prejudice in putting his case, the House of Lords still held that the court had no authority to declare the proceedings ended on this ground when the parties had made no complaint for that reason during the delay,

a position which no longer applies, since the arbitral tribunal is expressly empowered by the Arbitration Act 1996 to dismiss the claim on the ground of inordinate and inexcusable delay.

Consummation of the right to refer a dispute to arbitration

If it is impossible to proceed with the arbitral proceedings, the right of the parties to have recourse to arbitration will be extinguished. One refers in this respect to a *consummatio*[86] of that right. The parties may then apply to the state courts to decide the dispute. Simultaneously the arbitrator shall be relieved of his duty to decide.

However if the arbitrator dies, or is unable to decide, or his award is null and void, or he resigns, it does not automatically follow from this that the parties may ask the state courts to decide. The possibility of starting afresh new arbitral proceedings before new arbitrators still exists. It will depend on the arbitration agreement, or on the arbitration rules – if any – incorporated into it by reference and on the provisions of the applicable procedural law, to determine whether new arbitral proceedings are to be instituted or a *consummatio* of that right has occurred and the parties must submit the dispute to a state court.

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[84] Art. 46, Rules of Arbitration of the Indian Council of Arbitration, *cit.*

[85] *Bremer Vulcan Schiffbau und Maschinenfabrik v. South India Shipping Corp.*, (1980) 1 *All ER* 420.

[86] I.e. extinction.

The *consummatio* of the right to refer the dispute to arbitration has been held by Italian courts such as in *Montagni v. L'Assicuratrice:*[87]

> In a non procedural arbitration[88] where the arbitrators are given instructions to define a relationship between the parties in a binding way, the arbitration agreement ceases to be effective due to impossibility to achieve its scope either if that mandate is not performed by the arbitrators, who have been appointed and accepted it, or if they make an award which is null and void (in this case the award had been rendered by two arbitrators since the third one had refused to attend the meetings where the decision was to be made). If so, the parties to the arbitration agreement, unless they agree to renew it, may ask the courts to decide the issue which was originally referred to the arbitrators. The court which is asked to decide the dispute, after it has declared the award null and void, may not return the parties (even if some of them so request) to the same arbitrators in order that they issue a new award.

This view is reaffirmed in *Reale Mutua*[89] although still in a dispute involving a joint mandate to settle:[90]

> The agreement appointing three non-procedural arbitrators contains a waiver by the parties of the Court's protection of the rights arising from the relationship which is the subject-matter of the dispute. If, for any reason, that agreement ceases to produce effects, because of *impossibility* for the arbitrators to decide that dispute, then the parties resume the right to apply to the courts for the remedies provided for in the contract and to request the courts to issue the decision which was referred to the arbitrators.

27.7 Time Limit for The Award

Extension of the time limit by the arbitrators

Unless the parties have empowered the arbitrators to extend of their own initiative the time limit to make the award, any such extension is of no effect.

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87 *Montagni v. L 'Assicuratrice*Court of Cassation (Italy) July 6 no. 1752 (1966), *Giust. Civ Mass.* 1966, 1000*; accord: Gasperini v. Soc. Comp. Ind. Comm. Marittimo,* Court of Cassation (Italy) October 17, no. 2608 (1964), *Giust. Civ. Mass.* 1964, 1220*; Boschetti v.Industrie Pirelli,* Court of Cassation (Italy) November 23, no. 3176 (1973*), Giust. Civ. Mass.* 1973, 1653.

88 I.e. in proceedings conducted under a joint mandate to settle

89 *Soc. G. H. Astor v. Reale Mutua,* Court of Cassation (Italy) June 21, no. 4245 (1983*), Giust.Civ. Mass.*, 1983, 1509.

90 *I.e. arbitrato irrituale,* according to its construction made by this writer, while other authors take the view that its scope is to find an out of court solution to the dispute, which could be a settlement but could also have different contents.

This view has been confirmed by the Court of Cassation (France) in *Editions Mondiales*[91] where the arbitration agreement had provided that the time limit for the filing of the award was two months after the end of the exchange of the pleadings and the arbitrators, two months after that, had issued an order closing that stage and had decided within two months after that order. The Court of Cassation held that, in so doing, the arbitrators had unduly extended the time limit for their award.

A view which was confirmed by the same court in *Degrémont*:[92]

> When the arbitration agreement expressly, or through a reference to statutory provisions or to arbitration rules, establishes a time limit for the arbitrators within which their award must be rendered, if the award is made after that time limit has expired, (unless it has been duly extended) this is a ground for refusing to enforce the award since the arbitrators' authority to decide has ceased on the expiry of such a term.

International conventions, arbitration rules and some national legal systems will now be examined in this respect.

International conventions

International conventions do not expressly deal with the effects of non compliance with time limits to decide. Such effects seem to fall under the heading of lack of conformity of the decision with the arbitration agreement.

Arbitration rules

The Rules of the International Chamber of Commerce provide:[93]

> (1) The time limit within which the arbitral tribunal must render its final award is six months.
>
> ...
>
> (2) The court may extend this time limit pursuant to a reasoned request from the arbitral tribunal or on its own initiative, if it decides that it is necessary to do so.

The Rules of the London Court of International Arbitration state:[94]

> Unless the parties at any time agree otherwise in writing, the Arbitral Tribunal shall have the power, on the application of any party or of its

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91 *Sté SADP v. S.A. Editions Mondiales*, Court of Cassation (France) January 13, 1993, *Rev. arb.* 1995, 68.

92 *Communauté urbaine de Casablanca v. Sté Degrémont*, Court of Cassation (France) June 15,1994, *Rev. arb.* 1995, 88.

93 Art. 24, ICC Rules of Conciliation and Arbitration, (1998 edition).

94 Art. 22.1, Rules of the London Court of International Arbitration (1998).

> own motion, but in either case after giving the parties a reasonable opportunity to state their views:
>
> ...
>
> (b) to extend or abbreviate any time limit provided by the Arbitration Agreement or these Rules for the conduct of the arbitration or by the Arbitral Tribunal's own orders;

a provision to be examined on the background of the Arbitration Act 1996:[95]

> (1) Where the time for making an award is limited by or in pursuance of the arbitration agreement, then, unless otherwise agreed by the parties, the court may in accordance with the following provisions by order extend that time.
>
> ...
>
> (2) The court shall only make an order if satisfied that a substantial injustice would otherwise be done.

The Arbitration Rules of the European Court of Arbitration provide:[96]

> 1. The award shall be filed with the secretariat of the Court, in a number of originals equal to the number of parties plus one original for the Court, within the mandatory time limit of nine months after the transfer of the file to the arbitrators, save for express extensions of time given by the Court.
>
> In exceptional circumstances, the court may, pursuant to a fully reasoned and justified request, grant extensions up to a maximum of six months
>
> Any request (s) by the arbitral tribunal for an extension of the nine months time period for submission of the arbitral award must be filed by the arbitral tribunal with the Court
>
> The Court shall rule on the admissibility and merits of any request for extension, after the parties have been duly notified and heard.

An interesting situation of non-compliance with the time limit for the filing of the award is found in the French decision in *Ripolin*:[97]

> The award made and subscribed by the arbitrators before the expiry of the time limit but approved by the ICC Court of Arbitration after the expiry of such term was held to be made beyond this time limit, since such a decision is effective under the ICC Rules only after approval by the court.

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[95] Section 50 Arbitration Act 1996.

[96] Art, 23.1 Arbitration Rules, European Court of Arbitration.

[97] *Sté Ripolin,* Court of Cassation (France) April 27 (1981), see CRAIG *et al.*, op. *cit.*, III, para.19.02, at 101.

The Rules of the Arbitration Institute of the Stockholm Chamber of Commerce deal with this issue in the following way:

> An award shall be made not later than one year after the case has been referred to the arbitral tribunal. At the request of the arbitral tribunal the Institute may, however, if appropriate, extend this period.[98]
>
> An arbitral tribunal must after the close of the proceedings submit to the Institute one copy of each award and written order issued in the case, as well as of all recorded minutes therein.[99]

The Rules of the Euro-Arab Chambers of Commerce impose an even shorter term:[100]

> The period within which the arbitrator must make his award is ninety days from the date that he was sent the arbitration papers as laid down in para. 5 of this Article. The Board may, however, extend this period at the request of the arbitrator, if it thinks fit.

The Rules of the Netherlands Arbitration Institute[101] provide:

> 1. The arbitral tribunal shall render its award as soon as possible.

The Rules of the American Arbitration Association state:

> The parties may modify any period of time by mutual consent. The AAA or the arbitrator may for good cause extend any period of time established by these rules, except the time for making the award.
>
> The AAA shall notify the parties of any extension.[102]
>
> The award shall be made promptly by the arbitrator and, unless otherwise agreed by the parties or specified by law, no later than thirty days from the date of closing the hearing or, if oral hearings have been waived, from the date of the AAA's transmittal of the final statements and proofs to the arbitrator.[103]

A time limit of six months for rendering the award is stated by the Rules of the Italian Society for Arbitration:[104]

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98 Art. 26, Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, *cit.*

99 Art. 33, Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, *cit.*

100 Art. 23.10, Rules of Conciliation, Arbitration and Expertise of the Euro-Arab Chambers of Commerce, *cit.*

101 Art. 43, Rules of the Netherlands Arbitration Institute, in force since December 1, 1986.

102 Art. 39, Commercial Rules of the American Arbitration Association, *cit.*

103 Art. 41, Commercial Rules of the American Arbitration Association, *cit.*

104 Art. 28, Rules of the Italian Society for Arbitration, *cit.* (free translation from Italian).

> (1) Subject to a different ruling by the Court, the arbitrator must make his award within six months of the date on which the file was transmitted to him.
>
> (2) The time-limit for making the award may be extended by the Court either on its own initiative or at the reasoned request of the arbitrator or of one of the parties.
>
> Once this time-limit has expired, the arbitrator remains vested with his powers to perform his duties as set out in art. 36.

National legal systems

According to national reports, in Greek law no time limit is given for the making of the award; in the absence of any time limit in the arbitration agreement the courts of law may be requested to fix a time limit for the arbitrators.[105]

In French law, in the absence of any statement by the parties, the time limit is six months from acceptance by the last arbitrator,[106] even if it is stated in *Bruynzeel*[107] that:

> In the absence of an agreement by the parties, the arbitrators are not prevented in an arbitration between non-French parties from deciding the time limit within which the award is to be rendered (they had stated it as a 3 months period after the hearings were closed) and no breach of international public policy can be seen in this.

Under Swiss law the time limit is left to the parties, who may state it in the arbitration agreement or later on, and it may be extended by consent of the parties or, failing this, by the courts.[108]

If both parties are resident in Sweden and they have not decided otherwise, the time limit for making the award of six months from the request for arbitration, provided for by the previous legislations, has not being kept in the new one. Therefore if the parties do not fix any time limit for that , there is no time limit under Swedish law. However the rules of the Stockholm Chamber of Commerce provide for six month time limit.[109] The parties may agree on the time limit within which the arbitral tribunal shall make the award.[110] The time limit starts to run from the day of the appointment of the last arbitrator and not

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[105] *Arbitration Law in Europe,* at 212.

[106] *Arbitration Law in Europe*, at 153.

[107] *Sté Bruynzeel Deurenfabrik N. V. v.République Malgache,* Court of Cassation (France) June 30 (1976), *Clunet* 1977, 114.

[108] Art. 16, Swiss Intercantonal Arbitration Convention, *cit.*

[109] *Arbitration Law in Europe,* at 336. The Swiss Statute on Private International Law is silent in this respect.

[110] Section 19, no 1, Arbitration Law.

from the request for arbitration.[111] The time limit is three months in Luxembourg.[112]

Under Italian law the time limit is 180 days and the arbitrators have the authority to extend it by additional 180 days if evidence is to be heard.[113]

Under English law if the parties do not agree otherwise the arbitrator must make his award within a reasonable time. If he does not comply with this rule he can be removed by the High Court.[114] In Belgium, the basic term for an award is six months.[115]

However after the expiry of that term the interested party may apply to the court to fix a final term. In the absence of any statement by the parties, there is no time limit for the award under Austrian law.[116]

It is reported that under Japanese law there is no time limit imposed; however a time limit is generally stated in the rules of the arbitral institutions. For example, the time limit stated by the Rules of Japanese Commercial Arbitration Association is five weeks after the last hearing; this time limit may be extended to maximum eight weeks, if the arbitrator deems it necessary.[117] The language of the award and of the proceedings may be agreed upon by the parties to be Japanese, English or both Japanese and English; where both languages are officially used the award must be made in the two languages. In case of conflicts the Japanese version of the award shall prevail.[118]

In India, under the New Act, there is no time limit for making the award.

In Malaysia the arbitral tribunal is reported to have no time limit to make the award.[119] Under the rules of the Regional Centre, the award is to be made within 6 months of close of the proceedings.

In the Philippines in the absence of agreement of the parties or of arbitration rules to this effect, the arbitrators must render the award with 30 days after the closing of the final hearing.[120]

In Thailand the award is to be made within 180 days after the appointment of the last arbitrator.[121]

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[111] Section 19, no 2, Arbitration Law.

[112] *Arbitration Law in Europe,* at 264.

[113] Section 820, Rules of Civil Procedure.

[114] Section 24, Arbitration Act 1996.

[115] *Arbitration Law in Europe,* at 171.

[116] *Arbitration Law in Europe,* at 138.

[117] Rule 48.

[118] Rule 62 (3).

[119] P.G. LIM, *Malaysia,* in PRYLES, *Dispute Resolution in Asia, cit,* at 170.

[120] V.P .LAZARIN, *The Philippines,* in PRYLES, *Dispute Resolution in Asia, cit,* at 201.

[121] T. SUVANPANICH, *Thailand,* in PRYLES, *Dispute Resolution in Asia, cit,* at 289.

In Australia the state court may extend the time limit to make the award stated in the Act or in the arbitration agreement.[122]

In China the arbitral tribunal must make the award within 9 months after its formation.[123]

Amongst French precedents the time limit for the award was strictly applied in *Bloch*:[124]

> In a dispute between the Swedish company Delatrae Mockfjaerd and the French company Bloch et Fils, concerning the supply of sawn logs, an arbitral tribunal was constituted sitting in Antwerpen and consisting of the arbitrators Verry, Rosenlund and Van Nuland (Chairman). The tribunal decided after the 10 days time limit laid down for arbitrations concerning the product. The award was enforced by the President of the *Tribunal de Grande Instance* in Paris. The French company appealed, arguing that the arbitrators had decided after the expiry of the time limit for their decision. The Court of Appeal accepted this argument and held that the arbitrators had decided after the expiry of the time limit for their decision.

The expiry of the time limit for the award does not automatically produce the result that the arbitration agreement becomes of no effect, but simply that the appointment of that arbitral tribunal comes to an end. As held in *Morin*[125] one of the parties to that agreement may then put in action the procedure to appoint a new arbitral tribunal.

27.8 Lack of Signature by All the Arbitrators

Signature of the award by the arbitrators is an essential requirement. For a long time the consequences of lack of signature by the minority of the arbitral tribunal have been debated.

This situation arises fairly frequently. Sometimes it occurs because it is impossible for an arbitrator to sign the award (in the case of his death, paralysis, etc.). On other occasions it arises because an arbitrator does not want to disappoint the party which appointed him and which is the loser in the award. On other occasions it is perhaps due to the conduct of the majority of the arbitrators who have made that arbitrator feel he has not been sufficiently heard, or

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[122] Section 48(1) CCA.

[123] M.J. MOSER, *People'Republic of China*, in PRYLES, *Dispute Resolution in Asia*, *cit*, at 88.

[124] *SM Bloch et fils v. SM Delatrae Mockfjaerd,* Court of Appeal, Paris January 17 (1984), *Rev. arb.*, 1984, 498.

[125] *Morin et al.v.Morin*, Court of Appeal, Colmar September 21, 1993, *Rev.arb.* 1994, 348.

because he was denied the right to express a dissenting opinion, a right which is not protected by the mere mention that the award is a majority decision.

In all these situations the failure of one arbitrator to sign, in the absence of a favourable provision of the applicable law or arbitration rules, risks making the entire proceedings null and void. To avoid that, the tendency has developed to consider that signature by the majority is sufficient. This tendency has been expressed and confirmed by the Uncitral Arbitration Rules (1976):[126]

> ... Where there are three arbitrators and one of them fails to sign, the award shall state the reason for the absence of the signature.

The same position is taken by the Rules of the London Court of International Arbitration:[127]

> 3. If any arbitrator refuses or fails to sign the award, the signatures of the majority or (failing a majority) of the chairman shall be sufficient, provided that the reason for the omitted signature is stated in the award by the majority or chairman.

As to the legal systems which required signature by all the arbitrators, Austrian law[128] has abolished that requirement.

The danger of the entire proceedings being declared null and void for lack of signature by the whole arbitral tribunal has disappeared from many legal systems.

27.9 Discussion and Decision

The final decision must be made by the entire arbitral tribunal. The chairman of the tribunal generally has no authority to decide by himself; the situations in which this authority is given to him are very exceptional.

The Rules of the London Court of International Arbitration give to the chairman authority[129] only to issue orders for the conduct of the proceedings, and even then only after consulting the other arbitrators:

> In the case of a three-member tribunal the Chairman may, with the prior consent of the other two arbitrators, make procedural rulings alone.

Likewise under the Uncitral Model Law (1985):[130]

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[126] Art. 32.4., Uncitral Arbitration Rules, *cit.*

[127] Art. 26.4, Rules of the London Court of International Arbitration, *cit.*

[128] *Arbitration Law in Europe*, *op. cit.*, at 22.

[129] Art. 14.3, Rules of the London Court of International Arbitration, *cit.*

[130] Art. 29, Uncitral Model Law, *cit.*

> ... However, questions of procedure may be decided by a presiding arbitrator, if so authorized by the parties or all members of the arbitral tribunal.

Decisions on the merits must always be made by the arbitral tribunal. The only remedy provided for by some arbitration rules, if no majority is reached, is that the chairman may decide by himself. This is the situation under the Rules of the International Chamber of Commerce:[131]

> When the arbitral tribunal is composed of more than one arbitrator an award is given by a majority decision. If there is no majority, the award shall be made by the Chairman of the arbitral tribunal alone.

The award made in ICC proceedings no. 3881 (1984)[132] is one of the rare cases where a decision was made by the chairman of the arbitral tribunal:

> The three arbitrators, two Syrians and a Greek Chairman, sitting in Damascus, had been asked to decide a dispute between two plaintiffs, one of them Swiss and the other from Western Germany, and a defendant which was a Syrian financial public body, concerning a contract for the erection by the European parties of a factory in Syria. The award could not be made by majority and in the end the Chairman had to decide alone. The award was subscribed also by the other two arbitrators, but each of them had his signature preceded by the word 'dissenting' .

The Rules of the London Court of International Arbitration[133] are along the same lines:

> Where there are three arbitrators and the arbitral tribunal fails to agree on any issue, the arbitrators shall decide that issue by a majority. Failing a majority decision on any issue, the Chairman of the arbitral tribunal shall decide that issue.

Likewise under the International Rules of the Milan Chamber of Arbitration[134]

> 2. The decision shall be taken unanimously or by majority vote or, where no majority is possible, by the President of the arbitral tribunal. If it is not possible to secure a majority, then the award shall be made by the chairman of the arbitral tribunal.

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[131] Art. 25, ICC Rules of Conciliation and Arbitration, *cit.*

[132] DERAINS JARVIN, *Chronique de sentences arbitrales (Chronicle of Arbitral Awards), Clunet* 1986, 1096.

[133] Art. 16.3, Rules of the London Court of International Arbitration, *cit.*

[134] Art. 18.1, International Rules of the Milan Chamber of Arbitration, *cit.*

27.10 NON-ATTENDANCE AT THE DECISION

A different and more involved issue, in comparison with the lack of signature of the award, is non-attendance at the meeting where the decision is made. This must in turn be distinguished from non-attendance at some hearings during the proceedings. As to non-attendance during the proceedings, in some situations the Iran-US Claims Tribunal,[135] even though one of its members did not attend during the proceedings, nevertheless held the hearing. Attendance at the meeting, where the final decision is made, is certainly an essential requirement; it is generally held that the absence of one of the arbitrators, or of two of the five arbitrators who form the arbitral tribunal, makes the entire proceedings null and void. This is another worrying aspect of the arbitral mechanism.

The international conventions, arbitration rules and national legal systems deal, understandably, more with the need for a decision than with the effects of the possible absence of a minority of the arbitral tribunal.

The problems of a truncated arbitration have been highlighted by Schwebel.[136]

Illustration

> If an arbitrator does not attend a meeting, and has not first resigned, must the other arbitrators also refrain from deciding, with the consequence that the proceedings loose their effect, or do they have the right to decide by themselves?

A distinction should be made at the very beginning between two situations. In the first one the arbitrator attends the discussions of the tribunal, while it decides the dispute, disagrees with the other arbitrators and walks out of the meeting or does not attend a following meeting. In these situations it is submitted that such an arbitrator has participated to the discussion and to the decision and has disagreed. The other arbitrators may then sign the award by stating the reasons for which the remaining arbitrator does not sign. This is what happened in *Uiterwyk*[137] where the Iranian arbitrator, Mr. Mostafari, attended three meetings at which the dispute was discussed by the Tribunal and expressed his disagreement advising that he would have not attended further

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[135] Proceedings no. 2, 129 (1984) and 261 (1985) *Yearbook Commercial Arbitration,* 1986, vol. XI, at 260.

[136] S.M. SCHWEBEL, *International Arbitration: Three Salient Problems,* Cambridge, 1987, at 144.; *id. The validity of an arbitral award rendered by a truncated tribunal, ICC Bulletin* 1995,18

[137] *Uiterwyk Corporation et al. v. The Government of the Islamic Republic of Iran,* July 6, 1998 8, 19 Iran-U.S. CTR 3, 5, 6.

meetings. The remaining two arbitrators, after informing the third arbitrator, continued the discussion and in the end drafted and signed the award.

In the second situation, the arbitrator stops sitting as an arbitrator before the decision of the dispute even starts. This is the situation which gives rise to difficulties and to which two opposite solutions have been given. On the one hand, one has argued that the remaining arbitrators were entitled to decide alone. This is the position taken in *Saghi*[138] where the arbitrator who had been appointed by Iran held that the claim could not be heard and did not attend the meeting which aimed at deciding the issue of the nationality of the claimant. The Iran US Claims Tribunal held that it was entitled to continue hearing the proceedings even if one of its members had withdrawn.

This view was shared in *Milutinovic*.[139]

> The arbitral tribunal consisted of Prof. Eugen Bücher, Chairman and of Profs. Vladimir Jovanovic and Karl Heinz Boeckstiegel. The proceedings were governed by the ICC rules and by the Zurich civil procedural law. The dispute arose out of a consortium for the construction of an electric power station in Homs (Libya).
>
> At the end of the oral evidence, the claimant asked to hear again some witnesses as well as to hear some new witnesses. In spite of the opposition of the arbitrator appointed by the claimant, the arbitral tribunal rejected the application. Prof. Jovanovic then resigned due to his disagreement with that decision. The two remaining arbitrators decided to continue the proceedings and invited Prof. Jovanovic to attend an arbitrators' meeting. When he did not attend it, they issued an interim award which was approved by the ICC.

The opposite view holds that once the arbitral tribunal is truncated by the non-attendance or resignation of one of its members, it may not continue. This last view was shared by the Swiss Federal Court[140] which set aside the Milutinovic award.

Schwebel is in favour of the Milutinovic arbitrators'approach.

This view is shared by the Permanent Court of Arbitration's Optional Rules for Arbitrating Disputes between Two Parties, of which only one is a State, which provide:[141]

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[138] *James M. Saghi et al v. The Government of the Islamic Republic of Iran*, January 22, 1993 (unreported; claim registered on January 12, 1987, 14 *Iran-U.S. C.T.R.* 3, 9, 10, reported by SCHWEBEL, see *supra* note 136.

[139] *Milutinovic v. Deutsche Babcock AG* November 8,1987, ICC proceedings no.5017, reported by SCHWEBEL see *supra* note 136.

[140] Swiss Federal Court December 20, 1989, reported by SCHWEBEL see *supra* note 136.

[141] Art.13.

> 1. In the event of the death or resignation of an arbitrator during the course of the arbitral proceedings, a substitute arbitrator shall be appointed or chosen pursuant to the procedure provided for in Articles 6- 9 that was applicable to the appointment or choice of the arbitrator being replaced. Any resignation by an arbitrator shall be addressed to the arbitral tribunal and shall not be effective unless the arbitral tribunal determines that there are sufficient reasons to accept the resignation, and if the arbitral tribunal so determines the resignation shall become effective on the date designated by the arbitral tribunal. In the event that an arbitrator whose resignation is not accepted by the tribunal nevertheless fails to participate in the arbitration the provisions of paragraph 3 of this Article shall apply.
>
> 2. In the event that an arbitrator fails to act or in the event of the *de jure* or *de facto* impossibility of his/her performing his/her functions, the procedure in respect of the challenge and replacement of an arbitrator as provided in the preceding Articles shall apply, subject to the provisions of paragraph 3 of this Article.
>
> 3. If an arbitrator on a three-person tribunal fails to participate in the arbitration, the other arbitrators shall, unless the parties agree otherwise, have the power in their sole discretion to continue the arbitration and to make any decision, ruling or award, notwithstanding the failure of one arbitrator to participate. In determining whether to continue the arbitration or to render any decision, ruling or award without the participation of an arbitrator, the other arbitrators shall take into account the stage of the arbitration, the reasons, if any, expressed by the arbitrator for such non participation, and such other matters as they consider appropriate in the circumstances of the case. In the event that the other arbitrators determine not to continue the arbitration without the non participating arbitrator, the arbitral tribunal shall declare the office vacant, and a substitute arbitrator shall be appointed pursuant to the provisions of Articles 6 to 9, unless the parties otherwise agree on a different method of appointment.

by the international arbitration rules of the American Arbitration Association[142] which state:

> (1) If an arbitrator or a three person tribunal fails to participate in the arbitration for reasons other than those identified in Article 10 (writer's note: challenge, withdrawal, resignation, death, appointment of a substitute arbitrator), the two other arbitrators shall have the power in their sole discretion to continue the arbitration and to make any decision ruling or award notwithstanding the failure of the third arbitrator to participate. In determining whether to continue the arbitration or to render any decision, ruling or award without the participation of an arbitrator, the

[142] Art.11.

> two other arbitrators shall take into account the stage of the arbitration, the reason if any, expressed by the third arbitrator for such non participation and such other matters as they consider appropriate in the circumstances of the case. In the event that the two other arbitrators determine not to continue the arbitration without the participation of the third arbitrator, the administrator on proof satisfactory to it shall declare the office vacant, and a substitute arbitrator shall be appointed pursuant to the provisions of Article 6, unless the parties otherwise agree.

a view which has been shared by the new German Arbitration Law,[143] by the new arbitration rules of the ICC which state:[144]

> 2. An arbitrator shall also be replaced on the Court's own initiative when it decides that he is prevented *de jure* or *de facto* from fulfilling his functions, or that he is not fulfilling his functions in accordance with the Rules or within the prescribed time limits.

and by the arbitration rules of the World Intellectual Property Organisation.[145]

The Conventions (Geneva 1923, Geneva 1927 and New York 1958) do not generally rule on this issue; they deal only with the need for a discussion and decision by the arbitrators.

27.11 Decision by a Majority or Casting Vote

The Washington Convention (1965) provides:[146]

> (1) The tribunal shall decide questions by a majority of the votes of all its members.

Under the Uncitral Model Law (1985):[147]

> In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of its members . . .

Under the Rules of the London Court of International Arbitration:[148]

> If any arbitrator on a three member arbitral tribunal refuses or persistently fails to participate in its deliberations, the two other arbitrators shall have the power, upon their written notice of such refusal or failure to the LCIA Court the parties and the third arbitrator, to continue the ar-

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[143] Section 1052 German Arbitration Act December 1997.

[144] At 12.2 (1998 edition).

[145] Art 35.

[146] Art. 48 (1), Washington Convention (1%5), *cit.*

[147] Art. 29, Uncitral Model Law, *cit.*

[148] Art. 12.1, Rules of the London Court of International Arbitration, *cit.*

bitration (including the making of any decision, ruling or award) notwithstanding the absence of the third arbitrator.

The Russian rules state:[149]

> If the chairman of the arbitration tribunal, single arbitrator, or arbitrator is not able to participate in the consideration of the case, a new chairman of the arbitration tribunal, single arbitrator, or arbitrator shall be elected or appointed in accordance with the Rules, provided he is not to be replaced by a reserve arbitrator. If necessary, and with regard to the opinion of the parties, the arbitral tribunal may examine new issues which have been already considered in the course of hearings preceding the substitution.

The International Rules of the Milan Chamber of Arbitration state:[150]

> 1. When the dispute is to be settled by an arbitral tribunal, the arbitrators shall deliberate upon the award in the presence of each other.
>
> 2. The award may be made by a majority. If it is not possible to secure a majority, then the award shall be made by the Chairman of the arbitral tribunal.

In that situation it is said that the Chairman has the *casting vote.*

Under the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce:[151]

> The award shall be deemed to have been rendered at the place of arbitration. It shall state the date on which it was rendered, contain an order or declaration, as well as the reasons for it and shall be signed by the arbitrators. In absence of the signature of an arbitrator, an Award may be rendered provided that the Award has been signed by a majority of the arbitrators with a verification to the effect that the arbitrator whose signature is missing participated in deciding the dispute.

Under the Commercial Rules of the Inter-American Arbitration Commission:[152]

> 1. When there are three arbitrators, any award or other decision of the arbitral tribunal shall be made by a majority of the arbitrators.
>
> 2. In the case of questions of procedure, when there is no majority, or when the arbitral tribunal so authorizes, the presiding arbitrator may decide on his own, subject to revision, if any, by the arbitral tribunal.

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[149] Para. 24, Rules of the Arbitration Court of the USSR Chamber of Commerce and Industry, *cit.*

[150] Art. 37.1 and 2, International Rules of the Milan Chamber Arbitration, *cit.*

[151] Art. 28, Rules of the Arbitration Institute of the Stockholm Chamber of Commerce.

[152] Art. 31, Rules of the InterAmerican Commercial Arbitration Commission, *cit.*

On the other hand, the Rules of the American Arbitration Association[153] deal more with the requirement of the signature of the award:

> The award shall be in writing and shall be signed by a majority of the arbitrators. It shall be executed in the manner required by law.

while its International Rules provide:[154]

> 1. Awards shall be made in writing, promptly by the tribunal, and shall be final and binding on the parties. The parties undertake to carry out any such award without delay.

As to national legal systems, reference is made here too to the reports which have been published.

The award must be made by majority vote also under Austrian law.[155]

Under Greek law[156] the award must be made by a majority vote. If a majority can not be reached, the Chairman of the arbitral tribunal has the casting vote. Under English law, if an umpire is appointed, he decides alone; if there is an arbitral tribunal consisting of three arbitrators, the decision must be made by a majority or, in the absence of a majority, by the chairman[157] Decision is also by majority in France,[158] Italy,[159] Switzerland,[160] Spain[161] and Germany.[162]

Under Swedish law, if no majority can be reached, unless the parties have otherwise agreed, the arbitration agreement becomes ineffective.[163]

Under Egyptian law the award must be preceded by a discussion and decision, if there is more than one arbitrator; failing this the proceedings are expressly declared to have no effect.[164] The award must be made by a majority under Kuwaiti law also.[165]

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[153] Art. 42, Commercial Rules of the American Arbitration Association, *cit.*

[154] Art 27, International Arbitration Rules of the American Bar Association.

[155] *Arbitration Law in Europe,* at 22.

[156] *Arbitration Law in Europe,* at 212.

[157] Section 20, Arbitration Act 1996.

[158] Section 1470, Civil Procedure Code.

[159] Art. 823 Rules of Civil Procedure

[160] *Arbitration Law in Europe,* at 66.

[161] *Arbitration Law in Europe,* at 121.

[162] *Arbitration Law in Europe,* at 91.

[163] The Swedish Arbitration Act (1929) no. 145 (in force since January 1, 1984).

[164] SALEH, *op. cit.,* at 216.

[165] SALEH, *op. cit.,* at 268.

In the Lebanon the decision must be signed by all the arbitrators; it may also be signed by the majority of them, if it is proven that the remaining minority has attended the discussion and decision.[166]

The award must be made by majority vote under Saudi law also,[167]while unanimity is required if the arbitrators act as conciliators.

A majority decision is required also in India,[168] Pakistan,[169] the Philippines,[170] Korea,[171] Japan[172] and Indonesia.[173]

Under Australian law,[174] for the Uniform System a majority is sufficient; failing this the Chairman has the casting vote. The laws of some individual states, such as Queensland, provide that the proceedings are of no effect if no majority can be reached.

If there is no express statement in this regard, and if no majority is reached, proceedings become of no effect unless the arbitration agreement provides for other solutions. However, in general the alternative to the rule of the majority is to give the Chairman the casting vote.

27.12 Dissenting Opinions

Dissenting opinions have generally met considerable difficulties in civil law jurisdictions,[175] in which arbitration is influenced by the rule followed in court proceedings whereby the court's decision is secret. It has consequently been felt that it is natural to apply this principle *pari passu* to arbitral proceedings also.

This tendency is ignored in the common law jurisdictions which, being more respectful of individual opinions, recognise even in court proceedings the full right of a judge, who does not agree, to express his disagreement publicly.

Common law precedents are full of dissenting opinions, which are considered not only perfectly legitimate but also useful.

In the exchanges between these opposing positions, which take place frequently in international arbitration, the firm refusal of the civil law countries is

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166 Court of Cassation (Lebanon) no. 66 (1970), *Rec. Baz.* 1970, at 31-2, quoted by SALEH, *op. cit.*, at 142.

167 SALEH, *op. cit.*, at 317.

168 SIMMONDS *et al.*, *op. cit.*, at 54.

169 SIMMONDS *et al.*, *op. cit.*, at 161.

170 SIMMONDS *et al.*, *op. cit.*, at 186.

171 SIMMONDS *et al.*, *op. cit.*, at 114.

172 SIMMONDS *et al.*, *op. cit.*, at 99.

173 SIMMONDS *et al.*, *op. cit.*, at 74.

174 SIMMONDS *et al.*, *op. cit.*, at 15.

175 REDFERN and HUNTER, *op. cit.*, at 302-303.

generally transformed into forbearance of the dissenting opinion, which is still disliked.

It is suggested that keeping secret the opinion of an arbitrator, who dissents from the majority, is indeed absurd. An arbitrator plays a role equal to that of a judge and he should not be subject to limitations to his right both to form an opinion and to express it. The dissenting opinion, rather than being tolerated and kept secret, should be attached to the main decision or even incorporated in it[176] for the decision to reflect fully the resolutions. Therefore, instead of wasting energy trying to create obstacles to the minority arbitrator's opinion, it is suggested that it is more constructive to request that it be drafted at the same time as the decision is made by the majority. This has the advantage that the majority of the arbitrators have an opportunity to review their opinion in the general interest of a better decision. The dissenting opinion, instead of being concealed, would therefore be fully entitled to a place in the arbitral award.

The International Chamber of Commerce has formed a working group on this issue, the provisional conclusions of which[177] do not seem to be contrary to dissenting opinions.

The CPR Rules[178] expressly allow arbitrators to make dissenting opinions.

It is reported that under the CIETAC Arbitration Rules (1998) the dissenting arbitrator may join the dissenting opinion to the award.[179]

In passing, the French judgment in *Goualt*[180] should be mentioned in which (even if while deciding on the issue of different opinions, rendered in domestic French proceedings by the two arbitrators appointed by the parties, which had given rise to the need to appoint the third arbitrator) it was stated that:

> the opinion of an arbitrator is not a judicial act as is the award rendered by the arbitral tribunal.

The right to express a dissenting opinion is recognized in the Russian rules.[181]

> . . . The arbitrator disagreeing with the decision of the majority can express in writing his dissenting opinion which shall be attached to the file.

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[176] As in proceedings under a joint mandate to settle which took place in Milan (decision rendered in 1988).

[177] Which has been finalised and filed with the ICC.

[178] CPR Rules, Art 14.3

[179] J. TAO, *Amendments to CIETAC Arbitration Rules, Rev. arb.* 1998, 597.

[180] *J. P. Gouault v. J. Gouault*, Court of Appeal, Paris March 18, (1976) and March 24, (1977), *Rev. arb.* 1978, 31.

[181] Para. 35.22 Rules of the Arbitration Court of the USSR Chamber of Commerce and Industry, *cit.*

It is submitted that rather then concealing a dissenting opinion one should favour it first because of the deference due to the arbitrators' role and views and second because of the importance of the views which dissenting opinions may express. Werner[182] reminds that some of the greatest US Supreme Court judges were known as great dissenters.

The main reasons of the opposition to dissenting opinions are the fear that the secrecy of the arbitral decision be disclosed, that the dependency of party appointed arbitrators from such a party be strengthened and that the dissenting opinion may pave the way to a challenge of the award. These grounds are all opposed in detail by Werner who points out that even if the secrecy of the arbitral decision is entitled – what is arguable – to the same treatment of state court decisions, the expression of dissent does not involve a disclosure of how the decision was made, but only the existence of a minority view. As to the 'dependency' argument, Werner very properly points out that – even if exceptions may exist – in general the arbitrator is chosen by a party because he shares its approach and culture. It is this cultural affinity and not dependency which explains why frequently an arbitrator' dissent is in line with the position of the party which has appointed him.

As to 'paving the way' to challenges against the award, Werner remarks that no review of the merits is generally available and that Counsel's imagination does not frequently require outside help. It may happen that the award was wrong, and possibly for one of the reasons stated in the dissenting opinion. If so, concealing the dissenting opinion would not help to enhance the level of arbitral decisions.

Although even in France the practice of dissenting opinions is acknowledged as being frequent,[183] the ICC arbitration rules do not deal with this in spite of the long study on dissenting opinions made by a working group of its Arbitration Commission.[184] It has been suggested that the majority of each arbitral tribunal would be entitled to decide whether a dissenting opinion may be lodged and if so whether it may be communicated to the parties. This view cannot be shared. It is suggested that unless there is a mandatory provision of the applicable procedural law or of the arbitration rules which forbids this, an arbitrator must be free to express his dissenting opinion and to communicate it to the parties. Donovan[185] agrees that no arbitral institution has the authority to prevent an arbitrator from notifying his dissenting opinion to the parties

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[182] J. WERNER, *Dissenting Opinions Beyond Fears*, 9 *J.Int.Arb.* 4, 23.

[183] B. OPPETIT, *Le droit international privé, droit savant*, *RCDIP* 1992, 335; BREDIN, *Le secret du délibéré arbitral, Etudes Bellet*, Litec, 1991, 71.

[184] M. HUNTER, *Rapport final sur les opinions dissidentes et exprimées séparemment, ICC Bulletin* 1991, June, 3222.

[185] F.D. DONOVAN, *Dissenting Opinions, ICC Bulletin* 1996, 2,.78.

The issue whether the dissenting opinion is by itself an award has been addressed by Donovan.

The solution may be different depending on whether the dissenting opinion is incorporated or not in the award. In the former case it becomes a part of the award.

However in one situation the ICC International Court of Arbitration has asked the majority to severe the dissenting opinion from the award.

A situation which may arise is that the majority on each of various issues be made of different arbitrators. If so a dissenting opinion may exist as to each of such issues, the dissenting arbitrator being different on each of them.

Occasionally it is the chairman of the tribunal who becomes the minority arbitrator. See *Westland Helicopters.*[186]

In *Republic of Guinea Bissau*[187] an unusual situation arose. On the first issue, which was decisive for the other claims, a majority of two to one was reached. The chairman of the arbitral tribunal was one of the two in favour. However he also stated that in his view it would have been preferable if the decision had been different. Guinea Bissau attacked the award, arguing that in view of the chairman's statement said decision had to be treated as being opposite to what appeared from its literal wording or in the alternative that the chairman's position was contradictory.

The International Court of Justice, while hearing the attack against the award, held that it is not infrequent that an arbitrator is inclined to take a position different from the one for which he votes. The Court held that this had happened in those proceedings and that although the chairman disclosed his own inclination, he had voted in a different way, i.e. in favour of the decision which was under challenge.

27.13 Inertia of the Parties

It is questioned whether the prolonged inertia of the parties involves the termination of the proceedings. While the English High Court and the Court of Appeal have held in *Bremer Vulkan*[188] that inertia of the parties implies aban-

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[186] *Westland Helicopters Ltd (U.K.) v. Arab Organisation for Industrialisation, United Arab Emirates, Kingdom of Saudi Arabia, State of Quatar, Arab Republic of Egypt and Arab British Helicopter Company (Egypt)*, Interim Award March 25, 1984, ICC proceedings no 3879, arbitrators: Bücher (Chairman) Bellet and Mangård, *Yearbook Commercial Arbitration* 1986, 127.

[187] *Republic of Guinea Bissau v. Republic of Senegal,* International Court of Justice November 12, 1991, *Rev arb.* 1992, 523.

[188] *Bremer Vulkan Schiffbau Maschinenfabrik v. South India Shipping Corp.Ltd* [1981] A.C.909; see also DERAINS JARVIN, *Chronique de sentences arbitrales, Clunet* 1984, 919.

donment of the proceedings, when the dispute went to the House of Lords, Lord Diplock held that:

> Respondents in private arbitration are not entitled to let sleeping dogs lie and then complain that they did not bark.

Along the same lines are *The Boucraa,*[189] which made reference to a vested right of each party to continue the proceedings even if his inertia may amount to a breach of the arbitration agreement, and the award rendered in ICC proceedings no. 2730 (1982),[190] in which the arbitrators held that:

> If the Rules (1975 edition) contain provisions as to the duration of the arbitration, they do not however contain provisions for the extinction of the proceedings for lack of activity of the other party.

Under English law the position is now dominated by sections 40 and 41(3) Arbitration Act 1996 which, in front of inordinate and inexcusable delay, empowers the arbitral tribunal to

> make an award dismissing the claim.

French procedural law provides for termination of court proceedings if there is no activity for two years. However, arbitrators have held that this provision is not applicable to arbitration, rightly stressing that in arbitral proceedings the running of time is measured by the time limit, within which the decision is to be made, and that this time limit replaces the one above mentioned for court proceedings. In conclusion therefore, according to said arbitrators:

> there is no *inertia* as long as the proceedings remain within the time limit given to the arbitrators for their decision, even if that time limit is postponed several times.

In general, even outside ICC proceedings, continual extensions of the time limit fixed by the parties are the result of their intention to keep the proceedings alive, which in general can hardly be treated as *inertia.* The position is very different whenever the parties let the time limit for the arbitral award expire without postponing it.[191]

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[189] *Office Chérifien des Phosphates v. Yamashita Shinnihon Steamship Co .Ltd*, Court of Appeal of England (1993) 3 *All ER* 686, *ASA Bulletin* 1994, 433

[190] See DERAINS JARVIN *Chronique de sentences arbitrales* (Chronicle of Awards)*Clunet* 1984, 919.

[191] DERAINS JARVIN, *Chronique de sentences arbitrales, (*Chronicle of Awards*), Clunet,* 1984, 914.

Among Italian precedents the reasoning in CIS *Milano*[192] is to be reported:

> The Court of Cassation has held that the arbitration agreement is a source of duties for the parties as any other contractual agreement.
>
> The Court has further held that it follows that, in the event of lack of action by one of the parties to the arbitration agreement, or of his refusal to file an appearance before the arbitrators, the other party may avail itself of the various remedies for breach of contract, such as the possibility of obtaining the appointment of the other arbitrators by the bodies entitled to do so, or to rescind the arbitration agreement, or to claim damages.

Among Egyptian precedents, the judgment made in proceedings no. 450[193] states:

> Whenever it becomes impossible to arbitrate a dispute, the arbitration clause is to be deemed eliminated and as if it never existed, and the claimant regains the right to present his dispute to the courts as the normal forum for settlement.

It seems that a decision by a state court which declares that the place of arbitration chosen must be treated as *non conveniens* might produce a similar effect on the existence of the proceedings. An example of this in Indian precedents is the judgment rendered in *Indian Organic Chemicals Ltd.*[194]

An Indian company instituted proceedings before the Indian courts against a defendant who opposed the existence of an arbitration agreement which provided for arbitration in London.

The Bombay High Court rejected this plea holding:

> The balance of convenience also requires that this court should decline stay of the proceedings in the suit. The arbitrations under the plaintiffs' agreements with the defendants 1 and the defendants 3 are to be held in London. The arbitration under the agreement with the defendant 2 has its venue some place in India. The entire evidence will be in India inasmuch as the plaintiffs claim that defendants 1 and 2 committed breaches of the obligations which had to be performed in India. The reports in regard to the test runs and other vital issues on the matter would be in India. ...
>
> The minutes of the meetings dated 18th February 1976 and 19th February 1976 show that the parties themselves anticipated difficulties in the matter of the Reserve Bank granting foreign exchange for the purposes

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[192] CIS *Milano v. Barbua,* Court of Cassation (Italy) November 9, no. 5499 (1985), *Mediterranean and Middle East Quarterly Report* 1988, no. 2, 3.

[193] Court of Cassation (Egypt) March 5, no. 450 (1975), Judicial Year 40, *Mediterranean and Middle East Arbitration, Quarterly* 1987, no. 1, 5.

[194] *Indian Organic Chemicals Ltd. v. Chemtex Fibres, Inc. et al.,* High Court, Bombay, April 4, (1977) *Yearbook Commercial Arbitration,* 1979, at 271.

> of enabling the plaintiffs to pay even the fees of the English arbitrator ... . Consequently, having regard to the facts that the evidence of the matter would be in India and that the Reserve Bank might not sanction foreign exchange to the plaintiffs, it will be held that the balance of convenience requires that the suit ought not to be stayed and the foreign arbitration should not be permitted to proceed so as to considerably prejudice the claims or the defences of the plaintiffs.

The Indian Supreme Court followed the same direction in *Tractoroexport*:[195]

> An Indian company instituted proceedings against its Russian opponent before the Court of Madras, claiming breach of contract. The Russian company in its turn had instituted arbitral proceedings in Moscow under the arbitration clause. The Indian Supreme Court held that the New York Convention allowed a court to stay proceedings instituted before, if the arbitral proceedings have begun, and not just in case of the mere existence of an arbitration clause:
>
> "In this context we cannot also ignore what has been represented during the arguments. Current restrictions imposed by the Government of India on the availability of foreign exchange of which judicial notice can be taken will make it virtually impossible for the Indian firm to take its witnesses to Moscow for examination before the arbitral tribunal and to otherwise properly conduct the proceedings there."

The two Indian judgments were then influenced – and this must be stressed – by the remark that the Indian litigant would not be able to put his case in Moscow (which brings us back to the issue of the impossibility of proceedings taking place, which has already been examined).

It has been reported that, as a consequence of the last judgment, India amended its statute which had implemented the New York Convention in order to avoid such an interpretation of the Convention being made again.

27.14 Contents of the Award

The contents of the award are considerably affected by a comparison with court proceedings.

A detailed list of the contents includes the names of the arbitrators, reference to their appointment, the place of arbitration, the parties to the arbitration agreement, the facts, the claims and defences of the parties, the applicable procedural law, the development of the proceedings, the reasons and the decision, including the taxation of the costs of the proceedings and of the parties'

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[195] *Tractoroexport (Russia) v. Tarapore and Co. (India),* Supreme Court (India), January 1971, *Yearbook Commercial Arbitration* 1976, vol. 1, at 188.

fees and the sharing of such costs between the parties, as well as the place and date of the award and the signature of the arbitrators. Reports as to the drafting of the award have been written by Fontaine[196] and Lloyd.[197]

If all these elements have to be present in an award, the effect of one or more of them being missing depends on the applicable statutory provisions or arbitration rules concerning the validity of the award and the possibility for its challenge.

The effects of the lack of requirements regarding the contents of the award for the purposes of recognition may vary, since they depend on the international conventions, on public policy and on the procedural provisions of the state in which enforcement is requested.

Among the requirements of the award as to contents, the date and place of signature are particularly important. The date makes it possible to verify whether the award has been made within the time limit specified in the arbitration agreement, or in its absence required by statutory provisions. The place where the decision is made is equally relevant from various points of view. In the first place, to establish whether the arbitrator has complied with the arbitration agreement in this respect. In the second place, to identify the state court which is competent in the event of attacks against the award, and possibly to establish the state of origin of the award for the purposes of having it recognised in other states.

It must be pointed out that as – earlier discussed – when the award is subject to prior control by an arbitral institution, the date of the award is subsequent to this control; this must be kept in mind for respecting the time limit to make the award.

See, for example, the ICC Rules:[198]

> Before signing an award, whether interim or definitive, the arbitral tribunal shall submit it in draft form to the court.
>
> The court may lay down modifications as to the form of the award and, without affecting the arbitrator's liberty of decision, may also draw his attention to points of substance.
>
> No award shall be signed until it has been approved by the court as to its form.

and furthermore[199]

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[196] M.FONTAINE, *La rédaction de la sentence du point de vue d'un juriste de droit continental, ICC Bulletin* 1994, 1, 30.

[197] H.LLOYD, *Rédaction des sentences: la conception d'un juriste de common law, ICC Bulletin* 1994, 1, 38

[198] Art. 21, ICC Rules of Conciliation and Arbitration, *cit.*

[199] Art. 27, ICC Rules of Conciliation and Arbitration, *cit.*

> The award shall be deemed to be made at the place of the arbitration and on the date where it is signed by the arbitrator.

The most striking case of invalidity of the award is that of a decision different from the claims of the parties, such as that which declares the existence of facts different from those submitted by the parties or which amends the *causa petendi,* i.e. the grounds of the claim. This defect is traditionally defined *extra petita* (i.e. decision outside the claim).

Illustration

> An arbitrator, requested by a party to order the payment of an amount for reimbursement of expenses, issues an invalid decision if he declares that the amount is due as damages.

This generally results in the setting aside of the award, or in any event in its non-recognition.

Another defect, which is defined as *ultra petita* (i.e. a decision beyond the claim), consists in the contents of the award exceeding the claims of the parties.

Illustration

> An arbitrator, requested by a party to make a declaratory award, makes an invalid decision if, instead of merely declaring that the credit exists, he issues an order to pay the amount of that credit.

The possibility of separating the heads of the award, which fall under the arbitration agreement, from others which do not, for the purposes of keeping the award alive, has been held by the New York Convention:[200]

> . . . if the decisions on matters submitted to arbitration can be separated from those not so submitted . . .

The absence of complaints, during the arbitral proceedings, that the decision was not made within the time limit, was held in *Sonatrach*[201] to amount to a waiver of such right:

> The Rules provide that the award should be made within six months of the date that the terms of reference was [sic] signed. Shaheen has waived its objections to the alleged untimeliness of the award by failing to ob-

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[200] Art. V (1) (c), New York Convention (1958), *cit.*

[201] *Shaheen Natural Resources Company Inc (US) v. Société Nationale pour la Recherche, la Production, le Transport, la Transformation et la Commercialisation des Hydrocarbures (Sonatrach) (Algérie), US* District Court, Southern District of New York, November 15 (1983) in *Yearbook Commercial Arbitration* 1985, at 540.

> ject to the delay at the expiration of the initial six month period. Shaheen has not raised this objection before the panel or prior to the instant motion and is therefore estopped from raising it now.

Some legal systems allow the award not to be signed simultaneously and therefore each arbitrator may append his signature separately, in a different place. Under Italian law, for example, the new legislation passed in 1983 expressly provides:[202]

> (5) mention of the venue of the arbitral proceedings and of the place or way the decision has been discussed and made;
>
> (6) mention by all the arbitrators with the statement of the day, month and year when it is appended; the signature may be appended also in a place different from the one where the decision has been made and also abroad; if the arbitrators are more than one, the various subscriptions, without any need for a further personal conference, may take place in different places.

The place where the decision is made may then be different from the place where the award is signed. If so, there may be a problem in establishing which of these places has to be taken into account to establish whether the arbitration agreement has been respected, and to identify the competent court in the event of challenges, and also from the point of view of recognition of the award.

As far as challenges respect of the arbitration agreement is concerned, the solution necessarily depends on the drafting of the individual clause. As to identifying the court which has jurisdiction on challenges, which is chosen based on a territorial criterion, the place where the decision is made will generally be the one where it has been signed, since reaching a verbal agreement[203] on the basic points may not be sufficient for stating that a decision has been made. It is suggested that the place where the decision is signed may take priority also for applying international conventions for recognition, while it is submitted that neither is relevant for identifying the nationality of the award.

As to the territorial criterion, chosen by the international conventions, the Geneva Protocol (1923) refers to the state in the territory of which arbitration takes place;[204] the Geneva Convention (1927) refers to the awards made in the territory of one or the other of the High Contracting Parties;[205] the New York Convention (1958) refers[206] to:

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[202] *S*ection 823 nos. 5 and 6, as amended by the Arbitration Reform Act (1994).

[203] Which frequently is only a general understanding subject to subsequent examination of the draft award.

[204] Art. 2, Geneva Protocol (1923), *cit.*

[205] Art. 1, Geneva Convention (1927), *cit.* art. 2, Geneva Protocol (1923), *cit.*

[206] Art. I, New York Convention (1958), *cit.*

> awards made in the territory of a State other than the State where the recognition and enforcement are sought ...

The difference in the place where the proceedings are held, the place where the discussion and decision take place and that where the decision is signed, may consequently offer an opportunity for challenges.

The Uncitral Model Law (1985), for the purposes of recognition of awards, makes reference,[207] although in a negative way, to the place where the awards are made:

> An arbitral award, irrespective of the country in which it was made ...

One has earlier tried to draw a line between awards and orders issued by the arbitrators related to not decisive procedural issues. In this respect it has been pointed out that it is not sufficient to describe a decision as an award in order that it be an award. Even if it bears such a name, it may just be an order. Similarly it does not suffice that the arbitrators call some conclusions of theirs on the merits an award, if they do not decide them totally or partly.

Along this line is the French judgment in *Sicopag.*[208]

The arbitrators, having found that Sicopag was in breach as to 825 tons of products and that they disposed of no remedy against the Purchaser held that a negotiation should take place as to the remaining 500 tons and made proposals to the parties to this effect.

The Court of Appeal held that this document could not be characterised as a decision and that it was not an award.

The Core of the Award

There is no doubt that the main part of the award is the decision made by the arbitrators. Its ambit is limited by the claims and defences of the parties. It is within this framework that the decision may be made.

Frequently a decision will have a pecuniary nature and one of the parties will be ordered to pay a given amount to the other under a contract or as damages or under liability in tort.

On other occasions, the arbitrators will allow or reject a repudiation of contract or will establish title on real or personal estate or in general state the existence or non existence of a right or of a breach. If so the nature of the decision will be declaratory.

Unless the applicable procedural law or the agreement of the parties do not allow it, the decision may also be conditional. In some jurisdictions the power to condition the decision may have to be provided expressly. In international

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[207] Art. 35, Uncitral Model Law (1985), *cit.*

[208] *Sté Secopag v. Ets Louis Laprade* Court of Appeal, Paris October 24, 1991, *Rev. arb.* 1992, 494.

arbitration that might be not required, but it will be advisable to provide for it. The arbitrators' power to impose a condition in their interim award was challenged in *De Martin*[209] but the challenge was rejected.

The issue was delicate since the condition was related to the enforcement of the very award

> We further direct that this second interim award shall not be enforced until after the settlement or determination of other issues before us in this matter ...

However this power may not exist if the applicable procedural law entitles to enforce immediately.

Even if this chapter deals with the contents of the award, mention will be made here of requirements as to form. While the general requirement is merely that the award be in writing, in Spain, as it was held by the Spanish Supreme Court in 1994 in *ABC*[210] the award had to be made by notarial deed, if Spanish procedural law applied to it.

27.15. REASONS OF THE AWARD

Reasons have been defined clearly and concisely in *Bremer*[211] (per Donaldson L.J., as he then was):

> all that is necessary is that arbitrators should set out what, on their view of the evidence, did or did not happen and should explain concisely why, in the light of what happened, they have reached their decision and what that decision is ...

Two opposite views exist as to reasons.

In civil law jurisdictions, reasons are an essential requirement of judgments and awards. Lack of reasons is then a solid ground for setting aside the award. Insufficient or contradictory reasons, when they do not allow to understand the arbitrator's reasoning, are equated to lack of reasons and represent the majority of the situations in which an attack is made against the reasons of the award, while total lack of reasons is rare.

In some common law jurisdictions much less importance is paid to reasons. In English domestic arbitration for a long time an arbitrator was under no duty to give reasons, and in American domestic arbitration this seems still to be the rule.

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[209] *De Martin & Gasperini v.Turner Corporation Ltd,* Supreme Court of New South Wales May 29, 1992 11, *The Arbitrator*, 2, 86.

[210] *ABC v. Española S.A.,* Tribunal Supremo (Spain) March 28,1994, *Rev.arb.* 1994, 749.

[211] *Bremer Handelsgesellschaft m.b.H v. Westzucker GmbH,* [1989] *Lloyd's Rep.* 582, CA.

The sharp reaction of civil law systems to awards without reasons has led common law systems to pay more attention to this issue, in order to avoid the risk of non recognition of their awards on the ground of breach of the public policy of the requested state.

In England under the Arbitration Act 1996:[212]

> (4) The award shall contain the reasons for the award unless it is an agreed award or the parties have agreed to dispense with reasons.

and in the U.S. the International Commercial Rules of the American Arbitration Association provide:[213]

> The tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons shall be given.

The opposite reaction is to be registered in some civil law systems. In Italy in *Cornelius*[214] the Court of Cassation has held that lack of reasons in a foreign award was not in conflict with Italian public policy. Along the same lines is the French judgment in *Polar.*[215] In such legal systems the requirement for the reasons remains as to the domestic proceedings. This different discipline is one of the results of the distinction between domestic public policy and international public policy. The latter is less wide and concentrates on the very essential requirements. Therefore the reasons have been held to be essential as to domestic awards, but not essential as to foreign awards.

It is submitted that, in view of the basic principle of several civil law systems that anyone is entitled to know why his claims or defences have been rejected, this construction of the contents of international public policy, as not requiring reasons for non domestic awards and judgments, is not convincing and might not be shared by future court decisions.

The Washington Convention (1965) provides in this respect:[216]

> The award shall deal with every question submitted to the Tribunal and shall state the reasons on which it is based.

In *Mine*[217] the ICSID Ad Hoc Committee has held:

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[212] Section 52 (4).

[213] Art. 28.3.

[214] *Cornelius v. Scea S.p.A.,* Court of Cassation May 31 no. 2721, 1955, *Giur.it.* 1955, I, 1, 917.

[215] *Coumet et al. v. Sté Polar-Rakennusos et al.*, Court of Appeal, Paris March 8, 1990, *Rev. arb.* 1990, 675.

[216] Art. 48.3.

[217] *Government of Guinea v. Maritime International Nominees Establishment,* ICSID Tribunal December 14, 1989, *Yearbook Commercial Arbitration,* 1991, 40.

> The requirement that an award has to be motivated implies that it must enable the reader to follow the reasoning of the tribunal on points of fact and law.

and found that:

> ... to the extent that the Tribunal purported to state the reasons for its decision, they were inconsistent and in contradiction with the analysis of [Mine's] damages theories. ... For all these reasons the Committee finds that the portion of the tribunal's award relating to damages must be annulled for failure to state the reasons on which it is based.

See amongst writers Taruffo.[218]

As to the reasons for the award, and as to their effects, particularly if they are not given, reference is made to their examination from the point of view of public policy. It is reported that reasons are requested in Russia:[219]

> 2. A motivated arbitration award shall be sent to the parties in writing ...

As regards contradictory reasons, the French judgment in *Dame Krebs*[220] must be quoted:

> In a dispute between Mrs. Krebs and Milton Stern, a company which had obtained from her the exclusive right to distribute Grès perfume in the United States and Canada, the French Court of Cassation criticized the Court of Appeal for not having held that the arbitrators had contradicted themselves. They had affirmed on the one hand that a contractual clause, even if financially burdensome for the American distributor, had to be respected, but on the other hand they granted the American distributor – to balance the effects of the strict application of such a clause – equitable compensation, which allowed it to recover part of the loss which would have arisen from a strict application of that clause.

This decision is interesting because it is one of the big arbitral fights and, according to Fouchard,[221] it has given rise to about thirty decisions (between arbitral, civil and criminal proceedings). The comments on such a judgment stress that before such a judgment it was the arbitrators who were criticised for having wrongly construed the terms of the dispute, while in this case the Court of Cassation criticized the Court of Appeal because by

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[218] M.,TARUFFO *Sui vizi di motivazione del lodo arbitrale,* (On defects in the reasons of awards) *Riv.arb.*1991, 507.

[219] Art. 38, Rules of the Arbitration Court of the USSR Chamber of Commerce and Industry, *cit.*

[220] *Dame Krebs et autre v. Milton Stern et autre,* Court of Cassation (France) June 16, (1976), *Clunet,* 1977, 671.

[221] Ph. F0UCHARD, comments to the judgment quoted in note 220.

> refusing to recognise a contradiction in their (the arbitrators') reasons, the Court of Appeal has misunderstood the clear and precise terms of the award.
>
> (1) An arbitral award, irrespective of the country in which it was made, ...

The Court of Appeal, Paris has held in *Sermi*[222] that under French law conflicting reasons amount to absence of reasons, which are a ground to set aside the award, and in *Franco Kazakh*[223] that

> even if the ICC Arbitration Rules do not require that expressly, the Arbitrators have the duty to provide the reasons of their award in order to respond to a legitimate expectation and to eliminate lack of certainty in the parties.

The Court added that

> conflicting reasons must be treated as lack of reasons and as such they cause the setting aside of the award.

In most national legal systems, the arbitrators are obliged to explain how they reached their decision when the proceedings are subject to a procedural law which treats that as an essential requirement. The problem of identifying the applicable law in order to establish whether a duty to give reasons exists or not arose in *Compagnie d'Armement Maritime*:[224]

> A dispute between litigants from France and Tunisia, concerned a contract of *affrêtement* subject to French law, which contained an arbitration clause referring to English arbitration.

The French Court of Cassation held:

> The duty to give reasons depends on the law chosen by the parties to govern the arbitral proceedings and not on the law chosen to govern the contract.

This solution is however not unanimous, since among the authors Mezger[225] argues:

> The answer must be provided by the French rule of conflict, which designates the law of the contract as ruling also the arbitration clause which

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[222] *Société Sermi et Hennion v. Société Ortec*, Court of Appeal, Paris, May 15, 1997, *Rev. arb.* 1998, 558.

[223] *Société Forasol v. Société mixte Kazakh-CISTM*, Court of Appeal, Paris, March 5, 1998, *Rev. arb.* 1999, 86.

[224] *Compagnie d'Armement Maritime v. Compagnie Tunisienne de Navigation*, Court of Cassation (France) March 18 (1980) *Rev. arb.* 1980, 496.

[225] MEZGER, comments on the judgment quoted at note 224.

> is a part of it, or which refers to it without any contrary provision. We prefer this solution to art. V. 1 (a) of the New York 1958 Convention.

The international arbitration rules of the American Arbitration Association (1997) provide:[226]

> The tribunal shall state the reasons upon which the award is based, unless the parties had agreed that no reasons need be given.

The arbitration rules of the European Court of Arbitration require on the other hand the award to state *inter alia*:[227]

> the legal basis of the decision, except when the arbitrator had to act and determine as an *amiable compositeur*

An award which is lawfully without reasons in the state of origin, or under the applicable law, may be refused recognition only when it conflicts with the international public policy of the state requested to enforce it.

Readers are referred to the discussion of this under the public policy section.

27.16 Delegation by the Arbitrators of Their Authority to Decide

In *Sacheri*[228] the Italian Court of Cassation heard an appeal against the judgment of the Court of Appeal, Genova. Sacheri had challenged the award before the Court of Appeal submitting that:

> the arbitrators totally abdicated their authority to decide.

The Court of Appeal held that the award was valid even if

> ... The arbitrators, who were not legally trained, had delegated to an attorney at law, who had been appointed as *consulente tecnico* [expert], to draw up the award.

The Court of Cassation held:

> The issue is whether in a procedural arbitration[229] Italian procedural law allows arbitrators to delegate to an expert to decide legal issues which are essential to the decision making process. The question must be an-

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[226] Art 27.2.

[227] Art 23.4.

[228] *Sacheri v. Robotto*, Court of Cassation (Italy) June 7, no.2765 (1989) *Yearbook Commercial Arbitration* 1991, 15.

[229] *Arbitrato rituale* i.e., arbitral proceedings governed by arbitration law, to be distinguished, as earlier discussed, from *arbitrato irrituale*, in which the task is granted to one or more neutrals not to decide, but to settle or to establish the relationships between the parties.

> swered in the negative sense. ... Under Italian law it does not seem possible to allow the former (note: the arbitrator) to delegate to a third party to assess the legal issues which are relevant for the decision making process.

A different view was taken by the German Federal Court in *Ag v. Ast.*[230] Although a legal advisor had attended the hearings, had put questions to the witnesses, had participated in the arbitrators discussions in chambers and had drafted the award, the Court took the view that this did not amount to a delegation of the decision by the arbitrators and therefore was not in breach of public policy.

It is submitted that the same problem should arise whenever an arbitrator (being legally trained) delegates the study of a technical issue to a technical expert. In both situations one should distinguish between the situation where the expert or advisor reports, the arbitrator requests clarifications in order to fully understand and then decides, either as suggested by his advisor or otherwise, and the situation where he does not even try to understand the advice which he is given and follows it passively. It is suggested that in the former situation the arbitrator has proceeded correctly while in the second one he has, in both examples, abdicated his authority and duty to decide.

It was discussed whether an arbitrator had breached public policy by appointing a *huissier*[231] and by giving to him the task to examine the accounts between the parties, to establish which was the amount due and to report to the arbitrator. It was objected to the arbitrator that, by so doing, he had not simply requested to the expert to report on a fact, but also to decide a legal issue. The Court of Appeal, Paris decided that the arbitrator, in so doing, had not delegated his authority.

27.17 Sanctity of Deliberation Chambers or Power of State Courts to Invade

Reilly has rightly raised[232] the delicate issue whether state courts may, to use his own expression,

> invade the arbitrators deliberations chamber.

The *sanctity* of the judges' and arbitrators' deliberations chambers meets the general consensus.

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[230] Bundesgerichtshof January 18, 1990 II ZR 269/88, Riv. arb. 1991, 805 with commments from BRIGUGLIO.

[231] A professional who discharges various tasks such as those of a process server and may certify facts.

[232] M.T. REILLY, *The Court's Power to Invade the Arbitrators Deliberations Chamber*, 9 *J. Int. Arb* 3, 27.

A first type of invasion by state courts would consist in compelling arbitrators to testify. In common law it has been asserted that arbitrators, being quasi judicial officers, cannot be called and heard as witnesses to explain the reasons which have led them to reach their decision. Reilly reports that this attitude was taken in the U.S. by the *Brown* Court[233] which refused to allow arbitrators to testify.

Another type of invasion by state courts might consist in interpreting or amending the award. In this respect the House of Lords held in *Buccleuch*:[234]

> As soon as the award is made, it must speak for itself ... but cannot be ... explained or varied or extended by extrinsic evidence of the person making it.

The same conclusions are reached in general also in civil law systems, although not on the ground of a privilege of the arbitrator, being a quasi judicial officer, but because of the irrelevance of whatever could be said by the arbitrator about his intentions. As it was well summarised in *Buccleuch,* what matters is the award itself and not which was the intention of the arbitrator. The construction of the award, as well as of the judgment, cannot be implemented by something which was *not* written in it.

Irrelevance then, rather than sanctity, protects the unexpressed thoughts of the judge and of the arbitrator and, as to decisions made by a panel, their deliberations.

However the scenario may change. In the event of neither the award nor the record of the proceedings mentioning a procedural act which is material, then in such an extraordinary situation the arbitrator may be examined in order to get that information. This situation arose in the U.S. in *Hormel.*[235]

> The arbitrator issued a first and then a second award. The second award was challenged on the ground that by issuing the first one the arbitrator had completed his task and was therefore *functus officio*. The defendant submitted that the first award had been intended to be merely a draft. The District Court refused to admit into evidence an affidavit of the sole arbitrator confirming that the first award was merely a draft. In so deciding the District Court relied on the earlier discussed general principle. However the Court of Appeals reversed and remanded the case on the ground that, while the District Court was right in holding that it was improper for an arbitrator to interpret his award, there was a part of his affidavit, in which he deposed that he had advised the parties that his first award would be just preliminary and would be reviewed after hearing the par-

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[233] *Brown International Inc v. Ogden Steel Corp.*, 551 *F.Suppl*, 1432 (SDNY 1933).

[234] *Duke of Buccleuch v. Metropolitan Board of Works, Law Rep.* 5 H.L.418 (1872).

[235] *Local P-9 United Food and Commercial Workers International Union AFL-CIO v. Hormel & Co*, 776 F 2d 1393 (8th Cir.1985).

> ties, which provided objective evidence to be considered along any other possible evidence.

Apart from these exceptional situations, the rule stands that an arbitrator cannot be called to interpret in court his award, which was affirmed in *Grambling*[236] in the U.S., nor to sustain or explain it, which was confirmed in *General Teamsters*[237] in the U.S.

The above scenarios are to be distinguished from the situations in which the award is affected by corruption, fraud, partiality, undue means, misconduct, excess or incorrect exercise of the arbitrator's powers. In these situations the arbitrator's testimony may in fact be – as Reilly puts it – the best evidence.

On these grounds in *Fosfatos Mexicanos*[238] the Court, hearing a motion to vacate an award for evident partiality of the majority arbitrators, was submitted a very aggressive dissenting opinion issued by the minority arbitrator. The judge decided of his own motion to hear the dissenting arbitrator in order to check the credibility of the accusations. The respondent subpoenaed the other two arbitrators. In the end, the judge heard the three arbitrators, who disclosed their deliberations, which had been criticised in the dissent for having allegedly prevented the minority arbitrator from fully expressing his views. The Court rejected the motion and confirmed the award. Even if for the purpose of allowing the Court to evaluate the credibility of the accusation brought by the minority arbitrator, in this case the arbitrators' deliberations became public.

Although the above rule is general, there are – as Relly points out[239] – exceptions to those rules.

The ambit of such exceptions is described in *Andros.*[240]

> ... any questioning of arbitrators should be handled pursuant to judicial supervision and limited to situations where clear evidence of impropriety have been presented

27.18 PLACE WHERE AWARD IS MADE

When the decision is made in one place and the award is signed in another one, the place were the award was made may become arguable

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[236] *Grambling v. Food Machinery and Chemical Cop.*, 151 F Suppl. 853 (WD.So.Car.1957).

[237] *Wood v. General Teamsters Union, Local 406,* 583 F. Suppl. 1471 (W.D.S.D.1989).

[238] *Fertilizantes Fosfatos Mexicanos S. A. et al. v. Chemical Carriers Inc.*, 751 Supp, 468.

[239] REILLY, *supra* note 232.

[240] *Andros Compania Maritima S.A. v. Marc Rich & Co.,* 2d Cir. Court of Appeals, 579 F.2d 691 (2d Cir.1978).

In *Boots Frites*[241] the Court of Appeal, Paris held that since the venue of the proceedings was in the Netherlands, the hearings had taken place there, in case of disagreement as to the appointment of the third arbitrator a Dutch body would have appointed him and the arbitrators had filed their award with the clerk of a Dutch Court, the award was made in the Netherlands even if it had been signed in Versailles, France.

However the *Boots Frites* Court went further holding that there is a presumption that the award is made at the venue of the proceedings.

This view cannot be shared on several grounds.

First the Court does not state – as it would have been preferable- whether the presumption would have been rebuttable or not. In the absence of a statement to the contrary, it will be assumed that the presumption is rebuttable. This presumption could be applied to situations where the arbitrators have omitted to state where the award had been made.

However that was not the case in the proceedings before that Court since the arbitrators had stated that the award had been signed in Versailles.

Second, the place where a fact occurs cannot be changed though the consent of the parties. If an award is signed in Versailles that place cannot become Copenhagen just because the parties so wish.

A practice exists in some arbitration circles, according to which the arbitrators propose, and the parties frequently agree that, even if the award is made elsewhere it will be deemed as having been made at the venue of the proceedings.

It is suggested that such an 'agreement' goes beyond the power of any human being, arbitrators included.

The only issue which remains open seems to be whether in law in order to establish where an award was made one should give precedence to the place where the decision is made or to the different one where the award is signed

Hiscox[242] gives a clear reply to this query. It dealt with the matter of the time and place an award is made. The High Court of England held:

> since the arbitration was an English arbitration the central point of which was London, the award was made in London even if it was signed in Paris.

Reversing the conclusions of the first instance judge, the Court of Appeal held that an award is not made in a place other than the one in which it is signed. The House of Lords, rejecting the appeal against the judgment of the Court of Appeal, held:

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[241] *Sté Dubois & Vanderwalen v. Sté Boots Frites B.V.*, Court of Appeal, Paris September 22, 1995 *Rev. arb.*1996, 100.

[242] *Outwhaite v. Hiscox,* House of Lords July 24,1991, *Yearbook Commercial Arbitration* 1992, 599.

> A document is made when and where it is perfected. An award is perfected when it is signed.

This solution seems much more solid than the view that the award is made where the proceedings take place, a view which was held by several U.S. Courts such as in *Mc Gregor*[243] and in *Continental Grain*[244] and supported by Mann.[245]

One of the reasons for excluding to this effect the place where the proceedings take place, if different from the place where the award is signed, results from the record of *Aerojet,*[246] which recognises that the seat of the arbitral proceedings is frequently chosen merely because it is:

> a fair central point, equally accessible and convenient to both parties.

This position was reversed as to English law by the Arbitration Act 1996 which at Section 53 provides:

> unless otherwise agreed by the parties, where the seat of the arbitration is in England and Wales or Northern Ireland, any award in the proceedings shall be treated as made there, regardless of where it was signed, despatched or delivered to any of the parties.

27.19 AWARD BY CONSENT OF THE PARTIES

On some occasions, although not often, the parties reach an agreement or settle the dispute during the arbitral proceedings. If so, they enter into a settlement agreement and merely inform the arbitrator that they withdraw from the proceedings. This solution is frequent in civil law systems. In common law systems another formula is frequent: it consists of the arbitrators incorporating – upon request – the settlement agreement in the award, which may give advantages vis-a-vis a settlement from the enforcement point of view, which explains why this solution is adopted in those legal systems.

The arbitrator's decision in this situation is defined as an *award by consent.*

The Rules of the London Court of International Arbitration provide that:[247]

> In the event of a settlement of the parties' dispute, the Arbitral Tribunal may render an award recording the settlement if the parties so request in writing ('a Consent Award').

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[243] *McGregor & Werner Inc. v. Motion Picture Laboratory,* 804, F.2d 16 (2nd Cir.1986).

[244] *T & R Enter Inc. v. Continental Grain Co,* 613 F 2d 1272,1279 (5th Cir.1980).

[245] MANN, *Where is an award made?* 1 *Arb. Int.* 107 (1985).

[246] *Aerojet General Corp. v. American Arbitration Association,* 478 F 2d 248 (9th Cir.1973) quoted by BORN, *cit.* at 726.

[247] Art. 26.8, Rules of the London Court of International Arbitration, *cit.*

The Uncitral Arbitration Rules (1976) are along the same lines:[248]

> If, before the award is made, the parties agree on a settlement of the dispute, the arbitral tribunal shall either issue an order for the termination of the arbitral proceedings or, if requested by both parties and accepted by the tribunal, record the settlement in the form of an arbitral award on agreed terms. The arbitral tribunal is not obliged to give reasons for such an award.

No reference is made to the parties being required to subscribe the award by consent, as is the case, for example, under Italian law in court proceedings for the minutes of a hearing at which the parties settle the dispute. The solution of this issue will consequently depend on the applicable law.

If the award by consent has certain advantages in some legal systems, it remains to be seen whether it can be treated as any other award for the purposes of recognition in other states. The answer to this query will necessarily depend on the multilateral or bilateral conventions and on the national legal system.

Some doubts have been raised in this respect concerning the New York Convention (1958), which however does not deal expressly with this issue. The Uncitral Model Law (1985)[249] in order to answer such doubts states:

> An award *on agreed terms* ... shall state that it is an award. Such an award has the same status and effect as any other award on the merits of the case. (emphasis added)

According to van den Berg,[250] whenever a settlement is incorporated in an award, the latter will be treated (unless in exceptional cases) as any other award, and will consequently come under art. V (1) of the Convention.

27.20 Effects of the Award

The effects of the award in the state of origin are necessarily ruled by that legal system, or by the different national procedural law which has ruled the arbitral proceedings, except for the mandatory provisions of the state of origin.

A variety of effects of the award according to individual national legal systems has consequently to be registered. The nature of *res judicata* (to be read here not in its general meaning of a decision which is no longer attackable but merely as a final decision) is granted to it by French law:[251]

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[248] Art. 34.1, Uncitral Arbitration Rules (1976), *cit.*

[249] Art. 30, Uncitral Model Law (1985), *cit.*

[250] J. van den BERG, *op. cit.*, at 49-50.

[251] Art. 1476, New French Civil Procedure Code.

> The award has, from the time it is made, the authority of *res judicata* concerning the dispute which it decides

In other states one just finds the effect of it being enforceable, as in Belgium[252] and in Germany,[253] upon obtaining the *exequatur.*

In other jurisdictions, as in Italy, as soon as an award is made[254] it is submitted that it may be compared to a judgment, but even so in order to become an enforceable instrument in Italy it requires leave by the competent state court.[255]

The parties' commitment to enforce the award is to be found in many arbitration rules and in a way could be defined as a natural element of the arbitration agreement.

The ICC Rules of the Conciliation and Arbitration state:[256]

> Every award shall be binding on the parties. By submitting the dispute to arbitration under these Rules, the parties undertake to carry out the resulting award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made.

Likewise the Rules of the London Court of International Arbitration provide[257] that:

> All awards shall be final and binding on the parties. By agreeing to arbitration under these Rules, the parties undertake to carry out any award immediately and without delay (subject only to Article 27), and the parties also waive irrevocably their right to any form of appeal or recourse to any state court or other judicial authority, insofar as such waiver may be validly made.

The Uncitral Arbitration Rules (1976)[258] specify:

> ... The parties undertake to carry out the award without delay ...

However the commitment to enforce the award voluntarily is still, from a practical point of view, far removed from the right to enforce even if the debtor does not perform.

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252 L. MATRAY, Belgium, *International Handbook of Commercial Arbitration,* Kluwer.

253 G. LÖRCHER *The New German Arbitration Act,* 15 *J.Int.Arb*: 2, 85.

254 E. RICCI, *Commento alla legge 9 febbraio 1983 n. 28 (*Comments on Statute February 9 n. 28, (1983*) Le nuove leggi civili commentate* 1983 at 733 et *seq.*; M. RUBINO-SAMMARTANO, *Arbitrati Internazionali e Nazionali in Italia (International and National Arbitration in Italy) Foro pad.,* 1983, 11, 39.

255 Section 825, Italian Civil Procedure Code.

256 Art. 28.6, ICC Rules of Conciliation and Arbitration, *cit.*

257 Art. 26.9, Rules of the London Court of International Arbitration, *cit.*

258 Art. 32.2, Uncitral Arbitration Rules (1976), *cit.*

Some legal systems and arbitration rules expressly make the award binding. This is the case of the Uncitral Arbitration Rules (1976):[259]

> The award shall be made in writing and shall be final and *binding* on the parties ...

Similarly, the Rules of the London Court of International Arbitration:[260]

> All awards shall be final and *binding* on the parties.

This opinion is expressed in *Avco*:[261]:

> The terms 'final' and 'binding' merely reflect a contractual intention that the issues joined and resolved in the arbitration may not be *tried de novo* in any Court.[262] (emphasis added)

On the other hand, the 1988 Rules of the International Chamber of Commerce stated:[263]

> The arbitral award shall be final.

A provision which in the 1998 Rules has been amended[264] by stating that any award is binding on the parties, that they undertake to carry it out immediately and waive to any form of recourse to which they may waive.

While the Arbitration Rules of the European Court of Arbitration provide:[265]

> The arbitral award shall have the characteristics and force conferred on it by the applicable procedural law.

The Rules of the Netherlands Arbitration Institute state:[266]

> An arbitral award shall *bind the parties* from the date it is rendered.(emphasis added)

The Rules of the Inter-American Commercial Arbitral Commission deal with this issue as follows:[267]

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259 Art. 32.2, Uncitral Arbitration Rules (1976), *cit.*

260 Art. 26.9, Rules of the London Court of International Arbitration, *cit.*

261 *Iran Aircraft Industries and Iran Helicopter Support and Renewal Company v. Avco Corporation*, U.S. Court of Appeals, 2d Cir. November 24, 1992 no 92-7217, *Yearbook Commercial Arbitration* 1993, 596.

262 *I/S Stavborg v.National Metal Converters,* 500 F 2d 424,427 (2d Cir.1974).

263 Art. 24.1, ICC Rules of Conciliation and Arbitration, 1988, *cit.*

264 Art 28.6, ICC Rules, 1998, *cit.*

265 Art 23.11 Arbitration Rules of the European Court of Arbitration.

266 Art. 51, Rules of the Netherlands Arbitration Institute, (December 1, 1986), *cit.*

267 Art. 32 (2), Rules of the Inter-American Commercial Arbitration Commission, *cit.*

> The award shall be made in writing and shall be final and *binding* on the parties ...

This is also the situation in some legal systems, such as under Italian law which states[268] that:

> the award has a *binding* effect on the parties from the date of the signature by the last arbitrator.

The purpose that the award be binding is to allow that it be recognised in other jurisdictions. This notion is expressed by the terms *binding, obligatoire* (in French) and *obligatoria* (in Spanish).

The meaning of the term *final* will be examined in detail in the subsequent chapter on challenges.[269] The binding or final nature, which will also be dealt with more extensively in the subsequent chapter on recognition,[270] is then intended to allow recognition of the award in another state under the New York Convention which provides[271] that recognition may be refused if the party against which it is sought proves that:

> (e) The award has not yet become *binding* on the parties, ...

although in French law it has[272]

> from the time it is made, the effect of *res judicata,*

it is submitted that the award cannot be treated as final, i.e. not subject to challenges, until the terms for challenges have expired or, in case of a challenge, proceedings have been terminated because of negative results.

The award is not enforceable in many legal systems until the end of the *exequatur* proceedings which sometimes are long and involve attacks.

An interpretation of the term *final* from the legislator itself comes from the Geneva Convention (1927):[273]

> That the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to opposition, to appeal or *pourvoi en cassation* (in the countries where such forms of procedure exist) or if it is proven that any proceedings for the purpose of contesting the validity of the award are pending.

This in practice requires an *exequatur* in the state of origin in order to obtain one in the state requested to recognise the award, with the consequent need

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[268] Section 823, last paragraph., Italian Rules of Civil Procedure.

[269] See chapter 21.

[270] See chapter 23.

[271] Art. V, 1, (e), New York Convention (1958), *cit.*

[272] Section 1476, New French Civil Procedure Code, *cit.*

[273] Art. 1, (d), Geneva Convention (1927), *cit.*

for a *double exequatur.* To avoid the double *exequatur,* the New York Convention introduced[274] the simpler requirement of being *binding* independently from challenges, refusing recognition of the award only if:

> The award 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 law of which, that award was made.

Under a fairly uniform interpretation of the New York Convention, based also on the preparatory works for it, an award is binding if, even if not yet declared enforceable in the state of origin, it has the requirements to be declared as such.

The binding nature may then be determined only under national criteria and some legal systems, such as Italian law,[275] in order to avoid possible difficulties for foreign courts in construing their law, expressly confer a *binding* nature on the award.

In the sense that the award is binding when it is not subject to any ordinary appeal is *Palm and Vegetable Oils*:[276]

> The Respondent, however, has invoked art. V. (1) (e) of the Convention. With respect to the criteria laid down in this provision, it is undisputed between the parties that no ordinary means of recourse can be made against the arbitral award in question. Hence, it has become *binding* on the parties within the meaning of the Convention.

Greek precedents are in line with this position.[277]

A dispute arose between the parties over a charter agreement. The charterer referred it to arbitration in New York and the award was enforced by the New York Court. The applicant then sought enforcement in Greece of the award or of the American judgment which had declared it enforceable.

On the first point, the (Greek)court held that the decision rendered in New York on July 9, 1982 was a 'genuine arbitral award' according to section 906. However, the New York Court's decision granting enforcement to the arbitral award could not be enforced in Greece since it did not fulfil the requirements laid down in section 906.

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[274] Art. V, 1, (e), New York Convention (1958), *cit.*

[275] Section 823, Civil Procedure Code.

[276] *Palm and Vegetable Oil WN, BTID (Malaysia) v. Algemene Oliehandel International* BV *(Netherlands),* President, Court of First Instance, Utrecht, November 22 (1984), *Yearbook Commercial Arbitration* 1986, at 521.

[277] Court of Athens, judgment no. 3359 (1983) *Yearbook Commercial Arbitration,* 1986, vol. XI, at 500.

The possibility of the parties themselves agreeing in the arbitration agreement that the award will be binding was affirmed in the French legal system in *SEEE v. Yugoslavia*:[278]

> 46. Whereas the arbitration clause provides that the arbitrators are exempt from any formality, and will be able to judge as *amiables compositeurs,* and that the decisions of the arbitrators and third arbitrator, as the case may be, will be final and binding for both parties.
>
> 47. Whereas according to the procedure applicable to the arbitration in question, the decision of the arbitrators is consequently *binding on the parties* in the sense of the New York Convention of June 10, 1958.

The *binding effects* of an interim award were affirmed in an award made in ICC proceedings:[279]

> This arbitral tribunal is further of the opinion that the binding effect of its first award is not limited to the contents of the order thereof adjudicating or dismissing certain claims, but that it extends to the legal reasons that were necessary for such order, i.e. to the *ratio decidendi* of such award. Irrespective of the academic views that may be entertained on the extent of the principle of *res judicata* to the reasons of a decision, it would be unfair to both parties to depart in a final award from the views held in the previous award, to the extent they were necessary for the disposition of certain issues. By contrast, the arbitral tribunal made clear in other parts of its first award that the views expressed therein on certain other aspects of the case were of a preliminary nature only and without prejudice to its final decision. On such aspects, the arbitral tribunal holds itself entirely free to adopt other views with the benefit of further evidence and investigations.

The award deals with an exception to the rule that the arbitrators have no authority to amend, in their final award, their previous findings in interim awards. This solution to the problem does not necessarily have to follow the model of court proceedings. An in-depth study of this problem, in view of the variety of interim awards which can be made, and of the applicable procedural laws, is outside the scope of a general study of arbitration law. Certainly the procedural rules and the finality of even an interim award, with regard to what has been decided therein, may in several jurisdictions make the interim award unchangeable.

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[278] *Société Européenne d'Etudes et d'Entreprises (SEEE) v. Socialist Federal Republic of Yugoslavia et al.,* Court of Appeal, Rouen November 13 (1984), *Yearbook Commercial Arbitration* 1986, at 491.

[279] Final award March 28, 1984, ICC proceedings no. 3267, Reymond, (Switzerland) Chairman, *Yearbook Commercial Arbitration* 1987, at 87.

The decision of the Florence Court of Appeal in *Sally*[280] refers to a more involved factual situation, where a court decision had incorporated an award:

> Termarea objects that the judgment for which enforcement is sought is contrary to a judgment rendered by an Italian court: the English decision – contends the respondent – merely gave the status of a judgment to the arbitral award dated September 30, 1976, the enforcement of which had already been refused by the Court of Appeal of Florence, by a decision of April 13, 1978.
>
> (...)
>
> This court holds that the last English decision, rendered on May 10, 1979, undoubtedly cannot be enforced in Italy. Because of its peculiar contents, this decision has only the appearance of an autonomous judgment enforceable according to International Conventions and the States' municipal law on civil procedure. These contents are such in the last part of the judgment ('It is today ruled that the defendant pay to the claimant ...'), that they seem sufficient in themselves to resolve the dispute between the parties. Looking carefully, however, it has only the form of a payment order. The substance of the decision, on the contrary, is a full reference to, and a total incorporation of, the order given in the arbitral award previously rendered, which can be compared with what is provided in the Italian legal system by art. 825, paras. 2 and 5, Rules of Civil Procedure. As the award, for reasons which are not relevant here, has been declared not enforceable by a judgment of this same court, the decision at issue is undoubtedly contrary to that judgment, with the consequence provided for in art. 797, para. 3, of the Italian Rules of Civil Procedure.

This aspect of the relationship between the award and the court decision, as held in *Sally,* provides an opportunity to introduce an examination of the opposite aspect, i.e. of the argument which is sometimes raised that the award, once confirmed by a court judgment into which it has merged, can no longer be recognised and enforced as such. However, this argument is generally rejected.

The Indian Courts in *Steel India*[281] expressed the following opinion:

> The American claimant sought recognition of an ICC award rendered in London, which the London Court had enforced by a judgment. The Indian defendant opposed this on the grounds that, because of the judgment of the London Court, the award had now been merged into the Court judgment.

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[280] *Rederi Aktiebolaget Sally v. Termarea Srl.,* Florence Court of Appeal, January 19 (1981), *Yearbook Commercial Arbitration* 1985, at 453.

[281] *Cosid Inc. v. Steel Authority of India Ltd.* High Court, Delhi, July 12 (1985*), Yearbook Commercial Arbitration,* 1986, at 502.

The Court of Delhi rejected this argument holding:

> it was submitted that Cosid, having invoked the provisions of Sect. 26 of the English Arbitration Act 1950, resulting in the award being enforced as a judgment and order, the award thus became merged into an order and decree of the court and was no more actionable as an award and no enforcement and recognition thereof could be sought.
>
> (....)
>
> Cosid submitted that (the) plea of merger could not be allowed to be raised at this stage and that it had filed a copy of the order of the English court merely to show that the award in question had become final in the country where it was made and that this document could not be used by SAIL for raising a new plea not contained in the pleadings of the parties and in respect of which no issue had been framed.

The Court went further:

> I do not think that Cosid is quite correct.
>
> Filing of the order of the English court cannot be limited only to show that the award had become final. But, then I am not quite satisfied that the plea of merger could be raised in the present case. For one thing (the) doctrine of merger, as contended, is no bar to the enforcement of the foreign award. The foreign award cannot be enforced if it has yet not become binding on the parties or has been set aside or suspended by a competent authority of the country in which or under the law of which that award was made. Sect. 7 (1) (a) (v) of the Act refers. Secondly, as held by Anand J. in *Mls Copal Singh Hira Singh v. Punjah National Bank* (AIR 1976 Delhi 115), that a foreign judgment only creates a new obligation to pay but does not extinguish the original cause of action for the debt, and that a foreign judgment involves no merger of the original cause of action and a creditor who obtained a foreign judgment has two remedies open to him: either to bring an action in the domestic tribunal on the foreign judgment or to bring an action in the domestic tribunal on the original cause of action. In this context, Anand J. referred to a decision of the Supreme Court in *Badat and Co. v. East India Trading Co.* (AIR, 1964 SC 538). According to Cosid, (the) original cause of action in this case has been the award in question.

Similarly, the German Federal Court[282] stated:

> The Court of Appeal has correctly admitted the request for enforcement on the basis of Sect. 722 *et seq.* of the German Code of Civil Procedure.

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[282] Federal Court (Germany) March 27 (1984), *Yearbook Commercial Arbitration* 1985, at 426.

> It is true that the judgment of the Supreme Court of the State of New York is based on a foreign arbitral award. The German Code of Civil
>
> Procedure contains provisions for the enforcement of foreign arbitral awards in Sect. 1044. It is disputed how a foreign award which is confirmed by a foreign judgment (the so-called *'exequatur* judgment') is to be treated. The previous German Supreme Court *(Reichsgericht)* has only allowed enforcement of the foreign arbitral award because the arbitral award could not have become a judgment for the mere reason it had already obtained executory force abroad. This point of view is still today the generally accepted doctrine.

As to the effects of an award under Italian law there has been a limited number of decisions immediately after new legislation was introduced in 1983 which raised the issue whether the award had to be treated as a judgment or only as a contract between the parties. In *Ispro v. Gepi*[283] the Supreme Court held, on the possibility of challenging an interim award separately from the final award:

> The interim award cannot be challenged except with the final award.

In turn the Court of Appeal of Genoa in *Europetrol and Ronzana*[284] denied the possibility that a final award, which has not yet been declared enforceable, be challenged.

> The award cannot be challenged for nullity before it has been declared enforceable.

The court reached this decision through the following *iter* (i.e. reasoning):

> The difference between the old and the new system is stronger than those who supported this reform could imagine and has inspired some authors to hold that, contrary to what occurred before the new legislation when the attack for nullity could be made only against an award which had been granted an *exequatur* by the court, nowadays attacks would be possible immediately after signature by the last arbitrator because, as a consequence of that, the award acquires since that last signature *the effects of a decision.* (emphasis added).
>
> The possible subsequent *exequatur* therefore would merely confer on it the nature of an enforceable instrument in the territory of the Republic, since the *exequatur* would not be enough to grant to an award the effects of a decision if it had not already acquired such effects at the time it was made.

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[283] *Ispro v. Gepi,* Court of Cassation, June 9, no. 3835 (1986*), Foro pad.* 1986, 1, 295.

[284] *CO. E. D1. Srl. v. Europetrol Sas and Ronzana,* Court of Appeal, Genoa January 3 (1986*), Foro pad.* 1986, 1, 295.

> Other authors reach totally opposite conclusions and, on various grounds, hold that even today an attack for nullity or for reconsideration necessarily requires an award already granted *exequatur* and the effects of a judgment, because the new provisions which grant to the award 'binding effects between the parties' and make the filing of the award with the court only optional, are inserted in the framework of the old provisions. This means that rules are left unaltered which, before the new legislation and still today, make the possibility of challenging the award under section. 827 *et seq.* conditional on the existence of a duly filed award made enforceable by a county court decree. The binding effect which the award acquires when it is signed by the last arbitrator would then amount to an effect of a contractual nature, which would be more or less complete, or more or less stable, according to the opinions of the various authors. In no way would it give the award the effects of a judgment, and therefore the possibility of being challenged with the remedies available under art. 827 *et seq.*, Rules of Civil Procedure quoted above.
>
> The Court shares this last opinion and holds that the attack for nullity is not available.
>
> There is no doubt that, with the new legislation, provisions have been inserted in the old and well balanced system, which cannot be easily adjusted to the remaining old provisions which are still in force.

The matter is now regulated by the revised Rules of Civil Procedure[285] which no longer request the state court's exequatur in order that the award produces the effects of a judgment. It is the firm view of this writer that the award has to be treated as a judgment.

As to the extent of the effect of *res judicata* (granted by some legal systems, such as the French and the Belgian ones) on the grounds of the award, the award rendered in ICC proceedings nos. 2745 and 2762/3 (1977)[286] states:

> The reasons, which are the necessary support of the decision, share its authority of *res judicata.*

The problem of the binding effect of the award is dealt with also in the award made in *King v. Datel*:[287]

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[285] Section 825, Italian Rules of Civil Procedure.

[286] Y. DERAINS, *Chronique des sentences arbitrates, Clunet,* 1978, 992.

[287] *King v. Datel,* award made in 1987 in ICC proceedings no. 5423, in DERAINS JARVIN, *Chronique des sentences arbitrales, Clunet,* 1987, 1048.

> In fact the arbitrator, although he declares he has no jurisdiction, has declared the validity of the arbitration clause.

The question arises then whether that award would have a binding effect on the parties in the case of further court or arbitral proceedings, and in the latter case whether only if such proceedings are instituted with the same arbitral institution, or outside of it. It is submitted that the second arbitrator or judge, before whom the dispute should be instituted, would not be influenced by the first award, until it is recognized in the state where the judge or arbitrator sits, or has been challenged in the same without success and the decision on the challenge has become final, or if the parties' waiver of attacks is valid in that jurisdiction.

27.21 BINDING EFFECT OF PRECEDENTS – *STARE DECISIS*

The query about the binding effect of precedents involves both state court precedents and arbitral precedents. As to the former the international arbitrator faces this problem when he has to apply a national substantive or procedural law. The construction of national legislation is in fact guided by precedents and writings. The question may then arise whether an international arbitrator is *bound* by state court precedents in deciding that issue, when that legal system is ruled by the *stare decisis* principle.

Berger[288] has expressed the view that an international arbitrator is not bound by them. It is submitted that one has to distinguish between procedural and substantive issues. As to the former, the problem will not arise when the arbitrator is not bound to apply any national procedural law (except for those statutory provisions of the law of the venue of the arbitral proceedings which belong to its 'international public policy') and therefore in general in non domestic arbitral proceedings which are conducted in that jurisdiction. It is suggested that the same conclusion may not be reached if the arbitrators must apply a national procedural law, since in that case the procedural statutory provision will have to be construed according to such law and if this is governed by the *stare decisis* rule, then the relevant precedent will provide to the arbitrators the correct construction of the applicable procedural provision.

It is submitted that the same criterion is to be followed as to substantive issue, whenever the construction of such issue is to be established under a binding precedent

This while in the other situations, in which there is no national legislation to be applied, the international arbitrator cannot be bound by any state court precedent.

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[288] K.P. BERGER, *The International Arbitrator's Application of Precedents*, 9 *J. Int: Arb.* 4,5.

As to arbitral precedents, they are helpful in particular when they lay down principles of general application. Berger rightly refers in this respect to the *Dow Chemical* precedent[289] which so states as to the notion of a group of companies.

> The decisions of these tribunals progressively create *case law* which should be taken into account ... (emphasis added)

However, this should not mean that earlier arbitral decisions should become binding on another arbitrator.

Less convincing is the view taken by the Court of Appeal of Paris in *Ofer*[290] which held that if the arbitrators intend to base their decision on arbitral precedents which have not been published, they are under no duty to make them accessible in advance to the parties. One could argue, in support of such a conclusion, that the arbitrator is free to base his decision on the source of law which it deems appropriate. However if one deepens the analysis, it is suggested that the parties should be allowed to comment those sources of law which have not already been on record in the proceedings. This attitude applies also to arbitral precedents, since here too if the parties had had access to such precedents, since by definition they are not binding, they could have elaborated them in order to convince the arbitrator that they were either wrong or to be distinguished from the case in issue. See Schütze[291] and Vigoriti.[292]

In conclusion previous awards produce neither binding effects nor – I would add – persuasive effects, if this term is to be construed as meaning that the precedents could be psychologically *binding*.[293]

In this sense the *ad hoc* ICSID Committee has ruled in *Indonesia v. Amco Asia Corp*:[294]

> Neither the decision of the International Court of Justice in the case of the Award of the King of Spain, nor the decision of the Klockner *ad Hoc* Committee are binding on this *ad hoc* Committee. The absence, however of a rule of *stare decisis* in the ICSID arbitration does not prevent this *ad*

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[289] *Dow Chemical France et al. v.Isover Saint Gobin,* interim award September 23,1982, ICC proceedings no 4131, *Yearbook Commercial Arbitration* 1984, 131.

[290] *Sté Ofer Brothers v. The Tokyo Marine and Fire Insurance Co. Ltd et al., Rev. arb.* 1989, 695.

[291] R.A. SCHUETZE *The Precedential Effect of Arbitration Decisions*, 11 *J. Int. Arb* 3, 69.

[292] V. VIGORITI *La decisione arbitrale come precedente,* (The Award as a Precedent) *Riv. arb.* 1996, 33.

[293] M. RUBINO-SAMMARTANO, *Part on Italy World Litigation Law and Practice*, (Myrick gen.ed.) Matthew Bender, New York, 1986.

[294] *Republic of Indonesia v. Amco Asia Corp et al,* ICSID *Ad Hoc* Committee, May 16, 1986, *Yearbook Commercial Arbitration* 1987, at 129.

> *hoc* committee from sharing the interpretation given to art. 52 (1) (e) by the Klockner *ad hoc* Committee.

The absence of a binding effect does not conflict then with the attention rightly given by awards to previous arbitral decisions.

27.22 CONFIDENTIALITY IN ARBITRATION

Reference to confidentiality is not to be found in many statutory provisions on arbitration, while it is handled in detail, by the Uncitral Conciliation Rules.[295]

Privacy and confidentiality

A distinction is first to be made between privacy and confidentiality.

Privacy is the automatic consequence of the contractual nature of arbitration since it is a mechanism for the settlement of the dispute by recourse to 'private' instead of 'state' adjudication. Henceforth the proceedings are private. As it was held in *The Eastern Saga* (per Leggatt J):[296]

> The concept of private arbitration derives simply from the fact that the parties have agreed to submit to arbitration particular disputes arising from them and only between them. It is implicit in this that strangers shall be excluded from the hearings and the conduct of the arbitration ...

And as an implied term of confidentiality it is referred to in *Hassneh.*[297]

Confidentiality may be a consequence of privacy but it is not a full synonym for it. One must then establish how much confidentiality flows from privacy.[298]

Automatic confidentiality has been advocated by Boyd[299] and by Bond[300] and denied by Smit[301] and by Lew.[302]

In *Hyundai*[303] the High Court of England held (per Phillips J.) that the duty of confidentiality of the arbitrators:

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[295] Articles 10-14-20.

[296] *Oxford Shipping Co. Ltd v. Nippon Yusen Kaisha,* (The Eastern Saga) (1984), 3 *All ER* 835.

[297] *Hassneh Insurance v. Mew,* (1933), 2 *Lloyd's Report* 243.

[298] P. NEILL, *Confidentiality in Arbitration,* 12 *Arb. Int.* 3, 287; A. RODGERS and D. MILLER, *Non Confidential Arbitration Proceedings,* 12 *Arb. Int.* 3, 319; M. COLLINS, *Privacy and Confidentiality in Arbitration Proceedings,* 11 *Arb.Int.* 3, 321.

[299] S.C. BOYD, Expert Report in */BHP v. Plowman,* 11 *Arb Int.* 3, 265.

[300] S. BOND, *Expert Report* in *Esso /BHP v. Plowman,* 11 *Arb. Int.* 3, 213.

[301] H. SMIT, *Expert Report* in *Esso /BHP v. Plowman,* 11 *Arb. Int.* 3, 297.

[302] J. LEW, *Expert Report* in *Esso /BHP v. Plowman,* 11 *Arb. Int.* 3, 283.

is by no means fully charted

and must be subject to restrictions.

The Various Facets of Confidentiality

The duty of confidentiality in arbitration may apply to:

- the arbitrator;
- a party vis-à-vis its own conduct in the proceedings;
- a party vis-à-vis the conduct of the other parties and/or the arbitrator;
- the arbitral institution conducting the proceedings,
- counsel for the parties;
- witnesses, experts and expert witnesses;
- translators, typists, secretaries and assistants in general.

Confidentiality may affect various aspects of arbitral proceedings such as:

- the very submission of the dispute to arbitration;
- the documents produced in the arbitral proceedings;
- the facts transpired during the proceedings;
- the oral evidence;
- the stance taken by a party to the dispute by way of submissions;
- the award itself and within it the order and/or the reasons.

In the absence of general rules dealing with these aspects, the identification of the parts of the arbitral process which are not subject to confidentiality depends also on taking into account the interests involved in it, i.e. the interest of the party who intends to disclose it, the interest of the party who claims confidentiality as well as the state's interest that such matter become known in the public interest.

The very submission of the dispute to arbitration

The first aspect which could benefit of confidentiality is the existence of the dispute and its submission to arbitration.

However this may in some situations have to be disclosed by one of the litigants for example to its shareholders or lenders, particularly if it may substantially affect its financial conditions.

In other scenarios that information may have to be provided to government agencies or to courts in the framework of proceedings before them.

While an indiscriminate diffusion of this information would not be in line with confidentiality, the specific situations above described may justify derogating from it.

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[303] *Hyundai Engineering & Construction Company Ltd v. Active Building and Civil Construction (Pty) in liquidation*, High Court of England, reported in NEILL, *Confidentiality in Arbitration*, 12 *Arb. Int.* 3, 287.

The documents produced in the arbitral proceedings

The positions concerning the documents produced in arbitral proceedings tend to be extreme. According to a view all the documents produced in the proceedings would be secret; according to another view this pretended secrecy may not freeze them all.

The need to grant full confidentiality to documents produced in the arbitral proceedings has been held in *Tournier.*[304]

> The disclosure to the other party of such documents would be *almost equivalent to opening the door of the arbitration room to* third parties. (emphasis added)

a view which is supported by Bernstein[305] who submits that:

> There would be little point in excluding the public from an arbitration hearing if it were open to a party to make public, for example in the press, or on the television, an account of what was said or done at the hearing.

Probably both positions are extreme and a distinction may be useful, within documents submitted to arbitration, between historical documents, i.e. documents which existed before and outside the dispute, and ad-hoc documents, i.e. documents created only for that dispute. While as to ad hoc documents the position might be different, historical documents should not be subject to a duty of confidentiality.

Confidentiality has been the object of several Court and arbitral decisions.

In *Dolling Baker*[306] the English Court of Appeal has held:

> ... there must ... be some implied obligation on both parties not to disclose or to use for any other purpose any documents prepared for and used in the arbitration, or disclosed or produced in the course of the arbitration, or transcripts or notes of evidence in the arbitration or award, and indeed not to disclose in any other way what evidence had been given by any witness in the arbitration save with the consent of the other party or pursuant to an order or leave of the court.

This debate is echoed by two Australian Courts judgments in *Esso.*

In a dispute between two utility companies and governmental agencies of the Government of Victoria, the two companies had produced documents. The proceedings turned around the issue whether the Minister for Energy and

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[304] *Tournier v. National Provincial Bank and Union Bank of England*, Court of Appeal of England [1924] 1 *KB* 461.

[305] R. BERNSTEIN, *Handbook of Arbitration Practice*, 1993 para 18.6.3.

[306] *Dolling Baker v. Merret et al.* [1990] 1 WLR 1205 cited by J. PAULSSON and N. RAWDING, *The Trouble with Confidentiality*, 15 *The Arbitrator* 1 (1996), 12.

Minerals was free or not to use the information contained in the documents produced by the two companies for purposes other than those proceedings. The Minister issued court proceedings seeking a declaration that he was entitled to do so.

The High Court of Australia held (per Mason C.J.)[307] that the duty of confidentiality existed in arbitration but was not absolute and therefore that the Courts could not imply that:

> .... confidentiality is an essential attribute of a private arbitration imposing an obligation on each party not to disclose the proceedings or documents and information provided in and for the purposes of the arbitration.

The Chief Justice went further and recognised that even when a duty of confidentiality existed, it might be overtaken by a public interest:

> Why should the consumers and the public of Victoria be denied knowledge of what happens in these arbitration, the outcome of which will affect, in all probability, the prices chargeable to consumers by the public utilities?

The public interest element adds here to the average difficulties related to confidentiality. If the public interest notion is construed in order to apply beyond few extraordinary situations, such as when the national security is at stake, it remains to be seen whether this would destroy the private nature of arbitration in all the disputes of this type,

In *Cockatoo*[308] a dispute arose out of a lease and commercial agreement concerning the naval dockyard on that island. The arbitrator issued directions that:

> Neither party to the proceedings disclose or grant access to:
>
> (a) any document or other material prepared for the purposes of this arbitration;
>
> (b) any documents or other material, whether prepared for the purposes of this arbitration or not, which reveal the contents of any document or other material which was prepared for the purposes of this arbitration;
>
> (c) any documents or material produced for inspection or discovery by the other party for the purposes of these proceedings;
>
> (d) any document or material filed in evidence in these proceedings.

The proceedings went up to the Court of Appeal of New South Wales which (per Kirby, P.) limited the ambit of confidentiality even in normal situations, i.e. when the *public interest exception* does not interfere with it:

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[307] *Esso Australia Resources Ltd. v. Plowman*, High Court of Australia, 11 *Arb.Int.*, 235.

[308] *Commonwealth of Australia v. Cockatoo Dockyard Pty Ltd* (1995) 36 *NSWLR* 662.

> I do not believe that I should impose upon either party a straitjacket confining the use of documents which might concern matters which have become issues in the arbitration but which have come into existence within either party and which have been disclosed. I do not intend to suggest that one party should be free to use for whatever purpose they wished the other party's disclosed documents; they are not so free. But a party should be able to use its own documents and the information in them for its own and legitimate purposes.

and further on:

> It is quite another[thing] to cast the *net of confidentiality* protection so wide that it embraces a party's own documents perhaps prepared for the purposes of the arbitration but having a wider interest and utility. (emphasis added)

This view seems to have to be shared. In fact the origin of the documents may be relevant in order to decide as to their confidentiality. For example the documents produced by the opposite party are by nature more confidential than one's own documents.

The parties' stance in the proceedings

The claims, cross claims, defenses, admissions and confessions of the parties are perhaps the core of the arbitration proceedings.

Whenever a duty of confidentiality is recognised, they will then generally be protected by it.

That duty will apply also to Counsel and to their assistants and staff, to experts and expert witnesses, to translators, typists, stenographers and stenotypists.

In an analysis of the confidentiality issue, Paulsson and Rawding[309] refer also to an application made by Indonesia in *Amco*[310] for an interlocutory injunction restraining Amco from continuing to make statements describing –furthermore in an inaccurate way –the terms of the dispute. The application was dismissed by the ICSID Tribunal.

In the U.S. judgment in *Panhandle*[311] the Court held that the parties had not committed themselves to confidentiality, the only reference to this not being in the ICC Arbitration Rules but in the Internal Rules of the ICC, which concern only the members of such Court.

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[309] J. PAULSSON and N. RAWDING, *cit*, 19.

[310] *Amco Asia Corp.et al. v. Republic of Indonesia*, ICSID Tribunal December 9, 1983, 24 *International Legal Materials* 365 (1985).

[311] *United States v.Panhandle Eastern Corp. et al.* 118 F 346 (Delaware 1988).

The award itself

It is submitted that on the one hand the award, being the final product of arbitration, should be covered by the duty of confidentiality, but on the other hand it may have to be enforced or may be challenged, and this may not be prevented by invoking confidentiality out of place.

It is suggested that a distinction should be made between the first part of the award (which includes the facts, the submissions, the evidence and the hearing) the second part, the reasons, and the third part which contains the order, i.e. the decision itself. Except in the situations where the filing in Court becomes necessary, the first and second part of the award may generally remain confidential. The latter, except in the above situations, may (as earlier discussed), be disclosed in special situations such as to shareholders, lenders, auditors, potential purchasers conducting due diligence exercises.

When the award has to be used as a defence against claims from third parties, the entire award may have to be produced.

Confidentiality places itself between on the one-hand full secrecy and on the other hand disclosure.

The argument in favour of the existence of an implied term of confidentiality is that it is innate in the notion of arbitration.

The problem of classifying a possible breach of confidentiality by the arbitrators, or by participants to the proceedings, has been raised. It has been argued that such conduct would amount to a breach of confidence. The publication of awards is in a border region between the duty to preserve confidentiality on the one hand and the great advantage which their publications provide in the study and progress of the law of arbitration on the other. The formula of publishing long passages of awards, from which the name of the parties has been eliminated tries to satisfy both requirements.

Third parties' possible tort of divulging confidential information

Although the duty of confidentiality is an express or implied term of a contractual relationship it is suggested that a third party may, depending on the applicable substantive law, commit a tort if, intentionally or due to negligence, it damages a party to a dispute by divulging information related to arbitration.

As to Counsel for a party, his/her assistants and staff, although they have a contractual relationship only with one of the parties, one might infer, depending on the applicable law, an implied term of confidentiality also to the benefit of the other parties to the proceedings The same might apply to experts and consultants to a party

The possible breach by the arbitral institution seems to be in contract if one infers here too the above implied duty.

As to witnesses, as to the secretary to the arbitral tribunal when not appointed by the parties, and as to experts appointed by the Tribunal, liability seems to be in tort.

The same should apply to translators, typists and other assistants appointed by the tribunal or by the arbitral institution to assist the tribunal.

Sanction for breach of confidentiality

Whenever a duty of confidentiality exists, its breach by a party to the proceedings amounts to a breach of contract or to a tort if committed by a third party not bound to it in contract.

An interesting aspect of breach of confidentiality has been discussed in *Bulgarian Foreign Trade*:[312]

> Bulgarian Foreign Trade Bank (Bulbank) was a party to arbitral proceedings being held in Stockholm. The arbitrators made an award on jurisdiction affirming it and continued the proceedings. A copy of the award was handed by AIT's American Counsel to a third party which made it available to Mealeys's International Arbitration Report, which published it.

Bulgarian Foreign Trade Bank issued proceedings against AIT before the Stockholm City Court seeking a declaratory judgment that AIT by so doing had breached the arbitration agreement and claiming that the arbitration agreement be terminated. The Stockholm City Court found that AIT had breached the arbitration agreement. Confidentiality being a basic and fundamental rule in arbitration, that breach was fundamental.

The breach of contract, which was thereby fundamental, constituted valid grounds for Bulbank to avoid the contract.

The Svea Court of Appeal, which was seised of the appeal against such a judgment[313] held that:

> the publicising of information in arbitration proceedings could be viewed as a breach of the duty of good faith ... the sanction most likely comprised compensation payable to the other party for loss proven. In order to avoid an arbitration agreement it is required ... that a party committed a fundamental breach of contract.

and concluded that:

> Bulbank has not shown any cause that could afford a right to avoid the arbitration agreement.

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[312] *Bulgarian Foreign Trade Bank Ltd v A.I. Trade Finance Inc.* Stockholm City Court September 10, 1998, reproduced in 13(11) *Mealey's Int. Arbitration Report* at A-1 (1998).

[313] *A.I. Trade Finance Inc v. Bulgarian Foreign Trade Bank Ltd,* Svea Court of Appeal, March 30, 1999, reproduced in 14(4) *Mealey's Int. Arbitration Report* at A-1 (1999).

It is submitted that this conclusion has to be supported since in such a specific dispute, if the parties had anticipated a breach of confidentiality, it does not follow that they would not have entered into that arbitration agreement.

The conclusion might be different if the opposite could be established.

The sanction for such a breach will depend on the applicable law. The general remedy which is available is damages. However other remedies may be available in the alternative or in addition to damages, such as affirmative or negative action.

Conclusions

There seems to be a widespread belief that confidentiality covers the entire proceedings.

However except in the rare situations in which the matter is governed by an express term, one has to rely upon an implied term, the extent of which depends on many factors and may be different as to each specific aspect of the proceedings. In general this duty is not absolute and tends to apply only to such matters as are sensitive to one of the parties.

It has been suggested[314] that the exceptions to the duty of confidentiality are: the consent of the parties, a Court order, a Court authorization, the reasonable need to protect the interest of one of the parties and finally a reason linked to the administration of justice.

27.23 PUBLICATION OF THE AWARD

Publication of the award is another delicate issue.

It is held by the majority of writers that confidentiality is one of the main reasons for choosing arbitration. It is submitted that this view is too absolute and that while some times the parties are very keen on it, on other occasions they are less keen and in further situations they care very little about it. Even if frequently it will not be the main reason for choosing arbitration, confidentiality is an element of arbitration and its consequence is the non existence of an automatic right of any of the parties and of third parties to publish the award.

This gives rise to difficulties since, as stressed by Tashiro,[315] the publication of awards allows to achieve several goals.

First it may induce arbitrators to be even more careful since publication opens the door to a wider possibility of criticism. This criticism may be ig-

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[314] L. BURGER note to *Ali Shipping Corp. v. Shipyard Trogir*, Court of Appeal of England, December 19, 1997, *Rev. arb.* 1998, 579.

[315] K.TASHIRO *Quest for a national and proper method for the publication of arbitral awards*, 9 *J. Int. Arb.* 2, 99.

nored less easily than the criticism made by the loser, who may be influenced by his personal interest in the result of the dispute.

Second the publication provides information which helps to identify business practices and commercial usages.

Third publication may increase the degree of predictability of future awards.

Fourth publication allows arbitration law to progress through the study of precedents made by scholars.

The solution of several law reports is to publish awards either by way of an excerpt or after deleting the name of the parties and those references to the dispute which would allow to the public to identify the dispute.

Nevertheless those who already possess some information on the dispute shall frequently be able to understand that the excerpt concerns that dispute.

When the award is filed in Court, and even non litigants have access to the file, the award comes into the public domain. If it is filed in Court but only the litigants have access to the file, generally those parts of the award which are referred to in the judgment comes into the public domain when the Court judgment is filed.

The publication of awards is expressly allowed by the Russian arbitration rules[316]

> With the permission of the President of the Arbitration Court the awards of the Court may be published in periodicals or in special collections of awards. The interests of the parties shall be taken into account and in particular information concerning identification of the parties, enterprises, commodities and prices shall not be published.

and by the Polish arbitration rules:[317]

> The President of the Court of Arbitration may order the award to be published in legal and commercial periodicals, but without designation of the parties.

However the duty of secrecy is expressly specified for the arbitrator by the Polish arbitration rules:[318]

> He shall be bound to observe secrecy.

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[316] Para. 42, Rules of the Arbitration Court of the USSR Chamber of Commerce and Industry, *cit.*

[317] Para. 33, Rules of the Court of Arbitration at the Polish Chamber of Foreign Trade in Warsaw, *cit.*

[318] Para. 16, Rules of the Court of Arbitration at the Polish Chamber of Foreign Trade in Warsaw, *cit.*.

An arbitral precedent has dealt with the different issue of publication of an award by court order.

An arbitral tribunal,[319] while deciding a dispute between an Austrian corporation, as Claimant, and a French engineer, as defendant, related to the performance of a licence agreement concerning know-how, patents and technical assistance, dealt with an application that a summary of the award be published on several newspapers. The Tribunal dismissed the application on the ground that such a claim might be entertained only if the behaviour of the other contracting party had caused confusion in the market. The tribunal concluded that:

> ... this decision is in line with the spirit which inspires all arbitral proceedings, which is based on the search for a *discreet* settlement of a dispute between two or more parties (emphasis added)

27.24 Scrutiny of the Draft Award by the Arbitral Institution

Scrutiny of the draft award by the arbitral institution is one of the main characteristics of ICC arbitration. This although other French arbitral institutions provide this too.[320] Amongst them are the Arbitral Court of the French-Arab Chambers of Commerce, the Arbitration Court of Northern Europe, and the Arbitration Court of Normandy.

The ICC arbitration rules provide:[321]

> Before signing any award, the Arbitral Tribunal shall submit it in draft form to the Court. The Court may lay down modifications as to the form of the Award and, without affecting the Arbitral Tribunal's liberty of decision, may also draw its attention to points of substance. No award shall be rendered by the Arbitral Tribunal until it has been approved by the Court as to its form.

This scrutiny is made first by one of ICC's in-house counsel who reports on it. A member of the ICC Court files then his own report. The ICC Court decides then whether amendments are required as to the form of the award, or whether the attention of the Arbitrators has to be drawn on matters of substance. Approval of the award by the Court may also be granted subject to specific changes being made.

The scrutiny of the award has given rise to long debates and to opposite views. On the one hand one has recognised that the scrutiny gives to the arbitrators the opportunity of having a neutral comment before filing the award and

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[319] Award made in 1992 in ICC proceedings no. 6932, *Clunet* 1994, 1065.

[320] E. LOQUIN *L'examen du projet de sentence arbitrale par l'institution et la sentence de deuxieme degré, Rev. arb.* 1990, 427.

[321] Art. 27.

that in this way one reduces the risk of errors as to the form as well as to the substance.

On the other hand other observers have seen it as an interference with the liberty of the arbitrators to decide. The Turkish judgment in *Keban*[322] is still impressed – after so many years – in the memory of arbitration circles. The Turkish highest court held in fact that such a scrutiny was in breach of its public policy.

It is submitted that one has to distinguish between two ways of conducting the scrutiny. One of them is in aid of arbitration and it therefore does not interfere but rather it helps. The other one is a means for the arbitral institution to try to impose to an arbitrator a solution of an issue or of the dispute which is different from the one which he has chosen. This scrutiny would indeed be an interference. Fortunately the latter must be rather rare. On the whole it is then suggested that the scrutiny may be quite useful.

Nevertheless concern must be expressed for a tendency to enlarge the powers of the arbitral institutions during such a scrutiny. The view has been expressed, for example, that the arbitral institution might impose on the arbitrators to remedy to a breach of the procedural rights committed by them to the detriment of a party and/or to hold a new hearing. Likewise, it has been suggested that the arbitral institution might refuse to approve an award, if one of the arbitrators alleges to have been unable to examine the draft award. While the arbitral institution may, and one could say must, draw the arbitrators' attention to similar matters, the above described conduct seems to go beyond the limits of the above scrutiny.[323]

One should only add that other arbitral institutions, without imposing formally a scrutiny, *de facto* examine the award as soon as they receive it and, if needed, draw the arbitrators' attention to matters which, in their view, need to be addressed. In this way the same support is then given to the arbitrators while avoiding all the above discussed problems.

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[322] *Compagnie de Constructions Internationales, Compagnie Française d'Enterprise et Sté Impregilo v. D.S.I.*, Supreme Court (Turkey) March 10,1976 *Arbitrator* 1980, 241.

[323] D.T. MCGOVERN *L'approbation de la sentence par la Cour, ICC Bulletin* 1994, 1, 47.

CHAPTER 28

COSTS INTEREST AND HIGHER DAMAGES

SUMMARY: 28.1 Costs of the Proceedings – 28.1.1 Arbitrators' Fees – 28.1.2 The Arbitrator's Expenses – 28.1.3 Joint Liability of the Parties – 28.1.4 Advances – 28.1.5 Other Expenses of the Arbitral Proceedings – 28.1.6 Administrative Dues of the Arbitral Institution – 28.1.7 Witnesses Expenses and *per diem* – 28.1.8 Security for Costs – 28.1.9 Costs Follow the Event – 28.2 Interest – 28.2.1 Pre-Award and Post-Award Interest – 28.3 Higher damages – 28.4 Extra Costs for Inappropriate Conduct

28.1 COSTS OF THE PROCEEDINGS

Amongst the costs of the proceedings one may distinguish between:

- arbitrators fees
- arbitrators costs
- other costs of the proceedings
- administrative dues of the arbitral institution
- costs and fees of Counsel
- costs directly made by the party.

The causes of the high costs of international commercial arbitration and the ways to reduce them have been analysed by Schneider.[1]

On costs see also Redfern and Hunter.[2]

28.1.1 Arbitrators' fees

In *ad hoc* arbitration it is rare that the parties agree the fees of the arbitrators at the time of the arbitration agreement or of the submission.

If no reference has been made to an official or unofficial schedule, the arbitrators shall tax their fees when making the award. In some jurisdictions this taxation amounts just to a proposal made by the arbitrators to the parties. If not accepted by them their fees will have to be determined by the Court or by a another delegated body, taking into account the schedule which is closest to the arbitrator's activity. The Court's taxation will acquire at some stage the status of an enforceable instrument and the arbitrators shall become free to enforce it.

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1 M. SCHNEIDER, *Arbitration, Cost Control and Efficiency Through Progressive Identification of Issues and Separate Pricing of Arbitration Services,* 1 *Arb. Int.* 2, 119.

2 REDFERN AND HUNTER *cit.,* 1st ed., 304.

In other jurisdictions, if the arbitrators have taxed their fees in the award, when the award becomes enforceable that applies also to their fees.

28.1.2 The arbitrator's expenses

The same problems may arise as to the expenses met by the arbitrator.

Such expenses will be of different types such as travelling, hotel and/or restaurant expenses, faxes, clerical work and telephone costs.

The arbitrator shall be entitled to reimbursement of such costs provided they are reasonable.

If the parties are not willing to reimburse such expenses voluntarily, they will generally have to be taxed by the Court, or by the other body - if any - having such authority; depending on the applicable law they may be the object of the award or of an interim award.

28.1.3 Joint liability of the parties

In administered arbitration, the arbitrators being appointed by the arbitral institution, the latter and not the parties - as earlier discussed - will be liable for payment of the arbitrator's fees. Their amount will be determined based on the schedule of that institution.

In *ad hoc* arbitration, in the absence of an agreement between the arbitrators and the parties, the arbitrators - unless the applicable law provides otherwise - may have to apply to the Court for their taxation.

Once their taxation becomes enforceable, either party if so requested shall be under a duty to pay the entire amount of their fees, subject to recourse to the other party in order to recover the part of such fees which under the award is to the charge of the latter.

28.1.4 Advances

The existence of a right of arbitrators to receive from the parties reasonable advances on their costs and fees will depend on the applicable law and on the arbitration rules. Not all the arbitration rules deal with this.

In the absence of statutory or contractual ruling on this, arbitrators may consider the possibility of ordering the parties to pay an advance on their fees.

Some arbitral institutions regulate this matter and provide that lack of timely payment of the advances requested by the arbitrators or by the arbitral institution amounts to a waiver of the proceedings. In *Ferruzzi*[3] the French Court of Cassation has held that a provision equating non-payment of the advance as a waiver of the proceedings is not in breach of public policy and

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[3] *Sté Ferruzzi France v. UCACEL,* Court of Cassation (France) January 26, 1994, *Rev. arb.* 1995, 443.

that the Court order declaring that the proceedings have been waived on this ground must not be set aside. This decision, even if formally correct, may give rise to concern as it is shown by the follow up of that dispute.

> Ferruzzi quickly filed a second request for arbitration but the latter was declared not admissible since the arbitration rules of the *Union des coopératives agricoles de céréales d'Eure et Loire* (UCACEL) provided in this case for estoppel.

It is suggested that, subject to the applicable law, a stay of the proceedings is preferable based either on the express granting of such a remedy, or on the general remedies available under the law of contract which governs the relationship between arbitrators and parties.

28.1.5 Other expenses of the arbitral proceedings

The arbitral proceedings may give rise to other disbursements which are more linked to the proceedings than to the arbitrator himself. That is the case with disbursements such as the rental of the hearing facilities, the charges for typists or stenotypists, for recording and for the typing of transcripts of the hearing, for interpreters and/experts.

These expenses may be covered by the advances requested by the arbitrators and received by them; in administered arbitration they shall be paid by the arbitral institution, or by the arbitrator if he has ordered such services directly, unless they are charged to the parties or to one of them.

28.1.6 Administrative dues of the arbitral institution

In administered arbitration the dues of the arbitral institution are to be added to the other costs of the arbitral proceedings.

As a rule they are determined in a schedule which is either attached to the arbitration rules of that body or is to be found in its internal regulations which are incorporated by reference in the arbitration rules.

When the amount of such administrative dues is fixed from the beginning, generally based on the amount in dispute, room for discussion will generally either be null or very small.

28.1.7 Witnesses expenses and per diem

Unless the parties agree that all witness expenses are to be treated as expenses of the proceedings, each party will advance the costs for its own witnesses, keep evidence of them and then claim reimbursement of them as well as of its costs and Counsel fees.

A *per diem* compensation may have to be added to reimbursement of the actual costs met by the witnesses in order to attend the hearing. For that the

prior agreement of the parties, or at least an order prior to the taking of evidence, is advisable.

28.1.8 Security for costs

The old *cautio pro expensis*[4] has in general, broadly speaking, had its day.

The policy of many states has become to allow a party to litigate even if it is not in a position to deposit a security for costs rather than preventing it from having access to justice if it does not provide a security.

The practice of arbitration rules is generally not to impose security for costs.

In Australia in *Baulderstone*[5] it was held that an arbitrator has no power to order security for costs unless the parties have so agreed. Courts in turn have power to order a security only if this authority has been granted to them by statute.

This matter has been studied, amongst writers, by O'Reilly.[6]

In England in *Bank Mellat*[7] Kerr L. J. in delivering the main speech in the Court of Appeal held that it was inappropriate to grant a security for costs in international arbitration conducted under the ICC rules, when the parties had no connection with England. Amongst the reasons provided for this conclusion one should mention the view that an order for security would conflict with the spirit of the ICC rules and that the fact that the claimant was residing abroad was not by itself sufficient to justify imposing a security.

The House of Lords in *Ken-Ren*[8] took a different view:

> The Plaintiff (a Belgian company) had entered into a contract with the Defendant (a Kenyan company [Ken-Ren]) for the construction of a fertiliser plant in Kenya. The government was the majority shareholder of Ken-Ren. A dispute arose between the parties and was referred to ICC arbitration in London. The Belgian company refused to pay its share of the deposit requested by the ICC on the ground of Ken-Ren's insolvency. Nevertheless the latter paid not only its share of the deposit but also the one of the Belgian company.
>
> The Belgian company applied then to the English High Court for an order of security for costs against the Kenyan company: the latter opposed the application.

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4 Security for costs.

5 *Baulderstone Honribrook Engineering Pty Ltd. v. State Constructions Pty Ltd,* Supreme Court of South Australia 12, *The Arbitrator*, 3, 147.

6 M. O'REILLY, *Orders for Security for Costs from the Arbitrator's Perspective Arbitration* 1995, 247.

7 *Bank Mellat v. Helleniki Tekniki* [1984] QB 291.

8 *S. A .Copper Lavalin N. V. v. Ken Ren Chemicals and Fertilizers Ltd.* [1995] AC 38.

> The dispute went up to the House of Lords where the majority (Lords Keith, Slynn and Woolf) took the view that an order to post a security for costs had to be made not as a rule but only when – as in that dispute – special reasons justified it. Lord Mustill and Lord Browne-Wilkinson were in the minority. The Kenian company was then ordered to give security for costs.

Section 38 of the 1996 Act expressly gives to the arbitral tribunal power to order security for costs, a power which however may be excluded by the parties.

The decision on the issue whether a security for costs may be imposed or not totally depends on each Parliament's policy on the above reported fundamental issue.

It is submitted that access to justice should in general be refused only when a party, which has no funds, puts forward a claim deprived of any substance.

Amongst writers on this topic see Lynch.[9]

28.1.9 Costs follow the event

The old rule that costs follow the event, which prevails in many legal systems with the important exception of the United States, is applied in such jurisdictions to domestic and international arbitration as well.

Even when the rule is accepted in principle, a practice exists to award to a party only a share of its costs in the event of its recovering significantly less than it has claimed. However in *The Rozel*[10] the Commercial Court held that a partial victory is not by itself a reason for the winner to recover less than the entirety of its costs, unless the claimant has exaggerated his claim.

This decision is in line with the previous judgment of the English Court of Appeal in *Everglade.*[11]

One could add that a good reason not to award the costs to the winning party may be due to the defendant having offered to pay to the claimant the amount which in the end was awarded to it or an amount in that range.

28.2 INTEREST

The great majority of arbitral tribunals awards interest for the reason which has been well put in *Spalding:*[12]

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[9] K. LYNCH, *Security for Costs in Domestic and International Arbitration in England and Hong Kong* 12 J. *Int. Arb.* 2, 17.

[10] *Channel Islands Ferry Ltd v. Cenargo Navigation Limited*, High Court, Commercial Court, Q. B. February 15, 1994, *ASA Bulletin* 1994, 438.

[11] *Everglade Maritime Inc. v. Schiffahrtgesellschaft Detlev von Appen mbH*, Court of Appeal of England, March 4, 1993, 3, *WLR* 176 and *ASA Bulletin* 1993, 432.

[12] *Spalding v. Mason* 161, U.S. 375 (1986).

> It is a dictate of natural justice ... that a man is bound ... also to repair all the damage that accrues naturally from his breach.

In some jurisdictions interest is treated as an issue of substantive law while in other ones it is considered to be procedural.

Apart from the issue of the applicable law, the law of the State of enforcement may affect this issue as in the case of some Arab states which forbid *riba.*[13]

In other jurisdictions a given rate of interest may not be exceeded. Other jurisdictions do not allow compound interest.[14]

Amongst writers on this topic see Born[15] as well as Hunter and Triebel.[16]

28.2.1 Pre-award and post-award interest

A basic distinction is to be made between *pre-award* and *post-award* interest.

Whether the former is due will depend on the agreement of the parties or, in its absence, on the applicable law. The general rule is that interest follows the principal. Therefore if a party is found liable to pay the principal amount, in general it will be ordered to pay also interest on it unless the applicable substantive law or mandatory provisions of the *lex fori* exclude it or condition it to a given conduct by the creditor.

A distinction has been made in *Sun Oil*[17] between *pre-judgment* and *pre-award* interest.

> Sun Oil had opposed the award of *pre-judgment* interest on the ground that the arbitral tribunal had already granted *pre-award* interest. The Court found that the arbitral tribunal had awarded *pre-award* interest and that the Court could then grant *post award* damages (which in this case technically was *pre-judgment* interest).

English arbitrators lacked authority to award post award interest. That authority lied with the state courts.

In England, the Arbitration Act (1996)[18] now grants to the arbitrators a discretion to award simple or compound interest both *pre* and *post-award.* The situation created by *The London Explorer*[19] has then now been reversed.

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[13] The Arabic term for interest.

[14] I.e. interest computed on interest.

[15] BORN, *cit.* at 619 *et seq.*

[16] HUNTER and TRIEBEL, *Awarding interest in international arbitration*, 6 J. *Int. Arb.* 1

[17] Section 43.

[18] *National Oil Corp.(Libya) v. Libyan Sun Oil Co.*, U.S. District Court, District of Delaware, March 15, 1990, *Yearbook Commercial Arbitration* 1991, 651.

[19] *The London Explorer* [1972] AC.

The issue whether *post-award* interest is due or not will normally be governed by the law of the place where the award is made, or by the applicable procedural law if different.

The granting of post-judgment interest in general is an automatic consequence of the judgment.

As to post award interest on foreign awards see *Waterside Ocean*[20]

Post award *pre-judgment* interest has been awarded by US courts in domestic and international arbitration as in *Lake Utopia.*[21]

The rate of interest shall vary depending on several variables such as the contract rate, if agreed, or if not the legal rate of the applicable substantive law.

In this respect an ICC award made in 1992[22] between an Austrian supplier of furniture for a Croatian hotel, with a duty to assemble it, and the Croatian corporation held that the rate of interest had to be determined based on the law which was applicable under the conflicts rules.[23]

As to compound interest, another ICC arbitral tribunal has held in 1990[24] that it was due:

> not only because the agreement of the parties could be construed in that way but because, as it is had been held in *Starrett,*[25] the financial reality requires as well as fairness that if a party perhaps has suffered substantial damages under the heading compound interest, it should be compensated for that. This even more when the damaged party has had to pay compound interest to its lenders.

Payment of compound interest was then according to the tribunal in line with the international trade usages. This while in another ICC award made in 1990[26] the arbitral tribunal held:

> In an international arbitration, the determination of [interest] is not governed by precise and rigid rules. The general tendency which has developed amongst writers and in international precedents is to leave a great freedom to the arbitrator in determining the rate ... the arbitrator is not bound to apply the legal rate of any national legal system, be it the one of the law of the contract or of the place of the arbitration.

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20 *International Navigation v. Waterside Ocean Navigation*, US Court of Appeals, 2nd Circuit July 18, 1984, 737 Fed 2nd (1984) 15 l.

21 *Lake Utopia Paper Ltd. v. Cornelly Containers Inc.* 79 Civ. 510 (SDNY 1979).

22 ICC proceedings no 7153, *Clunet* 1992, 1006.

23 Von CAMMERER and SCHLECHTRIEM, *Commentary on the United Nations Uniform Law on Sales of Goods* (1990).

24 ICC proceedings no 5514, *Clunet* 1992, 1022.

25 *Starret Housing Corp. v. Iran*, Iran-U.S. Tribunal, August 14, 1987, 4 *Iran-U-S. CTR* 122, 15.

26 ICC proceedings no 6219, *Clunet* 1990, 1047.

28.3 HIGHER DAMAGES

Traditionally a late payment gives rise only to the sanction of payment of interest.

Nevertheless, in particular after the Second World War, it became apparent that damages could go beyond the legal rate of interest.

This was largely due to devaluation of the currency and/or to the increase of the cost of living occurred between due date and actual payment. This has merely emphasised an already existing problem.

In fact it is not infrequent that lack of collection of the amount which is due produces damages higher than the legal rate of interest. For example the creditor may miss the opportunity to purchase equipment or material and eventually, when he does collect, that asset may have become more expensive. Or the creditor may have been obliged to borrow money at a higher rate. He may have also been obliged to sell an asset in order to obtain cash and the sale price of the sold asset may have been lower than its value.

The difference between the actual loss caused by late collection and the legal rate of interest represents the creditor's damages exceeding interest and is occasionally referred to as *'higher damages'*.

The right of that creditor to such 'higher damages' will depend on the applicable substantive law. Some legal systems expressly provide for these higher damages. For example under Italian law:[27]

> The creditor who can prove to have suffered higher damages is entitled to claim them.

However:

> This right is excluded if the parties have agreed on interest for late payment.

Depending on the applicable law some of these damages, like devaluation or increase in the cost of living, may be presumed.

28.4 EXTRA COSTS FOR INAPPROPRIATE CONDUCT

The winning party may have to pay to the losing party a part of the latter's costs of the proceedings if it has used dilatory tactics, or has not complied with directions given by the arbitrators or has been responsible for other inappropriate conduct.

In *Behring*[28] the Iran US Claims Tribunal has held in this respect:

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[27] Section 1224, para 2, Civil Code.

[28] *Behring International Inc. v. Islamic Republic of Iran Air Force et al.*, Iran U.S. Claims Tribunal October 29, 1991, *Yearbook Commercial Arbitration* 1992, 382

> Because of the claimant's inappropriate conduct, particularly its failure to respond to the tribunal's orders of April 30, 1986, August 15, 1986, January 24, 1987 and February 17, 1989, the respondents were forced to incur higher attorney's fees and costs than otherwise would have been necessary. The tribunal therefore finds it reasonable to award to respondents U.S.$60,000 as estimated compensation for such extra cost.

Extra costs may also be claimed and granted as a penalty when the claim has been made although it manifestly had no grounds.

Extra costs are occasionally awarded by an arbitral tribunal against a party for having inflated its claim.

In some jurisdictions the arbitrators are free to award costs against only one party if its behaviour has been *frivolous or vexatious,* a concept which has been described as follows in *Norman v. Matthews*:[29]

> In order to bring a case within the description [of frivolous and vexatious] it is not sufficient merely to say that the Plaintiff has no cause of action. It must appear that his alleged cause of action is one which on the face of it is clearly one which no reasonable person could properly treat as *bona fide*, and contend that he had a grievance which he was entitled to bring before the Court.

A test which was deepened in *Cabot*:[30]

> The tribunal adopted the test for vexatiousness expressed by Roden J. in *Attorney General(Vic) J. v. Wentworth*:[31]
>
> 1. Proceedings are vexatious if they are instituted with the intention of annoying or embarrassing the person against whom they are brought.
>
> 2. They are vexatious if they are brought for collateral purposes and are not for the purpose of having the Court adjudicate on the issues to which they give rise.
>
> 3. They are also properly to be regarded as vexatious if, irrespective of the motive of the litigant, they are so obviously untenable or manifestly groundless as to be utterly hopeless.

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[29] *Norman v. Matthews* (1916) 85, LJKB 857, 13 *The Arbitrator* 3, 167

[30] *J.& C. Cabot v. City of Keilor*, Supreme Court of Victoria (per Gobbo J.) [1994]1 VR 220, 13 *The Arbitrator* 3, 167.

[31] (1988) 14 NSWLR 481, 491.

CHAPTER 29

UNCITRAL ARBITRATION

SUMMARY: 29.1 Uncitral's Achievements in the Field of Arbitration – 29.2 The New York Convention (1958) – 29.3 The Uncitral Arbitration Rules – 29.4 The Uncitral Model Law – 29.5 The Uncitral Guidelines

29.1 UNCITRAL'S ACHIEVEMENTS IN THE FIELD OF ARBITRATION

The United Nations have for a long time played an important role in the field of arbitration.

The New York (1958) Convention

Their first achievement was the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, which was entered into in New York on June 7, 1958[1] at the United Nations Conference on International Commercial Arbitration.[2] This Convention has since become the cornerstone of international arbitration.

The formation of Uncitral

In 1966 the United Nations have resolved to create a *Commission on International Trade Law (Uncitral)*. Thirty-six states have become members of that commission. The commission is since then the arm of the United Nations in this area.

The Uncitral Arbitration Rules

In 1976, after lengthy preparation and a large debate, Uncitral has completed and approved a set of arbitration rules: the *Uncitral Arbitration Rules*,[3] which have been welcomed both by parties from developing and developed countries alike as a very useful tool when deciding whether to refer a dispute to *ad hoc* arbitration.

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1 330 UNTS 38.

2 To which in August 1998, 119 parties had acceded.

3 U.N. Sales no. E 77 V 6.

The Uncitral Conciliation Rules

In 1980 Uncitral, after similar preparatory works, completed and approved a set of conciliation rules, the *Uncitral Conciliation Rules.*[4]

The Uncitral Model Law

In 1985[5] the General Assembly of the United Nations approved the draft resolution submitted to it by Uncitral and which was named the Model Law. This document has inspired many developed and developing legal systems and is substantially contributing to the harmonisation of arbitration law throughout the world.[6]

The Uncitral Guidelines

On June 14, 1996 Uncitral gave a final shape to its Guidelines for the Conduct of Arbitration.[7]

Criticism has been raised against them due to the concern that arbitrators might find themselves constrained by procedure.

Nevertheless these Guidelines seem to be a useful *checklist* in particular for those who just become involved in the conduct of arbitral proceedings.

The target of a worldwide legal system

After such substantial achievements the United Nations seem to start focusing on the very ambitious target of a world-wide legal system. The first move in that direction has been made by the International Institute for the Unification of Private Law (UNIDROIT) by publishing in 1994,[8] thanks to the efforts of its Working Group co-ordinated by Bonell,[9] the 'Principles of International Commercial Contracts'.

For such valuable targets and for all the achievements of the United Nations in this field, arbitration circles and more generally all those who want solutions of their disputes not to be subject to state monopoly and to parochial approaches, are to be grateful.

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4 U.N. Sales no E 81 V.6.

5 December 11, 1985 General Assembly Resolution 40/72, 40 GAOR Supp. no. 53.

6 HOLTZMANN-NEUHAUS, *A Guide to Uncitral Model Law on International Commercial Arbitration*, Kluwer, 1994.

7 *Documents officiels de l'Assemblée générale*, 51 session Suppl. Nr. 17(A/51/17).

8 UNIDROIT, *Principles of International Commercial Contracts*, Rome 1994.

9 Michael Joachim Bonell, Law Professor, University of Rome.

29.2 THE NEW YORK CONVENTION

The New York Convention (1988) has become the leading convention for the circulation of arbitral awards.

Dealing with it requires a full monograph, a task which has been diligently performed by van den Berg.[10]

Both the Convention and his analysis stand 19 years after his study has been published and require only very few adjustments.

A survey of the New York Convention is made in another part of this study.

29.3 THE UNCITRAL ARBITRATION RULES

The Uncitral Arbitration Rules are not binding by themselves either on any State or on any party.

They are a set of arbitration rules which the parties may incorporate by reference in their arbitration agreement or submission. They consequently become binding only as a consequence of a meeting of minds between the parties to that arbitration agreement or submission.

They are mainly designed to be used for *ad hoc* arbitration, but in theory might also be used to replace, subject to due adjustments, the rules of an arbitral institution, if the latter agrees to administer arbitral proceedings in this changed framework.

The Uncitral Arbitration Rules may be usefully compared with the other arbitration rules.

While many arbitral institutions have only published domestic arbitration rules, some of them have published international arbitration rules, i.e. rules which are not limited to local disputes. This is the case of the rules of the ICC, of the American Arbitration Association, of the London International Court of Arbitration and of the European Court of Arbitration.

Many traders will tend to choose administered arbitration, but others may prefer *ad hoc* arbitration. The latter frequently choose the Uncitral Arbitration Rules, rather than adjusting the rules of an arbitral institution in order to try to suit their own *ad hoc* proceedings.

A further advantage of the Uncitral Arbitration Rules is that, since they have been drafted by a United Nations Commission, users feel protected against any possible unconscious bias of the drafters in favour of a given continent or industry.

A mention will only be made here of those Uncitral rules which present special features in respect of general arbitration rules.

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[10] Van den BERG, *The New York Arbitration Convention of 1958*, Kluwer 1981.

Domestic and international disputes

The Uncitral arbitration rules may be used both for domestic and international disputes.

Representation

The Rules emphasise the right of the parties to arbitral proceedings not to be represented by lawyers. This provision is helpful indirectly because it acknowledges the norm, i.e. that representation by Counsel is allowed.

Number of arbitrators

Here the Rules have preferred to follow the general tendency of appointing three arbitrators, without taking into account that in medium-sized and small disputes the rule – as earlier discussed – should have been the opposite one.

Appointing authority

The Rules aim to fill a possible gap in the appointment of the third or of the sole arbitrator.

Whenever the parties have not stated who will appoint such an arbitrator then, if they or their arbitrators fail to reach an agreement on this, in many jurisdictions they may find themselves in trouble.

In this respect the provision of an appointing authority, the Secretary General of the Permanent Court of Arbitration, may be helpful.

Replacement of an arbitrator

The provision of the Uncitral arbitration rules that, upon application, the appointing authority may replace not only the arbitrator who has died or resigned, but also the one who fails to act or finds himself *de jure* or *de facto* unable to perform his functions aims to avoid the standstill situations which may arise and which occasionally find solutions, like in *Milutinovic,*[11] which may be a source of troubles.

Repetition of hearings

The Rules deal with another delicate issue, i.e. whether in the event of a replacement of an arbitrator, the proceedings should start all over again.

The solution proposed by the rules, i.e., to repeat the hearings only if the presiding arbitrator (or the sole arbitrator) is replaced, while in the other situations the decision is left with the discretion of the arbitral tribunal, offers a solution, which the parties remain free to extend to the other replacements.

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[11] See *supra* Chapter 26 note 9.

Evidence by witnesses

The provision by the Rules[12] that if one of the parties so requests the arbitral tribunal is under a duty to hear

> evidence by witnesses including expert witnesses or ... oral argument,

helps to avoid an arbitrator being tempted to decide himself, instead of that party, how to conduct his case.

Amendments to the claim or defence

The Rules deal also with the issue of amendments to the claim and defence, an issue on which there are two opposite views.

According to the liberal one the parties must be free to amend their claims or defences at any time during the proceedings, until the evidentiary stage is over.

According to the other view the claim and defence may not be amended.

The position taken by the rules[13] is to allow amendments within precise limits:

> Unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances.

It is submitted that such a level of discretion is too high.

Evidence by request of the arbitrators

The Rules offer to the parties a solution to the question whether the arbitrator may of his motion request the parties to provide further evidence. The solution chosen by Uncitral[14] is liberal.

Examination of witnesses by counsel

The rules avoid ruling on whether witnesses may or may not be examined by Counsel. The rules delegate this decision to the arbitrator:[15]

> The arbitral tribunal is free to determine the manner in which witnesses are examined.

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12 Art 15.2.

13 Art. 20.

14 Art. 24.

15 Art. 25.4.

As earlier discussed, it is suggested that leaving to the tribunal the possibility of preventing Counsel for the parties from examining and respectively cross-examining witnesses is very negative.

The Rules invite the arbitrators[16] not to close the hearings without first having checked whether the parties have:

> any further proof to offer or witnesses to be heard,

which shows due respect for the right of the parties to present their case.

Interim measures of protection

The Rules provide[17] for the right both of the arbitral tribunal and of state courts to issue interim measures.

As earlier discussed, however, concurrent jurisdiction may give rise to problems. Priority has been given in this respect to flexibility.

Experts

The solution adopted by the Rules, in line with civil law practice,[18] is in favour of the appointment of an expert by the arbitrator, as his own neutral advisor. However the civil law formula has been considerably improved by giving to parties the right to examine the neutral expert and to call expert witnesses.

Breach of the rules and waiver

The Rules[19] place the parties under a duty to complain promptly about breaches of the rules and provide that a failure to complain amounts to a waiver:

> A party who knows that any provision of, or requirement under, these rules has not been complied with and yet proceeds with the arbitration without *promptly* stating his objection to such non-compliance, shall be deemed to have waived his right to object. (emphasis added)

Applicable law

In the absence of a choice by the parties of the applicable substantive law, the arbitrators shall:[20]

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16 Art. 29.
17 Art. 26.
18 Art. 27.
19 Art. 30.
20 Art. 33.

> apply the law determined by the conflict of laws rules which it considers applicable.

Arbitrator's authority to terminate the proceedings

The Rules grant to the arbitrators the right to terminate the proceedings in given circumstances:[21]

> If, before the award is made, the continuation of the arbitral proceedings becomes unnecessary or impossible for any reason not mentioned in paragraph 1 (i.e. for reasons different from settlement of the dispute by the parties) the arbitral tribunal shall inform the parties of its intention to issue an award for the termination of the proceedings. The arbitral tribunal shall have the power to issue such an order unless a party raises justifiable grounds for objection.

Interpretation of the award

The rules grant to each party[22] the right to request that the arbitrators, within 30 days after receipt of the award, give an:

> interpretation of the award.

If so requested, the arbitrators are under a duty to provide their interpretation and:

> The interpretation shall form part of the award.

Correction of the award

Either party is entitled[23], within the same time period, to ask the arbitrators to correct in the award:

> any errors in computation, any clerical or typographical errors or any errors of similar nature.

Likewise the arbitral tribunal:

> may within thirty days after the communication of the award make such corrections on its own initiative.

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[21] Art. 34.2.

[22] Art. 35.

[23] Art. 36.

Additional award

Either party may, within thirty days after his receipt of the award,[24] give notice to the other party that he:

> request [s] the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award.

Provisions dealing with interpretation and correction after the award is made and requests for an additional award are not frequently to be found in arbitration rules. Furthermore they are not in line with court proceedings, where the judge, after rendering his decision, becomes *functus officio*.[25]

Possibly the traditional rules of procedure were too rigid in this respect and such a departure from them is more modern and should be viewed as an improvement.

Fees

The Rules provide[26] the criterion for establishing the fees of the arbitral tribunal which:

> shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject matter, the time spent by the arbitrators and any other relevant circumstance of the case.

The Rules further provide[27] that:

> Except as provided in paragraph 2 (note: the discretion of the arbitral tribunal to determine which party shall bear such costs or to apportion them between the parties) the cost of the arbitration shall *in principle* be borne by the unsuccessful party. (emphasis added)

A rule which is in keeping with the principle 'costs follow the event' which is followed by the great majority of legal systems.

Conclusions

The Uncitral Arbitration Rules contain several provisions which are frequently met in other arbitration rules and/or in the arbitration law of several legal systems. They also contain other provisions, like the above ones, which are not consistent with the majority of the other sets of rules.

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[24] Art. 37.

[25] Definitely no more in charge.

[26] Art. 39.

[27] Art. 40.

They might then be described as a set of rules which is more detailed and sophisticated than many arbitration rules, except for those of the major arbitral institutions.

While administered arbitration presents the clear advantage that the proceedings are placed in a well established procedural framework, if a party decides to choose an *ad hoc* arbitration, the Uncitral Arbitration Rules may well be chosen to govern such proceedings.

29.4 THE UNCITRAL MODEL LAW

Origin of the model law

The mechanism which eventually produced the Model Law was commenced by a resolution adopted by the Asian African Legal Consultative Committee (AALCC) during a session held in 1976 in Kuala Lumpur.

That Committee concentrated its attention on the need to ensure that the parties were free to depart from municipal procedural law and to adopt their own or other rules of procedure, provided they did not operate unfairly, and that sovereign immunity should not be available to a governmental agency, which was a party to a commercial transaction, in order to avoid complying with an arbitration clause accepted by it in respect of that transaction.

The Committee proposed that these matters become the object of a protocol to be annexed to the New York Convention (1958).

Uncitral's Secretariat took up this recommendation and promoted a study and discussion of such issues.

The result of this was on the one hand a *consensus* to study such matters, and or on the other hand the conclusion that it was not advisable to proceed by way of a protocol to be annexed to the New York Convention (1958) and that it was preferable to draft a new Convention or a Model Law.

In the end the formula of the Model Law prevailed. In reaching such a conclusion Uncitral was guided by the general view that the New York Convention had worked satisfactorily in the specific field of recognition and enforcement of foreign awards.

Since the New York Convention does not also deal with the conduct of the arbitral proceedings, it was decided that such issues should be regulated separately.

Success of the model law

The number of legal systems which have adopted the Model Law or inspired themselves to it is increasing. As earlier discussed, it includes not only

developing countries but also old legal systems and this stresses its importance as a unifying instrument.[28]

The approach of such legal systems to the Model Law has been addressed by several writers.[29]

Why a model law and not a convention

The Commission has weighed up the advantages and disadvantages of a convention vis-à-vis a model law.

On the one hand a convention, once ratified, becomes the law of the adhering States while a model law is just recommended to the various states.

On the other hand a convention requires the call of a diplomatic conference and then, once finalised, it further needs several years in order that the minimum number of ratifications can be gathered.

The United Nations took the view that a model law was preferable as a faster means for provisions to be adopted by various states. They further felt that it was easier for a state to absorb a model law rather than a convention since the latter gives much less room for flexibility.

The model law has been the result of a substantial amount of *travaux préparatoires*. For this reason Uncitral has been instructed by the resolution of the General Assembly to transmit to the various states:

> the text of the Model Law ... together with the *travaux préparatoires*.

Since it is impossible to deal shortly with the Model Law in full, only its most significant rules will be dealt with here.

Field of application

The Model Law sets various limits to its field of application.

(i) Territorial ambit

First the Model Law applies (i) in a state which has enacted it (ii) only to arbitrations which take place in it.[30]

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[28] K LIONNET, *Should the Procedural Law Applicable to International Arbitration be Denationalised or Unified?* 8 *J. Int.Arb.* 3, 5.

[29] F.B. WEIGAND, *The Uncitral Model Law: New Draft Arbitration Acts in Germany and in Sweden*, 11 *Arb. Int.* 4, 392; A. ROGERS *The Uncitral Model Law: an Australian Perspective*, 6 *Arb. Int.* 4, 348, Editorial, *The United Kingdom and the Uncitral Model Law*, 3 *Arb. Int.* 4, 278; B.S. TABALUJAN, *Singapore's Adoption of the Uncitral Model Law in International Commercial Arbitration*, 12 *J.Int.Arb.* 2, 51; E.A. SCHWARTZ *The ICC Arbitration Rules and the Uncitral Model Law*, 9 *Arb.Int.* 3, 231.

[30] Art. 1.

(ii)International commercial arbitration

Second, the Model Law will apply only to arbitration which[31] are

- international; and
- commercial.

Internationality requirement

The commission has limited the scope of the Model Law to international arbitration on various grounds, such as that international arbitration is the field where diversity produces its worst effects and also because unification of national laws is easier if limited to international arbitration.[32]

Test for internationality

The Model Law has set out five alternative tests to determine internationality:

- the places of business of the various parties are in different States; [33]
- the place of arbitration (determined in or pursuant to the arbitration agreement) is outside the States in which the parties have their places of business provided it is in the territory of the state which has enacted the Model Law;[34]
- a substantial part of the obligation is to be performed in a place different from those where the parties have their place of business;[35]
- the place where a substantial part of the obligation is to be performed, or the place with which the subject matter of the dispute has the closest connection is different from the place of business of the parties,[36] and
- the express agreement of the parties[37] that:

the subject matter of the dispute relates to more than one country.

It has been stressed by commentators that the requirement that the place of arbitration be outside the States, where the parties have their place of business, contains:

some ambiguity,

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31 Art. 1.1.

32 HOLTZMANN and NEUHAUS, *cit.*at 28.

33 Art.1.3 (a).

34 Art.1.3 (b) (i).

35 Art.1.3.(b) (ii).

36 Art.1.3 (b) (ii).

37 Art.1.3 (c).

because it refers to a place of arbitration determined not only in the arbitration agreement but even just 'pursuant to' it. However it is suggested that 'pursuant' should simply mean 'determined by the parties or by a neutral party' as provided for by the arbitration rules incorporated by reference into that agreement.

As to an express agreement of the parties that the dispute relates to more than one country, this may be accepted only if it corresponds to reality since the parties would not be entitled to alter the reality. Therefore a domestic arbitration could not become international just because of a statement made by the parties which has no basis in reality.

(iii) Commercial nature of the dispute

While the term commercial is clear in ordinary language, it may give rise to misunderstandings in those jurisdictions where commercial transactions (i.e. transactions between merchants or in which one party is a merchant) are governed by provisions which are different from those which regulate civil transactions and which are to be found in different statutes or in a different code.

Being conscious of this problem, the Model Law provides a *caveat* in a footnote, which reminds that the term 'commercial' is to be given a wide interpretation.

According to this liberal construction commercial disputes are to be equated to disputes arising out of trade.

(iv) Non- interference with bilateral and multilateral agreements

Eventually the Model Law expressly declares not to affect any agreements in force between the State which enacts it and any other State[38] as well as any other law of this State.[39]

The Model Law was designed in order to give to Member States the opportunity to apply it to international arbitration. Nevertheless the parties may treat as international an arbitration even by expressly agreeing that

> the subject matter of the arbitration agreement relates to more than one country.

Sanders points out[40] that the parties' agreement must be based on some international factors and refers to this option as an

> extension of scope of the Model Law by agreement.

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38 Art. 1.

39 Art 1.5.

40 P. SANDERS, *Quo Vadis Arbitration?*, Kluwer 1999.

In spite of that, States may adopt the Model Law also for domestic arbitration, which gives rise to

> one regime

a decision which is also referred[41] to as an

> extension of scope of the Model Law by law.

Other States, rather than adopting the Model Law also as to domestic arbitration, have preferred to offer to the parties to a domestic arbitration the possibility to

> opt into

the Model Law.

Waiver to right to object

Like the Uncitral Arbitration Rules, the Model Law requires that complaints for breach of it or for breach of requirements under the arbitration agreement should be made without undue delay, lack of it amounting to a waiver.

Waivers arise then from lack of complaint for that breach, except when the provision not-complied with is mandatory.

It has further been discussed whether this provision would also apply to breaches of agreements as to the conduct of the proceedings made by the parties after the arbitration agreement. The solution here seems to be positive, except when that agreement creates a heavier burden on the arbitrators, in which case in order for it to be valid the arbitrators will have to accept it expressly or by conduct.

Exclusion of disputes not-suitable for arbitration

The Model Law further excludes from its ambit those differences which are not suitable for arbitration under the law of the state which has enacted it.

Exclusion of court intervention

The Model law has made a sharp choice as to court intervention in arbitration. It provides:[42]

> In matters governed by this law, no court shall intervene except where so provided in this law.

The authoritative commentators of the Model Law[43] have stressed that this provision is not a sign of 'hostility' towards court intervention, but aims to

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41 P. SANDERS, *Quo Vadis Arbitration?*, Kluwer 1999.

42 Art.5.

provide certainty in order that the parties know exactly when court intervention shall be possible. They have pointed out that the intervention provided for by the Model Law covers many situations such as appointment and challenge of the arbitrators, interlocutory injunctions, failure or impossibility to act, competence of the arbitrators to decide on their jurisdiction, court aid in taking evidence, setting aside of awards and enforcement of awards.

Matters not governed by the model law

Problems may arise in identifying which matters are governed by the Model Law. A reference seems to be made to express or implied regulation. The commentators[44] have reported a helpful, albeit not exhaustive, list provided by the Secretariat and by the Working Group of matters not governed by the Model Law:

> Capacity of parties to conclude the arbitration agreement, the impact of state immunity, the contractual or other relations between the parties and the arbitrators or arbitral institution; fixing of fees and costs and requests for deposits or security; consolidation of arbitral proceedings, competence of the arbitral tribunal to adapt contracts, enforcement by courts of interim measures of protection ordered by the arbitral tribunal; and the period of time for enforcement of the arbitral awards,

and have suggested that one might add to them:

> The role of the courts prior to the selection of the place of arbitration, the liability of the arbitrators for misconduct or error, the competence of a court to execute a request to assist in the taking of evidence and the rules according to which it does so and the question of what disputes are and are not arbitrable.

Written form of arbitration agreement

The Model Law basically restates the general view that the arbitration agreement must be in writing.

However the importance of such a restatement consists in that in this way the national legislations of the States which enact the Model Law become unified as to the requirements for an international arbitration agreement.

The above referred to commentators of the Model Law[45] consequently refer to article 7 as one of the most important provisions of the Model Law. Amongst such useful restatements one may mention that the parties are free to

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[43] HOLTZMANN and NEUHAUS, *cit.*at 216.

[44] HOLTZMANN and NEUHAUS, *cit.* at 21.

[45] HOLTZMANN and NEUHAUS, *cit.* at 258.

enter into an arbitration agreement for present or future disputes, while the latter was in some countries still the object of complaint or reluctance.

Furthermore the parties may refer to arbitration disputes[46] in respect of a defined legal relationship whether contractual or not which includes even non-commercial disputes.

The written form is not just required to provide evidence but for the validity of the agreement. The requirement for written form should then exclude those agreements which are partially oral, such as an oral offer and a written acceptance, or a written offer and an oral acceptance.

The Model Law deals with the two other aspects, which are not a mere restatement.

First it recognises that a written arbitration agreement may arise also from a:

> statement of claim and defence in which the existence of an agreement is alleged by one party and not be denied by another.

Then it deals with arbitration clauses contained in a document incorporated in a written contract by reference:

> 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 that clause part of the contract.* (emphasis added) ...

Incorporation by reference has been and is the subject of a large debate. The Model Law has dealt with it by stating its requirements for such a reference to be valid. To be valid, it must make that clause part of the contract. This sentence has to be interpreted. The working group has stated[47] that this does not mean that

> the contract had to make *explicit reference* to the arbitration clause itself. (emphasis added)

It seems that it is insufficient to refer in a written contract to that other document as a whole. If it were not so, all 'global' references would be valid and the Model Law would not have needed to qualify the reference.

This leads to distinguishing the situations in which the parties already know that document, for example for having used it in the past, or examine it at the very time they make reference to it. In the former, an explicit written statement of that knowledge might not be required. In the other situations, the Model Law – independently from the intention of the working group – might have to be construed as requiring an explicit reference to the arbitration clause.

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[46] Art.7 (1).

[47] HOLTZMANN and NEUHAUS, *cit.* at 269.

Court referral of the parties to arbitration

The Model Law provides[48] that a state court must refer the parties to arbitration if two conditions occur:

- a party makes such a request not later than when submitting its first statement on the substance of the dispute; and
- unless the court finds that the agreement is (1) null and void (2) or inoperative (3) or incapable of being performed.

One should add also the situation where the subject matter is not capable of being arbitrated, a requirement which is not set out by the Model Law but which will generally be covered by domestic law.

The Model Law further provides[49] that even if court proceedings have been instituted, arbitral proceedings may commence or, if already commenced, may continue and:

> an award may be made while the issue is pending before the Court.

Number of the arbitrators

Whenever the parties have not determined it otherwise, the Model Law provides for three arbitrators.

The criticism already made[50] of this solution is here confirmed.

Grounds for challenge of arbitrators

The Model Law sets out[51] two grounds for the challenge of an arbitrator:

(1) if circumstances exist which give rise to justifiable doubts as to his impartiality or independence;
(2) or if he does not possess the qualifications agreed upon by the parties.

The lack of impartiality or of independence covers various aspects such as: having advised a party as to the matter in dispute; having a personal or business relationship with a party; being a partner of or Counsel for one of parties; having a financial interest; or having shown bias or partial behaviour.

In order that an arbitrator be challenged it is not necessary that impartiality or independence be proved but that that there be *justifiable doubts* as to it.

It is submitted that the Model Law has handled these grounds in a clear and comprehensive way.

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[48] Art.8.1.

[49] Art.8.2.

[50] See *supra* Chapter 12.

[51] Article 12(1).

The arbitrator's duty to disclose such circumstances, when approached in connection with his possible appointment as arbitrator, is in line with best practice and the arbitration rules.

The possibility that a party challenges the arbitrator, whom he has appointed or to whose appointment he has contributed, in the event of his becoming aware of such grounds after his appointment is a helpful addition in line here too with best practice.

As to the lack of qualifications, reference is made to those situations where the parties had set out that the arbitrator had for example to be (i) an attorney-at-law (ii) or an engineer (iii) an accountant (iv) a law professor or (v) was required to have a nationality different from that of the parties.

Arbitrator's failure or inability to perform

Here too the Model Law is in line with the most advanced arbitration rules. While in such situations the proceedings frequently drag without a remedy, the Model Law provides for three grounds to terminate the appointment of an arbitrator: (1) *de facto* inability to perform his task; (2) *de jure* inability to do so; (3) his failure to act without undue delay.

De facto inability encompasses the many situations in which the arbitrator is unable to proceed because of lack of time to devote to the proceedings, lack of diligence, because he cannot find a solution to an issue, or because of health problems.

De jure inability relates to the arbitrator losing the capability to act.

The third ground, failure to act without undue delay, then plays a residual role.

In this respect it should be noted that the initiative may come from the arbitrator(who may resign) or that the parties may agree to terminate him. In such situations there will generally be no controversy.

The request to terminate the appointment of an arbitrator may only be made by one of the parties. If so the decision will belong to the body which has been designated for such a task, if any, or in its absence to the state court.

If an arbitral institution has been appointed to supervise the proceedings but has not been expressly or impliedly entrusted with the authority to decide on the termination of an arbitrator, that body may at least raise the issue. If on the other hand the arbitral institution has been granted such an authority, the Model Law seems to exclude the possibility of a state court reviewing its decision.

It is further to be taken into account that the task of the state court is not to decide whether the arbitration is proceeding well or not, but whether the proceedings duly progress or are stuck.

The appointment of a substitute arbitrator is provided for by article 15.

Competence of the arbitral tribunal to rule on its jurisdiction

Article 16 of the Model Law commences by restating the generally accepted principle that (i) arbitrators may decide on their jurisdiction including the existence or the validity of the arbitration agreement and (ii) that to this effect:

> an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.

The Model Law further reassures a party, faced with the appointment of an arbitrator or contributing to it, that by doing so he does not become barred from later raising the plea of lack of jurisdiction of that tribunal.

Time limits are set out by the Model Law for raising such a plea. As to lack of jurisdiction they are the time the Statement of Defence is filed while, as to excess of arbitrators' authority, they are the time the matter is raised during the proceedings,. However in either case the arbitrators are entitled to admit a later plea, if in their view the delay is justified.

The Model Law than restates that the arbitrator may decide on his jurisdiction:

> either as a preliminary question or in an award on the merits.

If the arbitrator decides on his jurisdiction as a preliminary question, any party may request the competent state court to decide the matter within thirty days after receipt of notice of such ruling.

The Model Law further provides that such a:

> decision shall be subject to no appeal.

As pointed out by the Model Law commentators[52] the reason for this provision is that the arbitrators' decision is subject not only to immediate court review under this provision, but also to subsequent court review at two stages: (i) in the setting aside procedure and (ii) in recognition and enforcement proceedings.

Interim measures

The Model Law deals with the granting of interim measures in two related but separate articles.

First, by stating that recourse to state courts on such a ground before or during the proceedings is not incompatible with an arbitration agreement, it recognises[53] the state courts 'authority' to issue such measures. Secondly it

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[52] HOLTZMANN and NEUHAUS *cit* at 479.

[53] Art. 9.

recognises[54] the inherent power of the arbitral tribunal to order interim measures:

> unless otherwise agreed by the parties.

The Model Law refers in this respect to:

> interim measures of protection.

Measures for preservation of goods have not been limited in the same way as in the Uncitral Arbitration Rules. Protection may be widely construed here and it is submitted it should include interlocutory injunctions. During the preparatory stages of the Model Law it was proposed that the enforcement of such injunctions would be obtained from the state court on application by the arbitral tribunal. In the end it was preferred[55] to leave this to the procedural law of the relevant state.

Equal treatment of the parties

The Model Law sets down in a short provision[56] the fundamental rule of due process which is summarised as each party having:

> a full opportunity of presenting his case.

Determination of the rules of procedure

The Model Law restates [57] the general principles that (i) the parties are free to determine to procedure to be followed by the arbitrators and that (ii) in the absence of the parties' choice the tribunal is free:

> to conduct the arbitration in such manner as it considers appropriate.

Even if, as earlier discussed, in many jurisdictions this will just be a restatement, this provision plays an important role since it unifies the domestic legislation of the adhering States. For this reason Uncitral's secretariat has defined it as the:

> Magna Carta of arbitral procedure.

This provision further states that the tribunal's authority includes:

> the power to determine the admissibility, relevance, materiality and weight of any evidence.

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54 Art 17.

55 HOLTZMANN and NEUHAUS *cit.* at 531.

56 Art.18.

57 Art 19.

Out of such list, admissibility is the item which is particularly relevant, since granting such power to the arbitrators seems to prevail on the possible statutory provisions of domestic law on admissibility, which sometimes will treat this issue as a matter of substantive law. The Commission decided, as the above commentators report, that the discretion accorded to the arbitrators by art. 19 (2) (note: i.e. in the absence of a choice by the parties) should not be affected by the choice of law applicable to the substance of the dispute

The above commentators[58] point out that during the preparatory stages it was proposed that the parties may only agree on procedural issues before the arbitrator is appointed, in order to avoid the arbitrator, after accepting the appointment, being faced with material changes to the rules to be followed. However this suggestion was not followed since the Working Group found[59] that the freedom of the parties to agree on procedural matters:

> should be a continuing one.

Leaving the arbitrators to choose the rules of procedure might at first sight seem sound. However the importance of allowing the parties to choose the rules themselves has been earlier stressed.[60]

The place of arbitration

The Model Law is in this respect[61] basically a restatement of the well accepted principle that the parties are free to choose the place of arbitration and that in the absence of such a choice, the tribunal shall choose it.

This rule plays an important role in unifying the domestic legislation of the adhering States.

The Model Law sets out two directives. The arbitral tribunal must have regard (1) to the circumstances of the case and (2) to the convenience of the parties. The latter requirement aims to avoid a situation where the choice of a place is inconvenient for one of the parties and severely affects the possibility of that party to present its case, for example due to lack or insufficiency of foreign currency allocations.

The former includes a requirement that the Model Law be enacted and the New York Convention be ratified by the country considered as venue of the proceedings, as well as the role of state courts in said State in aid of arbitration and the possibility that the award be recognised and enforced in the other concerned states.

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58 HOLTZMANN and NEUHAUS *cit.* at 565.

59 HOLTZMANN and NEUHAUS *cit.* at 566.

60 See *supra* chapter 12.

61 Art.20.

The Model Law further provides[62] that in spite of the choice of the place of arbitration, the arbitral tribunal may meet elsewhere (i) for consultation amongst its members, (ii) to hear witnesses, experts and the parties or for inspecting goods, other properties or documents. However it is submitted that the use of such discretion shall not transform – it is submitted – the place of arbitration into a mere facade

Statement of claim and of defence

After restating the duty of each party to the proceedings to state at the beginning (i) the facts supporting his claim or defence (ii) the points at issue and (iii) the remedy sought, or the opposition to the remedy sought by the opposite party and (iv) to produce the relevant documents, the Model Law deals[63] with the delicate issue of amendments or supplements to the claim or defence during the proceedings.

It is difficult here to strike the right balance. If on the one hand no amendments are allowed, the proceedings will be too strict. If on the other hand amendments are allowed at any time, the proceedings may become disorderly.

The Model Law has set out the rule that either party may amend its claim or defence and has a limit to this right:[64]

> unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it.

Apart from amendments which would result in the dispute going beyond the scope of the arbitration agreement, the only ground taken into account by the Model Law in order that an amendment be refused is delay in making it. But any amendment by definition has to be made after the statement of claim or defence and may cause some delay. It is then submitted that no delay may entitle the arbitral tribunal to refuse an amendment apart from a delay which is so serious as to disrupt the proceedings.

Holding of hearings

The Model Law rules on the holding of hearings provide:

- that the parties may exclude oral hearings;
- if not the tribunal shall have discretion in deciding whether to hold or not oral hearings for the presentation of evidence or for argument

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62 Art. 20.

63 Art.23 (1).

64 Art.23 (2).

However, unless the oral hearings have been excluded by the agreement of the parties, the tribunal shall hold them if so requested by a party a formula which stresses the *right to a hearing*.

Default of a party

The Model Law[65] while dealing with the right of a party to default, has set out three protections for it. In order that default be declared and proceedings continue, that party must (i) have received adequate advance notice (ii) must have failed to participate without sufficient cause; furthermore (3) the arbitral tribunal will not treat default as:

> an admission of the claimant's allegations.

In order to protect the Defendant further the Model Law provides that if the Claimant fails to communicate his Statement of Claim to Defendant, who is in default, the tribunal shall terminate the proceedings.

Experts appointed by the arbitral tribunal

The Model Law entitles[66] the arbitral tribunal to appoint experts unless the parties have excluded it.

That expert, after delivering his written or oral report, shall participate to a hearing at which the parties shall have the opportunity (i) to put questions to him and (ii) to present expert witnesses.

The legislative history of the Model Law shows the issue was discussed whether the exclusion of experts, or of their duty to participate to a hearing, had to be agreed before the appointment of the arbitrator or could be decided after it. This limit was in the end not included in the relevant provision. Nevertheless an arbitrator, if deprived subsequent to his appointment of the right to appoint an expert, might have just cause to resign.

Court Assistance in taking evidence

The legislative history of the Model Law records several concerns in respect of state court assistance in the taking of evidence.[67] First the need for integration with court proceedings. The secretariat recommended that rules be set out dealing with (i) the contents of this request, (ii) the situations in which the state court could be entitled to refuse the request and (iii) whether the court should take the evidence or order that it be presented to the arbitral tribunal. However these proposals were not followed by the Commission.

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[65] Art.25.

[66] Art.26.

[67] Art.27.

Secondly, the possibility of abuses of the court process was taken into account. In this respect it was discussed whether only the arbitral tribunal or also the parties should be entitled to request assistance. In the end both alternatives where kept.

Thirdly it was discussed whether even international assistance could be requested. The negative approach prevailed leaving this issue to international conventions.

Applicable substantive rules

The Model Law deals at length with the applicable substantive rules since as stated in the Commission report:[68]

> The Model Law would be incomplete without a provision on rules applicable to the substance of a dispute, particularly in view of the fact that the Model Law deals with international commercial arbitration, where a lack of rules on that issue would give rise to uncertainty.

First the Model Law states that

> 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 also to its conflict of laws rules.

Second the Model Law recognises[69] that priority is due to the choice by the parties.

The parties are then free to choose also rules which are unconnected with the contract or the dispute. The term 'rules of law' is often construed as being wider than the statutory provisions of a given legal system. This term seems then to refer also to a uniform law, or to the parts of two or more legal systems which is common to all of them, as well as to applying the provisions of a given system for a part of the contract and of another legal system for another part of it, a method referred to as *dépecage. Lex mercatoria* too seems to be a possible object of a valid choice. Eventually the Model Law does not object to the parties authorising the arbitrators to decide *ex aequo et bono* or as *amiables compositeurs*. The use of these two terms is explained by the legislative history of the Model Law as being due to the various political systems referring to the same concept by using either one or the other of them.

The above referred to learned commentators rightly point out[70] that:

> The Working Group decided at an early stage that the term did not extend to 'general legal principles' or law developed in arbitration

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68 HOLZMANN and NEUHAUS *cit* at 765.

69 Art.28.

70 HOLTZMANN and NEUHAUS *cit* at 768.

> awards. The rationale for placing any limit on the parties' choice is probably that the rules chosen should be reasonably ascertainable by the arbitral tribunal.

In the absence of a choice by the parties, it is the arbitral tribunal's duty to choose itself the substantive applicable rules:

> failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

The legislative history of article 28 prompted a debate on whether the arbitrators should be empowered to choose directly the rules of law or had to apply the conflicts rules. The Model Law in the end adopted the latter view, the proponents of which had emphasised that it would have provided greater predictability and certainty.

The arbitral tribunal is then free to choose the conflict rules which it deems applicable. This provision is not necessarily satisfactory because it grants to the arbitral tribunal a great latitude.

Decision making

While the requirement for a majority of the arbitrators in order to pass a decision[71] is a standard provision, it may be worth stressing that this choice has excluded the alternatives to grant to the presiding arbitrator a casting vote or to act as the sole arbitrator, when no majority is formed.

The legislative history of the Model Law shows, even if this is not expressly stated, that all the arbitrators must be given the opportunity to participate in the deliberation. Accordingly it does not state that the arbitrators must be present. This should be construed as allowing discussions to take place by telephone, mail, video conference and in other ways involving electronics and telecommunications.

Award on agreed terms

The recording of a settlement by the arbitrators[72] in the form of an arbitral award on agreed terms would not draw much attention, if it did not involve two interesting questions.

First, whether the request for such a recording should come from both parties or may be made by only one of them. In spite of the argument raised during the discussions that after the settlement only the party entitled to collect under it would be eager to apply for this, the Commission has kept the

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[71] Art.29.

[72] Art.30.

requirement that the ruling be requested 'by the parties'. However in the Commission's report[73] it is admitted that:

> As long as the parties intend to have an award on agreed terms, the actual request could as a mechanical matter come only from one party acting on behalf of the other one.

The second question is whether the arbitral tribunal may refuse to proceed to such a recording. Ultimately the Commission adopted the formula

> if ... not objected to by the arbitral tribunal.

This solution might be a surprising one if no regard should be had to the point raised by the delegate of the United States[74] that it would be unwise to force the arbitrators to concur in a settlement that might:

> violate antitrust laws or income tax laws or be in furtherance of a conspiracy between the parties.

It is suggested that this comment at the same time sets out the limit within which arbitrators' objections are allowed.

Contents of the award

The Model Law accepts[75] that the award be signed only by the majority of the arbitrators:

> provided the reason for any omitted signature is stated.

The deposit of the award with any court or governmental agency is not required.

The issue whether dissenting opinions are allowed was discussed but in the end not dealt with.

The debate in the Commission whether reasons should be given has produced the result that, except if the parties have otherwise agreed, the giving of reasons is the rule.

The mention of the date and place of arbitration gave rise to a long debate, in view of the fact that the deliberations may take place in various ways, even by telephone and correspondence.

While, if the award does not state otherwise, one might presume that the award has been made at the venue of the proceedings, the presumption may not stand when there is evidence that the award was made elsewhere.

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[73] HOLTZMANN and NEUHAUS *cit.* at 823.

[74] HOLTZMANN and NEUHAUS *cit.* at 824.

[75] Art.31.

Deliberations have to be distinguished to this effect from the making, i.e. the signing of the award. The latter is a fact and no unrebuttable presumption may prevail on reality. Furthermore, in view of the importance of the place where the award is made, in order to identify the statutory provisions applying on the one hand to proceedings aiming to set aside the award and on the other hand to its enforcement, it is submitted that the place of arbitration has to be construed as the place where the parties had intended that the award be signed.

The legislative history of the Model Law witnessed a long debate as to when an award becomes binding. Several alternatives were considered, such as (i) the date of the award, (ii) the date of receipt of the award by the other party or (iii) the date of expiry of the time period to apply for its setting aside. In the end the Commission made no decision on this issue.

Termination of the arbitral proceedings

In view of the importance of that date, for example for limitation or in order to resort to another forum, the Model Law sets out[76] the various situations where the arbitral proceedings are terminated.

Some situations are fairly uncontroversial. That is the case of termination by the issue of the final award or by an order of the arbitral tribunal. Amongst the grounds for such an order, the Model Law lists the agreement of the parties as well as withdrawal by the Claimant of his claim, unless the Respondent objects and the arbitrators recognise a legitimate interest of Respondent to do so.

A more modern ground for termination of the proceedings is the arbitrators' finding that:

> the continuation of the proceedings has for any other reason become unnecessary or impossible.

This list includes other situations such as the lack of communication by Claimant of the Statement of Claim or the settlement of the dispute.

Correction, interpretation of awards and additional awards

The Model Law provides[77] three situations in which the award may suffer changes after it is made: (i) correction of some errors, (ii) interpretation of the award, (iii) the issue of an additional award.

Except for corrections of errors, which may be made by the arbitrator of his own motion, action aiming to interpretation or additional awards may be taken by the arbitrators only upon the request of a party.

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[76] Art.32.

[77] Art. 33.

A short time period, (30 days) is allowed to the parties for filing such requests. However the arbitral tribunal may expand such a time period[78] The Secretariat has listed[79] situations in which that time period may be extended:

(i) to permit consultations amongst the arbitrators;

(ii) to hold additional hearings or otherwise to take further evidence in cases in which an additional award is to be rendered and

(iii) to permit the non requesting party to respond to a request for a modification to an award.

Corrections include clerical, typographical errors or any errors of similar nature.

Interpretation of an award is subject to the parties having granted such an authority to the arbitrators and must concern a specific point or part of the award.

The right to obtain an interpretation of the award was the result of a large debate, during which the concern was expressed, (i) that interpretation would undermine the finality of the award, (ii) that interpretation should be limited to the reasons and not to the findings[80] and (iii) that one should allow clarifications or explanations but not rectification. The wording which has been adopted[81] by the Model Law did not include the above suggestions.

As to an additional award, the final text of the Model Law rightly omits the requirement – in order to issue an additional award – that no further hearing should be required. In fact if the arbitrators have omitted to decide on an issue, there is no reason why that claim should not be duly investigated by them.

Setting aside of the award

The main issue which has been debated as to the setting aside of awards was whether its grounds should be those provided for by the New York Convention 1958. The response was affirmative.

This has avoided conflicts between the Model Law and the New York Convention which would have been grossly detrimental to international arbitration. The solution adopted by the Model Law aims to incorporate the variety of possible attacks against the award which characterise national legislations.

The Commission examined various grounds for setting aside the award, additional to those of the New York Convention, which where proposed during the debate such as (i) omission of the decision on a point in dispute, (ii) admitted mistakes which do not fall into the class of clerical errors, (iii)

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78 Art. 33.4.

79 HOLTZMANN and NEUHAUS, *cit.* at 889.

80 In French *'le dispositif'*; in Italian *'il dispositivo'*.

81 Art.33(1)(b).

conflicting decisions, (iv) the discovery of new facts and (v) improper procurement of the award.

None of these grounds was in the end accepted by the Commission. The Commission restated its intention not to depart from the New York Convention's grounds. The view expressed by the Working Group is reported by the earlier referred to commentators[82] that this:

> solution would facilitate international commercial arbitration by enhancing predictability and expeditiousness and would go a long way towards establishing a harmonised system of limited recourse against awards and their enforcement. It was [further]stated in support that the reasons set forth in article V of the New York Convention provided sufficient safeguards and that some of the grounds suggested as additions to the list were likely to fall under the public policy reason.

Likewise the proposal to deal with manifest injustice was not accepted, also in view of the fact that the civil law notion of public policy would be wider than the common law one, in as much as it includes procedural injustice.

The situations where the New York Convention's grounds have not been followed are consequently few and not major. The main ones of them will be dealt with hereafter.

At sub-paragraph 2(a)(iv) the Model Law has not followed the New York Convention which according to the Secretariat gives at article V(1)(d):

> absolute priority to the agreement of the parties irrespective of whether such agreement is in conflict with the mandatory provision of the applicable procedural law.

The Model Law has provided that non compliance with the agreement of the parties is not a ground for setting aside the award if such agreement:

> was in conflict with a provision of this law from which the parties cannot derogate.

At sub-paragraph 2 (a)(i) the Model Law has removed the reference made by the New York Convention to the law applicable to the incapacity of the parties, since the Commission found that such a reference was incomplete and misleading.

Section 2(b) of article 34 resisted criticism concerning reference to the 'law of this State' as to suitability for arbitration. The Commission held that deletion of the reference would have been to go against the need for predictability and certainty.

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[82] HOLTZMANN and NEUHAUS, *cit.* at 912.

The further proposal to replace public policy with 'international public policy' was rejected on the grounds that there was no consensus on the concept of international public policy and that the term 'lacked precision'.

As to sub paragraph 3 the issue was raised that one needs to provide for the running of the time period for the setting aside of awards when- as it is the case in commodity arbitration – the award is subject to review by an appellate arbitral tribunal. The Working Group agreed that article 34 should not be construed as excluding such appeals, but in the end no language was introduced to this effect.

Paragraph 4 introduced the important new tool allowing that the award, which has been challenged, be corrected. The state courts may, on application, stay the setting aside proceedings:

> in order to give to the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

The proposal was made during the debate to provide that the Court which hears the setting aside proceedings give instructions to the arbitral tribunal as to the matters to be considered or as to the composition of the tribunal but the proposal was not accepted in order to avoid possible interference by State Courts on the Arbitral Tribunal's activity.

The attempt was also made, during the debate, to provide that the award could be set-aside only for material procedural defects but, although the positive aspects of this were recognised, no amendment was made to the previous wording. Nevertheless the Commission's report states, as pointed out by the above referred to commentators,[83] that:

> a setting aside court has [the] discretion not to set aside the award when such grounds (note: a non material error) are present.

Recognition and enforcement of awards

In this respect the major debate turned around the need or not to deal with recognition and enforcement in view of the existence of the New York Convention. The main reason in favour of regulating this matter, in spite of the existence of the New York Convention, was that by having one set of provisions dealing both with foreign awards and with domestic awards since issued – even in so-called international arbitrations – in that state and under its own law, one would harmonise arbitration law. Furthermore this would serve also a practical purpose since some awards might not be subject to the New York Convention.

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[83] HOLTZMANN and NEUHAUS, *cit.* at 922.

Reciprocity – in line with the New York Convention – was proposed during the debates but in the end was not dealt with.

Likewise the Secretariat's proposal to provide that neither a deposit nor registration was required even for such 'domestic awards' was not accepted.

The Commission also rejected proposals by the Secretariat to state for the sake of clarity that the award becomes binding 'between the parties' and to state the time when the award does become binding. The Commission did not reach a consensus as to the dates proposed which – as the above commentators report – were:

(i) the date that the award was made
(ii) the date that the award was received or
(iii)the date when the time period for applying for its setting aside had expired without attacks.

The final text of the Model Law has kept the provision that the enforcement '*may* be refused' although the wording was proposed that:

> it shall be refused.

The reason for the words chosen is to allow state courts not to refuse enforcement in the presence of very small breaches.

Other matters

Holtzmann and Neuhaus[84] have not only provided an extremely useful tool for the study of the Model Law, thanks to their deep analysis of all the debates reports and preparatory stages, but have also analysed matters which have not been addressed in the final text of the Model Law.

Amongst them, a reference should be made to:

- provisions granting the authority to (1) supplement contracts or (2) to adapt the contract, if circumstances change, a power which had been contemplated not as a part of the powers granted to the arbitrators but as additional powers:
- provisions for conciliation of the dispute as a method different from arbitration;
- provisions regulating the costs and fees of the arbitration;
- liability of the arbitrators;
- a distinction, amongst Model Law provisions, drawn between those to be treated as mandatory and the other provisions from which the parties could derogate;
- the issue of representation of the parties before the arbitrators;

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[84] HOLTZMANN and NEUHAUS, *cit.* at 1117.

- the provision of the time period for the enforcement of the award, a matter which has been the object of a study which had been completed with the proposal of the following alternative:
- either to grant a short time period, which could be extended if the delay was not due to the applicant;
- or a longer time period, which in this case would not be extendable.

29.5 THE UNCITRAL GUIDELINES

Uncitral's last contribution to arbitration consists of its guidelines for the conduct of arbitral proceedings. They have been published[85] under the heading

> Uncitral Notes on Organising Arbitral Proceedings.

As described in Uncitral's introduction, their purpose is:

> To assist practitioners by listing and briefly describing questions on which appropriately timed decisions on organising arbitration proceedings may be useful.

When first presented the Notes were the subject of severe criticism. One must admit that they put the organisation of the arbitral proceedings into a *procedural tunnel.*

However even taking into account authoritative critical views these guidelines are useful in particular to those who are not yet fully familiar with arbitral proceedings. Particularly in ad hoc proceedings all these people need some help and maybe even, so to say, a procedural tunnel.

The guidelines do not pretend to be binding and declare this openly:

> The arbitral tribunal remains free to use the Notes as it sees fit and is not required to give reasons for disregarding them.

They amount to a checklist which may be a useful reminder even to those who are familiar with arbitration.

It is true that, because of them, the Arbitral Tribunal's Order for Directions and the conduct of the proceedings may become more standardised and one shall not *prima facie* be able to recognise from the conduct of the proceedings, whether the arbitrator has much experience or is a mere beginner. However they allow proceedings to be conducted in a more regular way.

It is submitted that such a service takes priority on giving out precious know-how.

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[85] The Notes were finalised in New York on May 28-June 14, 1996, during the twenty-ninth session of the United Nations Commission on International Trade.

Arbitration rules

The guidelines start by reminding arbitrators and Counsel that, if they have not yet chosen a set of arbitration rules, they may still do so.

Language of the proceedings

Arbitrators and the parties are reminded that, besides the very choice of the language of the proceedings, the problems deriving from it such as translation of documents, simultaneous translation of oral presentation and of oral evidence, and their cost should be addressed.

Place of arbitration

The Guidelines draw the practitioners' attention on the criteria to be taken into account in choosing the venue of the proceedings. The issue whether meetings may be held elsewhere is also dealt with.

Administrative services

Arbitrators and Counsel for the parties are also reminded of the administrative services which may be required.

Deposits in respect of costs

Deposits which may be requested from the parties and their management by the arbitral tribunal are also dealt with by the Notes.

Confidentiality of the proceedings

The parties are reminded that it is possible to enter into a confidentiality agreement which may cover many aspects.

Routing of written communications

Alternative ways of dealing with the routing of communications between the arbitrators and the parties are dealt with here.

Telefax and other electronic means for sending documents

Various means for sending documents in paper based form or in an electronic form or cumulatively in both of them are also here reviewed.

Arrangements for the exchange of written submissions

Scheduling of written submissions and their exchange, whether simultaneous or consecutive, are also dealt with.

Defining points at issue

The possibility of defining the points at issue, the order in which they shall be dealt with, as well as the relief or remedy which is sought are here discussed.

Effects of settlement negotiations on the proceedings

The possibility of stating the effects of possible settlement negotiations on the schedule of the proceedings is also addressed by the Guidelines.

Documentary evidence

The Guidelines review also various aspects of documentary evidence such as time limits, the consequences of late submission, means of dealing with voluminous evidence and the possibility of the parties jointly submitting a bundle of agreed documents.

Other physical evidence

Reference is made also to physical evidence other than documents, such as inspection of goods or of a site or of a building ,or of accounts and even watching a video recording or observing the functioning of a machine and to the arrangements which may be made in this respect.

Witnesses

The Guidelines review the notice which may be required for each witness, the information to be provided, the possible use of witness statements, the interview of witnesses prior to their appearance, the order in which they will be heard, the way the witnesses will be heard, whether they will be asked to depose or not under oath, whether party representatives too may be heard and whether witnesses may remain in the hearing room while other witnesses are deposing.

Experts and expert witnesses

The possibility of the arbitrators appointing their expert, his terms of reference, and the possibility of the parties examining the expert and or appoint expert witnesses is also addressed in the Guidelines.

Hearings

The Guidelines deal with the basic decision whether a hearing is to be held or not, whether there shall be one period of hearings or separate hearings not close to each other, the setting of dates for the hearings and whether limits should be given to the parties for oral argument and for examining witnesses. They cover the order in which the parties shall present their evidence and their

oral argument, the length of the hearings, the arrangements for a record of the hearings and the possibility for the parties to file notes summarising their arguments.

Multiparty arbitration

A reference is made by the Guidelines also to aspects of multi-party arbitration

Filing or delivering the award

Finally the Guidelines draw the attention of arbitrators and Counsel to the possible requirements of the applicable law on the delivering and filing of the award.

CHAPTER 30

FILING AND NOTIFICATION OF THE AWARD

SUMMARY: 30.1 Filing with the Arbitral Institution and Delivery of the Award – 30.2 Prohibition to the Arbitrators to Deliver Directly to the Parties – 30.3 Filing of the Award with a State Court or Governmental Agency – 30.4 Effects of Refusing to File

The award is the final stage of arbitral proceedings but it may also become the starting point of a new series of proceedings aiming to obtain its enforcement or to avoid it. All these proceedings are dealt with in the last part of this study.

A distinction must first be made between the effects of the award in its state of origin and its effects in other states. It must also be pointed out that, while the award necessarily produces effects in the former, it does not follow that it will produce effects in other States.

30.1 FILING WITH THE ARBITRAL INSTITUTION AND DELIVERY OF THE AWARD

The first formality required by arbitration rules for administered arbitration is the delivery of the award to the parties.

The rules will provide whether the delivery is to be made by the arbitrators or by the arbitral institution. Frequently the arbitrators will have to deliver the award to the arbitral institution and the latter will notify the parties.

Delivery will generally be made by sending the award by mail; frequently registered mail will be required. The arbitration rules may also provide for service by hand or by special carrier.

Generally service by a state process server is not required but in some jurisdictions such a service may be mandatory.

The date of delivery is of great importance since, depending on the particular legal system, the loser may be entitled to attack the award within a given time limit running either from the delivery or from the filing. Before the attack or in the absence of an attack, or if it is unsuccessful, or sometimes during the attack, the winning party is entitled to enforce the award.

In ad hoc arbitration provision for the filing with an arbitral institution will generally not be made. However occasionally the parties may provide for it, in order that the date of the award be proved in a particular way. If the arbitral institution or other body designated for this deposit accepts receipt of it, then voluntary filing shall take place.

International conventions

The Washington Convention (1965) provides:[1]

> (1) The Secretary General shall promptly dispatch certified copies of the award to the parties. The award shall be deemed to have been rendered on the date on which the certified copies were dispatched.[1]

Likewise under the Uncitral Model Law (1985):[2]

> (4) After the award is made, a copy signed by the arbitrators in accordance with paragraph 1) of this art. shall be delivered to each party.

Arbitration rules

The ICC Rules of Conciliation and Arbitration state:

> 1 Once an award has been made, the Secretariat shall notify to the parties the text signed by the Arbitral Tribunal; provided always that the costs of the arbitration have been fully paid to the ICC by the parties or by one of them.
>
> 2 Additional copies certified true by the Secretary General of the Court shall be made available on request and at any time to the parties but to no one else.
>
> 3 By virtue of the notification made in accordance with paragraph 1 of this article, the parties waive any other form of notification or deposit on the part of the arbitrator.[3]
>
> 4 An original of each award made in accordance with the present Rules shall be deposited with the Secretariat of the Court.
>
> 5 The Arbitral Tribunal and the Secretariat of the Court shall assist a party in complying with whatever further formalities may be necessary.[4]

The Arbitration Rules of the European Court of Arbitration deal with the matter as follows:[5]

> 6. The Secretariat of the Court, or of the relevant National Executive Committee, shall make a record of the filing of the award, informing the parties of such filing and will ensure that the parties have made all due payments and, in default, will require all due payments to be made.

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1 Art. 49, Washington Convention (1965) *cit.*

2 Art. 31, Uncitral Model Law (1985) *cit.*

3 Art. 28, ICC Rules of Conciliation and Arbitration (1998), *cit.*

4 Art. 28, ICC Rules of Conciliation and Arbitration (1998), *cit.*

5 Art. 23, Arbitration Rules of the European Court of Arbitration (1997).

> 7. The parties accept that actual delivery of the award by the Secretariat will only be made after full payment of the fees, administrative costs and other payments requested by the Court.
>
> ...
>
> 9. Upon full payment, the Secretariat of the Court, or the Secretariat of the relevant National Executive Committee, shall send an original of the award to each party at the same time by registered delivery with return receipt.

The Rules of the London Court of International Arbitration provide:[6]

> The sole arbitrator or chairman shall be responsible for delivering the award to the LCIA Court, which shall transmit certified copies to the parties provided that the costs of the arbitration have been paid to the LCIA in accordance with Article 28.

The Uncitral Arbitration Rules (1976) state:[7]

> (6) Copies of the award signed by the arbitrators shall be communicated to the parties by the arbitral tribunal.
>
> (7) If the arbitration law of the country where the award is made requires that the award be filed or registered by the arbitral tribunal, the tribunal shall comply with this requirement within the period of time required by law.

Under the Arbitration Rules of the German Institute of Arbitration[8] copies of the award shall be communicated to the parties and:

> The award shall be deposited together with evidence of service at the registry of the competent court. ...

Under the International Rules of the Milan Chamber of National and International Arbitration:[9]

> 1. The arbitrator shall file the award with the Secretariat of the Chamber of Arbitration within six months of the first hearing.
>
> The Chamber of Arbitration shall forward the award to each party by sending the original award by registered mail with advice of receipt or by any other means allowing for a proof that the notice has been received.

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6 Art. 26.5, Rules of the London Court of International Arbitration, (1998) *cit.*

7 Art. 32, Uncitral Arbitration Rules *cit.*

8 Art. 24, Arbitration Rules of the German Institution of Arbitration (1992 edition).

9 Art. 21, International Arbitration Rules of the National and International Chamber of Arbitration of Milan, *cit.*

Under the Rules of the Euro-Arab Chambers of Commerce:[10]

> The arbitral award, bearing the signature of the arbitrator(s), shall be filed with the Secretariat/Registry, in at least as many copies as are required by the law of the country where the award is to be enforced.

The rules of the Italian Society for Arbitration provide as to *arbitrato rituale* (i.e. as to proceedings which are governed by arbitration law):[11]

> Within the mandatory time limit of 10 days after the last signature has been put to the award, the original award must be handed over by the arbitrator to each party against a receipt for it or transmitted by registered mail with a return receipt; the receipt shall be sent to the Secretariat as soon as possible. The arbitrator shall, without delay, file an original of the award in the Secretariat.

Under the Rules of the Inter-American Commercial Arbitration Commission:[12]

> (6) Copies of the award signed by the arbitrators shall be communicated to the parties by the arbitral tribunal.

The Commercial Arbitration Rules of the American Arbitration Association deal with this issue as follows:[13]

> Parties shall accept as legal delivery of the award the placing of the award or a true copy thereof in the mail addressed to a party or its representative at the last known address, personal service of the award, or the filing of the award in any other manner that is permitted by law.

And its International Arbitration Rules state:[14]

> ... Copies of the award shall be communicated to the parties by the Administrator.

Under the 1998 arbitration rules of the German Institution of Arbitration (D.I.S.):[15]

> 1. The arbitral tribunal shall provide a sufficient number of originals of the arbitral award. Without undue delay, the DIS Secretariat shall be supplied with one original of the award to keep on file as well as a sufficient number for delivery to the parties.

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[10] Art. 25, Rules of Conciliation Arbitration and Expertise of the Euro-Arab Chambers of Commerce, *cit.*

[11] Art. 33, Arbitration Rules of the Italian Society for Arbitration (1994), *cit.* 453.

[12] Art. 32, Rules of the Inter American Commercial Commission, *cit.*

[13] Art. 45, Commercial Arbitration Rules of the American Arbitration Association, *cit.*

[14] Art. 27.

[15] Art. 36.

> 2. The DIS Secretariat delivers one original of the award to each party.
>
> 3. Delivery of the award to the parties may be withheld until the costs of the arbitral proceedings have been paid in full to the arbitral tribunal and to the DIS.

According to the Rules of the Euro-Arab Chamber of Commerce:[16]

> ... The Secretariat/Registry alone [shall be] empowered to notify the text of the award to the parties after the arbitration costs and fees have been settled in full by either or both of the parties ...

30.2 Prohibition to the Arbitrators to Deliver Directly to the Parties

Some arbitration rules forbid the arbitrators to deliver the award to the parties directly. That is the case of the arbitration rules of the European Court of Arbitration, which provide:[17]

> 6. The Secretariat of the Court or of the relevant National Executive Committee shall make a record of the filing of the award, informing the parties of such filing and will ensure that the parties have made all due payments and, in default, will require all due payments to be made.
>
> ....
>
> 10. If the arbitrator or one of the arbitrators directly delivers the award to one party or to the parties, he will forfeit the right to payment of his fees from the Court and will be liable to the Court and to the other arbitrators respectively for payment of the administrative costs and of their fees not already fully paid by one or the other of the parties.

The ICC rules do not provide[18] an express sanction for breach by an arbitrator of its rules which foresee delivery of the award by the arbitrator to the Secretariat of the Court for its delivery to the parties:

> Once an award has been made, the Secretariat shall notify to the parties the text signed by the Arbitral Tribunal, *provided always that the costs of the arbitration have been fully paid* by the parties or by one of them. (emphasis added)

Similarly, the arbitration rules of the Euro Arab Chambers of Commerce state:[19]

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[16] Art. 25.

[17] Art. 23.

[18] Art. 28.

[19] Art. 27.

> The Secretariat /Registrar alone shall be empowered to notify the text of the award to the parties *after the arbitration costs and fees have been settled in full* by either or both of the parties. (emphasis added)

The delivery of the award is the last opportunity for the arbitral institution to receive voluntary payment from recalcitrant parties The prohibition to arbitrators to deliver the award to the parties is then the only way to ensure that the arbitral institution collects the fees which should still be due from the parties.

30.3 Filing of the Award with a State Court or Governmental Agency

Here, as in many other occasions, the arbitration rules, whether *ad hoc* or those of the arbitral institution, meet the procedural law of the state of origin.

The proceedings for the filing of the award with a given body, as well as for its delivery to the parties shall be governed by the national law of the place of arbitration, as well as by the arbitration rules applicable to the proceedings. The latter may add to the former, but will not replace it (unless the national procedural law can be derogated).

If the proceedings have been governed by a national procedural law, different from the law of the place of arbitration (or by arbitration rules which are not connected with a national procedural law) the formalities set out by the former, for the filing as well as for the delivery, shall be valid provided the law of the place of arbitration does not take the view that they conflict with its legal system. They shall then be complied with, in addition to the possible national formalities which cannot be derogated.

This provided that the law of the place of arbitration does not refuse the filing, holding that such an award is totally foreign to its legal system. This specific issue is dealt with later in this chapter.

The international conventions deal briefly with this issue, while the arbitration rules provide generally for the filing of the award with the secretariat of the corresponding arbitral institution and for the latter to deliver the award to the parties. When the duty to file the award with a state court or with a governmental agency is provided for by arbitration rules, that duty will frequently be placed by them on the parties. Nevertheless it may imposed by them on the arbitrators, or on the arbitrators as well.

The arbitration rules of the Inter-American Commercial Arbitration Commission state:[20]

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[20] Art. 32.

> 7. If the arbitration law of a country where the award is made requires that the award be filed or registered by the arbitral tribunal, the tribunal shall comply with this requirement within the period of time required by law.

Likewise the International Arbitration Rules of the American Arbitration Association:[21]

> If the arbitration law of the country where the award is made requires the award to be filed or registered, the tribunal shall comply with such requirement.

National legal systems

The requirements of individual legal systems are reported by the specialised publications. Reference is made to them for further information as well as to the need to update them.

According to such reports, under Australian law it is not necessary to file the award unless an application is made to the courts to enforce it[22] and under the laws of New Zealand a copy of the award signed by the arbitrators is required to be delivered to each party and there is no requirement for the award to be registered and deposited with a court.

Under Japanese law it is reported that certified copies of the award, bearing the signature and the seal of the arbitrator, are to be notified to the parties, while the original, together with the certificate of the process server, has to be filed with the competent court.[23] Under Indian law, there is no provision for filing the award in Court and if no application for setting aside the award is made within a period of three months, the award may be enforced as a decree of a state court.

Under Indonesian law the award is reportedly to be filed with the court within the jurisdiction of which the award has been made.

In the Philippines, in order for the Courts to confirm the award and for its enforcement, a certified copy is reported to have to be filed within one month from the award[24] with the competent *Regional Trial Court,* together with an application for the confirmation of the award. If the award is confirmed, judgment made by the state court has the same effect as the other court judgments.

In Abu Dhabi, three types of arbitral proceedings existed. As to those referred to arbitration by a state court during court proceedings, also defined as

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[21] Art. 27.6.

[22] SIMMONDS et al., *op. cit.*, at 16.

[23] SIMMONDS et al., *op. cit.*, at 98.

[24] V.P. LAZATIN, *The Philippines* in PRYLES, *Dispute Resolution in Asia, cit.*

judicial arbitration, the court supervised the proceedings.[25] Another type of arbitration provided for by this legal system is *Court Registered Arbitration,* in which the arbitration agreement was registered by the most diligent party with the court and control by the court was taking place at the end of the proceedings. In the third type, *Contractual Arbitration,* either party *could* file the award; the other party was thus entitled to oppose it before the state court. This system was reportedly replaced by the Federal Arbitration Act

In Bahrain all awards had to be filed, within three days after the date of the award, with the court which would have had jurisdiction in the absence of an arbitration agreement.[26] This provision is no longer to be found in the Decree issued by the Emir on August 16, 1994. Under the New Egyptian law[27] an original of the award must be deposited with the competent Court. If the award is in a foreign language a translation into Arabic – approved by the competent local authority – has to be filed with the original.

Under Jordanian law filing is reportedly not required and the award is subject to control by the court when its enforcement is sought. [28] Under Kuwaiti law it is reported that the original of the award must be filed by the arbitrators, together with the arbitration agreement, with the clerk of the court which would have had jurisdiction in the absence of an arbitration agreement. Filing must take place within 10 days after the date of the award[29], but delay is not sanctioned.

In Saudi Arabia the award has to be filed, within 5 days from when it is made, with the relevant authority.[30]

Under United States law the *Federal Arbitration Act* requires[31] that, in order to enforce an award, the parties must have agreed upon *entry of judgment,* which means that they must have expressed their *consent to judgment on the award*[32] (*i.e.* their consent that the competent Court, being asked for judgment, confirms the award) but that the State of New York has attributed such authority to its courts even in the absence of this stipulation. It is further held that this consent is not required for awards which come under the New York

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25 Act no 11, Official Gazette March 8, 1992 no 235

26 Decree no 9, 1994 Official Gazette August 17, 1994, no. 2125.

27 Statute no 27 (1994) promulgated on April 18,1994 Official Gazette no 16 (Suppl) April 21, 1994.

28 EL AHDAB, *op. cit,,* at 282.

29 EL AHDAB, *op. cit,,* at 309.

30 EL AHDAB, *op. cit,,* at. 602.

31 Art. 7.

32 CRAIG et al., *op. cit.*, para. 8. 11.

Convention.[33] and that the courts confirm the award as a matter of course, exceptions to this principle being rare.[34]

Under Italian law[35] the award must be delivered to the parties by the arbitrators within ten days after its subscription by the last arbitrator. The award must be filed with the competent Court only if a party intends to have it enforced in Italy. No time limit for such a filing is set for. And no filing in Italy is required if the award is to be enforced abroad.

Under Swiss law, according to the *Concordat:*

> Subject to Article 45 (2) the high court of common civil jurisdiction of the Canton in which the arbitration takes place shall be the competent judicial authority to:
>
> (e) accept deposit of the arbitral award and give notification of it.[36]
>
> The arbitral tribunal shall attend to the deposit of the award with the judicial authority provided for in Article 3.
>
> (2) The award shall be deposited, together with as many copies as there are parties, in cases where paragraph 4 applies.
>
> (3) If the award is not drafted in one of the official languages of the Swiss Confederation, the authority with which it is deposited may require an authenticated translation of the award.
>
> (4) Such authority shall notify the parties of the award and shall inform them of the date of deposit.
>
> (5) The parties may waive the deposit. They may likewise waive notification of the award by the judicial authority; in this case the notification shall be attended to by the arbitral tribunal.[37]

The parties' waiving the deposit of the award with the cantonal authorities is reported to be fairly frequent practice. In view of the problems which have arisen in this respect in international arbitration,[38] the new Swiss *Federal Statute on International Private Law* provides as to international arbitration (as defined by it):[39]

> (1) Each party *may* at its expense deposit a copy of the award with the Swiss Court at the seat of the Arbitral Tribunal.

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[33] CRAIG et al., *op. cit.* para. 8. 11.

[34] J.S. McCLENDON–R.E. GOODMAN, *International Commercial Arbitration in New York, cit.*, at 153.

[35] Section 825, Italian Rules of Civil Procedure (as amended by Section 17, Statute January 5 No. 25,1994, No. 28).

[36] Art. 3, Intercantonal *Concordat* (Agreement) on Arbitration, *cit.*

[37] Art. 35, Intercantonal *Concordat* (Agreement) on Arbitration, *cit.*

[38] CRAIG *et al., op. cit.*, 8, 12, 80.

[39] *Loi fédérale sur le droit privé,* December 1987, (entered into force on January 1, 1989).

> (2) On request of a party the Court shall certify the enforceability of the award.
>
> (3) On request of a party, the arbitral tribunal shall certify that the award was rendered pursuant to the provisions of this Statute; such certificate has the same effect as the deposit of the award. (emphasis added)

Under French law, filing of the award is necessary only to obtain its enforcement and no time limit is established for this.[40]

Under German law filing was compulsory. The award had to be filed with the competent court of the place where it is made.[41] This requirement has been set aside by the German Arbitration Act 1997.

Under Portuguese law the Chairman of the arbitral tribunal and not state courts shall order that a copy of the award be sent to each of the parties[42]. The original of the award is to be filed with the clerk of the court of the place of arbitration, unless the parties have excluded this or unless the rules of the institution entrusted with the supervision of the arbitration proceedings provide for another form of filing.[43] The filing must be notified to the parties by the Chairman of the Tribunal.[44]

Under English law awards may be enforced with the leave of the Court as a domestic judgment.[45]

Under Dutch law[46] the original award must be filed with the court of the district in which it is made.

Under Swedish law neither registration nor filing of the award is required.[47]

This brief review of reports from national legal systems shows a *large variety of solutions* for the filing of awards ranging from *exemption* from this formality, as in Swedish law, unless within the framework of an application for its enforcement, to the duty to file the award *immediately*.

In some other legal systems, such as those under Islamic law, filing is generally the start of an automatic court control of the award, covering more than just the formal aspects of it.

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40 See. Section 1477, New French Civil Procedure Code.

41 Act December 22, 1997 Bundesgesetzblatt 1997, I, 3224; G. LÖRCHER, *The New German Arbitration Act*, 15 *J. Int. Arb.*, 2, 85, 89.

42 Section 24 no 1, Arbitration Law.

43 Section 24, no 2, Arbitration Law.

44 Section 24, no 3, Arbitration Law.

45 Sections 66 and 100 Arbitration Act 1996.

46 Sections 1058, 1062, paras., 1 and *2* Dutch Civil Procedure Code (as amended by the Arbitration Act July 2, 1986). The entire text of such an Arbitration Act may be consulted in *Yearbook Commercial Arbitration* 1987, at 370 *et seq.;* see also *Clunet* 1987, 127 *et seq.*

47 See on this issue *Arbitration Law in Europe, cit.*, at *337*, as well as the previously quoted *Arbitration in Sweden*, at 157-188 and 169.

In general as to Arbitration Rules one can say that they provide for the *filing* of the award *with the arbitral institution* and for delivery of it by the arbitral institution to the parties or for the arbitrators doing so.

30.4 EFFECTS OF REFUSING TO FILE

The court, with which the award has been filed, on some occasions has refused to accept such a filing, returning the file to the depositor. This refusal has been seen as a setting aside of the award. That was the construction given to it by the Dutch Supreme Court in *SEEE v. Yugoslavia.*[48]

However this conclusion was not shared by the Court of Appeal, Rouen also in *SEEE v. Yugoslavia:*[49]

> 35. Whereas the Cantonal Court did not set aside the award and held that nothing prevented the arbitrators from submitting the arbitration to a procedure other than that instituted by the Procedural Code of Vaud and submitting their case to another judicial system.
>
> 36. Whereas the (Vaud) Court adds that the parties to the 1932 contract did not intend to submit future arbitrations to the judicial sovereignty of Vaud.
>
> 37. Whereas in dismissing the request for setting aside the Court admitted the recourse, in the sense that it held that the award did not constitute an arbitral award within the meaning of art. 516 of the Procedural Code of Vaud.
>
> 38. Whereas the scope of this decision is clear, given these grounds: the request for setting aside is declared inadmissible, and the award is withdrawn from the 'docket' of the Court, inasmuch as only decisions of Vaudoise law may remain thereon.
>
> 39. Whereas the ambiguous nature of this decision led SEEE to file an appeal before the (Swiss) Federal Supreme Court.
>
> 40. Whereas the decision of this last Court confirms the above analysis, since in order to dismiss the action it relies on the lack of interest of SEEE, specifying that the Cantonal Court did not set aside the award, that it did not intend to prejudge the validity or the binding force of the award in accordance with the parties' intention or such law as would be applicable to them, and that the parties were free to submit to an

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[48] *Sté Européenne d'Etudes et d'Entreprises SEEE v. Federal Republic of Yugoslavia,* Supreme Court, Netherlands, (November 7, (1975*), Yearbook Commercial Arbitration* 1976,, at 198.

[49] *Sté Européenne d'Etudes et d'Entreprises SEEE v. Federal Republic of Yugoslavia,* Court of Appeal, Rouen November 13 (1984), *Yearbook Commercial Arbitration,* 1986, at 491 *et seq.*

> ordinary court having jurisdiction the question whether the award was binding on and between them.
>
> 41. Whereas these decisions did not have the effect of setting aside the award or of depriving it of all legal existence, and establish only that the decision does not fall under the judicial sovereignty of Vaud.
>
> ...
>
> 46. Whereas the arbitration clause provides that the arbitrators are exempt from any formality, and will be able to judge as *amiables compositeurs,* and that the decisions of the arbitrators and third arbitrators, as the case may be, will be final and binding for both parties.
>
> 47. Whereas according to the procedure applicable to the arbitration in question, the decision of the arbitrators is consequently binding on the parties in the sense of the New York Convention of June 10 1958.

It is suggested that the conclusions of the Swiss Federal Court and of the Rouen Court of Appeal may be accepted. In fact, non-acceptance of the filing simply means that the award does not belong to the procedural system of the country in question. Someone may still want to see this as setting aside the award, but it is submitted that this meaning is very different from the court's intention. Of course the position is different if the filing is refused not because the award does not belong to that particular legal system, but because it contains irregularities or the court meant to deny the binding nature of the award under the (different) procedural law applicable to it. However, if the court simply finds that the award does not belong to the procedural system of that state, this cannot be construed as an intention to set it aside.

The Dutch judgment is interesting from another point of view. If the state of origin rightly considers that the award does not belong to its procedural system, and the State whose procedural law has been applied considers it to be its own award, the latter might be the state where the award has to be filed, meaning that, if it is not filed in time in that second state, there may be a negative result.

If, on the other hand, no national procedural law has been applied, since the parties chose arbitral rules not connected with any national procedural law, no filing would seem to have to be made unless a mandatory provision of the *lex loci arbitratus* so requires. Even so the possibility of filing the award in that jurisdiction could be taken into account. However, the possibility of its being refused would have to be considered.

As to the different, but connected, issue of the award obtaining binding nature, reference is made to the relevant part of this study.[50] Unless the matter is regulated statutorily, in the relationships between the parties this generally depends on their intention. It may also transpire from the arbitration agreement,

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[50] See *infra* chapters 32 and 34.

or from the conduct of the parties, that they intended it to be binding or non-appealable.

For the purposes of recognising the award in other states, generally regard should be had to the intention of the parties and, in its absence, to the national law of the place of arbitration.

CHAPTER 31

CHALLENGES OF AWARDS

SUMMARY: 31.1 Classes of Challenges – 31.2 Extension of Judicial Review by Contract – 31.3 Prior Waiver to Challenges – Effects – 31.4 Waiver by Conduct During Arbitral Proceedings – 31.5 Jurisdiction on Challenges – 31.6 Challenges in the International Conventions – 31.7 Remedies Available before the National Courts – 31.8 Challenges before Another Arbitrator – 31.9 Court Precedents – 31.10 No Setting Aside if Arbitrator Has Chosen from Available Remedies – 31.11 Setting Aside for *Dénaturation* (Manifest Disregard) of Contractual Documents – 31.12 Challenges against the First Instance Award, When Appellate Arbitral Proceedings are Provided for – 31.13 Anti-suit Injunctions Against Actions to Vacate – 31.14 Challenges Outside the State of Origin

31.1 CLASSES OF CHALLENGES

Challenges being governed by the applicable procedural law, each legal system has his set of challenges available against the award. A study of this matter could by itself be the object of a monograph either dealing with a comparison between challenges in the various legal systems or even only with a study of the challenges available under a given national system.

Rather than getting involved in such a detailed analysis, it is proposed to concentrate on identifying the main classes of challenges.

Class of challenges aiming to a review of the merits of the award

The general principle on challenges has been stated by a U.S. Court of Appeals in *Bridas*:[1]

> The whole point of arbitration is that the merits of the dispute will not be reviewed in the courts, wherever they be located;

a view which is echoed by *Saxis*:[2]

> Extensive judicial review frustrates the basic purpose of arbitration, which is to dispose of disputes quickly and avoid the expense and delay of extended court proceedings.

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1 *Isec v. Bridas*, U.S. Court of Appeals, Southern District, August of New York August14, 1990, *Yearbook Commercial Arbitration* 1992, 639.

2 *Saxis Steamship Co. v. Multifacs Intl. Traders,* 375 F 2d 577,582 (2d Cir.1967).

This principle does not necessarily conflict with the view expressed by Lord Justice Kerr (as he then was) in the 1984 Alexander lecture:[3]

> No one below the lowest tribunals should have unreviewable legal powers over others.

A distinction is in fact to be made between a review of the award limited to procedural irregularities, which is generally accepted and the review on the merits which, according to prevailing opinion, may not be allowed in state courts.

In spite of that in some legal systems a review of the merits of foreign or international awards is required in order to be able to enforce them in such jurisdictions.

Class of Challenges based only on procedural irregularities

Several legal systems, such as the Swiss one allow challenges only on procedural irregularities and on violation of international *ordre public* (public policy). The background of this legislative choice seems to be that the award is the product of the intention of the parties that the merits should only be tried by the arbitrators and, consequently, may only redress procedural irregularities since the parties' implied premise of their referral of disputes to arbitration is that the arbitrators will decide the merits in a correct way.

Class of Challenges based also on errors of substantive law

An intermediate position is taken by the legal systems which grant to their courts the right to review the award also in case of errors on substantive law. This is the case in England, which provides for review of the award on points of law, with either the agreement of all the other parties or with permission by the state court. The parties may exclude, by agreement, review on points of law.

Likewise Italy, which provides that the challenge against the award may also be based on an error on substantive law but that this ground may be excluded by the parties.

This view does not seem to be shared by the U.S. legal system, which is firmly anchored to the principle, affirmed in *Mobil Oil,*[4] that awards may not be vacated because the arbitral tribunal has based its decision on wrong substantive law. This view was amended as a result of an important distinction made in *Wilko*[5] between an error in law and *manifest disregard of the law*:

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[3] Reported by A.ROGERS, *An Overview of the International Arbitration Scene*, 6 *The Arbitrator* 1,5.

[4] *Mobil Oil Indonesia Inc v. Asamera Oil Ltd* 392, NYS 2d 614 (App.Div.1997).

[5] *Wilko v. Swan*, U.S. Supreme Court, 346 US 417 (1953).

> ... The interpretations of the law by the arbitrators, in contrast with manifest disregard ,are not subject in the federal courts to judicial review for errors in interpretation.

a view which has been further amended in *Shearson*[6]

> To the extent that *Wilko* rested on suspicion of arbitration as a method of weakening the protection afforded in the substantive law..... it has fallen out of step with our current strong endorsement of the Federal statutes favouring this method of resolving disputes.

Class of challenges based on manifest disregard of the law

Manifest disregard of the law is a ground for *vacatur* of an award introduced in the American system by a *dictum* in *Wilko*[7].

This ground was accepted by subsequent courts even if it was construed in a narrower way i.e., as the knowledge by the arbitrator of a well-defined provision of law and his *deliberate intention* not to apply it. This construction limits considerably the ambit of this ground in respect of an alternative construction of it as a 'major' error of law.

In *Halligan*[8] the Court of Appeals for the Second Circuit, in spite of the absence of reasons for the arbitrators' decision, held that:

> The arbitrators here manifestly disregarded the law or the evidence or both.

Smit[9] rightly points out that by doing so the Second Circuit has introduced a new ground: *disregard of the evidence* and that, since the Court could not show that this had taken place through the arbitrator's reasons (since no reasons were given- as it is permitted in US domestic arbitration -), it had to confine itself to express its

> firm belief

that there had been such manifest disregard of law / evidence or both. This opinion is indeed arguable since first it is a mere hypothesis and second disregard of the evidence seems to be an even more daring step than the Halligan requirement of that error being deliberate.

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6 *Rodriguez v. Shearson American Express* 490, U.S. 477 (1989).

7 *Wilko v. Swan* 346 U.S. 427 (1953).

8 *Halligan v. Piper Jaffray*, 148 F3rd 197 (2d Cir) 1998.

9 H. SMIT, *Is Manifest Disregard of the Law or the Evidence or Both a Ground for Vacatur of an Arbitral Award?, Am. Rev. Intl. Arb* 1997, 3-4, 341.

31.2 EXTENSION OF JUDICIAL REVIEW BY CONTRACT

While the parties may not modify during the proceedings the nature of their challenge, in French law the parties may launch a new challenge if still available. In this vein is the decision of the Court of Appeal, Paris in *Marteau.*[10]

The possibility of the arbitrator opposing a judgment, which has criticized his award, was denied in *Duval.*[11]

Widening by the parties of ambit of judicial review

It has been held[12] that the parties may widen the ambit of judicial review. In *Midland Metals*[13] the arbitration agreement has incorporated the AAA Rules adding:

> Upon an application to the Court for an order confirming the said award the Court shall have the power to review (1) whether the findings of fact rendered by the arbitrator are, on the entire record of said arbitration proceedings, supported by substantial evidence and (2) whether as a matter of law based on said findings of fact the award should be affirmed, modified or vacated. Upon such a determination, judgment should be entered in favour of either party consistent therewith.

Similarly in *Syncor,*[14] the arbitration clause stated that:

> The arbitrator shall not have the power to commit errors of law or legal reasoning, and the award may be vacated or corrected by judicial review, for any such error.

The here below opinion held by the *Kyocera* Court has opened a very wide debate on whether, in an international dispute, the parties may grant to state courts, in their arbitration agreement, the authority to review the merits.

The parties had agreed that the state court (namely the Federal District Court for the Northern District of California) could:

> vacate, modify or correct any award (i) based upon any of the grounds referred to in the Federal Arbitration Act (ii) when the arbitrators'

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[10] *D. Marteau v. Sociètè CIGP*, Court of Appeal, Paris, October 7, 1997, *Rev. arb.* 1998 n° 2.

[11] *V. v. Société Raoul Duval*, Court of Cassation (France) December 16, 1997, *Rev. arb.* 1999, 2, 253.

[12] J.D. HAMLIN, *Contractual Alteration of the Scope of the Judicial Review: The U.S. Experience*, 15 *J. Int. Arb.*, 4, 47.

[13] *Fils et Câbles d'Acier de Lens v. Midland Metals Corp.*, 584 F. Supp. 240 SDNJ 1984.

[14] *Synco JNCR International Corp. v. McLeland*, 1997 U. S App (4th Cir.) 11 August 1997), quoted by HAMLIN.

> findings of fact are not supported by substantial evidence or (iii) when the arbitrators's conclusions of law are erroneous.[15]

The District Court refused to review the merits of the award under items (ii) and (iii) of the arbitration agreement. The Court of Appeals[16] reversed the decision, ordering the review of the decision by applying the agreed standards.

Rau points out that by doing so the Ninth Circuit aligned itself with the 5th Circuit in *Gateway*[17] and with the 4th Circuit in *Syncar.*[18]

In both cases, the Court of Appeals held that the district court had erred by not reviewing '*de novo*' the award for errors of law as it had been provided for by the arbitration agreement.

Rau[19] registers the contrary views expressed by Löwenfeld[20] and Smit,[21] as well as Posner J.'s opinion in *Chicago Sun Times*[22] that

> federal jurisdiction cannot be created by contract

as well as the extreme position taken in *Schmidt*[23] where the Supreme Court of Minnesota held that trial *de novo*:

> would result in complete frustration of the very essence of the public policy favoring arbitration.

Rau deals with a richness of arguments with the thesis that the FAA grants to the courts the authority to give to the award the effect intended by the parties and consequently that the Court of Appeals was right in *Kyocera.*

This view has been expressed by exploiting all possible argument.

Nevertheless it is suggested that one should distinguish between the parties imposing on the arbitrators the duty to support their findings of fact by substantial evidence and to avoid errors of law, which seems legitimate, and

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15 *Lapine Technology Corp v. Kyocera Corp,* 909 F.Supp.697 (ND.Cal 1995).

16 *Lapine Technology Corp v. Kyocera Corp,* U.S. Court of Appeals, 9th Circuit 130 F 3d 884 891 (9th Cir. 1997).

17 *Gateway Technologies Inc. v MCI Telecommunications Corp,* 64 F3d 993,995 (5th Cir. 1995).

18 *Syncor Intl. Corp. v. Mc Leland* 1997 WL 452245 (4th Cir).

19 A.S. RAU *Contracting Out of the Arbitration Act, Am. Rev. Intl. Arb.* 1997, Vol 8, nos 3-4, 225.

20 A.F. LÖWENFELD, *Can Arbitration coexist with Judicial Review: A Critique of Lapine v. Kyocera, ADR Currents*, Sept 1998, at 1, 22.

21 H. SMIT, *Contractual Modificationn of the Scope of Judicial Review of Arbitral Awards,* 8 *Am. Rev. Intl. Arb.* 147 (1997).

22 *Chicago Typographical Union No 16 v Chicago Sun Times Inc.*, 935, F2d 1501, 1505, (7th Cir. 1991).

23 *Schmidt v Midwest Ins. Co*, 426 2d (Minnesota 1988) 870, 874-875.

the further provision that breach of such duties would entitle state courts to correct the award.

The latter agreement does not seem to have the strength of modifying the Rules of Procedure, whenever they do not already grant that authority to state courts. Nevertheless it is submitted that an award made in breach of the above stated special contractual duty of the arbitrators might be set aside on another ground, i.e. that the arbitrators have not complied with the arbitration agreement, whenever they have not supported their findings of fact or have committed an error of law. As earlier discussed, this may be seen in general as a breach by the arbitrator of his duty to act with due care. Even when the parties have not been so specific, one may in fact argue at least in some jurisdictions that the arbitrators are under a duty to act *diligenter* (i.e. with due care) and, whenever they have not done so, they have committed a fundamental breach of their duties.

31.3 Prior Waiver to Challenges – Effects

The desire to settle arbitral disputes quickly is frequently expressed in the agreement by the parties which states that the award cannot be challenged and must be enforced immediately.

Arbitration rules

The majority of arbitration rules follow this pattern. The ICC Rules of Conciliation and Arbitration provide that:[24]

> ... By submitting the dispute to arbitration under these Rules the parties undertake to carry out any award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver may be validly made.

The rules of the London Court of International Arbitration are similar to them:[25]

> To the extent permitted by the law of the seat of the arbitration, the parties shall be taken to have waived any right of appeal or review in respect of any such decisions of the LCIA Court to any state court or other judicial authority. If such an appeal or review remains possible due to mandatory provisions of any applicable law, the LCIA Court shall, subject to the provisions of the applicable law decide whether the arbitral proceedings are to continue, notwithstanding an appeal or review.

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[24] Art. 28.6, ICC Rules of Conciliation and Arbitration, *cit.* (1998).

[25] Art. 29.2, Rules of the London Court of International Arbitration, *cit.*

The International Rules of the Milan Chamber of National and International Arbitration specify:[26]

> (2) By instituting proceedings before the Chamber of International Arbitration, the parties expressly waive the right to challenge the arbitral award.

The Arbitration Rules of the European Court of Arbitration state:[27]

> By acceptance of these Rules, the parties expressly waive their right to any redress against the award, except where ... certain attacks against the arbitral award or the appellate award may not be validly waived by the parties pursuant to mandatory provisions of the applicable procedural law.

The Rules of the Euro-Arab Chambers of Commerce provide that:[28]

> Any award made under these Rules shall be final and may not be the subject of any form of appeal.

Likewise the Uncitral Arbitration Rules (1976):[29]

> The award shall be made in writing and shall be final and binding on the parties. The parties undertake to carry out the award without delay.

Not only such arbitration rules clearly state that the award is not challengeable but this is often also found in *ad hoc* arbitration agreements as well.

However this waiver does not always produce effect, or at least full effect. The total or partial validity of previous waivers of challenges depends on the applicable procedural law. Under Italian law, for example, a waiver of challenges is not valid for petitions for reconsideration[30] and in challenges for nullity it has an effect only on challenges based on non-observance by the arbitrators of statutory provisions of substantive law.[31]

Also from this point of view the choice of the applicable procedural law and of the place of arbitration are important, since the possibility of challenges against the award depends on this.

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[26] Art. 18, Rules of the National and International Milan Court of Arbitration, *cit.*

[27] Art. 23.12.

[28] Art. 25, Rules of Conciliation Arbitration and Expertise of the Euro-Arab Chambers of Commerce, *cit.*

[29] Art. 32.2, Uncitral Arbitration Rules, *cit.*

[30] Section 831, Italian Rules of Civil Procedure.

[31] Section 829, Italian Rules of Civil Procedure.

31.4 WAIVER BY CONDUCT DURING ARBITRAL PROCEEDINGS

State courts frequently complain that the ground for challenges which is argued before them has not been the object of any complaint by that party during the arbitral proceedings.

In *Bridas*[32] the US Federal Court has been particularly direct in blaming such conduct and has rejected the challenge which was based on grounds which had not been raised during the arbitral proceedings.

The effect of lack of complaint during the arbitral proceedings to deprive that party of the right to use that complaint as a ground for challenges against the award has been asserted. In France in *Société bordelaise*[33] the court rejected the challenge, owing to an irregularity in the appointment of the arbitrator by a state court, on the basis that:

> Since that party had appeared before the arbitrator without raising any objection as to his appointment, it had no right to attack the award on that ground.

In *Boisson*[34] the Court of Appeal, Paris held that a party which had appeared without, during the entire arbitral proceedings, making any complaints as to the validity of the arbitration agreement, had *by conduct* ratified that agreement.

In *Polymages*[35] the same court held that such a conduct amounted to a waiver to that ground for setting aside. This view has been expressed also by writers.[36]

The Swiss position has been expressed by the Swiss federal court in *Fincantieri*[37] by holding:

> The party which deems that his right to be heard or that another of his rights has been breached, must raise this in the arbitral proceedings. In the absence of that, it is no more entitled to seek the setting aside of the award. This conduct... is *against good faith.*

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[32] *Isec v. Bridas*, U.U District Court (SNYD) August 24, 1990, *Rev. arb.* 1994, 739.

[33] *Socété bordelaise de crédit industriel et commercial*, Court of Appeal, Paris June 29, 1992, unreported

[34] *Boisson et al v. Sté Totem Holding et al*, Court of Appeal, Paris, October 19, 1995, *Rev. arb.*1996, 79.

[35] *Scop. Polymages v. Scop. Autographe*, Court of Appeal, Paris, May 1, 1995, *Rev. arb.* 1996, 79.

[36] L. CADIET, *La renonciation à se prévaloir des irrégularités de la procédure arbitrale*, *Rev. arb.* 1996, 3.

[37] *Fincantieri Cantieri Navali Italiani v. M.*, Swiss Federal Court, September 7, 1993, *Rev. arb.* 1993, 691.

One can see from the above precedents that state courts have developed a tendency not to entertain grounds for challenges if they could have been raised during the arbitral proceedings and have not been.

Objections against such late challenge have been raised such as ratification, waiver and lack of good faith.

In spite of this tendency it is submitted that each situation has to be examined on its own merits without an absolute negative approach and that one may not always qualify silence in such a way.

The argument of lack of existence of the arbitration agreement has to be raised during the arbitral proceedings. As to other grounds it is suggested that one should first search for the reason why they have not been raised earlier. If this is, for example, due to local Counsel being unaware that under the national law of the foreign party, which he was representing, the signatory had no authority to enter into that arbitration agreement, or if communications between that party and its local Counsel were made difficult by their languages being different, then if this ground is raised only when that lack of communication has come to an end, this does not seem to amount either to ratification or to waiver or to bad faith, but merely to a communication problem.

In other situations, refusal by the arbitral tribunal to allow a party to call witnesses, or to examine them directly, or limitation by the arbitrator of the number of witnesses, is by itself a breach of due process, which does not seem to vanish if not challenged immediately. One should not forget that the parties and their Counsel do not wish to be unpleasant to the arbitrator. This is perfectly understandable and it is suggested that it should not be regarded as evidence of ratification or of bad faith.

31.5 Jurisdiction on Challenges

Increase of number of challenges

In recent years challenges have considerably increased within the framework of litigation arising out of arbitration. The losers have not hesitated to challenge an award, not only before the judge most suitable for such challenge, but also before any other court from which they could hope to obtain an advantage.

Identification of the Court having jurisdiction on challenges

The identification of the court, before which the award may be properly challenged, is complicated by a large number of challenges having the sole purpose of confusing the situation or of putting pressure on the opponent.

For those who conduct an analysis of this issue the first solution is that jurisdiction on challenges belongs to the courts of the state where the award was made. This principle may be drawn from the Austrian Supreme Court in *Norsolor*:[38]

> The setting aside of an award is governed by the laws of the state in which it is made, while other states may recognise or enforce it.

The Belgian position is reflected in *Brafi*:[39]

> The appeal made in Belgium against the award of a foreign arbitral tribunal (and of which a Swiss Court had ordered the enforcement) cannot be heard. Only a possible Belgian enforcement order could be attacked.

This view was followed by the Court of Budapest[40] which refused to hear a challenge against an award made in Paris on the ground that under its procedural law it could only hear challenges against Hungarian awards.

An intermediate position, dealing with awards made under a different procedural law, is to be found in the French judgment in *Gotaverken*:[41]

> The Court of Appeal, Paris, having found that the award had been rendered under a procedural law different from French law, and therefore not connected with French law, and that it could therefore not be considered as a French decision, held that the attacks against such decision were those available against foreign awards and therefore that the *appel en nullité* (note: an attack provided for by French procedural law only for domestic, and not for international, awards), which had been made could not be heard.

A position which from a proper starting point reaches conclusions which cannot be shared is to be found in *The Singer Company*[42] where the Supreme Court of India held that an award is foreign not because it is issued in a foreign state (right premise) but because it is based on an arbitration agreement which is not governed by local law (conclusion which is not to be shared because it is suggested that the 'foreign' element consists in a non domestic procedural law

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38 *Norsolor S.A. v. Pabalk Ticaret Ltd.*, Supreme Court (Austria), November 18, (1982), *Yearbook Commercial Arbitration*, 1982, at 312-314.

39 *S. P. R. L. Brafi v. Kondor-Holz Werk Karl Brangart KG,* Court of Appeal Brussels, June *21, (1967) Clunet* 1971, 899.

40 *ASA Bulletin* 1992, 313.

41 *General National Maritime Transport Company v. Sté Gotaverken Arendal AB,* Paris Court of Appeal, February 21, (1980), *Rev. Arb.* 1980, 524.

42 *National Thermal Power Corporation v. The Singer Company et al.*, Supreme Court of India May 7, 1992, no. 1978/1992 *Yearbook Commercial Arbitration* 1993, 403.

governing the proceedings, while the law governing the arbitration agreement should not be relevant in this respect).

It is suggested that, if the award is made under a different procedural law from that of the place of arbitration, the challenge may only be made before the courts of the state whose procedural law has been applied. The Swiss decision in *SEEE v. Yugoslavia* dealt with the filing of the award, as a premise to challenges:[43]

> The Tribunal of the Canton of Vaud affirmed that the award could not be filed with a Swiss Court because it could not be treated as a Swiss arbitration, since two arbitrators had been appointed under the applicable procedural law.

The court, as stressed above, simply drew natural conclusions from the application of the procedural law. Since this was different from Swiss procedural law, it was not possible to accept the filing of the award with a Swiss Court, since the filing opens the door of a given legal system and is also the premise of the challenges provided for by that system. Nevertheless it is admitted that the position is not easy, due to the absence in many legal systems of clear legislation in this respect.

The position is simple if the award is made in state A under its procedural law. The situation is less simple when the award is made in state A but under the procedural law of state B, since under the geographic criterion such an award has the nationality of state A, while under the procedural criterion it has the nationality of state B.

In addition to the lack of a consensus among writers in this respect, the above mentioned *duality* means that challenges, if not excluded by international conventions, might be conceivable before the courts of state A or before the courts of state B or before both of them. That being so, in theory the courts of state A could affirm their jurisdiction, holding that it is a national award, while the courts of state B could exclude their jurisdiction, holding that the arbitration, albeit governed by its procedural law, must be treated as belonging to state A. In that situation there is no conflict of jurisdictions.

However, if the courts of state A exclude their jurisdiction, holding that the award belongs to state B, and the courts of state B deny jurisdiction, holding that the award has the nationality of state A, there will be a negative conflict of jurisdictions. (i.e. both state courts will deny their jurisdiction)

Likewise if both courts assert their jurisdiction, there will be a positive conflict of jurisdictions and of decisions.

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[43] *SEEE v. Yugoslavia*, Tribunal, Canton of Vaud, February 12, 1957, (confirmed by the Swiss Federal Court on September 18, 1957, quoted by van den BERG, *op. cit.*, at 41).

The German Statute,[44] which implemented the New York Convention and which provided:

> (1) When an award, falling under the ambit of the Convention, is made in another Contracting State under German procedural law, attacks for setting it aside may be made in Germany. They are governed by Sections 1041, 1043, 1045 (1) and 1046 of the Civil Procedure Code.

is no more applicable since the German Arbitration Law 1998 now concentrates on the place of arbitration:

> If the place of arbitration as referred to in section 1043 is situated in Germany.

Awards which may be challenged before a national court, (hereinafter also referred to as the *state of the challenge)* can be distinguished as follows:

- awards issued in the state in which the challenge is made, under its procedural law between parties from that state;
- awards made in the state in which the challenge is made, under its procedural law, but between parties one or both of whom do not belong to that state, or which deal with disputes related to international trade;
- awards issued in the state in which the challenge is made, but which have not been governed by the procedural law of that state;
- awards made abroad under a procedural law or under rules which are different from the procedural law of the state in which the challenge is made;
- awards made abroad, but governed by the procedural law of the state in which the challenge is made.

Awards made abroad (under a procedural law different from the law of the state of the challenge) should not in principle create problems in another state since in the latter their recognition or enforcement should be sought and no challenges should be made.

The position is more involved, when establishing jurisdiction on challenges on awards made in other states, but under the procedural law of the state of the challenge. While the German legal system expressly stated that its courts had jurisdiction on challenges on them, most other legal systems do not rule on this issue and, as already mentioned, this may give rise to conflicts

The position should be clear regarding awards made in a jurisdiction, under its own procedural law between parties belonging to it. The courts of that state should have jurisdiction to entertain challenges against such awards which are clearly domestic.

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[44] Statute March 15, 1961 cited by GAJA, *New York Convention, cit.*, 1V, 3.1.

The position is more complicated in order to establish jurisdiction on challenges against awards made in the state of the challenge, but under a procedural law which is different from the law of the latter, or under procedural rules which do not make any reference to any national procedural laws. Whether the state, where the proceedings have taken place rather than the state whose procedural law has been applied, has jurisdiction on challenges against those awards, will depend on the specific legal system and may, as we have seen, give rise to conflicts of jurisdictions.

Domestic awards between foreign parties

These traditional classes of awards have been joined in recent years by the class of awards made in a state under its procedural law (and which therefore up to this point are to be treated as domestic awards), but in which both parties or one of them do not belong to that state or which concern international transactions. This situation would fall, according to a widespread view, under the notion of international arbitration from a subjective or objective (instead of procedural) point of view.

The legal systems, which (apart from the class of foreign awards) have based their distinction between national and international arbitration on such criteria, are inclined to treat these arbitrations in a partly different way from domestic arbitrations.

On the other hand, those who recognise as international arbitrations only those proceedings which contain international procedural elements, see no reason to treat differently, within domestic arbitration, purely internal arbitration from the other proceedings in which one or more parties belong to different states, or in which the relationship, on which the dispute is based, is not purely domestic.

Among the differences of treatment attributed to these arbitrations (internal from a procedural point of view, but international from a subjective or objective point of view) sometimes they are declared not to be subject to challenges.

This is the case in France, where awards made there dealing with disputes related to international trade are subject only to one type of challenge: the *recours en annulation* (limited to procedural irregularities).[45]

Similarly, the new Swiss Federal law gives[46] to the parties to a Swiss arbitration, if they are all non-residents, the possibility of expressly excluding challenges on the award.

Even more, under Belgian law the possibility of challenging an award made in Belgium was excluded if none of the parties to the proceedings was Belgian

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[45] Section 1504, New French Civil Procedure Code.

[46] Section 192, Swiss Federal Law on Private International Law, December 18, 1987.

or resided in Belgium. A provision which has been more recently mitigated[47] by leaving to the discretion of the parties the possibility of excluding it, with the consequence that the rule is now the availability of setting aside proceedings:[48]

> The parties may, by an express statement in the arbitration agreement or by a subsequent agreement exclude any application to set aside the arbitral award when none of the parties is either an individual of Belgian nationality or residing in Belgium or a legal person having its head office or a branch there

This recent legislation certainly has the best intentions. However, it is suggested that it breaches the basic rule of equality of treatment between awards governed by domestic law, which should apply also to challenges.

Procedurally international awards

It is submitted that the principle, which must be applied to establish jurisdiction on challenges, should be reaffirmed when the internationality of the award is procedural, i.e. when the award was not made under a national procedural law. Since, as it is suggested, only the courts whose procedural law has ruled the arbitration should have jurisdiction on challenges against it, when two or more procedural laws apply (e.g. one to the appointment of arbitrators, another one as to the taking of evidence) or when arbitration rules, not tied to a specific legal procedural system, have been chosen, no court might have jurisdiction to entertain challenges. This conclusion is not as negative as *prima facie* it might appear, since that award, not being domestic in any jurisdiction, will need permission to be enforced as a foreign award, and at that time an opposition to the permission may be made, which generally will be based on the same or on very similar grounds to those of an application to set it aside.

Parallel Challenges

The existence of parallel court proceedings aiming one to challenge and the other one to recognize the award, which involves the possibility of *conflicting decisions*, is recorded in *St. Gobain.*[49]

> The French company St. Gobain, loser in arbitral proceedings against an Indian party, attacked the award before the High Court, New Delhi. In

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47 Art. 1717 Civil Procedure Code.

48 Statute May 19, 1998 which introduced an amendment to Section 1717, Civil Procedure Code, consisting in the addition of No. 4.

49 *Compagnie de St. Gobain-Pont à Mousson v. The Fertilizer Corporation of India Ltd.*, High Court, Delhi, August 28, (1970); *id.*, President of the Tribunal de Grande Instance, Paris, May 15 (1970), quoted by Van den BERG, *op. cit.*, at 20.

> the meantime the Indian party sought recognition of the award in Paris. The Indian High Court, taking the view that the award had been made in India and that Indian domestic arbitration law applied to it, held that it was bound to apply the domestic procedural law concerning attacks and not the New York Convention. The Indian Court held that the award was valid under Indian law. In the meantime the French Court applied the New York Convention and declared the award enforceable in France.

Clearly parallel challenges do not always produce the same results and the possibility of conflicting judgements, which will be here below discussed, gives rise to concern.

In international conventions reference is to be found[50] to challenges against the award in the courts of the state under the law of which the award is made.

The New York Convention (1958) expressly lists as a ground for possible refusal of recognition or enforcement that:[51]

> The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country under the law of which the award was made.

The Geneva Convention (1961) provides:[52]

> The setting aside in a Contracting State of an arbitral award covered by this Convention shall only constitute a ground for the refusal of recognition or enforcement in another Contracting State where such setting aside took place in a State *in which*, or *under the law* of *which*, the award has been made. ...

The Uncitral Model Law (1985) expressly deals with challenges against the award:[53]

> Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only ... if ... ;
>
> (v) 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; or . ..

Situations where the procedural law and the place of arbitration are the same as in *Bridas*[54] will not help to sort this problem out:

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50 Art. 4, para. 2., Geneva Protocol (1923), *cit.*

51 Art.V.1 (e), New York Convention (1958), *cit.*

52 Art. IX.1, Geneva Convention (1961), *cit.*

53 Art. 36.1, Uncitral Model Law, *cit.*

54 *ISEC v. Bridas,* U.S. District Court, Southern District of New York, August 24, 1990 *Yearbook Commercial Arbitration* 1992, 639.

> In this case, the parties subjected themselves to the procedural law of Mexico. Hence, since the situs or forum of the arbitration is Mexico, and the governing procedural law is that of Mexico, only the courts of Mexico have jurisdiction under the Convention to vacate the award.

One might believe that such a double reference means that the courts of either state have jurisdiction. However it is submitted that this provision has to be construed differently, i.e. as referring to the procedural law of the venue of the arbitral proceedings, which is the normal situation. In this case the courts of the place where the arbitral proceedings have had their venue will have jurisdiction.

In the rare situations in which the procedural law which has governed the arbitral proceedings is not that of the venue of the proceedings, the setting aside should be decided *only* by the courts of the state the procedural law of which has governed such proceedings.

It is submitted that the parallel between Court and arbitral proceedings may help.

No state court would entertain an appeal against a judgment made by a foreign court. This might be seen as being merely due to a division of sovereignty between states. However it is suggested that the reason for this is deeper. While state courts agree to apply foreign substantive law, they would not agree to attempt to apply foreign procedural law, because this task is considered more difficult.

31.6 Challenges in the International Conventions

Challenges are an inevitable fact in arbitration as well as in court proceedings. Arbitration cannot expect total exemption from a remedy which – when not abused – is physiological. International conventions and national legal systems deal with that issue.

International conventions

The Geneva Protocol (1923) does not deal expressly with challenges but with situations where arbitral proceedings are declared to have no effect:[55]

> ... Such references (note: to the arbitrators) shall not prejudice the competence of the judicial tribunals in case the agreement or the arbitration cannot proceed or becomes inoperative.

The Geneva Convention (1927) states:[56]

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[55] Art. 4, para. 2, Geneva Protocol (1923), *cit.*

[56] Art. 3, Geneva Convention (1927), *cit.*

> If the party against whom the award has been made proves that, under the law governing the arbitration procedure, there is a ground other than the grounds referred to in Article 1 (a) and (c) and Article 2 (b) and (c) entitling him to contest the validity of the award in a Court of Law, the Court may, if it thinks fit, either refuse recognition or enforcement of the award or adjourn the consideration thereof, giving such a party a reasonable time within which to have the award annulled by the competent tribunal.

The New York Convention (1958) was construed by the Swedish Supreme Court in *Gotawerken,*[57] dealing (at the same time) with two challenges:

> The fact that two attacks are pending against the award in France, which have not led to the setting aside or to the stay of the award, does not allow to refuse the recognition of the award under the New York Convention.

As to the procedure concerning challenges, the Uncitral Model Law (1985)[58] states:

> (1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.
>
> (2) An arbitral award may be set aside by the court specified in Article 6 only if:
>
> The court finds that:
>
> ...
>
> (3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under art. 33, from the date on which that request had been disposed of by the arbitral tribunal.
>
> (4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside of proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside..

The Washington Convention (1965), contrary to the other International Conventions, rather than making reference to challenges against the award before ordinary courts, reserves jurisdiction on challenges to its Centre:[59]

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[57] *Supra* note 24.

[58] Art. 34, Uncitral Model Law, *cit.*

[59] Art. 52, Washington Convention (1965), *cit.*

(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:

(a) that the tribunal was not properly constituted;

(b) that the tribunal has manifestly exceeded its powers;

(c) that there was corruption on the part of a member of the tribunal;

(d) that there has been a serious departure from a fundamental rule of procedure;

(e) that the award has failed to state the reasons on which it is based.

(2) The application shall be made within 120 days after the date on which the award was rendered except that when annulment is requested on the ground of corruption such application shall be made within 120 days after discovery of the corruption and in any event within three years after the date on which the award was rendered.

3) On receipt of the request the Chairman shall forthwith appoint from the Panel of Arbitrators an *ad hoc* Committee of three persons. None of the members of the Committee shall have been a member of the tribunal which rendered the award, shall be of the same nationality as any such member, shall be a national of the State party to the dispute or of the State whose national is a party to the dispute, shall have been designated to the Panel of Arbitrators by either of those States, or shall have acted as a conciliator in the same dispute. The Committee shall have the authority to annul the award or any part thereof on any of the grounds set forth in paragraph (1).

(4) The provisions of Articles 41-45, 48, 49-53 and 54 and of Chapters V1 and VII shall apply *mutatis mutandis* to proceedings before the Committee.

(5) The Committee may, if it considers that the circumstances so require, stay enforcement of the award pending its decision. If the applicant requests a stay of the enforcement of the award in his application, enforcement shall be stayed provisionally until the Committee rules on such request.

(6) If the award is annulled the dispute shall, at the request of either party, be submitted to a new tribunal constituted in accordance with Section 2 of this Chapter.

31.7 Remedies Available before the National Courts

Largely speaking the families of challenges available against awards are then:

- a review of the merits, which corresponds to appeals in court proceedings;
- the setting aside of the award in the case of the existence of serious procedural irregularities;

– the setting aside of the award for errors on a point of substantive law,

and the procedural ways to deal with the effects of setting aside are:

– remittal to the arbitral tribunal for reconsideration;
– decision of the dispute by the court.

A survey of the various national legal systems concerning challenges against the award would require a very deep comparative analysis of the various national statutory provisions, which is outside the scope of this study. Therefore only a short reference to some of these legal systems is made, based on their presentation by the specialised studies which have been published.[60]

Egyptian law is reported to provide for a renewal of the proceedings on various grounds, such as fraud or forgery, or if some evidence subsequently proves to be false or new documents are discovered or there is contradiction between the grounds of the award.[61] In addition to this remedy, Egyptian law is reported to provide for the setting aside of the award; upon application this remedy may be extended to a review of the merits and the court, after setting aside the award, may decide the merits. Among the grounds for setting aside the award one must mention[62] the non-existence or nullity of the arbitration agreement, the non-suitability of the dispute for arbitration, a breach of law by the arbitrators and the irregularity of the award or of the proceedings such as lack of reasons.[63]

Under Saudi law the award must reportedly be filed within five days with the court, which would have had jurisdiction in the absence of the arbitration agreement, and the parties may raise objections to the award,[64] to be filed within fifteen days from receipt of notice of it. El Ahdab comments this as allowing a review of the merits[65]

In Kuwaiti Law reportedly the award may be set aside. No appeal is available, unless the parties have agreed on it. Rehearing of the award is allowed in several cases.[66]

Under Syrian law both appeal and renewal of the proceedings are reported to be allowed. If the appeal is available, the judgment of the court deciding on it is not subject to a further appeal to the Court of Cassation.[67] Under Iraqi law no direct appeal against the award is reported to be allowed; it must be made

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60 And which, because of their general nature and possible new amendments, have to be carefully checked *in loco* at the time they have to be applied to a specific issue.

61 Section 511, Egyptian Civil Procedure Code (hereinafter ECCP).

62 Section 512, ECCP.

63 SALEH, *op cit* at 117.

64 Section 18, Decree M/47.

65 EL AHDAB, *op. cit.*, art 607 *et seq.*

66 EL AHDAB, *op. cit,*, art 313 *et seq.*

67 EL AHDAB, *op. cit.*, art 673 *et seq.*

against the judgment which has confirmed it;[68] if enforcement of the award is refused, the award is set aside. If applications to set aside the award are allowed, the *quadi* (judge) may decide the merits, or remit the dispute to the arbitrators for re-examination.[69] In Bahrain, the appeal which entitled the court to review the dispute (both in law and in fact) has been abandoned. Only setting aside is provided for.[70] Under Japanese the appeal to an arbitral tribunal of second instance, if agreed upon by the parties, is reported to be allowed.[71] Under Indian law the setting aside of an award is reportedly permitted on limited grounds and in some situations remittal to the arbitrators is available. The law of the Philippines is reported to provide for the setting aside of the award by the *'Regional Trial Court'*, if a petition is filed within 30 days after the award is filed and a notice is given to the opposing party.[72] Under Thai law an appeal is reportedly available in limited situations against the judgment of the court which has scrutinized the award and has declared it to be enforceable; in some situations a challenge against the court's decision which confirms the award, or which rejects the request for its confirmation,[73] is reported to be available. Under Australian law no challenges are reportedly available against foreign awards; unless an opposition to recognition and enforcement of such awards is being sought.[74] The Model Law provides for setting aside foreign awards on procedural grounds which correspond to the grounds which entitle courts to refuse recognition and enforcement under the New York Convention. As far as domestic awards are concerned setting aside on points of law is provided for by the Commercial ArbitrationAct.[75]

In New Zealand challenges against domestic awards are reported to consist in setting aside and remittal to the arbitrators.[76] Under Spanish law it is reported that domestic awards which have been rendered in law (as opposed to natural justice) may be challenged before the Supreme Court for breach of law or irregularity as to formal requirements, while challenges of decisions made according to natural justice are allowed on more limited grounds, such as expiry of the time limit for the award, or because issues not submitted to

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68 Section 274 Iraqi Civil Procedure Code.

69 EL AHDAB,. *op. cit.*, at 131.

70 EL AHDAB, *op. cit.*, art 151.

71 SIMMONDS, et al., *op. cit.*, at 102 and Y. TANIGUCHI, *Commercial Arbitration in Japan, ICCA, Congress Series* 4, at 29 *et seq.*

72 V.P. LAZAMIN, *The Philippines,* in PRYLES, *Dispute Resolution in Asia, cit.*

73 T. SUVANPANICK, *Thailand,* in PRYLES, *Dispute Resolution in Asia, cit.*

74 International Arbitration Act 1974.

75 PRYLES, *Australia*, in PRYLES, *Dispute Resolution in Asia, cit.* at 25 *et seq.*

76 SIMMONDS et al., *op. cit.*, at 148.

arbitration have been decided or because of the dispute not being capable of settlement by arbitration.[77]

Under French law challenges against arbitral awards made outside France are not provided for, while opposition to enforcement is allowed, if provided for by an applicable Convention; even failing this, French procedural law allows opposition to enforcement[78]. As to domestic awards, an appeal (before the court of appeal in the district where the award has been made) and, if the parties have waived the appeal,

> recours en annulation

in addition to reconsideration and opposition by a third party are provided for.[79]

As regards awards rendered in France, but concerning disputes which relate to international trade, only *recours en annulation* is provided for.

The French decision in *Mackprang* should be mentioned here.[80]

> The Paris Court of Appeal rejected the plea that an appeal against an award could not be heard since the award had not yet been given the *exequatur,* holding that:
>
> The award, which is a product of private justice, acquires from the beginning, vis-à-vis third parties, the authority of *chose jugée* (note: final decision).

Under Dutch law the award may reportedly be set aside in domestic arbitration and proceedings for recognition and enforcement are provided as to non-domestic awards. Appeal against the award before a second arbitral tribunal is allowed if the parties so agree.[81]

Under Swedish law, the award may reportedly be set aside by the Court of Appeal on procedural grounds or be declared invalid either for breach of public policy, or if the dispute was not capable of settlement by arbitration or if the award does not comply with the law as to its written form and signatures.[82]

Italian law provides for setting aside proceedings and for a petition for reconsideration.[83]

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77 *Arbitration Law in Europe, op. cit.,* at 122.

78 *Arbitration Law in Europe, op. cit.,* at 157.

79 *Arbitration Law in Europe, op. cit.,* at 156.

80 *Martin et autres es qualités et S.A. Cerex v. Firme Mackprang et al.*, Paris Court of Appeal, December 2 (1977), *Rev. arb.*, 1979, 246.

81 See Section 1050, Dutch Civil Procedure Code as amended by the Arbitration Act (1986), reported in *Yearbook Commercial Arbitration* 1987, at 30.

82 Sections 33 and 34, Arbitration Law (1999).

83 Sections 827-831 C.P.C.

Under Swiss law the Intercantonal *Concordat* does not apply to awards made outside Swiss territory:[84]

> (1) This convention shall apply to any proceedings before an arbitral tribunal the seat of which is within one of the Cantons parties to this Agreement.

The 1987 Swiss Federal Law, in the chapter concerning international arbitration,[85] provides that:

> The provisions of this chapter shall apply to all arbitrations if the arbitral tribunal is situated in Switzerland and if at the time when the arbitration agreement was concluded, at least one of the parties had neither its domicile nor its habitual residence in Switzerland.[86]
>
> Setting aside proceedings may only be brought before the Federal Supreme Court. The procedure is governed by the Federal Judicial Organisation Act relating to public law appeals.
>
> However, the parties may agree that the court at the seat of the arbitral tribunal shall decide in lieu of the Federal Supreme Court; its decision is final. For this purpose the Cantons shall designate a sole Cantonal authority.[87]
>
> Where none of the parties has its domicile, its habitual residence, or a business establishment in Switzerland, they may, by an express statement in the arbitration agreement or by a subsequent agreement in writing, exclude all setting aside proceedings, or they may limit such proceedings to one or several of the grounds listed in art. 190, para. 2.
>
> Where the parties have excluded all setting aside proceedings and where the awards are to be enforced in Switzerland, the New York Convention of June 10, 1958 on the Recognition and Enforcement of Foreign Arbitral Awards shall apply by analogy.[88]

In England, under the Arbitration Act (1996) if the Court finds lack of jurisdiction by the arbitrator, it may set aside the award.

If serious irregularities affecting the tribunal, the proceedings or the award are found by the state court, it must remit the award to the arbitrators or – if inappropriate -set it aside in whole or in part or declare the award to be of no effect. The parties may exclude the courts' review of the award on a point of law. In the absence of this, either the agreement of the parties or leave by the

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84 Art. 1, *Swiss Intercantonal Concordat, cit.*

85 Swiss Federal Statute on Private International Law, December 18, 1987.

86 Section 176, para. 1, Swiss Federal Statute; see *supra* note 46.

87 Section 191, Swiss Federal Statute; see *supra* note 46.

88 Section 192, Swiss Federal Statute; see *supra* note 46.

Court will be required for such a review. Any further appeal from the High Court to the Court of Appeal is subject to leave.

English law also provides for an *action on the award,*[89] under which the award is treated as a source of contractual obligations and as such is governed by common law.

It is reported that Greek law does not provide for challenges on foreign awards. Domestic awards may be challenged after they have been served on the losing party.[90] In Belgium only an award made in that country may be the object of an application to set aside before Belgian courts, and the proceedings will be governed by the Judicial Code.[91]

In the State of New York[92] besides the *review of the award by* the arbitrator, which may be allowed by the arbitration rules, the courts have the authority to order *remittal to the arbitrators for rehearing,* or to modify the award on the same grounds which allow the arbitrators to do so such as clerical or calculating errors *(modification by the court);* furthermore a mechanism for *confirmation or vacation* of the award is provided for. The state court may be requested to issue a judgment, which confirms the award; such proceedings are known as *entry of judgment.* It is also reported that the matter may be governed in a different way by the United States Arbitration Act and by the arbitration law of the individual states.

This review shows the variety of challenges available in the various national legal systems. These range from a mere setting aside to remittal to the arbitrators and to the setting aside followed by the replacement of the arbitrators' decision with a decision of a state court. The remedies available and the related time bar thus depend on the national legal system before which the challenge is made. In those situations where remittal to the arbitrators for completion of their award should not be allowed and the state court should not be allowed to decide afresh, either during the same proceedings or in subsequent ones, the further problem arises whether the parties should remain without any further access to justice.

The effects of a challenge, made during the arbitral proceedings, on the proceedings themselves are the subject of a study by Perrot.[93]

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89 See MUSTILL and BOYD, *op. cit.,* at 494-496.

90 See *Arbitration Law in Europe, cit.,* at 215.

91 Section 1704; B.HANOTIAU-G. BLOCK, *The Law of 19 May 1998, Amending Belgian Arbitration Legislation,* 15 *Arb. Int.,* 1, 97.

92 See McCLENDON-GOODMAN, *International Commercial Arbitration,* New York 1986, at 133 *et seq.*

93 R. PERROT, *Arbitrage interne et arbitrage international. Les recours devant la Cour d'Appel empèchent-ils l'arbitre de poursuivre sa mission?* (Domestic and international arbitration. Do attacks before the Court of Appeal prevent the arbitrator from continuing his task?) *Rev. arb.* 1987, 107.

It may be legitimate to wonder whether the possibility of keeping an award alive by separating the issues, covered by the arbitration agreement, (to remain valid), from those which are not covered by it (and which are to be declared invalid), provided for both in the New York Convention[94] and in the Geneva Convention (1961)[95] allows to apply by analogy the same principle if the award has not decided all the issues submitted to it. It is suggested that a construction by analogy is difficult and that insufficiency of the award *vis-a-vis* the arbitration agreement causes problems which are different from those arising if the award exceeds the arbitration agreement. The most obvious solution would be the nullity of the award.

A distinction may perhaps be drawn between situations where the award is irreparably different from the arbitration agreement (because it has not decided all the issues which were submitted to it) and situations in which, for example in the jurisdictions where a subsequent reference to the same arbitrator is allowed under the same arbitration agreement or because of the possibility of requesting an additional award one may achieve – although by various stages – conformity with the arbitration agreement. Whether in the latter case the nullity of the award may be avoided is a delicate issue.

Under Italian law[96] both the awards, which decide outside the arbitration agreement, and those, which do not decide on some of the issues covered by the arbitration agreement, are subject to challenges for nullity.

A tendency by the arbitrators to keep the award alive as well as to construe the contract in order to keep it alive must be recognised. In fact:[97]

> The application by the arbitrators of the law which keeps the contract alive rather than of the law which declares it null and void is frequent.

Remission of the case to arbitrators is not infrequent in common law systems while until recently it was practically unknown in civil law systems.

The Model Law[98] has introduced remission of the case by the Court to the arbitrators during setting aside proceedings, in order to

> give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside,

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94 Art. V, 1(c), New York Convention (1958), *cit.*

95 Art. IX, 1(c), Geneva Convention (1961), *cit.*

96 Section 829 n. 4, Rules of Italian Civil Procedure.

97 Y.DERAINS, *Chronique des sentences arbitrales,* (Chronicles of awards) *Clunet,* 1986, 1136. As an example see the award made in 1984 in ICC proceedings no. 4145, *Clunet,* 1985, 985.

98 Art. 34, para.4.

which appears to be a useful, even if unusual way, to put straight things avoiding a court judgment.

This remedy is different then from the German provision which entitles the court to remit the case to the arbitrators after setting aside the award, a formula which is different from the Italian one[99] which provides that the court after setting side the award decides the matter on the merits, unless the parties have agreed otherwise.

31.8 CHALLENGES BEFORE ANOTHER ARBITRATOR

International Conventions generally provide for challenges against awards to be made before state courts. The Washington Convention (1965), with its possibility of challenges to be made before an *ad hoc* arbitral committee (although in exceptional cases and not as a general remedy) is therefore an interesting exception. Challenges against awards before another arbitrator are reported to be allowed in few national legal systems such as in Japan, Italy (however limited to joint mandates to settle)[100] and the Netherlands if the parties have expressly provided for it. An appellate arbitral instance is provided for in several commodities arbitration rules.

Post award arbitral proceedings

In *Harrys*[101] the Iran-U.S. Claims Tribunal held in respect of post-award arbitral proceedings[102] that:

> The claimant here seeks a revision of the tribunal's reasoned findings, not a mere correction of an arithmetic[al] error. The provisions of art. 36 do not apply in such a circumstance.

The European Court of Arbitration has provided in its arbitration rules the right to a full review of the merits by an appellate tribunal, subject to leave to appeal, to be appointed by that arbitral institution itself.[103]

It is suggested that challenges before another arbitrator, when not totally ignored, have had a rather cold welcome.[104]

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[99] Section 830, Rules of Civil Procedure.

[100] See M. RUBINO-SAMMARTANO, *Arbitrati italiani, stranieri e internazionali. Distinzioni e analisi* (Italian, Foreign and International Arbitration. Distinctions and Analysis), *Foro pad.* 1979, 11, 13; see also *Torri v. Associazione Selezionatori Sementi it.*, Court of Cassation (Italy), September 27, no. 2981 (1980) *Mass. Foro It.* 1968, 798.

[101] *Harrys Int'l. Telecomm's Inc.* v. *Iran*, 18 *Iran-U.S. CL. Trib. Rep.* 76-37, 1988, quoted by VOLLMER and BEDFORD see *infra* note 100.

[102] A. N. VOLLMER and A. J. BEDFORD, *Post-Award Arbitral Proceedings,* 15 *J. Int. Arb.* 1, 37

[103] See *supra* note 85.

The importance of an appellate instance, within arbitral proceedings, is stressed in a subsequent chapter of this study.[105]

31.9 COURT PRECEDENTS

Volumes could be filled only with precedents on challenges of awards. One shall just confine himself to mentioning some of them.

In the US, as held in *Folkways*:[106]

> a court may vacate an award when the arbitrators manifestly disregarded the law in reaching their decision

a point which the *Titan*[107] court has brought further holding that manifest disregard exists if:

> an arbitrator understood and correctly stated the law but proceeded to ignore it.

In *Avco*[108] the U.S. Court of Appeals held:

> the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner ...
>
> Avco was not made aware that the Tribunal now required the actual invoices to substantiate Avco's claim. Having thus led Avco to believe it had used a proper method to substantiate its claim, the Tribunal then rejected Avco's claim for lack of proof.
>
> We believe that by so misleading Avco, however unwittingly, the Tribunal denied Avco the opportunity to present its claim in a meaningful manner. Accordingly Avco was unable to present [its] case within the meaning of Art VI (b) and enforcement of the award was properly denied.

A position which is much more acceptable than the one taken by the *Parsons & Whittemore* court.[109]

In Canada the *Quintette* court[110] held:

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[104] E.GAILLARD, Comments on the award May 16, 1986, *Amco Asia et al v. Republic of Indonesia,* in *Chroniques des sentences arbitrales CIRDI, Clunet,* 1987, 184 *et seq.*

[105] See *infra* chapter 34.

[106] *Folkways Music Publishers Inc. v. Weiss*, 989 F 2d 108, 111-112 (2d Cir) 1993.

[107] *Siegel v. Titan Industries Corp.*, 779 F 2d 891 893 cited in *Yearbook Commercial Arbitration* 1995, 965.

[108] *Iran Aircraft Industries et al. v. Avco Corporation*, U.S. Court of Appeals, Second Circuit, November 24, 1992, no. 92 – 7217, *Yearbook Commercial Arbitration* 1993, 596.

[109] *Parsons v. Whittemore Overseas Co.* 508 F 2 975-76.

> ... Even if the board was wrong in its conclusion on that point, that would constitute mere error in interpreting the contract and would not.... provide a ground for setting aside.

In *Mine*[111] the *Ad Hoc* ICSID Committee heard an application that the award made by an ICSID Tribunal be annulled. The Committee granted it:

> for failure to state the reasons on which it is based.

In its reasons the Ad Hoc Committee considered a further ground for annulment, manifest excess of power, for having failed to apply the law .In the end the Committee rejected such a ground. It may be of interest to consider the argument presented by a party, the Republic of Guinea, in support of this ground:

> Most notable is the total lack of citation to legal authorities. The single legal reference is contained in the one footnote citing an article of the French civil code as it appears in Louisiana law.

In *Sun Oil*[112] a U.S. company operating in Libya stopped its exploration activities in that country, on the ground that its personnel could not enter Libya since the US government had frozen US passports in the framework of its embargo against Libya. The arbitral tribunal rejected such a defence and awarded US $20 million to the Libyan contracting party. The Libyan company requested confirmation of the award in the U.S., which was granted rejecting Sun Oil's defences that enforcing the award would be inconsistent with the US foreign policy. The US District Court held:

> The problem with Sun Oil's argument is that 'public policy' and 'foreign policy' are not synonymous.

For example in *Parsons & Whittemore*[113], the Second Circuit addressed this very issue saying:

> To read the public policy defence as a parochial device, protective of national political interests, would seriously undermine the Convention's utility. This provision was not meant to enshrine the vagaries of international politics under the rubric of public policy.

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[110] *Quintette Coal Ltd v. Nippon Steel Corp. et al.*, British Columbia Court of Appeal, October 24, 1990, *Yearbook Commercial Arbitration* 1993, 159.

[111] *Government of Guinea v. Maritime International Nominees Establishment*, ICSID *Ad Hoc* Committee, December 14, 1989,*Yearbook Commercial Arbitration* 1991, 4.

[112] *National Oil Corporation v. Libyan Sun Oil Company*, U.S. District Court, District of Delaware, March 15, 1990, *Yearbook Commercial Arbitration* 1991, 651.

[113] *Parsons & Whitmore Overseas Company*, 508 F 2d at 974.

In *Larroche*[114] the French Court of Cassation held that an award may be set aside not because of a wrong characterisation by the arbitrators of the contractual relationship but only if their settlement of the dispute conflicts with public policy.

Review of the merits

The remedy of reconsideration of the award was excluded by an arbitral tribunal in *Biloune*:[115]

> As provided in article 32(2) of the Uncitral rules, the award on jurisdiction and liability which this tribunal issued on October 27,1979 was and is 'final and binding' on the parties. The Uncitral rules make no provision for reconsidering an reward.

In France in *Fougerolle*,[116] while hearing an appeal against the appellate judgement which had rejected a claim that the award be set aside since the opposite party had fraudulently withheld documents and consequently breached the international public policy, the Court of Cassation held:

> As a consequence of the general principles of law relating to fraud..... the rescinding of an award made in France concerning international arbitration is by way of exception to be admitted in the case of fraud, as long as the arbitral tribunal remains constituted after the making of the award (or can be reconstituted).

Exhaustiveness of challenges

The principle is to be found in several legal systems, that the parties may not provide for challenges different from the ones provided for by the applicable law. In *Binaate Maghreb*[117] it was affirmed.

> Here a French and an Indian company had provided that the award could be the object of a review of its merits.

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[114] *Sté Sica Veradour v. Ets Laroche*, Court of Cassation (France) February 20, 1991, *Rev. arb.*1991, 447.

[115] *Biloune et al. v. Ghana Investments Centre et al* (Schwebel, Chairman, Wallace and Leigh arbitrators) awards October 22, 1989 and June 30, 1990 *Yearbook Commercial Arbitration* 1994, 11.

[116] *Fougerolle S.A. v. Procofrance S.A.*, Court of Cassation, May 25, 1992, *Yearbook Commercial Arbitration* 1994, 204.

[117] *Sté Binaate Maghreb v. Sté Screg Routes* Court of Appeal, Paris December 12, 1989, *Rev. arb.* 1990, 863.

In *Fougerolle* the Court of Appeal of Paris held that the arbitrator had no authority to allow any challenge which was excluded by the applicable procedural law.

Classification of challenges

In *Abu Nasser*[118] it was held that it is not allowed to classify a challenge otherwise than as it was made, in order to avoid to declare it inadmissible:

> Here an appeal had been filed against a court order enforcing an award. Realising that such a means would have had no standing as to international awards, the appellant had argued that the Court of Appeal was entitled to classify its challenge as a *recours en annulation* (application to set aside without a review of the merits). The court held that French procedural law did not allow to classify the appeal otherwise.

Even if this solution will be correct under French law, in other legal systems and situations it might be possible to classify otherwise a challenge (provided it complies – independently from its name – with the requirements for such other challenge) under the principle aiming to keep as much as possible to the basic intention of the parties.

Effects of the setting aside

In *Armes Blanches*[119] the French Court of Cassation held that the setting aside of an award, due to the expiry of the time limit to file it, affects the steps subsequent to such an expiry, while it does not affect the steps prior to it such as a neutral expert's report filed in the proceedings.

This solution may be acceptable in that scenario but would have to be handled with care in other situations.

Estoppel

In *Bel Air*[120] it has been affirmed that, in a situation where the parties have continued to attend the arbitral proceeding without raising this issue, even after the expiry of the time limit for the filing of the award, such a conduct is to be construed as an implied acceptance to extend such a time limit, barring them from raising this argument later on.

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[118] *Damon v. Abu Nasser*, Court of Appeal, Paris, April 5, 1990, *Rev. arb.* 1990, 875

[119] *Sárl Hostin Armes Blanches v. Sté Prieur Sports*, Court of Cassation (France) May 18, 1989, *Rev. arb.* 1990, 903.

[120] *Sté Entreprise Guy Broussail v. Sté Marbrerie du Bel Air et al.*, Court of Appeal, Paris June 26,1987, *Rev. arb.* 1990, 905.

Likewise in *Ferruzzi France*[121] the French Court of Cassation has held that the claimant is estopped from arguing that the arbitration clause, without which he would have not started the arbitral proceedings, would be inexistent or null and void.

31.10 No Setting Aside if Arbitrator Has Chosen from Available Remedies

In *Le Grand Livre*[122] the Court of Appeal of Paris rejected a challenge which aimed at setting aside an award because of the remedy which had been granted by the arbitrator. The Court held that the arbitrator was entitled to choose between the two alternative remedies sought by the claimant: specific performance and damages.

31.11 Setting Aside for *Dénaturation* (Manifest Disregard) of Contractual Documents

In *Fougerolle*[123] the French Court of Cassation has definitely such a ground for setting aside consisting in the award having based its decision on a fundamentally wrong construction of contractual documents.

Since 1872 in France in court proceedings this had been a ground for setting aside by the Court of Cassation of judgments in those situations where the previous judges had not given to the contractual documents their manifest meaning.

In two occasions prior to *Fougerolle* the French Court of Cassation had held that this principle should not apply to challenges against arbitral proceedings.

In spite of this Fougerolle argued again before the Court of Cassation that *dénaturation* was still a ground for setting aside the award:

> The Court of Cassation rejected this argument on two grounds. First, because *dénaturation* is not listed amongst the grounds for setting aside awards. This argument was rightly criticised by Bellet[124] since even in the absence of an express listing, one should ensure that the ground in issue is not included in one of those which are listed.

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[121] *Sté Ferruzzi France v. Ucacel*, Court of Cassation (France) January 26, 1994, *Rev. arb.* 1995, 443.

[122] *Sté Hoche Friedland v. Sté Le Grand Livre du mois*, Court of Appeal, Paris, June 8, 1990, *Rev. arb.* 1990, 917.

[123] *Sté Fougerolle v. Sté Butec Engineering*, Court of Cassation (France) December 20, 1993, *Rev. arb.* 1994, 126.

[124] P.BELLET, *Comments to Fougerolle –Butec*, see supra note 106.

> Second because *dénaturation* does not amount to non-compliance by the arbitrators with their task, a ground which is expressly provided for. This second ground operates as an alternative reason. This reasoning has been approved by Bellet, since replacing the arbitrators' construction with the court's construction would for the court mean dealing with the merits, which is not its task.

It is submitted that this view may not be shared since the Court of Cassation was not requested to correct the merits of the award but to check whether the arbitrators had complied with the agreement of the parties which had granted to them the task to hear and decide the dispute with diligence. In the systems of Roman law tradition one says in such situations that the agent must act with the diligence of a *bonus pater familias.*[125]

That for example would not be the case if the arbitrator had not complied with the rules of due process, since breach of due diligence does not affect the merits, but the conduct of the proceedings.

It is suggested that disregarding the manifest meaning of the contractual documents is not in line with the diligence of a 'good father'. It is submitted that in such a situation an award should be set aside not because it is wrong on the merits, but for breach of the duty of diligence.

Criticism for non setting aside awards on the ground of *dénaturation* was expressed also by Robert.[126]

This while the view expressed by the French Court of Cassation in *Pakistan Atomic Energy*[127] that the court's task is not to control the application by the arbitrators of trade usages or of natural justice must be shared, except when breach of diligence should be found in the arbitrator's conduct in this respect.

31.12 Challenges Against the First Instance Award, When Appellate Arbitral Proceedings Are Provided For

Whenever appellate arbitral proceedings are provided for the issue arises whether one *may* challenge the first instance award.

That issue was decided in *Worldwide*[128] where the arbitration agreement referred to the rules of the Chambre arbitrale maritime de Paris, which provided for appellate arbitral proceedings:

> Having lost before the arbitrators, Corelf applied for the appellate arbitral proceedings and at the same time attacked the first instance

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[125] The good father of a family.

[126] J.ROBERT, *La dénaturation par l'arbitre: réalités et perspectives*, *Rev. arb.* 1982, 405.

[127] *Sté Pakistan Atomic Energy Commission v. Sté générale pour les techniques nouvelles*, Court of Cassation (France) January 7, 1992, *Rev .arb.* 1992, 659.

[128] *Sté Corelf v. Sté Worldwide*, Court of Appeal, Paris, July 7, 1995, *Rev. arb.*, 1997, 270.

award before the state courts. The Court of Appeal, Paris held that, when appellate arbitral proceedings are provided for, only the appellate award may be attacked.

In the event of the appellate award allowing the appeal against the first instance award, the former will generally be the award to be challenged before the state courts. But if the appellate award rejects the appeal then, depending on the applicable procedural law, if the loser intends to challenge the results of the arbitral process, either the first instance award or both of them may have to be challenged before the state courts.

A further problem to be considered is not whether a party *may* challenge the first instance award before the state courts when appellate arbitral proceedings are provided for or pending, but whether it *must* challenge it before the state courts even if appellate proceedings are pending or provided for in order to avoid becoming time barred from attacking it later on.

Under some national law, either an immediate challenge will be expressly required or –more likely – the matter will not be regulated and one may not be sure that he does not need to challenge the first instance award in the meantime. In such situations challenges may be conservatively made before the state courts, to be followed by an application for their stay pending the appellate arbitral proceedings.

31.13 Anti-Suit Injunctions Against Actions to Vacate

Actions to vacate or to enforce the award are occasionally opposed even by means of an antisuit injunction, when a party takes the view that the action has been instituted by the opposite party before the court of a state which has no jurisdiction, or other serious grounds for such an application exist.

This has occurred in *Western*[129] where the Indian company, against which the award was made, instituted proceedings in India in order to have the award set aside. At the same time the American party, which had won the arbitral proceedings, applied to a U.S. court for leave to enforce the award.

The Indian party applied then to the Indian court for an injunction to the American party not to continue the U.S. proceedings. The Indian Court granted the injunction, on the basis of the existence of a potential for conflicting decisions.

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[129] *Oil and National Gas Commission of India* v. *The Western Company of North America*, High Court, Bombay, April 3, 1986, *Yearbook Commercial Arbitration* 1988, 473.

31.14 CHALLENGES OUTSIDE THE STATE OF ORIGIN

The natural place for challenges of an award is the legal system to which the award belongs. However, the assertion of this principle is easier than its application. It does not cause difficulties regarding arbitrations which take place in one state and are governed by its procedural law, whether the litigants belong to that or to another state. These are typically domestic proceedings, whether they concern domestic disputes or those which relate to international trade.

The problem is more difficult if arbitral proceedings take place in one state and are governed by the procedural law of another state:

> Proceedings governed by procedural law of state B take place in state A. Two important premises of this situation are taken as granted, i.e. that state A does not prevent arbitral proceedings from taking place in its territory under a different procedural law, and that state B does not forbid use of its procedural law for proceedings which take place outside its territory.

In such a case in which legal system may the award be challenged?

Should it be state A, although its procedural law was not applied, and therefore merely because it let the arbitrators sit in its territory? Or should it be state B, whose procedural law has ruled the proceedings, even if the award was rendered outside its territory? Or will both states have jurisdiction, with the risk of conflicting decisions?

It is submitted that the key to identifying the procedural system, which has jurisdiction, is the procedural law which governed the arbitral proceedings. If a breach of procedural law is asserted it must be decided only by the courts of the legal system to which such procedural law belongs. Therefore, in the above situation it is submitted that the courts of state B, and not those of state A, have jurisdiction. The Swiss decision in *SEEE v. Yugoslavia* confirms this:[130]

> The Tribunal of the Canton of Vaud affirmed that the award could not be filed with a Swiss Court because it could not be treated as a Swiss arbitration, since two arbitrators had been appointed under the applicable procedural law.

The court simply drew natural conclusions from procedural law. Since this was different from Swiss procedural law, it was not possible to accept the filing of the award with a Swiss Court, since this is also the premise of the challenges provided for by that legal system).

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[130] *SEEE v. Yugoslavia, Tribunal*, Canton of Vaud, February 12, (1957) (confirmed by the Swiss Federal Court on September 18, (1957), quoted by van den BERG, *op. cit.*, at 41).

In *Libye*[131] the Court of Appeal, Paris has held that:

> le *recours en annullation* (challenge) may not be made before French Courts against an award made outside France in the matter of an international dispute.

The objection could be made that, even if one follows this view, if the award breaks the public policy of the host state, the latter should be entitled to intervene. However, this intervention is not prevented, but may take place, in the proceedings which aim directly at obtaining recognition or enforcement of the award in that state, through opposition to the application for enforcement.

The problem arises whether the New York Convention (1958) allows challenges, in that situation, in both legal systems (i.e. in the state where the award was made and in the state the procedural law of which was applied). The Convention covers such awards:[132]

> ... It shall also apply to arbitral awards not considered as domestic awards in the state where their recognition and enforcement are sought.

It also provides[133] for the setting aside and for the stay of the award by:

> a competent authority of the country in which, or under the law of which, that award was made.

Nevertheless, it is suggested that such an expression, concise as it is, does not mean that the setting aside or stay can be decided by both such jurisdictions, since this would involve the serious risk of conflicting decisions, but only by the courts of the state in which the award was made (if its procedural law was applicable) or, if the procedural law of another state has been applied, only by the courts of the latter. The hypothesis in which arbitral proceedings are governed by arbitration rules which do not belong to a given procedural law is more complex than proceedings taking place in state A under the procedural law of state B:

> Arbitral proceedings take place in state A; they are not governed by the procedural law of any state, but by arbitration rules not connected with any procedural law (although the arbitrators are bound to comply with the international procedural public policy of the venue of the arbitral proceedings).

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[131] *Société Procédés de préfabrication pour le béton v. Lybie*, Court of Appeal, Paris, October 28, 1997 *Rev. arb.* 1998, 399.

[132] Art. 1.1, New York Convention (1958), *cit.*

[133] Art. V.1 (e), New York Convention (1958), *cit.* 75. art. IX.1, Geneva Convention (1961), *cit.*

In such a situation which court is competent to hear a possible challenge against the award?

Contrary to the previous situations in which a choice had to be made between the two states courts (of state A and of state B) the difficulty here is to identify a state whose courts may hear the challenge (no state seems suitable, as none of them may treat the award as a part of its procedural system). If the award in that situation does not belong to any legal system from the procedural point of view, should it be impossible to challenge the award in any legal system? The objection could be made that the challenge does not necessarily invest only procedural issues. In fact it may concern not only the term to file an appearance, the due formation of the arbitral tribunal, its compliance with the procedural rules, but also the capacity of the parties, the validity of the arbitration agreement, the suitability of the dispute for arbitration. However, many such possible defects may be used also as grounds for refusing recognition of 'non-national' awards, for example under the New York Convention. Should it then be concluded that in such a situation the only remedy available is not a challenge, but simply opposition to recognition proceedings? Such a radical conclusion may leave doubts. The New York Convention, even if it provides for arbitral proceedings governed by a different procedural law (recognition of which can then be sought in their state of origin) does not expressly deal with the hypothesis that the proceedings could be governed by arbitration rules not belonging to any national law. The Convention seems to have concentrated its attention on the hypothesis of a difference between the applicable procedural law and the law of the state of origin. However, if the Convention has not expressly dealt with this hypothesis, it has not excluded it. In fact when it includes in its scope awards which are not treated as domestic awards it does not limit the hypothesis only to the application of a national procedural law. Similarly, when it provides that the award must have become binding for the parties it does not link the binding nature to a national legal system.

Therefore, if the tendency of the Convention is, as seen above, to favour enforcement, if it were to be held that an award is not enforceable because it was not governed by a national procedural law (or rather since it was governed only by the public policy provisions of the procedural law of the place of arbitration), it is suggested that this would go against the purpose of the Convention. What is necessary is that the party, which considers an award to be wrong, be protected from it. The instruments available in this respect are direct challenge, or opposition to applications for recognition and enforcement. Of those remedies, if a direct challenge cannot be made, still the opposition to recognition (or enforcement) remains available.

It should be added that the grounds for challenge and those for non - recognition of an award listed in the Uncitral Model Law are almost identical.

It is submitted that the losing party is therefore sufficiently protected, even in this situation, by the mere possibility of opposing the application for recognition or enforcement of the award.

With regard to challenges made in other states, it should be pointed out that, with the aim of reducing the large number of challenges which are made nowadays, for the purposes of recognition the Geneva Convention (1961) excludes any relevance to the setting aside of the award by the authorities of other states, i.e. states different from the one where the award was made and from the one whose national procedural law governed the proceedings:

> The setting aside in a Contracting State of an arbitral award covered by this Convention shall only constitute a ground for the refusal of recognition or enforcement in another Contracting State where such setting aside took place in a state in which, or under the law of which, the award has been made ...

It should be noted that the basis of such a provision is that setting aside proceedings may *de facto* be instituted even in states which have none of the above two links with the award.

CHAPTER 32

ENFORCEMENT IN THE STATE OF ORIGIN

SUMMARY: 32.1 Obtaining the Effects of an Enforceable Instrument – 32.2 Enforcement Proceedings – 32.3 Time Bar for Starting Enforcement Proceedings – 32.4 Oppositions to Enforcement – 32.5 State Immunity from Enforcement – 32.6 Stay of Enforcement – 32.7 Partial Enforcement – 32.8 Does Rejection of Claims to Set Aside Equal Leave to Enforce? – 32.9 Refusal of Leave to Enforce Local Award for Non Compliance With Municipal Procedural Law.

In the absence of challenges, or at the end of them, the award might appear to be the conclusion of the dispute, at least in the jurisdiction in question. In reality, that is not the case since, unless the award is voluntarily performed, it must be enforced through enforcement proceedings. For its enforcement in its *state of origin*, the award has then to go through the various stages of enforcement proceedings and resist possible oppositions, either to the right to enforce it or to single steps of the enforcement proceedings, which may be made during them.

32.1 OBTAINING THE EFFECTS OF AN ENFORCEABLE INSTRUMENT

One should first examine the proceedings to be followed by a domestic award, in order to become an *enforceable instrument* in the state of origin according to the International Conventions, the arbitration rules, and some national legal systems, using for the latter the various specialised publications.

International conventions

The Geneva Protocol (1923) provides that:[1]

> Each Contracting State undertakes to ensure the execution by its authorities and in accordance with the provisions of its national law of arbitral awards made in its own territory under the preceding articles.

The Geneva Convention (1927)[2] and the New York Convention (1958)[3] do not deal with enforcement in the state of origin, since they both govern the

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1 Art. 3, Geneva Protocol (1923), *cit.*

2 Geneva Convention (1927), *cit.*

3 New York Convention (1958), *cit.*

enforcement of awards in other states. The New York Convention (1958) in fact concerns[4] the 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 ... (emphasis added)

The Geneva Convention (1961)[5] is along the same lines.

The New York Convention also deals with the delicate subject of awards made in the state where enforcement is sought, but not under its procedural law, as to which therefore such a state might refuse to recognize that it has the requirements to become a *national* enforceable instrument. The Convention provides that the recognition or enforcement of such awards may then be requested in such a state under the New York Convention.

The Uncitral Model Law (1985) deals[6] with the enforcement of the award independent of the state in which it is sought:

> An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of Article 36.

Enforcement is dealt with in more detail by the Washington Convention (1965)[7] which, because of its truly international nature, provides that an award made in any adhering state (concerning disputes related to investments between one contracting state and a national of another contracting state) must be treated *in each adhering state* as a national judgment.

Arbitration rules

The ICC Rules of Conciliation and Arbitration state:[8]

> By submitting the dispute to arbitration under these rules, the parties undertake to carry out any award immediately and without delay ...

In fact the majority of arbitration rules expressly provides that the parties have a duty to perform under the award. This is the case also of the rules of the London Court of International Arbitration:[9]

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4 Art. 1, 1, New York Convention (1958), *cit.*

5 Geneva Convention (1961), *cit.*

6 Art. 35, Uncitral Model Law (1985), *cit.*

7 Art. 54 (1), Washington Convention (1965), *cit.*

8 Art. 28.6, ICC Rules of Conciliation and Arbitration, (1998) *cit.*

9 Art. 26.9, Rules of the London Court of International Arbitration, (1998) *cit.*

> ... by agreeing to arbitration under these rules, the parties undertake to carry out any award immediately and without any delay ...

The rules of Conciliation Arbitration and Expertise of the Euro-Arab Chambers of Commerce provide:[10]

> Any award made shall be executed by the parties in good faith

The same rules further state:[11]

> If one party refuses to comply voluntarily with an arbitral award any of the other parties to the arbitration may, if necessary, ask the competent authorities in the country where the award is to be enforced to enforce the award in accordance with the legal procedure of the country in question.

In turn the Uncitral Arbitration Rules (1976) provide:[12]

> ... The parties undertake to carry out the award without delay.

National legal systems

This survey is based on published studies, but in view of the particularities of national legislations and of their frequent changes, it will be necessary to check locally on each occasion.

Under Japanese law it is reported[13] that the arbitrators must have the award served on the parties and file it with the court having jurisdiction and that an award which is declaratory does not require an enforcement order, while this is required if the award is remedial; that enforcement is declared by judgment and may not be declared if there are any grounds on which the setting aside of the award may be sought.

In the Philippines[14] it is reported that a domestic award must be filed within one month with the Regional Trial Court giving notice to the opposing party, with a motion to have it confirmed. If the award is not vacated or modified, the court confirms the award. The judgment which is entered thereupon has for enforcement purposes the same effect of a court judgment. In Malaysia too[15] the award is reported to be enforceable as a court judgment. Application to the court

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[10] Art. 25, para. 3, Rules of Conciliation, Arbitration and Expertise of the Euro-Arab Chambers of Commerce, *cit.*

[11] Art. 25, para. 5, Rules of Conciliation, Arbitration and Expertise of the Euro-Arab Chambers of Commerce, *cit.*

[12] Art. 32.2, Uncitral Arbitration Rules (1976), *cit.*

[13] Y. TANIGUCHI, *Commercial Arbitration in Japan,* ICCA, Congress Series no 4, Kluwer 1989.

[14] V.P. LAZATIN, *The Philippines*, in PRYLES, *op. cit.*

[15] T. SUVANPANICH, *Malaysia*, in PRYLES, *op. cit.*

to confirm the award is reportedly to be made also in Thailand.[16] The Court after scrutinizing the award confirms it or denies enforcement. Once the award is confirmed, it may be enforced. In Australia foreign awards are reported to be enforceable under the New York Convention or an other applicable Convention. Enforcement takes place upon leave to enforce or under an ordinary action at common law, also referred to as the *action on the award,* according to which the courts are requested to enforce the commitment to comply with the award, which is construed as being implied in the arbitration agreement.

It is reported that the new Indian Arbitration Act does not provide for the award to be filed in Court and to be made a decree of the Court. On the other hand an award is deemed to be a decree of the Court when an application to set it aside is dismissed or if no application for that has been filed timely.

Under Egyptian law an enforcement order is reportedly required.[17] Under Saudi law a domestic award in order to be enforced is reported to require an enforcement order by the competent state court. The order is not granted if the time period to appeal it has not yet expired or if grounds to set it aside exist. The award which has obtained an enforcement order has the same effects as a judgment of the court which has issued the order.

An enforcement order is reported to be required in Kuwait,[18] but in order to issue it no review of the merits by the President of the state court is required.[19]

It is further reported that under Syrian law the President of the Court grants an enforcement order after summoning the parties.[20] In Iraq the award is reported to be subject, for the purposes of enforcement, to a summary decision by the Court which may lead to its confirmation or to its setting aside, in which case either the court decides the matter again or remits it to arbitration.[21]

In Germany the application for leave to enforce is rejected if there is one ground upon which it could be set aside. If so, the award will be set aside.[22] In Sweden an enforcement order must be sought from the Order Executor *(Kronofogdemyndighet);* to this end he will make a summary control of the award.[23]

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16 P.G. LIM, *Thailand,* in PRYLES, *op. cit.*

17 Section 509 ECCP; EL AHDAB, *Arbitration with Arab Countries, cit.*, at 191.

18 SALEH, *op. cit.*, at 271.

19 EL AHDAB, *Arbitration with Arab Countries, cit.*, at 311

20 SALEH, *op. cit.,* at 115.

21 EL AHDAB, *Arbitration with Arab Countries, cit.*, at 231

22 Section 1060, German Reform Act December 22, 1997

23 *Arbitration Law in Europe, cit.,* at 338; see also *Arbitration in Sweden, cit.,* at 157-159.

To enforce domestic awards in Italy an application is to be made to the Court for an enforcement order; the court decides *ex parte* after making a control just as to some requirements of the award as to form.[24]

Enforcement in Great Britain is granted by the High Court[25] either by leave to enforce or through a judgment made on an action on the award.

Under French law, enforcement is granted by the Tribunal de Grande instance in charge of enforcements and there is no previous debate between the parties. If leave to enforce is refused, this decision may be appealed within one month to the Court of Appeal. The leave to enforce is not subject to challenge, but the challenge, or *recours en annullation*, against the award involves an opposition to the enforcement and stays its effects.[26] Enforcement in French law has been the subject of a detailed study by Thieffry[27] and of an interesting question by Peyre as to the possibility of a partial enforcement order only being made.[28]

Under Greek law, it is reported that the domestic award is filed with the clerk of the Court of first instance. The Court of first instance issues upon application an enforcement order after a mere control of compliance of the award with form requirements.[29]

It is reported that under Austrian law after the arbitrator certifies that the decision is binding and enforceable, the Court of First Instance, *Bezirksgericht,* is requested to issue an enforcement order.[30] Under Belgian law, in order to be enforced, the domestic award must reportedly be submitted to the President of the Court of First Instance; his decision is not preceded by a debate between the parties. The President of the Court ensures that public policy is upheld by the award and that the dispute is arbitrable.[31]

In Portugal it is reported that the court shall refuse of its own motion[32] the request for enforcement when it ascertains that the dispute should have not been decided by arbitrators, either because it had to be submitted under special

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[24] Section 825, para. 2, 3 Italian Rules of Civil Procedure.

[25] *Arbitration Law in Europe*, *cit.*, at 175; MUSTILL and BOYD, *op. cit.*, at 30 – 31.

[26] *Arbitration Law in Europe, cit.*, at 155.

[27] THIEFFRY, *L'exécution des sentences arbitrales,* (Enforcement of awards) *Rev. arb.* 1983, at 423.

[28] J.C. PEYRE, *Le juge de l'exéquatur, fantome ou réalité* (The Judge of Enforcement, Ghost or Reality) in *Rev. arb* 1985, 231.

[29] *Arbitration Law in Europe, cit.*, at 214.

[30] *Arbitration Law in Europe, cit.*, at 24.

[31] Section 1704, Judicial Code, B. HANOTIAU, *Survey of a New Statute Amending Belgian Legislation on Arbitration, The American Review of International Arbitration*, 1997, vol. 8, 3-4; VAN HOUTTE, *La loi belge du 27 mars 1985 sur l'arbitrage international,* (Belgian Statute March 27, 1985 on international arbitration) *Rev. arb.* 1986, 36.

[32] Section 814, no 2, Civil Procedure Code

statutory provisions exclusively to a state court or to compulsory arbitration or because the right in issue was not capable of settlement by arbitration. The granting of the enforcement in the state of origin is affirmed in Brazilian precedents:[33]

> The award is granted *exequatur* by the courts of the state where it is made; the enforcement order of an award may be given effect by the Brazilian Courts.

This survey of the various national legal systems shows that the award is far away from enjoying, in its state of origin, the automatic effects of an enforceable instrument. On the contrary, in the best situation it is subject merely to a formal control by the courts; that is a position which seems to prevail in European countries, the German approach being a specific and interesting solution. However, in other continents enforcement proceedings frequently involve a debate between the parties.

It follows from this that the procedure, required for the award to become an enforceable instrument, inevitably extends the time needed for the arbitration agreement to produce its effects.

32.2 Enforcement Proceedings

As is well known the achievement of the nature of enforceable instrument is not the end of the enforcement proceedings. Once the award is declared to be an enforceable instrument, it frequently has to go through long proceedings before it is actually enforced in its *state of origin.* In fact the entire enforcement proceedings provided for in the applicable national procedural law have to be followed. In the meantime the debtor will be entitled to raise defences of limitation, or of payment of the debt after the award, or of set-off, issues which on some occasions may be complicated.

As far as the enforcement proceedings themselves are concerned, the various national legal systems may be substantially different. From legal systems where the attachment and the auction are very fast, one moves to others where it may take years between the beginning and the end of the enforcement proceedings. An example of the first group of systems seems to be the state of New York[34] where the award, once confirmed by the court, becomes enforceable under the local enforcement proceedings, which provide for *restraining notices* (through which the creditor notifies, through its attorney, the debtor or the third party not to dispose of, and not to transfer, their assets for a period of time of one year without instructions from the court or from the bailiff). In this way the assets of

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[33] Supreme Court (Brazil) November 8, 1979, No. 21, *Clunet* 1981, 606.

[34] McCLENDON and GOODMAN, *op. cit.*, at 161.

the debtor or of third parties (also referred to as *garnishees)* may be frozen by that notice, which is protected since a breach of it amounts to *contempt of court.*

Another instrument to expedite the enforcement consists of summoning the third parties and the debtor to depose on oath regarding the existence of assets, which may be used to enforce the proceedings. Even the breach of such *subpoenas* is punished as contempt of court.

However many legal systems unfortunately belong to the second type of enforcement proceedings which last several years.

32.3 Time Bar for Starting Enforcement Proceedings

One should identify the possible time bars for instituting proceedings to enforce an award. The delicate issue of whether limitation is in nature substantive or procedural consequently has to be confronted.[35] If it is treated as a substantive issue, related to the claim arising from the award and to its extinction, the time bar will be dictated by the substantive law; if it is not, by the applicable procedural law. Difficulties may even arise in this respect if the parties have not chosen the substantive and procedural law.

Difficult disputes may also arise as to when time starts to run. It has been held that this would be the time the breach or the tort, from which the claim arises, takes place. Mustill and Boyd[36] have held that the action on the award is independent of the legal relationship from which the dispute arises, and that the time bar must run from the time the implied promise to perform the award was broken. This view was confirmed in *Agromet Motorimport*[37] where the English High Court held (per Octon J.):

> There is an implied term that an award will be honoured when it is made. If the award is not honoured there is then a breach of that implied term and time begins to run for the purposes of the Limitation Act.

In civil law jurisdictions time may in general be seen as starting to run from the time that party receives notice of the award.

32.4 Oppositions to Enforcement

Several legal systems allow the debtor to oppose the enforcement proceedings. Those oppositions are divided (in some legal system expressly, in others *de facto)* into those challenging the creditor's *right to enforce* and those against

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35 See supra chapter 15.

36 MUSTILL and BOYD, *op. cit.*, at 369 et seq.

37 *Agromet Motorimport Ltd. v. Maulden Engineering Co. (Beds.) Ltd. (UK),* High Court, England, Queen's Bench Division, April 11, (1984), *Yearbook Commercial Arbitration,* 1987, at 523 et seq.

individual enforcement steps.[38] Through the former the right of the creditor to enforce is challenged. This opposition cannot be based on grounds which belong to the merits, since they can no longer be raised. However, new elements may be put forward if they have deprived the creditor of his right to enforce. This may be the case of limitation of the claim after the award or of payment of the debt, made by the debtor after the award, for example by way of set-off or during previous enforcement proceedings. Such issues may be complicated by the difficulty of identifying the applicable law.

Apart from these issues, which challenge the right of the creditor to enforce, other obstacles may be created which do not involve the existence of such a right, but the way such a right is enforced or, in other words, irregularities in the individual enforcement steps, such as non-compliance with time limits to be respected from one step to the next of the enforcement proceedings.[39]

The filing of an opposition to the enforcement does not prevent, in several legal systems, filing also one or more oppositions to individual enforcement steps. The time required to decide the opposition, during which enforcement is frequently stayed, or to decide several oppositions, if they are made separately, is longer in the legal systems which require that the decision on the opposition be rendered in the form of a judgment. A further postponement of the time required in order that the creditor may satisfy his claim takes then place.

However it must be recognized that those difficulties are not exclusive to arbitration and exist also in the enforcement of court judgments. An example can be made to stress the difficulties which may arise even at that stage.

Illustration

> Two contracting parties, respectively Greek and Egyptian, enter into a contract in Greece, which is to be performed in Egypt.
>
> The parties have made no express choice of the substantive law and the proceedings are under ICC rules. The place of arbitration is Turkey.
>
> Identification of the oppositions to enforcement proceedings and of the applicable time bars may not be easy.

32.5 State Immunity from Enforcement

One generally concentrates on sovereign immunity *from suit.* As earlier discussed[40] in this respect a distinction is generally to be made between situations where a sovereign acts in such a capacity and those where he enters

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[38] See, under Italian law, Sections 615 to 632 Rules of Civil Procedure.

[39] See, under Italian law, Sections 623 to 628 Rules of Civil Procedure.

[40] See *supra* Chapter 11.

into commercial transactions. In the former case, the state enjoys the *jus imperii* (sovereign status) and may not be subject to suit. When a state enters into a commercial transaction, it acts as a businessman (*ex jure gestionis*) and it should be subject to suit. If so, if that state has entered into an arbitration agreement, it may not later refuse to arbitrate, remembering only at that stage its status as a sovereign.

Sovereignty applies nowadays to Governments, to their Ministries, to public bodies like central banks and to the major local authorities such as regions, provinces and municipalities, when acting *ex jure imperii*.

However one may come across pleas of sovereign immunity made at a different level, i.e. from bodies which are not, sometimes by far, entitled to it.

Sovereignty may be relevant also from a different point of view, i.e. in respect of enforcement. A State may then plead sovereign immunity from suit, or merely from enforcement, or from both of them.

As to immunity *from enforcement* a distinction is generally made between assets which are destined to the public role of that state, such as the building and the furniture of its local Embassy or Consulate, and other assets which have not such a destination. As to the latter, enforcement may be possible. In this respect regard must be had to the law of the place where the assets are placed.

Occasionally enforceability on the assets of a state will depend on reciprocity. In other terms if the state, on the assets of which enforcement is being tried, recognises in its own country to the assets of the state, where enforcement is taking place, immunity from enforcement, the latter may tend to reciprocate. Similarly the host State may grant no immunity from enforcement to the assets of another State, which in its own country grants no immunity to the assets of the former.

Even this matter has then to be checked under the local law.

In *Unamuno*[41] immunity from enforcement of the award on a ship, Unamuno, was refused to the Spanish Banco de Credito Industrial on the ground that not only title to the ship had not been established but that, before that, it had failed to provide any conclusive evidence that it was the foreign central bank or central bank authority of Spain since being a subsidiary entity owned by the state does not satisfy the test for sovereign immunity.

In *OIAETI*[42] the French Court of Cassation has held that, if the rule is immunity of foreign states and of their governmental agencies from enforcement, nevertheless there was no immunity for the assets used by them for commercial activities, such as money due to Iran. This decision is in line with

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[41] *Sesostris S.A. v. Transportes Navales S.A.*, U.S. District of Massachusetts, December 28, 1989, *Yearbook Commercial Arbitration* 1991, at 640.

[42] *Islamic Republic of Iran, OIAETI et al. v. Sté Framatome, Sté Alsthom, Sté Spie Batignolles et al.*, Court of Cassation (France), March 20, 1989, *Clunet* 1990, 1004.

the subsequent judgment of that Court authorising Iran's counter attachment against *Eurodif*.[43]

32.6 STAY OF ENFORCEMENT

The enforcement of awards may be stayed like the enforcement of Court judgments.

The stay is generally ordered by the Court from which the setting aside of the award is sought.

The grounds for the stay and jurisdiction to stay the award are governed by the applicable national procedural law.

Therefore the stay may depend on the existence of serious and irreparable damage, and/or on the existence of *prima facie* solid grounds of the application to set aside or on a comparison between the inconvenience caused to the parties by either decision on that application or on other grounds.

The stay of enforcement may also be conditional, based on the applicable procedural law, upon the posting of a security.

Stay of the enforcement proceedings against a security by the applicant has been ordered by a U.S. District Court in *Skandia*[44] in line with art. 6, New York Convention.

See amongst writers Ruffini[45] and Monégier du Sorbier.[46]

In *Datema*[47] it was held that enforcement of a foreign award should not be refused unless it has been set aside in that foreign State or at least the application for its setting aside is likely to succeed.

32.7 PARTIAL ENFORCEMENT

The issue whether enforcement may only be granted in part will be governed by the applicable procedural law.

A difficulty may arise when statutory provisions are silent on this point.

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[43] *Sté Eurodif v. Islamic Republic of Iran*, Court of Cassation (France) June 28, 1989, *Clunet* 1990, 1004.

[44] *Skandia America Reinsurance Corporation (U.S.) v. Caya Nacional de Ahorro y Seguro*, U.S. District Court, Southern District of New York, May 21, 1997, no. 96 Civ. 2301 (KMW) *Yearbook Commercial Arbitration* 1998, 956.

[45] G. RUFFINI, *La sospensione dell'esecuzione delle sentenze arbitrali*, (The stay of the enforcement of awards) *Riv. arb.* 1993, 697.

[46] M. MONEGIER du SORBIER, *L'exécution de la sentence*, (The enforcement of the award), *Rev. arb.* 1990, 465.

[47] *Datema A.B. v. Forenede Cresco Finans A.S.*, Supreme Court, Sweden, November 23, 1992, *Yearbook Commercial Arbitration* 1994, at 712.

In this case the response will have to come from general principles of the applicable procedural law.

It is submitted that a distinction has to be drawn between applications for leave to enforce and enforcement proceedings.

In the latter in principle there should be no objection to the award creditor enforcing the award only in part. On some occasions such as when, after the award has been made, he has collected a part of the amount due to him under the award, he may have no other course of action.

In the former, in several jurisdictions the tendency may either be to enforce the entire award or not at all. In some situations, such as when each part of the award is dependent on the other one or is influenced by it, such as in the case of an award granting a certain amount to one party (by allowing his claim) but granting immediately afterwards another amount to the opposite party (by allowing his counter claim) an enforcement of part of the award would not be conceivable.

When a similar situation does not arise the possibility of an application for enforcement of only a part of the award may not be automatically excluded.

In general the possibility that a state court enforces *of its own motion* only part of an award should be excluded. However situations may arise where part of the award is for example in conflict with the public policy of the state in which enforcement is applied for. If so enforcement in part may be possible if that part of the award is capable of enforcement. If not enforcement of the entire award may have to be refused.

32.8 Does Rejection of Claims to Set Aside Equal Leave to Enforce?

The issue arises whether a judgment rejecting a claim to set aside an award amounts to an enforcement order or whether that party has to apply afresh for such an order.

The matter was dealt with by a U.S. Federal Court of Appeals in the *Viking Trader*,[48] which held that a French judgment rejecting the appeal to set aside amounted to granting leave to enforce. However this decision was based on a specific French procedural provision[49] which expressly states that rejection of an application to set aside an award amounts to granting leave to enforce it.

In the absence of such a specific statutory provision it is submitted that the solution should be the opposite to this.

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[48] *Seetransport Viking Trader Schiffahrtgesellschaft mbH & Co KG v. Navimpex Centrala Navala et al.*, U.S. Court of Appeals, 2nd Circuit, July 8, 1994, *Yearbook Commercial Arbitration* 1995, at 989.

[49] Section 1490, Civil Procedure Code (France).

32.9 Refusal Of Leave to Enforce Local Award for Non-Compliance with Municipal Procedural Law.

It has been earlier discussed whether an award made in a state, under a procedural law different from its municipal one, is subject to challenges in that state and it has been suggested that it should not.

A different aspect of the delicate relationship between the venue of the proceedings and a procedural law different from the *lex fori* is provided by *SEEE v. Yugoslavia.*[50]

> The award was made in Lausanne by a tribunal which – as provided for by the arbitration agreement – consisted of two members. An application to the local Court was made to grant leave to enforce the award. The court refused it on the ground that the procedural law of that Canton required arbitral tribunals to be made of an uneven number of arbitrators. An award made by two arbitrators could then not be treated as an award made under the procedural law of that Canton, and therefore could not be granted leave to enforce it. The Canton court's decision was confirmed by the Swiss Federal Court.

[50] *SEEE v. Yugoslavia*, Swiss Federal Court, September 18, 1957, *Rev. crit.* 1958, 358.

CHAPTER 33

ENFORCEMENT AND RECOGNITION IN OTHER STATES

SUMMARY: 33.1 Distinction Between Recognition and Enforcement – 33.2 Nature of the Enforcement Order: a Step of the Enforcement Proceedings? – 33.3 Recognition as a Counterclaim or as a Defence – 33.4 Need to Enforce the Interim Award Together With the Final One – 33.5 Enforcement of Judgment Entered on an Award – 33.6 Forum Shopping – 33.7 Counterclaims in Recognition Proceedings – 33.8 Enforcement of Part of the Award – 33.9 Autonomy of Enforcement Proceedings from Setting Aside Proceedings – 33.10 Enforcement of a Set Aside Award – 33.11 Enforcement of Conflicting Decisions – 33.12 Time Bar for Enforcement – 33.13 Preventive Independent Proceedings to Establish That Foreign Award May Not Be Recognized – 33.14 Enforcement in the Absence of International Conventions – 33.15 Enforcement Not Sought Under International Conventions – 33.16. Enforcement Under International Conventions – 33.17 Enforcement in Various States

33.1 DISTINCTION BETWEEN RECOGNITION AND ENFORCEMENT

International conventions normally refer both to recognition and enforcement of awards. That is the case of the New York Convention (1958):[1]

> This Convention shall apply to the recognition *and* enforcement of awards made in the territory of a state other than the state where the recognition and enforcement of such awards are sought (emphasis added).

The Geneva Convention (1927) provides in its opening lines:[2]

> In the territories of a High Contracting Party, to which the present Convention applies, an arbitral award made in pursuance of an arbitration agreement whether relating to existing or future differences ... covered by the Protocol ... shall be recognized as binding and shall be enforced.

To eliminate any possible doubt about the need to make a distinction between recognition and enforcement, the Convention goes on to state:[3]

> To obtain such recognition *or* enforcement ... (emphasis added)

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1 Art. 1.1, New York 1958 Convention, *cit.*

2 Art. 1, para. 1, Geneva 1927 Convention, *cit.*

3 Art. 1, para. 2, Geneva 1927 Convention, *cit.*

Similarly, the Uncitral Model Law (1985) states that:[4]

> (1)An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of Article 36.

Immediately afterwards it provides:[5]

> Recognition *or* enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only ... (emphasis added)

The constant joint reference to recognition and enforcement might lead to the conclusion that the two terms must be read together, and that the repetition is practically superfluous. However, recognition must be distinguished from enforcement since the latter is intended to ensure that the losing party carries out the award, while the purpose of the former is different and, in a way, more limited. It simply seeks recognition that the award has a value similar to that of a judgment issued by the courts of the state in which recognition is requested. It could be said that mere recognition is generally less useful and that for this reason the large majority of applications are for enforcement. The objection could be made that enforcement contains an acknowledgement that, if the foreign award were not recognized, it could not be declared enforceable. Whether this is true or not an application might aim simply at obtaining recognition. Another possible use of recognition, which is very rightly highlighted by van den Berg,[6] is in order to try to neutralise a losing party's attempt to obtain from the state courts a new decision conflicting with the award.

33.2 NATURE OF THE ENFORCEMENT ORDER: A STEP OF THE ENFORCEMENT PROCEEDINGS?

The issue has been debated on several occasions whether the enforcement order is already a step in the enforcement proceedings or is only preliminary to them.

The Court of Appeal of Paris in *Sénégal*[7] held that it was a step in the enforcement proceedings and *as such* had to be set-aside, since Sénégal was entitled to immunity from enforcement. As pointed out by Broches[8] this

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4 Art. 35, Uncitral Model Law, *cit.*

5 See *supra* note 4.

6 van den BERG, *op. cit.*, at 244.

7 *Etat du Sénégal v. Sentin as liquidator of SOABI,* Court of Appeal, Paris December 5, 1989, *Rev. arb.* 1990, 164.

8 A. BROCHES, comments to Sénégal, see *supra* note 7.

decision conflicts with two previous French judgments. The first of them is *SEEE v Yugoslavia* [9] where President Bellet held:

> ... the enforcement order is not a step of enforcement proceedings but precedes them,

a view which was reaffirmed by the Court of Appeal of Paris in *Benvenuti.*[10]

33.3 RECOGNITION AS A CONTERCLAIM OR AS A DEFENCE

An application for recognition may be made, if the applicable procedural law allows it, even in other pending proceedings such as those, which may be instituted by the loser ignoring the award. Italian procedural law, before the Recent Reform Act, provided that one may seek recognition of foreign judgments[11] not as a claim but as a counterclaim or a defence (a provision which was applicable in given circumstances also to foreign awards), which was handled as follows.[12]

> The foreign judgment may be invoked also during other proceedings when the judge is satisfied that the necessary requirements ... exist.
>
> Such a decision produces effects only within such proceedings. Nevertheless, if such an application is made to the Court of Appeal, which would have jurisdiction to recognize the foreign award, then the court's decision on this incidental application may – on application – produce the same effects as its decision on a main claim for recognition of the award.

This specific provision has been abolished by the Reform Act. Foreign judgments are now recognised, opposition proceedings being instituted if the foreign judgment is not accepted. Similar provisions might be found in some jurisdictions as to awards.

In several jurisdictions a foreign award may be used also as a mere defence, coming under the heading of *exceptio rei judicatae* (i.e. plea that the issue has already been decided in a final way).

An application for joining proceedings, where recognition is the main claim, with other proceedings instituted separately from the former, cannot be excluded. However even in the legal systems in which the two proceedings may pend before the same court and be in the same procedural instance, an

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9 *SEEE v. Yugoslavia*, Court of Justice, Paris July 8, 1970, *Rev. arb.* 1975, 328

10 *Benvenuti & Bonfant v. People's Republic of Congo*, June 26, 1982, *Rev. arb.* 1982, 207, quoted by Broches see *supra* note 8.

11 International Private Law Reform Act May 31 no. 218, 1997.

12 Sections 799 and 800 Italian Rules of Civil Procedure.

application for staying the other proceedings, until recognition of the award has been granted or rejected, would more frequent.

33.4 Need to Enforce the Interim Award Together with the Final One

In the event of an interim award on the *an debeatur*[13] (liability) and of the final award on the *quantum*, or in any other event of a final award not being independent from the interim award, it may not be sufficient to apply simply for the enforcement of the final award, and one may have to apply for enforcement of the interim *as well as* of the final award.

The Court of Appeal of Bologna so held in 1993[14] and concluded that since the interim award had not been produced, the precondition to enforcement was missing.

33.5 Enforcement of Judgment Entered on an Award

A party, feeling that the enforcement of an award would be refused, has occasionally entered a judgment on the award and then applied for recognition of the judgment rather than of the award.

In the U.S. the practice of entering a judgment on the award is statutorily regulated, as a means of strengthening the award. Born[15] deals with the entry of judgment requirement of the US Federal Arbitration Act, which applies to domestic arbitration. Born shares the view that the inclusion of such a provision in the arbitration agreement is not required in international arbitration although it may be safer to provide for it.

Except in such a situation, recourse to entry of judgment may be a manoeuvre to overcome a refusal by some state court to recognize the award The Italian Court of Cassation has dealt with this issue in *Damiano*[16] where it set aside the Italian judgment on the ground that it had enforced a judgment without checking whether its contents were new vis-à-vis an award to which recognition had been refused:

> Enforcement of the arbitral award was sought and denied in Italy, and the judgment denying enforcement had become final. The Court of Appeal of Messina should have examined the contents and scope of the High Court judgment with respect to the arbitral award of the Arbitration

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13 Whether any amount is due.

14 Court of Appeal, February 4, 1993, *Yearbook Commercial Arbitration* 1994, 700.

15 BORN, *cit.* at 664.

16 *F.lli Damiano s.n.c. v. August Topfer & Co.*, Court of Cassation (Italy) March 13, no. 2846, 1991, *Yearbook Commercial Arbitration* 1992, at 559.

> Board of the Refined Sugar Association of London, in order to ascertain whether the High Court had rendered a totally new and autonomous decision with respect to the award – a decision, therefore, the enforcement of which was not barred on *res judicata* grounds- or whether it had merely founded its enforcement declaration on the arbitral award.

In *Hyundai*[17] the Supreme Court of New South Wales, Australia, held that, for the purpose of enforcement, a foreign award may not be treated as having merged into the foreign judgment entered on it.

In *Curacao*[18] a U.S court enforced as a foreign judgment the decision of a Curacao court which had confirmed an award, but the record does not show manoeuvres to bypass obstacles to enforcement of the award. Likewise the High Court of England in *East India,*[19] the Court of Appeal of Paris in *Weisbaum*[20] and the Court of Cassation of Italy in *Bestetti.*[21]

Alternative claim

While some courts have held that it was possible to sue *alternatively* on the foreign award and on the foreign judgment, which has affirmed the award, in *Badat*[22] the Supreme Court of India held:

> in the process, the award by them has given way to judgment of the Supreme Court of NewYork. It is this judgment which can now furnish a cause of action and not the award.

Direct enforceability of foreign enforcement order

On some occasions a party, instead of seeking enforcement of the award or of the judgment on the award, has applied for enforcement of the foreign enforcement order of the award.

Two opposite positions are recorded in this respect by Hascher:[23]

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17 *Brali v. Hyundai Corp. and Biakh v. Hyundai Corp.*, 4 LR 1076 (1989) quoted by D. HASHER *Arbitration awards and the Brussels Convention*, 12 *Arb. Int.* 3, 233.

18 *Island Territory of Curacao v. Solitron Devices Inc.* 356 F Supp.1, 10 (SDNY 1973).

19 *East India Trading v. Carmel Exporters & Importers Ltd* [1952] *All ER* 1053 (Q.B.).

20 *Weisbaum & Sons v. Archaimbault* Court of Appeal, Paris October 20, 1959, *Rev.arb.*1960, 48.

21 *Oleificio Bestetti v. Can Grain*, Court of Cassation (Italy) February 27, no 1273, 1979, *Yearbook Commercial Arbitration* 1982, at 333.

22 *Badat & Co. v. East India Trading Co.* [1964] 4 SCR 19 (India) quoted by HASCHER, see *infra* note 23.

23 D.HASCHER, *Arbitration Awards and the Brussels Convention,* 12 *Arb. Int.* 3 (1996) 233.

On the one hand the Ontario Supreme Court in *Stolpe*[24] has held that the Dutch enforcement order of a Dutch award could be enforced directly in Canada since the term judgment includes orders and decrees.

On the other hand in *Comptoir Agricole*[25] the Court of Appeal of Caen has held that the Dutch award and not its enforcement order could be enforced in France.

33.6 FORUM SHOPPING

Forum shopping is the search, by a party to an arbitration agreement, of the most favourable venue for the proceedings or for the place where to try to enforce or to attack the award .The premise for this choice is the identification of assets of the award debtor in the various jurisdictions. If assets are available only in one of them, frequently there will be no alternatives amongst which to choose.

If the factual premise for a choice exists, then the interested party will compare the advantages and disadvantages of each jurisdiction. Amongst the basic elements which will be given weight are the degree of liberalism in recognising a foreign award and in this respect whether the New York Convention has been adopted, whether it has been implemented, how strict the notion of public policy and suitability for arbitration are, whether the enforcement proceedings may be stayed, how long they will last, whether immunity from enforcement is granted, and in which situations, to governmental agencies, the grounds for setting aside and duration of the related proceedings.

See amongst writers Redfern and Hunter[26] and Park.[27]

33.7 COUNTERCLAIMS IN RECOGNITION PROCEEDINGS

Occasionally the defendant in recognition proceedings asserts a counter-claim, which may be met by the argument that there is no room for counterclaims in recognition proceedings.

In *Jugometal*[28] a U.S. Court allowed defendant to assert counter-claims and to set off on the ground that:

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[24] *Stolpe & Co. v. Browne & Co.* [1930] 4 DLR 703.

[25] *Comptoir Agricole du Pays Bas Normand v. Sté Néerlandaise Central Bureau* October 22, 1959, *Clunet* 1961, 142.

[26] REDFERN and HUNTER, *cit*, at 366.

[27] W.PARK *International Forum Selection*, Kluwer 1995.

[28] *Jugometal v. Samincorp Inc.* 78 F 504, 507 (SDNY 1978).

> This is not a situation in which a lengthy hearing on an unliquidated claim would defer the trial of the main case or frustrate the fair and speedy administration of justice as required by the Convention.

In *Kwong*[29] another US court distinguished the case it was trying from *Jugometal* on the ground that it had to deal with unliquidated claims.

Speedy recognition is certainly important, but unless the opposite conduct causes the parties to wait for years, it is suggested that the reasons given by *Jugometal* have weight:

> The interests of justice require that the court exercise its powers over the counter-claims and strikes a net balance ...
>
> It would be inequitable to permit this plaintiff to recover a judgment here against the defendant on the concededly valid arbitral award in its favour, and at the same time to withhold enforcement of these counter-claims here ... The Convention does not prevent this Court from entertaining set-offs or counter-claims ...

33.8 Enforcement of Part of the Award

One may be inclined to believe that either enforcement is granted or it is refused, without room for intermediate solutions. However enforcement may even be granted only partially. The New York Convention deals expressly[30] with this possibility:

> if the decision on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions submitted to arbitration may be recognised end enforced.

This provision has been applied in *Cereals of Syria*[31] where the Court of Appeal of Trento granted enforcement of a part of the amount awarded by the arbitrators and refused to grant enforcement for the balance.

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[29] *Kwong Kam Tan Trading Company v. Consup Commodities Inc*, U.S. District Court, District of New Jersey, December 29, 1992, *Yearbook Commercial Arbitration* 1994, 797.

[30] Art V letter c).

[31] *General Organisation of Commerce and Industrialisation of Cereals of the Republic of Syria v. Simer*, Court of Appeal, Trento January 14, 1981, *Yearbook Commercial Arbitration* 1983, at 386.

33.9 AUTONOMY OF ENFORCEMENT PROCEEDINGS FROM SETTING ASIDE PROCEEDINGS

Frequently the control which is to be made in order to enforce a foreign award – when enforcement is opposed – is based on the same or on very similar grounds than those on which the award may be set-aside in its state of origin (be this origin based on territory or on procedural law).

The relationship between the two proceedings is then to be analysed in order to establish whether each of them is independent from the other, or one of them prevails on the other one or each of them influences the other one.

This analysis should start from a factual premise. It is assumed that one is dealing with the enforcement of a foreign award in a given jurisdiction and that the setting aside proceedings take place in another jurisdiction. This produces the result that two separate state courts have authority to decide issues, which are frequently the same and may decide them in a completely different and possibly conflicting way.

It is submitted that it is not obvious that two proceedings on the same, or on extremely similar issues, must co-exist. Alternatively they should at least be coordinated. This view is expressed in Chapter 35 of this study and seems to be shared by Leurent.[32]

A priority of one of these two proceedings on the other one could derive from International Conventions or from domestic legislation, since national legislation may regulate this matter in a way which is different from international conventions.

National legislation may then apply whenever international conventions, and in particular the New York Convention, are not applicable or have not been invoked.

The New York Convention (1958) deals with this matter[33] providing for a ground for a possible refusal of recognition of the award:

> The award.... has been set aside or suspended by the competent authority of the country in which, or under the law of which, the award was made.

The Model Law suggests[34] to adopt the same rule.

The consequence of these provisions, when applicable, is that the setting aside proceedings may but do not necessarily take priority over enforcement proceedings. In fact if the courts of the state (the procedural law of which – it is

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[32] B.LEURENT, *Reflections on the international effectiveness of arbitration awards*, 12 *Arb. Int.* 3 (1996) 269.

[33] Art V e).

[34] Art. 36 (a)(v) Model Law.

suggested in line with the earlier discussed construction of the notion of 'origin' – has governed the arbitral proceedings) set aside the award, may a foreign court still enforce it?

In those situations in which the New York Convention does not apply, unless domestic law regulates differently the relationship between these two proceedings, it may happen, as it has happened, that neither of them takes priority, and the domestic courts seised of an application to enforce a foreign award may do so, ignoring that such an award has been set aside in its state of 'origin'.

In each legal system the solution will depend on the applicable procedural law. That solution may range from priority granted to one of such proceedings to the opposite solution of local courts being entitled to ignore the other proceedings. In a search for coordination between the two proceedings, the former might be attractive.

Enforcement is in general not pre-empted by setting aside proceedings, which take place before another jurisdiction. It follows from this that, unless the New York Convention applies, has been invoked and 'national discretion' is exercised to refuse enforcement, the setting aside proceedings, even when that judgment has become final in that jurisdiction, do not produce effects in other legal systems, unless that judgment has been recognized there. The court which is seised with an application to enforce the foreign award is then not bound to refuse enforcement.

The view has been clearly expressed by the Court of Appeal of Paris in *Unichips*[35] that the enforcement court may apply its own procedural law such as to arbitrability and public policy, if they are less severe than those of the New York Convention.

No progress is to be registered in this respect by *Hilmarton*[36] where the Court of Appeal of Versailles has held that enforcement in France of a Swiss set-aside award does not prevent enforcement in France, in separate proceedings, of the Swiss judgment setting aside that very award, this conflict being subject to a decision by the Court of Cassation if seised of an application of this kind.[37]

It is submitted that contrary to this one should take the view that the enforcement of a foreign award does imply that the award has not been set-aside under its procedural law.

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[35] *Sté Unichips Finanziaria v. Gesnouin*, February 12,1993 Court of Appeal, Paris, *Rev. arb.* 1993, 255.

[36] *Omnium de Traitement et Valorisation v. Hilmarton*, Court of Appeal, Versailles, June 25, 1995, *Clunet* 1996, 120.

[37] A solution which is criticized by E.GAILLARD (*Comments to Omnium*, *Clunet*, 1996, 133) for whom the Court of Cassation may decide in case of two conflicting decisions only if they both belong to the French legal system.

33.10 ENFORCEMENT OF A SET ASIDE AWARD

This situation has been dramatically worsened by the exequatur granted in France and in the U.S., based on domestic procedural law and not on the New York Convention, to awards, which had been set aside in their country of origin. This, even if one shares with Born the view[38] that the New York Convention (1958) is not the exclusive avenue for enforcing an award

This unusual application was successfully made in *Hilmarton* and in *Chromalloy.*

In *Hilmarton*[39] the French winner in arbitral proceedings applied for enforcement in France of a Swiss award. In the meantime the loser had succeeded in having the award set-aside in Switzerland and the setting aside had become final in that jurisdiction.

The French Court of Cassation confirming the French appellate judgment held that, since the applicant had not sought enforcement under the New York Convention, French procedural law applied, which did not request for enforcement that the award be not set-aside in other jurisdictions. The Court held:

> ... the award made in Switzerland is an international award which is not integrated in the legal system of that state, so that it remains in existence even if set-aside, and its recognition in France is not contrary to international public policy.

The same view was expressed by the U.S. Court for the District of Columbia, which in *Chromalloy*[40] confirmed an Egyptian award although an Egyptian court had set it aside. The U.S. Court held that the award could be confirmed since it was valid under U.S. law.

Subsequent to Chromalloy, two U.S. judgments refused to enforce foreign awards which had been vacated in their state of origin.

This may seem a departure from the Chromalloy approach.

However a scrutiny of them shows that the decision here is merely based on a distinction between the contents of the arbitration agreement on which the three awards were based.

In *Baker v. Chevron*[41] the 2d Circuit distinguished the Baker arbitration agreement, which was governed by the laws of the Federal Republic of Nigeria and as a consequence of which the Nigerian Courts had vacated the award,

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38 BORN, *cit.*, at 659.

39 *Hilmarton Ltd v. Omnium de Traitement et de Valorisation*, Court of Cassation (France) March 23, 1994, *Yearbook Commercial Arbitration* 1995, at 663 and *Clunet* 1994, 701.

40 *Chromalloy Aeroservices v. The Arab Republic of Egypt*, 939 F Supp. 907 D (D.C. 1996).

41 *Baker v. Chevron* 191 F 3d 194 (2d Cir. 1999).

from the Chromalloy arbitration agreement which provided that the award "could not be made subject to any appeal or other recourse".

As a consequence of that, while Egypt had breached the commitment not to challenge the award, and the U.S. Courts could not allow it to benefit from such a breach, in Baker the parties had not made such a commitment and the U.S. Courts had no reason to interfere with the result of application of Nigerian Court remedies to the Nigerian award by making enforceable in the U.S. an award which had been vacated in its state of origin.

In *Spier v. Calzaturificio Technica S.p.A.*[42] (2) the District Court of the Southern District of New York applied the same criterion in refusing to enforce in the U.S. an Italian award which had been vacated in Italy.

An apparently different view was expressed in *Clair*[43] by the Court of Appeal of Paris which held that a Swiss award cannot be enforced in France if it has been vacated in Switzerland.However that decision was based on the New York Convention, although the case report does not state whether the applicant had based its application on that Convention.

A less known precedent which is not along very different lines is *Ford Bacon* (1) in which the Brussels Court granted the exequatur to an award which had been set aside by the Court of Appeal of Algier which have been the venue of the arbitral proceedings. The decision was based on Belgian Law, since at that time the New York Convention was not yet in force between Belgium and Algeria.

Hilmarton has given rise to long arguments between writers. The *French solution* has been characterized by Besson[44] as a *sign of imperialism*[45] . Reference was made to a 'Paris Convention for the rescue of distressed awards'. The solutions which have been outlined are several indeed. Prof. Fouchard has advocated[46] *de lege ferenda* that setting aside proceedings be abolished and that one should leave only to State Courts the control for the

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[42] *Spier v. Calzaturificio Technica S.p.A.* 1999 U.S. Dist. Lexis 16618 (SDNY October 19, 1999) Reargument den., no. 86 Civ. 3474 (CSH) (Nov. 23, 1999) cited by B.H. GARNFINKEL and J. GARDINER, A *Blow to the New York Convention? ADR Currents,* December 1999.

[43] *Berardi v. Clair*, Court of Appeal, Paris June 20, 1980, *Yearbook Ccommercial Arbitration* 1882, at 319.

[44] S. BESSON and L. PITTET, *La reconnaissance à l'étranger d'une sentence annulée dans son état d'origine – réflexion sur la suite de l'affaire Hilmarton, Bulletin ASA* 1998, 3, 498.

[45] *Sonatrach v. Ford Bacon & Davis Inc.*, First Instance Court, Brussels, December 6, 1988, *Bulletin ASA* 1989, 213, *Yearbook Commercial Arbitration* 1990, at 370.

[46] Ph. FOUCHARD, *La portée internationale de l'annulation de la sentence arbitrale dans son pays d'origine, Rev. arb.* 1997, 329.

enforcement of the award. Prof. Poudret[47] has responded proposing to extend the standards of the Brussels and of the Lugano Convention to arbitral awards, making easier the enforcement amongst such countries.

Paulson[48] has proposed to distinguish between grounds for refusal which are of a local nature, which he argues should be disregarded, and grounds of an international nature which should be kept. He further suggests that this can be achieved without amending the New York Convention since the latter has aimed at favouring the enforcement and not at governing the matter completely. Therefore, when the Convention provides that the setting aside of an award made in the state of origin may be a ground for refusal, according to Paulson it leaves it up to each jurisdiction to decide whether in such a situation enforcement should be granted or refused or left to the discretion of that single Court. Van den Berg, who is rightly defined by Paulson as *the champion* of the New York Convention, submits[49] that the New York Convention is based on the assumption that the arbitral award is valid and is not to be set aside. Apart from that, he does not share Paulsson's detailed and interesting comments and shares Reisman's view[50] that to enforce an award, which has been set aside in its state of origin, might breach a well established sharing of tasks between national jurisdictions.

Van den Berg reminds that in any event the ambit of the grounds for refusal of enforcement has already been reduced by the European Convention on International Commercial Arbitration (1961). Its art. 9 has been applied only once in *Radenska*[51] where the Supreme Court of Austria held that the setting aside of an award, for breach of the public policy of the state in which the award was made, is not[52] a ground to refuse the enforcement requested in another Member State.

The matter has been dealt with by other writers.[53]

Two comments are offered in addition to this already rich discussion. The first one is that, in case of an award made in a state, under the procedural law of that state, even if it may be described (and it frequently is) as international

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47 J. Fr. POUDRET, *Quelle solution pour en finir avec l'affaire Hilmarton? Réponse à Philippe Fouchard*, *Rev. arb.* 1998, 7.

48 J. PAULSON, *L'éxécution des sentence arbitrales en dépit d'une annulation en fonction d'un critère local*, *Bulletin CCI* 9, 1998, 1, 14.

49 A. J. van den BERG, *L'exécution de la sentence arbitrale en dépit de son annulation?*, *Bulletin CCI*, 9, 1998, 2, 15.

50 H.M. REISMAN, *Systems of Control on International Adjudication and Arbitration*, Duke University Press 1997.

51 *Radenska v. Kajo*, Supreme Court of Austria, February 23, 1998, *Rev. arb.* 1999, 385.

52 According to art. 9/1, European Convention (1961).

53 P. LASTENOUSE, *Why setting aside an arbitral award is not enough to remove it for the international scene*, 16 *J. Int. Arb.* 2, 25.

from the point of view of the nationality of the parties or of the place where the contract to which it relates is to be performed, the award is a national award of that state. If so, it is subject to setting aside as the judgments of that state and it is submitted that once it is set aside by the Courts of its state of origin, it does not exist any longer as any judgment made in court proceedings in that state.

The position may be different when the award has been made in a state under the procedural law of another state. If so, if the latter does not grant to it its nationality and the award may be challenged before the courts of the state where it was made, it may be subject to the same treatment of the former situation. However in the event of an award governed by international arbitration rules and not by a national procedural law, (except for the mandatory provisions of the *lex fori*) then one is in the presence of an international award and the argument that its setting aside in a state does not necessarily affect enforcement in other jurisdictions may be raised. One may have to agree with Paulson that the Convention is not wishing to give absolute directions in this respect since it could very easily have provided that the setting aside of an award in its state of origin (or in the state the procedural rules of which had been applied) would have *always* prevented recognition. It is submitted that the Convention did leave to each state some latitude. It is therefore up to that state to exercise, with prudence, the discretion which it has under its laws.

It is suggested that Hilmarton is not a very good example of an orderly way to deal with this situation. The enforcement of the first award, of the second award which was conflicting with the former, and of the judgment of the Swiss Federal Court, which set aside the first award, is certainly surprising.

If the French Court of Cassation had not been seised of the situation and its decision had not mitigated it, the enforcement of the two awards and of the judgment setting aside the first one would have been an example of perfect inconsistency.

The possibility of staying the enforcement, to which Paulson rightly refers, seems a lost opportunity.

The solution which may be provided to this problem by legal systems, without amending their provisions, is to stay enforcement not only until the setting aside proceedings in the state of origin are completed, but until the judgment setting them aside becomes the object of an application to the same Court for recognition . At that time the Court would be able to hear the two applications possibly in separate but parallel proceedings, and to be able to decide them in the best way.

Since a certain number of arguments have put forward solutions *de lege ferenda*, it is suggested to consider the solution proposed in the last chapter of this study (which goes back to proposals, made in 1987, to provide for an International Arbitral Court of Appeal to review the awards, replacing all

national setting aside and enforcement proceedings). Under this proposed Convention, like under the Washington Convention, the decision of the international appellate tribunal would be final and enforceable in all member states.

If one tries to design a better future, it is suggested that this might be the solution.

Other writers have dealt with this situation.[54]

The French and U.S. position has brought this trend to its extreme conclusion. It is suggested that their conclusion is unacceptable. Whenever the award, enforcement of which is sought, has been set aside in its state of origin, the premise for its enforcement should in general no longer exist. In the event of an application for leave to enforce a non existing award there should be no doubts. It is submitted that the same conclusion is to be reached if that award exists but is null and void. This view is shared by van den Berg[55] while Smit[56] is of the view that even if the award has been set aside, the court from which enforcement is sought may grant it.

This conclusion should not change if the award has been set aside by the courts of the state the procedural law of which has governed the arbitral proceedings. This matter is further analysed in another part of this study.[57] The comments made there are to be added to these.

It is further suggested that the above reported excesses show that this entire line of thought, accepting that leave to enforce be independent from the setting aside of the award, is not acceptable.

33.11 Enforcement of Conflicting Decisions

In *Hilmarton* the Court of Appeal of Versailles has added a further intricacy to this already absurd situation.

As earlier discussed, after the French enforcement order of the Swiss award (although it had been finally set-aside in Switzerland), the court was seised of an application to enforce the very Swiss judgment which had set-aside that award. The French Court granted enforcement to that judgment too, holding

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54 G. SAMPLINER, *Enforcement of Foreign Arbitral Awards after Annulment – in their Country of Origin, International Arbitration Report*, 1996, 145; *id., Enforcement of Nullified Foreign Arbitral Awards, Chromalloy revisited*, 14, *J. Int. Arb.* 1997, Set. 3, 141; E. SCHWARTZ, *A Commentary on Chromalloy, Hilmarton à l'Americaine*, 14, *J. Int. Arb.* 1997, 125; G. DELAUME, *Enforcement against the foreign state of an arbitral award annulled in a foreign state, Rev. Dr. Int.* 1997, 253.

55 A.J.van den BERG, *When is an arbitral award non domestic under the New York Convention?* 6 *Pace L. Rev.*25, 1985, 41.

56 H. SMIT, *Anational arbitration* 63 *Tulane L. Rev.* 1989, 641

57 See *infra* Chapter 31

that one could not grant enforcement just to the first judgment or award which was submitted to the courts and that the conflict between the two French enforcements might be remedied by a petition to the Court of Cassation.

The peculiarity of the French legal system in this respect does not change the negative assessment in general of situations where a legal system might recognise two conflicting decisions.

33.12 TIME BAR FOR ENFORCEMENT

Even enforcement is subject to time bar, when the credit arising from the award becomes extinguished due to the expiry of the statutory time limit to assert it.

The first issue which arises in respect of time bar is whether it is governed by procedural or by substantive law.

It is submitted that, unless the opposite is statutorily provided for, it should be an issue of substantive law since its concerns the existence of the credit.

The matter should then be governed by the national applicable law.

In the U.S. the time bar is three years after the award is made.[58] In Russia it is also three years, running from the time the award acquires legal force.

In England it is six years from the time the award debtor refuses to comply with the request to pay.

33.13 PREVENTIVE INDEPENDENT PROCEEDINGS TO ESTABLISH THAT FOREIGN AWARD MAY NOT BE RECOGNISED

While the classical remedy against a foreign award is to oppose an application for leave to enforce it, situations may arise where, in the absence of an application by the winner for leave to enforce, the losing party has an interest in obtaining in his own country a decision that such an award is not enforceable.

If so, would that party be prevented from making such a claim because the opposite party has not filed an application for leave to enforce the award?

The first question which arises in examining this query is whether a solution is provided by the New York Convention. However in *Acteurs Auteurs Associés*[59] the Court of Paris has held that the New York Convention confines itself to set out the grounds which do not allow recognition of foreign awards, leaving to each legal system to regulate the procedural regime to obtain recognition. That Court concluded that court proceedings, seeking a

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[58] Section 207, Federal Arbitration Act.

[59] *Sté Acteurs Auteurs Associés v. Sté Herndale Films Corporation*, Court of Paris, November 22, 1989, *Rev. arb.* 1990, 693.

declaratory judgment that a foreign award cannot be recognized, are admissible.

Therefore in principle the institution of court proceedings for a declaratory judgment that a given award may not be recognised in another jurisdiction is conceivable. It will depend then on the local procedural law whether or not such preventive proceedings are admissible.

As an alternative to such proceedings in some jurisdictions the loser in those arbitral proceeding may be free to act, until the award is recognised, as if that award did not exist.

33.14 Enforcement in the Absence of International Conventions

In the absence of international conventions each legal system shall apply its own procedural law to make a foreign award effective in its territory, whether through enforcement or simply through recognition.

A short survey of the position of other legal systems is made here, based on published reports made on them, which due to the peculiarities of each of them and to frequent changes should be be checked locally in each case

Under Italian law, for example,[60] whoever wants a foreign award to have effect in the Italian legal system must apply to the President of the competent Court of Appeal, filing the original or a certified copy of the award and of the submission or of the contract containing the arbitration agreement. The President of that Court of Appeal, after checking that the award complies with form requirements of awards, that the dispute is arbitrable under Italian law and that the award does not conflict with Italian public policy, grants leave to enforce. The order may be opposed on various grounds and in the absence of opposition becomes final. These opposition proceedings are based on grounds which are very close to those provided for by the New York Convention.

The decision of the Court of Appeal may be attacked before the Court of Cassation; it may also be the subject of a petition for reconsideration,[61] if the requirements for this exist.

Under Greek law it is reported that a foreign award, if the various requirements for this exist (such as the arbitrability of the dispute, the validity of the arbitration agreement, the respect of the right of a party to put its case and to reply to its opponent's case, and evidence that the award cannot be challenged), is declared enforceable by the judge of First Instance. The award must not conflict with a previous Greek judgment issued between the same parties and which is *res judicata,* or with Greek public policy.[62]

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[60] Section 839, Italian Rules of Civil Procedure.

[61] Section 395, Italian Rules of Civil Procedure.

[62] *Arbitration Law in Europe, cit.*, at 215.

The earlier provision of German law:[63]

> A foreign award, which has become final under the applicable law, is declared enforceable in the same way as a domestic award, unless different provisions of international conventions apply. The application for an enforcement order is rejected whenever:
>
> 1.The award is not binding under the applicable law.
>
> 2.The award conflicts with good morals or with German public policy.
>
> 3.A party has not been duly represented, unless it has expressly, or tacitly, accepted that the arbitral proceedings continue in spite of this.
>
> 4.A party has not been given the opportunity to be heard during the proceedings.
>
> Whenever, after having been declared enforceable, the award is set aside in the foreign country, proceedings may be instituted for setting aside the enforcement order .... .

has been replaced by the German Arbitration Act (1997) which provides that recognition and enforcement shall be granted in accordance with the New York Convention and that:[64]

> The provisions of other treaties on the recognition and enforcement of arbitral awards shall remain unaltered.

The Swiss Federal Statute on Private International Law,[65] in its section on international arbitration, defines as international arbitration those proceedings in which the place of arbitration is Switzerland, and in which one of the parties, at the time the arbitration agreement was entered into, had neither its domicile nor its permanent residence in Switzerland. As to foreign arbitration it provides that:

> The recognition and enforcement of a foreign award is governed by the New York Convention June 10, 1958 on the Recognition and Enforcement of Foreign Arbitral Awards.[66]

Under French law[67] the recognition and enforcement of foreign awards are dealt with as follows:

> The awards are recognised in France if their existence is proven by the party, which applies for recognition, and if such recognition does not manifestly conflict with international public policy. Whenever such

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63 Section 1044, Zivilprozessordnung.

64 Section 1061.

65 Swiss Federal Statute on Private International Law, December 18, 1987.

66 Section 194, Swiss Federal Statute (see *supra* note 15).

67 Section 1498, New French Civil Procedure Code.

> requirements exist, they are declared enforceable in France by the judge competent for enforcement.

The existence of an award is established:[68]

> ... by producing the original [of the award] together with the arbitration agreement, or a certified copy of the same. Whenever such documents are not drafted in French, the party shall produce a translation of them certified by a translator registered with an official list of translators.

An appeal against the refusal to recognize or to enforce an award is provided for as well as an appeal against the granting of recognition or enforcement. French law also provides for and regulates attacks, through the *recours en annulation*, against international arbitration (as defined by it) which has taken place in France.[69]

English law has not only ratified, but inserted in the Arbitration Act 1996 the provisions of the New York Convention.[70] An award will not be enforced in England when it has been set aside in the state of origin.[71]

Dutch law distinguishes between the enforcement of foreign awards rendered in a state with which a treaty for the recognition and enforcement exists and of awards rendered in a state which has no international convention with the Netherlands.[72] In the former case the provisions of the new Statute (sect. 985-991) apply insofar as they are compatible with the Convention. In the latter case the court verifies that there is no obstacle to enforcement such as a breach of public policy.

Recognition and enforcement in Portugal of arbitral awards made abroad is governed by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards[73] and where the Convention is silent, by the rules of the Civil Procedure Code.

The Convention was ratified[74] by the Portuguese Parliament. Portugal has deposited its instrument of accession to the Convention with the Secretary-

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68 Section 1499, New French Civil Procedure Code.

69 Section 1504, New French Civil Procedure Code, cit.

70 Sections 100 to 104, Arbitration Act 1996

71 Section 103 Arbitration Act, 1996

72 Sections 1075-1076, New Dutch Civil Procedure Code.

73 Entered into in New York on June 10 1958

74 Parliament's Resolution no. 37/94 passed on March 10, 1994, followed by Decree no 52/94 June 1 1994 of the President of the Republic; the instrument of accession was deposited by Portugal on October 18, 1994. According to the Portuguese Constitution (Section 8, para 2) international conventions duly ratified or approved by Portugal enter into force in the internal legal system after their publication on the Republic's Official Journal. No implementing legislation is thus required for the purpose of incorporating into Portugese law foreign conventions ratified by Portugal.

General of the United Nations. The Convention has then entered into force in Portugal on January 1995.[75]

Portugal has made a reservation. Because of it, the Convention only applies in Portugal to the recognition and enforcement of awards made in the territory of another Contracting State.[76]

El Ahdab reports[77] that enforcement of foreign awards in the Arab countries must be approached by dividing them into three groups:

- those countries which have not adopted the New York Convention (Iraq, Libya, Oman, Quatar, the United Arab Emirates, Yemen and Sudan) and whose legislation does not distinguish between national and international arbitration;
- the countries which have acceded to the New York Convention (Bahrain, Jordan, Kuwait Morocco, Syria and Saudi Arabia);
- those countries which have gone further than the New York Convention (Algeria, Egypt, Lebanon and Tunisia).

The position in Argentina is dealt with by Grigera Naon[78],in Brazil by De Medeiros and Cardoso[79] in Germany by Schlosser[80] in China by Bersani[81] in the U.S. by Born and by Niddam[82] in Egypt by El Gamal[83] in India by Narriman;[84] as to the Asia Pacific region by Moser[85] and in Turkey by Unal.[86]

Under Australian law arbitral awards are reported to be subject to different rules in the various states. An application for enforcement of an award may be opposed either by an application to set the award aside on the grounds of

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75 Pursuant to article XII, para 2 of the Convention

76 Which is stated in art. 2 of Parliament's above resolution and in the text of the President's Decree.

77 A.H. EL AHDAB, *Enforcement of Arbitral Awards in the Arab countries,* 11 *Arb. Int.* 2, 169.

78 H.,GRIGERA NAON, *The enforcement of arbitral awards in Argentina, Riv. arb.* 1996, 411.

79 J.L.A. DE MEDEIROS-M.I. CARDOZO, *The enforcement of arbitral awards in Brazil, Riv. arb.* 1996, 421.

80 P.SCHLOSSER, *The enforcement of arbitral awards in Germany, Riv. arb* 1995, 602.

81 M.D.BERSANI, *The enforcement of arbitral awards in China, ICC Bulletin* 1994, 2, 48.

82 L.A.NIDDAM, *Enforcement of international awards in the U.S., Rev. arb.* 1993, 13; BORN, *cit.*

83 Y. EL GAMAL, *Quelques observations sur la loi égyptienne nr.27/1994 relative à l'arbitrage, ICC Bulletin* 1994, 2, 3

84 F.S.NARIMAN, *Commentaires de deux arrêts récents et importants de la Cour Suprème de l'Inde, ICC Bulletin* 1994, 2, 35.

85 M.J.MOSER, *The recognition and enforcement of foreign arbitral awards: a survey of the Asia Pacific Region, ICC Bulletin* 1994, 2, 20.

86 S.ÜNAL, *The New York Convention and the recognition and enforcement of foreign arbitral awards in Islamic Law,* 7 *J. Int. Arb.* 4, 55.

misconduct of the arbitrator or of improper procurement of the award. Under Japanese law a foreign award is reported to be enforced according to the New York Convention or to the applicable bilateral treaty (as the Chinese – Japanese Trade Agreement) or to the provisions of Arbitration Law which are a part of the Civil Procedure Code; besides the requirement – which however is debated – of reciprocity, the award must satisfy several conditions. Amongst them is the requirement that the award must not be incompatible with Japanese arbitration law (suitability for arbitration, arbitration agreement, and so on), with Japanese public policy and with the rules concerning representation of the parties and due conduct of the proceedings. The competent court must generally be identified, based on the criteria which apply to ordinary court proceedings.[87]

As to enforcement in India, reference is made to writings by Deshpande[88] Tupman[89] Paulsson[90] and Ebb.[91]

33.15 Enforcement Not Sought Under International Conventions

A party may apply for enforcement of a foreign award under the *lex fori* even if international conventions could be applied.

This principle was confirmed by the French Court of Cassation in *Polish Ocean*:[92]

> Art.7, New York Convention June 10, 1958 for the Recognition end Enforcement of Foreign Awards does not deprive a party, which has an interest in doing so, from availing itself of the award in the way provided for by the law of the place where enforcement is sought. It follows from this that a French Court may not, when the award has been set aside or stayed by the competent Court of the state in which the award has been made, refuse to grant its exequatur since this is not one of the grounds for refusal provided for by section 1502 Civil Procedure Code, although it is provided for by art VI, 1, e) New York Convention.

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87 SIMMONDS *et al*, *op. cit.*, at 103.

88 V.S.DESHPANDE, *Jurisdiction over foreign and domestic awards in the New York Convention* 1958, 7 *Arb. Int.* 2, 123.

89 M.TUPMAN, *Staying enforcement of arbitral awards under the New York Convention*, *Arb. Int.* 1987, 209.

90 J.PAULSSON, *The New York Convention's Misadventures in India*, *International Arbitration Report* 1992, 18.

91 L.F.EBB, *Reflections as to the Indian Enforcement of the GE-Renusagar Award*, 1 *Arb. Int.* 3 (1994) 141.

92 *Sté Polish Ocean Line v. Sté Jolasry*, Court of Cassation (France) March 10, 1993, *Rev. arb.* 1993, 256.

33.16 ENFORCEMENT UNDER INTERNATIONAL CONVENTIONS

In spite of the clear priority given to the New York Convention over other conventions, foreign awards are not always enforced under the former, either because the requested state has limited its application to the adhering states, or to commercial disputes, or because it has not joined the New York Convention.

Among other conventions, the Washington Convention (1965) deserves special mention, since it entitles to enforcement in all the Contracting States without a distinction being made between domestic and foreign awards. The enforcement proceedings are the same for all of them.[93]

> Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that state. A Contracting State with a federal constitution may enforce such an award in or through its federal courts, and may provide that such courts shall treat the award as if it were a final judgment of the courts of the constituent state.

An award rendered under the Washington Convention can therefore be enforced as a final judgment of the courts of the state requested for the enforcement. This inevitably implies that if this first stage is the same, the enforcement proceedings vary according to each state depending on its procedural law. However, even ICSID awards cannot be enforced without difficulty, as it is shown by the *Liberian Eastern Timber* dispute:[94]

> In spite of Liberian Eastern Timber obtaining an ICSID award favourable to it, its enforcement – requested in the United States -on two occasions encountered obstacles set up by the Liberian Government through a plea of immunity from enforcement.

The Geneva Convention (1927) on its turn provides a detailed mechanism for enforcing foreign awards; however, it no longer applies in the relationship between states which have joined the New York Convention.

The relationship between the two Conventions is ruled by the New York Convention (1958) which provides:[95]

> The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral awards of 1927 shall

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[93] Art. 54, 1, Washington Convention (1965), *cit.*

[94] *Liberian Eastern Timber Co. (LETCO) v. Gouvernement de la République du Libéria,* ICSID award March 31, 1986 (arbitrators B. Cremades (Chairman), Pereira and Redfern) *Clunet* 1988, 167, with comments by GAILLARD.

[95] Art. V11.2, New York Convention (1958), *cit.*

> cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

The Geneva Convention (1927) is then still applicable when it is not excluded by the application of the New York Convention. In any event, the Geneva Convention has a more limited scope than the New York Convention in as much as it concerns awards rendered only in the territory of a Contracting State and involving parties belonging to Contracting States. Consequently, an arbitrable dispute between parties belonging to Contracting States which has taken place in a non-Contracting State cannot be recognised under the Geneva Convention, while the New York Convention has abandoned the nationality requirement and takes into account the place where the award is made.

Amongst these, is the problem arising from the applicability of the Geneva Convention to two states which have adhered to it, but only one of which has adhered to the New York Convention, without taking advantage of the possibility of limiting it to the Contracting States. The consequence of this might be that the state in question is no longer bound by the Geneva Convention, which is the only one to which the other State is bound. This is one of the various interesting queries raised by the study made by van den Berg[96].' who rightly points out, amongs other things, that the New York Convention recognizes' the validity of the other conventions:[97]

> The provisions of the present Convention shall not effect the validity of multilateral or bilateral agreements 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.

A party is entitled to request the application of the convention, which he deems most favourable to him, or of a national procedural provision. This principle is rightly defined by van den Berg as *the most favourable right provision.*[98]

Since the New York Convention does not prevent enforcement of an award under a more favourable national provision, in *Norsolor*[99] the French Court of Cassation criticized that no search had been made in the national procedural law for a more favourable provision:

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[96] van den BERG *op. cit.*, at 117.

[97] Art. VIII, New York Convention (1958), *cit*

[98] van den BERG, *op. cit.*, at 82.

[99] *Pabalk Ticaret Sirketi Ltd. v. SA Norsolor*, Court of Cassation (France), October 19 (1984), *Clunet*, 1985, 680.

> Since the New York Convention did not allow the recognition in France of an award set aside in its state of origin, the Court of Appeal erred in not trying to find out whether the national provisions were more favourable to recognition.

On the other hand it is not possible to combine the various conventions or provisions by choosing, for each single issue of a dispute, the provisions of a different convention[100] or procedural law.

The European Geneva Convention (1961) has a different and more limited scope than the New York Convention. First of all[101] it concerns:

> ... arbitration agreements concluded for the purpose of settling disputes arising from international trade between physical or legal persons having, when concluding the agreement, their habitual place of residence or their seat in different Contracting States ...

while the New York Convention covers:[102]

> ... all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

Furthermore the European Convention concerns only disputes between parties belonging to different Contracting States.

If the combination between conventions is not possible, some of them may complement each other. For example, van den Berg[103] points out that the European Convention and the New York Convention are complementary, underlining that the European Convention does not deal with recognition and enforcement, for which a reference has to be made to the New York Convention. The European Convention however states that:[104]

> 2. In relations between Contracting States that are also parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10th June 1958, paragraph 1 of this article limits the application of Article V (1) (e) of the New York Convention solely to the cases of setting aside set out under paragraph 1 above.

In other words the recognition and enforcement of a foreign award cannot be refused, even if it has been set aside, unless on the grounds provided for in the Geneva Convention. From this point of view the two conventions can thus be applied simultaneously.

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[100] van den BERG, *op cit.*, at 85.

[101] Art. 1.1 (a), European Geneva Convention (1961), cit.

[102] Art. 11. 1, New York Convention (1958), *cit.*

[103] van den BERG, *op. cit.*, at 95.

[104] Art. IX.2, Geneva Convention (1961), *cit.*

Several Countries which had adhered to the Moscow Convention (1972)[105] seem to have withdrawn from it.

The Panama Convention (1975)[106] concerns the Latin American countries, the majority of which have not joined the New York Convention.

In the event of conflict between international conventions, the Vienna Convention [107] offers the traditional criteria which are summarised by the *lex posterior derogat priori* rule (i.e. the subsequent statute prevails on the previous one) and by the prevalence of the *lex specialis* (the special statutory provision) on general provisions. However, nowadays relationships between conventions seem to be governed mainly by the more recent principle of *maximum effectiveness*, which, as van den Berg[108] rightly points out, clearly emerges from Article VII.1 of the New York Convention. Once the applicable convention has been identified or the parties have chosen, from the various applicable conventions, and applied the most favourable provision principle, enforcement is governed by the said convention. Along these lines is *Denysiana*:[109]

> This solution corresponds to the so-called rule of maximum effectiveness, as was correctly referred to by the lower court. According to this rule, in [the] case of discrepancies between provisions in international conventions regarding the recognition and enforcement of arbitral awards, preference will be given to the provision allowing or making easier such recognition and enforcement, either because of more liberal substantive conditions or because of a simpler procedure.

Less attention is generally given to bilateral conventions, which mainly concern the financial relationships between the Contracting States. This also because the New York Convention is frequently more favourable than they are. Nevertheless, as van den Berg emphasizes,[110] under some of them enforceability achieved by an award in the state of origin cannot be refused in another Contracting State unless there is a breach of the latter's public policy and, from this point of view, bilateral conventions may be more favourable.

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[105] Art. VI, *Convention sur la solution par le voie d'arbitrage des litiges civils et de droit découlant des relations de la Coopération Economique Scientifique et Technique* (Convention on the Settlement through Arbitration of Civil Legal Disputes arising from Economic, Scientific and Technical Cooperation Relationships), Moscow May 26, 1972.

[106] Inter-American Convention of International Commercial Arbitration, January 30, 1975.

[107] Vienna Convention on the Law of Treaties, May 23, 1969.

[108] van den BERG, *op. cit.*, at 119.

[109] *Denysiana S.A. (Switzerland) v. Jassica S.A. (Switzerland)*, Federal Court (Switzerland), March 14, (1984), *Yearbook Commercial Arbitration*, 1986, at 536.

[110] van den BERG, *op. cit.*, at 108.

The wording of a clause contained in various bilateral conventions is reported here:[111]

> The clauses of contracts entered into between citizens and legal entities and/or associations of either High Contracting Party and the citizens, legal entities and associations of the other High Contracting Party which provide for the settlement of disputes by arbitration shall not be treated as invalid for the purposes of their enforcement in the territories of the other High Contracting Party solely because the place designated for the arbitral proceedings is outside such territories or because the nationality of one or more of the arbitrators is not that of the other High Contracting Party. No award duly made in conformity with such arbitral clause, which is final or enforceable under the laws of the place where it is made, shall be deemed invalid or not enforceable in the territories of either High Contracting Party solely because the place, where that award is made, is outside such territories or because the nationality of one or more of the arbitrators is not that of the High Contracting Party. Nothing in this article must be construed so that an award may become enforceable in the territories of either High Contracting Party before it has been duly recognized there.

The recognition or enforcement in other states may then, also under the New York Convention, be governed by other multilateral or bilateral conventions, or by a national procedural law. Whenever more than one convention is applicable and none has been chosen by the parties, when that is allowed, the conflict between them has to be solved.

The requirements for recognition and enforcement therefore depend on the multilateral or bilateral convention, or the national procedural law held to be applicable. Although the various conventions do not basically differ from each other, in this respect, the matter will have to be examined in relation to the specific convention or statutory provision. For the purposes of applying international conventions, the role which the choice of the parties may play is dealt with in *Confex*:[112]

> A French purchaser sued a Rumanian seller before the Tribunal de Commerce, Marseille, for non-conformity of the purchased goods. The Rumanian seller argued that the arbitration convention contained in a previous contract between the parties applied, and that the Geneva Convention (1961) applied too. The Court of Cassation, rejecting this

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[111] See for example the bilateral Italy-US Convention, *Accordo che completa il trattato di amicizia, commercio e navigazione* (Agreement which Completes the Treaty of Friendship, Commerce and Navigation), Washington September 26, 1951.

[112] *Sté Confex (Rumania) v. Ets Dahan (France)*, Court of Cassation (France) February. 25, (1986), *Yearbook Commercial Arbitration*, 1987, at 484.

argument, held inter alia that the Geneva Convention had not been invoked by the parties in the appellate proceedings.

33.17 ENFORCEMENT IN VARIOUS STATES

In principle, there is nothing to prevent an award from being enforced simultaneously in various states even if this will involve the possibility for the award debtor to oppose enforcement in each country.

Only when such a multiple enforcement becomes oppressive are remedies available to protect the debtor, such as when, during national enforcement proceedings concerning various assets, the creditor attaches assets, which are worth in excess of his claim.

However, in the past the possibility of enforcement in various states was not automatically accepted as shown in the Rumanian decision no. 2281 (1979):[113]

> A German Federal company requested the enforcement in Rumania of a final award rendered by the Court of Arbitration at the Chamber of Commerce in Zurich. The Tribunal of the Municipality of Bucharest in its judgment no. 138 of December 9, 1976 rejected the application since the award had already been declared enforceable by the Court of Munich.
>
> The Rumanian Supreme Tribunal rightly criticized the decision of the first judge, since the creditor had not been satisfied by the first enforcement proceedings. The Supreme Court reaffirmed on this occasion the principle that a creditor may attach all the assets of the debtor.

[113] Supreme Court (Socialist Republic of Rumania), December 17, no. 2281 (1974), *Clunet*, at 181.

CHAPTER 34

RECOGNITION AND ENFORCEMENT UNDER THE NEW YORK CONVENTION

SUMMARY: 34 1 Field of Application – 34.1.1 Relationship with Domestic Law and Other International Conventions – 34.1.2 The More Favourable Right Provision – 34.1.3 Foreign v. International and Domestic Awards – 34.1.4 Universality and the Two Reservations – 34.1.5 Need for Domestic Implementation – 34.2 Recognition of Arbitration Agreements – 34.2.1 Special Meaning of Recognition –34.2.2 Form Requirements of Convention Awards – 34.2.3 Contents of the Arbitration Agreement – 34.2.4 Reference to Arbitration – 34.3 Recognition and Enforcement of Awards – 34.3.1 Documents to Be Filed When Applying for Leave to Enforce – 34.4 Grounds for Refusal – 34.4.1 Grounds to Be Raised by the Opposite Party – 34.4.2 Grounds for Refusal on the Court's Motion – 34.5 Interim Awards – 34.6 Enforcement Procedure

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention 1958) is by far the most important international convention in the field of arbitration.[1] The New York Convention is completed by the European Convention (1961).

As it is well known, in spite of its heading, the Convention deals not only with recognition and enforcement of arbitral awards but also with recognition of arbitration agreements, while it does not deal with setting aside proceedings. In view of the very deep study made by van den Berg[2] one shall confine oneself to an elementary survey of the Convention, referring the reader to such an authoritative textbook for further and better information.

34.1 FIELD OF APPLICATION

34.1.1 Relationship with domestic law and other international conventions.

The Convention supersedes:[3]

- the Geneva Protocol 1923 on arbitration clauses;
- the Geneva Convention 1927 on the execution of foreign arbitral awards.

The New York Convention:[4]

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1 New York June 10, 1958, 330 *United Nations Treaty Series* 1959, 38.

2 van den BERG *The New York Arbitration Convention of 1958*, Kluwer 1981.

3 Art. VII.1.

4 (see supra note 1).

- does not affect the validity of multilateral and bilateral international conventions entered into by the contracting states;
- allows any interested party to apply for recognition and enforcement of an arbitral award based *only on domestic law* or on other international conventions.

34.1.2 The more favourable right provision

The provision of the New York Convention referred to above produces the result that the Convention does not automatically replace all the other multilateral and bilateral conventions. In case of conflict between it and the other conventions, van den BERG is of the view that the old principles *lex posterior derogat priori*[5] and *lex specialis derogat generali*[6] apply as well as the more recent *règle d'efficacité maximale*[7] according to which that Convention would prevail, under which the validity of the arbitration agreement is affirmed.

It is suggested that the first two principles would apply, had the Convention itself not provided that it shall not affect the other conventions, which seems to mean that it neither replaces nor detracts from their validity even if it is 'subsequent' and 'more specific'.

As to the maximum efficacy principle, despite its excellent intentions, it seems to be largely based on common sense rather than on an express statutory basis and to be applicable only when none of the two conflicting conventions would prevail.

It is then submitted that the New York Convention on the one hand does not replace the other conventions (except for the Geneva Protocol 1923 and the Geneva Convention 1927) but on the other hand is not automatically replaced by them. These Conventions consequently co-exist.

Furthermore each party is free to invoke one or the other of them at his discretion.

Van den Berg defines this provision as the *more favourable right provision.*[8]

Van den Berg further takes the view that the Convention may not be combined with other laws or conventions and cites in support a German decision of 1976.[9] Even if this suggestion is logical and attractive, it does not seem to be sure that, in the absence of an express prohibition, a party may not

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5 The subsequent statute supersedes the earlier one.

6 A specific statute supersedes a general one.

7 The principle of maximum efficacy.

8 VASSALLI, an den BERG, *cit at.* 86.

9 Court of Appeal, Köln June 10, 1976, *Yearbook Commercial Arbitration* 1979, F. R. Germany no. 14.

apply for recognition based on the Convention, but base some specific aspect of its application on domestic law or on another convention.

34.1.3 Foreign v. international and domestic awards

The Convention provides for recognition of *foreign* arbitral awards as opposed to domestic awards. The Convention defines as foreign awards:

- The awards made in the territory of a state other than the requested state, as well as
- the awards made in the territory of the requested state but which are 'not considered as domestic in that state'.

The criterion stated by the Convention for identifying the foreign nature of an award is then not the nationality of the parties, but the place where the award is made, which must be a state different from the one which is requested to enforce it. This choice fits well into the traditional line of international conventions.[10]

However, apart from this criterion, the Convention also recognizes, as a second criterion, the foreign nature of those awards which are made in the state requested to enforce them but which are not considered as national awards there because they are governed by a different procedural law.

The Convention, in defining its scope, states that:[11]

> ... It shall also apply to arbitral awards not considered as domestic awards in the state where their recognition and enforcement are sought.

This concept is reaffirmed by the Convention where[12] it provides that enforcement may be refused whenever the award has not yet become binding, or has been stayed or set aside by the competent authority:

> ... of the country in which, or under the law of which, that award was made. (emphasis added)

An authoritative commentator on the Convention, van den Berg, stresses[13] that a study of the awards rendered in the various Contracting States on the application of the New York Convention shows that the second criterion is very rarely used. Nevertheless, it is submitted that its importance from a systematic point of view is not reduced because of this.

In such systems awards classified as international (merely based on the subjective or objective criterion) are treated as domestic, they belong to the

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[10] See in this respect *supra* Chapter 2.

[11] Art. I.1, New York Convention (1958), *cit.*

[12] Art. I.1 , New York Convention (1958), *cit.*

[13] van den BERG, *op. cit.*, at 350.

subtype 'domestic international awards' and are regulated by domestic law, in some respects differently from wholly domestic awards.

Aside from domestic and foreign awards, can there be a third separate category of international awards? As discussed earlier it is suggested that the response is positive. However for the purposes of the Convention, 'international awards', in which internationality is based on non application of domestic procedural law, are to be equated to foreign awards.

An analysis of the notion of foreign awards has been made by Pryles.[14]

34.1.4 Universality and the two reservations

The Convention aims to regulate awards rendered *in any other state*, independently of the nationality of the parties and of the underlying transaction (which may all be domestic as far as the requested state is concerned). As earlier discussed, the Convention even covers awards made abroad between nationals of the same state. This construction was shared in *Donati.*[15]

The Convention is then indeed *universal.*

According to van den Berg, the Convention would not apply to arbitration proceedings which are not governed by a national procedural law. He defines such awards *a-national.*[16] However the arbitration rules of the major international arbitral institutions are not linked to a national procedural law. It is submitted that this creates no major problem since the mandatory provisions of the *lex fori* will by definition apply even if excluded, and this avoids arbitral proceedings floating in the air, without being anchored to any legal system. The concern which arises from van den Berg's comment does not consequently seem justified and the Convention applies also to such awards.

The Convention grants to each adhering state the possibility of making two reservations, i.e. to limit its applicability.

The *first reservation* is reciprocity.[17] Based on it, a state may adhere to the Convention only as to awards made in the territory of another *contracting* state. As it was held in *Société Nationale*[18] reciprocity has to be established based on the place where the award is made and not based on the nationality of the parties

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[14] M. PRYLES, *Foreign Awards and the New York Convention*, 9 *Arb. Int.* 3, 259.

[15] *Donati and Lupalu v. Saima,* Court of Milan January 8, 1990, *Yearbook Commercial Arbitration* 1992, 53.

[16] van den BERG, *cit.* at 29.

[17] van den BERG, *cit.* at 24.

[18] *La Société Nationale v.Shaheen National Resources Co*, F. Supp. 57 (SNDY1983) cert. denied 469 U.S. 883 (1984).

The *second reservation* is the commercial reservation.[19] Under it, a state may limit the applicability of the Convention to:

> Differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the law of the state making such a declaration.

Problems arise as to classification of commercial relationships which is left to the law of each state.

In spite of van den Berg's effort to support a uniform interpretation of the Convention, it does not seem possible always to overcome references to national legislation. Precisely in this situation each national legislation has its own concept of a commercial relationship – a concept which is different in those states, like France, which still have a Commercial Code and Commercial Courts, in respect of the other states which do not have such a division.

34.1.5 Need for domestic implementation

In the first place it must be pointed out that, in order for the Convention to apply to a state, it is not always sufficient for that state to have ratified it, but the Convention must also have been implemented, when necessary, in the relevant legal system in compliance with its provisions. Along these lines is the judgment rendered by the Mahkamah Agung (Supreme Court) of Indonesia in *Navigation Maritime Bulgare*:[20]

> The court then addressed the question of whether Indonesia is bound by the 1958 New York Convention, and concluded that it was not. While acknowledging that Indonesia ratified the New York Convention in 1981, the court stated that 'in accordance with Indonesian practice', it is still necessary for the Government to promulgate implementing regulations concerning whether a request to enforce a foreign award should be made to a District Court (and if so, which District Court) or whether such request should be made directly to the Supreme Court for a determination as to whether the award is contrary to the Indonesian legal order. Pending promulgation of such implementing regulations, Indonesian courts cannot enforce foreign arbitral awards.

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[19] van den BERG, *cit.* at 25.

[20] *Navigation Maritime Bulgare (Bulgaria) v. P. T. Nizwar (Indonesia)*, Mahamah Agung (Supreme Court) (Indonesia), August 20, (1984), *Yearbook Commercial Arbitration* 1986,voat 508 *et seq.*.

34.2 Recognition of Arbitration Agreements

In *Eurocar*[21] a U.S. District Court, after hearing argument against enforcing an Italian award made pursuant to the Italian *arbitrato irrituale*, based on the submission that this type of proceedings is outside the New York Convention, concluded that – although the matter was highly disputable – such awards are enforceable.

34.2.1 Special meaning of recognition

Although the heading and the scope of the Convention relate to the recognition and enforcement of foreign arbitral awards, van den Berg rightly stresses[22] that, through the grounds for non-recognition of the award, the Convention also regulates the validity of arbitration agreements through provisions which, even if split into many separate parts of the Convention, still – if put together – fully govern the matter.

The convention has not clarified the meaning of recognition of *arbitration agreements*. In this respect recognition is not to be construed in the usual sense of court proceedings aiming to obtain a decision giving effect to an agreement, in our case to an arbitration agreement.

Several questions arise from this vagueness. First, one has to establish whether recognition is merely preparatory to the duty of the courts of the adhering state to deny their jurisdiction and to refer the parties to arbitration or whether it produces other effects.

It is submitted that art. II(i) seems to have the sole purpose of stating that arbitration agreements in writing must be treated as automatically valid, as an effect of the convention, without any other step having to be taken.

The Convention does not further clarify whether it deals only with non-domestic or also with domestic arbitration agreements. The additional issue has been raised whether in the event of the Convention applying only to non domestic agreements, it would apply also to domestic arbitration agreements, in which one of the parties is not national, or the underlying transaction is transnational.

Regrettably, due to the silence of the Convention, the options available to the interpreter are three; i.e. that the Convention applies (i) only to foreign agreements, (ii) also to domestic agreements of the international subtype, (iii) or also to fully domestic arbitration agreements.

Van den Berg opts for the last alternative.

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[21] *Eurocar Italia S.p.a. v. Maiellano Tours Inc.*, no. 97-7724 (2nd Cir. Sept. 2, 1998).

[22] *Michel Warde v. Sté Feedex International Inc.*, Tribunal de Grande Instance de Paris, April 13, (1984), *Rev. arb*, 1985, 155.

In the absence of an express provision, one has to analyse whether the solution to this query may derive from the general structure of the Convention. Since the Convention deals with foreign awards (i.e. awards made in a state different from the one in which the agreement is being taken into account, or in that very state, but which are governed by a procedural law which is different from the one of that state) one might infer from this that even the reference to arbitration agreements is limited to foreign arbitration agreements.

One could distinguish between arbitration agreements which have been entered into in that very state, (and which because of that might not require to be recognised), and arbitration agreements entered into outside that state and which might be granted this recognition, (even if perhaps they would not obtain it under the law of the state where they were entered into). However this criterion does not help to clarify the situation. In the absence of clarification from the Convention, it seems that the Convention has to be construed as providing that all the arbitration agreements which possess the requirements referred to by it involve the duty of the courts of an adhering state to deny its jurisdiction.

34.2.2 Form requirements of convention awards

Contrary to other Convention requirements, this requirement was meant not to be left to each adhering state but to be uniform. Its supersedes then the municipal law requirements as to form.

The majority view is that this is at the same time a minimum and a maximum requirement in order that the arbitration agreement be enforced and that it is not possible to prove the agreement by other means. The Convention requires the agreement to be:

> signed by the parties or contained in an exchange of letters or telegrams.

A distinction has then been made between

- a submission;
- an arbitration clause:

signed by the parties; or contained in an exchange of letters or telegrams.

A submission, or an arbitration clause in a contract, signed only by one party but tacitly accepted by the other one by appearing in court and asserting rights or defences, would produce estoppel from any challenge to the lack of validity of the arbitration agreement. However this conclusion is not accepted in every jurisdiction.

In the exchanges of telegrams or faxes, the signature of the parties is not required.

In this regard, the municipal requirement in some legal systems of a second and specific acceptance of the arbitration clause, (which is treated as onerous), is superseded by the Convention.

It is submitted that orally or tacitly accepted arbitration agreements are not valid under the convention.

Problems arise in respect of an arbitration clause included in standard terms which have been *incorporated by reference* by the parties in their contract.

Incorporation in the standard terms may take place in two ways:

- when the standard terms are printed on the back of the contract, or of a proposal;
- when they are printed on a separate document.

Some writers have taken the view that in there two situations the requirements would be different. This view is not shared since the place where the standard terms are printed should not produce different results. The issue seems to be whether the reference in the contract, or in a proposal, to standard terms, containing also an arbitration clause, is a specific or a general reference. If it is specific to that clause, as a rule the reference is valid. If it is a general reference to these standard terms, it may not be valid, whether the standard terms are printed on the back or on a separate document, unless knowledge of that clause by the other party can be established; for example because of specific discussion of it or because of previous relationships between the parties or because the clause is standard in the trade. If knowledge of the arbitration clause is lacking, it is submitted that the issue is not a matter of form but of lack of consent to submit the dispute to arbitration. The views on whether a general reference is sufficient to prove consent are divided. Disagreement as to bills of lading and insurance contracts are strong. A US court in *Sphere Drake*[23] has held that the signatures of the parties would be required only as to submissions and not as to contracts containing an arbitration clause. This is a conclusion which, it is suggested, cannot be supported.

Judicial disagreement in respect of the construction to be given to the requirement for written form of exchanges of letters, telexes or cables is sharp. In *Zambia Steel*[24] the Court of Appeal of England has held that if the contract is entered into and a written document containing an arbitration clause is part of it, oral assent by the other party is sufficient.

This construction is in line with a tendency not to require, when a contract is entered into by the agent of a party, that his authority be in writing.

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[23] *Sphere Drake Ins.p.l.c. v. Marina Towing Inc*, 16 F 3d 666 (5th Cir.) *ASA Bulletin* 995, 94.

[24] *Zambia Steel & Building Suppliers Ltd v. James Clark & Eaton Ltd*, Court of Appeal of England, May 16, 1986 *Yearbook Commercial Arbitration* 1986, 547.

The opposite view is held by the Italian Court of Cassation such as in *Marc Rich*[25] which held that a telex sent by Marc Rich to Italimpianti, including an arbitration clause, did not give rise to an arbitration agreement, since the latter gave no reply to it.

In many jurisdictions the tendency seems to be to require that even the acceptance of a written proposal be in writing.

Van den Berg takes the view that a revision of the Convention would not be necessary. However it is suggested that article II could substantially benefit from clarification.

34.2.3 Contents of the arbitration agreement

In order that the arbitration agreement ousts the jurisdiction of the state courts, it must have minimum contents such as

- submit all or any differences arising or which may arise in respect of a defined legal relationship, which may be contractual or not;
- a dispute must have arisen;
- the dispute must be capable of settlement by arbitration, also under the law of the state requested to enforce it;
- the parties must not be under any incapacity;
- the agreement must be valid according to the law chosen by the parties or failing that, under the law of the state where the award was made.

34.2.4 Reference to Arbitration

Unless the state court seised of the action covered by the arbitration agreement finds that the agreement is:

- null and void, or
- inoperative; or
- incapable of being performed,

that court has no discretion as to how to deal with this situation and is under a duty to refer the parties to arbitration provided one of them so requests, *ex officio* remittal to arbitration being then excluded.

In order for a referral to take place, no request for arbitration needs to be already pending. It is sufficient that the dispute falls under an arbitration agreement.

The term 'referral to arbitration' has given rise to difficulties since it may be construed as requiring:

- a stay of the court proceedings, (alone or combined with an invitation to the parties to refer the dispute to arbitration); or

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[25] *Marc Rich & Co. AG v. Italimpianti S.p.A.* Court of Cassation (Italy) January 25 no. 1161991, *Yearbook Commercial Arbitration* 1992, 554.

- a judgment denying jurisdiction; or
- an order compelling the parties to arbitration.

The term 'referral' chosen by the Convention is in fact not familiar to many jurisdictions. In view of that, its most acceptable construction is probably that the Court seised denies its own jurisdiction and advises the parties that the dispute falls under the arbitration clause or submission.

In the absence of a uniform provision on referral, each contracting state will have to implement the Convention in the way it deems proper.

It has been discussed whether the Convention allows or prohibits applications for interlocutory injunctions. As van den Berg rightly suggests, the Convention aims simply to facilitate the enforcement of arbitration agreements and awards. It does not then deal with this issue which remains open and will be governed by the applicable municipal law.

34.3 Recognition and Anforcement of Awards

The Convention is definitely in favour of the enforcement of awards. This clear tendency has led a US court to affirm in *Viking Trader*:[26]

> New York is relatively generous in recognising foreign judgements.

As earlier discussed, the heart of the Convention is the recognition of arbitration agreements as binding and the recognition and enforcement of foreign awards. Reference is made to Chapter 33.1 as to the distinction between recognition and enforcement.

34.3.1 Documents to be filed when applying for leave to enforce

The Convention has simplified the requirements in order to obtain leave (or permission as it is now described under the new English Civil Procedure Rules) to enforce.[27] The documents to be attached to the application for leave are, as it is well-known:

- the duly authenticated original award or a duly certified copy of it;
- the original arbitration clause or submission, or a duly certified copy of it;
- together with a duly certified translation of them into the language of the country where leave to enforce is sought.

However even a provision as short and apparently simple as this one has given rise to construction difficulties.

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[26] *Transport Viking Trader Schiffahrtgesellschaft mbH & Co u. KG. v. Navimpex Centrala Navala*, U.S. Court of Appeal, 2nd Cir July 8, *1994 Yearbook Commercial Arbitration* 1995, 988.

[27] Art IV.

First the Convention does not clarify whether by requiring the production of the:

> agreement ... under which the parties undertake to submit to arbitration all or any differences,

it refers only to the arbitration clause or to the entire contract which incorporates it. Since in the latter case the applicant would be compelled to produce very long translations, clarification would have been useful.

Furthermore the Convention does not clarify also the precise level of certification which it requires . Is certification to be made only by a notary public? Of which country? Which state officials, if any, are allowed to certify in countries where notaries do not discharge such tasks?

As to the award, the Convention requires a:

> duly authenticated original award.

Whether the original needs to be authenticated is unclear. This might in fact refer:

- to a duty to produce an original which be equal to the one which has been filed with a state court or with a local agency of the Government or with an arbitral institution; or
- to the need that the signature of the arbitrator and his identity be certified by a notary public or other state official.

The filing of one original of the award with the Court or a Government's local agency or with an arbitral institution is frequent but not compulsory. In view of that the former construction might not be the best one. The latter construction could then be more acceptable. This view is shared by van den Berg.[28]

The risk of becoming too formal regarding the documents to be produced has been felt by the Commercial Court, Zurich which has held[29] that:

> ... one should not apply too strict a standard to the formal requirements for the submission of documents (authentications, certificates regarding the absence of remedies) when – as in the case under consideration – the conditions for recognition are undisputed and materially beyond doubt.

In *Bergesen*[30] the literal construction requiring 'a duly authenticated copy or the duly authenticated original' was not accepted and the court was satisfied with an affidavit from the chairman of the tribunal as to the authenticity of the award.

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28 van den BERG *cit.* 34.

29 Handelsgericht Zurich April 2, 1990, *Yearbook Commercial Arbitration* 1992, 584.

30 *Bergesen v.Joseph Muller Corp.*710 F 2nd 928 (2nd Cir 1983).

The requirement set up by art. 4 of the Convention, for a duly authenticated original or a duly certified copy of the original, was simplified in *Banque Arabe* by a Belgian Court which has construed it as the duty not to produce the original certified by the Court of the state of origin of the award but a certified copy of the original.[31]

The very requirement that a document be duly authenticated or duly certified has been stressed by Lord Mustill and Boyd[32] as being:

> unfamiliar in an English context,

up to the point that the appropriate form suggested by these writers is an affidavit deposing to its authenticity, accuracy as a copy or truth as a translation as the case may be.

A solution accepted in *Guandong*[33] where the Hong Kong Court held that a document issued by a Hong Kong solicitor, employed by the Plaintiffs' solicitors, affirming the attached award to be a true copy of the duly authenticated arbitration award of China's CIETAC was complying with the above requirements.

The doubts as to the meaning of this provision have not come to an end. In *Israel Portland Cement*[34] the Italian Court of Cassation held that the production of the original agreement containing the arbitration clause or of a certified copy of such original is:

> a prerequisite to obtain enforcement of a foreign award. Failure to supply [this document] must be objected ex officio by the Court, it precludes enforcement ...

and continued by stating that this

> is not a procedural flaw causing [the Court] to declare the request inadmissible and leaving [to the Court] the power to review the merits in new proceedings. Rather, it causes [the Court] to hold that the request for enforcement is unfounded: a decision which may become *res*

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31 *Compagnie Inter-Arabe de Guarantie des Investissements v. Banque Arabe et Internationale des Investissements,* Tribunal de Première Instance de Bruxelles, January 25, 1996, *Riv. Arb.* 1998, 2, 287.

32 MUSTILL and BOYD, *The Law and Practice of Commercial Arbitration in England* 2nd ed. at 620.

33 *Guandong New Technology Import and Export Corporation v. Chiu Shing trading as B. C. Property & Trading Company*, Supreme Court of Hong Kong August 23,1991,*Yearbook Commercial Arbitration* 1993, 385.

34 *Israel Portland Cement Works (Nesher)Ltd v.Moccia Irme S.p.A,.* Court of Cassation (Italy)December 19, no. 13665 (1991) *Yearbook Commercial Arbitration* 1993, 419. *Accord:Jassica S.A. v.Polojaz,* Court of Cassation (Italy) February 12 no. 1526 (1987) and Court of Cassation (Italy) May 26 no. 4706 (1987) *Yearbook Commercial Arbitration* 1992, 525.

> *judicata*, thereby precluding a review of the merits in subsequent proceedings where the arbitration agreement is supplied.

A more lenient construction of the Convention is due to *Renusagar*.[35] The High Court, Bombay, while hearing an appeal against an enforcement order, held that the production of a mere photocopy of the award was not in line with the New York Convention but that

> this irregularity was cured by subsequently filing a duly authenticated copy.

The strict construction of the Convention has a literal basis. In fact the Convention provides that the production of the duly authenticated original or copy be made at the time of the filing. Up to this it seems the Convention has expressed itself correctly. It was rightly stating that in the absence of that document being attached to the application for enforcement, the enforcement court could not issue the enforcement order. However, if in the absence of that document, the order is issued and opposed, and during the opposition proceedings the applicant files another copy of that document, (which is in line with the Convention's form requirements) it is submitted that the irregularity must be treated as having been cured and that the above referred to literal wording of the Convention does not preclude it.

The Italian Court of Cassation in *Lampart*[36] changed its opinion holding that non-compliance with the requirement of art. IV Convention must cause the rejection of the application, a decision which is procedural in nature since it does not deal with the merits.[37]

It is submitted that the above problems and precedents suggest that this provision should be drafted in a different way in order to avoid that applications risk being rejected due to a lack of this requirement.

Furthermore in some jurisdictions the notarization of a signature may require the presence of the Notary at the time it is appended. Now the practice of issuing awards generally ignores this possible requirement.

It is further suggested that the Convention could have also clarified (i) whether the production of such documents could only be made at the time of the filing of an application for leave to enforce or also during these proceedings until the order on such application (or also after them during the opposition proceedings) and (ii) whether the lack of production of them before that time limit, (apart from causing the refusal of the leave or upholding the opposition),

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[35] *Renusagar Power Company v. General Electric Company,* High Court Bombay October 12, 1989, *Yearbook Commercial Arbitration* 1991, 553.

[36] *Campomarzio Impianti v. Lampart Vegypary Gepgyar*, Court of Cassation (Italy) September 20 no. 9980, 1959 *Riv. arb.* 1996, 78.

[37] which should then be construed as allowing a new application to be filed.

would enable a further application for leave to be made. It has been held by some courts[38] that any such further applications would be barred.

As to translations of the above documents, there is a tendency to allow that a certification be made instead of a sworn translation and that it can be made either in the state where the award was made or in the other one where the application for leave to enforce is filed. Even on this issue the Convention could have been more specific.

One might add that a certified copy of the documents evidencing the appointment of the arbitrators should have been inserted among the documents to be attached to the application.

For all these reasons it is submitted that the present wording of art. IV.2 is not satisfactory.

34.4 GROUNDS FOR REFUSAL

The Convention sets out[39] two classes of grounds for refusal:

- those which must be raised and proved by the opposite party;
- those which may be raised of its own motion by the state court, from which leave to enforce has been requested.

34.4.1 Grounds to be raised by the opposite party

The first comment to be made after examining the grounds for refusal is that a review of the merits is excluded.

The second one is that apparently discretion is granted to the enforcement court whether or not to refuse enforcement. The Convention provides in fact:[40]

> Recognition and enforcement of the award *may* be refused. (emphasis added)

It has been suggested that in spite of such language the state courts would be under a duty to refuse enforcement in the presence of any of the Convention's grounds for refusal. However this construction seems to force the wording of the Convention.

Van den Berg suggests[41] that leaving some discretion to the enforcement court is advisable or acceptable. While this comment, if taken by itself, may be correct, its effect does not seem to be in line with the important aim of ensuring uniformity.

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38 *Volpini v.Trementozzi*, Court of Casssation (Italy)February 12, no. 152, 1977 *Mass. Giust. Civ.* 1977, 62; *Accord: Viceré v. Impresa Prodexport Italy,* Court of Cassation (Italy) May 26 no. 3456, 1981, *Mass. Giust. Civ.* 1981, 1210.

39 Art. V.

40 Art. V.

41 van den BERG, *cit.* at 265.

a) incapacity and lack of validity of the arbitration agreement

The first ground for refusal is incapacity of the parties to be established under the law applicable to each of them.

Lack of validity of the arbitration agreement includes its non existence, lack of consent, lack of authority of the signatory, including the agent who has entered into the agreement. Validity is to be assessed under the substantive law chosen by the parties or – in its absence – under the law of the state where the award is made.

b.1) lack of proper notice of the proceedings

Lack of proper notice either of the appointment of the arbitrators – or of the arbitration proceedings -is covered by this ground for refusal.

The reference to a proper notice seems to involve that too short a notice is to be equated to lack of notice.

b.2) a party being prevented from presenting its case

This ground for refusal embraces every situation in which a party has not been given a reasonable opportunity to present its case in a meaningful way. This must include the possibility of each party to comment on the case of the opposite party and to prove its own case by calling the evidence which is reasonably fit to discharge its burden of proof.

c.1) the award has decided differences not contemplated by or not falling within the terms of the arbitration clause

This ground for refusal covers awards which have decided matters which are outside the ambit of the arbitration clause; if so the arbitrators have then exceeded their 'contractual' jurisdiction, even if they have not gone beyond the claims, counterclaims or defences of a party to the proceedings.

c.2) the award has decided matters beyond the parties' claims and defences

This ground deals with situations where the arbitrator has decided matters which are beyond the claims and counterclaims made by the parties in the submission or during the arbitration proceedings instituted under an arbitration clause. In these situations the arbitrators have decided *ultra petita*, i.e. beyond what the parties themselves have requested to them.

The Convention provides that, if the decision on such matters can be separated from the other decisions made in the award, the award may still be recognised or enforced limited to the latter. This ground does not deal with the opposite situation, i.e. omission by the arbitrators in their final award of a

decision on all the claims which had been made by the parties and which fell under the arbitration clause or submission.

d.1) lack of conformity of the composition of the arbitral tribunal with the agreement of the parties

The lack of conformity in the composition of the arbitral tribunal either with the agreement of the parties – in view of the contractual basis of arbitration proceedings – or with the law of the place where the arbitration proceedings have taken place is a ground for refusing enforcement.

d.2) lack of conformity of the arbitration procedure with the agreement of the parties

Non conformity of the arbitration procedure with either the agreement of the parties or with the law of the place where the arbitration proceedings have taken place gives rise to a refusal to enforce.

It is suggested that the arbitration procedure does not conform either with the agreement of the parties when the arbitrators proceed without due care, since the parties expect the arbitrators to hear the dispute and to decide by using due care and this duty is inherent in their task.

e.1) The award has not become binding for the parties

On this issue the Convention is quite different from the Geneva Convention (1927). Under the latter, in order to be enforced in other states an award had to be no longer attackable in its state of origin. It is now considered sufficient for it to be binding. The extent of the binding nature is the subject of wide debate. According to one opinion it means that the award is no longer subject to review on the merits (even if it may be challenged from other points of view); according to another opinion it means the award can be enforced even if it has not yet been declared enforceable in its state of origin. A distinction must be made between 'binding nature' and 'finality'. It is submitted that, whenever not already declared expressly binding by the related legal system, an award may be considered binding if it can be enforced, even if not yet declared enforceable in the state of origin.

The non-immediate effect of a challenge in the state of origin on recognition in another state was reaffirmed in the French judgment in *Michael Warde*:

> The award rendered in London by GAFTA (The Grain and Feed Trade Association Ltd) in 1983, which ordered Mr. Warde to pay US dollars 537,500 to Feedex International, was declared enforceable in France. Mr. Warde applied for a stay of enforcement since he had challenged the award in England. The French Court rejected the application.

However, Mezger points out[42] that whenever, after the exequatur has been granted by the state requested to enforce the award, the award is set aside in its state of origin, it must be possible to set aside the enforcement order, even if that is not expressly provided for in the Convention or in the national statutory provisions.

The change introduced by the New York Convention for enforcement is substantial. It means that the previous requirement that the award be declared enforceable in the state of origin, which frequently involved going through the different degrees of challenges in that jurisdiction what caused great delay in enforcing it, has been abandoned. What has been defined as a *double exequatur* is then no longer necessary under the New York Convention.

The binding nature of the award is defined by the adjective binding (in English), *obligatoire* (in French), and *obligatoria* (in Spanish).

It has been debated whether the binding nature of the award has to be established based on the law of the place where it was made or whether an autonomous notion to determine whether an award is binding has been dictated by the New York Convention. The latter solution was adopted by the French Court of Cassation in *Banque Arabe*.[43]

In *Norsolor*[44] it was held that annulment in the state in which – or under the law of which – the award has been made, is not relevant for the purposes of recognition if the law of the state, requested to enforce it, allows recognition in spite of it. The French Court of Cassation reversed the judgment of the Paris Court of Appeal which had set aside the French enforcement order of the award rendered in Vienna, as a result of its having been set aside by an Austrian Court:

> Whereas, in amending this decision and retracting the order in which it granted enforcement of points III and IV of the arbitral award, the judgment under attack applied art. V (1) (e), of the New York Convention, ratified both by Austria and France, and according to which the recognition and enforcement of an award would be refused only if the award had been set aside by a competent authority of the country in which, or under the law of which, that award was made, and the judgment under attack relied on the fact that these points II and IV of the decisional part of the award had been set aside by a decision dated January 29, 1982 of the Vienna Court of Appeal on the ground that the arbitral tribunal, in violation of art. 13 of the Rules for the ICC Court of

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[42] MEZGER, *Comments to judgment, op. cit.*

[43] *Compagnie Inter-Arabe de Garantie des Investissements v. Banque Arabe et Internationale des Investissements,* Court of Cassation, (France) June 5, 1998, *ASA Bulletin 1998,* 4, 719.

[44] *Pabalk Ticaret Sirketi Ltd. v. S.A. Norsolor,* Court of Cassation (France) October 19, 1984, *Clunet* 1985, 680.

> Arbitration, had not determined the national law applicable and limited themselves to refer to international lex mercatoria, a 'world law of questionable validity'; Whereas by ruling in this manner, where a Court of Appeal had a duty to determine, even ex officio, if French law would not allow Pabalk to avail itself of the award at stake, the Court of Appeal violated the above-mentioned provisions.

It has also been excluded that the Convention requires, as a condition for recognition or enforcement, that an award, issued in the defendant's country, can be enforced also in the claimant's country. An example of this is found in *Viking Falcon*:[45]

> The Spanish defendant argued that enforcement of the award made in London had to be refused since Spanish awards were not enforceable in Singapore. The Supreme Tribunal ruled that:
>
> 'The Court held that, apart from the fact that AIT does not provide sufficient proof for its allegation, the New York Convention does not state that arbitral awards cannot be enforced if and when an award rendered in the State of the respondent would not be enforceable in the State of the petitioner'.

Van den Berg rightly stresses[46] the clear tendency of the Convention to allow enforcement. The existence of this *favor executionis* (favour towards enforcement) deserves particular attention, since the whole Convention should be read in relation to it.

The legislative history of the Convention shows that there was a large amount of discussions and changes before one replaced the word 'final' with the word 'binding '. The Working Party tried to envisage a situation where the award was no longer subject to an appeal which could have a 'suspensive effect' and where one did not have to wait until all possible remedies had been exhausted. This construction grants to the Convention autonomy in assessing the binding nature of the award.

According to another construction, it would be left to the agreement of the parties to establish when the award becomes binding. According to a third construction, the binding nature of the award would depend on the law applicable to it.

The first construction seems preferable to the others.

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[45] *Odin Shipping Co. (PT) Ltd. (Singapore) v. Aguas Industriales de Tarragona, (Spain)*, Supreme Court, (Spain), October 4, (1983), *Yearbook Commercial Arbitration* 1986, vol. XI, at 528 et seq.

[46] van den BERG, *op. cit.*, at 155.

e.2) The award has been set aside or suspended in the country where, or under the law of which, it was made

The Convention provides[47] that the Court seised of an application to enforce the award may *adjourn* the decision on enforcement, possibly against some security, if an application to set aside or for its suspension has been made to a Court of a different state which is competent under article V (1)(e). If the award has been set aside or suspended by such a court, the enforcement court may refuse to grant leave to enforce it.[48] This solution does not seem convincing in case of a mere suspension of enforcement by the other court, since a stay of the decision on enforcement by the enforcement court could in this situation have been adequate.

In *Fertilizer India*[49] a US Court has held that since in the country of origin the award was not yet binding within the meaning of the New York Convention, unless reviewed by an Indian court for errors in law, the enforcement of the award in the US had to be stayed.

Criticism of the construction of article V(1)(e) and of the tendency to hold that arbitration proceedings are governed by the law of the place where the arbitration proceedings take place has been expressed by Deshpande.[50]

It has been debated whether the suspension of an award may derive from a statutory provision such as article 1506 French new procedural code. The Swedish Supreme Court excluded it in *Gotaverken.*[51] A US court decided in the opposite way in *Government of Quatar.*[52]

This matter is discussed more at length in Chapter 31.

34.4.2 Grounds for refusal on the court's motion

The Convention provides[53] for two grounds for refusal of leave to enforce which may be raised by the Court of its own motion.

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47 Art. VI.

48 Art V. 1 (e).

49 *Fertilizer Corp. of India v. Idi Management Inc.*, 527 *F Supp.* 948 (S.D. Ohio 1981) quoted by BORN, *cit* at 491.

50 V. S. DESHPANDE, *Art. V. 1 (e) of the 1958 New York Convention,* 8 *J. Int. Arb.* 3, 77

51 *A. B. Gotaverken v. General National Maritime Transport*, Swedish Supreme Court August 13, 1979, *Yearbook Commercial Arbitration* 1981, 237.

52 *Creighton v. The Government of Quatar*, U.S.(D. Columbia) cited by van den BERG, *The New York Convention: Its Effects, Interpretation, Problems, ASA Bulletin Special Series* no.9, 1996, 31.

53 Art.V.2.

a) non suitability for arbitration under its own law

This requirement aims to avoid disturbing the Enforcement Court's legal system by the enforcement of awards which have decided issues – such as for example family's status – which according to it are not capable of arbitration.

b) conflict with public policy

Along the same line runs the second ground, which deals with the public policy domain of the enforcement state, which must be respected.

Within the field of public policy several legal systems, such as those of Italy and France, distinguish between the domestic and international public policy of a state. In this respect it has been stressed on other occasions[54] that the international public policy of a legal system is a concept appropriate to that system and is not a reference to a supranational public policy.

Furthermore the international public policy is the more important part of the domestic public policy. Therefore while some other parts of a state's public policy may not be opposed to the entry of a foreign statute or a foreign judgement or award into its territory, the most important parts of the public policy of the host state, i.e. its international public policy, must produce their full effect and be applied. See Kuner[55] as to the public policy exception in the US and Germany.

In *Aluminum Plant*[56] the English Court has distinguished between an illegal underlying contract and an award which does not enforce the underlining contract and therefore is not tainted by its illegality. In the Court of Appeal's opinion that award could then be enforced.

In *Soleimany v. Soleimany*[57] the Court of Appeal held that the award referred on its face to an enterprise with illegal object. The Court viewed it as contrary to public policy. Accordingly the award was not to be enforced.

In *Westacre*[58] the Court of Appeal held that English public policy would not be offended if an arbitral tribunal enforced a contract which, though contrary to the domestic public policy of the place of performance, did not offend the domestic public policy of the country or its proper law or civil?? law. In that

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[54] RUBINO-SAMMARTANO–MORSE, *Public Policy in Transnational Relationships,* Kluwer 1991.

[55] C.B. KUNER, *The Public Policy Exception to the Enforcement of Foreign Arbitral Awards in the United States and in Germany under the New York Convention,* 7 *J. Int. Arb.* 4, 71.

[56] *S. et alios v. N. Aluminum Plant et al.*, Court of Appeal, England, December 16, 1997, *ASA Bulletin* 1998, 1, 204.

[57] *Soleimany v. Soleimany,* Court of Appeal of England and Wales, January 20, 21, February 10, 1998 [1999] 3 *All ER*, 847.

[58] *Westacre Investments Inc v. Yugoimport Holding Co. Ltd. et al,* Court of Appeal of England and Wales, March 24-26, May 12, 1999, [1999] 3 *All ER* 866.

case, the evidence suggested that a contract for the purchase of personal influence was contrary to public policy in Kuwait, but that its enforcement would not be contrary to Swiss public policy. It followed that there were no public policy objections to enforcement of the award on its face.

34.5 INTERIM AWARDS

The lack of regulation of interim awards may give rise to an important *lacuna.* Let us assume that an arbitration tribunal makes an interim award on liability and reserves the decision on quantum to the final award. Let us further assume that (ii) the tribunal makes the final award (i), that both awards are made in the territory of a state different from the one where enforcement is sought, (iii) that they are both challenged without success in their state of origin, (iv) that their recognition is governed by the New York Convention (v) the recognition and enforcement of the interim award is sought first, and (vi) in separate proceedings the recognition is sought of the final one. Contrary to article 2(2) or the 1927 Geneva Convention, which in this situation granted to the enforcement court discretion to grant enforcement or to postpone it, article 5(1)(c) does not deal with this issue. If the interim award is refused enforcement, would that be a ground for refusing enforcement of the final award? How could liability be excluded and the award on the quantum enforced?

Let us consider now a different situation where no final award is made by an arbitrator who had been appointed *intuitu personae* and cannot then be replaced. May the party who has succeeded on liability issue court proceedings for quantum? This claim might not be entertainable in some jurisdictions.

Let us further assume that the interim award is set aside in the country of origin, while the final award is enforced in another state.

It is suggested that these situations need to be regulated by providing an additional ground for refusal of enforcement; whenever the final award is not autonomous from the interim award and the latter is set aside, and more generally by dealing with the above potential conflicts, for example by providing that an interim award may not be enforced separately from the final one. On interpretation of the Convention by state courts see Giardina for Italy,[59] Luer for Germany[60] and in general van den Berg.[61]

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[59] A. GIARDINA, *Court Decisions in Italy Interpreting and Implementing the New York Convention,* 7 J. *Int. Arb.* 2, 77.

[60] H. J. LUER, *German Court Decisions Interpreting and Implementing the New York Convention,* 7 *J. Int. Arb.*1, 127.

[61] A. J. van den BERG, *Summary of Court Decisions on the New York Convention* ASA *Bulletin* Special Series no. 9 1996

34.6 ENFORCEMENT PROCEDURE

The procedure to enforce foreign awards is not regulated in detail by the Convention, which in providing for registration of the foreign award (subject to opposition to it) makes reference to:

> the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles.

One has to distinguish between:

- the proceedings which aim to make the foreign award an enforceable instrument in the Requested State; and
- the actual enforcement proceedings, i.e. the proceedings which enforce the enforceable instrument.

The lack of detailed regulation of the first stage has meant that several procedural issues (such as the issue of the leave *vis-à-vis* the opposition proceedings) are not uniform.

Apart from that, the actual enforcement proceedings are totally based on municipal law which may request as its first step leave to enforce the Court order, or judgment, which has recognised the foreign award.

The further provision of the Convention that:

> There shall not be imposed substantially more onerous conditions or higher fees or charges ... than are imposed on the recognition and enforcement of domestic arbitral awards,

has further encouraged the adhering States not to harmonise their municipal provisions on enforcement.

CHAPTER 35

THE CONTINUAL SEARCH FOR IMPROVEMENTS

SUMMARY: 35.1 Lessons From the Past and Trends – 35.2 Excessive Formalism 35.3 Court Interference v. Court Non Intervention – 35.4 Need for Constructive Dialogue – 35.5 Reduction of Challenges – 35.6 One Arbitrator and the Award in One Year – 35.7 Appeal to an Appellate Arbitration Panel – 35.8 Permission to Appeal Conditional on the Placing of a Security (Self-Executing Mechanism) – 35.9 One Supra-National Court of Arbitration and an Immediately Enforceable Appellate Award – 35.10 A Clearer Position on the Main Legal Issues: *Tronc commun* and Procedural Law – 35.11 Third Generation Arbitration – 35.12 The Continuous Search for Improvement

35.1 LESSONS FROM THE PAST

Drawing lessons from the past has always been necessary to try to see into the future; therefore lessons from the past cannot be omitted even in arbitration law. As mentioned on several occasions during this study, sometimes expressly and sometimes through specific references, negative elements are certainly not missing in the practice of arbitration law. Only those look at arbitration in a passive way, will refuse to recognise the existence of problems, stating with Leibnitz[1] that we live in the best world possible, and therefore we have the best possible arbitral system.

It is submitted that one of the greatest faults of arbitration is the excessive duration of the proceedings. While its main attraction is said to be its swiftness, its actual duration often bitterly disappoints anyone seeking justice through arbitration. Another serious down side is the cost of arbitral proceedings.[2] The fees of three arbitrators, the administrative costs of the arbitral institution, counsel's fees to be paid by each party and possible expenses (for example for travel, translations, employees and witnesses) to be borne by the parties result in a global cost for the losing party (or for the winning party who does not succeed in obtaining costs from its opponent) being higher than the cost of court proceedings in a national court or in a court of another legal system.[3]

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1 G.G. LEIBNIZ, *Meditationes de cognitione, veritate atque ideis* (Meditations on knowledge, truth and ideas) (1684), *Die Monadologie* (1720).

2 To the point that the parties, except for specialised arbitrations, generally consider themselves very lucky if in important disputes they obtain the decision in *only* two years.

3 A burden which the parties would bear more cheerfully if at least they could obtain a very quick decision.

Yet if these are the most striking negative elements, they are unfortunately not the only ones. Some arbitrators have a worrying tendency to imitate court proceedings, as if that were a supreme achievement. As neophytes sometimes tend to be over zealous, likewise some arbitrators go as far as fixing unnecessary mandatory terms which may prevent one of the litigants from presenting its case adequately.[4]

To this the dissatisfaction which is frequently expressed concerning the choice of arbitrators must be added. Criticism generally concerns the third arbitrator, who is often not chosen directly by the parties, and sometimes not even by the body which is designated to do so; for example the International Chamber of Commerce in its rules leaves that designation to its National Committees.

Some of these choices[5] are often strongly criticised. Even admitting that several of these criticisms come from the party whose claim has not been allowed, and may be based on that reason only, they cannot all be without foundation. Therefore some of them must be justified and, in view of the key position of the third arbitrator, if a bad choice is made for any of the various possible reasons, it will damage the arbitral product.

In the end arbitral proceedings suffer the negative effects of the applicable law not being chosen by the parties, because that law must then be sought by the arbitrators, who frequently resort to artificial criteria such as the conflict rules. Similarly, if the procedural law is not chosen by the parties, this in the end may be a source of surprise at least for one party.

To this it must be added that parties frequently resort to attacks against the award in the courts both during and after the arbitral proceedings.

The past and the present then appear to be fraught with difficulties.

Certainly international arbitration has made a big progress. For example it has modernized itself, it has reduced the differences between the various legal systems and it has harmonized practices. Its universalisation has been substantially improved.

Sanders has been quoted[6] as elegantly saying:

> International commercial arbitration is like a *young bird* trying to fly; it rises in the air but from time to time falls back upon his home nest. The young bird is however growing up quickly. In many cases international arbitration can spread its wings freely in the international air ... the award is then liberated from national borders and tends to be denationalised. (emphasis added)

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4 Exposing themselves to criticism for breach of due process.

5 Which tend to be reserved to the same *limited* number of persons.

6 By B. LEURENT, *Reflections on the International Effectiveness of Arbitration Awards*, 12 *Arb. Int.* 3, 269.

However as earlier discussed arbitration has not been the perfect alternative to court proceedings which many people expected and this has given rise to the Alternative Dispute Resolution formulas, as a *further* alternative not only to courts but also to arbitral proceedings.

This concern is echoed in Justice Drummond's 1996 John Keays lecture:[7]

> ... If the arbitration industry is unable to satisfy the demands of consumers of its services for an efficent, economical an expeditious dispute resolution service, then it will *continue to wither*. I say 'continue' because the process is already under way. (emphasis added)

The excesses which arbitration may reach, when not properly administrated and when it is not set into the framework of reasonable review of its decision by state courts and it is left to multiple attacks, have been earlier discussed. Regrettably real arbitral sagas have been reported with tales of their duration and cost, and a number of post award proceedings have been instituted.

Sir Michael Kerr has succeeded in driving home this point in a light and pleasant way by inventing the dispute referred to as the *Macao Sardines* case.[8]

On the status of arbitration, its progress in the last decades and its perspectives see Plantey,[9] Brower,[10] Blessing,[11] Leurent,[12] Hunt,[13] Asouzou,[14] Rubino-Sammartano,[15] Sandrock,[16] Goff,[17] Sanders,[18] Delaume,[19] Loquin,[20] Craig,[21]

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7 *The Arbitrator*, August 1996, 76.

8 M. KERR, *Arbitration v. Litigation, The Macao Sardines Case*, 3 *Arb. Int.*, 1,79 (1987).

9 A. PLANTEY, *Une polique générale de l'arbitrage international est elle possible?, ICC Bulletin*, 7, 1, 15.

10 C. N. BROWLER, *Lessons to be Drawn from the Iran-U.S. Claims Tribunal*, 9 *J. Int. Arb.*1, 51.

11 M. BLESSING, *Globalisation (and Harmonisation?) of Arbitration*, 9 *J. Int. Arb.* 1,79.

12 B. LEURENT, *Reflections on the International Effectivness of Arbitration Awards*, 12 *Arb Int.* 3, 269.

13 R. HUNT, *A Pro-Active Role in the Arbitral Process*, 16 *The Arbitrator*, 3 174.

14 A.A. ASOUZOU, *A Threat to Arbitral Integrity*, 12 *J. Int. Arb.* 4, 145.

15 M. RUBINO-SAMMARTANO, *Is Arbitration to be just a Luxury Clinic?*, 12 *J. Int. Arb.* 4, 145; *id., An International Court of Appeal as an Alternative to Long Attacks and Recognition Proceedings*, 6 *J. Int. Arb.* 1, 181.

16 O. SANDROCK, *Is International Arbitration Inapt to Solve Disputes Arising Out of International Loan Agreements?*, 11 *J. Int. Arb.* 3, 33.

17 GOFF of CHIEVELEY, *Windows on the World, Arbitration* 1992, 5.

18 P. SANDERS, *Cross Border Arbitration – A View on the Future, Arbitration* 1996, 168.

19 G.R. DELAUME, *Reflections on the Effectiveness of International Arbitral Awards*, 12 *J. Int. Arb.* 1, 5.

20 E. LOQUIN, *L'examen du projet de sentence au deuxième degré, Rev. Arb.* 1990, 427.

21 W. CRAIG, *Uses and Abuses of Appeals from Awards*, 4 *Arb. Int.* 1988, 174.

Paulsson,[22] Holzmann,[23] Schwebel.[24]

Sanders rightly identifies[25] three trends: towards harmonisation, towards conciliation and towards judicialisation.

One could wonder whether there is also a trend to denationalise arbitration. An analysis of this issue may probably have to start from a distinction between the nationalisation of international arbitration and proceedings not governed by any law.

The first situation is frequent. Several arbitrators tend indeed to apply their national law and habits even to international arbitration. It is suggested that generally this is not what the parties expect when they decide to refer a dispute to international arbitration. This danger may then be described as nationalising international arbitration. It is submitted that to avoid this one requires an open mind and the capability to forget national peculiarities.

Respecting the international character of a dispute means then not construing the applicable procedural rules in a restricted national way and to choose procedural rules – in the areas where this should be possible – without linking them to a given legal system.

Harmonisation does not seem to play a role at this stage, but at the earlier stage when the national procedural rules become closer, if not the same.

A different scenario consists of proceedings totally unlinked to a national procedural law. This rather than being just unsatisfactory will frequently be impossible since, as earlier discussed, the mandatory provisions of at least the *lex fori* will apply, even when excluded by the parties. Nationless arbitral proceedings are then generally not to be feared and will be rare. For example, in proceedings under the Washington Convention 1965, a set of arbitration rules will govern the proceedings and, since the Convention has the force of law for the adhering states, such proceedings are indeed *not lawless.*

Apart from ICSID proceedings, procedurally international arbitration seems then to fall entirely under the New York Convention. It is difficult then to agree, in this respect, with Sanders' suggestion that they would simply be proceedings akin to arbitration and that their decision could not be enforced.

Amongst desirable improvements, one must mention those suggested by

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[22] J. PAULSSON, *Cross Enrichment of Public and Private Law Dispute Resolution Mechanisms in the International Arena,* 9 *J. Int. Arb.* 1, 59.

[23] M.H. HOLTZMANN, *A Task for the 21st Century: Creating a New International Court for Resolving Disputes on the Enforceability of Arbitral Awards,* in *The Internationalisation of International Arbitration,* Graham & Trotman, London, 1995.

[24] S.M. SCHWEBEL, *The Creation and Operation of an International Court of Arbitral Awards,* in *The Internationalisation of International Arbitration,* Graham & Trotman, London, 1995.

[25] P. SANDERS, *Quo Vadis Arbitration?,* Kluwer 1999.

Sanders,[26] i.e. a Model Law on Conciliation and harmonisation of implementation of the New York Convention. One could add to them a continuous effort to harmonise the various arbitration laws.

35.2 EXCESSIVE FORMALISM

It has been discussed that the image of arbitration as a *luxury clinic* has been created and that this seriously damages arbitration.

A luxury clinic which might be seen as echoed by the notion of elitism;[27] but this term rightly means that, as in many other trades, one needs arbitration to be conducted by capable people. This caveat is reflected by Hacking's comments.[28]

The concern for the delicate situation in which a certain way to conduct arbitration has pushed the entire arbitral process is reflected in Okekeifere.[29] His query whether arbitration as the most effective dispute resolution method is:

> Still a Fact or Now a Myth?

confirms the danger which arbitration is running.

It is submitted that not only the progress, but the very survival of arbitration depends on the ability of the arbitration world to put straight the various deviations which are registered and to ensure that the arbitral process can always be run in a *spirit of service*, serving the needs of the parties.

The very approach of the legislature to arbitration is frequently a source of difficulties due to lack of clarity. In turn, the legislature is frequently influenced by the arbitration circles, since inevitably it has to turn to them when it deals with this specific field. In this case the problem is to be found at this level.

Until the course of the vessel has been corrected, it would be vain to complain about single deviations.

The first difficulty often lies with the drafting of the statutes and of the rules, which is not always clear and leaves large room for confusion.

In view of the large number of judges and arbitrators who tend to go *by the book* and prefer a harsher formalistic construction to a less pedantic construction which takes into account the *ratio*[30] of the statute or of the rule, the damage which may be caused by such a drafting is substantial.

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[26] P. SANDERS, *Quo Vadis Arbitration?*, Kluwer 1999.

[27] J. PAULSSON, *Ethics, Elitism, Eligibility*, 14 *J. Int. Arb.* 4, 13.

[28] HACKING, *Ethics, Elitism, Eligibility: Response*, 15 *J. Int. Arb.* 4, 73.

[29] A.I. OKEKEIFERE, *The Commercial Arbitration as the Most Effective Dispute Resolution Method, "Still a Fact or Now a Myth?"*, 15 *J. Int. Arb.* 4, 81.

[30] The purpose of a provision.

Even when the language is clear, some interpreters may construe it very differently from its intended meaning. Sometimes this will be done deliberately.

The damage produced by a narrow minded formalistic construction of the law may even in this field escalate into a denial of justice.

For example, two requests for arbitration made by *Ferruzzi*[31] were rejected by French courts, the first one on the ground that lack of timely payment of an advance on the costs of the proceedings would amount to a waiver to the proceedings, and the second one because such a waiver would prevent the filing of a second request.

It is submitted with respect that the provisions under which such rulings were made and/or their construction cannot be right, because through formally correct legal reasoning a behaviour which appeared to be only aimed at discontinuing such proceedings was construed as a decision to waive for ever the opportunity of obtaining justice through arbitration.

Similarly in NIOC[32] after a dispute had arisen and NIOC had appointed the first arbitrator, the Court of Paris was seised by NIOC of an application to appoint the arbitrator whom the other party, the State of Israel, had refused to appoint. The arbitration agreement provided:

> Each party shall appoint one arbitrator. If these arbitrators do not decide unanimously or cannot agree on the appointment of the third arbitrator, the President of the ICC, Paris shall appoint the third arbitrator. The award of the arbitral tribunal shall be final and binding.

In order to support the jurisdiction of the Court of Paris to appoint the second arbitrator, NIOC based its application on the reference made by the parties to Paris in the agreement and in the arbitration clause.

Israel opposed the application holding that the reference to Paris in the arbitration agreement was limited to the appointment of the third arbitrator. In turn NIOC stressed that, if the Court of Paris did not appoint the second arbitrator, the arbitration agreement would be of no effect.

Nevertheless the Court of Paris rejected the application holding that there was insufficient evidence to conclude that Paris had been chosen as the venue of the proceedings, which would have allowed the Court of Paris to appoint the second arbitrator.

It is suggested, with respect, that the approach which has prevailed was to the detriment of an appropriate solution of the situation.

If a lesson can be drawn from the past it is that the international arbitration system is certainly not perfect and there is still a long way to go to improve it.

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[31] *Sté Ferruzzi Agricola v. UCACEL*, Court of Cassation (France) January 26, 1994, *Rev. arb.* 1995, 443.

[32] *National Iranian Oil Company v. State Israel*, Tribunal de Grande Istance de Paris, January 10, 1996 (order) *ASA Bulletin* 1996, 319.

35.3 COURT INTERFERENCE V. COURT NON-INTERVENTION

For a very long time state courts gave clear signs of being jealous of arbitrators. To this a mistrust for arbitrators had to be added. However, as earlier discussed, the general attitude has substantially changed since then.

In spite of that in some legal systems one may still feel the presence of relics of that old tendency in the shape of the possibility granted to state courts to interfere with arbitral proceedings or with their product, the award.

The full review of the merits to which several jurisdictions still submit foreign awards might be seen, from outside such a state, as an example of interference.

In other legal systems a tendency has been registered to assert as much as possible the local jurisdiction, as well as to apply local procedural and/or substantive law, even to foreign arbitral proceedings. In this respect reference may be made to *Mc Donnell Douglas*[33] where an arbitration agreement provided that:

> The arbitration shall be conducted in accordance with the procedure provided in the Indian Arbitration Act ... The seat of the arbitration proceedings shall be London, United Kingdom.

However, the High Court held that the provisions of the Indian Act would deal with the internal conduct of the arbitration but that:

> by their agreement the parties have chosen English law to govern their arbitral proceedings.

This conclusion – with respect – seems to be diametrically opposed to the precise wording and to the purpose of that arbitration clause.

Even an excessively narrow construction of the arbitration agreement might be a sign of a, perhaps involuntary, tendency to keep arbitrators outside the area of dispute resolution.

On other occasions it may be just a specific judge who, possibly inadvertently, interferes because he is suspicious of arbitrators.

These solutions are clearly to be distinguished from the discharge by state courts of their duty to check the existence and or validity of the arbitration agreement, or submission, and therefore of the arbitrators' jurisdiction.

A completely different scenario is provided by those courts which give the impression not to want to be involved in matters which have been the subject of arbitral proceedings. The background to their position seems to be that since the parties have chosen to refer the dispute to arbitration, they must be happy with it and not seek from state courts protection against its result. This position

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[33] *Union of India v. Mc Donnell Douglas Corp. Inc.*, High Court of England, Q.B. Division December 22, 1992 *Yearbook Commercial Arbitration* 1994, 235.

may in theory be correct, but it cannot be justified in many situations. In this respect reference is made to *Fougerolle*[34] where the French Court of Cassation held that a totally twisted construction of the documents by the arbitrator would not amount to a breach which could justify setting aside the award. It is submitted that even if such a breach is not expressly mentioned in the list of grounds for setting aside the award, the first duty of an arbitrator is to proceed and reach a decision with due care and consequently a breach of this duty must cause the setting aside of the award.

On several occasions state courts – in particular in France – have dismissed applications to set aside an award because the arbitrator had not allowed a party to call evidence.

These courts have held that the arbitrators have a full discretion as to the taking of evidence. It is submitted that the above rules finds its limit whenever that evidence is required in order that such a party be allowed to prove its case. Ignoring these situations may hardly consistent with the frequently paid tribute to the *droits de la défense*, i.e. the right of each party to prove its case, which is the basis of due process.

One says that *les extrèmes se touchent.*[35] This saying seems to apply to the situation which one is examining here. In fact the opposing attitudes discussed above seem to share the fact that they are both extreme positions. One of them conveys the feeling that some courts do not wish to help those who have chosen arbitration, while the other one seems to be mainly concerned with affirming the priority of state courts and municipal law over arbitration and foreign or international rules.

As Mustill and Boyd have rightly pointed out,[36] the problem seems to be:

> to strike a realistic balance between meddling and indifference.

35.4 Need for a Constructive Dialogue

It is suggested that the first level on which the arbitral product can certainly be improved, with little effort, is that of creating a constructive dialogue. It has already been mentioned that sometimes arbitrators feel they have a duty to imitate their national courts.[37] This means they remain distant from the parties, not only at the level of personal relationships, but also from the point of view of discussion. In civil law countries there is generally no real dialogue between

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[34] *Sté Fougerolle v. Sté Butec Engineering*, Court of Cassation (France) December 20, 1993, *Rev. arb.*, 1994, 126.

[35] Two opposites end up by having some point of contact.

[36] MUSTILL and BOYD, *The Law and Practice of Commercial Arbitration in England*, 2nd edition, Butterworths, London, 1989, 453.

[37] Sometimes to feel more secure and sometimes because of inertia.

the judge, or the arbitrator, and the parties. The claimant drafts its request, and subsequently its proceedings and files them together with its documents. After a time the defendant proceeds in the same way; later on the arbitrator notifies to the parties his order for directions without a real debate which could clarify the positions and eliminate possible misunderstandings.[38]

It is this characteristic of civil law proceedings that on other occasions[39] this writer has defined as a *dialogue between deaf people.*

The situation should be better in common law systems.[40] Nevertheless, even here arbitrators, trying to imitate judges, sometimes remain *totally passive* during the proceedings, taking on the role of the umpire in a tennis competition. Writers from common law systems find arbitrators in that case to be *po-faced*[41] and on other occasions they have been described as *mummified.*[42]

Litigants who refer disputes to arbitration are generally not looking for an imitation of court proceedings, but count on a *greater capacity for understanding* from arbitrators. It is suggested that a constructive dialogue is not only a big advantage for the arbitrator, and for the parties, but is also a duty of international arbitrators, now that arbitration after a long period of reluctance and suspicion is generally well accepted, as appears to be the case from the United States decision in *Mineraçao de Trinidade*:[43]

> The United States Arbitration Act ... reversing centuries of judicial hostility to arbitration agreements, was designed to allow parties to avoid 'the costliness and delays of litigation', and to place arbitration agreements 'upon the same footing as other contracts' *Scherk v. Alberto-Culver Co., supra* at 510-11 (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess., 1, 2 (1924) (footnote omitted). The Courts slowly but surely have adopted Congress' favorable attitude towards arbitration agreements. Compare *Wilko v. Swan,* 346 US 427, 434-35 (1953) (an 'arrangement' to arbitration is a 'stipulation', and ... the right to select

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38 In fact it is uncommon for the judge or the arbitrator, in civil law proceedings, to request verbal clarification to better understand the position of the parties, with the advantage for the arbitrator of clarifying their position and for the parties to understand possible confusions, or that they have wrongfully assumed that some facts had already been established.

39 M. RUBINO-SAMMARTANO, *La prova nel processo civile* (Evidence in Civil Proceedings), *Foro pad.,* 1986, 87 *et seq.*

40 Where the tradition of a constructive dialogue, between the court and the party, during the proceedings, is well established.

41 See A.W. SHILSTON, *Milestones in the Evolution of Modern Commercial Arbitration, Arbitration,* (The Journal of the Chartered Institute of Arbitrators) 1987, vol. 53, 32.

42 See note 41.

43 *Mineraçao da Trinidade Samitri (Brazil) v. Utah International Inc. (US),* US Court of Appeals, 2nd Circuit October 10, (1984), *Yearbook Commercial Arbitration,* 1986, at 572.

> the judicial forum is the kind of 'provision' that cannot be waived under Sect. 14 of the Securities AcC) with *Scherk v. Alberto-Culver Co., supra* 417 US at 517-18 (refusing to apply *Wilko* to an international commercial agreement). The Federal policy favoring arbitration requires us to construe arbitration clauses as broadly as possible.

Likewise the Supreme Court of Bermuda in *Belvedere*:[44]

> I turn now to the question of arbitration. At one time the Courts used to be very jealous of arbitration. They used to find all sorts of reasons for interfering with arbitrators and their awards. But the approach to arbitration has changed in modern days. The Courts welcome arbitration in commercial disputes. They encourage references to arbitration by commercial men in the City of London. They do not lightly interfere with their awards.
>
> It seems to me that if a defendant who is being sued in the Courts asks that a matter should go to arbitration in accordance with their agreement, prima facie that agreement ought to be honoured: the action should be stayed and the matter should be allowed to go to arbitration.

and again in the United States in *Mitsubishi:*[45]

> The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our Courts.... We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our Courts. 407 US at 9, 92 S.Ct., at 1912.

the last words being borrowed from the earlier 1974 judgment in *Culvert.*

Among the authors this is clearly recognised by Oppetit:[46]

> Arbitration has become an essential tool of international financial relationships.

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[44] *Belvedere Insurance Co. Ltd. (Bermuda) v. C. S. C. Assurance Ltd. (Bermuda),* Supreme Court of Bermuda, March 23. (1982*), Yearbook Commercial Arbitration,* 1987, at 477 *et seq.*

[45] *Mitsubishi Motors Corporation (Japan) v. Soler Chrysler-Plymouth Inc. (US),* US Supreme Court, July 2, (1985*), Yearbook Commercial Arbitration,* 1986,, at 555 *et seq.*

[46] OPPETIT, *Les Etats et l'arbitrage international: esquisse de systematisation* (States and International Arbitration: Systematization Scheme) *Rev. Arb.* 1985, at 493; see also the report by G. DELAUME, *SEEE v. Yugoslavia: Epitaph or Interlude,* 4 *J. Int. Arb.* 3, 25 *et seq.*

35.5 REDUCTION OF CHALLENGES

The number of challenges on awards has exceeded an acceptable level.

Litigation in bad faith on awards has been criticised, when legitimate remedies offered by the legal system are used improperly. In *Dallal v. Bank Mellat*[47] the English High Court, having found that, in the previous proceedings before the Iran-US Claims Tribunal, Mr. Dallal had been given the opportunity to assert his reasons and was therefore just repeating the same claims and the same arguments, concluded:

> in my judgment the present proceedings are, and must be recognised, as an abuse of the process of the Court, which this Court should not allow to continue. Accordingly I exercise my discretion to strike out Mr. Dallal's writ and statement of claim.

Likewise in *Compagnie d'Armement Maritime*[48] the French Court held that:

> Holding, both before the Arbitral Tribunal and before the Court, arguments whose uselessness could not be doubted, even more so since some of them had already been rejected by a previous decision of the Court, taken within the framework of other proceedings, CAM transformed its right to institute proceedings into an abuse of proceedings; these dilatory tactics have caused CO.TU.NAV. very serious prejudice, not only because of the concern and of irrecoverable cost which the company has had to bear, but also because of the delay in collecting the amounts due to it, made worse by the loss on the exchange rate of English currency; that the Court, having regard to the elements which are available to it in order to assess, deems that CO.TUNAV. is entitled to an indemnity to cover the prejudice which it has suffered.

However, the Court at this stage surprisingly restricted itself to an assessment of the modest amount of:

> fifty thousand francs.

This decision leads to the bitter conclusion that if abusive recourse to challenges is not punished or is punished only very mildly, this is a premium for the litigant who acts in bad faith. Among the authors, Boitard for example,[49] does not hesitate to state that the awards:

> suffer a long paralysis because of the abuse of challenges.

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[47] *Dallal v. Bank Mellat,* High Court of England, June 27, July 1, 2, 3 and 26 (1985), Q.B.13 (1986) 1 *All ER* 239.

[48] *Compagnie d'Armement Maritime v. Compagnie Tunisienne de Navigation,* Court of Appeal Paris, July 11, (1978), *Rev. arb.* 1979, 258.

[49] M. BOITARD, comments on the judgment quoted *supra* at note 48.

35.6 ONE ARBITRATOR AND THE AWARD IN ONE YEAR

If this and the other inconveniences to be eliminated are put together, it is suggested that on the one hand an attempt should be made to reduce the number of challenges and on the other hand, in order to achieve that, a review of the merits would be extremely useful and should be introduced. At the same time the total duration of arbitral proceedings should be reduced.

On previous occasions[50] this writer has advocated the introduction of some changes:

- a 9 month/one year and one arbitrator system;
- an appellate arbitration panel;
- a self-executing process.

Let us start by reviewing these suggestions. It is submitted that, except in special cases, one year should be the maximum duration of arbitration proceedings. One of the things which prevent this is having a panel of three arbitrators. Finding a date suitable for all the arbitrators and for the parties' counsels is more difficult than when there is only one arbitrator.

Furthermore no arbitrator feels fully responsible for the timing, since he is just one of the members of the panel. Another problem is that one does not frequently find an arbitrator and an arbitral institution showing a firm determination to respect a time-limit. Without this determination the length of the arbitration will continue to be at the mercy of dilatory tactics of one of the parties and of other slowing down factors.

If one good arbitrator is selected and asked to adhere strictly to the time limit, he should be able to reach a satisfactory decision much more quickly. Furthermore, having only one arbitrator will reduce arbitration costs to about one-third of what they are at present and will make the burden more bearable.

It is suggested that a one year time-limit and one arbitrator is an important and attainable target, except in very complex disputes and when experts are to be appointed.

35.7 APPEAL TO AN APPELLATE ARBITRATION PANEL

The present system aims at ensuring that the merits are tried by the arbitrator only. However, it is submitted that this leaves a *high level of risk*. If nearly all legal systems grant two instances to litigants, how this can be excluded in arbitration is not simple. Generally, the high standard of arbitrators and the time needed for the two instances are used as arguments against it, but even if some arbitrators may have higher standards than the average judge, it is sug-

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[50] M. RUBINO-SAMMARTANO, *Third Generation Arbitration, Appeals to a New Panel within Arbitration Proceedings*, 4 *J. Int. Arb.* 1, 76.

gested that one should not easily accept that the average arbitrator has higher standards than the average judge. It is consequently submitted that this reason does not justify the exclusion of an appellate instance.

As to the length of the proceedings, if the sole arbitrator makes his decision within one year, an appellate panel of three arbitrators should, generally speaking, decide within a further year, particularly since the panel will generally not rehear the evidence.

Appellate arbitral proceedings are already used in commodity arbitration, as well as in ICSID proceedings. Even the World Trade Organisation, which has been created in the wave of GATTS, has introduced an appellate body to hear appeals against the panel's decision.

The French Civil Procedure Code provides[51] for a mechanism similar, even if not identical, to an appeal:

> the person in charge of the organisation of arbitral proceedings may provide that the arbitral tribunal shall submit a draft award and that if that draft is challenged by a party, the matter will be referred to a second arbitral tribunal.

The European Court of Arbitration introduced in its Arbitration Rules (1997) an appellate arbitral instance,[52] although giving to the parties the opportunity of excluding it.

See amongst writers Loquin. The opportunity for the second instance arbitrators to proceed to a full review of the merits has been expressed also by him.[53]

In *Chicago Sun Times*[54] Posner J. held in passing that parties may agree on an appellate arbitration panel.

It is then suggested that there is no reason why the arbitrator's decision should not be reviewed by an appellate arbitration panel.

The desire, good in itself, to protect the award, is probably an important component of the present problems. A blind protection of the award, excluding even a review by another arbitrator and preventing a review of the merits by the courts, has given rise to all the various attacks against the award recorded nowadays. An appeal, which would be *physiological* if entrusted to an appellate arbitral tribunal, has so become *pathological*. We must recognize that a full review of the merits is essential to protect the parties' rights and, in the end, also protects arbitration itself.

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[51] Section 1455, New Civil Procedure Code.

[52] Art. 28, Arbitration Rules, European Court of Arbitration (1997).

[53] E. LOQUIN, *Les pouvoirs des arbitres internationaux à la lumière de l'évolution récente du droit de l'arbitrage international, Clunet* 1983, 293.

[54] *Chicago Typographical Union No 16 v Chicago Sun Times Inc.* 935, F2d 150, 1505, (7th Cir. 1991)

Consequently the target could be to hold two instances in two years; at present, often not even one is completed in two years.

35.8 Leave to Appeal Conditional on The Placing of a Security (Self-Executing Mechanism)

This writer advocated on other occasions[55] the introduction of a leave to appeal conditional upon the appellant paying the amount awarded by the sole arbitrator to the other side, or a different amount to be fixed by the arbitration panel. This amount should be put at the disposal of the appellate arbitration panel, either by way of a deposit with the arbitral institution, or in ad hoc proceedings with the arbitrator, or by deposing it with a bank with irrevocable instructions to dispose of it according to the instructions of the arbitral tribunal. The latter will be entitled to transfer it or part of it to the winner of the appellate proceedings or to return it to the depositor.

If the appeal is made by the party which has won only partly in the first instance arbitral proceedings, the arbitral institution, or the arbitrator in ad hoc proceedings, shall establish the amount to be deposited by the appellant, which will correspond for example to the appellate arbitrators fees, to the fees to counsel and to the other costs which are likely to be incurred by the opposite party in such appellate proceedings.

Even the totally winning party may benefit from this procedure, by seeking a leave to enforce the award, which the other parties will be entitled to resist and which once granted would bar any attacks or oppositions to recognition in any Member State.

This system should allow the automatic enforcement of the award without need for recourse to state courts, since it provides the winner with the right to obtain through it the amount awarded to him in the first instance, even if the loser decides to attack the appellate award. It may also avoid attacks since they will no longer delay performance under the appellate award while long recognition proceedings in distant countries will no longer be required if they have adhered to the Convention.

The European Court of Arbitration has instituted such a mechanism in its Arbitration Rules (1997).

Partial improvement but not full cure

Even if such changes could substantially improve arbitration, they do not seem to solve the problem completely. In fact the self-executing process would not always be applicable, and even when it is, there would still be the possibility of

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[55] See *supra* note 50.

challenges, as well as the risk that more years would pass before the award is actually enforced.

SEEE v. Yugoslavia[56] serves as a stern warning. The fact that a dispute, commenced around 1950, had not yet reached the stage of enforcement of the award after over three decades, is an appalling reminder of this.

Even if this dispute is in some respects exceptional, many other disputes have also lasted too long and have become complex battlefields. *Dame Krebs*[57] is reported as having given rise to about 30 proceedings; *Norsolor*[58] is reported as having been the object of five French instances and of three Austrian instances; *Mine v. Republic oi Guinea*[59] has involved many jurisdictions and *Westland*[60] involved far too many proceedings. Finally, the *Pyramids* arbitration[61] should also be mentioned, with its latest ICSID developments.

If sometimes a court denies its jurisdiction, on other occasions several courts may affirm it adding to the confusion.

In other situations as earlier discussed a state court has enforced an award which had been set aside in its state of origin, although it was fully aware of this circumstance.

Furthermore it must be accepted that even recognition proceedings, when opposed, contain an attack on the award, so opposition to recognition proceedings allows a *second attack* on the award, before another court. It may follow that, even if the appeal is rejected in the state of origin, recognition may be refused in another jurisdiction and vice versa.

Finally, there are also difficulties involved in enforcing the award after it has been recognized.

Arbitration is sailing nowadays through a real sea of troubles and users are entitled to protection. It is suggested that the only way to deal effectively with challenges and enforcement difficulties is not to leave the problem to be settled

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[56] *Société d'Etudes et d'Entreprises (SEEE) v. Socialist Federal Republic of Yugoslavia et al.*, Court of Appeal, Rouen November 13, (1984), *Yearbook Commercial Arbitration* 1986, at 491.

[57] *Dame Krebs et autre v. Milton Stem et autre,* Court of Cassation (France), June 16, (1976), *Clunet* 1977, 671.

[58] *Pabalk Ticaret Limited Sirketi v. Norsolor S.A.,* Vienna, Court of Appeal, January 19, (1982), *Yearbook Commercial Arbitration,* 1983, at 365.

[59] *Maritime International Nominees Establishment v. The Republic of Guinea,* Court of Geneva, March 13, (1986), *Yearbook Commercial Arbitration* 1987, at 183.

[60] *Westland Helicopters Ltd v. Arab Republic of Egypt, Arab Organisation for Industry, United Arab Emirates, Kingdom of Saudi Arabia, State of Quatar, Arab Republic of Egypt and Arab British Helicopter Company (Egypt),* interim award, March 25, 1984, *Yearbook Commercial Arbitration* 1986, at 127.

[61] *République Arabe d'Egypte v. Southern Pacific Properties,* (the *Pyramids arbitration),* Court of Appeal Paris, July 12, (1984), *Clunet* 1985, 130, confirmed by the French Court of Cassation.

in various ways by the individual legal systems, but to harmonize the solutions by an addition to the most popular arbitration convention or by entering into a new convention which deals expressly with this.

Addendum to the New York Convention

One is aware that several authors hold the view that it is wiser not to touch the New York Convention and should be particularly sensitive to the comments of van den Berg[62] in this respect. They rightly stress the advantages already obtained through the Convention, the difficulty involved in a revision process, the time needed to complete it and also the effort required to obtain a uniform interpretation of it by the courts of the various legal systems.

One would not differ from such authoritative views if it were not for the very delicate nature of arbitration at present, which seems to require prompt and substantial action. As long as national attacks, national opposition to recognition proceedings and national pre-award court proceedings prosper, arbitration will never be the rapid process needed by the business community.

A new convention

The great success achieved by the New York Convention makes it attractive to link these changes to it. In principle, nothing prevents the Convention from having a much wider scope than mere recognition and enforcement.Even the Geneva Convention (1961) has implemented it, even if by remaining separate from it, and this has met general satisfaction.

However if one is worried at touching it, the suggested changes may take the form of a new convention, without disturbing the New York Convention.

35.9 One Supra-National Court of Arbitration and an Immediately Enforceable Appellate Award

The present delays in the enforcement when awards are challenged can only be avoided if a really new solution is found; likewise long recognition proceedings (which for example in Italy involve full proceedings lasting an average of two years) may disappear.

The solution which has been proposed by this writer is to institutionalise the appellate instance by entrusting the appointment and supervision of appellate proceedings to a new body, an International Arbitral Court of Appeal. Each party to these proceedings would be entitled to appoint an arbitrator and the International Court would then appoint the Chairman or alternatively the Court might appoint all three arbitrators. The appellate panel would be controlled by

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62 A.J. van den BERG, *The New York Arbitration Convention of 1958*, Kluwer 1981.

this new body, which would also administer the appellate arbitration proceedings.

This solution might be seen as non-applicable if the award is not appealed against by the loser. Even so, the mechanism might provide that the winning party may apply to the International Court to appoint the appellate tribunal to grant leave to enforce the award. Leave to enforce the award by the appellate arbitral tribunal could then very well have the same effect as the above-mentioned rejection of an appeal.

This International Court of Appeal, once instituted under the auspices of an international convention, could then provide the level of supervision needed to satisfy the contracting states. In exchange for this, the appellate award should be treated as final in the member states of this new convention. It should have the strength of an instrument for enforcement, without the need for recognition proceedings and without any possible opposition to them.

This solution would then replace all possible challenges before national courts during the arbitration proceedings and after them, and avoid going through recognition and pre-attachment proceedings. In other words, the award would be recognized as not open to challenge and be a title to attach assets in any member state. The International Court of Appeal's supervision would provide control over the proceedings, which might justify a waiver by the member states of national challenges on the one hand and of recognition proceedings on the other. It is submitted that only through such a convention can a framework be built into all this and challenges against the arbitration agreement, or submission, and challenges against the awards can be avoided.

At the same time that court interventions against the award are to be stopped, court intervention in aid of the appellate arbitral proceedings (e.g. to hear witnesses or to obtain the production of documents) should be allowed by the Addendum or by a new convention.

Conservative-minded authors will immediately criticize this as being an impossible and infeasible solution. It has also been argued that the limited recourse which until now has been available to the Permanent Court of Arbitration[63] and to the International Court of Justice[64] does not encourage new experiments in that direction. However, arbitration between States takes a different course and the future of this proposed new International Arbitral Court of Appeal cannot be judged with the yardstick applied to inter-state arbitration

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[63] Still the infrequent recourse to the Hague Conventions of 1899 and 1907 may be due to the limits imposed on such conventions by the contracting states.

[64] In any event the arbitration of disputes between States is inevitably different from private disputes.

If there is any merit in this new proposal, it should be solid enough to overcome administrative difficulties.

Furthermore, this proposal is very much in line with the Washington Convention (1965) mechanism. Even the Washington awards are treated in all Member States as national judgments and may not be attacked, the only attacks being those provided for in the Convention, i.e. attacks before an *ad hoc* Committee. Except as to the disputes governed by the Washington Convention the role of this Committee would be played, according to this proposal, by the appellate arbitral tribunal under the supervision of the International Arbitral Court of Appeal.

However contrary to the Washington Convention the appellate tribunal would not just set aside the first instance award but decide again the entire dispute. This difference seems to be a substantial improvement vis-à-vis the present ICSID *ad hoc* Committee. These proposals go further, also in as much as they establish the rule of having a full review of the merits. The intervention of an International Arbitral Court of Appeal completes then this suggested reform scheme, which consists of:

1. First instance arbitration proceedings, conducted by one arbitrator appointed by the parties in *ad hoc* arbitration, or by the existing administrative body in institutional arbitration, and to last no more than one year (this period to be monitored very carefully by the administrative body).
2. An appellate instance before a panel of three arbitrators, to last not more than one year, and to be conducted under the supervision of the new International Court of Arbitration,[65] or of a revived Permanent Court of Arbitration.[66]
3. Leave to appeal, conditional as a rule upon the amount in dispute being placed at the disposal of the arbitrators (unless exemption from this condition is granted by the arbitrators in very special circumstances); and in the absence of an appeal the possibility of applying for leave to enforce the first instance award to be governed by these new provisions.
4. The award to be an enforceable instrument in all contracting states, therefore excluding attacks before national courts as well as the need for recognition proceedings in the State where the award will be enforced.

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[65] To be instituted by such Addendum to the New York Convention or by a new convention.

[66] Which seems well suited to take over such important task.

In 1996 Leurent[67] has advocated that one should give priority to the proceedings to set aside the award instituted before the competent state court, which decision could, through an international convention, become final in any other proceeding for recognition or even cause automatic recognition of the said award.

These comments cover part of the proposal made earlier by this writer.[68] Both views draw practical consequences from the reflection that proceedings to set aside award and opposition to recognition proceedings are substantially based on the same grounds and that this duplication has to be avoided in order that the post award phase be shortened. They also coincide as the to the instrument to be used to achieve such a result, which for both of them is an international convention.

Basically the same formula proposed by this writer in 1987, and developed in his subsequent writings in 1989 and in 1990, is the object of writings by Holtzmann[69] and Schwebel,[70] in 1995 although they make no reference to such prior presentation.

The views expressed by these writers are welcome since they start the debate.

Holtzmann and Schwebel present again the proposal for an international court, to be founded through an international convention, replacing municipal courts in deciding on setting aside proceedings. The decision made in such proceedings is to become an enforceable instrument in all member states to that convention.

There is no substantial departure from the original proposal except that this development does not include a review of the merits and that the international Court should decide itself rather than appointing an appellate arbitral tribunal.

It is suggested that the original proposal stands and the appellate decision should be made by the International Arbitral Court of Appeal, based on applications to set aside an award or to grant permission to enforce it, after giving to the parties the opportunity to present their case in a meaningful way. Whether such an application has been opposed or not, that decision should be treated in all the States, which have adhered to such a convention, as a final leave to enforce the award rejecting any possible dispute as to enforceability, and

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67 B. LEURENT, *Reflections on the International Effectivness of Arbitration Awards*, 12 *Arb Int.* 3, 269.

68 See *supra* note 50.

69 H.H. HOLTZMANN, *A Task for 21st Century: Creating a New International Court for Resolving Disputes on the Enforceability of Arbitral Awards,* in *Internationalisation of International Arbitration* Graham & Trotman, London, 1995, at 109.

70 S.M. SCHWEBEL, *The Creation and Operation of an International Court of Arbitral Awards*, in *Internationalisation of International Arbitration*, Graham & Trotman, London 1995, at 115.

barring any setting aside proceedings by any courts of such states. The appellate award should then be an enforceable instrument in all such jurisdictions as a final judgment made according to their domestic procedural law.

The review of the merits by the International Arbitral Court of Appeal would add to the above the opportunity of avoiding the risks involved in the choice of a one-shot system.

35.10 A CLEARER POSITION ON THE MAIN LEGAL ISSUES: *TRONC COMMUN* AND PROCEDURAL LAW

The Addendum or new convention would also seem to provide a good opportunity to improve the standard arbitration clauses.

The standard arbitration clauses which are presently widely recommended do not generally deal with several important issues. While this is certainly meant as a sign of respect for the intention of the parties, in practice it prepares the ground for very heated disputes and difficulties during arbitration proceedings which contribute to their length. An addition to the New York Convention might therefore also cover these matters in order to simplify the proceedings. The procedural law should be stated and could consist of the rules set up by the parties, or by the chosen administrative body or, failing these rules and in any event in the appellate instance, by the rules of the International Arbitral Court of Appeal.

It could also be stated that arbitration proceedings conducted under these procedural rules would not be treated as national, but as supranational proceedings or, if one prefers, as proceedings under the Convention. The standard clause should also provide for the choice of the place of arbitration, the language of the proceedings and the nationality of the arbitrators, and for the proper law. It is suggested that the latter might be the *tronc commun*, i.e. the common part of the laws of the parties to the contract (or relationship) from which the dispute arises.[71] The possible gaps in the *tronc commun* should be filled by the arbitrators inspiring themselves to Unidroit's Principles of International Commercial Contracts[72] and, if not sufficient, by avoiding, in any event, that the parties be taken by surprise.

Stating the procedural law and the proper law would considerably simplify the arbitrators' task and accelerate the proceedings. It is further suggested that the standard clause should provide that any State, by entering into an arbitra-

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[71] M. RUBINO-SAMMARTANO, *Le tronc commun des lois nationales en presence* (The common part of the parties' laws) *Rev. Arb.* 1987, 133.

[72] Thus avoiding the arbitral proceedings becoming too unsatisfactory, see *Liberian Eastern Timber Corporation v.Gouvernement de la République du Libéria, US* District Court, Southern District of New York, December 12, (1986) and US District Court, District of Columbia, April *16, (1987), Clunet* 1988, 179.

tion clause or agreement under the revised New York Convention, thereby waives all pleas of sovereign immunity, and of immunity from enforcement of the award. The proceedings would then be released from these issues, which may be considerable obstacles to the proper functioning of the arbitral process.

Since any new scheme disturbs well-established habits, it is to be expected that objections will be raised. However, it is hoped that the danger which arbitration is facing will encourage people if not to agree on it, at least to look for other equally and possibly more effective solutions. The main thing is for not to continue to close our eyes to the fact that too many people find the current process unacceptable and that one must look for improvements in a constructive way.

35.11 THIRD GENERATION ARBITRATION

The rapid pace of the last century has meant that we are accustomed to frequent changes. For example, there were computers which were defined as first-generation computers, then came their second generation, and now one speaks of their third generation. These expressions perhaps can also be used as to arbitration. There was a time when parties placed their disputes confidently in the hands of a highly respected arbitrator without any formality, accepting in advance any decision he would make and promptly performing in accordance with it. That could be considered as first-generation arbitration. Since then, there has been a move towards the second generation, in which arbitrations have become much more frequent, but also more involved, since the provisions are more complex and the awards frequently challenged.

The Supreme Court in the United States echoes this in *Mitsubishi*:[73]

> As international trade has expanded in recent decades, so too has the use of international arbitration to resolve the disputes arising in the course of that trade. The controversies that international arbitral institutions are called upon to resolve *have increased in diversity as well as in complexity.* Yet the potential of these Tribunals for efficient disposition of legal disagreements arising from commercial relations has not yet been tested. If they are to take a *central place* in the international legal order, national Courts will need to 'shake off the old judicial hostility to arbitration', *Kilukundis Shipping Co. v. Arntorg Trading Corp.*, 126 F.2d 978, 985 (2d Cir. 1942), and also their customary and understandable unwillingness to cede jurisdiction of a claim arising under domestic law to a foreign or *transnational* Tribunal. To this extent, at least, it will be necessary for national Courts to subordinate domestic notions of arbitrability to the international policy favoring commercial arbitrations. See *Scherk, supra.*(emphasis added)

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[73] See *supra* note 45.

The greater complexity of arbitral proceedings and attacks are generally seen as negative. Perhaps they are simply a natural development of arbitration and, as such, they must be accepted while possible remedies for them are to be carefully sought.

It is suggested that we are entering the third generation of arbitration[74] The arbitral referee system, multiparty arbitration, the introduction of rules for the taking of evidence (to avoid a party being taken by surprise by rules to which he never expected to be subject), the use of mechanisms for establishing the intention of the parties in a way which may be closer to their real intention, recognition of the supranational nature of arbitration rules, all this creates a new background based on which it might be possible to operate constructively and to which the above proposals may contribute.

35.12 CONTINUOUS SEARCH FOR IMPROVEMENT

As earlier discussed, there seems to be an excessively conservative approach to arbitration. Consequently new ideas rarely develop.

Several notions, and several sentences, tend to be over used and over reported, As a result of this psychological inertia, they become, as it was nicely put by Bauer[75]

> real Mantras.[76]

This is in line with Justice Oliver Wendell Holmes' comment in *Hyde*,[77] reported by Bauer:

> It is one of the misfortunes of the law that ideas become *encysted* in phrases and thereafter for a long time cease to provoke further analysis.

As earlier suggested arbitration is not a cruel goddess whom one may only worship.

The area of mystery which contributes to the creation of this special atmosphere, which psychologically prevents many people from trying to improve arbitration, is reflected in Dezaley and Garth's[78] reference to arbitration as a:

> somewhat mysterious world.

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[74] M. RUBINO-SAMMARTANO, *Third Generation Arbitration,* see *supra* note 50.

[75] R.G. BAUER, *Once a Catchy Phrase, Always Immutable Law*, 11 *J. Int Arb* 4, 41.

[76] Religious formulas often repeated without thinking about their meaning.

[77] *Hyde v. United States*, 225 U.S. 347,391 (1912).

[78] Y. BEZALEY and B. G. GARTH, *Dealing in Virtue*, University of Chicago Press 1996.

Arbitration requires to be understood and improved. Only in this way is its effectiveness as a *service to citizens* assured and there will be no need to look for alternative methods to settle disputes.

It is with this in mind that these remarks have been made. They are now entrusted for constructive analysis and development to those who care about arbitration.

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